

FREEDOM OF EXPRESSIVE ASSOCIATION AND GOVERNMENT SUBSIDIES

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INTRODUCTION

The government provides vast subsidies to expressive associations. Universities and cities let groups use government property. Universities fund student groups' meetings and publications. The federal and state governments provide tax exemptions, which are tantamount to a matching grant.¹ Many of these programs are available to a broad range of groups that meet certain objective criteria (e.g., student groups, nonprofit groups, and veterans' groups).

May the government limit these programs to groups that don't discriminate based on religion, sexual orientation, sex, race, ethnicity, and similar factors?² Such discrimination is often a constitutional right—a right that's one of Chief Justice Rehnquist's and Justice O'Connor's important contributions to First Amendment jurisprudence.³ And many groups exercise this right.

The Boy Scouts discriminate against the irreligious and against practicing homosexuals. Some religious student groups discriminate against members of other religions, and sometimes against practicing homosexuals. The Catholic

1. I'll sometimes use the term "subsidies" to refer to all of these—direct monetary subsidies, tax exemptions that function much like subsidies, and access to government property, which is an in-kind subsidy. See *Rosenberger v. Rector*, 515 U.S. 819, 835 (1995) (treating provision of funds as similar to provision of space); *Cammarano v. United States*, 358 U.S. 498, 513 (1959) (treating the income tax deduction for charitable contributions to groups as a subsidy for such groups). I also include both a group's own exemptions from taxes (whether income, property, sales, or what have you) and its contributors' right to deduct donations to the group. The latter right is tantamount to a matching grant provided by the government. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989) (plurality); *id.* at 28 (Blackmun, J., concurring in the judgment); see also *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544 (1983).

2. I will not discuss in detail those cases where the government declines to offer discriminating groups a *special* benefit, or rescinds such a benefit that was once offered (for instance, special benefits for the Boy Scouts). I think that the government is certainly entitled to deny such preferential treatment to groups whose member or officer selection practices it finds improper, see, e.g., *Barnes-Wallace v. Boy Scouts of Am.*, 275 F. Supp. 2d 1259, 1287-88 (S.D. Cal. 2003), *appeal docketed*, No. 04-55732 (9th Cir. Apr. 29, 2004); the hard question is whether the government may also deny generally available benefits to such groups.

3. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000) (Rehnquist, C.J., writing for the Court, and joined by O'Connor, J., casting the necessary fifth vote); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 631 (1984) (O'Connor, J., concurring in the judgment). For convenience, I will sometimes use "discriminate" as shorthand for discrimination based on the various categories set forth in many modern antidiscrimination laws, including race, ethnicity, religion, sex, and (in some jurisdictions) sexual orientation. I recognize that this is imprecise, and I'll sometimes expressly use phrases such as "discriminate based on race, religion, or the like" to stress that antidiscrimination rules don't bar all discrimination. But such imprecision is needed to avoid tiresome repetition.

Church discriminates based on sex in selecting its clergy,⁴ and of course based on religion.⁵ Orthodox Jewish synagogues discriminate based on ethnicity, not just religion, in choosing rabbis and members.⁶ Meetings organized by the Nation of Islam sometimes exclude attendees based on race and sex.⁷ Some religious schools discriminate based on religion in selecting students, at least in the sense that they will choose only those students who are willing to participate in the religion's devotional activities.⁸ May all these groups be constitutionally excluded from generally available benefit programs, because

4. See Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 484-85 (1992) (arguing that organizations that discriminate based on sex in choice of leaders, including the Catholic Church, should lose their tax exemptions).

5. Some may argue that the Church's requirement that priests be Catholic—and even that they be men—isn't really “discrimination,” but just an insistence that the priests adhere to the basic tenets of the group in which they are seeking to participate. Nonetheless, if the tenets themselves command action that's discriminatory, in the classic antidiscrimination law sense of “treat[ing] a person in a manner which but for that person's sex[, religion, or other identity attribute] would be different,” *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991); see also *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 683 (1983); *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978), enforcing them constitutes “discrimination.” One can argue whether it's good discrimination or bad discrimination, but it is at least a rational decision for government entities to treat such behavior as discriminatory.

6. Consider someone who had been an atheist all his life, but who comes to adopt Judaism as his belief system. If his mother wasn't Jewish, then to become a synagogue member or a rabbi he would need to go through an often burdensome conversion process; if his mother was Jewish, no such process would be required. See SIMCHA KLING, *EMBRACING JUDAISM* 7 (1987). Also, historically, Cohens, which is to say members of a particular line of Jewish families, have been barred from marrying spouses who aren't ethnically Jewish, even if the spouses had converted to Judaism, though this view is not universally followed today. MAURICE LAMM, *BECOMING A JEW* 227-28 (1991) (noting the prohibition); J. SIMCHA COHEN, *INTERMARRIAGE AND CONVERSION: A HALAKHIC SOLUTION* 125 (1987) (noting that some rabbis have permitted, under certain circumstances, a Cohen to marry a convert); M. MIELZINER, *THE JEWISH LAW OF MARRIAGE AND DIVORCE IN ANCIENT AND MODERN TIMES AND ITS RELATION TO THE LAW OF THE STATE* 59-60 (1987) (noting that, in modern times, prohibitions concerning Cohens marrying converts “are not generally regarded”).

7. See, e.g., *Donaldson v. Farrakhan*, 762 N.E.2d 835 (Mass. 2002) (upholding Nation of Islam's right to organize its meetings this way); *City of Cleveland v. Nation of Islam*, 922 F. Supp. 56 (N.D. Ohio 1995) (same).

8. See, e.g., Sacred Heart High School, Admissions Criteria 2006, <http://www.sacredhearthighschool.org.uk/admissions.htm> (last visited Apr. 4, 2006) (giving consideration only to girls from Catholic families, with first priority to “practicing Catholic girls from practicing Catholic families”); St. Apollinaris Catholic School, Criteria for Admissions, <http://www.stapollinaris.com/Site/1/390/3/Overview.aspx> (last visited Apr. 4, 2006) (“[S]tudents are expected to participate in religious exercises.”); St. Fabian Catholic Church, Admission Policy, <http://www.stfabian.org/admissions.php> (last visited Apr. 5, 2006) (“All students must participate in the religious education courses offered for their grade level, participate in the worshipping community while in school, and agree to act in a manner consistent with Christian values.”); St. Francis of Assisi Catholic School, Admissions, <http://ccsfa.org/admissions.html> (last visited Apr. 4, 2006) (“Students are expected to participate fully in the religious program of the school.”).

they exercise this constitutional right to discriminate?

This Article will try to answer this question. Part I will discuss what I call the No Duty To Subsidize Principle, to which Chief Justice Rehnquist and (to a lesser degree) Justice O'Connor have contributed much:⁹ the principle that the government generally need not subsidize the exercise of constitutional rights. Groups have the constitutional right to put on events and programs open only to blacks, heterosexuals, men, or religious believers; they may also put on programs open to all listeners but designed by group officers who are chosen in discriminatory ways. Yet the government need not subsidize this right, just as the government need not subsidize the rights to abortion, private schooling, or political expression about candidates or about legislation.¹⁰

In Part II, I'll discuss the chief exceptions to the No Duty To Subsidize Principle. Under what I call the No Governmental Viewpoint Discrimination Principle, the government may not discriminate among speakers based on viewpoint, at least when it subsidizes a broad range of private speakers that are expressing their own views. Under the No Governmental Religious Discrimination Principle, the government may not exclude religious conduct from subsidy programs when it subsidizes equivalent secular conduct. Both principles mean that sometimes the government indeed must subsidize behavior with which it disagrees, at least if it subsidizes other behavior that differs only in its viewpoint or religiosity.

But, as I'll explain, these exceptions do not stop the government from imposing antidiscrimination conditions on its subsidies. Such conditions are

9. See *infra* note 183.

10. In addition to the general First Amendment expressive association right that *Dale* recognized, religious groups might have a special "freedom of religious association" right under the Free Exercise Clause. This could either be a narrow church autonomy right recognized even after *Employment Division v. Smith*, 494 U.S. 872 (1990), see Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1506-07 (1999) (so suggesting), or a "hybrid" of the expressive association right and the Free Exercise Clause right, compare *Smith*, 494 U.S. at 881-82 (so suggesting), with *Kissinger v. Bd. of Trs. of the Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993) (criticizing the hybrid rights doctrine, in my view persuasively), *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (Souter, J., concurring) (likewise), and Bertrand Fry, Note, *Breeding Constitutional Doctrine: The Provenance and Progeny of the "Hybrid Situation" in Current Free Exercise Jurisprudence*, 71 TEX. L. REV. 833 (1993) (likewise). See generally Thomas C. Berg, *Religious Liberty in America at the End of the Century*, 16 J.L. & RELIGION 187, 196 (2001) (summarizing the debate surrounding the "hybrid rights" doctrine, if doctrine it is).

Yet even if such a "freedom of religious association" right exists and is somewhat stronger than the normal freedom of expressive association, it seems to me that the No Duty To Subsidize Principle should apply to the freedom of religious association as much as to the freedom of expressive association. If there are any extra constraints on applying nondiscrimination conditions to religious groups and especially to churches, they would likely come not from the freedom of religious association, but from the Establishment Clause, see *infra* Part V, and state Religious Freedom Restoration Acts and similar regimes, see *infra* Part VI.

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religion-neutral, viewpoint-neutral, and generally even content-neutral, at least if they're applied evenhandedly to all participating groups.

So exclusion based on a group's exercise of its expressive association rights is not barred by the No Governmental Viewpoint Discrimination exception. But, some may argue, perhaps courts should develop an analogous exception barring the government from discriminating based on a group's expressive association decisions.

In Part III, I'll discuss this argument. It's a hard argument to analyze, because the Court has never offered a theoretical explanation for the limits on the No Duty To Subsidize Principle.

Why are exclusions based on the viewpoint of speech or on religiosity different from exclusions based on the content of speech, on the exercise of abortion rights, and on the exercise of private schooling rights? The Court has never squarely explained this. But I'll suggest that the Court has already implicitly rejected this exception—it has recognized that excluding groups for their expressive association decisions should generally *not* be treated the same as excluding groups for their viewpoint. And a retreat from this position would likely be both unwise and improbable.

In Part IV, I'll discuss the No Penalizing Privately Funded Behavior Principle: the principle that the government may not deny benefits to people simply because they've exercised (or are planning to exercise) a right using *their own* funds. The government may deny medical funding for abortions, but may not deny welfare benefits to women who have had abortions. The government may decline to subsidize editorializing by public broadcasters, but may not condition subsidies to public broadcasters on the broadcasters' promise not to editorialize even with their own money.

This, I'll suggest, is one possible argument for some constitutional limits on the government's attaching antidiscrimination conditions to its funding. A group may not be denied benefits simply because it has chosen to (for instance) organize male-only, Christian-only, or black-only events using its own money. One can also argue—though in my view this is a losing argument—that a group may not be denied benefits simply because its officers are chosen in discriminatory ways. But the group may still be denied benefits for those particular events that are limited to participants (whether members, listeners, or others) based on race, sexual orientation, religion, sex, or ethnicity.

In Parts V and VI, I'll switch to arguments that are specific to religious groups. In Part V, I'll discuss whether the Establishment Clause bars the government from applying broad "no subsidy if you discriminate" conditions to churches that discriminate in choice of clergy. My view is that the Clause might limit the government's attempts to delve into contested claims about whether a church really does discriminate, but does not bar the government from applying the condition to churches that admit that they do discriminate.

In Part VI, I'll ask whether some discriminating groups may have *statutory* rights to exemption from subsidy conditions, under the state or federal

Religious Freedom Restoration Acts (RFRA) (or, in some states, state constitutional rights under state religious freedom clauses).¹¹ It turns out that denial of a benefit may indeed sometimes constitute a “substantial burden” under the RFRA. Objecting groups may thus sometimes be entitled to retain the subsidy and yet be exempted from an antidiscrimination condition that violates their religious principles. The matter, though, is far from clear, because the RFRA case law on subsidies is so ambiguous.

Finally, in the Conclusion, I’ll speculate that the likely practical consequences of denial of government benefits are not going to be terribly dire for discriminating groups. First, these groups will often win subsidies through the political process, as legislators conclude that at least certain forms of discrimination ought not disqualify groups from participating in subsidies. Second, even if the groups end up stripped of their tax exemptions (the most valuable subsidy that’s at stake), they will be no worse off than lobbying or electioneering organizations, many of which thrive despite their lack of tax-exempt status. And I’ll also suggest that this fits well with Chief Justice Rehnquist’s (and, to a large extent, Justice O’Connor’s) conservative jurisprudence, under which even constitutionally protected activities are not freed from pressures that may be imposed by government funding decisions.

I. THE NO DUTY TO SUBSIDIZE PRINCIPLE

The government need not subsidize the exercise of constitutional rights, even when it subsidizes other analogous behavior. The government need not fund private schooling, even if it funds public schooling.¹² Public hospitals need not perform abortions, even if they perform many other medical procedures, including childbirth.¹³ Government medical aid programs need not subsidize abortions.¹⁴ The government need not fund advocacy of abortion, even if it funds advocacy of other options for pregnant women.¹⁵

The government generally need not open its property (except traditional public fora) for all speakers, even when it opens it for some speakers.¹⁶ The government need not give all speakers access to a benefit, even when it gives

11. See Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369 (1994) (discussing this under the federal Religious Freedom Restoration Act, which at the time was seen as applicable to state governments as well as the federal government; the analysis should be equally applicable to state religious accommodation mandates).

12. *Maier v. Roe*, 432 U.S. 464, 477 (1977); *Norwood v. Harrison*, 413 U.S. 455, 462 (1973).

13. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 509-11 (1989); *Poelker v. Doe*, 432 U.S. 519, 521 (1977).

14. *Harris v. McRae*, 448 U.S. 297, 316-17 (1980); *Maier*, 432 U.S. at 475-79.

15. *Rust v. Sullivan*, 500 U.S. 173, 196-97 (1991).

16. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

such access to some speakers.¹⁷ The government need not open its property for constitutionally protected solicitors of charitable contributions even when it opens it for leafletters.¹⁸

The government need not provide tax exemptions for contributions that go towards electioneering or lobbying—speech that advocates the election or defeat of a candidate, or the enactment or rejection of legislation—even when the government exempts contributions that go towards other speech.¹⁹ In particular, contributions to political parties and political candidates are not tax-exempt, though political parties and candidates have the same speech and association rights as do nonlobbying, nonelectioneering groups.

If this No Duty To Subsidize Principle applies to the right of expressive association, then the government may likewise decline to subsidize certain kinds of expressive association decisions. The Boy Scouts have the right to exclude homosexuals and the nonreligious from membership and therefore from camps, athletic events, meetings, and more. Yet the government may decide that its subsidy programs and its real estate—such as park facilities (except when used as traditional public fora for speech), marinas,²⁰ rooms in government buildings, and the like—should only be made available for events that are open to people without regard to their religion or sexual orientation.

Private schools may likewise have an expressive association right to engage in religious discrimination (though likely not race discrimination²¹) in choosing students or teachers. Yet the government need not subsidize the constitutional right to send one's children to private school or the schools' constitutional right to discriminate. Thus, even if the government chooses to subsidize private schooling, it may limit the subsidy to schools that do not discriminate, so that the subsidy does not inadvertently support a school's discrimination.²²

17. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806-11 (1985) (limiting a government-organized charitable fund drive to nonideological groups); *Perry*, 460 U.S. at 46 (allowing only recognized public employee unions access to a government employer's internal mail system); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983) (allowing only veterans' groups, and not other groups, to use tax-deductible contributions for lobbying).

18. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683 (1992).

19. *Cammarano v. United States*, 358 U.S. 498, 513 (1959).

20. *See Evans v. City of Berkeley*, 38 Cal. 4th 1, 14 (2006).

21. *See Runyon v. McCrary*, 427 U.S. 160, 176 (1976).

22. In this I disagree with Paulsen, *infra* note 38, at 713, which reasons that "the legally permissible scope of government authority to regulate private religious schools . . . is not enlarged by a religious group's acceptance of voucher funds that the government has provided to students on a religion-neutral basis." Just as the government may decide that government-provided school voucher funds can be spent only in a public school and not a private school (imagine a public-school-only voucher program), or that government-provided medical voucher funds can be spent only on childbirth and not abortion, the government may decide that government-provided school voucher funds be spent only in a school that's open to all religions and not in a school that's open only to one or a few. That

Similarly, a Baptist student society has the constitutional right to insist that its members be Baptist, and even that they refrain from homosexual behavior. But a public university may decide to make its classrooms and student group funds (which might be spent, for instance, for food at student group meetings) available only for events at which people are welcome without regard to religion and sexual orientation.

What if a group opens its meetings to all students—or at least to students without discriminating based on race, religion, and the like—but discriminates in choosing its officers? Here too the government may decide not to subsidize such groups: it may limit funding to those groups that discriminate neither in their choice of officers nor in their choice of members or attendees.

Running a student expressive group is a position of some influence. It lets the officer help decide which events are organized and which speakers are brought to campus. It may also be a helpful credential for the officer's future career. The university may legitimately want to make sure that when its subsidies help enhance students' influence or credentials, this help is distributed without regard to the students' race, religion, and the like. To accomplish this, the university may insist that student groups—which is to say group officers, acting on the groups' behalf—get university subsidies only when the officers are chosen nondiscriminatorily. And this reasoning would similarly apply to other subsidies, such as tax exemptions.

Government decisions that government funds not be used in discriminatory ways may often be misguided, especially when applied to expressive associations. I don't see much wrong, for instance, when a religious group (whether a church or a student group) discriminates based on religion in choosing officers, members, or event attendees.²³ Just as the Sierra Club may properly discriminate based on ideology in favoring environmentalists, so the Catholic Church may properly discriminate based on ideology in favoring Catholics. Federal antidiscrimination law expressly reflects this judgment,²⁴ though some state universities' antidiscrimination rules do not.²⁵

Even groups that discriminate based on other factors, such as race, ethnicity, sex, or sexual orientation, help create a diversity of views and outlooks and ought to be included within general benefit programs aimed at

the government must allow a certain constitutionally protected behavior does not mean that it must subsidize this behavior.

23. See *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 871 (2d Cir. 1996) (reasoning that religious discrimination in choice of certain officers by student groups that use school property should generally be constitutionally protected because it is not "invidious" or "highly offensive").

24. See, e.g., 42 U.S.C. § 2000e-1 (2006) (exempting religious organizations from the ban on religious discrimination in employment).

25. See, e.g., Memo from CSU-San Bernardino Administrator Christine Hansen to the Christian Student Association (Oct. 3, 2005), available at <http://thefire.org/index.php/case/696.html>.

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promoting such diversity.²⁶ And these kinds of groups generally don't pose the problems that have historically justified antidiscrimination law: expressive associations that have an expressive reason to discriminate offer only a small fraction of all the opportunities that are available to prospective members, and thus don't risk systematically denying members of one group a livelihood, an opportunity to find shelter, or an education.

Moreover, while each association individually may use certain benefits in a manner that excludes certain people, the benefit program in the aggregate will still help people of all groups. For instance, even if a devoutly Christian student group excludes gays from positions as officers, gay students will still have plenty of groups—likely including ones that are geared towards them, or towards religious groups that are more accepting of gays—in which they can participate.

Yet these policy arguments against excluding discriminatory groups do not show that such exclusion is unconstitutional. After all, public debate may well be richer if people could give tax-exempt contributions to groups that advocate the enactment or rejection of legislation, or the election or defeat of a candidate. Funding private as well as public education would help foster a diversity of views. Likewise, many argue that funding childbirth while not funding abortion is disrespectful of pregnant women, and that any campaign against abortion should proceed purely through persuasion rather than through excluding abortion from broad-ranging medical benefits.

But all these are discretionary choices for legislators, not judges. That many taxpayers disapprove of a certain exercise of a constitutional right, and don't wish to subsidize such behavior, should itself suffice to justify excluding the exercise of the right from the benefit program. And, in particular, the judgment that “public funds, to which all taxpayers of all races contribute, not be spent in any fashion which . . . subsidizes . . . racial discrimination” (the judgment that President Kennedy set forth as a justification for Title VI of the Civil Rights Act)²⁷—as well as similar judgments as to sex, race, religion, and sexual orientation—should suffice to justify a legislative decision to fund only nondiscriminating groups.

26. Seana Shiffrin also points out that groups' ability to select their membership can help them form ideas, as well as help them convey those ideas effectively. See Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 864-73 (2005).

27. Special Message to the Congress on Civil Rights and Job Opportunities, 1 PUB. PAPERS 483, 492 (June 19, 1963).

II. THE NO GOVERNMENTAL VIEWPOINT DISCRIMINATION / NO GOVERNMENTAL RELIGIOUS DISCRIMINATION PRINCIPLES

The No Duty To Subsidize Principle has two important exceptions. Two lines of cases, in the first of which Chief Justice Rehnquist and Justice O'Connor again played important roles,²⁸ have barred discrimination against certain kinds (but not other kinds) of constitutionally protected behavior, and have thus required the government to subsidize the exercise of constitutional rights.

The first line of cases holds that the government may not discriminate based on viewpoint within an otherwise generally available program of benefits to speech. Though the government may subsidize student speech related to science (content discrimination),²⁹ it may not subsidize all speech except religious speech (viewpoint discrimination).³⁰ Though the government may exempt from taxes nonprofit speakers except those engaging in electioneering (content discrimination), it may not exempt nonprofit speakers except those who are unwilling to swear loyalty to the government (viewpoint discrimination).³¹

The Court has at times articulated this doctrine as barring even *content* discrimination in a designated public forum, but it has consistently held that such fora can be designated for certain topics and certain classes of speakers, and that content-based restrictions are permissible if they're used to enforce the terms of this designation.³² Since the government may define fora in content-based but viewpoint-neutral ways or, if necessary, close fora and reopen them with new content-based but viewpoint-neutral definitions, in practice the mandate ends up being one of viewpoint neutrality, not content neutrality.³³

The second line of cases involves the Free Exercise Clause, which generally bars discrimination against activity based on the religious nature of that activity. Presumably the government may not allow only secular circumcisions at public hospitals, but bar religious circumcisions. Likewise, it may not bar food stamp recipients from using the stamps for religious purposes, for instance to buy ritually significant foods, such as the traditional ingredients

28. See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001) (Rehnquist, C.J., and O'Connor, J., providing the fourth and fifth votes for the five-Justice majority, though a sixth Justice, Justice Breyer, also concurred in part); *Rosenberger v. Rector*, 515 U.S. 819, 833-34 (1995) (Rehnquist, C.J., and O'Connor, J., providing the fourth and fifth votes for the five-Justice majority).

29. *Rosenberger*, 515 U.S. at 829-30 (noting government's power to limit a forum to certain subjects, even when it involves content discrimination).

30. *Id.* at 833-34; *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993).

31. *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958).

32. See, e.g., *Rosenberger*, 515 U.S. at 829.

33. See *id.* at 829-30.

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for a Passover meal.³⁴ True, when food stamps are used to prepare a ritual meal, or government property is used for religious circumcisions, the government is partly subsidizing the exercise of Free Exercise Clause rights.³⁵ Yet the government generally may not discriminate against religious practices by excluding them from subsidy programs (at least setting aside restrictions on the use of government subsidies for education in devotional theology, which the Court has approved as an exception to the Free Exercise Clause nondiscrimination rule³⁶).

Here, then, is the simplest form of expressive groups' argument for equal access to various benefit programs:

The programs—whether they provide access to property, to funding, or to tax exemptions—are public fora designated for the expression of a diversity of private views.³⁷ *Boy Scouts v. Dale* recognizes that our discriminatory selection decisions are necessary for us to speak effectively, and are thus part of our Free Speech Clause rights. Under *Rosenberger v. Rector*, the government may not discriminate based on content within public fora, so long as the speech is within the forum's purpose, and the government may not discriminate based on viewpoint at all in these fora (or even in nonpublic fora). Therefore, the government may not discriminate based on our exercise of our expressive association rights, either. *Boy Scouts* plus *Rosenberger* equals we win.³⁸

34. See *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990) (declining to overrule *Sherbert v. Verner*, 374 U.S. 398 (1963), and recharacterizing what remains of it as assuring that the government may not discriminate against religious practices even in the distribution of benefits).

35. See, e.g., *Hartmann v. Stone*, 68 F.3d 973, 977-79 (6th Cir. 1995) (striking down an Army regulation that excluded child care providers who "teach or promote religious doctrine" from a general program that let child care providers use government-owned housing on military bases).

36. *Locke v. Davey*, 540 U.S. 712, 719-20 (2004); Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 174-200 (2004) (discussing the boundaries of *Locke v. Davey*).

37. See, e.g., *Rosenberger*, 515 U.S. at 833-34 (treating government funding as a designated public forum); *id.* (characterizing a tax exemption scheme as a designated public forum); *Widmar v. Vincent*, 454 U.S. 263, 267-68 (1981) (treating government property as a designated public forum).

38. See, e.g., *Boy Scouts of Am. v. Till*, 136 F. Supp. 2d 1295, 1308-09 (S.D. Fla. 2001) (accepting this argument); Response to Defendants' Cross-Motion for Summary Judgment and Reply in Support of Plaintiff's Motion for Preliminary Injunction and Declaratory and Permanent Injunctive Relief at 6-8, *Christian Legal Soc'y v. Crow*, No. 04-CV-2572 PHX NVW (D. Ariz. Aug. 23, 2005) (same); Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653, 675-77 (1996) (making essentially this argument); Victor T. Hu, Note, *Nondiscrimination or Secular Orthodoxy? Religious Freedom and Breach of Contract at Tufts University*, 6 TEX. REV. L. & POL. 289, 307-17 (2001) (making this argument).

A. Content Neutrality

By any traditional First Amendment definition of content neutrality, though, antidiscrimination rules are content-neutral. They do not treat expressive associations differently based on what the associations say. They are not justified by the content of the expressive associations' speech³⁹ but by whether the associations let prospective members participate without regard to their race, religion, sex, and the like.⁴⁰ Associations are covered whether they express racist views or antiracist views, religious views or atheist views, pro-gay-rights views or anti-gay-rights views.⁴¹

The government is generally free to limit subsidies in content-neutral ways. It may subsidize nonprofit speakers but not for-profit speakers, though making money from speech is itself a constitutional right.⁴² It may subsidize student speakers but not nonstudent speakers, though refusing to become a university student is also surely a constitutional right.⁴³ It may subsidize veterans' groups

39. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

40. Paulsen, *supra* note 37, at 679, argues that antidiscrimination rules operate based on "the content of [groups'] speech (their constitutions and statements of faith)," but I don't think this is quite so. Antidiscrimination rules bar funding of groups that discriminate; a group's statement that, for instance, only Christians may be members is evidence that the group is indeed discriminating, just as a medical group's statement that all its revenues may be used to fund abortions is evidence that the group funds abortions and is thus ineligible for a government funding program that excludes abortion funding.

If a group is willing to let in all members, but merely announces that its leadership prefers Christians, and that while non-Christians may join they do so against the leadership's wishes, then any attempt to exclude the group from a funding program based on this speech would indeed be content-based. (Backers of such an exclusion may argue that the group is improperly creating a "hostile educational environment" or "hostile public accommodations environment" for non-Christian students by expressing such an unwelcoming attitude, but I agree that such hostile environment rules are indeed content-based speech restrictions, and generally unconstitutional. See generally Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 LAW & CONTEMP. PROBS. 299 (2000).) But when a group expressly states that it discriminates in its selection of members or officers, then an exclusion of the group because of what it does—discriminates—is content-neutral even though what it says is used as evidence of what it does. See generally *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993) (holding that the use of speech as evidence does not pose First Amendment problems); *Haupt v. United States*, 330 U.S. 631, 641-42 (1947) (same); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1315 (2005).

41. See *Evans v. City of Berkeley*, 38 Cal. 4th 1, 14 (2006) (using this argument to uphold a nondiscrimination condition on access to a city-owned marina).

42. See 26 U.S.C. § 501(c)(3) (2006) (generally limiting the charitable tax deduction to nonprofits); *Simon & Schuster, Inc. v. Crime Victims Bd.*, 502 U.S. 105 (1991) (holding that the First Amendment protects for-profit speech). There is likewise a constitutional right to associate with others to create a for-profit institution; *Simon & Schuster*, after all, involved a book publisher (itself a large organization) associating with an author to jointly make a profit from speech.

43. *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995) (noting government's power to reserve a forum for "certain groups"); *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981)

but not other groups, though the right to associate with nonveterans for expressive purposes is surely constitutionally protected.⁴⁴ It may subsidize speakers who publish newspapers but not speakers who organize equally constitutionally protected demonstrations.⁴⁵ It may even deny subsidies on content-based grounds, so long as the content-based distinction is part of the definition of the program: Consider the content-based exclusion of electioneering and lobbying speech from tax subsidies.⁴⁶

The government may likewise choose to subsidize nondiscriminating speakers but not discriminating speakers (whatever views those speakers express). Such a restriction is content-neutral—and a fortiori viewpoint-neutral—and reasonable, even if some of us might disagree with the policy judgments that underlie it.

If a government agency were to apply its antidiscrimination rules *only to groups that express certain viewpoints*, this viewpoint discrimination would be unconstitutional.⁴⁷ Excluding the Boy Scouts and all other discriminating groups from a government charitable fund drive is content-neutral and generally permissible.⁴⁸ Excluding only the Scouts, but not other groups that equally violate the antidiscrimination policy, may show that the government is acting because of the viewpoint the Scouts express and not because of the discriminatory actions that the Scouts take.⁴⁹ But if the government opens a subsidy program only to nondiscriminating groups, it is free to enforce that policy so long as it acts based on the groups' conduct, and not the groups' ideas.

B. Disparate Impact

Of course, the antidiscrimination rules don't affect all speakers equally: the Christian Law Society will be much more affected by a ban on religious discrimination than, say, the Federalist Society. Yet that's true of many content-neutral rules. Bans on destroying draft cards especially affect anti-draft

(strongly implying that a university need not "make all of its facilities equally available to students and nonstudents alike").

44. *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983).

45. *Cf. Rosenberger*, 515 U.S. 819 (involving such a program).

46. *Regan*, 461 U.S. at 551; *Cammarano v. United States*, 358 U.S. 498, 513 (1959).

47. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811-12 (1985).

48. *See Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 98 (2d Cir. 2003).

