

California Constitutional Law: The Religion Clauses

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Introduction

THE UNIQUE RELIGION provisions in the California Constitution provide compelling reasons to follow an independent state-law religion analysis, one that remains within the bounds set by federal law, harmonizes the various state and federal constitutional provisions, and best satisfies the competing legal and policy considerations. Read together, the California Constitution religion clauses permit the state government to confer on religion nothing more than generally available incidental benefits, doing only the minimum that is reasonably necessary to alleviate burdens on free exercise created by the government itself. Indeed, the California Constitution religion clauses require the state government to involve itself in the religions of the state's populace to the least degree possible.

While early California historical evidence might support a permissive approach to religion in the state, current California religion doctrine rejects that view as failing to account for the impermissible intangible benefit to religion from the appearance of government preference for religious observance. The modern view of the state and Federal Establishment Clauses is that their broad principles protect all religions from governmental interference and discrimination, and the California Constitution is committed to the Jeffersonian principle of

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separation of church and state.¹ California's religion clauses, by providing greater protection of individual rights against establishment violations, are more protective of individual freedom of belief because the state constitution requires greater government neutrality and has broader restrictions on actual or apparent preference.² This reduces the state's ability to prefer one religion under the guise of accommodation, while retaining the state's ability to alleviate a burden on all affected religions equally. This approach is consistent with the thesis of Madison's classic statement on establishment of religion: "[T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."³ As discussed below, federal law has maintained that position inconsistently, and it presently provides a permissive avenue for gov-

1. *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947); *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809, 838 (Cal. 1991) (Mosk, J., concurring). This phrasing of the concept comes from a letter by President Thomas Jefferson:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, *I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and State.* Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

Letter from Thomas Jefferson to Messrs. Nehemiah Dodge and Others, a Committee of the Danbury Baptist Association, in the State of Connecticut (January 1, 1802), in THOMAS JEFFERSON: WRITINGS 510, 510 (Merrill D. Peterson ed., 1984) (emphasis added).

2. See *Fox v. City of L.A.*, 587 P.2d 663, 665 (Cal. 1978) (noting that the United States Constitution "may not be [as] comprehensive" as the California Constitution).

3. 2 JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, in THE WRITINGS OF JAMES MADISON 183, 186 (Gaillard Hunt ed., 1901). See *Everson*, 330 U.S. at 65–66. See also Justice Souter's dissenting opinion in *Mitchell v. Helms*:

Jefferson's Virginia Bill for Establishing Religious Freedom provided "[t]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever . . ." Jefferson, A Bill for Establishing Religious Freedom, in 5 *The Founder's Constitution* 84 (P. Kurland & R. Lerner eds., 1987); see also *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 870–872 (1995) (SOUTER, J., dissenting). We have "previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute." *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 13 (1947).

Mitchell v. Helms, 530 U.S. 793, 870–71 n.1 (2000) (Souter, J., dissenting) (citations in original).

ernment to do more than is strictly necessary to accommodate free exercise rights.

This Article first reviews the development of California religion law against the background of federal law. Next, the historical development of the California religion clauses is explored, and each of the state constitution's religion clauses is described separately. Finally, all of the California religion clauses are synthesized and analyzed against the limits imposed by federal law, then applied to a practical example to demonstrate the operation of the proposed standard. This Article argues that, to the extent there is a lack of clarity regarding the degree of neutrality required by the Supreme Court, California's distinct constitutional provisions compel a standard that follows the most strictly neutral line permissible under federal law. The standard proposed here is derived directly from the language of the California Constitution and decisions of the California Supreme Court. Consequently, rather than arguing for a change in the law, this Article proposes a view of the religion authorities that clarifies and harmonizes existing law.

I. Federal Free Exercise and Establishment Principles

A. General Principles

The California religion analysis must operate within the outer bounds set by federal law, as the religion clauses of the First Amendment apply to the states through the Due Process Clause of the Fourteenth Amendment.⁴ The Federal Constitution's religion clauses were not applied to the states until the 1940s—the Freedom of Religion Clause in *Cantwell v. Connecticut*⁵ and the Establishment Clause in *Everson v. Board of Education*.⁶ The *Everson* decision marked the first time the Supreme Court reviewed a challenge to state law under the Establishment Clause, and the decision outlined the general considerations that continue to define this area of the law.⁷ The *Everson* court described six examples of prohibited general practices:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government

4. *Comm. for Pub. Educ., v. Nyquist*, 413 U.S. 756, 760 n.3 (1973); *Cal. Educ. Facilities Auth. v. Priest*, 526 P.2d 513, 516 n.6. (Cal. 1974) (The First Amendment to the U.S. Constitution provides in relevant part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

5. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

6. *Everson*, 330 U.S. 1.

7. *Id.* at 15–16.

can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.⁸

In *Reynolds v. United States*, cited as support for this portion of *Everson*, the Supreme Court accepted Thomas Jefferson's letter to the Danbury Baptist Association "almost as an authoritative declaration of the scope and effect" of the First Amendment.⁹ "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"¹⁰

For the federal religion clauses, history plays an important role in understanding establishment and free exercise principles.¹¹ The Supreme Court has noted that the federal religion clauses may not be construed "with a literalness that would undermine the ultimate constitutional objective as illuminated by history."¹² History can aid constitutional analysis in the search for core values and principles underlying the text of the Constitution and illuminate the text to show the evils to be prevented and the benefits to be obtained. Thus, a proper construction of the federal religion clauses must comport with "what history reveals was the contemporaneous understanding of [their] guarantees."¹³ Federal law does not require "a hermetic separation" of church and state, as that would be "an impossibility [the Supreme Court] has never required."¹⁴ Certainly the history of the Supreme Court's religion jurisprudence demonstrates that to be true

8. *Id.* at 15.

9. *Reynolds v. United States*, 98 U.S. 145, 164 (1879).

10. *Everson*, 330 U.S. at 16.

11. Even assuming the validity of historical evidence in construing the religion clauses, that only adds to the need for an independent California religion analysis based on the state's own historical experience and history of applying the California Constitution religion clauses. See *infra* Parts III, IV, and V.

12. *Walz v. Tax Comm'n*, 397 U.S. 664, 671 (1970). See also *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984).

13. *Lynch*, 465 U.S. at 673. See also *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 777 n.33 (1973) (Establishment Clause cases have recognized "the special relevance in this area of Mr. Justice Holmes's comment that a page of history is worth a volume of logic") (internal quotation omitted).

14. *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 745-46 (1976).

for two reasons. First, religious institutions are entities on par with any other type of institution and so cannot be excluded from public services and benefits without discriminating against them.¹⁵ Second, in some instances the government must accommodate religion to alleviate a government-imposed burden.¹⁶ But the fact that religion and government cannot be entirely separated should not mean that actions outside the nexus of free exercise and establishment are thereby automatically permitted. Instead, the fundamental neutrality principle (discussed in detail below) operates to prevent government from going too far beyond what is reasonably necessary into the prohibited territory of actively supporting religion.¹⁷

Despite the admonitions of Madison and Jefferson, and the broad language of the prohibitions they placed in the religion clauses of the First Amendment, the country's history "has not been one of entirely sanitized separation between Church and State."¹⁸ Instead, the Supreme Court has never thought it to be "either possible or desirable to enforce a regime of total separation," and as a consequence cases arising under the religion clauses have presented "some of the most perplexing questions" it has confronted.¹⁹ There exist only some guiding principles for resolving such questions, such as neutrality, context, and accommodation, and a default three-part test that has garnered (but thus far survived) much criticism. The lack of clear rules in this area of the law results from the fact that the Establishment and Free Exercise Clauses

are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute. In attempting to articulate the scope of the two

15. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (holding that the Establishment Clause does not require a public university to exclude a student-run religious publication from assistance available to other student-run publications); *Everson*, 330 U.S. 1 (upholding reimbursement to parents for costs of busing their children to public or private school).

16. *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005).

17. Aside from preserving freedom of conscience, the Federal Establishment Clause was at least partly intended to avoid the dangers of political division along religious lines. *Lemon v. Kurtzman*, 403 U.S. 602, 622–24 (1971). As Justice Harlan wrote in *Walz*, the Establishment Clause precludes "that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." *Walz*, 397 U.S. at 694. See also *Nyquist*, 413 U.S. at 797 (noting the potential for seriously divisive political consequences over the deeply emotional issue of church-state relations).

18. *Nyquist*, 413 U.S. at 760.

19. *Id.*

Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis.²⁰

As a result, federal religion jurisprudence is composed of controlling constitutional standards that operate within a vaguely defined scope of inquiry; less a wall separating church and state than a no man's land between them.²¹

Supreme Court religion cases alternately show concern for the chilling effect on free exercise resulting from government sponsorship of religion, and acknowledgment of the country's history of Christian influence. It cannot be denied that religion had a significant influence on American history.²² Visible symbols of religion, particularly of Christian ideology, are widespread in the culture: the reference to God in the California Constitution preamble; the likeness of George Washington at prayer on postage stamps; the expression "In God We Trust" on the currency; the term "Anno Domini" on the cornerstone of the California Supreme Court building; and, the invocation "God save the United States and this Honorable Court" at the

20. *Waltz*, 397 U.S. at 668.

21. *Lemon*, 403 U.S. at 614 ("[T]he line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."); *Nyquist*, 413 U.S. at 761. Other guiding principles have been proposed, such as endorsement and coercion, but these are not discussed here as they have not been expressly adopted by a majority of the Supreme Court as principles of general application. These factors can be sufficient but not necessary to prove an Establishment Clause violation. *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 687 (2002) (O'Connor, J., concurring) (advocating for the "endorsement test"); *Nyquist*, 413 U.S. at 786 ("[P]roof of coercion . . . [is] not a necessary element of any claim under the Establishment Clause."). *Cf. Lee v. Weisman*, 505 U.S. 577, 592, 605 n.6 (1991) ("[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.") (Blackmun, J., concurring) ("As a practical matter, of course, anytime the government endorses a religious belief there will almost always be some pressure to conform.").

22. See generally James E. Wood, Jr., *Introduction: Religion and the Constitution*, in *THE FIRST FREEDOM: RELIGION AND THE BILL OF RIGHTS 1* (James E. Wood, Jr. ed., 1990); Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559 (1989); Richard A. Jones, "In God We Trust" and the Establishment Clause, 31 J. CHURCH & ST. 381 (1989) (arguing "that the God-references fail the Supreme Court's Establishment Clause doctrines but do not in fact violate the Establishment Clause"); RODNEY K. SMITH, *PUBLIC PRAYER AND THE CONSTITUTION: A CASE STUDY IN CONSTITUTIONAL INTERPRETATION* (1987); THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986); ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982); CHARLES E. RICE, *THE SUPREME COURT AND PUBLIC PRAYER: THE NEED FOR RESTRAINT 27-69* (1964) (discussing the influence of religion throughout American history); ANSON PHELPS STOKES & LEO PFEFFER, *CHURCH AND STATE IN THE UNITED STATES 1-103* (1964) for information on the history of religious establishments in the colonies and the relationship between church and state at the time of adoption of the Constitution and the Bill of Rights, including the practice of public prayer.

opening of the Supreme Court term.²³ These written words and practices are variously justified as merely a benign recognition of religion as part of American culture,²⁴ as generic “ceremonial deism,”²⁵ or simply as a traditional part of American heritage.²⁶ Whatever the explanation, the bottom line is that they will continue to be allowed, as the Supreme Court has held that the goal of avoiding governmental endorsement “does not require eradication of all religious symbols in the public realm The Constitution does not oblige government to avoid any public acknowledgment of religion’s role in society.”²⁷

These public acknowledgments of religious sentiment are allowed despite the neutrality principle, which in this context means that by showing a preference for any religion, the government sends the message to nonadherents that they are outsiders and not full members of the political community, while sending an accompanying message to adherents that they are insiders and favored members.²⁸ The very prevalence of religion and religious pluralism, in the country generally and in California specifically, is itself a reason compelling strict government neutrality in religious matters. Maintaining neutrality is important both to preserve religious freedom and to avoid fomenting religious strife:

Ours is a religiously diverse nation. Within the vast array of Christian denominations and sects, there is a wide variety of belief and practice. Moreover, substantial segments of our population adhere to non-Christian religions or to no religion. Respect for the differing religious choices of the people of this country requires that government neither place its stamp of approval on any particular religious practice, nor appear to take a stand on any religious question. In a world frequently torn by religious factionalism and the

23. See *Marsh v. Chambers*, 463 U.S. 783, 786, 788–89 n.10–11 (1983); *Fox v. City of L.A.*, 587 P.2d 663, 680–81 (Cal. 1978) (Richardson, J., dissenting). See also 36 U.S.C. § 302 (2006) (national motto is “In God We Trust”); 36 U.S.C. § 119 (“The President shall issue each year a proclamation designating the first Thursday in May as a National Day of Prayer on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals.”); 36 U.S.C. § 169(b) (“The President is requested to issue each year a proclamation—(1) calling on the people of the United States to observe Memorial Day by praying, according to their individual religious faith, for permanent peace.”); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 669–71 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part); *Lynch*, 465 U.S. at 674–78 (describing numerous illustrations of government acknowledgment of religious heritage).

24. *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809, 825–27 (Cal. 1991) (Lucas, C.J., concurring).

25. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37–38 (2004) (O’Connor, J., concurring).

26. *Marsh*, 463 U.S. at 786–88.

27. *Salazar v. Buono*, 130 S. Ct. 1803, 1818 (2010).

28. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000).

violence tragically associated with political division along religious lines, our nation's position of governmental neutrality on religious matters stands as an illuminating example of the true meaning of freedom and tolerance.²⁹

As a result of these competing themes, the Supreme Court has long struggled with the federal religion clauses, vacillating between a strict reading and a permissive approach that amounts to a "majority rules" interpretation.³⁰

Naturally, there is evidence in the historical record to support either position.³¹ There are anachronistic pronouncements in Supreme Court decisions that this country is not only "a religious nation" but also "a Christian nation."³² There are also numerous references to Christian ideology in early American political writing. For example, Samuel Adams described the new republican version of the American city on the hill as "the *Christian* Sparta."³³ But a constitution is not set in stone, and the drafters' comments are not the only source of constitutional meaning; as discussed below, this is particularly true with the California Constitution's religion clauses. Instead, our understanding of the breadth of its protections can evolve over time, and it is at times necessary to return a constitution to its first principles.³⁴ Thus, expressions of original intent that, in isolation, seem to conflict with the unqualified principles in the text of a constitution cannot be the only guide.³⁵ In any event, the conflicting federal historical values have little impact on interpreting the California religion clauses, and only the general principles that define the outer limits of permissible state discretionary action are controlling.

29. *Sands*, 809 P.2d at 821.

30. Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 818 n.2 (1984) (describing the federal religion debate largely as a history of swings back and forth across the substantive divide between benevolent neutrality and stricter separation).

31. *Id.* at 818 n.2. *See, e.g.*, *Sch. Dist. v. Schempp*, 374 U.S. 203, 231 (1963) (Brennan, J., concurring) ("[T]he rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand.") (quoting Rep. Daniel Carroll of Maryland during the debate upon the proposed Bill of Rights in the First Congress, 1 ANNALS OF CONG. 730 (1789)).

32. *Church of Holy Trinity v. United States*, 143 U.S. 457, 471 (1892).

33. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787*, at 118 (1998).

34. *Id.* at 34.

35. *Weems v. United States*, 217 U.S. 349, 373 (1910); *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 399 (1819).

B. The Neutrality Principle

Neutrality is the basic guiding principle underlying federal establishment law.³⁶ Neutral accommodation of religion is permitted, while promotion and advancement of religion are not.³⁷ This approach is understood as a detached, accommodating, accepting, and benevolent posture, lest “strict” neutrality be construed as hostility.³⁸ Indeed, while there are some exceptions, even determining what constitutes a religion or a religious belief is a matter the federal courts have largely abjured.³⁹

36. While other establishment principles have been proposed and used, such as endorsement and coercion, neutrality is the lodestar principle that subsumes those other considerations and to which religion analysis always returns. Additionally, neutrality by its very nature a standard that is significantly less prone to subjective judicial influence than endorsement or coercion. *See* *Bd. of Educ. v. Grumet*, 512 U.S. 687, 699 (1994) (Free Exercise and Establishment Clauses compel the state to pursue a course of neutrality toward religion); *Wallace v. Jaffree*, 472 U.S. 38, 52–55 (1985) (“[T]he political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among ‘religions’—to encompass intolerance of the disbeliever and the uncertain.”); *Larson v. Valente*, 456 U.S. 228, 244 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”); *Schempp*, 374 U.S. at 216 (rejecting the proposition that the Establishment Clause “forbids only governmental preference of one religion over another”); *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (the Establishment Clause “requires the state to be . . . neutral in its relations with groups of religious believers and non-believers”).

37. *Mitchell v. Helms*, 530 U.S. 793, 815–16 (2000).

38. The Court described its approach of detachment:

To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.”

Zorach v. Clauson, 343 U.S. 306, 314 (1952).

On the topic of neutrality, Justice Goldberg stated:

[U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

Schempp, 374 U.S. at 306 (Goldberg, J., concurring).

39. *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds”) (citation omitted); *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981) (“Courts are not arbiters of scriptural interpretation”); *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (“[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment.”); *United States v. Ballard*, 322 U.S. 78, 87 (1944) (explaining that in applying Free Exercise Clause, courts may not inquire into the truth, validity, or reasona-

The Supreme Court has used the neutrality principle to prohibit government preference among churches, government financial aid to churches, and government promotion of religious practice. At one time it was thought that neutrality merely proscribed the preference of one Christian sect over another, “but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.”⁴⁰ Despite some historical support for that view in early authorities, it has more recently been debunked and rejected.⁴¹ Thus, the modern federal view contemplates that neutrality does not simply require that government-sponsored religious observances be nondenominational—it bars such practices entirely, as neutrality applies among religions as much as it applies between religion and the lack thereof.⁴² For example, in striking down a Minnesota law requiring registration of some churches, but not others, as charitable organizations, the Court observed: “The

bleness of a claimant’s religious beliefs). There are some exceptions to this broad principle. *See, e.g.*, *Friedman v. S. Cal. Permanente Med. Grp.*, 125 Cal. Rptr. 2d 663, 676 (Ct. App. 2002) (Title VII requires a functional approach and asks whether a belief functions as religion in individual’s life rather than defining religion according to its content); *Tomic v. Catholic Diocese*, 442 F.3d 1036, 1039 (7th Cir. 2006) (In determining whether an entity is covered by religious organization exemption, “federal courts cannot always avoid taking a stand on a religious question.”); *May v. Baldwin*, 109 F.3d 557, 562–63 (9th Cir. 1997) (evaluating significance of religious belief to decide if it is substantially burdened by state action); *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984) (adjudication of free-exercise and establishment claims sometimes requires courts to determine whether religious beliefs are sincerely held); *Therriault v. Carlson*, 495 F.2d 390, 395 (5th Cir. 1974) (although courts should not pass judgment between bona fide and bogus religions, courts must distinguish legitimate religions from obvious shams).

40. *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985).

41. *Id.* at 52–55 (unambiguously concluding that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all); *Everson*, 330 U.S. at 18 (First Amendment “requires the state to be a neutral in its relations with groups of religious believers and non-believers”).

42. *Wallace*, 472 U.S. at 60 (state characterization of prayer as a favored practice is an endorsement and inconsistent with established principle that government must pursue a course of complete neutrality toward religion). *See also* *Stone v. Graham*, 449 U.S. 39, 42 (1980); *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 792–93 (1973) (“A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of ‘neutrality’ toward religion.”); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”); *Schempp*, 374 U.S. at 215–22; *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (“Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause.”); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 211–12 (1948); *Everson*, 330 U.S. at 18 (explaining that the First Amendment requires the state to be a neutral in its relations with groups of religious believers and nonbelievers, but it does not require the state to be their adversary as state power “is no more to be used so as to handicap religions, than it is to favor them”).

clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another This constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause.”⁴³ This is consistent with the primary evils against which the Establishment Clause was intended to protect: “sponsorship, financial support, and active involvement of the sovereign in religious activity.”⁴⁴

Despite the plain meaning of this broad neutrality principle, some justices of the federal and California high courts have attempted to justify unadorned, nonsectarian references to a supreme being as harmless acknowledgment of a widely held belief, not as an establishment of religion:

If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all. One cannot say the word “God,” or “the Almighty,” one cannot offer public supplication or thanksgiving, without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs. With respect to public acknowledgment of religious belief, it is entirely clear from our Nation’s historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.

. . . .

Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion. The former is, as *Marsh v. Chambers* put it, “a tolerable acknowledgment of beliefs widely held among the people of this country.” . . . Publicly honoring the Ten Commandments is thus indistinguishable, insofar as discriminating against other religions is concerned, from publicly honoring God. Both practices are recognized across such a broad and diverse range of the population—from Christians to Muslims—that they cannot be reasonably understood as a government endorsement of a particular religious viewpoint.⁴⁵

Surely this must be wrong. Indeed, the Supreme Court has expressly rejected this view:

43. *Larson v. Valente*, 456 U.S. 228, 244–45 (1982).