49. *See, e.g., Wyman*, 335 F.3d at 95-97 (concluding that there was no evidence of this); *Cuffley v. Mickes*, 208 F.3d 702, 709 (8th Cir. 2000) (concluding that this happened in a Missouri government agency's decision to exclude the KKK from an adopt-a-highway program); Carolyn Fast, Note, *Scouting Out Discrimination Against the Discriminating Boy Scouts: Does Connecticut's Exclusion of the Boy Scouts from Its State Employee Charitable Campaign Violate First Amendment Rights?*, 35 COLUM. J.L. & SOC. PROBS. 255, 268-72 (2002) (arguing that this happened in one of the Boy Scouts exclusion cases).

speakers who want to burn draft cards as a means of protest.⁵⁰ Special tax exemptions for veteran groups tend to favor those views that veteran groups favor (for instance, greater benefits for veterans).⁵¹ Bans on residential picketing tend to affect anti-abortion protesters more than pro-choice protesters, who have traditionally felt little interest in engaging in such picketing.⁵² Yet this differential impact doesn't make facially content-neutral rules content- or viewpoint-based.⁵³

Funding conditions banning religious discrimination have an extra form of disparate impact on religious groups, which might be closer to facial content discrimination. Each religion is a kind of ideology. Ideological groups are usually left free to choose members based on whether they agree with the group's ideology—the UCLA Sierra Club is free to exclude antienvironmentalists. But under religious discrimination bans, religious groups are barred from choosing members based on whether they agree with the group's religious ideology.⁵⁴ Religious groups are thus denied the right that other ideological groups possess.

Yet even seen this way, the no-religious-discrimination condition is still content-neutral. The test for content discrimination, the Court has held, is whether an ordinance is *justified with reference to the content of the speaker's speech*.⁵⁵ A no-religious-discrimination condition is likely not justified by the content of the funded groups' speech. Rather, it's justified by a judgment that discrimination against prospective group members based on their religions is

50. *United States v. O'Brien*, 391 U.S. 367 (1968).

51. *Regan*, 461 U.S. at 550-51.

52. *Frisby v. Schultz*, 487 U.S. 474 (1988).

53. *See Hill v. Colorado*, 530 U.S. 703, 724-25 (2000) (so concluding generally); *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 87, 93-95 (2d Cir. 2003) (so holding as to nondiscrimination conditions on access to government benefits). This is where I think the Second Circuit erred in *Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839, 858-59 (2d Cir. 1996): The court reasoned that a prohibition on religious discrimination in student clubs' choice of officers would "affect the 'religious . . . content of the speech at [the] meetings'" and therefore constitutes "a decision based on 'the content of the speech at [the] meetings.'" But this conflates deliberate discrimination against certain speech and certain views, which is impermissible under the First Amendment (and often even when the issue involves the use of government assets), with disparate impact of some laws on certain kinds of speakers, which is generally not unconstitutional. *See James Weinstein, Free Speech, Abortion Access, and Judicial Viewpoint Discrimination*, 29 U.C. DAVIS L. REV. 471, 525-28 (1993). (The *Hsu* court was primarily applying the Equal Access Act, but it interpreted the Act in this respect as tracking First Amendment law. *Hsu*, 85 F.3d at 858.)

54. *See Memorandum in Support of Plaintiff's Motion for Preliminary Injunction at 10, Christian Legal Soc'y v. Crow*, No. 04-CV-2572 PHX NVW (D. Ariz. Mar. 4, 2005) (making this argument); Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. CIN. L. REV. 151, 215-16 (2003) (same); Berg, *supra* note 10, at 225 (same); Hu, *supra* note 38, at 302-07 (same); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 731 n.209 (1992) (same); Paulsen, *supra* note 38, at 677 (same).

55. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

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less proper than discrimination based on their other ideologies. This judgment—which is familiar from antidiscrimination law more broadly, since antidiscrimination law likewise bans discrimination based on targets’ religion and not discrimination based on targets’ other ideologies—focuses on the prospective members’ beliefs, not on the regulated groups’ speech or beliefs. And in fact the ban on religious discrimination applies to all groups, whatever their ideologies may be.

Moreover, even if the ban on religious discrimination is somehow seen as content-based, content-based definitions of designated public fora are generally constitutional. Viewpoint-based definitions are indeed prohibited,⁵⁶ but a ban on religious discrimination against prospective members treats religious viewpoints no differently from secular viewpoints.⁵⁷ A pro-choice group, for instance, would remain free to discriminate against pro-life prospective members regardless of whether the prospective members’ views stem from religious premises or from secular premises. The antidiscrimination rule treats alike all viewpoints on certain inherently religious subjects: it bars groups from discriminating against individuals based on whatever views the individuals hold about God, the afterlife, and the like.

C. Discriminatory Intent?

Some also suspect that the antidiscrimination rules are intended to make it harder to transmit certain kinds of viewpoints.⁵⁸ Yet it’s not clear that such discriminatory intent, even if proven, is enough to make a facially content-neutral law viewpoint-based.⁵⁹ And it is pretty clear that if the courts were to accept such an argument, they would demand powerful proof, not just strong suspicion among the cynical.

In the leading case on discriminatory intent, *United States v. O’Brien*, the Court upheld a law extending a ban on defacing draft cards to specifically cover destruction of draft cards. The law’s challengers plausibly speculated that the prohibition on draft-card destruction was intended (at least in part) to interfere with draft-card burning as a form of protest, yet the Court found that

56. *Rosenberger v. Rector*, 515 U.S. 819, 829-30, 833-34 (1995).

57. In this respect, the rule is different from the *Rosenberger* rule, which funded the expression of secular viewpoints on various subjects (for instance, abortion rights) but not the expression of religious views on those subjects.

58. *E.g.*, Paulsen, *supra* note 38, at 676 (reasoning that antidiscrimination rules are “directed chiefly at the assertedly discriminatory *ideas* entailed in the [group’s] statement of faith”).

59. Compare *United States v. O’Brien*, 391 U.S. 367 (1968) (generally saying “no”), with *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936) (assuming that the answer is “yes”), and *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811-12 (1985) (suggesting that even facially viewpoint-neutral exclusion from a nonpublic forum may be unconstitutional if the exclusion “is in fact based on the desire to suppress a particular point of view”).

speculation inadequate.⁶⁰ Given this holding, it's hard to see how courts would accept similar speculations about antidiscrimination rules.

This is especially so because there is an eminently plausible and speech-neutral explanation for why subsidy administrators may want to impose nondiscrimination rules: the commonly held view that discrimination is generally wrong and thus generally should not be subsidized by the government, regardless of what the discriminatorily selected group members or officers end up saying.

In fact, such a view can easily be adopted by government officials who are not even thinking about what the covered groups are likely to say, for instance when a university imposes a general ban on discrimination by all student groups, whether they are fraternities, sororities, chess clubs, or ideological groups. Such thoughtlessness about the policy's effects on expressive associations may be faulted, but it can't be faulted on the grounds that it involves an intent to suppress certain kinds of speech. Nor is there usually powerful evidence that administrators who are now applying those rules are doing so out of a desire to suppress speech. If a group is violating the rules, it makes sense to assume that administrators who try to exclude the group are doing so to enforce the rules, at least unless there's evidence that administrators are selectively enforcing the rules against some groups but not against others.

D. Enactment Being Based on, and Expressing, the Viewpoint of Its Authors

Of course, antidiscrimination rules are based on viewpoint in the sense that they are enacted because of a certain viewpoint their authors have—the viewpoint that discrimination is bad or that funds raised from taxpayers or students of all identity groups shouldn't be used (even indirectly) in ways that involve discrimination against members of certain identity groups.⁶¹ Antidiscrimination rules help express this viewpoint and potentially persuade the public that this viewpoint is proper⁶² and that groups that discriminate deserve to be condemned as well as excluded from the benefit.⁶³

But all rules, including quintessentially viewpoint-neutral and content-neutral rules, are enacted because of their authors' viewpoints, and most rules

60. See *O'Brien*, 391 U.S. at 382-83.

61. See Special Message to the Congress on Civil Rights and Job Opportunities, *supra* note 27.

62. See, e.g., Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 603-04 (1998) (discussing how government action can change people's attitudes through what it expresses); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 340 (2000) (same); Michael H. Shapiro, *Regulation as Language: Communicating Values by Altering the Contingencies of Choice*, 55 U. PITT. L. REV. 681, 686 (1994).

63. See Bainbridge, *supra* note 11, at 384 (arguing that benefit programs that exclude discriminating groups "stigmatize[]" such groups).

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convey this viewpoint to the public by their existence and enforcement. The exclusion of nonstudent groups from a university funding program rests on the viewpoint that the university ought to spend its funds on programs that are run by students (rather than on programs that may help students but are run by outsiders), and it conveys this viewpoint to the public (or that portion of the public that pays attention to such rules). The exclusion of lobbying from activities that can be supported by tax-exempt funds reflects—and conveys—the view that taxpayers' funds ought not be spent to promote legislative proposals (as opposed to other causes) with which the taxpayers may disagree.

Even clearly content-neutral laws that ban generally expressive conduct (e.g., residential picketing) or occasionally expressive conduct (e.g., burning draft cards, slapping people, being nude in public) rest on viewpoints about which behavior is harmful and lend rhetorical support to those viewpoints. That surely can't be enough to render all these laws viewpoint-based.

E. Magnitude of Burden

Some may argue that the exclusions are unconstitutional—even if they are viewpoint-neutral and content-neutral—because they impose too great a burden on groups' ability to speak. Even content-neutral restrictions are unconstitutional when they fail to leave open ample alternative channels for speech.⁶⁴ Applying a public law school's antidiscrimination rules to the Christian Legal Society, the argument would go, would entirely force it off campus, leaving it without adequate alternatives to speak on campus. The Society cannot exist as a distinctively Christian group if it's required to let in non-Christians or people who act contrary to its position on homosexuality.

This needn't always be true, since some universities may still leave unrecognized groups with some ability to meet on campus or at least very near campus.⁶⁵ But even if it is true, it's beside the point in a designated public forum.

Governmental restrictions on speech that's said on private property or in a traditional public forum must leave open ample alternative channels.⁶⁶ But a government has no obligation to open up its other property to speech. It could, for instance, completely exclude student groups from campus facilities, or completely deny tax exemptions for charitable contributions to ideology-spreading organizations. And when the government chooses to open up its property as a designated forum for some groups, it may define that forum as

64. *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994).

65. *See* *Christian Legal Soc'y v. Walker*, No. 05-C-4070, at 3 (7th Cir. Aug. 22, 2005) (noting that Southern Illinois University's rules let unrecognized student groups meet on campus, but deny such groups "access to campus bulletin boards, private meeting space, storage space, a faculty advisor, and university website, publication, and email access").

66. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

limited to certain kinds of groups—e.g., groups that don't engage in electioneering or lobbying, groups that are open only to students, groups that are open to students without regard to students' race, religion, sexual orientation, and the like—so long as it does so reasonably and in ways that are neutral as to the viewpoints that the groups express.

The groups that are outside the forum's designation are simply not granted access to the government property or subsidy. They are entitled to many alternative channels for speech, on private property or in a traditional public forum. But they are not entitled to the nontraditional-public-forum property or subsidy that the government has chosen to open only to certain kinds of groups.

F. *The No Governmental Religious Discrimination Principle*

I have spoken so far of one area in which the government must fund the exercise of constitutional rights: the No Governmental Viewpoint Discrimination Principle, which says that a government program benefiting a broad range of viewpoints may not exclude those viewpoints that the government disfavors. Let me now turn to the other area—the No Governmental Religious Discrimination Principle, under which a government program benefiting a certain kind of practice must usually⁶⁷ provide the same benefits to the religious instances of that practice. A government hospital, for instance, that allows circumcisions may not allow only secular circumcisions (whether medical or based on the parents' aesthetic preferences) but exclude religious circumcisions.

Does the Free Exercise Clause require that funding programs exempt religious groups' no-religious-discrimination conditions? The theory would be that such a condition is itself religious discrimination against religious groups: As I noted above in connection with the Free Speech Clause argument, a no-religious-discrimination rule leaves secular ideological groups free to discriminate based on whether people share the group's secular ideology, but bars religious ideological groups from discriminating based on whether people share the group's religious ideology.⁶⁸ A Free Speech Clause challenge to the no-religious-discrimination rule would have to show that such a rule discriminates based on the content or the viewpoint of the groups' speech. A Free Exercise Clause challenge, on the other hand, would only have to show that the rule is based on the groups' religiosity.

Yet here too that argument is a stretch. The no-religious-discrimination

67. For the chief exception, see *Locke v. Davey*, 540 U.S. 712 (2004), which upheld the government's provision of college scholarships usable for a wide range of majors, but not for devotional theology majors.

68. See Memorandum in Support of Plaintiff's Motion for Preliminary Injunction at 10, *Christian Legal Soc'y v. Crow*, No. 04-CV-2572 PHX NVW (D. Ariz. Mar. 4, 2005) (making this argument); Paulsen, *supra* note 38, at 698-99 (same).

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rule applies, both facially and in practice, to all groups, religious or otherwise. The Sierra Club is barred from discriminating against Jews for Jesus as much as the Jewish Legal Society is barred from discriminating against Jews for Jesus.

True, the antidiscrimination rule has a more serious effect on religious groups than on nonreligious groups, because religious groups would derive more benefit from the ability to discriminate based on religious ideology. But any law that happens to prohibit a practice that some religious groups find important would have this effect. Peyote laws, for instance, have a more serious effect on religious groups that see peyote use as a sacrament than on most secular groups whose members may just want to experiment with peyote. Yet such a disparate impact, even when it substantially burdens a group's exercise of religion, does not even render unconstitutional *criminal prohibitions* of practices.⁶⁹ It surely wouldn't bar *the exclusion from benefit programs* of groups that engage in those practices.⁷⁰

No-religious-discrimination conditions do differ from peyote bans and other generally applicable laws in one way: They expressly mention the word "religion." Yet they do so in focusing on the *prospective group member's or officer's* religion, not on the group's own religion. It's hard to see them, then, as "an attempt to disfavor [a] religion"—or religion generally—"because of the religious ceremonies it commands."⁷¹

If, however, such no-religious-discrimination subsidy conditions are held unconstitutional when applied to religious groups, this would only extend to conditions that groups not discriminate based on *religion*. Conditions that groups not discriminate based on other attributes wouldn't violate the Free Exercise Clause, even if the conditions substantially burden religious groups that (for instance) disapprove of certain sexual orientations (or at least the behavior generally associated with these orientations).

After all, the conditions also substantially burden those secular groups

69. *Employment Div. v. Smith*, 494 U.S. 872 (1990). Outright prohibitions on religious groups' discrimination in choosing members or clergy are indeed unconstitutional, but because of the freedom of expressive association or perhaps a specific "freedom of religious association" that survives *Smith* as a "hybrid" of the Free Exercise Clause and the freedom of expressive association, not because of a more traditional independent Free Exercise Clause claim. See *supra* note 10.

70. Professor Tushnet reasons that the nondiscrimination conditions might violate the Establishment Clause, because they have a disparate impact on particular denominations that find religious exclusivity in group membership and leadership to be especially important, and such a disparate impact is impermissible when it occurs in a government funding program that includes some religious groups. See Mark Tushnet, *Vouchers After Zelman*, 2002 SUP. CT. REV. 1, 28. But I doubt that this is so under the Court's Establishment Clause jurisprudence; among other things, even the many school aid programs that the Court has upheld have disproportionately benefited those religious groups (such as the Catholic Church) that run the largest numbers of eligible schools.

71. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993).

whose ideologies counsel racial, ethnic, sexual, or sexual orientation discrimination, just as they do for religious groups. A women-power group that insists that its ideas require it to exclude men from membership or from officer positions would be bound by these rules as much as a religious group that takes the same view. A Korean-American group that condemns intermarriage between Koreans and non-Koreans would be barred from excluding members or officers who practice such intermarriage,⁷² just as a religiously Jewish group that condemns intermarriage between ethnic Jews and non-Jews would be.

Finally, a religious group that is permitted to remain in a subsidy program despite its religious discrimination—either because of a constitutional decision, or through a legislatively or administratively created exemption—need not be allowed to use this permission as a means of engaging in other forms of discrimination.

True, a religious group (say, a Catholic group) that condemns homosexuality might demand that its members *share those views*. Such a demand would be neither religious discrimination nor sexual orientation discrimination, but only discrimination based on holding a certain viewpoint that secular people could hold as well as religious ones. But such a group rule wouldn't just exclude practicing homosexuals, or at least those practicing homosexuals who believe that homosexuality is proper—it would also exclude heterosexual Catholics who disagree with church teachings on this issue. And if the group tolerates these dissenting heterosexual Catholics but excludes dissenting homosexual Catholics, then it would be engaging in prohibited sexual orientation discrimination, not permitted religious discrimination.⁷³

III. A NEW PRINCIPLE OF NO GOVERNMENTAL DISCRIMINATION BASED ON EXPRESSIVE ASSOCIATION DECISIONS?

A. *The Line and Which Side Expressive Association Should Fall On*

Very well, some may say, let's assume that excluding groups from subsidy programs based on their expressive association decisions isn't viewpoint discrimination and thus isn't banned by existing doctrine. But it should *be treated like* viewpoint discrimination. The Court should create a No

72. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983) (holding that discrimination against people who engage in interracial relationships is a form of race discrimination).

73. The same, of course, would apply to nonreligious groups. A hyper-feminist group that wants to let in all female students but no male students can't easily avoid the ban on sex discrimination by simply conditioning membership on a belief in the impropriety of men's participation in women's counsels. Such a group-imposed condition would exclude many men (likely all men, since by trying to join the group they manifest their lack of the required belief), but also many women, including those women that the group might still want to involve (perhaps because the group hopes to talk those women around, or at least wants the women's participation in the other, less separatist projects that the group is engaged in).

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Governmental Discrimination Based on Expressive Association Choices Principle, just as it has created a No Governmental Viewpoint Discrimination Principle and a No Governmental Religious Discrimination Principle.⁷⁴

B. The Lack of an Accepted Theoretical Explanation for the Line

The difficulty with analyzing this argument is that the Court has never clearly explained why some refusals to subsidize are improperly discriminatory and others are properly discriminatory. Why may the government refuse to subsidize—as part of a generally available funding program—certain subject matters of speech (for instance, electioneering or lobbying⁷⁵), but may not refuse to subsidize certain viewpoints (for instance, support for violent revolution⁷⁶)? Why may the government refuse to subsidize the constitutional right to send children to private school or to get an abortion—even when it subsidizes rival activities, such as public schooling or childbirth—but may not refuse to subsidize the constitutional right to express religious views or engage in religious practices?

The Court has never squarely explained this. It has just sometimes conclusorily asserted that a certain form of discrimination against funding the exercise of a constitutional right is improper (which means the government has to subsidize the exercise of the right),⁷⁷ and at other times asserted that the government need not subsidize the exercise of a right (which means the government may discriminate against funding the exercise of the right). We thus have no principle that tells us on which side of the line refusal to subsidize a newly recognized right (such as the right to exclude people from a group) should fall.

One possible explanation for the doctrine is that viewpoint discrimination is improper because it skews debate against certain viewpoints. Yet discrimination against abortions and in favor of childbirth in government funding programs may skew people's reproductive choices in favor of childbirth; the Court's response to this was to hold that the state is free to "ma[k]e childbirth a more attractive alternative, thereby influencing the woman's decision."⁷⁸ Discrimination in favor of public schools in government funding skews our educational system in favor of government-run education and skews our public discourse in favor of the views taught to the nearly ninety percent of all children who go to government-run schools.⁷⁹

74. See Paulsen, *supra* note 38, at 682-83 (taking such a view).

75. Cammarano v. United States, 358 U.S. 498, 513 (1959).

76. See Speiser v. Randall, 357 U.S. 513, 518-19 (1958).

77. See, e.g., Widmar v. Vincent, 454 U.S. 263, 267 (1981).

78. Maher v. Roe, 432 U.S. 464, 474 (1977).

79. See NAT'L CTR. FOR EDUC. STATS., 1997 DIGEST OF EDUCATION STATISTICS tbls. 40 & 59 (1998), available at <http://nces.ed.gov/pubs/digest97/d97t040.html>.

One may also argue that the government must treat all viewpoints as equal in the eyes of the law, at least where private speech—including government-funded private speech (as opposed to the government's own speech)—is involved, because the government must remain subservient to, rather than dominant over, public opinion. But why must it treat as equal advocacy of good views and bad views, when it need not treat as equal public and private schooling, abortion and childbirth, or advocacy of the adoption of a proposed law and advocacy of the adoption of a moral ideal? And even accepting that the government must treat advocacy of discrimination and advocacy of equality as legally equal (within designated public fora), how can we tell whether it must also treat discriminatory actions by expressive associations and nondiscriminatory actions by such associations as legally equal?

C. *Permissible Discrimination Against Certain Associational Decisions*

Nonetheless, while we don't have a solid theoretical foundation for our inquiry, we do have two important practical data points.

First, discrimination against certain associational decisions is present in the quintessential, and largely uncontroversial, example of a permissible designation for a public forum: university programs that are open to student groups.⁸⁰

By being open only to student groups, such programs discriminate against certain constitutionally protected expressive associations. Students are constitutionally entitled to associate with nonstudents as well as with fellow students. They may even have ideological reasons to do this. A student group aimed at fighting homelessness may think it important—both as a means of generating the proper speech, and as symbolic expression by itself—to have homeless people on its executive board. A town-and-gown group might for similar reasons want half its officers and members to be nonstudents and the other half students. A religious student group may want to organize itself as a theocracy, with all decisions, especially ones about the group's speech, being made by a religious official rather than by a student.

Yet presumably the university is entitled to say that only groups that are entirely student-run may use university resources. Nor can this be simply explained away by a principle that a university may choose to subsidize only groups that are run by members of the university community.⁸¹ I take it that a university may choose to impose content-neutral limits on which members of

80. *E.g.*, *Widmar*, 454 U.S. at 268 n.5 (strongly implying that a university need not “make all of its facilities equally available to students and nonstudents alike”).

81. *See* Paulsen, *supra* note 38, at 683 (explaining the limitation of funding programs to student groups as “directly germane to the nature of the forum itself,” since “the university must be able to restrict access to that subset of the general public that is the focus of its mission”).

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the university community it funds, for instance by limiting certain programs to groups run by graduate students, full-time students, or honors students. Moreover, even if the university's limits on allowed groups must be tied to the university's role in helping the university community, one can equally argue that a university is entitled to subsidize only groups that are accessible to university community members without regard to race, religion, and the like.

Second, the unanimous *Regan v. Taxation with Representation of Washington* upheld Congress's decision to limit a certain subsidy only to veterans' groups.⁸² Of course, nonveterans' groups are entirely protected by the right to expressive association. So are groups in which veterans choose to associate mostly with nonveterans. And yet Congress is free to subsidize a certain set of expressive associations (veterans' organizations) as a means of promoting private speech on a wide range of issues⁸³ and not to subsidize other expressive associations that exercise their rights to associate with nonveterans.

Such a policy surely has a disparate impact on speakers who want to express different viewpoints. While veterans come in all political stripes, it's a pretty good bet that veterans' organizations will, on balance, have somewhat different views on various issues than other equally constitutionally protected expressive associations. Yet the policy is permissible, despite its facial discrimination based on a group's expressive association choices and its disparate impact on different kinds of speech.⁸⁴

IV. ANTIDISCRIMINATION RULES AND RESTRICTIONS ON WHAT GROUPS DO WITH THEIR OWN MONEY

So far I have spoken chiefly of the government's choosing to subsidize only nondiscriminating *programs*—for instance, providing university funding only for events that are open to attendees without regard to race, religion, and

82. 461 U.S. 540, 544 (1983). Federal law lets contributors give tax-deductible contributions to nonprofit educational groups, but only if those groups did not engage in lobbying; this was in effect a subsidy to such groups, since it provided something like a federal matching grant program for contributions. *Cammarano v. United States*, 358 U.S. 498, 513 (1959). Federal law also provided the subsidy to a class of groups that *did* engage in lobbying—veterans' groups; *Taxation with Representation* upheld that limited subsidy, even though it preferred certain speakers over others. See *Taxation with Representation*, 461 U.S. at 544.

83. Recall that this is not government speech, as in *Rust v. Sullivan*, 500 U.S. 173, 193 (1991), or a discretionary grants program, but a nondiscretionary benefit program aimed at promoting private speech, much like the program in *Rosenberger v. Rector*, 515 U.S. 819, 833-34 (1995).

84. Paulsen, *supra* note 38, at 684 n.72, criticizes *Taxation with Representation* and argues that limiting a funding program to veterans' groups should indeed be unconstitutional. If the Court adopted this view, then the case for the unconstitutionality of limiting funding programs to nondiscriminating groups would also be strengthened. But for now the unanimous *Taxation with Representation* seems well entrenched, and it has indeed been reaffirmed in *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995).

the like. What about the government's subsidizing only nondiscriminatory *groups*—for instance, providing university funds or a tax exemption only to groups that select officers or voting members without discrimination based on the forbidden grounds?

The Court has routinely distinguished limits on *how government assets are used* from limits on *who uses the assets* or on *what other behavior the user engages in with its own assets*; and here again Chief Justice Rehnquist and Justice O'Connor have played leading roles. Thus, the government may choose not to subsidize abortions, but it may not deny food stamps to all women who have had abortions, or require women who get food stamps to promise not to get abortions.⁸⁵ The government need not fund editorials by public broadcasters, but it may not deny funding to public broadcasters that have run editorials paid for by nongovernment funds.⁸⁶ The government may demand that tax-exempt groups not engage in lobbying or electioneering, but only because those groups may set up non-tax-exempt affiliates that can then use purely tax-paid funds for that speech.⁸⁷

This is what the Court has in practice roughly meant by the "unconstitutional conditions" doctrine: While the government may generally place conditions on the use of benefits that it provides, it generally may not control the use of the recipient's other assets as a condition of providing the benefit. We might call this the No Governmental Restrictions on Use of Private Funds Principle.

Expressive association rights, though, don't lend themselves to an easy distinction between "how government assets are used" and "who uses the assets." Whenever a group with discriminatorily chosen decisionmakers (officers or voting members) uses government assets, the government is helping distribute power and influence in discriminatory ways.⁸⁸ If the government wants to avoid providing such assistance, it has to limit its benefit programs to groups whose members are chosen nondiscriminatorily.

Nor can the group continue discriminating with private funds and set up a

85. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 510 n.8 (1989) (Rehnquist, C.J., for the majority) (so suggesting); *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980) (likewise); *Maher v. Roe*, 432 U.S. 464, 474 n.8 (1977) (likewise).

86. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 399-401 (1984). Justice O'Connor provided the needed fifth vote for the majority, though here then-Justice Rehnquist was in the dissent.

87. *League of Women Voters*, 468 U.S. at 399-401; *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544 (1983). Because of this doctrine, the government sometimes indirectly facilitates behavior that it would prefer not to facilitate: for instance, if the government gives a public broadcaster \$1 million for programming other than editorials, this frees up some of the broadcaster's own money that could now be spent on editorializing. Nonetheless, in a world where all people and groups get *some* government benefits, whether tax exemptions, social security, or government contracts, the doctrine is a necessary check to what would otherwise be extremely broad government power.

88. *See supra* Part I.

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nondiscriminating affiliate that uses government funds. To be a true affiliate, truly under control of the parent group, the affiliate must be controlled by the parent group's discriminatorily selected decisionmakers. When that affiliate uses government assets, the government is again helping distribute power and influence in discriminatory ways.

Thus, with speech, abortion, choice of audience for events, and various other rights—rights which are exercised by people or organizations some of the time—the rights-holders may exercise these rights on their own dime and yet get government money for their other conduct. They need not surrender their rights in exchange for the subsidy. Conversely, the government may subsidize the behavior it wants to support and yet not subsidize the other behavior.

But a group's choice of its decisionmakers directly affects each decision that the group makes. If the government must fund the group's activities, the government will be funding decisions by discriminatorily selected decisionmakers. Yet if the government need not fund decisions by discriminatorily selected decisionmakers, the group will indeed have to surrender its right to discriminate in selecting decisionmakers in exchange for the subsidy.

The Court has never explained what would happen in this sort of situation, where a segregated-fund or affiliate approach can't work.⁸⁹ Yet if the government may not put expressive associations to the choice of altering their officer selection criteria or forgoing government benefits, this would have some rather substantial results even outside antidiscrimination rules.

For instance, say that a university opens up a designated public forum—classroom access, publication funding, social activities funding, and the like—for groups that are controlled entirely by students.⁹⁰ This means that a group must either forgo the benefit or give up its associational rights to select nonstudents as officers and to become a branch of a broader organization. (The broader organization cannot set up a purely student group as an affiliate controlled by its nonstudent-run portion, since then the affiliate wouldn't really be controlled by students.) Or say that a university opens up a forum only for groups that are democratically run by a majority of their members. This means that a group must either forgo the benefit or give up its associational right to organize itself in other ways.⁹¹

Yet these restrictions, it seems to me, ought to be permissible. The

89. *Regan v. Taxation with Representation* didn't have to confront this; presumably a mixed veteran-nonveteran organization, which was not entitled to the special tax exemption for veteran groups that lobby, could set up an affiliate veteran organization that qualified for the exemption.

90. See *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) (strongly implying that a university need not "make all of its facilities equally available to students and nonstudents alike").

91. See, e.g., *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (reaffirming associations' rights to choose how to govern themselves).

university is providing the forum to help advance what it sees as its mission of educating the students, or at least providing them with an interesting intellectual and social environment. If the university decides that organizations with certain structures are especially useful to that mission, the university should be entitled to support those organizations, even if others may think that a more flexible approach would be better. And the constitutional rule that tolerates a requirement that groups *must* discriminate against nonstudents would likewise tolerate a requirement that groups *may not* discriminate on certain bases among students.

On the other hand, if I'm mistaken and the unconstitutional conditions doctrine does bar government control over the group's choice of its decisionmakers, then it's helpful to recognize that this principle extends beyond preempting certain antidiscrimination rules. Rather, it potentially requires the government to fund a broad range of expressive groups that it might otherwise not want to fund, for instance because they consist of nonstudents or because they are structured in ways that the government thinks do not serve its goals.

V. THE ESTABLISHMENT CLAUSE AND NONDISCRIMINATION CONDITIONS

Might antidiscrimination conditions attached to subsidies violate the Establishment Clause when religious groups are involved? Clergy hiring decisions are constitutionally immune from antidiscrimination law scrutiny; this rule rests partly on the right of expressive association and the Free Exercise Clause, but some cases suggest that it is also supported by the Establishment Clause.⁹² Does this principle apply to nondiscrimination rules that are subsidy conditions rather than categorical mandates?