44. *Nyquist*, 413 U.S. at 772.

45. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 893–94 (2005) (Scalia, J., dissenting) (citation omitted). *See also* *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809, 830 (Cal. 1991) (Lucas, C.J., concurring) (“[R]especting *the idea* of a Supreme Being by offering prayer in the context of a culture, the institutions of which presuppose its existence may not be the same as respecting *an establishment* of religion. So long as a practice does not suggest or promote favoritism or factionalism among churches and there is no direct or indirect pressure brought by government to force participation, it need not be universal.”).

At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But . . . the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.⁴⁶

Indeed, the Supreme Court has repeatedly reaffirmed the principle that the Federal Establishment Clause prevents distinctions between the religious and the atheist, as much as it bars distinguishing among religious sects.⁴⁷ Moreover, the historical record supports the conclusion that the national framers intended the Establishment Clause to ensure broad neutrality in religious matters:

[T]here is also evidence supporting the proposition that the Framers intended the Establishment Clause to require governmental neutrality in matters of religion, including neutrality in statements acknowledging religion.

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The fair inference is that there was no common understanding about the limits of the establishment prohibition, and [Justice Scalia's] conclusion that its narrower view was the original understanding . . . stretches the evidence beyond tensile capacity. What the evidence does show is a group of statesmen, like others before and after them, who proposed a guarantee with contours not wholly worked out, leaving the Establishment Clause with edges still to be determined.⁴⁸

Accordingly, neutrality remains the central principle of federal religion analysis.⁴⁹ Neutrality is required even if the government's intent is simply to support the faithful without endorsing a particular view: "When the government acts with the ostensible and predominant purpose of advancing religion, it violates the central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides."⁵⁰

46. *Wallace*, 472 U.S. at 52–53 (footnote omitted).

47. *McCreary Cnty.*, 545 U.S. at 860 ("[T]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.") (internal quotations omitted). See also *Schempp*, 374 U.S. at 216 ("[R]eject[ing] unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another."); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (government cannot impose requirements "which aid all religions as against non-believers" nor "aid those religions based on a belief in the existence of God as against those religions founded on different beliefs"); *Everson*, 330 U.S. at 15–16 (Establishment Clause prevents government from aiding one religion, all religions, or preferring one religion over another).

48. *McCreary Cnty.*, 545 U.S. at 878–79.

49. *Id.* at 860.

50. *Id.*

The fact that a law is ostensibly neutral because it is facially secular and is intended to effect the advancement of a legitimate state end, does not save the law when it *also* has an intent or effect of preferring a religion.⁵¹ This “purpose” inquiry (discussed in more detail below) aims to prevent government from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters by manifesting a purpose to favor one faith over another, or adherence to religion generally.⁵²

One counterintuitive aspect of federal religion doctrine is that the government may (and sometimes must) accommodate religious practice. The government may do so without violating the Establishment Clause when the government acts with the purpose of alleviating “exceptional government-created burdens on private religious exercise.”⁵³ But even accommodation lends inadequate justification if it involves government sponsorship, particularly of a specific religion. For example, in *School District of Abington v. Schempp*, the Supreme Court upheld an Establishment Clause challenge to a public school practice of reading Bible passages without comment at the beginning of each school day; students not wishing to participate were permitted to absent themselves.⁵⁴ The Court noted that although our heritage and culture is in part grounded in the belief of the Almighty, the Federal Constitution mandates governmental neutrality that neither prefers one religion over another, nor advances all religion, but instead creates a sanctuary where all religions may flourish without governmental interference.⁵⁵ The Court concluded that state sponsorship of Bible reading during the school day violated the principle of neutrality, placed the state behind religious inculcation, and infringed the free-exercise rights of nonbelievers.⁵⁶

51. *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 783–84 n.39 (1973) (noting that a law with primary effect to promote a legitimate government interest is not immune from further examination on whether it also has direct and immediate effect of advancing religion). Ordinarily, courts hesitate to question the motives of other branches of government. Establishment analysis is the exception: “[in] contrast to the general rule that legislative motive or purpose is not a relevant inquiry in determining the constitutionality of a statute . . . , our cases under the Religion Clauses have uniformly held such an inquiry necessary” *McDaniel v. Paty*, 435 U.S. 618, 636 n.9 (1978) (Brennan, J., concurring).

52. *McDaniel*, 435 U.S. at 636.

53. *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005); *Salazar v. Buono*, 130 S. Ct. 1803, 1818–19 (2010).

54. 374 U.S. 203, 226 (1962).

55. *Id.* at 217–19.

56. *Id.* at 222–27. *See also* *Engel v. Vitale*, 370 U.S. 421 (1962) (prohibiting the recitation of prayer at the beginning of the school day).

Of course, neutrality (or any other factor) alone will rarely be enough to resolve a religion case, and focusing on one principle to the exclusion of others generally is the wrong approach.⁵⁷ Religion cases break into several categories that each feature particular concerns in greater or lesser measure than the others, such as schools, public property displays, and holiday observances.⁵⁸ Necessarily, then, there is no uniform federal approach to religion cases, other than being guided by these general principles and the likely application of the *Lemon* analysis (discussed below).⁵⁹ Consequently, the resolution of religion cases under federal law remains largely determined by the circumstances of each case.⁶⁰

C. Federal Religion Jurisprudence in Practice: The *Lemon* Analysis

The default test applied in federal establishment cases comes from *Lemon v. Kurtzman*.⁶¹ In *Lemon*, the Supreme Court invalidated aid to nonpublic school teachers and schools using this analysis: “[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.”⁶²

The *Lemon* test, with its focus on the distinction between religious and secular purpose and effect, has become the standard device for measuring the Federal Establishment Clause.⁶³ However, it tends to be honored more in the breach than in the observance, and despite its prevalence and controlling status, the *Lemon* analysis is not well-regarded.⁶⁴ *Lemon* has had a “checkered career” in the Supreme

57. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 876 (2005) (“[G]iven its generality as a principle, an appeal to neutrality alone cannot possibly lay every issue to rest, or tell us what issues on the margins are substantial enough for constitutional significance. . . .”). See also *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring).

58. See *Bd. of Educ. v. Grumet*, 512 U.S. 687, 720 (1994) (O’Connor, J., concurring) (“There are different categories of Establishment Clause cases, which may call for different approaches.”).

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

60. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000) (internal citation and quotation omitted). See also *Van Orden v. Perry*, 545 U.S. 677, 696 (2005) (Thomas, J., concurring) (“This Court looks for the meaning to an observer of indeterminate religious affiliation who knows all the facts and circumstances surrounding a challenged display.”); *Mitchell v. Helms*, 530 U.S. 793, 869 (2000) (Souter, J., dissenting) (“Particular factual circumstances control, and the answer is a matter of judgment.”).

61. 403 U.S. 602 (1971).

62. *Lemon*, 403 U.S. at 612–13 (citations and quotations omitted).

63. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 314.

64. For example, Justice Scalia has noted:

Court's decisions on religion cases and has been applied, at best, inconsistently.⁶⁵ While at least six Supreme Court justices have expressed dissatisfaction with *Lemon* on a variety of grounds, a Supreme Court majority has never agreed on a replacement, and consequently *Lemon* remains the law.⁶⁶

For example, in his complaints against *Lemon*, Justice Scalia draws a distinction in the principle that the government cannot favor one religion over another and argues not only that the principle applies where public aid or assistance to religion is concerned, or where the free exercise of religion is at issue, but also that "it necessarily applies

[A] majority of the Justices on the current Court . . . have, in separate opinions, repudiated the brain-spun "*Lemon* test" that embodies the supposed principle of neutrality between religion and irreligion. See *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 398–399 (1993) (SCALIA, J., concurring in judgment) (collecting criticism of *Lemon*); *Van Orden, ante*, at 692–693) (THOMAS, J., concurring); *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 720 (1994) (O'CONNOR, J., concurring in part and concurring in judgment); *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 655–656, 672–673 (1989) (KENNEDY, J., concurring in judgment in part and dissenting in part); *Wallace*, 472 U.S. at 112) (REHNQUIST, J., dissenting); see also *Committee for Public Ed. and Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (STEVENS, J., dissenting) (disparaging "the sisyphian task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon*").

McCreary Cnty. v. ACLU, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting) (citations in original).

65. Justice Rehnquist described a litany of inconsistent applications of *Lemon*: See, e.g., *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 398–399 (1993) (SCALIA, J., concurring in judgment) (collecting opinions criticizing *Lemon*); *Wallace v. Jaffree*, 472 U.S. 38, 108–114 (1985) (REHNQUIST, J., dissenting) (stating that *Lemon*'s "three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service" (internal quotation marks omitted)); *Committee for Public Ed. and Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (STEVENS, J., dissenting) (deriding "the sisyphian task of trying to patch together the blurred, indistinct, and variable barrier described in *Lemon*"). We have even gone so far as to state that it has never been binding on us. *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area. . . . In two cases, the Court did not even apply the *Lemon* 'test' [citing *Marsh v. Chambers*, 463 U.S. 783 (1983), and *Larson v. Valente*, 456 U.S. 228 (1982)]"). Indeed, in *Lee v. Weisman*, 505 U.S. 577 (1992), an opinion upon which the Court relies heavily today, we mentioned, but did not feel compelled to apply, the *Lemon* test. See also *Agostini v. Felton*, 521 U.S. 203, 233 (1997) (stating that *Lemon*'s entanglement test is merely "an aspect of the inquiry into a statute's effect"); *Hunt v. McNair*, 413 U.S. 734, 741 (1973) (stating that the *Lemon* factors are "no more than helpful signposts").

Santa Fe Indep. Sch. Dist., 530 U.S. at 319–20 (Rehnquist, C.J., dissenting) (citations in original).

66. See *supra* note 65 and accompanying text.

in a more limited sense to public acknowledgment of the Creator. If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all.”⁶⁷ Indeed, this is what the concept of making no law respecting an establishment of religion implies. As discussed below, that is exactly the modern California rule, because while there may be room for play in the joints at the nexus of the Federal Establishment and Free Exercise Clauses, under the state constitution the best course is the most neutral one possible. As James Madison warned, even seemingly small indulgences present a risk:

[It] is proper to take alarm at the first experiment on our liberties Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?⁶⁸

Partly because of the inadequacy of *Lemon*, and partly due to the context-dependent nature of religion cases, the Supreme Court has applied different standards to schools, public lands, and Congress; less religion is allowed in schools, some is allowed on public lands, and the branches of government have significant latitude in using religious references.⁶⁹ For example, in public schools the Establishment Clause bars: forbidding the teaching of evolution;⁷⁰ posting a copy of the Ten Commandments on a public classroom wall;⁷¹ requiring daily Bible readings;⁷² allowing school-sanctioned prayer at a high school graduation ceremony;⁷³ having a moment of silence “for meditation or voluntary prayer”;⁷⁴ and reciting “denominationally neutral” prayers.⁷⁵ Even within a context-specific category, the details matter. Sometimes, when the circumstances viewed as a whole appear to be ecumenical

67. *McCreary Cnty.*, 545 U.S. at 893 (Scalia, J., dissenting).

68. 2 JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, in THE WRITINGS OF JAMES MADISON, *supra* note 3, at 183, 185–86. See also *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (“The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.”).

69. See, e.g., *Salazar v. Buono*, 130 S. Ct. 1803, 1818–19 (2010) (Kennedy, J., with two Justices concurring in part and two Justices concurring in the judgment) (“The Constitution does not oblige government to avoid any public acknowledgment of religion’s role in society Rather, it leaves room to accommodate divergent values within a constitutionally permissible framework.”).

70. *Epperson v. Arkansas*, 393 U.S. 97 (1968).

71. *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam).

72. *Sch. Dist. v. Schempp*, 374 U.S. 203 (1962).

73. *Lee v. Weisman*, 505 U.S. 577 (1991).

74. *Wallace v. Jaffree*, 472 U.S. 38 (1984).

75. *Engel v. Vitale*, 370 U.S. 421 (1962).

rather than showing endorsement of a particular religion, sectarian religious symbols such as a crèche or menorah may be constitutionally displayed on public lands.⁷⁶ But such displays are not permitted when the displayed symbol is specific to only one religion or subclass of religions.⁷⁷ On the other hand, the political branches of the federal government may conduct public prayers.⁷⁸ Consistent with the explanation of these distinct categories as occupying points on a spectrum, in *Marsh v. Chambers* the Supreme Court noted that the adults in a legislature require less protection from state-sponsored religious exercises than schoolchildren, on the theory that legislators are less susceptible to religious indoctrination and peer pressure.⁷⁹

There is a striking comment in *Marsh v. Chambers* that government religious expression can be justified on the basis that it is “a tolerable acknowledgment of beliefs widely held among the people of this country”—in other words, that government may endorse majority religious views or practices simply because enough people agree with them. This rationale may also explain the decision to allow the crèche

76. See *Lynch v. Donnelly*, 465 U.S. 668 (1984) (permitting crèche as part of holiday display with Santa Claus house and Christmas tree); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989) (permitting a menorah next to Christmas tree with sign referring to liberty).

77. See *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam) (outlawing Ten Commandments posted in public classrooms); *Cnty. of Allegheny*, 492 U.S. 573 (outlawing crèche standing alone in public courthouse with Roman Catholic religious society name and New Testament quotation attached).

78. *Marsh v. Chambers*, 463 U.S. 783, 786–92 (1983) (discussing the history of Congress opening its sessions with prayer); *Newdow v. Roberts*, 603 F.3d 1002 (D.C. Cir. 2010) (using “So help me God” during the presidential inauguration does not violate the Establishment Clause).

79. *Marsh*, 463 U.S. at 792. There may also be an unstated separation of powers rationale, with the Supreme Court being unwilling to tread into the minefield of regulating the personal religious observations of members elected to the other branches. At least one federal court has noted that *Marsh* partly resulted from judicial deference to the legislative branch in the management of its internal affairs. *Van Zandt v. Thompson*, 839 F.2d 1215, 1219 (7th Cir. 1988). In any event, *Marsh* appears to be an outlier limited to its facts. See *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987) (*Marsh* is “not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted”). In declining to apply *Lemon* and upholding the practice of opening legislative sessions with prayer, the Court based its holding on the “unique” history of legislative prayer. *Marsh*, 463 U.S. at 790–91. In *County of Allegheny*, the Court rejected Justice Kennedy’s proposal to extend *Marsh* beyond its facts to sanction governmental religious practices accepted in 1791 and their contemporary equivalents: “*Marsh* plainly does not stand for the sweeping proposition . . . that all accepted practices 200 years old and their equivalents are constitutional today [This] reading of *Marsh* would gut the core of the Establishment Clause, as this Court understands it.” *Cnty. of Allegheny*, 492 U.S. at 603.

display on public land in *Lynch v. Donnelly*.⁸⁰ Whatever the reasons underlying those decisions, *Marsh* and *Lynch* together illustrate the conflict in Supreme Court religion doctrine between “concern regarding whether official support of religion might affect freedom of worship by placing indirect pressure on minority religionists to conform . . . [and] the need to accommodate America’s religious heritage.”⁸¹ On the other side are the oft-cited statements of neutrality: “When government . . . allies itself with one particular form of religion, the inevitable result is that it incurs ‘the hatred, disrespect and even contempt of those who held contrary beliefs.’”⁸² Though the conflict is clear, it also seems clear that dicta like that found in *Holy Trinity Church v. United States*⁸³ are anachronisms, that cases like *Marsh* are outliers, and that the Supreme Court remains (at least in theory) committed to Jeffersonian neutrality.⁸⁴

This conflicted history explains both why *Lemon* is the default test, and why it remains so: *Lemon* is simultaneously the best and worst compromise of the competing values and approaches. It is a problem that the *Lemon* analysis is such a lemon, yet the bigger problem is that there is no consensus on the federal bench regarding what would be a better replacement. After reviewing the religion cases decided by the Supreme Court, the California high court unanimously held that it was “unable to harmonize the holdings of these cases” and noted that the “high court itself has implied that its decisions on the subject cannot be reconciled.”⁸⁵ Regardless of its defects or the inconsistency of its application, *Lemon* remains the guiding standard in federal establishment cases, because nothing else has commanded anything ap-

80. *Lynch*, 465 U.S. at 675. The plurality’s reaction in *Lynch* may simply have been, “it’s Christmas!” At least one member of the Court reportedly has expressed that view in relation to the Court’s own Christmas celebration, in response to a delegation of clerks concerned about preserving the Court’s secular neutrality. EDWARD LAZARUS, CLOSED CHAMBERS 332–33 (1998).

81. Harry Simon, Note, *Rebuilding The Wall Between Church and State: Public Sponsorship of Religious Displays Under the Federal and California Constitutions*, 37 HASTINGS L.J. 499, 512 (1986).

82. *Sch. Dist. v. Schempp*, 374 U.S. 203, 221–22 (2002) (quoting *Engel v. Vitale*, 370 U.S. 421, 431 (1962)); *Zorach v. Clauson*, 343 U.S. 306, 313–14 (1952) (noting that as much as the state must remain neutral in the affairs of religion, the state also cannot assume a posture of hostility).

83. *Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892).

84. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005).

85. *Cal. Teachers Ass’n v. Riles*, 632 P.2d 953, 961–62 (Cal. 1981). The *Riles* court reviewed several cases considering the application of the applying the “child benefit” principle in cases concerning aid to sectarian schools: *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Wolman v. Walter*, 433 U.S. 229 (1977).

proaching a consistent majority on the Supreme Court. But that fact has no effect on the ability of California courts to develop and apply a religion analysis that is specific to the California Constitution.

II. The California Incidental-Benefits Standard

A. Overview

Religion cases presented under the California Constitution, in contrast to those brought solely under the federal charter, rarely turn exclusively on an application of *Lemon*. Indeed, it would be surprising to see such a case given the variety of constitutional claims available in California. True, the establishment provision in article I, section 4 of the California Constitution (added by the electors as an initiative amendment in the November 5, 1974 general election) is nearly identical to the Federal Establishment Clause and thus standing alone, provides no basis for an independent state law analysis.⁸⁶ But the terms of the California Free Exercise Clause in article I, section 4 (known as the “no preference” clause) are distinct, and the California Constitution contains two other provisions (no sectarian education in article IX, section 8 and no sectarian aid in article XVI, section 5) that have no analogues anywhere in the Federal Constitution.

The distinct terms of these unique provisions in the state constitution have been viewed by at least a plurality of the California Supreme Court as providing additional, stricter state-law guarantees that religion and state government must remain separate.⁸⁷ Together, the California religion clauses form part of a contiguous whole, and this comprehensive scheme governing separation of church and state means that religion claims brought under the California Constitution necessarily require analysis of all the California religion clauses through a unified state-law-specific analysis, rather than merely applying *Lemon*. Though each constitutional provision could be viewed in isolation as requiring a subtly different posture with respect to religion, state government can only act with one hand. Consequently, all of the religion clauses must be read together under a single unified analytical framework—one that accounts for binding federal law but which also maintains faith with and gives due credit to the independently effective California constitutional provisions.

86. See *E. Bay Asian Local Dev. Corp. v. State*, 13 P.3d 1122, 1132 (Cal. 2000) (identity of language between California and Federal Establishment Clauses requires application of federal establishment analysis).

87. See *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809, 820 (Cal. 1991). *Accord E. Bay Asian Local Dev. Corp.*, 13 P.3d at 1132.

B. The California Religion Clauses Merit an Independent State Interpretation

California courts construe provisions of the state constitution in light of the unique language, purpose, and history of the state's charter. Whether analyzed from a structural or interpretive perspective, the complementary religion provisions in the state constitution substantially differ from those in the Federal Constitution. Consequently, other than respecting the boundaries marked by federal religion jurisprudence, there is little reason to permit federal law to govern the whole analysis of these distinct and independent state constitutional provisions. This is so even when the state constitution contains the same language as a federal constitutional provision; because the California Constitution is the supreme law of the state, a document of independent force that establishes the state's governmental powers and safeguards the individual rights and liberties of its citizens.⁸⁸ The state high court is the final arbiter of the meaning of the state constitution's provisions.⁸⁹ Its power to interpret the state charter is a non-delegable aspect of the basic structure of California government.⁹⁰ Consequently, California courts are not bound by Supreme Court decisions regarding analogous state constitutional provisions. However, decisions of the Supreme Court, while not binding on state constitutional law issues, are entitled to great deference, and ordinarily the state supreme court will not depart from a construction placed by the Supreme Court on a similar provision in the Federal Constitution absent cogent reasons.⁹¹ As discussed below, strong reasons for an independent state analysis exist in abundance for the religion clauses.