The *Lemon v. Kurtzman* Establishment Clause test has been heavily criticized; and its three prohibitions on government actions that (1) have a "pre-eminent purpose [that is] religious,"⁹³ (2) have a "primary effect that . . . advances [or inhibits] religion,"⁹⁴ or (3) "foster an excessive entanglement with religion"⁹⁵ are too abstract to be particularly helpful. Nonetheless, though the

92. See, e.g., *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 463, 465-66 (D.C. Cir. 1996); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1170 (4th Cir. 1985). This principle generally applies to nonclergy positions that are nonetheless "important to the spiritual and pastoral mission of the church" because they primarily involve "teaching [religious subjects], spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship," *Shalihsabou v. Hebrew Home of Greater Wash.*, 363 F.2d 299, 306 (4th Cir. 2004) (quoting *Rayburn*, 772 F.2d at 1169), though not to lay teachers at religious schools and to employees in similarly nonreligious positions, see, e.g., *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 169 (2d Cir. 1993); *Geary v. Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 328 (3d Cir. 1993).

93. *Stone v. Graham*, 449 U.S. 39, 41 (1980).

94. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

95. *Id.* at 613.

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test has not been much of a rule, it has been something of a rule-generating device—a set of factors that the Court has considered in defining the more precise subordinate rules that the Court has over time evolved.⁹⁶ And the test's three prongs are helpful rubrics for thinking about Establishment Clause claims to which none of those more precise rules apply.

A. *Preeminent Purpose*

To begin with, applying nondiscrimination conditions to all grant recipients, including religious groups, has a pretty clear secular purpose—the desire to ensure that “public funds, to which all taxpayers of all [identity groups] contribute, not be spent in any fashion which . . . subsidizes . . . discrimination.”⁹⁷ As I've argued above,⁹⁸ I think that as a policy matter this desire should sometimes yield to other interests. Yet the desire is secular and legitimate, even if in my view at times mistaken.

True, the antidiscrimination conditions may sometimes be used against religious organizations that are condemned because of their discriminatory practices (as in *Bob Jones University*). But this doesn't undermine the conditions' secular purpose. Generally available benefit programs (such as school choice plans) don't lose their secular purpose just because they include popular religious groups.⁹⁹ Likewise, generally applicable conditions on benefit programs don't lose their secular purpose just because they apply to unpopular religious groups, or the unpopular practices of religious groups.

B. *Primary Effect*

Antidiscrimination conditions may disproportionately affect—and thus inhibit, at least in comparison to competitors—those religious groups that feel a religious compulsion to discriminate.¹⁰⁰ But *Bob Jones University v. United States* squarely held that this doesn't make such conditions invalid:

Bob Jones University also contends that denial of tax exemption violates the Establishment Clause by preferring religions whose tenets do not require racial discrimination over those which believe racial intermixing is

96. See EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES* 699 (2d ed. 2005).

97. Special Message to the Congress on Civil Rights and Job Opportunities, *supra* note 27, at 492 (defending Title VI of the Civil Rights Act).

98. See *supra* notes 23-27.

99. *Cf. Zelman v. Simmons-Harris*, 536 U.S. 639, 653-54 (2002) (noting that the school choice program was enacted for “the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system,” though most of the private schools that got the school choice funds were religious).

100. See Memorandum in Opposition to Defendants' Partial Motion to Dismiss at 11, 13, *Christian Legal Soc'y v. Crow*, No. 04-CV-2572 PHX NVW (D. Ariz. Feb. 1, 2005).

forbidden. . . . [A] regulation does not violate the Establishment Clause merely because it “happens to coincide or harmonize with the tenets of some or all religions.” The IRS policy at issue here is founded on a “neutral, secular basis,” and does not violate the Establishment Clause.¹⁰¹

This logic applies to clergy hiring as well as to student admissions.

C. Excessive Entanglement

1. Entanglement in influencing clergy selection as such

When courts conclude that applying employment laws to clergy violates the Establishment Clause, they generally rest on the “excessive entanglement” theory. One possible excessive entanglement argument is that any governmental attempt to influence churches’ choice of leaders—whether through legal command or through funding pressure—is “excessive entanglement” because clergy selection questions are none of the government’s business: churches have “the fundamental right . . . to ‘decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.’”¹⁰²

Yet deciding how taxpayer money will be spent generally is the government’s business, especially given the general No Duty To Subsidize Principle. The government is free to pressure women to bear a child to term, by offering funding for childbirth but not for abortion. The government is free to pressure parents not to exercise their rights to send their children to private school (including a private religious school), by offering funding for public education but not private education. The government is free to pressure organizations, including churches, not to exercise their rights to support or oppose candidates or legislative proposals, by offering tax deductibility to groups that do not engage in such speech.¹⁰³

In this respect, the government is free to entangle itself with people’s abortion decisions and religiously motivated childrearing decisions, and even with churches’ decisions about which statements the church will make to the public and which sermons the minister will preach. The mere fact of the government’s trying to influence churches not to discriminate in employment decisions doesn’t seem any more of an excessive entanglement than are the other attempts to influence constitutionally protected behavior. There needs to be some extra reason why pressuring people’s or organizations’ behavior is improper in this situation while it’s proper in others.

101. 461 U.S. 574, 604 n.30 (1983).

102. EEOC v. Catholic Univ. of Am., 83 F.3d 343, 462 (D.C. Cir. 1996) (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952), though while discussing a direct regulation of a church’s discriminatory hiring practices, rather than the denial of a benefit to organizations that discriminate).

103. See generally Part I (describing the No Duty To Subsidize Principle).

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2. *Entanglement in the fact-finding that is likely to be required for enforcement*

More often, entanglement is raised as an objection to the procedures that enforcing antidiscrimination law would involve. First, some have argued that any investigation of church personnel actions is an unconstitutional entanglement, but the Court has rejected such a position.¹⁰⁴

Second, the Court's decision in *NLRB v. Catholic Bishop of Chicago* suggested that applying the National Labor Relations Act to religious schools might be unconstitutional, because the pervasive and continuous involvement by the National Labor Relations Board in religious school policymaking might be an unconstitutional entanglement.¹⁰⁵ But since then, lower courts have generally allowed the application of antidiscrimination law to the very same class of employees—teachers in religious schools (at least those teachers who teach generally nonreligious subjects)—to which *Catholic Bishop* refused to apply labor law. Antidiscrimination law, the courts have reasoned, focuses on discrete hiring decisions and thus involves not too much of an entanglement, unlike labor law, which would “inject the Board into ‘nearly everything’ that occurs in a religious school.”¹⁰⁶

Third, one could argue that applying antidiscrimination law to clergy employment decisions would involve excessive entanglement in determining the true motives for such decisions. Deciding whether an organization discriminates among people often requires fact-finders to make hard calls about people's qualifications. If a law firm passes over a great black lawyer to promote a mediocre white lawyer, that's evidence of race discrimination, often the strongest evidence that the plaintiff can find.

When we are dealing, however, with the choice of clergy, which is based partly on the choosers' sense of the “guidance of the Holy Spirit”¹⁰⁷ or of whether a would-be canon law professor has the theological understanding needed to “teach in the name of the Church,”¹⁰⁸ judges and jurors may find it

104. See *Ohio Civ. Rights Comm'n v. Dayton Christian Sch.*, 477 U.S. 619, 628 (1986) (“[T]he Commission violates no constitutional rights by merely investigating the circumstances of a [religious school teacher]’s discharge . . . if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge.”).

105. 440 U.S. 490, 502 (1979) (holding that applying the Act to religious schools raised enough constitutional doubt that the Act should instead be interpreted as not covering such schools).

106. *Geary v. Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 328 (3d Cir. 1993).

107. *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1170 (4th Cir. 1985) (quoting the Potomac Conference of Seventh-Day Adventists' description of how its clergy are chosen); see also *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1357 (D.C. Cir. 1990) (“[E]valuation of the ‘gifts and graces’ of a minister must be left to ecclesiastical institutions.”).

108. *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 463, 465-66 (D.C. Cir. 1996).

hard to decide whether the church's stated reason (for instance, this candidate doesn't seem holy, inspiring, or orthodox enough) is sincere or just a pretext for discrimination.¹⁰⁹ Whether the rejected candidate would have made a better clergyman than the selected candidate—and thus whether the real reason for the decision likely wasn't quality but was race, age, sex, or what have you—is a quintessentially religious judgment of the sort that secular decisionmakers are not supposed to make.¹¹⁰

The desire to avoid excessive entanglement in religious matters might thus counsel in favor of not letting government actors judge the motives behind clergy employment decisions and thus in favor of concluding that clergy hiring decisions are categorically protected against antidiscrimination laws.¹¹¹ And this rationale offers an escape from the No Duty to Subsidize Principle: if government fact-finding about whether a church discriminated in choice of clergy involves impermissible decisionmaking about religious questions, it may be just as impermissible in subsidy decisions as in regulatory decisions, even if

109. See *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 171 (2d Cir. 1993) (noting that in discrimination cases “a plaintiff may be able to put into question the genuineness of the employer’s putative non-discriminatory purpose by arguing that the stated purpose is implausible, absurd or unwise,” and that “such a plausibility inquiry could give rise to constitutional problems where . . . a defendant proffers a religious purpose for a challenged employment action,” but nonetheless holding that courts may adjudicate discrimination claims raised by lay teachers at religious schools so long as the fact-finders “presume that an asserted religious motive is plausible in the sense that it is reasonably or validly held”).

110. See *Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981) (holding that secular courts may not judge the reasonableness of religious beliefs, though holding that they may judge their sincerity).

111. I say “might” because the problem discussed in the text is raised by all judgments of a religious claimant’s sincere religious belief, including those required by the *Sherbert/Yoder*-era Free Exercise Clause religious accommodation regime or by the Religious Freedom Restoration Act religious accommodation regimes, see *infra* Part VI (discussing those regimes). Deciding whether any religious objector is motivated by “honest conviction” that the challenged law violates his beliefs (rather than by a desire to get the exemption’s secular benefits), *Thomas*, 450 U.S. at 716, may often be as hard as deciding whether a church is motivated by “honest conviction” that a particular candidate is less holy (rather than by the candidate’s being of the wrong race, sex, or the like). And in the process of making such decisions, the fact-finders might be equally tempted to smuggle in impermissible considerations about how reasonable or familiar the claimants’ or the churches’ beliefs are.

If, as is widely believed, such decisions about a religious claimant’s sincerity are permissible when courts apply religious accommodation laws to benefit religious objectors, they might be as permissible when courts apply antidiscrimination law to restrain churches. Perhaps then churches that insist on their right to select clergy members based even on discriminatory grounds should look to the expressive association right (either generally or as part of a narrow substantive Free Exercise Clause guarantee, see *supra* note 10) rather than to the Establishment Clause. See generally Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981) (generally arguing for a broad church autonomy right, but arguing that such a right should be recognized under the Free Exercise Clause and not under the Establishment Clause).

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there is no substantive entitlement to a subsidy.

But it's not clear that such entanglement via fact-finding would be present when the church makes quite clear that it discriminates in its choice of clergy, for instance when the Catholic Church refuses to ordain female priests. A government entity that is deciding whether to deny benefits to the discriminating group may make this decision without any religious entanglement—without anything more than taking the group at its word.¹¹²

And religious groups that discriminate in choice of clergy will often be quite candid about their practices. They may feel a religious obligation to be candid. They may also feel it important to convey to their members the religious principle that the discrimination embodies—not just to have an all-male priesthood, but to acknowledge and explain the doctrinal foundations of such a policy. And the leadership of a large religious organization may recognize that the practices they see as religiously necessary must be expressly articulated to be consistently implemented throughout the organization.

So perhaps the antientanglement principle of the Establishment Clause counsels against closely scrutinizing groups' claims that they do not discriminate in clergy hiring and accepting groups' self-certification on the subject. But when they discriminate overtly, then the government can deny them a subsidy—alongside any other groups that discriminate—without excessively entangling itself with religious decisionmaking.¹¹³

VI. RELIGIOUS EXEMPTIONS AND GOVERNMENT SUBSIDIES

As I suggested above, there are two exceptions to the No Duty To Subsidize Principle: the viewpoint-neutrality requirement in free speech subsidy cases and the prohibition on discrimination based on religiosity.

But from 1963 to 1990, there was a third exception. During those years, religious objectors sometimes had a Free Exercise Clause right to exemptions from generally applicable laws; this obligation extended not just to exemptions from criminal prohibitions, but also to exemptions from conditions attached to benefit programs. The objectors were thus entitled to get the subsidy, with the offending condition waived. And the government was thus required to subsidize the objectors' Free Exercise Clause rights.

Chief Justice Rehnquist worked hard to reverse this mandatory exemption regime (both as to subsidies and as to prohibitions). In 1990, in *Employment*

112. If the government goes beyond denying a benefit, and instead authorizes (say) Title VII lawsuits against the church on those grounds, that would be constitutional—but on expressive association grounds, not on Establishment Clause grounds.

113. *Cf. Locke v. Davey*, 540 U.S. 712, 717 (2004) (upholding against a Free Exercise Clause challenge a program that gave scholarships to a wide range of students but not to those who were majoring in devotional theology, and that relied on the school's own self-certification of "whether the student's major is devotional").

Division v. Smith,¹¹⁴ he succeeded, though over Justice O'Connor's strenuous objection. But since then, the federal government and about a dozen states have enacted a statutory exemption regime patterned on the pre-*Smith* Free Exercise Clause case law,¹¹⁵ and about a dozen other states have interpreted their state constitutions the same way.¹¹⁶ These accommodation schemes generally borrow the framework of pre-*Smith* Free Exercise Clause case law, which for twenty-seven years provided a constitutional right to religious accommodation:

- (a) Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except
- (b) . . . if it demonstrates that application of the burden to the person . . . is the least restrictive means of furthering [a] compelling governmental interest.¹¹⁷

Under this test, some discriminating groups might be entitled to participate in subsidy programs even if the groups violate the programs' nondiscrimination conditions. A student-run Christian Legal Society, for instance, can argue:

Our religious beliefs tell us to create a community of fellow traditionalist Christians at the law school. The nondiscrimination condition that the school imposes on access to meeting rooms and to funds thus substantially burdens our religious beliefs. We are therefore entitled to a religious exemption from this condition.¹¹⁸

A religious high school that feels a religious obligation to discriminate based on religion or sexual orientation can make a similar argument about a school voucher program that comes with nondiscrimination conditions. So can the

114. 494 U.S. 872 (1990).

115. See Volokh, *supra* note 10, at 1468 & n.6.

116. ALA. CONST. art. I, § 3; Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280-81 (Alaska 1994); City Chapel Evangelical Free Inc. v. City of South Bend, 744 N.E.2d 443, 450 (Ind. 2001); Fortin v. Roman Catholic Bishop, 871 A.2d 1208, 1227 (Me. 2005); Attorney Gen. v. Desilets, 636 N.E.2d 233, 235-36 (Mass. 1994); Reid v. Kenowa Hills Pub. Sch., 680 N.W.2d 62, 68-69 (Mich. Ct. App. 2004); State v. Hershberger, 462 N.W.2d 393, 398 (Minn. 1990); St. John's Lutheran Church v. State Comp. Ins. Fund, 830 P.2d 1271, 1277 (Mont. 1992); *In re Browning*, 476 S.E.2d 465, 467 (N.C. Ct. App. 1996); Humphrey v. Lane, 728 N.E.2d 1039, 1045 (Ohio 2000); Hunt v. Hunt, 648 A.2d 843, 852-53 (Vt. 1994); First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 187 (Wash. 1992); State v. Miller, 549 N.W.2d 235, 240-41 (Wis. 1996).

117. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2000), *invalidated as to state laws* by City of Boerne v. Flores, 521 U.S. 507 (1997). Subsection (b) actually reads "is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest," but the second clause necessarily includes the first.