In addition to textual differences and the wealth of California-specific history supplying meaning to the unique state provisions, the current interpretations of the religion clauses in the Federal Constitution are not as comprehensive as the California provisions.⁹² That is all the more reason for a state-law analysis specifically tied to the state

88. CAL. CONST. art. I, § 24; *E. Bay Asian Local Dev. Corp.*, 13 P.3d at 1132; Comm. to Defend Reprod. Rights v. Myers, 625 P.2d 779, 783 (Cal. 1981). It is clear from the drafters' debates that article I, section 24 was specifically intended to allow California courts to give greater scope to the California Constitution than that required by the federal high court to similar, or even identical, language of the Federal Constitution. *Sands*, 809 P.2d at 839 n.3 (Mosk, J., concurring). Of course, provisions in the California Constitution are expressly made subordinate to any contrary provision of the U.S. Constitution. CAL. CONST., art. 3, § 1.

89. *Raven v. Deukmenjian*, 801 P.2d 1077, 1087 (Cal. 1990).

90. *Id.* at 1088–89.

91. *E. Bay Asian Local Dev. Corp.*, 13 P.3d at 1139; *Raven*, 801 P.2d at 1087.

92. *Fox v. City of L.A.*, 587 P.2d 663, 665 (Cal. 1978).

charter. All of the California-specific provisions must be accounted for in the state's religion analysis.⁹³ That notion holds true even if approached from an ordinary interpretive perspective, as the California Constitution is subject to the same interpretation rules as a statute, which mandate that each provision must be given independent weight and all provisions must be read together.⁹⁴ Accordingly, all of the California Constitution's religion provisions must be read together and harmonized, the better to give effect to the intent of the drafters. True, in *East Bay Asian Local Development Corp. v. State*, the California Supreme Court decided that federal law applies to establishment claims under the state constitution.⁹⁵ But that decision concerns only *one* of the several religion clauses in the California Constitution, and collectively these unique state constitutional provisions provide the kind of cogent basis that warrants distinguishing the state religion analysis from the federal approach.⁹⁶

C. History of the California Constitution Religion Provisions

1. Article I, Section 4: "Without Discrimination or Preference"

The text of the "no preference" clause ("NPC") in article I, section 4 of the California Constitution seems straightforward. It provides: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed."⁹⁷ By its plain language, this provision seems to require a stricter separation between church and state than that required by the Federal Constitution. Yet a majority of the California Supreme Court has explained neither the scope of this guarantee nor the applicable level of constitutional scrutiny.

93. CAL. CONST. art. I, §26 provides: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." The present article I, section 26 appeared as article I, section 22 in the 1879 constitution. It was repealed and readopted, renumbered as section 28 but otherwise unchanged, by the electorate on November 5, 1974.

94. *Harbor v. Deukmejian*, 742 P.2d 1290, 1298 (Cal. 1987). *See also* *Greene v. Marin Cnty. Flood Control & Water Conservation Dist.*, 231 P.3d 350, 358 (Cal. 2010) ("The principles of constitutional interpretation are similar to those governing statutory construction. In interpreting a constitution's provisions, our paramount task is to ascertain the intent of those who enacted it. To determine that intent, we look first to the language of the constitutional text, giving the words their ordinary meaning. If the language is clear, there is no need for construction. If the language is ambiguous, however, we consider extrinsic evidence of the enacting body's intent.") (citations and quotation omitted).

95. *E. Bay Asian Local Dev. Corp.*, 13 P.3d at 1132.

96. *Raven*, 801 P.2d at 1087–88.

97. CAL. CONST., art. I, § 4.

This Article endeavors to interpret the NPC in a manner consistent with its usage throughout California's constitutional history and decisions of the state supreme court. From this analysis emerges the view that the NPC requires equal treatment of religious beliefs and nonbeliefs by state government. As with the federal religion clauses, there is some historical support for the position that the mere impression of preferential treatment is not always, by itself, impermissible. But as discussed below, California's constitutional statement on religion is more comprehensive than any one provision standing alone. When considered together, even the possible original intent of the drafters of the NPC must give way to a unified view of the constitution based on the subsequent substantive changes to the state charter's religion provisions.

a. The History of the NPC Shows Permissiveness for Preferences

The origins of the clause in the New York Constitution and its evolution in California show that the 1849 drafters did not intend for the NPC to *entirely* preclude statutes or state actions giving the mere impression of preferential treatment toward a given religious belief. The phrase in article I, section 4 of the California Constitution guaranteeing "[f]ree exercise and enjoyment of religion *without discrimination or preference*" is clear with regard to the *kind* of state action prohibited.⁹⁸ Inherent in the meaning of "free exercise and enjoyment of religion" is the notion that an individual may adhere to any of a number of religious faiths or practice no religious belief at all.⁹⁹ In preserving the ability of *all* citizens to fulfill their individual beliefs, the plain text of the phrase withholds from state government the power to promote or advance any particular belief system to the detriment of others. Thus, on its face, the NPC requires equal treatment of religious beliefs by state government and precludes a state-established religion.

But the text of the NPC is ambiguous as to the *degree* of limitation, in other words, the extent to which government must remain neutral. Although an anti-establishment principle is clear from the text, the clause is phrased as a guarantee of a personal right. Resolving the ambiguity begins with the ordinary rules of constitutional interpretation:

The principles of constitutional interpretation are similar to those governing statutory construction. In interpreting a constitution's

98. *Id.* (emphasis added).

99. *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809, 810 (Cal. 1991).

provision, our paramount task is to ascertain the intent of those who enacted it. To determine that intent, we “look first to the language of the constitutional text, giving the words their ordinary meaning.” If the language is clear, there is no need for construction. If the language is ambiguous, however, we consider extrinsic evidence of the enacting body’s intent.¹⁰⁰

Accordingly, we turn to the history of the NPC.¹⁰¹ Article I, section 4 originated in the California Constitution of 1849, a document produced during tumultuous times by convention delegates who sought to establish a government that would, among other pursuits, “secure the blessings of civil, *religious*, and political liberty.”¹⁰² Delegates Moore and Dimmick, for example, acknowledged that the convention participants arrived with instructions from their constituents “to lay down the broad and general principles of religious freedom,”¹⁰³ a sentiment echoed by all in attendance at the close of the convention.¹⁰⁴ The Treaty of Guadalupe-Hidalgo had already promised that Mexican citizens living in American California would be “secured in the free exercise of their religion without restriction.”¹⁰⁵ Yet to the delegates—living in an era when state and local governments operated beyond the reach of the Federal Bill of Rights—the Califor-

100. *Thompson v. Dep’t of Corr.*, 18 P.3d 1198, 1200 (Cal. 2001) (citations omitted).

101. *Golden Gateway Ctr. v. Golden Gateway Tenants Ass’n*, 29 P.3d 797, 804 (Cal. 2001); *Hill v. Nat’l Collegiate Athletic Ass’n*, 865 P.2d 633, 641–42 (Cal. 1994).

102. J. ROSS BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION, IN SEPTEMBER AND OCTOBER, 1849, at 475 (1850) (emphasis added). Manifest Destiny and imperialistic war with Mexico facilitated American possession of California in 1846. ROCKWELL DENNIS HUNT, THE GENESIS OF CALIFORNIA’S FIRST CONSTITUTION 1846–1849, at 9–11, 15–16 (1895). Yet organized civil government proved elusive for the remainder of the decade as congressional disagreement over slavery expansion left California under military rule. *Id.* at 28–29. Reports of gold discovery, and the disorganized population swell that followed, intensified cries for political order during this perilous “No-Government period.” *Id.* at 24, 32. Pockets of self-government emerged as local leaders—many of whom would later contribute to the drafting of the state constitution—fueled a popular movement toward a unified state government. *Id.* at 26. Thus, “the desire for government was universally known” when General (and de facto governor) Bennett Riley called for a Constitutional Convention to commence September 1, 1849. *Id.* at 33–34. Forty-eight delegates gathered in Monterey’s Colton Hall from ten districts across California. *Id.* at 34–35. Largely strangers, the delegates reflected the youth (thirty-two were under the age of 40) and transient diversity of the state. BROWNE, *supra* note 102, at 92 (“[T]he people are a moving, floating population.”). They were a mix of farmers, military men, and commercial professionals, only seven of whom were lifelong Hispano-California residents. *Id.* at 478–79. Together, “the delegates assembled in Convention, as *Californians*, and carried on their deliberations in a spirit of amity, compromise, and mutual concession for the public weal.” *Id.* at 474.

103. BROWNE, *supra* note 102, at 92.

104. *Id.* at 474–75.

105. *Id.* at 69, 158.

nia Constitution presented the principal safeguard against state encroachment on individual freedoms.¹⁰⁶

The convention addressed religious freedom as part of its first substantive debate during the opening week of the convention.¹⁰⁷ Delegate Gwin reported that the first eight sections were taken from the New York Constitution, including the draft religion clause.¹⁰⁸ As first proposed, the religion clause read:

The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this State to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.¹⁰⁹

The following day, delegate Norton explained that article I, section 4 “not only guarantees to every man his rights in matters of religion, but protects the community from any violation of the peace, and from all acts of licentiousness calculated to impair the well-being of society, or infringe upon the dignity of the State.”¹¹⁰ No one rose to give an express explanation of the phrase “without discrimination or preference.”¹¹¹

106. GRODIN ET AL., *THE CALIFORNIA STATE CONSTITUTION: A REFERENCE GUIDE* 36 (1993). See also BROWNE, *supra* note 102, at 32–33 (1849 delegation rejects proposal by Charles Botts of Monterey that any bill of rights be set forth only as “declaratory of general fundamental principles.”).

107. BROWNE, *supra* note 102, at 30.

108. *Id.* at 31.

109. *Id.* at 30 (emphasis added) (referring to the California Constitution of 1849, proposed article I, section 3).

110. *Id.* at 39.

111. According to the edition of Webster’s dictionary on hand at the 1849 Convention the terms “discrimination” and “preference” are defined similarly. BROWNE, *supra* note 102, at 36. A dictionary from 1848 defines “discrimination” as: “*n.* 1. The act of distinguishing; the act of making or observing a difference. 2. The state of being distinguished. 3. Mark of distinction. —SYN. Discernment; penetration; clearness; acuteness; judgment; distinction.” NOAH WEBSTER, *AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* 303 (1848). The same dictionary defines “preference” as: “*n.* 1. The act of preferring one thing before another; estimation of one thing above another; choice of one thing rather than another. 2. The state of being preferred.” *Id.* at 771. Note that the term “discrimination” did not then carry the same negative connotation it does today. Consequently, the drafters’ inclusion of both terms into the “no preference” clause may indicate a purposeful redundancy used to emphasize a single point, rather than two terms with distinct meanings. This, taken with the other historical evidence discussed herein, seems to indicate that “without preference or discrimination” was redundant, and so from a purely originalist perspective the clause may not support a disjunctive reading. However, *Riles*, *Fox* and dicta in *East Bay Asian* all read the NPC more broadly, giving effect to the plain meaning of all the words in their modern understanding, as required by the principles of constitutional interpretation. See

Delegate Botts (who was from Virginia) proposed that the convention adopt Virginia's Free Exercise Clause instead of the borrowed New York provision.¹¹² This substitute omitted language regulating "licentious" practices.¹¹³ Delegate Norton spoke in favor of the New York provision, as it "not only *guarantees to every man his rights in matters of religion*, but protects the community from any violation of the peace, and from all acts of licentiousness calculated to impair the well-being of society, or infringe upon the dignity of the State."¹¹⁴ The New York provision under debate, Botts argued, might lead to a "declaration . . . that the Roman Catholic religion is inconsistent with the safety of the State," and he wanted "a bill of rights to declare . . . the right of man to *worship in his own way*."¹¹⁵ Delegate Sherwood, a lawyer who had served in the New York legislature,¹¹⁶ responded that no limit on Catholics was intended, and explained of the licentiousness clause: "There have been sects known [in New York] to discard all decency, and admit spiritual wives, where men and women have herded together, without any regard for the established usages of society. It was for this reason that the clause was put in the Constitution of New York."¹¹⁷ Sherwood carried the day—the Botts amendment was rejected, and the provision was adopted as article I, section 4.¹¹⁸

Greene v. Marin Cnty. Flood Control & Water Conservation Dist., 231 P.3d 350, 357–58 (Cal. 2010). As a result, while the intent of the drafters may have been different (and it is at least ambiguous), the intervening substantive changes to the religion provisions of the state constitution counsel that the current understanding of "without preference or discrimination" should be in the disjunctive.

112. BROWNE, *supra* note 102, at 38–39.

113. *Id.* at 38–39. The substitute proposed by Botts read:

That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity toward each other.

Id.

114. *Id.* at 39 (emphasis added).

115. *Id.* (emphasis added).

116. GRODIN ET AL., *supra* note 106, at 43.

117. BROWNE, *supra* note 102, at 39.

118. *Id.* John Ross Browne records of the debate indicate that:

MR. BOTTS thought this the place in which Virginia might appear most appropriately. One of the most eloquent and beautiful clauses in the Constitution of Virginia, was the following, in the bill of rights. He proposed it as a substitute for the third section reported by the Committee:

That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of relig-

Because the 1849 drafters discussed and relied on the borrowed New York religion clause, the history of the Free Exercise Clause in the 1846 New York Constitution is at least relevant background here, as it suggests the contours of the right to religious liberty that the 1849 California drafters had in mind.¹¹⁹ A review of this history indicates that the authors of the New York Constitution sought a government tolerant of diverse religious beliefs, removed from the evils of uniform

ion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity toward each other.

MR. HALLECK remarked that this left out a very important provision contained in the article from the Constitution of New York, in regard to witnesses appearing in court.

MR. NORTON was decidedly opposed to the amendment. He could see no objection to the section as reported by the Committee. It is plain and explicit. It not only guarantees to every man his rights in matters of religion, but protects the community from any violation of the peace, and from all acts of licentiousness calculated to impair the well-being of society, or infringe upon the dignity of the State.

MR. BOTTS remarked, that under the clause reported by the Committee, a declaration might be made that the Roman Catholic religion is inconsistent with the safety of the State. He wanted to prohibit the Legislature from making such a declaration. He wanted a bill of rights to declare, what the bill of rights of Virginia does, in the most appropriate and beautiful language—the right of man to worship in his own way. The one does it—the other does not.

MR. SHERWOOD said that the gentleman from Virginia, (MR. BOTTS,) was evidently not acquainted with the history of the new sects in the State of New York, or he would see the propriety of the restrictions contained in the section reported by the Committee. There have been sects known there to discard all decency, and admit spiritual wives, where men and women have herded together, without any regard for the established usages of society. It was for this reason that the clause was put in the Constitution of New York. No such thing as an attempt to limit the Roman Catholics to any fixed rules of worship was intended; but it was deemed necessary that society should be protected from the demoralizing influence of fanatical sects, who thought proper to discard all pretensions to decency.

The question was taken on the amendment of MR. BOTTS, and it was rejected.

The question was then taken on the proposition of the Committee, and it was adopted, as follows:

4. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed, in this State, to all mankind; and no person shall be rendered incompetent to bear witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.

BROWNE, *supra* note 102, at 38–39 (formatting in original).

119. *Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n*, 29 P.3d 797, 804 (Cal. 2003) (New York constitutional history relevant to interpreting a clause of the California Constitution drawn from an analogous provision in the New York Constitution).

public worship experienced under Dutch and English colonial rule.¹²⁰ Their objective conformed to the American nonpreferentialist tradition of the late 18th century, whereby constitutional protections “were designed to foster a spirit of accommodation” between state and religion while forbidding exclusive privileges to one church.¹²¹

The original New York religion clause dates to the 1777 New York Constitution, which set out to “guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind.”¹²² That its authors meant to ensure “universal religious toleration” while ensuring a separation between church and state can be seen in corollary provisions excluding ministers from those eligible for political office and expressly disapproving statutes and common-law doctrine “which may be construed to establish and maintain any particular denomination of Christians or their ministers.”¹²³ Indeed, an early draft of the 1777 clause included a passage allowing religious freedom “to all denominations of Christians without preference or distinction and to all Jews, Turks, and Infidels.”¹²⁴ The provision securing religious freedom was continued, without its vivid preamble, in the New York Constitution of 1821, and again in the 1846 constitution as delegates further shifted power from the political branches of government to the people.¹²⁵ This later version—the version on hand in Monterey in 1849—read exactly as proposed in California.¹²⁶

Similar to contemporaneous U.S. and California Supreme Court decisions, early judicial treatment of the New York NPC expressly pre-

120. See 1 CHARLES Z. LINCOLN, *THE CONSTITUTIONAL HISTORY OF NEW YORK: 1609–1822*, at 541–44 (1906) [hereinafter LINCOLN Vol. 1].

121. Patrick M. Gaffy, *The Myth of Separation: America's Historical Experience with Church and State*, 33 *HOFSTRA L. REV.* 475, 483–84 (2004).

122. N.Y. CONST. of 1777, art. XXXVIII.

123. LINCOLN Vol. 1, *supra* note 120, at 543 (quotation omitted).

124. *Id.* at 541.

125. 4 CHARLES Z. LINCOLN, *THE CONSTITUTIONAL HISTORY OF NEW YORK: The Annotated Constitution* 55 (1906) [hereinafter LINCOLN Vol. 4]; 2 CHARLES Z. LINCOLN, *THE CONSTITUTIONAL HISTORY OF NEW YORK: 1822–1894*, at 106–07 (1906) [hereinafter LINCOLN Vol. 2].

126. N.Y. CONST. of 1846, art. I, § 3. Significantly, the delegates at the 1867 New York Constitutional Convention agreed that the words “without discrimination or preference” provided a safeguard against legislative establishment of a state church. LINCOLN Vol. 2, *supra* note 125, at 291. And the “spirit” of religious neutrality continued in evidence during debate on state funding of public schools. *Id.* at 480–87, 498–99. Although these later discussions tell us nothing about the mindset of the founding California delegates, they strengthen the inference that our state’s “no preference” clause derives from an analogous constitutional provision requiring government to pursue a policy of even treatment toward religion.

served governmental alignment with overtly Christian moral precepts.¹²⁷ In upholding a blasphemy conviction, the New York Supreme Court of Judicature held that “free, equal, and undisturbed enjoyment of religious opinion, whatever it may be . . . is granted and secured; but to revile . . . the religion professed by almost the whole community, is an abuse of that right.”¹²⁸ The 1777 constitution’s allowance of religious exercise without discrimination or preference “never meant to withdraw religion in general To construe it as breaking down the common law barriers against licentious, wanton, and impious attacks upon christianity [sic] itself, would be an enormous perversion of its meaning.”¹²⁹

The New York antecedents of article I, section 4 also illuminate the *degree* to which the state government was required to avoid preferential treatment of a particular sect. Actions by the New York Legislature before that state’s 1846 constitutional convention also indicate that the New York Constitution was viewed as permitting a government preference for Christian teachings. In 1838, the Assembly Committee on Colleges, Academics, and Common Schools rejected a citizens’ petition for a law prohibiting religious exercises in public schools, citing the Bible as “indispensable to a good system of popular instruction.”¹³⁰ Six years later, the New York Legislature restricted sectarian teaching in public schools—yet allowed scripture readings to continue.¹³¹ And at the 1846 convention itself, the delegates rejected a proposal that would have imposed an express legislative duty to pre-

127. *People v. Ruggles*, 8 Johns. Cas. 290, 294–96 (N.Y. Sup. Ct. 1811); *cf.* *Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892) (noting that “we are a Christian people, and the morality of the country is deeply ingrafted upon Christianity”); *Gordon v. Bd. of Educ.*, 178 P.2d 488, 494 (Cal. 1947).

128. *Ruggles*, 8 Johns. Cas. at 295.

129. *Id.* at 296. After much discussion, this constitutional interpretation was left undisturbed by the delegates to the 1821 New York Constitutional Convention. That body saw Chancellor Kent—who as Chief Justice authored the *Ruggles* opinion—rise in opposition to a proposed amendment that would have prevented the judiciary from declaring any religion as the law of the state. LINCOLN Vol. 4, *supra* note 125, at 56–57. His response characterized the 1777 framers as intending “to preserve . . . the morals of the country, which rested on Christianity as the foundation.” *Id.* at 57. The convention later adopted a watered-down amendment with Kent’s vote, but after further deliberation, restored the religion clause to its original form. Significantly, the rationale supporting this exception to free exercise without preference remained the law of New York at least through the late 19th Century. *See Neuendorff v. Duryea*, 69 N.Y. 557, 563 (1877) (finding that “the Christian Sunday may be protected from desecration by such laws as the Legislature in its wisdom may deem necessary”).

130. 3 CHARLES Z. LINCOLN, *THE CONSTITUTIONAL HISTORY OF NEW YORK: 1894–1905*, at 567–68 (1906) [hereinafter LINCOLN Vol. 3].

131. LINCOLN Vol. 3, *supra* note 130, at 570.

clude local prosecution of those observing an alternate Sabbath.¹³² In sum, the Framers of the 1846 New York Constitution clearly intended that New York's Free Exercise Clause permit preferential advancement of the state's dominant religious belief, so long as that advancement avoided official coercion to actively engage in Christian worship.