118. Such a claim was made in *Christian Legal Society v. Crow* under the Arizona Religious Freedom Restoration Act. See Defendants' Partial Motion To Dismiss Complaint at 10, *Christian Legal Soc'y v. Crow*, No. 04-CV-2572 PHX NVW (D. Ariz. Dec. 30, 2004). The claim was dismissed on state law sovereign immunity grounds, see E-mail from Prof. James Weinstein, Arizona State University, to author (Mar. 3, 2006, 19:19 PST) (on file with author), but this should not preclude such claims in cases that request injunctions rather than damages, or that are raised in states that have broader sovereign immunity waiver policies.

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Catholic Church, should the IRS ever conclude that groups that discriminate based on sex in choice of employees should be denied § 501(c)(3) status and that contributions to them therefore shouldn't be tax-deductible (something that the IRS concluded in *Bob Jones University* as to religious universities that discriminate based on race in student conduct rules¹¹⁹).

Should the objecting groups prevail and get the benefits while escaping the condition? This turns out to be a murky issue; I can't hope to give an answer here, but I'd like to point to and briefly discuss three key questions:

- a. *Scope*: Which practices of which groups count as "exercise of religion," and thus potentially trigger the statutory right?
- b. *Burden*: When does denying a subsidy in the cases that we are discussing constitute a "substantial burden" on religious exercise?
- c. *Justification*: Even if excluding a group from the benefit is a substantial burden on exercise of religion, does the government have a compelling justification for this exclusion?¹²⁰

A. *Scope—Who May Ask for Religious Accommodation?*

To begin with, the predicate for a religious accommodation claim differs from the predicate for an expressive association claim. Groups have an expressive association right to exemption from antidiscrimination laws if those laws would substantially burden the group's activity to express itself.¹²¹ Groups have a RFRA right to a religious exemption if the laws would substantially burden the group's religious exercise.

A substantial burden clearly exists if a group's religious beliefs obligate it to discriminate.¹²² Thus, the Catholic Church's practice of selecting only men as priests is almost certainly the exercise of religion; the Church understands the practice to be God's will. Likewise for a Christian students' group that sincerely feels a religious compulsion to gather only with like-minded members (i.e., Christians) who behave consistently with what the group sees as Christian

119. 461 U.S. 574, 585 (1983); *see also* Becker, *supra* note 4, at 484-85 (arguing in favor of such an interpretation).

120. A fourth question, which is whether giving a subsidy to religious expressive associations that discriminate but not to secular expressive associations that discriminate violates the Free Speech Clause, is dealt with in Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 610-17 (1999).

121. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000).

122. *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981). What a group's beliefs are is potentially a more complex question than what an individual's beliefs are, since a group's members may well disagree among each other on certain matters (even matters that are important to the group's philosophy). Nonetheless, courts have generally not been troubled by this and have usually accepted that groups do indeed have beliefs that can qualify for religious accommodation. *See, e.g., Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

morality (i.e., among other things, do not engage in homosexual behavior).

The matter is more uncertain if a group merely feels religiously *motivated*, not compelled, to discriminate—for instance, if a Christian students' group simply concludes, based on its religious beliefs, that creating a traditionalist Christian community can help its members' spiritual growth and can help spread God's word. Some statutes, including the Federal RFRA, expressly say that "exercise of religion" means "any exercise of religion, whether or not compelled by . . . a system of religious belief."¹²³ Other statutes just say that it means "the exercise of religion under . . . the First Amendment";¹²⁴ the Federal RFRA used to say this until 2000, when it was expressly amended to use the "whether or not compelled" language.¹²⁵

Some federal decisions, both before the Federal RFRA was amended and after, have held that religious motivation suffices.¹²⁶ Other court decisions, including those interpreting the "whether or not compelled" language, have held that religious compulsion is necessary, since if one's practice is only religiously motivated, banning it does not pose a "substantial burden" (presumably since the ban isn't requiring one to violate one's religious beliefs).¹²⁷ This compulsion-versus-motivation question is one of the important unresolved questions of RFRA law.

Another important unresolved question is whether RFRA should be understood as covering even deeply felt but nonreligious conscientious beliefs. Though RFRA on their face apply only to "exercise of religion," courts have sometimes interpreted religious accommodation provisions as equally accommodating deeply felt conscientious (but nonreligious) belief that "occup[ies] in the life of its possessor a place parallel to that filled by . . . God [among religious people]."¹²⁸ This began with the conscientious objector exception from draft law, which literally covered only religious objections, but

123. *E.g.*, 42 U.S.C. § 2000bb-2(4) (2000) (adopting the definition in 42 U.S.C. § 2000cc-5(7)(A) (2000)); ARIZ. REV. STAT. ANN. § 41-1493.01 (1998); FLA. STAT. ANN. § 761.02(3) (1998); IDAHO CODE ANN. § 73-401 (1991); 775 ILL. COMP. STAT. 35/5 (2005); N.M. STAT. ANN. § 28-22-2 (2003); TEX. CIV. PRAC. & REM. CODE ANN. § 110.001 (2005); UTAH CODE ANN. § 63-90b-102 (2004).

124. *E.g.*, OKLA. STAT. ANN. tit. 51, § 252 (1963); S.C. CODE ANN. § 1-32-20 (2006).

125. *See* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, § 7(a)(3), 114 Stat. 803, 807 (amending Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 5(4), 107 Stat. 1488, 1489).

126. *See, e.g.*, *Kikumura v. Hurley*, 242 F.3d 950, 960-61 (10th Cir. 2001) (so holding when interpreting a RFRA that includes the "whether or not compelled" definition); *Brown-El v. Harris*, 26 F.3d 68, 70 (8th Cir. 1994) (so holding when interpreting a RFRA that lacks such a definition).

127. *See, e.g.*, *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1033 (Fla. 2004) (so holding when interpreting a RFRA that includes the "whether or not compelled" definition); *Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 172 (4th Cir. 1995) (so holding when interpreting a RFRA that lacks such a definition); *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (likewise); *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995) (likewise).

128. *Welsh v. United States*, 398 U.S. 333, 339 (1970).

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which the Court interpreted to also include deeply felt conscientious objections.¹²⁹ Courts and the EEOC have likewise generally interpreted Title VII's religious accommodation provision to cover deeply felt conscientious objections.¹³⁰

On the other hand, *Wisconsin v. Yoder*, one of the cases that RFRA was intended to restore, held that only religious beliefs, not philosophical ones, qualify for Free Exercise Clause protection.¹³¹ The statutes say "exercise of religion," not "exercise of religion or conscientious belief." And one reason to read the statutes as not limited to religion—a concern that they might otherwise unconstitutionally prefer religion in violation of the Establishment Clause—seems weaker after *Cutter v. Wilkinson*, which unanimously held that accommodations for religious objectors generally do not constitute unconstitutional preferences for religion.¹³² All this becomes relevant when a group discriminates because of a deeply felt but not religious ideology, for instance if a radical feminist group limits membership to women, or a black or

129. *Id.*

130. *See, e.g.*, *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 137 n.4 (3d Cir. 1986) ("The breadth of the 'exemption' afforded by Title VII is underscored by the fact that in defining religion, the EEOC has used the same broad definition as the Selective Service employs for conscientious objector purposes."); *Nottelson v. Smith Steel Workers*, 643 F.2d 445, 454 n.12 (7th Cir. 1981) (noting the same broad definition); *Redmond v. GAF Corp.*, 574 F.2d 897, 901 n.12 (7th Cir. 1978) ("We believe the proper test to be applied to the determination of what is 'religious' under § 2000e(j) can be derived from the Supreme Court decisions in [*Welsh*] and [*United States v. Seeger*, 380 U.S. 163 (1969)], i.e., (1) is the 'belief' for which protection is sought 'religious' in person's [sic] own scheme of things, and (2) is it 'sincerely held.'"); *Ali v. Southeast Neighborhood House*, 519 F. Supp. 489, 490 (D.D.C. 1981) ("Sincere beliefs, meaningful to the believer, need not be confined in either source or content to traditional or parochial concepts of religion. [*Welsh*.] See also [*Seeger*] for the definition of 'religious training and belief' as applied to a conscientious objector claim, which definition is no less appropriate here."); *Wondzell v. Alaska Wood Prods., Inc.*, 583 P.2d 860, 866 n.12 (Alaska 1978) ("In order to avoid the danger of unconstitutionality we would interpret [the state statute] to accord the same privileges to all sincere conscientious beliefs, whether or not they are accompanied by a belief in a supreme being."); *Friedman v. S. Cal. Permanente Med. Group*, 125 Cal. Rptr. 2d 663, 685 (Ct. App. 2002) (adopting the definition from CAL. CODE REGS. tit. 2, § 7293.1 (2000) that defines religious practices to include beliefs that have "importance [to claimant] parallel to that of traditionally recognized religions"); *Kolodziej v. Smith*, 682 N.E.2d 604, 607 (Mass. 1997) (upholding a jury instruction that "religious beliefs [for purposes of Title VII] include moral or ethical beliefs as to what is right or wrong which are sincerely held with the strength of religious views"); Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1 (1980) (defining "religious practices" "to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views"). *But see Seshadri v. Kasraian*, 130 F.3d 798, 800 (7th Cir. 1997) (Posner, J.) (concluding that Title VII does not apply when "the plaintiff's belief, however deep-seated, is not religious").

131. 406 U.S. 205, 215-19 (1972); *see also* *Werner v. McCotter*, 49 F.3d 1476, 1479 n.1 (10th Cir. 1995) (interpreting RFRA to embody the *Yoder* requirement that "the governmental action must burden a religious belief rather than a philosophy or a way of life"); *United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996) (likewise).

132. 544 U.S. 709 (2005).

white separatist group limits membership by race.

A third important unresolved question is how RFRA's apply to interdenominational groups that nonetheless have a few shared religious beliefs; the main example is the Boy Scouts. In the Boy Scouts' case, those beliefs are a belief in a God who ought to be revered and a belief that homosexuality is wrong (if that belief is understood to flow from the Scouts' religious views or at least deeply held conscientious views).¹³³ During the pre-*Smith* era that RFRA's were aimed at restoring, the Court did make clear that claimants are entitled to exemptions even if they describe themselves as generally "Christian" rather than adhering to one particular denomination.¹³⁴ It's not clear, though, whether the same would apply to groups that simply describe themselves as generally theistic.

B. Substantial Burden—Does Not Subsidizing Religiously Motivated Discrimination Qualify?

Prohibiting a group from discriminating, when its religion requires it to discriminate, would clearly constitute a "substantial burden." But is there a substantial burden when the government simply denies the group a benefit, which is to say the government refuses to fund the group's religiously compelled behavior?

Sherbert v. Verner (1963), one of the cases that RFRA is expressly supposed to "restore," suggests the answer is usually yes.¹³⁵ In *Sherbert*, Adell Sherbert was offered unemployment compensation by the state on the condition that she "accept available suitable work when offered . . . by the employment office."¹³⁶ All of the available jobs, however, required her to work Saturdays, which her religion forbade. She therefore refused the jobs and was denied unemployment benefits.¹³⁷

The Court held that this denial violated the Free Exercise Clause, and the Court's reasoning would apply equally when the government denies a religious organization benefits based on its religiously motivated refusal to comply with

133. Boy Scouts of Am. Nat'l Council, "Duty to God," <http://www.bsalegal.org/dutyto-155.htm> (last visited Apr. 7, 2006) (describing BSA's view that "no member can grow into the best kind of citizen without recognizing an obligation to God"); Boy Scouts of Am. Nat'l Council, "Morally Straight," <http://www.bsalegal.org/morallys-156.htm> (last visited Apr. 7, 2006) (describing BSA's view that homosexuality is not "morally straight and clean in thought, word, and deed"). The BSA's views about duty to God are partly instrumental rather than theological, but presumably the BSA's belief that belief in God is necessary for good citizenship reflects an underlying belief that God exists and is good.

134. *Frazee v. Ill. Employment Sec. Dep't*, 489 U.S. 829, 834 (1989).

135. See 42 U.S.C. § 2000bb(b)(1) (2000) (stating, as part of the legislatively enacted findings that RFRA's purpose is to restore the accommodation rule used in *Sherbert v. Verner* and *Wisconsin v. Yoder*).

136. *Sherbert v. Verner*, 374 U.S. 398, 401 (1963).

137. *Sherbert v. Verner*, 125 S.E.2d 737, 738 (S.C. 1962).

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a nondiscrimination condition. Here's the relevant passage from *Sherbert*, with the party's identity and the subsidy condition changed:

Here not only is it apparent that [the group's] declared ineligibility for benefits derives solely from the practice of [its] religion, but the pressure upon [it] to forego that practice is unmistakable. [The nondiscrimination condition] forces [the group] to choose between following the precepts of [its] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [its] religion in order to [get benefits], on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [the group] for [its discriminatory practices].

Nor may the [condition] be saved from constitutional infirmity on the ground that [the] benefits are not [the group's] "right" but merely a "privilege." It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. . . . [T]o condition the availability of benefits upon this [group's] willingness to violate a cardinal principle of [its] religious faith effectively penalizes the free exercise of [its] constitutional liberties.¹³⁸

In *Thomas v. Review Board* (1981), another unemployment compensation case, the Court reaffirmed that denials of broadly available benefits could be seen as substantial burdens on religious practice, again using language that would apply to discriminating groups that seek exemptions from a nondiscrimination condition:

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.¹³⁹

The Court expressly reaffirmed this holding in *Hobbie v. Unemployment Compensation Commission* (1987)¹⁴⁰ and adhered to it in *Frazer v. Illinois Employment Security Department* (1989).¹⁴¹

In the case that's factually closest to the ones we are discussing, *Bob Jones University v. United States* (1983), the Court also seemed to basically follow this approach. The IRS decided that Bob Jones University was ineligible to receive tax-exempt donations because it engaged in race discrimination against its students; the Court upheld the denial of the benefit but only after concluding that the IRS policy passed the compelling interest test.¹⁴²

In *Bob Jones University*, unlike in the other cases, the Court did downplay in some measure the magnitude of the burden: It noted that "[d]enial of tax

138. *Sherbert*, 374 U.S. at 404.

139. 450 U.S. 707, 717-18 (1981).

140. 480 U.S. 136, 141 (1987).

141. 489 U.S. 829, 832 (1989).

142. *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983).

benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets”¹⁴³ and held that “[the] governmental interest [in eradicating racial discrimination in education] substantially outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs.”¹⁴⁴ But the Court nonetheless seemed to apply the same compelling interest test that it had applied in cases involving outright prohibitions on religious practice.¹⁴⁵ The Court’s *Frazer* and *Hobbie* decisions followed *Bob Jones University* and did not treat that case as having lowered the standard of scrutiny for benefits cases. And when some Justices argued in *Bowen v. Roy* (1986) that *Bob Jones University* called for benefit denials to be treated differently than outright prohibitions, that position attracted only three votes.¹⁴⁶

Under these cases, the government was indeed required to subsidize the exercise of what was then seen as a constitutional right. Sherbert’s, Hobbie’s, and Frazer’s religious practices of not working on the Sabbath were in some measure subsidized by unemployment compensation; so was Thomas’s religious practice of avoiding munitions work. Bob Jones University’s religious practice of engaging in discrimination would have been subsidized as well, if there hadn’t been a compelling interest to trump the religious freedom right—for instance, if the interest in stopping the discrimination was found not to be compelling because the case involved sexual orientation discrimination by a religious scouting group rather than race discrimination by a university.¹⁴⁷ And the Bush Administration has likewise taken the view that requiring recipients of charitable choice funds not to discriminate in employment based on religion may substantially burden the recipients’ religious exercise.¹⁴⁸

143. *Id.* at 603-04.

144. *Id.* at 604.

145. *Id.* at 603-04; *see also, e.g.*, *State ex rel. Cooper v. French*, 460 N.W.2d 2, 16 (Minn. 1990) (citing *Bob Jones University* as general compelling interest case that sets precedent applicable even outside government subsidy context); *State v. Motherwell*, 788 P.2d 1066, 1071 (Wash. 1990) (likewise).

146. *Bowen v. Roy*, 476 U.S. 693, 706 & n.16 (1986) (Burger, C.J., joined by Powell and Rehnquist, JJ.); *cf. id.* at 730 (O’Connor, J., concurring in part and concurring in the judgment, joined by Brennan and Marshall, JJ.) (expressly rejecting this position); *id.* at 715 (Blackmun, J., concurring in part) (endorsing Justice O’Connor’s view on this score, and suggesting that *Bowen v. Roy*, a benefits denial case, “require[d] nothing more than a straightforward application of *Sherbert*, *Thomas*, and *Wisconsin v. Yoder* [a criminal prohibition case]”); *id.* at 733 (White, J., dissenting) (taking the view that “*Thomas* and *Sherbert* control this case”).

147. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 658-59 (2000) (so holding as to a ban on discrimination, though not deciding whether there would be a compelling interest in denying government subsidies to an expressive group that discriminates based on sexual orientation in choosing its members); *cf. infra* Part V.C (discussing the possible difference between a compelling interest in banning discrimination and a compelling interest in not subsidizing discrimination).

148. *See Charitable Choice Regulations Applicable to States Receiving Substance Abuse Prevention and Treatment Block Grants*, 42 C.F.R. § 54.6 (2003) (treating the

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Yet can the *Sherbert* language be taken literally to cover all conditions attached to subsidies? Consider a variant on *Regan v. Taxation with Representation*,¹⁴⁹ which was decided the same day as *Bob Jones University*. In *Taxation with Representation*, the Court held that the government had no duty to subsidize Taxation with Representation's lobbying by making contributions to the group tax-deductible, even though the government was subsidizing lobbying by veterans' groups. Imagine, though, that instead of Taxation with Representation, the claimant was a hypothetical Quaker group that was trying to enact laws cutting military spending.

We feel a religious duty, the Quaker group sincerely argues, to urge people to enact laws that would help dismantle the machinery of war-making. Refraining from lobbying, and limiting ourselves to more indirect public education, would be a violation of what we see as God's will. We are therefore entitled to lobby, without losing the benefit of our tax exemption:

Here not only is it apparent that [our] declared ineligibility for benefits derives solely from the practice of [our] religion, but the pressure upon [us] to forego that practice is unmistakable. [The no lobbying condition] forces [us] to choose between following the precepts of [our] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [our] religion in order to [get the tax exemption], on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [us] for [our lobbying for pacifist legislation].

Nor may the [condition] be saved from . . . infirmity on the ground that [the] benefits are not [our] "right" but merely a "privilege." It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. . . . [T]o condition the availability of benefits upon [our] willingness to violate a cardinal principle of [our] religious faith effectively penalizes the free exercise of [our] . . . liberties.¹⁵⁰

Should this have been a winning claim? Can it be that the government has to subsidize the constitutionally protected exercise of the Quaker group's

application of a no-religious-discrimination condition to a religious charitable service provider as potentially constituting a substantial burden on the provider's religious freedom); 68 Fed. Reg. 56,430, 56,435 (Sept. 30, 2003) (to be codified as 45 C.F.R. pt. 96) (arguing that such a rule is justified by RFRA); 67 Fed. Reg. 77,350, 77,351 (proposed Dec. 17, 2002) (to be codified as 45 C.F.R. pt. 96) (likewise).

149. 461 U.S. 540 (1983).

150. Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 977-81 (1989) (setting forth an analysis under which such an argument would indeed be successful, at least in showing that the limits on the deductibility of contributions do pose a substantial burden on the Quaker group's religious practice); cf. *Branch Ministries v. Rossotti*, 211 F.3d 137, 142 (D.C. Cir. 2000) (considering a church's claim that RFRA entitled it to an exemption from the no-lobbying condition imposed on § 501(c)(3) nonprofit organizations, but rejecting it because this particular church—unlike the group in my hypothetical—did not "maintain that a withdrawal from electoral politics would violate its beliefs").

religious freedom rights, even when the subsidized rights are functionally equivalent to Taxation with Representation's equally constitutionally protected free speech rights, which the government need not subsidize?¹⁵¹

Likewise, say that parents feel a religious obligation to send their child to a religious school, but a school choice program is limited to providing choice among public (and therefore secular) schools. Could the parents argue that they are entitled to an exemption from the public-school-only condition, because their "ineligibility for benefits derives solely from the practice of [their] religion" and "pressure[s them] to forego that practice" by sending their children to the subsidized public school rather than the expensive and unsubsidized private school?

It's true that the public-school-only condition "forces [the parents] to choose between following the precepts of [their] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [their] religion in order to [get the school choice subsidy], on the other hand." Yet I take it that courts would still say (whether under a RFRA today or under the Free Exercise Clause during the pre-*Smith* era) that this doesn't count as a presumptively unconstitutional substantial burden, but rather as a permissible refusal to fund the exercise of a constitutional right. The No Duty To Subsidize Principle applies when the constitutional right is the parental right to send one's children to a private school. It should equally apply to the Free Exercise Clause right—or statutory RFRA right—to send one's children to a religious school.¹⁵²

What then should courts do with RFRA claims brought by discriminating groups that want to get a subsidy but be exempted from a nondiscrimination condition? I can think of several options.

1. Courts can adopt the No Duty To Subsidize Principle and thus treat religious accommodation claims the same as abortion rights claims, parental rights claims, and the like. To do this, they would have to recharacterize *Sherbert* as being limited to only a small subset of subsidy cases. They might, for instance, limit *Sherbert* to cases involving "individualized governmental assessment of the reasons for the relevant conduct" (which is how *Smith* tried to deal with it¹⁵³). Or they might suggest that *Sherbert* is applicable only when the government discriminates among religions. *Sherbert*, after all, stressed that

151. The Quaker group's argument cannot be dismissed simply by saying that they could still benefit from the tax deduction for their nonlobbying work, by creating an affiliate that engages in the lobbying using only nondeductible contributions. That the government subsidizes nonlobbying speech but not lobbying speech would still pressure the group to take advantage of the subsidy by engaging only in the subsidized behavior.

152. See Gary S. v. Manchester Sch. Dist., 374 F.3d 15, 20-21 (1st Cir. 2004) (citing the no-duty-to-subsidize cases in rejecting parents' claim that RFRA entitled their child to certain disabled education benefits that were available only in public schools and not in the religious school to which the child was going); Goodall v. Stafford County Sch. Bd., 60 F.3d 168, 172 (4th Cir. 1995) (same).

153. Employment Div. v. Smith, 494 U.S. 872, 884 (1990).

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Saturday worshippers were only asking for the same benefits that South Carolina law already gave to Sunday worshippers.¹⁵⁴ And *Maier v. Roe* cited to this portion of *Sherbert* when it distinguished *Sherbert* as being “decided in the significantly different context of a constitutionally imposed ‘governmental obligation of neutrality’ originating in the Establishment and Freedom of Religion Clauses of the First Amendment.”¹⁵⁵

Nonetheless, *Sherbert* itself didn’t limit its reasoning to such situations, but discussed subsidy programs more broadly; and the arguments for enacting RFRAs have generally treated *Sherbert* as being a general religious liberty case, and not just a religious equality case.¹⁵⁶ Whatever one thinks of the merits of *Sherbert*, RFRAs do make the *Sherbert* reasoning part of the statutory mandate, and under that reasoning the government must sometimes subsidize religious practice.

2. Courts can apply the *Sherbert* reasoning broadly, and hold that the government must generally exempt objectors from conditions attached to subsidy programs, since otherwise the conditions would improperly “pressure [objectors] to forego [their religious] practice[s].”¹⁵⁷ Religious groups that insist on discriminating would get exemptions from antidiscrimination conditions attached to benefits (unless the Court finds that the condition passes strict scrutiny). Religious groups that insist on lobbying or electioneering would get exemptions from no-lobbying/no-electioneering conditions attached to tax exemptions. Religious parents who insist on sending their children to religious schools would still be entitled to access various benefits programs that the government otherwise opens only to public school children.

Such a position, though, sharply departs from the normal constitutional No Duty To Subsidize Principle. The argument would be that this is what the statutes call for; if legislatures don’t like it, they need to modify their RFRA statutes accordingly. Yet it seems unlikely that the legislatures that enacted RFRAs intended them to create such a broad entitlement to subsidies of claimants’ religious practices.

3. Courts can distinguish burdens based on their practical importance, and on the corresponding pressure on recipients. *Sherbert*, for instance, involved denial of unemployment compensation, which is many people’s main source of

154. *Sherbert v. Verner*, 374 U.S. 398, 406, 409 (1963).

155. 432 U.S. 464, 474 (1977) (citing *Sherbert*, 374 U.S. at 409); *Sherbert*, 374 U.S. at 409 (stating that “the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences”).

156. See, e.g., Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(b)(1) (2006) (“The purposes of this Act are . . . to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened.”).

157. *Sherbert*, 374 U.S. at 404.

money for food, shelter, and the like. Denial of funds to a student group is less likely to pressure the group to forego the practice; presumably the group, especially if it's really committed to its religious beliefs, can raise the modest sums at stake from members, from the national organization, or from foundations.

Such a line, though, would be hard to draw. Where, for instance, would government-subsidized education fall? The cost of private education is prohibitively high for many parents. I suspect that millions of parents are indeed pressured to send their kids to public school instead of religious school—even when their convictions tell them that they should send the children to religious school—by the fact that the government's education subsidy extends only to public schools. Is a public-school-only school choice program as burdensome as an unemployment compensation program that requires people to be ready to work Saturdays?

Likewise, it's not clear how burdensome the denial of a tax exemption would be. *Bob Jones University* tried to downplay this burden, though it still seemed to treat it as sufficient to trigger strict scrutiny. Yet if the typical donor to a group is in the 30% aggregate federal and state tax bracket,¹⁵⁸ denying the tax exemption would presumably cause contributions to fall by at least roughly 30%.¹⁵⁹ (A person who gave \$1000 before, but got a \$300 tax break in exchange, would presumably give only \$700 if the tax break were removed, unless he feels some specific religious obligation to give the \$1000 regardless of tax consequences.) That is a huge loss to a typical institution and likely enough to impose substantial pressure on the institution to compromise its principles in order to accept the benefit.

And what about conditions on access to university property, rather than just to university funding? A Christian students' group that feels religiously committed to spread its message to the university community might be able to pay for pizza and even speaker travel expenses by raising money itself. But if the university bars it from using on-campus rooms, bulletin boards, and e-mail lists, then the group will be largely unable to bring in new members or to draw nonmember attendees for its events. Does that qualify as a substantial enough burden?

158. The average taxpayer paid a 26% marginal income tax rate in 2006. See Nat'l Bureau of Econ. Res., *US Federal and State Average Marginal Income Tax Rates in the NBER TAXSIM Model*, <http://www.nber.org/~taxsim/marginal-tax-rates/plusstate.html> (last revised Jan. 10, 2005). Presumably, though, the typical donor is wealthier than the average taxpayer; a 30% marginal tax rate sounds like a safe estimate.

159. I say "at least" because some contributors might decide that their money is better spent on a charity that gets the matching grants from the government—why donate \$700, even to a cause you love, where the same net \$700 expenditure can give your second most favorite cause \$1000? Thus, instead of giving the group the \$1000 they would have had the contribution been tax deductible, or even the \$700 that is financially equivalent to the donors if the contribution isn't tax-deductible, they might give this particular group nothing, and give their tax-deductible \$1000 to some other group.

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4. Courts could try to focus on how central the condition seems to be to the government program. *Sherbert* expressly noted that “[t]his is not a case in which an employee’s religious convictions serve to make him a nonproductive member of society.”¹⁶⁰ This suggests that someone who has religious reasons not to be looking for work at all—for instance, who feels a religious command to spend a year (or a lifetime) in meditation and prayer, or to take a months-long religious pilgrimage—could be constitutionally excluded from unemployment benefits.

Why would that be, given that a “must be available for some work” condition would still “pressure [recipients] to forego [their religious] practice” of not working once they have children, by “forc[ing them] to choose between following the precepts of [their] religion and forfeiting benefits . . . and abandoning one of the precepts of [their] religion in order to [get benefits]”?¹⁶¹ Presumably because the condition that unemployment recipients be actually unemployed—in the sense of wanting work but not having it—was at the heart of the unemployment program. We’re trying to subsidize those who are actively seeking work, the state would say, not the retired, students, hermits, or pilgrims.

Thus, perhaps *Sherbert* and Bob Jones University were seen as constitutionally eligible for a waiver of a subsidy condition (though Bob Jones University was ultimately denied the waiver on compelling interest grounds) because they fit within the core requirements of the program. *Sherbert* was available to work. Bob Jones University was running a nonprofit educational institution. The claimants did violate some conditions—that they be available for work Monday through Saturday and that they not discriminate based on race—but those conditions were peripheral.

What’s more, because *Sherbert* and Bob Jones University were willing to accept many of the program’s goals, denying them benefits does more than just refusing to subsidize their religious practices. *Sherbert*, after all, was generally willing to work five days a week. (She was also willing to work a sixth day, Sunday, but custom and state law made such work largely unavailable.) Denying her unemployment compensation because she refused to work Saturdays wasn’t just refusing to subsidize her religiously motivated refusal to work Saturdays—it was also refusing to subsidize the rest of her unemployed days.

Likewise, Bob Jones University provided many of the public benefits that nonprofit educational institutions are expected to provide. Denying it a tax exemption wasn’t just refusing to subsidize its race discrimination—it was also refusing to subsidize everything else the University did. (The University’s racial discrimination tainted the University’s positive contributions, because those contributions were distributed in a discriminatory way; but it didn’t

160. *Sherbert*, 374 U.S. at 409.

161. *Id.* at 404.

completely or probably even largely negate those contributions.)

Under this approach, denying nonstudent religious groups an exemption from the “student groups only” requirement in a student group funding program wouldn’t be a substantial burden; that requirement is central to the program, and the nonstudent groups just don’t qualify to participate in the program at all. But denying religious groups an exemption from a nondiscrimination requirement would be a substantial burden, by analogy to *Bob Jones University*, on the theory that the nondiscrimination condition is peripheral.

This, though, raises the obvious difficulty of determining which conditions are really central to the government program. Why isn’t the requirement that one be willing to work during the whole six-day work week, rather than just part of the work week, central to a program aimed at the willing-to-work unemployed? Why isn’t a requirement that charities, student groups, and children’s groups serve everyone without regard to race, sexual orientation, religion, and the like central to the government program? Where would a “no lobbying with tax-exempt funds” condition fit? What about a “use this school voucher only at public schools” condition?

Courts are sometimes called on to distinguish central aspects of a program from marginal aspects; consider the Supreme Court’s confidence in its ability to tell what rules are vital to golf, and thus not waivable for disabled players, and what rules are peripheral.¹⁶² Yet this is no easy task, and one that courts should probably avoid when possible—though perhaps they should be less hesitant to embrace it in statutory contexts, where a legislature can correct court-created distinctions that it thinks are mistaken, than in constitutional contexts.¹⁶³

Which option courts will choose is hard to predict. Each has serious problems, which is one reason I’m hesitant to endorse any one.