Returning to the 1849 California debates, Delegate Botts tried a second time to insert the Virginia language into article I, section 4.¹³³ The delegates' intent to broadly protect free exercise, consistent with public safety, was again evident as they revisited the argument and voiced fears that the legislature or the courts could infringe religious liberty.¹³⁴ Botts renewed his complaint that there was

no guaranty in [the] Bill of Rights for religious liberty. It is left wholly to the Legislature I believe we have no right to prescribe the forms of worship of any religious sect; they are all amenable to the laws of the land, and *it is not our province to exclude any class from worshipping God as their conscience may dictate.*¹³⁵

Norton spoke again, deriding Botts for "opposing everything coming from the State of New York," and supported the licentiousness provision as "a very important protection to the community."¹³⁶ Delegate Hastings thought the licentiousness clause could be omitted, as the

whole object is effected by the first clause. *Religious liberty is secured.* Beyond that you contradict what you have said above, and you put it in the power of your courts to decide whether the exercise of any peculiar religious belief is compatible with the public safety and morality or not *First we secure religious liberty to the full extent; next we deny religious liberty beyond a certain extent. This is inconsistent with the principles which we have avowed.*¹³⁷

Delegates Tefft and Vermeule supported the whole section, arguing that it secured "religious liberty so far as is consistent with decency and public order. No man ought to desire more" and explained the sense of the section as "that it guaranties [sic] the free exercise and enjoyment of religious worship, provided it does not amount to licentiousness, or a breach of the peace."¹³⁸ Article I, section 4 was then adopted unchanged; again, without any discussion on the scope of the NPC.

132. LINCOLN Vol. 2, *supra* note 125, at 110–11.

133. BROWNE, *supra* note 102, at 292.

134. *Id.* at 292–93 (comparing remarks of Norton, Hastings, and Vermeule).

135. *Id.* at 292 (emphasis added).

136. *Id.*

137. *Id.* at 292–93 (emphasis added).

138. *Id.* at 293. *See also id.* at 336 (delegate Lippett arguing that states should be free to exclude citizens of other states who were members of licentious religious sects).

The discussion regarding article I, section 4 is not the only evidence in the 1849 debates regarding the delegates' views on religion. The 1849 delegates looked to the Christian deity for moral guidance throughout the proceedings, as each day opened with prayer from the convention's designated chaplains.¹³⁹ The Preamble, also copied from the New York Constitution, references the "Supreme Being" as the source of freedom.¹⁴⁰ The Preamble was debated twice, and the version that was initially proposed by the committee on the constitution was ultimately adopted and has remained in the state constitution unchanged since then.

Based on the treatment of religion in the 1849 debates, the presence of overtly Christian references during the convention, and the conditioning of the right of religious liberty in conformity with prevailing religious norms, it is difficult to avoid concluding that the drafters of the 1849 California Constitution meant anything other than a right to Christian religious liberty.¹⁴¹ As a result, the 1849 drafters may well have tolerated state action aligned with California's dominant Christian religion and may have condoned a law or state action that gave the appearance of a preference for mainstream religious beliefs.

In contrast, the debates on the next California Constitution demonstrate the beginning of a trend toward greater protection of individual religious liberty. Only thirty years after the original convention, in 1878, delegates assembled in convention in Sacramento to write a new constitution for a state coping with powerful corporate

139. HUNT, *supra* note 102, at 40–41 (explaining that the first regular session "was 'opened with prayer to Almighty God for His blessing on the body, in their work, and on the country'" (internal citation omitted)). The convention lasted forty-three days; it convened on Saturday, September 1, 1849 in Colton Hall in Monterey, and adjourned on Saturday, October 13, 1849. BROWNE, *supra* note 102, at 7, 476. On Monday, September 3 the convention opened with a "Prayer by the Rev. S.H. Willey." *Id.* On the third day, Tuesday, September 4, a delegate moved the resolution, which was adopted: "Resolved, That the President appoint a Committee of three to call upon the clergy of Monterey, and request them to open this Convention each day with prayer." *Id.* at 19. In the days following, the prayer was by either the Rev. S.H. Willey, the Rev. Padre Antonio Ramirez, or the Rev. T.D. Hunt; all told, prayers were heard 31 times in the convention. *Id.* at 7, 26, 30, 32, 42, 44, 54, 76, 94, 106, 121, 137, 152, 163, 167, 174, 200, 224, 246, 274, 301, 307, 316, 331, 344, 363, 380, 402, 430, 441, 459.

140. BROWNE, *supra* note 102, at 416.

141. See *Ex parte Andrews*, 18 Cal. 678, 684 (1861), *rev'g Ex parte Newman*, 9 Cal. 502 (1858) (noting that the CAL. CONST., art. I, § 4 proscribes "invidious" religious discrimination, but does not void ostensibly secular legislation such as a Sunday closing law that "advance[s] the interests of a sect or class of religionists"). See also BROWNE, *supra* note 102, at 123, 194–99 (accepting the right of "peculiar" Mormons settled around Salt Lake to chart their own political course).

monopolies, soaring population, financial panic, drought, and significantly misguided racial resentment.¹⁴² The NPC came up for debate twice. Although several amendments were proposed, only one was adopted that fortified the separation between church and state by *guaranteeing* religious free exercise without discrimination or preference. Delegate Vacquerel suggested striking the phrase “without discrimination or preference” and instead adding: “And the Legislature shall not, under any consideration, enact any law giving preference to any religious sect or mode of worship.”¹⁴³ Vacquerel argued that the change would ensure “that the Legislature should have nothing to do with the liberty of conscience of the people.”¹⁴⁴ Delegate Beerstecher offered an amendment that included the change that ultimately was adopted, substituting “guaranteed” for “allowed” in the section’s first sentence, and the delegate (O’Sullivan) who ultimately offered that successful change argued in support:

I shall support the substitute offered by my colleague . . . for this reason: the word “allowed,” in the second line of section four of the declaration of rights, as read to the committee, clearly implies the right to disallow or deny; in other words, instead of being an inherent right, it implies a privilege granted by somebody. Now, sir, any such assumption, by implication or otherwise, is, or should be, repugnant to every man. The word “guaranteed” is better, because it clearly implies an acknowledgment or guarantee of rights, and not the granting of them.¹⁴⁵

Delegate Hager offered a version of Pennsylvania’s Free Exercise Clause which mandated that “All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience No preference shall ever be given by law to any religious establishment or mode of worship.”¹⁴⁶ All of these amendments were rejected.

Delegate O’Sullivan proposed to strike out “allowed” and replace it with “guaranteed,” explaining:

142. GRODIN ET AL., *supra* note 106, at 9–11. Early in the convention, the delegates addressed a sentiment that the “no preference” clause enabled indirectly discriminatory actions, such as governmental enforcement of Sunday closing laws, that disproportionately impacted religious minorities. 1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA: CONVENEED AT THE CITY OF SACRAMENTO, SATURDAY SEPTEMBER 28, 1878, at 89, 120, 217–18 (1880) [hereinafter 1878 DEBATES Vol. 1] (citing petitions from mainstream Christian organizations supporting Sunday closing laws); *Id.* at 89, 120, 217–18, 224, 306, 376, 602–03 (citing petitions from Seventh-Day Adventists and other religious minorities opposed to such laws).

143. 1878 DEBATES Vol. 1, *supra* note 142, at 243.

144. *Id.*

145. *Id.*

146. *Id.*

I propose this amendment, because it is quite evident that the word "allowed" conveys the idea that the right to disallow or deny exists. Now, sir, I deny that any Government or any power on earth has a right to grant or deny freedom of religious belief. No such power exists, and where it is attempted to be enforced, it is simply despotism. Freedom of thought is inalienable. Our Government, being republican, should guarantee full liberty to the citizen in his actions. "Guarantee," therefore, is the proper word to be used in this case, because its meaning is in full accord with the genius of our institutions, which recognize the inalienable rights of all men.¹⁴⁷

The change passed nearly unanimously, with only three dissenting votes.¹⁴⁸ The 1878 convention otherwise left article I, section 4 unaltered.¹⁴⁹ These actions by the 1878 delegates concerning the NPC are consistent with the view that restrictions on state entanglements with religion were primarily intended to advance personal religious freedom, as reflected in contemporaneous California Supreme Court decisions.¹⁵⁰

Finally, the NPC was amended again in 1974 when the electorate adopted a streamlined version of article I, section 4 through an initiative constitutional amendment.¹⁵¹ The ballot argument in favor of Proposition 7 provided that the initiative was intended to "modernize

147. 3 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA: CONVENEED AT THE CITY OF SACRAMENTO, SATURDAY SEPTEMBER 28, 1878, at 1171 (1881) [hereinafter 1878 DEBATES Vol. 3].

148. *Id.*

149. The same delegate (O'Sullivan) later was far less successful in proposing an absolute bar on public funding for "any religious services in institutions controlled by the State," including by legislative chaplains. *Id.* at 1287. Another delegate sarcastically wondered if it would be better to "make it a felony for any one to read the Lord's Prayer within three miles of any public institution in this State." *Id.* at 1288. The proposal failed on a vote of 27-101. *Id.*

150. See, e.g., LINCOLN Vol. 1, *supra* note 120, at 541-44; BROWNE, *supra* note 102, at 474 (noting that individual rights are secured by the people and only protected by the government); 1878 DEBATES Vol. 3, *supra* note 147, at 1171 (noting that freedom of religion should be "guaranteed" by the state, not "allowed"); *Ex parte* Burke, 59 Cal. 6, 13 (1881) (upholding Sunday closing law as a secular exercise of police power); *Ex parte* Koser, 60 Cal. 177, 192 (1882) [upholding Sunday closing law as a secular exercise of police power]; *Evans v. Selma Union High Sch. Dist.*, 222 P. 801, 803 (Cal. 1924) (King James Bible, although affiliated with Protestantism, is a "recognized classic" that may be placed on public school library shelves given no impediments to stocking other holy books); *Gabrielli v. Knickerbocker*, 82 P.2d 391, 394 (Cal. 1938) (pupil who objected to Pledge of Allegiance on religious grounds may be expelled by public-school authorities seeking only to instill secular patriotic values); *Gospel Army v. City of L.A.*, 163 P.2d 704, 712 (Cal. 1945) (noting that the government must not yield its power to regulate conduct "characteristic of the secular life" because sect had a religious motivation to solicit charitable donations).

151. *Proposition 7: Declaration of Rights*, in CALIFORNIA VOTERS PAMPHLET: GENERAL ELECTION NOVEMBER 5, 1974, at 26, 27, 70 (1974) [hereinafter *Proposition 7*].

and shorten California's Constitution."¹⁵² Accordingly, the 1974 amendment to the NPC was merely a nonsubstantive rephrasing into contemporary language.¹⁵³

b. The NPC Requires Even Treatment of Religious Beliefs

Based on this historical review, and considered alone, it is possible to conclude that the NPC would permit the appearance of preferential treatment short of an Establishment Clause violation. But the text of the NPC is phrased as a guarantee of a personal right, and the overall history of the clause is at least not inconsistent with a focus on preserving individual religious liberty. Thus, standing alone the NPC is ambiguous as to the degree to which government must remain unaffiliated with any particular religious view, given the apparent conflict between the history of the clause and its plain meaning. As discussed below, the better view is that, particularly considered together with the other California religion clauses, the NPC requires even treatment of religious beliefs (or nonbeliefs) by state government, even in appearances.

In the broadest sense, the NPC requires state neutrality towards the free exercise rights of its citizens.¹⁵⁴ Under this provision, the state supreme court held that the illumination of a cross on the Los Angeles City Hall building showed an impermissible preference to Christianity, as preference "is forbidden even when there is no discrimination."¹⁵⁵ And a plurality of the state supreme court found that government sponsorship of religious invocations at public school ceremonies "appears to take positions on religious questions" in violation of the NPC.¹⁵⁶ At a minimum, under federal law it can present no *absolute* bar to governmental accommodation of religion, and so the NPC has been held to permit the exemption of religious organizations from landmark preservation laws.¹⁵⁷ As of this writing, however, the California Constitution's NPC awaits a binding interpretation by the California Supreme Court, as a majority of the state high court has yet

152. *Arguments in Favor of Proposition 7*, in CALIFORNIA VOTERS PAMPHLET: GENERAL ELECTION NOVEMBER 5, 1974, at 28, 28 (1974).

153. *Mandel v. Hodges*, 127 Cal. Rptr. 244, 257 (Ct. App. 1976).

154. *Cal. Educ. Facilities Auth. v. Priest*, 526 P.2d 513, 520 (Cal. 1974). *See also* CAL. CONSTITUTION REVISION COMM'N, PROPOSED REVISION OF ARTICLE I, ARTICLE XX, ARTICLE XXII OF THE CALIFORNIA CONSTITUTION 18 (1971).

155. *Fox v. City of L.A.*, 587 P.2d 663, 665 (Cal. 1978).

156. *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809, 820 (Cal. 1991).

157. *E. Bay Asian Local Dev. Corp. v. State*, 13 P.3d 1122, 1139 (Cal. 2000).

to definitively construe its reach.¹⁵⁸ It is clear, however, that the question remains open.¹⁵⁹

The opinions of the justices of the California Supreme Court considering the NPC present divergent views on its meaning. In one view, the clause presents an unyielding pillar of governmental neutrality towards all religious beliefs. In the other, the clause permits an appearance of preference that falls short of an official establishment of religion. The difference between these views is vast, and the decisions applying them are often inconsistent.

One position, best exemplified by Justice Mosk's concurrence in *Sands*, concludes that the Framers of the California Constitution intended to erect "a Jeffersonian wall of separation between church and state in California."¹⁶⁰ Under this view, the clause requires a policy of strict governmental neutrality toward religion by "seek[ing] to prevent government from giving *any* advantage to religion."¹⁶¹ Courts hearing a "no preference" challenge must determine "whether government has granted a benefit to a religion or religion in general that is not granted to society at large."¹⁶² And with the exception of cases where a religious group has been denied access to a limited public forum, Justice Mosk's view would impose an absolute bar without regard to any compelling government interest: "Once government bestows that differential benefit on religion, it has acted unconstitutionally in this state."¹⁶³

The other approach views the NPC as a permissive standard that supplements the existing prohibition against state establishment in the First Amendment and its "make no law" counterpart in article I, section 4. As stated by Justice Panelli in his *Sands* dissent, "the clause appears to add only the requirement that the state not prefer, or discriminate against, a particular sect."¹⁶⁴ His review of the proceedings

158. See *N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court*, 189 P.3d 959, 968–69 (Cal. 2008); *Catholic Charities v. Superior Court*, 85 P.3d 67, 91 (Cal. 2004); *E. Bay Asian Local Dev. Corp.*, 13 P.3d at 1139; *Smith v. Fair Emp't & Hous. Comm'n*, 913 P.2d 909, 931 (Cal. 1996) (plurality opinion); *Sands*, 809 P.2d at 834 (Lucas, C.J., concurring). See also *Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 788 (9th Cir. 2008).

159. *E. Bay Asian Local Dev. Corp.*, 13 P.3d at 1139.

160. *Sands*, 809 P.2d at 838 (Mosk, J., concurring).

161. *Id.* at 840. See also *E. Bay Asian Local Dev. Corp.*, 13 P.3d at 1143 (Mosk, J. dissenting).

162. *Sands*, 809 P.2d at 840.

163. *Id.* at 840 n.4.

164. *Id.* at 856 (Panelli, J., dissenting) ("Article I, section 4 . . . affords essentially the same guaranty of religious freedom and state neutrality as does the First Amendment . . ."). *Id.* at 945 (Baxter, J., dissenting).

of California's 1849 constitutional debates—relying heavily on the delegates' invitation of a daily convention prayer and expression of gratitude to "Almighty God" in the Preamble—suggested to him that the Framers condoned incidental religious expression in official proceedings.¹⁶⁵ Far from erecting a wall of separation, in Justice Panelli's view, the drafters' reliance on divine providence signals constitutional acceptance of "ceremonial prayer" such as invocations at public school graduation ceremonies.¹⁶⁶ The *East Bay Asian* decision evoked Justice Panelli's permissive construction of the NPC when stating in dicta that the NPC simply presents a check on direct government interference with personal religious liberty: "the plain language of the clause suggests . . . that the intent is to ensure that free exercise of religion is guaranteed regardless of the nature of the religious belief professed, and that the state neither favors nor discriminates against religion."¹⁶⁷

Justice Mosk's strict neutrality viewpoint has some support. Chief Justice Bird, concurring in *Fox*, reasoned that even a trivial showing of a Christian preference by a city's display of a cross was constitutionally impermissible.¹⁶⁸ California Attorney General Edmund G. Brown once observed that "it would be difficult to imagine a more sweeping statement of the principle of governmental impartiality in the field of religion" than that found in the NPC.¹⁶⁹ Due in part to this conclusion, he opined that voluntary Bible readings in public classrooms for sectarian purposes constituted an unconstitutional display of preference to Christianity.¹⁷⁰

Lastly, in the absence of a conclusive California Supreme Court decision, federal courts in the Ninth Circuit have essentially adopted Justice Mosk's bright line approach by finding that "California courts have interpreted the no preference clause to require that not only

165. *Id.* at 853–55.

166. *Id.* at 854–55. *Cf.* *Fox v. City of L.A.*, 587 P.2d 663, 682 (Cal. 1978) (Richardson, J., dissenting) (relevant Establishment Clause inquiry is "whether the *degree* of government's involvement in religion can reasonably be said to be 'substantial' or 'excessive.'").

167. *E. Bay Asian Local Dev. Corp. v. State*, 13 P.3d 1122, 1139 (Cal. 2000). *See also* *Catholic Charities v. Superior Court*, 85 P.3d 67, 103 (Cal. 2004). (Brown, J., dissenting) (free-exercise rights are better viewed as prohibiting state action that may be consistent with a mainstream belief but harmful to an alternative religious perspective). *But see E. Bay Asian Local Dev. Corp.*, 13 P.3d at 1139 ("[E]xemption is neither a governmental *preference* for or *discrimination against* religion.") (emphasis added).

168. *Fox*, 587 P.2d at 760 (Bird, C.J., concurring).

169. *Religion in Schools*, 25 Ops. Cal. Att'y Gen. 316, 319 (No. 53-266) (1955).

170. *Id.* at 318–20.

may a governmental body not prefer one religion to another, it also may not appear to be acting preferentially.’”¹⁷¹

Given the evidence of the drafters’ intent, neither of the approaches taken by Justice Mosk or Justice Panelli seems entirely correct. However, Justice Mosk’s view—that the NPC mandates strict state neutrality toward all religious beliefs, with government precluded from giving “any advantage” to a particular sect—has significant advantages.¹⁷² It provides certainty for government and potential litigants and, if achievable in practice, would lower the probability that any of the state’s countless activities would tend toward religious entanglement.¹⁷³ And the Justice Mosk view has gained some acceptance among federal courts.¹⁷⁴ Justice Panelli’s view on the other end of the accommodation spectrum relies on the openly Christian tone of the constitutional conventions to argue that the drafters condoned incidental religious expression in government activities.¹⁷⁵ But this proves too much—while that may have been true given the social customs of the nineteenth century, that observation does not dictate the same conclusion today, particularly given the subsequent amendments to the state charter by voters in 1974. Instead, the drafters’ alignment with California’s traditionally dominant religions at best supports a middle position of intent to permit *some* minimal appearance of religious preference *despite* the guarantee of religious liberty.

As discussed below, the existence *vel non* of support for either the Justice Mosk or the Justice Panelli view in the history of the NPC is not the final answer, as over time and with changes to the state constitution the zone wherein state action may properly assume the appearance of preferential treatment has significantly diminished. Considered in isolation, the NPC would require application of a difficult standard that adds little to existing protections under federal law and would fail to account for the distinct character of the California religion clauses. Accordingly, what is needed is an analysis that ac-

171. *Johnson v. Poway Unified Sch. Dist.*, No. 07-783, 2008 U.S. Dist. LEXIS 107665, at *41 (S.D. Cal. Sep. 4, 2008) (quoting *Tucker v. State of Cal. Dept. of Educ.*, 97 F.3d 1204, 1214 (9th Cir. 1996)).

172. *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809, 836–40 (Cal. 1991) (Mosk, J., concurring). *See also E. Bay Asian Local Dev. Corp.*, 13 P.3d at 1143.

173. *Cf. CAL. CIV. PROC. CODE* § 170.1(a)(6)(A)(iii) (West 2006) (allowing for judicial disqualification where there are factual grounds to “reasonably entertain a doubt that the judge would be able to be impartial”).

174. *See supra* note 142. *Johnson v. Poway Unified Sch. Dist.*, 2008 U.S. Dist. LEXIS 107665 at *41 (S.D. Cal., Sep. 4, 2008) (No. 07-783) (quoting *Tucker v. State of Cal. Dept. of Educ.*, 97 F.3d 1204, 1214 (9th Cir. 1996)).

175. *Sands*, 809 P.2d at 853–56 (Panelli, J., dissenting).

counts for *all* of the religion provisions in the state constitution, such as the one proposed here. In the end, while the NPC may be susceptible of either the Justice Mosk bright-line approach or the Justice Panelli flexible view, the choice between them is a false one, as the better answer is the incidental benefits standard discussed below.