C. Justification—Is There a Compelling Interest in Not Funding Discrimination Groups?

Say that a nondiscrimination condition on a subsidy is indeed seen as substantially burdening the group’s religious exercise. May the government still impose the condition on the grounds that it’s “the least restrictive means of furthering [a] compelling government interest”?

In all the problems that we have been discussing, we have been assuming that the groups have a constitutional right to discriminate, as expressive associations or as religious institutions.¹⁶⁴ This usually means (more or less)

162. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 682-88 (2001) (interpreting 42 U.S.C. § 12182(b)(2)(A)(ii) (2001), which requires courts to determine whether an accommodation would “fundamentally alter the nature” of an activity).

163. See Volokh, *supra* note 10, at 1554-58.

164. Otherwise, the answer to the question this Article is investigating—may the

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that courts have concluded—explicitly or implicitly—that there’s no compelling interest in preventing this group’s discrimination.¹⁶⁵ The question is whether the government has a compelling interest in *refusing to fund* the discrimination, even if it lacks a compelling interest in prohibiting the discrimination.

The religious accommodation doctrine, both under the pre-*Smith* Free Exercise Clause and under the RFRA, tells us frustratingly little about this question. The Court has never set forth a rule defining what makes an interest compelling, and the precedents also tell us little because they tend to be highly particularized. In *Bob Jones University*, the Court did hold that there’s a compelling interest in preventing government funds from supporting race discrimination in access to education. But that decision rested expressly on the discrimination’s being race discrimination, and on its being in education:

The governmental interest at stake here is compelling. . . . As discussed in Part II-B [which chronicled the massive efforts since *Brown v. Board of Ed.* to dismantle racial segregation], the Government has a fundamental, overriding interest in eradicating racial discrimination in education²⁹—discrimination that prevailed, with official approval, for the first 165 years of this Nation’s constitutional history. . . .

29. We deal here only with religious *schools*—not with churches or other purely religious institutions; here, the governmental interest is in denying public support to racial discrimination in education. As noted earlier, racially discriminatory schools “exer[t] a pervasive influence on the entire educational process,” outweighing any public benefit that they might otherwise provide.¹⁶⁶

In the cases we are considering, we are dealing with churches and (except for the Boy Scouts) largely religious student groups. We aren’t dealing with massive nationwide efforts to dismantle a deeply entrenched discriminatory system that had deprived millions of people of important economic opportunities. We aren’t dealing with groups that exert a pervasive influence on the entire educational process. While some of the discrimination is literally “in education,” that discrimination is performed by small and not terribly important student organizations and is likely not the sort of educational discrimination that the *Bob Jones University* Court had in mind.

Stepping back from the religious accommodation case law doesn’t help us much, either. Strict scrutiny doctrine is notoriously hard to transport from one field to another. In equal protection and free speech cases it has with few exceptions been “strict in theory, fatal in fact.”¹⁶⁷ In religious accommodation

government exclude discriminating groups from generally available benefits?—is obvious: if the government could outlaw the group’s actions, it can also take the lesser step of excluding the group from the benefit program.

165. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 658-59 (2000).

166. *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 & n.29 (1983).

167. Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (coining the “strict in theory

cases, it has been “strict in theory, feeble in fact,”¹⁶⁸ though the recent decision in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*¹⁶⁹ seems to suggest some reinvigoration.

Moreover, even if we do look to non-religious-accommodation cases that discuss government interests in not subsidizing certain practices, we won’t see much that’s helpful. As Part I points out, the Court has generally held that the government can pick and choose what to subsidize. But it has done this by holding that there is no presumptive right to a subsidy in the first place and that the compelling interest inquiry is therefore unnecessary.¹⁷⁰ The cases therefore don’t express an opinion on whether the interest in not subsidizing the practice is compelling.

In *Widmar v. Vincent*, the Court did hold that the government lacked a compelling interest in not subsidizing religious speech;¹⁷¹ and in the unemployment compensation cases, the Court implicitly concluded that the government lacked a compelling interest in not subsidizing religious practice.¹⁷² But the reasoning in those decisions on this subject was both sketchy and particularized. It’s hard to draw much precedential help from these decisions in cases where the refusal to subsidize stems not from a desire not to subsidize religious practice, but from a desire that “public funds, to which all taxpayers of all [identity groups] contribute, not be spent in any fashion which . . . subsidizes . . . [identity-group-based] discrimination.”¹⁷³

In my view, the interest in excluding discriminating associations from generally available subsidies is not particularly compelling. As I’ve argued above,¹⁷⁴ discrimination by those groups generally has little effect on people’s earning potential or life opportunities. There is nothing here like the massive and often economically crippling race discrimination in employment and

and fatal in fact” line, though in the context of equal protection rather than free speech); see also Eugene Volokh, *Freedom of Speech, Permissible Tailoring, and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1996) (describing how strict scrutiny in free speech cases has indeed generally been fatal in fact).

168. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994); Volokh, *supra* note 10, at 1498-1501 (discussing the difference between strict scrutiny in religious accommodation cases and strict scrutiny in other contexts).

169. 126 S. Ct. 1211 (2006).

170. See, e.g., *Locke v. Davey*, 540 U.S. 712 (2004); *Harris v. McRae*, 448 U.S. 297, 316-17 (1980); *Maher v. Roe*, 432 U.S. 464, 479 (1977).

171. 454 U.S. 263, 276 (1981).

172. See *Sherbert v. Verner*, 374 U.S. 398 (1963) (rejecting the argument that the government had a compelling interest in denying unemployment compensation to those who were unavailable for work for religious reasons); *Thomas v. Review Bd.*, 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting) (arguing that offering unemployment compensation in such cases was indeed extending a subsidy to religious practice, but not persuading any of his colleagues).

173. See *supra* note 27 and accompanying text.

174. See *supra* text accompanying notes 23-27.

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education that triggered the Civil Rights Act and triggered the rejection of demands for religious exemptions from that Act.¹⁷⁵

Nor are taxpayers entitled to feel much justifiable outrage because their funds are going to institutions that discriminate against the group to which the taxpayer belongs. The money is going to a vast range of competing organizations, and often many of the benefited organizations make a point of preferentially serving the very groups that other organizations discriminate against. There is surely a rational basis for the government to exclude discriminating organizations from a broad subsidy program, but I don't think there's a compelling interest. What's more, if courts agree with my view, but the legislature disagrees and concludes that it does have a compelling interest in denying subsidies to discriminating groups, the legislature can easily correct the courts by expressly excluding such conditions from the coverage of the jurisdiction's RFRA.¹⁷⁶

Yet I should stress that this is just my opinion of what the courts should do. The "compelling interest" case law, such as it is, makes it impossible to make any firm predictions or solid doctrinal arguments.

D. Statutory Protections vs. Constitutional Protections

RFRA's, then, may prove to be a greater help than the First Amendment to groups that want an exemption from nondiscrimination conditions. The argument for reading RFRA's as embodying a No Governmental Discrimination Based on *Religious* Expressive Association Decisions Principle is substantial, though not open-and-shut.

Yet this argument is statutory (or, in some states, state constitutional), not federal constitutional. This has several implications:

1. Most obviously, the protection RFRA's offer to successful claimants is less secure than the First Amendment would offer. A legislature that's unhappy with the grant of an exemption can effectively override that grant; all it would take is a statute excluding antidiscrimination rules from the RFRA.¹⁷⁷ Even if we are dealing with a state constitutional provision, not a state statute, such provisions are much easier to amend than is the Federal Constitution.

2. On the other hand, a court that's asked to create a new statutory No Governmental Discrimination Based on Religious Expressive Association Decisions Principle might be more open to such a request than a court asked to create a similar constitutional principle. First, the court would be asked to *implement* the will of the political branches, rather than to override that will. Its rhetoric would not be that "the Constitution demands that the taxpayers subsidize actions that the taxpayers' agents prefer not to subsidize," but rather

175. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 590-91 (1983).

176. See Volokh, *supra* note 10, at 1474-76, 1554-59.

177. *Id.* at 1558-59.

that “the taxpayers’ direct agents (legislators) have instructed us to extend subsidies to certain beneficiaries, even if the taxpayers’ less direct agents (university officials) believe otherwise.”

Second, precisely because the court’s actions are subject to legislative override, judges could be less hesitant in using their own discretion about where to draw the substantial-burden line or about whether an interest in preventing subsidies to discriminatory groups is compelling. “The legislature asked us to do this,” judges may reason to themselves, to litigants, and to the readers of their opinions. “It didn’t give us clear rules to apply. It must have been calling on us to use our discretion. And if it doesn’t like the result we reach, it can step in and change the statutes. We therefore needn’t be as hesitant here as we are when we’re asked to invalidate government action on constitutional grounds, where our judgment can’t be as easily corrected.”¹⁷⁸

3. Finally, I expect that Chief Justice Rehnquist would have been much more satisfied with the statutory RFRA religious exemption approach than with the constitutional Free Exercise Clause approach. It’s true that RFRA supporters were often strongly critical of *Employment Division v. Smith*,¹⁷⁹ an opinion the groundwork for which Chief Justice Rehnquist started laying in his solo dissent in *Thomas v. Review Board*.¹⁸⁰ But the reality of RFRA, rather than the rhetoric behind it, is one of legislative decision subject to legislative modification, and that’s the sort of thing Chief Justice Rehnquist generally supported.

Certainly his concerns about the need to retain legislative “flexibility” to deal with religious exemption requests¹⁸¹—flexibility that he suggested may sometimes properly lead to the grant of an exemption¹⁸²—would be satisfied by the RFRA. The legislature has used its own discretion to create the RFRA regime, and it retains the flexibility to correct judicial overreadings of the RFRA. I did well in my struggle against a broad reading of the Free Exercise Clause, Chief Justice Rehnquist might have thought, and the operation of RFRA in no way undermines my victory.

CONCLUSION: NO DUTY TO SUBSIDIZE, REVISITED

On many occasions, Chief Justice Rehnquist stressed that most decisions about government funding—including the funding of the exercise of constitutional rights—are properly left to the political process, not to

178. *Id.* at 1487-90.

179. *See, e.g.*, Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221.

180. 450 U.S. 707, 720 (1981) (Rehnquist, J., dissenting).

181. *Id.* at 727.

182. *See, e.g., id.* at 723 (stressing that the state could, if it wished to, “choose to grant exemptions to religious persons from state unemployment regulations”); *see also* *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711 (1985) (Rehnquist, J., dissenting).

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constitutional decisionmaking by judges.¹⁸³ Justice O'Connor often joined him in this,¹⁸⁴ and usually the rest of the Court joined him as well.

And the reasons for this conclusion, it seems to me, stand up fairly well in the case of expressive association rights. First, while such a denial of benefits would have substantial effects on discriminating groups, these effects ought not be exaggerated. The Boy Scouts and the Catholic Church would surely not want to lose their status as groups to which contributions can be deducted from the contributors' income tax, but if they do, this would hardly be their death knell.

Various public interest groups (from political parties on down) that express views for or against legislation or candidates survive well even though contributions to them are taxable. Many for-profit speakers survive even though they aren't subsidized by tax deductions on payments by subscribers, by tax exemptions for the speaker's income, or by property tax exemptions. Many discriminating nonprofit speakers, almost certainly including the Scouts and the Church, would survive as well.

Second, such a denial of benefits would indeed be practically constrained by the political process. It seems unlikely that the Boy Scouts or the Catholic Church will lose their tax exemptions any time soon in most American jurisdictions. If there are nondiscrimination conditions attached to certain government benefits, most governments (especially the federal government) would provide some exemption for groups like the Scouts and the Church. The relative (though not complete) success of the pro-RFRA movement suggests that religious exemptions are often popular causes. And the exemptions that are enacted will generally also be available to other comparable groups, even if those groups are smaller and less popular.¹⁸⁵

Third, even if some jurisdictions—and perhaps some day the federal government—choose to deny certain benefits to groups that discriminate, that decision is part of legislatures' right to choose what taxpayers subsidize. If the majority in some state is strongly opposed to sexual orientation discrimination, it need not fund programs from which certain voters (or children of voters) are excluded on bases that the voters find repugnant.

183. *E.g.*, *United States v. Am. Library Ass'n*, 539 U.S. 194, 211-12 (2003) (plurality); *Rust v. Sullivan*, 500 U.S. 173, 196-97 (1991); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 509-11 (1989); *FCC v. League of Women Voters*, 468 U.S. 364, 402-08 (1984) (Rehnquist, J., dissenting); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 547-49 (1983); *see also* *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting, joined by Rehnquist, C.J.); *Harris v. McRae*, 448 U.S. 297, 316-17 (1980) (joined by Rehnquist, J.); *Maher v. Roe*, 432 U.S. 464, 479 (1977) (likewise); *Norwood v. Harrison*, 413 U.S. 455, 462 (1973) (likewise).

184. This happened, for instance, in *American Library Ass'n*, *Webster*, and *Regan*.

185. *See, e.g.*, *Cuffley v. Mickes*, 208 F.3d 702, 711 (8th Cir. 2000) (striking down the exclusion of the KKK from a generally available government program that purportedly excluded discriminating groups, because other much less controversial discriminating groups—such as the Knights of Columbus—were not excluded).

Fourth, all this reminds us of some of the limits to the rights created by conservative courts. Conservatives, for instance, long asked the conservative Justices to protect property rights or rein in punitive damages; yet they ultimately found that the conservative Justices' conservative jurisprudence generally imposed considerable limits on what those Justices were willing to do, even as to rights that conservatives sympathize with and see as underprotected.¹⁸⁶ Conservative Justices do tend to defer considerably to legislatures even when those Justices impose some constitutional constraints, and this is especially so when it comes to funding decisions.

And fifth, this gives us some basis for a tentative prediction. The viewpoint-neutrality rule of free speech law emerged partly as a compromise between 1970s and 1980s liberal, moderate, and conservative Justices. The liberals wanted to require broadly the government to subsidize free speech rights, at least once the government had opened certain benefit programs to public participation. The conservatives were reluctant to accept this, but ultimately adopted a compromise rule that viewpoint-neutral restrictions on such programs were unconstitutional but other content-based restrictions were generally allowed.¹⁸⁷ This compromise rule generally satisfied most of the Justices, and as the conservative wing of the Court came to accept a broader view of free speech protection in the 1990s and 2000s,¹⁸⁸ the viewpoint-neutrality command endured.

On the other hand, I doubt that there will be a similar consensus on the Court for supporting discriminating expressive associations' right to participate in government subsidies. In *Boy Scouts v. Dale*, the liberals have already demonstrated a fairly narrow view of the expressive associations' right to discriminate.¹⁸⁹ The conservatives took a broader view, but it's far from clear that all of them—or even most of them—will take the same view when the matter involves government subsidies rather than regulations. When a subsidy case arises, it seems unlikely that discriminating expressive associations will find the five votes they need to prevail.

186. See, e.g., Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569 (2003); Christopher E. Smith & Thomas R. Hensley, *Assessing the Conservatism of the Rehnquist Court*, 77 JUDICATURE 83 (1993); Christopher E. Smith & Thomas R. Hensley, *Unfulfilled Aspirations: The Court-Packing Efforts of Presidents Reagan and Bush*, 57 ALB. L. REV. 1111 (1994).

187. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806-11 (1985); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

188. See Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994-2000*, 48 UCLA L. REV. 1191 (2001), available in updated form at <http://www.law.ucla.edu/volokh/howvoted.htm> (covering 1994-2002).

189. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 663-700 (2000) (Stevens, J., dissenting).