2. Article I, Section 4: No Establishment of Religion

Before 1974, article I, section 4 read: “The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this State.” The present language of article I, section 4 dates from the adoption by initiative (Proposition 7) of a legislative constitutional amendment on November 5, 1974. Proposition 7 repealed article I, section 4 as formerly worded, and added a provision that “[t]he Legislature shall make no law respecting an establishment of religion.” This sentence is “virtually identical” to the Establishment Clause of the First Amendment to the United States Constitution: “Congress shall make no law respecting an establishment of religion.”¹⁷⁶ The analysis by the Legislative Analyst in the ballot pamphlet for Proposition 7 describes the measure in part:

DECLARATION OF RIGHTS. LEGISLATIVE CONSTITUTIONAL AMENDMENT. Reorganizes and substantively amends various provisions of Article I

. . . .

This proposition revises Article I of the State Constitution, which declares the fundamental rights of the people of the state

. . . .

Clarification of Existing Law [T]he proposition says that rights guaranteed by the State Constitution are not dependent on those guaranteed by the federal Constitution.

Federal Rights in State Constitution. The proposition puts the following three rights into the State Constitution. These rights presently are contained in the federal Constitution.

(a) The Legislature shall make no law respecting the establishment of religion.¹⁷⁷

The ballot argument in favor of Proposition 7 provides in part:

STRENGTHENS YOUR INDIVIDUAL RIGHTS

. . . Proposition 7 contains all of the rights presently enjoyed by Californians and places in our State Constitution some of the rights enjoyed by Californians as citizens of the United States, but which are not presently in our State Constitution. For example, Proposition 7 adds to our Constitution . . . a prohibition against

176. Fox v. City of L.A., 587 P.2d 663, 667 n.2 (Cal. 1978) (Bird, C.J., concurring).

177. Proposition 7, *supra* note 151, at 26.

the State's "establishment of religion". Those rights and safeguards are not presently in the California Constitution, but should be.¹⁷⁸

The California Supreme Court has held that the identity of language between California and Federal Establishment Clauses requires application of federal establishment analysis.¹⁷⁹ But given that the language of this initiative must be viewed in the context of the overall scheme of the 1974 revision, it is clear that Proposition 7 altered the overall tenor of article I, section 4.¹⁸⁰ When the electorate voted to reaffirm the NPC, it did so through consideration of a "package" that presented an expanded bundle of religious rights, and the express limitation on state-established religion comprised a new stick in that bundle. Moreover, the ballot argument indicates that the electorate intended the new language to bolster the existing anti-establishment protection.¹⁸¹ Accordingly, although the text of the NPC remained unchanged by the 1974 amendment, with the addition of express protection against establishment of religion, it is reasonable to conclude that this revision narrowed the zone wherein state action may permissibly assume the appearance of preferential action. This is particularly so given the text and judicial construction of article XVI, section 5, discussed below.

3. Article XVI, Section 5: No Aid to Religion

The text of article XVI, section 5 currently provides in full:

Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 3 of Article XVI.¹⁸²

178. *Arguments in Favor of Proposition 7*, *supra* note 152, at 28.

179. *E. Bay Asian Local Dev. Corp. v. State*, 13 P.3d 1122, 1138–39 (Cal. 2000).

180. *See Prof'l Eng'rs v. Kempton*, 155 P.3d 226, 239 (Cal. 2007) (noting that if "language is ambiguous . . . [the court] consider[s] extrinsic evidence of the enacting body's intent.").

181. *Arguments in Favor of Proposition 7*, *supra* note 152, at 28 ("Proposition 7 adds to our Constitution . . . a prohibition against the State's 'establishment of religion.' Those rights and safeguards are not presently in the California Constitution, but should be.").

182. CAL. CONST. art. XVI, § 5.

The current version of article XVI, section 5 has been renumbered numerous times, but it has always maintained substantially the same form. It first appeared in the 1879 constitution as article IV, section 30 and was renumbered with minor editing as article XIII, section 24 in 1966.¹⁸³ It was renumbered again as article XVI, section 5 in 1974 and is “materially identical” to its predecessors.¹⁸⁴

Article XVI, section 5 was a new provision added to the 1879 constitution. It is unique to California, having no federal analogue. The adoption of this broadly worded ban on government aid to religion in 1878 was especially significant given that the 1878–1879 convention considered and rejected a number of other provisions on religion, such as acknowledging the Christian character of the State and God as the source of civil authority, prohibiting blasphemy, and allowing Bible reading in public schools.¹⁸⁵ In rejecting those proposals, the 1878 delegates instead *emphasized* the separation of church and state by adding article XVI, section 5, adding a specific ban on state aid to sectarian schools in article IX, section 8, and retaining and strengthening the NPC in article I, section 4.¹⁸⁶

183. Proposition 1a, adopted 1966, included nonsubstantive edits and a renumbering: Fortieth, That Section 30 of Article IV is amended and renumbered to be Section 24 of Article XIII, to read:

SEC. 30. SEC. 24. Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the State state, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 22 21 of this article.

PROPOSED AMENDMENTS TO CONSTITUTION: PROPOSITIONS AND PROPOSED LAWS, GENERAL ELECTION app. at 8 (1966) (strikeout and bold in original).

184. *Fox v. City of L.A.*, 587 P.2d 663, 668 n.3 (Cal. 1978). (Bird, C.J., concurring). Article IV, section 30, originally numbered article IV, section 37, was adopted by constitutional convention May 7, 1879. It was renumbered as article XIII, section 24 and amended by the electors as Proposition 1a on November 8, 1966. article XIII, section 24 was repealed by the passage of Proposition 8 on the November 5, 1974 ballot, which also added current article XVI, section 5. Former article XVI, section 5, added November 6, 1928 (providing for the issuance and sale of bonds for the 1932 Olympiad) was repealed by the electors on November 6, 1962.

185. 1878 DEBATES Vol. 1, *supra* note 142, at 89, 120, 156, 217–18. See *Fox*, 587 P.2d at 668 (Bird, C.J., concurring).

186. As discussed below, article IX, section 8, adopted as part of the 1879 constitution, proscribes “any sectarian or denominational” teachings in public school and bars state sup-

During the 1878 convention, article XVI, section 5 was renumbered and proposed several times and in several different forms. The debates strongly support the conclusion that a majority of the delegates shared the conviction that the article XVI, section 5 ban on state aid to religion was total.¹⁸⁷ Delegate Andrews remarked “if there is anything that the people of this State are more unanimous upon than any other, it is that there shall be no subsidies granted, in any form or shape, to any private corporation, church, or otherwise.”¹⁸⁸ Even adding one exception caused a heated debate, as the delegates extensively argued over a narrow amendment to article XVI, section 5 to allow state aid to church-sponsored orphanages.¹⁸⁹ And after that, no other exception gained any support.¹⁹⁰

The argument over the orphans was partly technical, partly substantive, and it is impossible to determine for certain which of the various arguments made was conclusive, other than to overgeneralize the sentiment of those in favor as generally being consistent with the “benevolent purposes” of the convention.¹⁹¹ Some delegates simply were concerned that the convention’s intent to carve out an exemption would be frustrated by later judicial interpretation, or that the apparent conflict would at the very least cause significant judicial frus-

port for schools beyond state control. *Cal. Teachers Ass’n v. Riles*, 632 P.2d 953, 963–64 (Cal. 1981).

187. See *Imperial Merch. Servs., Inc. v. Hunt*, 212 P.3d 736, 741 (Cal. 2009) (under the rule of construction *expressio unius est exclusio alterius*—“to express or include one thing implies the exclusion of the other”—if exemptions are specified, courts may not imply additional exemptions absent a clear intent to the contrary) (citing BLACK’S LAW DICTIONARY 620 (8th ed. 2004)).

188. 1878 DEBATES Vol. 3, *supra* note 147, at 1273.

189. At the time of the 1878 debate current article XVI, section 3 was numbered article IV, section 22, which read in part:

No money shall be drawn from the treasury but in consequence of appropriations made by law, and upon warrants duly drawn thereon by the Controller; and no money shall ever be appropriated or drawn from the State treasury for the use or benefit of any corporation, association, asylum, hospital, or any other institution, not under the exclusive management and control of the State as a State institution; nor shall any grant or donation of property ever be made thereto by the State.

1878 DEBATES Vol. 1, *supra* note 142, at 363.

190. Indeed, on the morning after that amendment was adopted, it seems that the delegates had lost patience with the subject of regulating religion entirely, as Delegate O’Sullivan offered an impassioned speech supporting his amendment: “No money shall be appropriated for the payment of any religious services in institutions controlled by the State, or in either House of the Legislature.” The reaction was dismissive, and it was soundly rejected (27 ayes and 101 noes) after nothing resembling debate. 1878 DEBATES Vol. 3, *supra* note 147, at 1287–88.

191. *Id.* at 1273.

tration.¹⁹² One delegate expressed concern that subterfuge was involved in making the orphans exception even more explicit than it already was: “I hope this amendment will not pass. It looks to me like a trick. [Article XVI, section 3] provides, that notwithstanding anything contained in that or any other section, the Legislature shall have such power. This is only buncombe, and it is in bad taste to make buncombe here.”¹⁹³ The delegates also were concerned that a loophole was being opened through which religious sects, merely by affiliating themselves with orphanages, could qualify for state support.¹⁹⁴

192. For example, some delegates stated:

MR. BEERSTECHEER . . . We want this amendment [to article XVI, section 5, that it would not prevent the legislature from granting aid to orphans under article XVI, section 3(2)] in order to avoid the possibility of a construction by the Supreme Court, that these sections may conflict with each other. I don't want to take any chances. If we propose to do a thing let us do it thoroughly or not do it at all.

. . . .

. . . There may be a chance that the Supreme Court may decide adversely to [article XVI, section 3(2)] and in favor of [article XVI, section 5]. There is a possibility of doubt arising in the matter, and in order that there may not be any doubt I offer this amendment. It confers no additional power. I consider it necessary, and it has been considered necessary by a number of gentlemen versed in the law.

. . . .

MR. WILSON, of First District. Mr. President: As I understand it, section twenty-two, as it now stands, is the deliberate judgment of this Convention. They have adopted it. Now, if section thirty-seven is in conflict with it, it ought to be made consistent with it. It ought to be altered so as to be made to conform to section twenty-two. It will do no harm to insert this amendment. My own judgment as a lawyer is, that section twenty-two and section thirty-seven, as they now stand, are in conflict with each other, and it would require a very close construction by the Courts, and some torture and Judge-made law, to get out of section thirty-seven any authority to make these appropriations. The Court may very well say, that while section twenty-two allows aid to be granted to private institutions which are supporting and maintaining orphans, section thirty-seven prohibits the granting of aid to any such institutions which are under the control of any church or sectarian denomination. This would exclude the Hebrew Orphan Asylum, the Protestant Orphan asylums, and the Catholic asylums, because they happen to be under the control of churches. Therefore, the only orphan asylums that could receive aid would be those under the control of irreligious people and infidels. If they are under the control of the church they would be cut off.

Id. at 1272–73.

193. See *id.* at 1272, for the remarks of Mr. Filcher. “Buncombe” is a term describing an inconsequential speech made by a representative to Congress from Buncombe County in North Carolina, who made an inconsequential speech solely to please his constituents. *THE NEW OXFORD AMERICAN DICTIONARY* 228 (2d ed. 2005).

194. Arguing against the amendment, Mr. Howard said:

. . . I hope that the amendment of the gentleman from Sacramento will not be adopted. The effect of it is to authorize grants of money and donations to any religious society that can manage to connect itself with an asylum. I am opposed

At least one delegate suggested, possibly with some sarcasm, that the apparent conflict was no conflict at all and that the convention's intent indeed was to prevent state aid from being given to church-affiliated orphanages:

MR. REYNOLDS. Mr. President: I don't see any need in the world for this amendment. We have not authorized by [article XVI, section 3(2)], the Legislature to appropriate money to any religious creed, or church, or sectarian purpose, and I am astonished that the gentleman should assume that we have by offering such an amendment as this. [Laughter.]¹⁹⁵

There were several explanations for the orphan exemption, including Christian charity, avoiding religious discrimination, and simple economics. One delegate argued that preventing church-affiliated orphanages from receiving the same state aid provided to secular organizations amounted to religious discrimination:

MR. REDDY . . . Now, there is nothing in this section which prohibits the appropriation of money for the support of orphans in charge of non-religious people. Those having the religious code of morals would be debarred from having charge of orphans, the very ones, it seems to me, who ought to have charge of them. The result

to that. If the authors of the American revolution achieved anything, or one thing more particularly than another, it was the separation of church and State.

Now, sir, I am opposed to all measures by which any connection between church and State can be run in. What is the effect of it? Suppose a Buddhist church establish itself, as has been threatened, in San Francisco? It is a religious sect. Suppose it connects itself with the support of orphans? Then the Legislature can grant to it donations of money, and in that way uphold the sect; and so with every other sect. Suppose that the Chinese—as they will do if they are permitted to continue coming here, and get their right of suffrage—connect their Joss houses with the support of orphans, or charities of some other character? Then the Legislature may make an appropriation to support a Joss house. It seems to me that we are running wild upon this subject. We ought to take care that we do not infringe upon the principles of the American Government, and that is by the State not to support any church or any religious creed. In what we have done the other day, we have gone far enough, God knows, and let us stop there. It seems to me that the proposition that you will support a church because it connects itself with some charity, is perfectly monstrous, and this Convention ought to set its face against it.

2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA: CONVENEED AT THE CITY OF SACRAMENTO, SATURDAY SEPTEMBER 28, 1878, at 819 (1881) [hereinafter 1878 DEBATES Vol. 2].

The delegate from Sacramento, Mr. Freeman, proposed to amend article XVI, section 5 to add: "Nothing in this section contained shall prohibit the granting of aid by the State to institutions or associations for the maintenance of orphans, half orphans, abandoned children, or indigent persons, although such institutions or associations be under the control of some religious sect or association." *Id.* at 819. The proposed amendment was rejected. *Id.* at 820.

195. 1878 DEBATES Vol. 3, *supra* note 147, at 1272.

is that these non-sectarian gentlemen would have made a deliberate attack upon all religions. You do not deny a man the right of being a juror, or a witness, or anything else, on account of his religious belief, but you do deny him the right of taking care of these orphans on account of his religion The fact that a man has a religious belief ought not to exclude a man from making a contract with the State for the support of these orphans, and accepting pay therefor.¹⁹⁶

The economic argument was that it simply was more cost-effective for private institutions to care for the orphans:

MR. SHAFTER I am not a very religious man but I have some heart left [Article XVI, section 5] does not contain any such language as was attributed to it by the gentleman from Place, Mr. Filcher [T]his money is given and paid over to these institutions, not for the support of schools or churches, but for a certain given purpose I say it is far cheaper and much better to have these orphans taken care of in this way than it would be to have them all in one institution, under the charge of State officers.”¹⁹⁷

The key exchange on whether the orphans exception was strictly limited, or allowed a broader exemption for any charitable purpose, features an explicit question about the intended breadth of the orphans exception, and a reassuring answer:

196. 1878 DEBATES Vol. 3, *supra* note 147, at 1273.

197. *Id.* The economic argument also was made in a minority report from the committee that drafted the article on the legislature that contained the conflicting provisions:

MR. PRESIDENT: The undersigned members of the Committee on Legislative Department dissent from the conclusions arrived at by a majority of the committee as to State aid to the various charitable and benevolent institutions that have hitherto cared for the orphaned wards of this State It is the purpose of the majority of your committee to destroy existing institutions which, as agents of the State, perform a portion of the functions of government Yet the majority have not pointed out any way in which the places of these institutions are to be filled in the economy of government. None will be so reckless as to assert that the State must not, in some form or other, care for them; and the only alternative . . . would be the creation of costly asylums and the multiplication of public offices and commissions to manage them. That such a course would be unwise and would result in a lower grade of service at an increased cost, is a proposition which the undersigned believe cannot be successfully controverted.

. . . .

But above the question of costs there stands another as to the efficiency of the service, and the undersigned have no hesitation in asserting that the destinies of the orphans are better placed in the hands of the good men and women of this State, who perform the duty as a labor of love, than they would be in the hands of officers chosen at random and paid with gold for their services.

We believe that under the present system the good of the orphans and of the State is best subserved. That under this system the ends of government have been fully met in the “best service at the least expense.

1878 DEBATES Vol. 1, *supra* note 142, at 364–65.

MR. LAINE. Didn't you draft that amendment to section twenty-two?

MR. WILSON. Yes, sir.

MR. LAINE. Why did you put that proviso in, "notwithstanding anything contained in this or any other section?"

MR. WILSON. Because I saw a determination on the part of some gentlemen to cut off these children, and to pursue each section of this article to the end, with the same hostility. That is the reason. There have been three distinct assaults made. Therefore I prefer, as far as I am concerned, to repel them with three distinct matters of defense. It will cut these asylums off, because it is well known that all of them, or nearly all, are under the management of some religious sect.

. . . .

MR. STUART. *I ask the gentleman if this [exception for aid to orphanages] will not open the treasury for others?*

MR. WILSON. *Not at all, sir. It does not extend any further than section twenty-two. That is the extent of the amendment.* I am just as much opposed as any gentleman upon this floor to any union of church and State. But I do not look upon this as State aid to a church. It is for the orphans. It is aid granted to these unfortunate children. And because they happen to be under the care of good, pious people, I do not see that it is any reason why they should be cut off. These children cannot control their own destinies. Every child is born under some religious faith—Catholic, Protestant, or Hebrew. They cannot help being orphans; they cannot help themselves. Why should they be cut off and disowned by the State, because they happen to be in charge of good, pious people, who are devoting their lives in caring for the poor and lowly. Gentlemen who are in favor of granting this aid should vote for this amendment.¹⁹⁸

It seems clear from the debates that the consensus among the delegates was that the conflict should be resolved in favor of allowing *only* a limited exception for state aid to sectarian orphanages, and article XVI, section 5 was approved by a wide margin (94 ayes and 33 noes).¹⁹⁹

198. 1878 DEBATES Vol. 3, *supra* note 147, at 1273 (emphasis added).

199. *Id.* Compare *Bradfield v. Roberts*, 175 U.S. 291 (1899), where the Supreme Court held that it did not violate the Establishment Clause for Congress to construct a hospital building for caring for poor patients, although the hospital was managed by sisters of the Roman Catholic Church. The Court reasoned: "That the influence of any particular church may be powerful over the members of a non-sectarian and secular corporation, incorporated for a certain defined purpose and with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body." *Id.* at 298.

4. Article IX, Section 8: No Sectarian Education

In a similar vein, article IX, section 8 of the California Constitution bars state support for religious schools. The current text of the provision states:

No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State.²⁰⁰

This section first appeared in the 1879 constitution and has remained unchanged.²⁰¹ This provision of the state constitution is self-executing, requiring no legislation to enforce it.²⁰² As originally proposed, article IX, section 8 read in similar terms to the final version, and it was later shortened and renumbered, again having substantially the same meaning: “No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools.”²⁰³

200. CAL. CONST. art. IX, § 9.

201. One amendment, proposed by Senate Const. Amend. No. 40 (1982), was rejected by the electorate as Proposition 9 at the general election held on November 2, 1982. The November 2, 1982 ballot pamphlet for Proposition 9 would have retained the existing text of article IX, section 8 and designated it as subdivision (a), and added a subdivision (b) to read as follows: “Notwithstanding subdivision (a) and Section 5 of Article XVI, the provision of textbooks to pupils attending schools other than the public schools, pursuant to subdivision (b) of Section 7.5, may not be construed as an appropriation for the support of any school.” The ballot argument against Proposition 9 read in part:

In 1981 a unanimous California Supreme Court (in *Riles*, 29 Cal.3d 794) declared that spending public money to provide textbooks for nonpublic school pupils was unconstitutional. This amendment would overrule that court decision The constitutional guarantee of separation of church and state means the freedom to go to a religious school, but not at public expense. Providing free textbooks would be a direct public subsidy of private and religious schools At best, Proposition 9 is a smokescreen for government handouts to private and religious institutions at the expense of the public schools. At worst, it opens a floodgate of constitutional questions and legislative efforts designed to radically alter our system of education in California.

This ballot argument echoes the concerns of the delegates to the 1878 convention that the orphans exception to article 16 section 5 would “open the treasury to others.” 1878 DEBATES Vol. 1, *supra* note 142, at 819; 1878 DEBATES Vol. 3, *supra* note 147, 1273.

202. *People ex rel. Beckwith v. Bd. of Educ.*, 55 Cal. 331, 334 (1880).

203. 1878 DEBATES Vol. 1, *supra* note 142, at 693. *See also* 1878 DEBATES Vol. 2, *supra* note 194, at 1099 (discussing how “sectarian” should be address in schools); 1878 DEBATES Vol. 3, *supra* note 147, at 1265 (discussing how “denominational” should be addressed in schools). The original proposal for article IX, section 8 read: “*Resolved*, That neither the General Assembly, nor any county, town, township, school district, municipal or other corporation, shall ever make any appropriation to, or pay from any public fund whatever, anything in aid of any sectarian purpose, or to help support or sustain any school, acad-

Most notably, article IX, section 8 developed out of the same dialogue at the 1878 convention that spawned article XVI, section 5. The comments made during these debates suggest a delegation focused on schools as a place where government entanglement with religion promised particularly weighty consequences. Discussion of separate amendments to prohibit religious teachings and sectarian texts in public schools illustrates this point.

MR. RINGGOLD. There is more in that amendment [to also preclude sectarian texts] than you may suppose. I could mention the name of a lady teacher in San Francisco, who makes a business of knowing the particular faith of the parents or guardians of the children in her class, and I assure you that some of the children are more favored than others. The thing is done often, and I want to guard against any such influence in our public schools.

. . . .

MR. WILSON, of First District. [commenting on the more comprehensive ban] Mr. Chairman: I am in favor of the amendment proposed by the gentleman from San Francisco. It is a very proper addition to section nine. The section prohibits the appropriation of public moneys to the support of sectarian schools, but it does not go far enough and prevent the teaching of sectarian doctrines in the common schools. Therefore it seems to me to be a very proper amendment to adopt. The amendment of the gentleman from Santa Clara is on the same subject, but in my judgment is not so comprehensive as the other. One excludes such books, while the other goes farther, and says that no such instruction shall be given, directly or indirectly. It not only includes the exclusion of books of that character, but forbids any instruction of that kind, in any way whatever. Therefore I think it covers all that is intended by the gentleman from Santa Clara²⁰⁴

A long line of California authorities is in accord with this interpretation.²⁰⁵ In sum, the adoption of article IX, section 8 contempora-

emy, seminary, college, or university, or other institution of learning controlled by any sectarian denomination whatever; nor shall any grant or donation of land or personal property ever be made by any such public corporation for any sectarian purpose whatever. Reading dispensed with. Referred to the Committee on Education." 1878 DEBATES Vol. 1, *supra* note 142, at 83.

204. 1878 DEBATES Vol. 2, *supra* note 194, at 1109.

205. See, e.g., *Evans v. Selma Union High Sch. Dist.*, 222 P. 801 (Cal. 1924) (purchase of the King James version of the Bible for a public school library does not imply school adoption of the dogma therein in violation of article I, section 4); *Gordon v. Bd. of Educ.*, 178 P.2d 488 (Cal. 1947) (statute allowing schools to excuse pupils so that they may participate in religious exercises or to receive religious instruction does not violate article IX, section 8, even though schools furnished cost of preparing literature and registration cards); *California Teachers Ass'n v. Riles*, 632 P.2d 953 (Cal. 1981) (statute authorizing superintendent of public instruction to lend, without charge, textbooks used on public schools to students attending nonpublic schools, and which provided funds for that purpose, violates article XVI, section 5); *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745 (Ct. App. 1999).

neously with article XVI, section 5 strongly supports the conclusion that the drafters of the 1879 constitution intended to create a stringent safeguard against state support for religious indoctrination in public schools.²⁰⁶

D. Synthesis of the California Constitution Religion Provisions

1. Introduction

The various provisions in California's Constitution relating to church-state relations must be read together to create a comprehensive regulatory scheme: free exercise and enjoyment of religion without discrimination or preference are guaranteed; no law respecting an establishment of religion can be enacted; no aid can be given to sectarian education; the University of California is required to be free from sectarian influence; the legislature may exempt real property used exclusively for religious worship from property taxation; and no aid may be given to religion (except for orphanages).²⁰⁷ The usual principles

There are a number of Attorney General opinions similarly construing article IX, section 8. *See* 76 Ops. Cal. Att'y Gen. 52, 52 (No. 91-808) (1993) (noting that the state may allow religious organizations which lack suitable facilities limited access to public school facilities for use on Sunday, or other noninstructional time, so long as the organization is charged an amount at least equal to the school district's direct costs); Educational Voucher Program, 64 Ops. Cal. Att'y Gen. 61, 61-62 (No. 80-109) (1981) (noting that a private school, not church-operated, offering a religious-oriented curriculum or related religious activities on a voluntary basis could constitutionally qualify to receive voucher funding if the effect of the government aid had only a "remote, indirect, and incidental" effect upon religion and adequate provisions were made to ensure that the public funds thus provided were used only for secular purposes; however a private school, not church-operated that "mandates" its pupils to participate in a religious-oriented curriculum would be eligible for such voucher funding only if it met the criteria by which a voluntary religious program would be tested and, in addition, the school were determined not to be a "sectarian" or "religious" school); Religion in Schools, 25 Ops. Cal. Att'y Gen. 316, 318-23 (No. 53-266) (1955) (noting that religious prayers may not be part of public school curriculum, selections from Bible may not be read in schools for religious purposes, though the Bible may be used for reference, historical, or other nonreligious purposes, and the Gideon Bible may not be distributed by the public school system). *But see* Private Colleges, 29 Ops. Cal. Att'y Gen. 91, 91-92 (No. 57-24) (1957) (no constitutional objection to state furnishing without charge state-adopted textbooks to colleges and universities operated by private persons, corporations, or churches with accredited teacher training programs, for primary purpose of acquainting students in teacher training courses with state adopted books then in use).

206. One California court construing the "exclusive control" language in article IX, section 8 looked back at the legislative history of the provision and found that it was included as an expression of concern about funding "any opposition system of schools against the common schools of the state." Bd. of Trs. of the Leland Stanford Junior Univ. v. Cory, 145 Cal. Rptr. 136 (Ct. App. 1978). But public support for private organizations that only incidentally impart scholastic instruction while pursuing a secular mission have been upheld. *Id.* at 663 (citing *Aid Soc'y v. Reis*, 12 P. 796 (Cal. 1887)).

207. CAL. CONST. art. I, § 4, art. IX, § 8. 9(f), art. XIII, §§ 3-5, art. XVI., § 5.

of constitutional construction require them to be harmonized.²⁰⁸ The general rule of construction in the state constitution itself provides that its provisions are mandatory and prohibitory, unless expressly declared to be otherwise.²⁰⁹ Nothing about the text of the religion clauses indicates that they were intended to be optional. Finally, the Religion Clauses must be interpreted in the context of the guarantee in the California Constitution that “[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.”²¹⁰ As a result, these state constitutional provisions require the California government to ensure that citizens of different religious beliefs can live together in mutual tolerance and respect by maintaining strict neutrality in religious matters, accommodating religion only as reasonably necessary, and otherwise permitting only generally available incidental benefits to accrue to religion.

California courts have declined opportunities to synthesize the religion clauses in the state constitution. The current California rule is that the identity of the language in the California and Federal Establishment Clauses requires state action reached by either provision to be decided under the Supreme Court’s *Lemon* standard.²¹¹ Cogent

208. CAL. CONST. art. I, §§ 24, 26; *Greene v. Marin Cnty. Flood Control & Water Conservation Dist.*, 231 P.3d 350, 357–58 (Cal. 2010) (noting that constitutional interpretation requires ascertaining drafters’ intent, looking first to the language, giving the words their ordinary meaning and considering extrinsic evidence only if the language is ambiguous); *Harbor v. Deukmejian*, 742 P.2d 1290, 1298 (Cal. 1987) (related constitutional provisions must be read together, harmonizing related provisions without distorting their apparent meaning, giving effect to the whole scheme); *Serrano v. Priest*, 487 P.2d 1241, 1249 (Cal. 1971) (constitutional provisions will be reasonably construed to avoid conflict).

209. CAL. CONST. art. I, § 26 provides: “The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.”

210. CAL. CONST. art. I, § 24 provides in part: “Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.” See also *Fox v. City of L.A.*, 587 P.2d 663, 663 (Cal. 1978).

211. *E. Bay Asian Local Dev. Corp. v. State*, 13 P.3d 1122, 1138 (Cal. 2000); *Johnson v. Huntington Beach Union High Sch. Dist.*, 137 Cal. Rptr. 43, 51 (Ct. App. 1977), cert. denied, 434 U.S. 877 (equating state and Federal Establishment Clauses); *Mandel v. Hodges*, 127 Cal. Rptr. 244, 257 (Ct. App. 1976). The California Supreme Court resolved this question in *E. Bay Asian* after it was left open in *Sands*: “Although federal cases may supply guidance for interpreting this provision, California courts must independently determine” the scope of the Establishment Clause in article I, section 4, as required by article I, section 24. *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809, 820 (Cal. 1991). However, the portion of *Sands* considering the state constitutional provisions did not command a majority:

[T]hree justices have concluded that the practice violates our state Constitution, two have concluded it does not, and two (myself included) have declined to reach any state constitutional issues. Therefore, our judgment does not rest on the state Constitution; any resolution of the state constitutional issues will necessarily await another day.

Id. at 833 (Lucas, C.J., concurring).

and persuasive reasons exist for departing from high court authority where interpretation of the religion clauses of the state constitution as a whole is concerned. Decisions of the Supreme Court, while not binding on questions of California constitutional law, ordinarily will not be departed from in the absence of cogent and persuasive reasons.²¹² Such a reason exists when “clear differences in the language and history of [state and federal] constitutional provisions may show that they are not truly parallel.”²¹³

The unique religion provisions in the text of the California Constitution, the history of their amendments, the expressed intent of the drafters, and past judicial interpretations, all demarcate the clear differences in state and federal law providing cogent and persuasive reasons to develop a distinct state religion analysis. Because the California Constitution contains significant textual differences that impose greater restrictions on state aid to religion, the California Constitution requires a stricter separation between church and state within the outer bounds set by federal law.²¹⁴ Under the California religion clauses, there is less room for religious influence in government and public contexts, as it is impossible to honor one religious view without neglecting all the others. Thus, even if the two Establishment Clauses are equivalent, because the California Free Exercise Clause requires stricter observance of neutrality, the balance of establishment and free exercise necessarily changes in the state analysis. This means at the very least that California’s incidental benefits rule and NPC require a restrictive application of the accommodation principle. Accordingly, when the proper case presents the issue, the California Supreme Court should take the opportunity to reconcile all of

212. *Raven v. Deukmejian*, 801 P.2d 1077, 1088 (Cal. 1990).

213. *Sands*, 809 P.2d at 835 (Lucas, C.J., concurring) (“[C]lear differences in the language and history of [state and federal] constitutional provisions may show that they are not truly parallel . . .”). Decisions of a state supreme court interpreting that state’s constitution are unreviewable in the federal courts under the independent state law grounds rule. *Michigan v. Long*, 463 U.S. 1032, 1037–44 (1983) (clear statement of “adequate and independent state ground of decision” in state court opinion precludes Supreme Court review).

214. *Fox*, 587 P.2d at 665. Federal religion doctrine “may not be that comprehensive.” *Id.* For example, because the California Constitution bans preference *or* discrimination in the disjunctive, preference “is forbidden even when there is no discrimination.” Although in isolation the State Establishment Clause must be viewed as equivalent to the Federal Establishment Clause, the unique California NPC compels a significant difference in application. This is particularly true for cases arising at the intersection of establishment and free exercise doctrine, each requiring observance and balance with the other, to give both effect without overvaluing one.

the California constitutional provisions on religion with a unified analysis such as that proposed here.

2. The Distinct California Incidental-Benefits Standard

The California incidental-benefits standard is derived from article XVI, section 5, and was first stated in *California Education Facilities Authority v. Priest*. In that case, the state supreme court considered a program whereby the proceeds from public bonds were made available to all schools, regardless of religious affiliation, for building and maintaining facilities; no public funds were expended, as the benefited schools repaid the bonds through a leasing program.²¹⁵ *California Education Facilities Authority* thus involved a universal benefit—something that is available to all regardless of religious belief.²¹⁶ But even this apparently neutral school bond measure came within the broad ambit of article XVI, section 5 and required an incidental-benefits analysis. The *California Education Facilities Authority* court stated the incidental-benefits test as follows:

[T]he provision was intended to insure the separation of church and state and to guarantee that the power, authority, and financial resources of the government shall never be devoted to the advancement or support of religious or sectarian purposes. Under this section, the fact that a statute has some identifiable secular objective will not immunize it from further analysis to ascertain whether it also has the *direct, immediate, and substantial effect of advancing religion*.

.....
The section has never been interpreted, however, to require governmental hostility to religion, nor to prohibit a religious institution from receiving an *indirect, remote, and incidental benefit* from a statute which has a *secular primary purpose*.²¹⁷

Importantly, this standard was not limited to money grants:

We do not read [article XVI, section 5] so narrowly. Its terms forbid granting “anything” to or in aid of sectarian purposes, and prohibit public help to “support or sustain” a sectarian-controlled school. The section thus forbids more than the appropriation or payment of public funds to support sectarian institutions. It bans

215. Cal. Educ. Facilities Auth. v. Priest, 526 P.2d 513, 514–15 (Cal. 1974).

216. The free exercise provision of article I, section 4 was not in play in *California Education Authority* because the issuance of school bonds could not impair anyone’s freedom of belief, nor was article IX, section 8 implicated because no public money was involved and no sectarian education support was at hand. That posture resolved the facial invalidity issue, but it provides an incomplete explanation by avoiding the concern that the effect of using bond proceeds to benefit religious schools certainly is a benefit to a sectarian institution.

217. Cal. Educ. Facilities Auth., 526 P.2d at 520–21 (emphasis added, citations omitted).

any official involvement, whatever its form, which has the direct, immediate, and substantial effect of promoting religious purposes.²¹⁸

This is consistent with the NPC in article I, section 4, as even a nonfinancial substantial benefit to religion can create the appearance of an impermissible preference in violation of the anti-establishment element of that provision. Following the *California Education Facilities Authority* construction of article XVI, section 5, the incidental-benefits standard imposes the broadest and strictest ban on state involvement in religion of all the state religion clauses, and as such should be outcome-determinative in a comprehensive religion framework. The California Attorney General has called article XVI, section 5 “the definitive statement of the principle of government impartiality in the field of religion” and has opined that article XVI, section 5 “prohibits the use of any public funds to aid any religious or sectarian purpose.”²¹⁹

The standard for challenges under article XVI, section 5 can be generally stated as follows:

Where the main purpose of an act is lawful, an incidental or immaterial benefit may result to some religious organization.²²⁰ But when an impermissible religious preference has objectively resulted, as when a substantial benefit is conferred, the law is unconstitutional.²²¹ Even the appearance of a preference is a substantial enough benefit to violate Article XVI, section 5.²²²

There is no *de minimis* exception to the explicit command in article XVI, section 5 that no public entity “shall ever . . . pay from any public fund whatever, or grant anything to or in aid of any religious sect.” This section prohibits not only material aid to religion, but *any*

218. *Id.* at 522 n.12.

219. Tax Funds, 37 Ops. Cal. Att’y Gen. 105, 109 (No. 60-106) (1961) (tax funds cannot be used to support the production of a dramatized version of the Gospel); Leasing of Vacant Public School Classrooms by Sectarian Institution, 60 Ops. Cal. Att’y Gen. 269, 276 (No. CV76-247) (1977) (noting that sectarian institutions may not lease vacant classrooms in public schools to conduct religious education). Attorney General opinions are entitled to great weight, and extra weight should be accorded Attorney General opinions in areas of special expertise. *Lexin v. Superior Court*, 222 P.3d 214, 238 n.17 (Cal. 2010); *Cal. Ass’n of Psychology Providers v. Rank*, 793 P.2d 2, 11 (Cal. 1990). An Attorney General opinion is particularly persuasive in the absence of controlling authority, and when the Legislature (which is presumed to know of an Attorney General construction) takes no corrective action. *Cnty. of San Diego v. State*, 931 P.2d 312, 334–35 (Cal. 1997); *Rank*, 793 P.2d at 11.

220. *Cal. Educ. Facilities Auth.*, 526 P.2d at 520–21; *Bowker v. Baker*, 167 P.2d 256, 261 (Cal. Dist. Ct. App. 1946).

221. *Cal. Educ. Facilities Auth.*, 526 P.2d at 522 n.12.

222. *Id.* at 520–21; *Fox v. City of L.A.*, 587 P.2d 663, 665 (Cal. 1978) (under article I, section 4 preference is forbidden even when there is no discrimination).

official involvement that promotes religion.²²³ The actual transfer of public funds is unnecessary, as aid to religion in any form is barred; simply allowing sectarian access to the name and resources of the government would violate article XVI, section 5, as governmental authority and prestige is a sufficiently substantial benefit.²²⁴ Article XVI, section 5 “was intended to insure the separation of church and state and to guarantee that the power, authority, and financial resources of the government shall never be devoted to the advancement or support of religious or sectarian purposes.”²²⁵

However, even the seemingly strict *California Education Facilities Authority* test is deceptively flexible. On one hand, the *California Education Facilities Authority* court emphasized that article XVI, section 5 forbids *all* forms of governmental aid to religion, whether in the tangible form of cash or in the intangible form of prestige and preference: “It bans any official involvement, whatever its form, which has the direct, immediate, and substantial effect of promoting religious purposes.”²²⁶ As a result, whether a statute has a secular objective is irrelevant to the article XVI, section 5 analysis necessary to determine whether the act has the direct and substantial effect of advancing religion.²²⁷ On the other hand, article XVI, section 5 does not require “governmental hostility to religion” since it permits a religious institution to receive “an indirect, remote, and incidental benefit from a statute which has a secular primary purpose.”²²⁸

Despite expounding on the expansive nature of the prohibition in article XVI, section 5 against granting “anything” in aid of sectarian purposes, the *California Education Facilities Authority* decision upheld a bond act that allowed religious schools to build or maintain facilities with funds from a government agency’s public bond sales. Rather than viewing this as a transfer of the proceeds from a public debt offering to private religious institutions, in determining that the bond act did not have the substantial effect of supporting religious activities,

223. *Cal. Educ. Facilities Auth.*, 526 P.2d at 522 n.12.

224. *Fox*, 587 P.2d at 671–72 (Bird, C.J., concurring).

225. *Cal. Educ. Facilities Auth.*, 526 P.2d at 520.

226. *Id.* at 522 n.12.

227. *Id.* at 520; *Frohlinger v. Richardson*, 218 P. 497, 501 (Cal. Dist. Ct. App. 1923). Consequently, public financing for a film of a religious parade depicting the life of Jesus Christ violates this provision even though the film had the secular purpose of publicizing county attractions in order to promote tourism. *Cnty. of L.A. v. Hollinger*, 34 Cal. Rptr. 387 (Dist. Ct. App. 1963). Similarly, public financing of the restoration of a mission owned by a religious organization is barred even though historical interests were served. *Frohlinger*, 218 P. at 500.

228. *Cal. Educ. Facilities Auth.*, 526 P.2d at 521.

the court focused on several factors: the “generally available” element (the fact that the benefits of the bond act were granted to sectarian and nonsectarian colleges on an equal basis), the facial neutrality of the act (all aid for religious projects was prohibited), and the fact that no financial burden was imposed upon the state (benefited schools repaid the bonds).²²⁹ The court also gave deference to the legislative finding that the bond act’s primary purpose of supporting the maintenance and improvement of higher education facilities advanced legitimate public ends.²³⁰ Thus, although “in certain subtle respects” the bond act appeared to approach state involvement with religion, “we cannot say that in the abstract it crosses the forbidden line.”²³¹

The incidental-benefits analysis was refined in *California Teachers Ass’n v. Riles*, where the challenged statutes authorized the Superintendent of Public Instruction to lend free public school textbooks to students attending nonprofit nonpublic schools and provided funds for that purpose.²³² The *Riles* court asked whether the program only indirectly benefited religion and qualified the character of the benefit

229. *Id.* at 522. Contrast the plurality decision in *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (upholding school book program that included sectarian schools on grounds that neutrality principle requires upholding aid offered to a broad range of groups or persons without regard to their religion); *Agostini v. Felton*, 521 U.S. 203, 231 (1997) (noting that government aid can be made available to both religious and secular beneficiaries on a nondiscriminatory basis).

230. *Cal. Educ. Facilities Auth.*, 526 P.2d at 521–22.

231. *Id.* at 522. *California Education Facilities Authority* also should be viewed in its context. Falling within the school subcategory, *California Education Facilities Authority* involved the two school-specific factors of the public incentive to support education and the need to avoid aid to sectarian instruction; in the union of those constitutional values, under federal law the program was constitutional because a state may “provide church-related schools with secular, neutral, or nonideological services, facilities, or materials.” *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971); *Cal. Educ. Facilities Auth.*, 526 P.2d at 518. *See also* *Cal. Teachers Ass’n v. Riles*, 632 P.2d 953, 964 n.16 (Cal. 1981) (distinguishing *California Education Facilities Authority* because the statute considered in that case provided assistance to college students, its benefits were restricted to colleges that did not require students to receive religious instruction, and it did not involve the expenditure of public funds for the support of sectarian schools.). One view of this decision and its incidental-benefits rule is that it is “at odds with both the absolutist language of article XVI, section 5 and with the framers’ intent in enacting that section.” Simon, *supra* note 81, at 530–31. The better view is that even absolute principles must bow to some practical necessity. Indeed, the whole of the religion decisions can be characterized accurately as seeking a practical balance between the Establishment and Free Exercise Clauses, each being an equally opposing absolute principle. Just as absolute separation of powers is neither achievable nor desirable, a slavish devotion to principle regarding one or the other religion clause results in at best a victory of form over substance, and at worst, in an unwarranted discrimination against a competing principle.

232. *Riles*, 632 P.2d 953.

conferred by the program.²³³ A unanimous court held the statutes unconstitutional because they violated the twin prohibitions in article IX, section 8 and in article XVI, section 5 forbidding the appropriation of money for sectarian schools, as the benefit to religious schools provided by the statute was neither indirect nor remote.²³⁴ Moreover, by providing textbooks at public expense, the loan program appropriated money to advance the sectarian educational function of the schools.²³⁵ Providing free textbooks to sectarian schools amounted to a direct, substantial benefit, beyond the general government services available to all state citizens.²³⁶ However, the *Riles* court did not define a standard for distinguishing between direct/indirect and substantial/insubstantial benefits, instead focusing on the distinction between providing textbooks at public expense (which appropriates public

233. *Id.* at 962.

234. *Id.* at 962–64. Several other states have constitutional provisions similar to article XVI, section 5, which have been interpreted by their respective state courts to have similarly broad scope to ban anything other than indirect and insubstantial aid. *See id.* at 963 (“Nebraska’s provisions are virtually identical to section 5 of article XVI of the California Constitution.”); *Gaffney v. State Dep’t of Educ.*, 220 N.W.2d 550, 553–54 (Neb. 1974) (Nebraska article VII, section 11 “says what it means and means what it says” and prohibits aid from public funds to nonpublic schools “in any manner, shape, or form”); *Almond v. Day*, 89 S.E.2d 851 (Va. 1955); *Dickman v. Sch. Dist. No. 62C*, 366 P.2d 533 (Or. 2001); *Epeldi v. Engelking*, 488 P.2d 860 (Idaho 1971).

235. *Riles*, 632 P.2d at 962–64.

236. The *Riles* court explained:

. . . [I]t is an undeniable fact that books are a critical element in enabling the school to carry out its essential mission to teach the students.

. . . .

By providing textbooks at public expense, the loan program appropriates money to advance the educational function of the school. In this respect the program is distinguishable from generalized services government might provide to schools in common with others, such as fire and police protection, the maintenance of roads and sidewalks, and similar public services. These services, unlike education, have no doctrinal content, and they do not advance the essential objective of the sectarian school, which is the education of the child.

Id. at 963 (citation and quotation omitted).

Compare *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), where the Supreme Court held that a law providing school busing at public expense to all schools, secular public and religious private, was a valid general program to assist parents, regardless of religion, to get their children to school safely and expeditiously. The Court acknowledged that the contribution of tax funds for the support of an institution which teaches the tenets of any church is unconstitutional but reasoned that providing free transportation to children was a safety measure analogous to providing traffic policemen, fire protection, sewage disposal connections, or streets and sidewalks which serve churches or church schools. In characterizing these public services, the Court stated that these were “separate and . . . indisputably marked off from the religious function.” *Id.* at 18. *See also Cochran v. La. State Bd. of Educ.*, 281 U.S. 370 (1929) (giving free textbooks to private religious sectarian and other schools is not aid to religion).

money to advance the sectarian educational function of the school) and “generalized services government might provide to schools in common with others.”²³⁷ That in turn required only a simple analysis under the broad language of article IX, section 8 and of article XVI, section 5, which made the aid unlawful simply because it was to a sectarian school, not because it was for a particular purpose.²³⁸

Following *California Education Facilities Authority* and *Riles*, as discussed below, the incidental-benefits standard required by article XVI, section 5 is the only analytical method that adequately accounts for all of the California Constitution’s religion provisions, including the NPC, while remaining consistent with federal law.

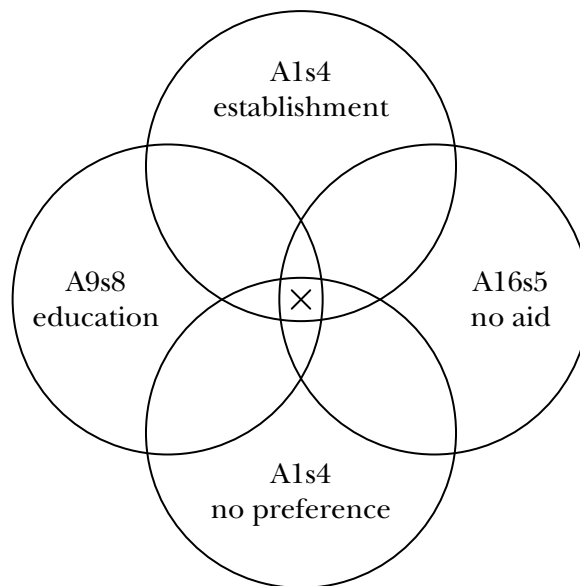
3. The Incidental-Benefits Standard Unifies the California Religion Clauses

The California Religion Clauses are more restrictive than their federal counterparts given the no preference language and the additional prohibitions against public aid to religious institutions in article IX, section 8 and article XVI, section 5. Thus, it must be the case that

237. *Riles*, 632 P.2d at 963 (public services have no doctrinal content and do not advance the essential education objective of the sectarian school). *Accord Everson*, 330 U.S. at 18 (public services to parochial schools are “indisputably marked off from the religious function”) (citing *Norwood v. Harrison*, 413 U.S. 455, 465 (1973)). This is related to the concept in *Smith*, that laws of general application that impose a burden on religion will not make a free-exercise violation. *See Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (“Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any”). The common principle is that in performing its public service functions, religious organizations should receive no special treatment, no more and no less consideration than any other citizen. The only exception is when the government is specifically responsible for burdening a free-exercise right, in the limited context of unusual government control over the citizen, as in the military, *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985); *Larsen v. U.S. Navy*, 486 F. Supp. 2d 11 (D.D.C. 2007), a prison, *Cutter v. Wilkinson*, 544 U.S. 709 (2005), or a school, *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994).

238. *Riles*, 632 P.2d at 964 (“Those provisions do not confine their prohibition against financing sectarian schools in whole or in part to support for their religious teaching function, as distinguished from secular instruction.”). With some logical consistency, the *Riles* court distinguished and harmonized the decisions in *Bowker* and *California Education Facilities Authority*. *Bowker* was properly decided because it did not involve assistance to the educational function of parochial schools, as bus transportation was analogous to the provision of other generalized governmental services that were available to all schools. *California Education Facilities Authority* was properly decided because its benefits were restricted to colleges that did not require religious instruction, and it did not involve the expenditure of public funds for the support of sectarian schools. *Id.* at 964 n.16. Thus, based on the specific language of these California constitutional provisions, there is little basis to apply a purpose-and-effects test like *Lemon* in evaluating a government practice under the state constitution, as those factors are irrelevant to the *character* of the aid (substantial or not) and the nature of the recipient (secular or sectarian).

the California Constitution permits even *less* entanglement and even *less* state aid to religion than does the Federal Constitution. True, after the decision in *East Bay Asian*, a California Establishment Clause question considered in isolation would be subject to the *Lemon* analysis. But in California it is rare for a California religion case to involve only the Establishment Clause. That is because, while federal religion cases arise in the union of the Establishment and Free Exercise Clauses, in California an even more complex conflict of constitutional values occurs, as such cases arise in the union between the establishment, no preference, no aid, and sectarian education clauses:



The better method, then, is to reconcile all of the California religion clauses by considering their cumulative effect on religion issues with an establishment component and to apply a least common denominator approach that focuses on article XVI, section 5 as the baseline. This approach has the benefit of avoiding at least one of the defects of the federal *Lemon* standard, which requires a highly subjective determination of whether the government practice at issue involves excessive entanglement. This necessarily involves a fine judgment in line-drawing: “*Everson* and later cases have shown that the line between state neutrality to religion and state support of religion is not easy to locate. ‘The constitutional standard is the separation of Church and State. The problem, like many problems in constitutional

law, is one of degree.’”²³⁹ In other words, *Lemon*’s entanglement prong allows subjective decision making to exert significant influence. A stricter California approach at least reduces that source of unpredictability, which makes *Lemon* difficult to apply.

The line between government sponsorship of and discrimination against religion is admittedly a fine and difficult one to draw. Courts have been vigilant in barring government from discriminating against religion, but the Supreme Court has been relatively lenient in allowing incidental benefits to religion from generally applicable laws, even permitting government to accommodate religion and to incorporate religious elements in public life. While the current California doctrine adequately observes the traditional establishment rules, article XVI, section 5 requires the state judiciary to be concerned with preventing the mere appearance of excessive public support for religion. As a practical matter, it is difficult to imagine a law of general application that will benefit all religious organizations equally, without some disadvantage to any sect or to the nonreligious. Additionally, Supreme Court cases standing for the proposition that government may expressly aid religion generally create a two-fold dilemma: ensuring neutrality among sects while maintaining the more fragile neutrality between the religious and the nonreligious. The California incidental-benefits analysis simplifies those problems considerably and makes that balance far more achievable.

239. *Bd. of Educ. v. Allen*, 392 U.S. 236, 242 (1968) (quoting *Zorach v. Clausen*, 343 U.S. 306, 314 (1952)). Justice O’Connor has noted that the analysis is fact-specific:

Our school aid cases often pose difficult questions at the intersection of the neutrality and no-aid principles and therefore defy simple categorization under either rule. As I explained in *Rosenberger*, ‘[r]esolution instead depends on the hard task of judging-sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case.’

Mitchell v. Helms, 530 U.S. 793, 844 (1999) (O’Connor, J., concurring).

The Court has reiterated this analysis in other cases:

We must also be sure that the end result—the effect—is not an excessive government entanglement with religion. The test is inescapably one of degree . . . the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement.

Walz v. Tax Comm’n, 397 U.S. 664, 674–75 (1970).

4. The Incidental-Benefits Standard Can Be Reconciled with the Historical Evidence

The trend in California religion doctrine supports a rule that harmonizes all of the religion provisions in the state constitution by limiting government aid for sectarian purposes to only incidental benefits. Considered together with the history of the religion clauses in the state constitution, the 1849 constitution stands at least for a principle of religious freedom: "In detailed and comprehensive language, the delegates to the 1849 Convention committed this state to the fundamental policy of neutrality in matters of religion. Their legacy to us was a society where religion is a matter of faith, not law."²⁴⁰ Of course, that commitment to neutrality did not imply hostility toward religion that would be impermissible under federal law: "Those who framed its language were hardly hostile to religion. Rather, they understood that individuals remain free to decide matters of belief only so long as the power and the authority of the state are never devoted to the advancement of any particular sect or denomination."²⁴¹ The 1878 drafters held that same goal:

An examination of the debates of the constitutional convention which drafted the Constitution of 1879 indicates that the provision was intended to insure the separation of church and state and to guarantee that the power, authority, and financial resources of the government shall never be devoted to the advancement or support of religious or sectarian purposes.²⁴²

Even to the extent that Christian-flavored discussion of the 1849 or 1878 delegates can be taken to imply a Christian preference, the California Constitution "is a living document that has been amended hundreds of times."²⁴³ Moreover, "constitutional pronouncements have no claim to immortality. Times change and previously obscured wisdom emerges."²⁴⁴ It also is true that, while determining the drafters' original intent is the focus of California constitutional interpretation, the California Supreme Court has cautioned that the task requires being mindful of these admonitions:

Justice Landau's article criticizes or sets forth cautions regarding the following practices, among others: (1) reliance upon the drafters' "original intent" in order to determine what a given provision

240. *Fox v. City of L.A.*, 587 P.2d 663, 668 (Cal. 1978) (Bird, C.J., concurring).

241. *Id.* at 667 (Bird, C.J., concurring) (internal citation and quotation omitted).

242. *Cal. Educ. Facilities Auth. v. Priest*, 526 P.2d 513, 520-21 (Cal. 1974).

243. *Powers v. City of Richmond*, 893 P.2d 1160, 1223 (Cal. 1995) (Lucas, C.J., dissenting).

244. *Johnson v. Huntington Beach Union High Sch. Dist.*, 137 Cal. Rptr. 43, 60 (Ct. App. 1977) (McDaniel, J., dissenting).

means today; (2) the problem of generalization—that is, reasoning from what is known of the drafters’ intent, to resolve a matter beyond that fairly contemplated by the drafters; (3) selective reliance upon history to explain or justify a conclusion; (4) inferring drafters’ intent from the absence of debate or discussion; (5) inferring meaning of a clause borrowed from another jurisdiction from the other jurisdiction’s subsequent interpretation of that clause; and (6) failing to recognize that the understanding and perception of history is in part a function of the availability of source materials.²⁴⁵

In other words, California is not so originalist in reading its constitution as it may seem at first glance. Thus, the comments of the drafters of the religion clauses must be placed in their proper historical context and considered against the overall structure of ensuring government absence from the field of religious competition. Should comments by the delegates regarding racial inferiority (such as “The African will always be subservient to the Caucasian”)²⁴⁶ be taken to compel the conclusion that equal protection does not apply in California? Surely not. The fact that the drafters were themselves Christians and seemed comfortable with what may today seem to be excessive Christian influence in their public lives, does not detract from the absolute nature of the principles they elected to impose on future California public life. Similar advances in individual liberty based on increasingly pure readings of broad constitutional principles have already occurred in other contexts.²⁴⁷

Indeed, the 1849 convention applied this reasoning in the debate over granting separate property rights to women:

MR. DIMMICK The time was, sir, when woman was considered an inferior being; *but as knowledge has become more generally diffused, as the world has become more enlightened, as the influence of free and liberal principles has extended among the nations of the earth, the rights of woman have become generally recognized* [S]he is now regarded as entitled to many of the rights in her peculiar sphere which were formerly considered as belonging only to man

MR. JONES [The principle that a wife has no rights] had its origin in a barbarous age, when the wife was considered in the light of a menial, and had no rights. State after State has adopted

245. *Californians for an Open Primary v. McPherson*, 134 P.3d 299, 305 n.8 (Cal. 2006) (discussing Jack L. Landau, *A Judge’s Perspective on the Use and Misuse of History in State Constitutional Interpretation*, 38 VAL. U. L. REV. 451 (2004)).

246. BROWNE, *supra* note 102, at 145.

247. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (finding miscegenation laws unconstitutional); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (finding racially segregated public education unconstitutional).

this principle. The barbarous principles of the early ages have been done away with from time to time.²⁴⁸

There is no less reason to apply such reasoning to religion. The fact that no delegate in the California constitutional conventions raised a protest against its seeming endorsements of Christian faith could indicate that, since all the delegates were Christians, none saw any harm. But it is equally plausible that any non-Christian or atheist in the chamber remained silent—and in this context, silence cannot be taken as acceptance. Instead, “far from indicating acceptance, such silence may bespeak only the hesitancy of religious minorities to come forward to complain about the recognition given to the majority religion.”²⁴⁹ And, of course, it is no answer to point out that for many years the customs in the nation and state have been significantly tinged with Christian observance, as the “mere longevity of custom does not in itself insulate a practice from constitutional scrutiny.”²⁵⁰

The history of the California religion clauses reveals that, whatever the original meaning of the NPC may have been, its historical evolution requires at least even treatment of religious beliefs (or nonbeliefs) by state government, particularly through avoidance of any official establishment of, preference for, or discrimination against religion. The current text is phrased as a guarantee of a personal right, indicating that a balance between free exercise and anti-establishment elements is inherent in the operation of the clause. The focus of the 1849, 1878, and 1974 drafters on preserving individual religious liberty throughout the clause’s history shows that free exercise rights are paramount; if anything, the most rational view of the evolution of article I, section 4 in particular is that its protection of individual religious liberty *increased* over time. Indeed, the California Supreme Court has suggested that the no preference provision is more comprehensive than the religion clauses of the First Amendment.²⁵¹ Moreover, both the free exercise and establishment components were expressly strengthened after the 1849 convention, first with the expansion of the NPC’s free exercise guarantee in 1879 and the introduction of article XVI, section 5 and article IX, section 8, and next with the addition of the Establishment Clause in 1974. These changes and additions had the cumulative effect of substantially limiting the zone wherein state action could assume the appearance of

248. BROWNE, *supra* note 102, at 263–64 (emphasis added).

249. *Fox v. City of L.A.*, 587 P.2d 663, 670 (Cal. 1978) (Bird, C.J., concurring).

250. *Id.* at 671 (Bird, C.J., concurring).

251. U.S. CONST. amend I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;”); *Fox*, 587 P.2d at 665.

preferential treatment, requiring an analysis that focuses on the strictest, least common denominator element: the incidental-benefits analysis under article XVI, section 5.

This incidental-benefits standard is consistent with the NPC. At the time of the 1849 convention, the first ten Amendments to the Federal Constitution applied only to the federal government.²⁵² Consequently, when the 1849 delegates wrote only the NPC into article I, section 4 and omitted a specific Establishment Clause, two conclusions are possible. It is conceivable that the delegates may not have intended to prevent the state from establishing a religion, but the obvious implications of the NPC and the comments of the delegates make this scenario highly unlikely. It is far more likely that the NPC was intended to prevent the government from discriminating against any religion by establishing one. Thus, the 1974 Establishment Clause ballot pamphlet argument that described the addition as codifying *existing* law was literally true—the California Constitution already contained the establishment concept and adding the clause simply codified the preexisting principle. If there was any doubt about this, the fact that article XVI, section 5 had been in the state constitution since 1879 should have been conclusive.

Another reason to view the NPC as including an establishment component is the disjunctive dual-rights phrasing of the text itself. Because the NPC is both mandatory and prohibitory, “[b]y its express terms, what [article I, section 4] mandates is the perpetual guaranty of the [f]ree exercise and enjoyment of religion; what it prohibits is discrimination against, or preference in favor of, one religion as opposed to another.”²⁵³ As Attorney General, Governor Edmund G. Brown described the scope of the NPC in the broadest terms: “[i]t would be difficult to imagine a more sweeping statement of the principle of governmental impartiality in the field of religion.”²⁵⁴ Accordingly, the California Supreme Court has interpreted the NPC as being more protective of the principle of separation of church and state than the Federal Constitution. Governmental action is allowed as long as “it neither favors, fosters, nor establishes any religion . . . [nor which] in

252. *Barron v. City of Balt.*, 32 U.S. 243, 247 (1833) (“The Constitution was ordained and established by the people of the United States for themselves, for their own (federal) government, and not for the government of the individual states.”).

253. *Mandel v. Hodges*, 127 Cal. Rptr. 244, 257–58 (Ct. App. 1976) (internal quotations omitted).

254. *Religion in Schools*, 25 Ops. Cal. Att’y Gen. 316, 319 (No. 53-266) (1955).

any way, directly or indirectly, infringe[s] upon the free exercise rights of the people of this state.”²⁵⁵

Whether viewed from a purely textualist perspective or from the viewpoint of a living constitution, the current construction of the NPC should be one that prevents even the appearance of preference. This would present a significant distinction from the more permissive federal standard.²⁵⁶ A plain-text reading of the NPC shows that it bars either kind of government interference with individual belief: discrimination against, and preference for, any one religion. This is consistent with the text and current interpretation of the other broadly worded bans in the California Constitution on public support for religion, and in particular it is consistent with the incidental-benefits standard. That nondiscrimination principle was the rationale for the decision in *Mandel v. Hodges*, in which the court held that the governor’s order granting state employees three paid hours of leave for Good Friday violated the California NPC by creating the appearance of a preference for one religion that necessarily discriminated against others: “Because it has appointed an exclusively Christian holy day as a paid ‘holiday’ for all pertinent purposes affecting state offices and employees, it amounts to ‘discrimination’ against all non-Christian religions and ‘preference’ of those which are Christian.”²⁵⁷ Accordingly, by barring even the appearance of a benefit, the incidental-benefits

255. Cal. Educ. Facilities Auth. v. Priest, 536 P.2d 513, 520 (Cal. 1974).

256. See, e.g., Bd. of Educ. v. Grumet, 512 U.S. 687, 706 (1994) (holding that the challenged law facilitating the practice of religion did not render it an unconstitutional establishment); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 333–34 (1987) (upholding law exempting religious employers from Title VII on principle of “ample room under the Establishment Clause for ‘benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference’”) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970)); *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 144–45 (1987) (“[G]overnment may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.”).

257. *Mandel*, 127 Cal. Rptr. at 258. The decision in *California School Employees Ass’n v. Sequoia Union High School District*, 136 Cal. Rptr. 594 (Ct. App. 1977), is not to the contrary. In *Sequoia*, decided by the same appellate panel that decided *Mandel*, a school district’s contract with the teachers’ union required paid time off for Good Friday. The panel distinguished its earlier decision in *Mandel* on the grounds that *Sequoia* involved a negotiated collective bargaining agreement to provide Good Friday as a paid holiday to represented school district employees under different statutory authority that did not “in any way encourage a choice of Good Friday over any other holiday.” *Sequoia*, 136 Cal. Rptr. at 595. Thus, as the holiday arose out of employee-employer negotiations, not an executive order, “we fail to find the connection so excessive as to warrant invalidating the contractual bargain struck between the District and CSEA.” *Id.* at 596.

standard required by article XVI, section 5 satisfies the requirement of the NPC that an appearance of preference be avoided.

III. Harmony of State and Federal Law

A. Introduction

The California incidental-benefits standard is distinct from federal religion jurisprudence but remains within its limits. The California Constitution, like the Federal Constitution, does not merely proscribe an establishment of religion. “Rather, all laws ‘respecting an establishment of religion’ are forbidden.”²⁵⁸ “The primary evils the [establishment] clause was intended to protect against are ‘sponsorship, financial support, and active involvement of the sovereign in religious activity.’”²⁵⁹ Federal establishment cases are evaluated under the analysis in *Lemon*²⁶⁰ while neutrality remains the fundamental principle of the establishment doctrine.²⁶¹

The California Constitution, with its substantively different religion clauses, requires a finer analysis than does federal law, one that imposes both greater restriction on the government and greater protection for individual belief.²⁶² In California, the incidental benefits standard prevents more than incidental benefits from accruing to religious organizations, except that the government may do only what is reasonably necessary to accommodate a burdened free exercise right.

258. *Fox v. City of L.A.*, 587 P.2d 663, 665 (Cal. 1978) (emphasis original).

259. *Johnson v. Huntington Beach Union High Sch. Dist.*, 137 Cal. Rptr. 43, 48 (Ct. App. 1977) (quoting *Walz*, 397 U.S. at 668).

260. A state action challenged under the Federal Establishment Clause must (1) have a secular legislative purpose, (2) neither advance nor inhibit religion as its primary effect, and (3) not foster excessive governmental entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

261. *Id.* at 625.

262. Under *Widmar v. Vincent*, 454 U.S. 263, 276–77 (1981), states generally may not deny student religious groups use of facilities generally open to other student groups. This means only that, after *Widmar*, a state constitution cannot be a basis for discriminating against religion. See *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (nothing that the state may pay bus fares of students attending parochial schools as state pays all student bus fares for attending both public and private schools). But that is merely an aspect of the neutrality principle—government may not exclude religious organizations from generally applicable benefits. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (noting the government “may not aid, foster, or promote one religion or religious theory against another.”). The converse is also true: a religious organization may not exclude itself from a generally applicable law. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Accordingly, the state constitution remains a viable source of authority that prevents the state government from acting in the realm of benevolent neutrality, so long as its actions do not amount to discrimination against religion.

In other words, the California Constitution limits government discretion in accommodating free exercise rights to only the minimum required to satisfy federal free exercise concerns.²⁶³ This stricter California incidental-benefits standard follows the requirements of the stricter state constitutional provisions, while complying with Supreme Court religion doctrine.

The distinction between California and federal religion doctrine lies in the extent of permissible state support, with federal law providing government significantly more discretion in accommodating religion. Under federal law the government may acknowledge religion: “The [federal] constitution does not oblige government to avoid any public acknowledgment of religion’s role in society Rather, it leaves room to accommodate divergent values within a constitutionally permissible framework.”²⁶⁴ And it is well established that the limits of state accommodation of religion “are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.”²⁶⁵ Instead, under federal law “there is room for play in the joints productive of a *benevolent* neutrality which will permit religious exercise to exist without sponsorship and without interference.”²⁶⁶ The room for such “play in the joints” between the Free Exercise and Establishment Clauses allows the federal government to accommodate religion beyond free-exercise requirements without violating the Establishment Clause. In that space, some legislative action is permitted that is neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause.²⁶⁷

263. To put it in Orwellian-sounding terms, the California rule is that anything not made compulsory by the Federal Free Exercise Clause is forbidden by article I, section 4 and article XVI, section 5. See T.H. WHITE, *THE ONCE AND FUTURE KING* 120–21 (1958) (After Merlyn changes the Wart into an ant, the Wart finds himself at the entrance to an ant nest, where a sign reads: “EVERYTHING NOT FORBIDDEN IS COMPULSORY.”).

264. *Salazar v. Buono*, 130 S. Ct. 1803, 1818–19 (2010) (citing *Lee v. Weisman*, 505 U.S. 577, 598 (1992)) (“A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution”); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987) (The federal government “‘may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.’”) (quoting *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 144–45 (1987)).

265. *Walz v. Tax Comm’r*, 397 U.S. 664, 673 (1970) (upholding permanent categorical tax exemption for all religious organizations as “simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions”). *Id.* at 674

266. *Id.* at 669 (emphasis added).

267. *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (“[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation”) (quoting *Walz*, 397 U.S. at 669) (citation omitted); *Amos*, 483

The early trend in California decisions applying the California Free Exercise and Establishment Clauses was to apply the California clauses consistently with their federal analogues, and consequently the standard was comparatively permissive.²⁶⁸ For example, *Gordon v. Board of Education*, which upheld a school release program for religious students, surveyed the then-current decisions of other states under their own Establishment Clauses and echoed the common refrain that the drafters of the 1879 constitution, like those of the nation, were religious men:

[T]here was no thought whatsoever in the minds of the framers of that document in opposition to or of hostility to religion as such. They proposed to insure separation of church and state, and to provide that the power and the authority of the state should never be devoted to the advancement of any particular sect or denomination. Our pioneer forefathers did not have the remotest idea that they were laying the foundations of the great Commonwealth of California that was to be as a jejune, godless state; they believed one of the great pillars of our national strength to be the general acceptance of religion by our people.²⁶⁹

Similar statements generally tolerating nonsectarian Christian religious accommodation in schools are found in Supreme Court decisions from that era.²⁷⁰

For example, in *Holy Trinity Church*, the Court commented that “no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people” and that “this is a religious nation.”²⁷¹ Indeed, such statements are common in Supreme Court opinions of the time: “We are a religious people whose institutions presuppose a Supreme Being.”²⁷² Thus, it seems that the

U.S. at 337–38 (federal government may exempt secular nonprofit activities of religious organizations from prohibition on religious discrimination in employment).

268. In the era before *Gitlow v. New York*, 268 U.S. 652 (1925), that approach may not have been warranted, as state constitutions were the only protection for individual rights. In the modern era of near-complete incorporation of the Federal Bill of Rights against the states through the Fourteenth Amendment, state courts would seem to have even less incentive to develop their independent body of state constitutional law, as the federal courts set the minimum protections required under the federal constitution.

269. *Gordon v. Bd. of Educ.*, 178 P.2d 488, 493 (Cal. Dist. Ct. App. 1947).

270. See, e.g., *Sch. Dist. v. Schempp*, 374 U.S. 203, 212 (1963) (“It is true that religion has been closely identified with our history and government.”); *Engel v. Vitale*, 370 U.S. 421, 434 (1962) (“The history of man is inseparable from the history of religion.”); *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (“We are a religious people whose institutions presuppose a Supreme Being.”).

271. *Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892).

272. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). This language was quoted with approval in *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984), *Marsh v. Chambers*, 463 U.S. 783, 792 (1983), and *Schempp*, 374 U.S. at 213.

presumption of judicial opinions from the first century of the state's existence was that the whole extent of religious diversity was confined at most to the Abrahamic faiths:

What more logical advance could be made in the science of sociology than the unification of religious leaders in a coordinated effort to teach children faith and morality—and for that purpose to excuse them from schools for one hour a week to go to the church or tabernacle or synagogue of their parents' choice?²⁷³

The modern trend in state and federal religion cases is more restrictive—properly so, given the current reading of the state and federal constitutions as protecting all religions (not merely the Christian variants). While courts from both periods likely would agree that it is appropriate for a public school to purchase a King James Bible for a public school library, certainly a modern court would bar such schools from using that work as a classroom text.²⁷⁴ Similarly, while the traditional reading of the Free Exercise and Establishment Clauses as not requiring governmental antipathy to religious observance remains true today, the necessary result of the neutrality required in public contexts is that *no* religion should be allowed observance. While there may be debate on that matter in the Supreme Court under federal law, it surely is the correct view under the more restrictive language of the California religion clauses.

For example, a public religious display case such as *Lynch* should be resolved differently under California law. An official holiday celebration is a problematic neutrality issue under federal law because public promotion of the religious aspect of one religion's holiday means that citizens with other beliefs are excluded by their own government, and the holiday's believers have the satisfaction of official endorsement that their holy day is indeed noteworthy because the polity has identified itself with their religious celebration. While it is true that some Christian holy days have become secular holidays, others such as Good Friday have not.²⁷⁵ Christmas particularly presents this issue, as it is a holiday with secular aspects that grew out of a religious observance and currently contains elements of both. Some aspects of observing the Christmas holiday can cross the Rubicon into a holy day observance, such as placing a crèche or cross on

273. *Gordon*, 178 P.2d at 494.

274. *Schempp*, 374 U.S. 203 (finding classroom Bible readings unconstitutional); *Evans v. Selma Union High Sch. Dist.*, 222 P. 801 (Cal. 1924) (finding Bible in school library constitutional).

275. *See Mandel v. Hodges*, 127 Cal. Rptr. 244 (Ct. App. 1976) (finding that Good Friday does not reflect a secular purpose).

public lands. Yet there is a clear distinction between secular and religious symbols, even for a holiday of mixed origin: “Easter crosses differ from Easter bunnies, just as Christmas crosses differ from Christmas trees and Santa Claus.”²⁷⁶ Under the federal standard, this is not an Establishment Clause violation because, at most, it presents an appearance risk.²⁷⁷

The California NPC, however, bars a religious symbol on a public building during Christmas, as that is not mere “participation in the secular aspects” of the holiday season.²⁷⁸ Under California’s NPC and article XVI, section 5, even the appearance of a religious preference makes the practice unconstitutional.²⁷⁹ This result flows from both the California incidental-benefits analysis *and* the federal establishment neutrality principle, as “[g]overnments must commit themselves to ‘a position of neutrality’ whenever ‘the relationship between man and religion’ is affected. To be neutral surely means to honor the beliefs of the silent as well as the vocal minorities.”²⁸⁰

276. *Fox v. City of L.A.*, 587 P.2d 663, 666 (Cal. 1978).

277. *See* *Protestants & Other Ams. United for Separation of Church & State v. O’Brien*, 272 F. Supp. 712, 721 (D.D.C. 1967) (display of the Madonna and Child on a Christmas postage stamp held not to offend the Federal Establishment Clause).

278. *Fox*, 587 P.2d at 666.

279. *Id.* at 665 (under article I, section 4 preference is forbidden even when there is no discrimination). *See* *Cal. Educ. Facilities Auth. v. Priest*, 526 P.2d 513, 521 (Cal. 1974) (noting that “the fact that a statute has some identifiable secular objective will not immunize it from further analysis to ascertain whether it also has a direct, immediate, and substantial effect of advancing religion”).

280. *Fox*, 587 P.2d at 666 (citation omitted). Compare *Allen v. Morton* 495 F.2d 65 (D.C. Cir. 1973) (per curiam), where court approved the inclusion of a crèche as part of a national “Pageant of Peace” on federal parkland adjacent to the White House but did so on the express condition that the government erect explanatory plaques disclaiming any sponsorship of religious beliefs associated with the crèche. *Id.* at 67–68. Leaving aside the different analysis compelled by the differing constitutional provisions, the divergent results in *Lynch* and *Fox* can also be explained by another of the general religion concepts—that context matters, in much the same way and for the same reasons that it does in the related context of balancing the competing interests under the Religious Land Use and Institutionalized Persons Act (“RLUIPA”). *Cutter v. Wilkinson*, 544 U.S. 709, 722–23 (2005) (while 42 U.S.C. § 2000cc-1(a) adopts a “‘compelling governmental interest’” standard, “[c]ontext matters” in applying that standard) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003)). Context certainly plays a role in evaluating the purpose element of the *Lemon* test. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 874 (2005) (“purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context”); *Edwards v. Aguillard*, 482 U.S. 578, 594–95 (1987) (purpose enquiry looks to “plain meaning of the statute’s words, enlightened by their context and the contemporaneous legislative history . . . [and] the historical context of the statute . . . and the specific sequence of events leading to [its] passage.”). Just as Christmas has both religious and secular aspects, a religious symbol such as the Ten Commandments or a crèche can be impermissibly sectarian or permissibly secular depending on the presentation. *McCreary Cnty.*, 545 U.S. at 868, 874 n.23 (displaying text is clearly religious, as distinct from a symbolic depiction of tablets

While acknowledging that the question is one of degree, the federal *Lemon* standard allows more than incidental benefits to accrue to religious organizations, drawing the line only where a law's primary effect advances religion.²⁸¹ And while the California standard also necessarily must be concerned with marking a point on a continuum, the restrictive language of article XVI, section 5 requires that state governmental aid to religion stop well short of fostering the primary effect of advancing religion. Instead, the California Constitution bars any significant aid to religion, other than an incidental benefit that is the natural result of a generally applicable law.²⁸² Moreover, the degree of incidental benefit to religious organizations must be comparable to the benefit to the secular public at large.

This difference in stringency further shows why the *Lemon* analysis is inadequate to resolve multifaceted religion cases brought under the California Constitution. The California religion provisions require consideration of whether there is an appearance of sponsorship and whether a more than incidental benefit has been conferred on religion. Consequently, a practice that would be lawful under the more permissive *Lemon* test may not pass muster under the stricter California analysis. For example, a state governmental act that specifically intends to benefit religion would violate both the state NPC and the "purpose" element of *Lemon*. But while a practice that has only the appearance of sponsorship or grants a more than incidental benefit would violate the state no preference and no aid clauses, those qualities would not necessarily violate the "effect" and "entanglement" elements of *Lemon*. The substantive difference is that the California

with ten roman numerals, which could be seen as alluding to a general notion of law, not a sectarian conception of faith and noting a courthouse frieze and pediment with Moses in the company of seventeen other mostly secular lawgivers posed no risk of neutrality violation); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 598 (1989) (distinguishing *Lynch* based on whether something in the context of the display "detracts from the crèche's religious message"). *See also* *DiLoreto v. Bd. of Educ.*, 87 Cal. Rptr. 2d 791, 797 (Ct. App. 1999) (school district's display of the Ten Commandments on a baseball field fence would infringe the State Establishment Clause under *Lemon*).

281. *Tilton v. Richardson*, 403 U.S. 672, 679 (1971).

282. For example, courts permit religious schools to receive benefits generally available to all charitable or educational institutions. Just as a law of general application may incidentally impair religious observance, so is the reverse true: a law of general application may incidentally benefit religious organizations. *See* *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (state may pay bus fares of students attending parochial schools as state pays all student bus fares for attending both public and private schools); *Cochran v. La. State Bd. of Educ.*, 281 U.S. 370 (1929) (giving free textbooks to private religious sectarian and other schools not aid to religion); *Gordon v. Bd. of Educ.*, 178 P.2d 488, 494 (Cal. Dist. Ct. App. 1947) (state may release students for religious observance because students of any religion may participate).

religion analysis permits less of an effect, and less entanglement, than would be permissible under *Lemon*.

Uncritical application of the federal model in California presents two practical difficulties. First, it would disregard the express terms of article XVI, section 5, which requires a more stringent test. Second, the federal model suffers from the well-known deficiency of necessarily embroiling courts in highly subjective resolution of questions of degree. Such hairsplitting analytical models, lacking in any objective criteria, untowardly enhance judicial discretion while simultaneously weakening judicial legitimacy, as an “I know it when I see it” test generally does.²⁸³ For instance, when the Supreme Court upholds government actions that would be improper under California law, it does so in permissive language, holding that government *may* exceed the usual Establishment Clause limits to satisfy free exercise concerns.²⁸⁴ With room for play in the joints between the Establishment and Free Exercise clauses, government must have some leeway in exercising its discretion to resolve these difficult questions of competing constitutional values and public policy.²⁸⁵ But by no means does that permissiveness compel the conclusion that a particular degree of accommodation is *required* by federal law. Nor would the Supreme Court be likely to even attempt drawing a hard line in this area of the law, where First Amendment religion issues arise from the tension of the competing free-exercise and establishment values, “each constitutionally respectable, but none open to realization to the logical limit.”²⁸⁶ The Supreme Court has acknowledged its inability to pro-

283. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

284. *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005).

285. In *Cutter*, the Supreme Court upheld RLUIPA, a federal statute that regulated the religious practices of state-prison inmates, and pointed out that laws in this area of conflicting values were permissible within a certain range:

[T]he Establishment Clause[] commands a separation of church and state

[T]he Free Exercise Clause[] requires government respect for, and noninterference with, the religious beliefs and practices of our Nation’s people. While the two Clauses express complementary values, they often exert conflicting pressures. . . .

Our decisions recognize that “there is room for play in the joints” between the Clauses, some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause [W]e hold that § 3 of RLUIPA fits within the corridor between the Religion Clauses: On its face, the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause.”

Id. at 719–20 (citations omitted).

286. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 875 (2005); *Locke v. Davey*, 540 U.S. 712, 718 (2004) (“These two Clauses . . . are frequently in tension”); *Walz v. Tax Comm’n*, 397 U.S. 664, 668–69 (1970) (“The Court has struggled to find a neutral course between the

vide any “bright line” guidance, and that only a framework of analysis from general principles is available in this “extraordinarily sensitive” area of constitutional law.²⁸⁷ “[T]radeoffs are inevitable, and an elegant interpretative rule to draw the line in all the multifarious situations is not to be had.”²⁸⁸ That being so, in the play between the joints of these competing principles, a reasonable state law approach that tacks closer to one value, without violating the other, presents a permissible value judgment for a state judiciary.²⁸⁹

While the principles of *Lemon* necessarily will have some application on California religion cases, it is by no means dispositive. It is true that the California Supreme Court has applied *Lemon* in cases that primarily involved federal constitutional claims.²⁹⁰ But the state high court has never held that *Lemon* completely governs the state-law religion analysis. On the contrary, the decision in *Catholic Charities v. Superior Court* strongly suggests that another test may apply in cases that involve more than one religion provision of the state constitution.²⁹¹ Consequently, the applications of *Lemon* to federal establishment claims by California courts should not detract from the availability of a California-specific religion analysis.

Even if the Supreme Court no longer concerns itself with it, under the California religion clauses the potential for divisiveness caused by state action should remain a factor. Under the no preference and no aid clauses, impermissible governmental support is present when the weight of secular authority is behind the dissemination of religious tenets.²⁹² Members of other religions may be unable to secure the same public benefit because of insufficient numbers, money, or influence. Thus, the free-exercise rights of the other religions would be infringed by the inability to participate, as would the

two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other”).

287. *Lemon v. Kurtzman*, 403 U.S. 602, 612, 614 (1971) (wall of separation is not without bends and may constitute a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship).

288. *McCreary Cnty.*, 545 U.S. at 875.

289. *Cutter*, 544 U.S. at 719 (“neutrality” is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation).

290. *Catholic Charities v. Superior Court*, 85 P.3d 67, 80 (Cal. 2004); *E. Bay Asian Local Dev. Corp. v. State*, 13 P.3d 1122, 1130–38 (Cal. 2000); *Mandel v. Hodges*, 127 Cal. Rptr. 244 (Ct. App. 1976).

291. 85 P.3d 67, 91 (Cal. 2004). *See also* *N. Coast Women’s Care Med. Grp., Inc. v. San Diego Cnty. Superior Court*, 189 P.3d 959, 968–69 (Cal. 2008) (noting that there are three possible tests that might govern free exercise of religion claims under the state constitution).

292. *See Johnson*, 137 Cal. Rptr. at 50.

free-exercise rights of nonbelievers be affected by the pressure upon them to conform to the beliefs of the recognized religion. Either scenario creates unnecessary competition between sects and encourages divisiveness over religious beliefs.²⁹³ Such problems are best avoided with a state-law analysis that minimizes government involvement in religion.

B. The Extent of a Permissibly Neutral Accommodation

Two exceptions, which track more expansive federal principles, create space in the California incidental-benefits analysis. First, of course, the appearance of sponsorship is not unlawful when it constitutes an incidental benefit, as when the government involvement is trivial because it is part of a generally available program. Second, the Federal Free Exercise Clause requires that government be able to alleviate specific government-imposed burdens on free-exercise rights, to the extent reasonably necessary to alleviate that burden. Such a necessary accommodation may involve a greater degree of apparent government sponsorship than would otherwise be permissible, on a sliding scale that varies directly with the degree of responsibility the government bears for the impairment of free exercise rights that necessitates the accommodation. In other words, to comply with federal guarantees the state constitution allows government a closer entanglement with individual free exercise as its degree of harm to those free-exercise rights increases.

Neutrality continues to apply, of course, when the government acts with the purpose of alleviating “exceptional government-created

293. *See id.* at 50–51. One criticism that will be leveled at the incidental-benefits standard is the difficulty in distinguishing between substantial and incidental benefits. There are at least some clear examples on the continuum from substantial to incidental. Municipal benefits, such as sidewalks, streets, roads, highways, and sewers are furnished for the use of all citizens regardless of religious belief, and police and fire departments give the same protection to denominational institutions as to privately owned property and their expenses are paid from public funds. *Bowker v. Baker*, 167 P.2d 256, 262 (Cal. Dist. Ct. App. 1946). Incidental in this context must incorporate two elements: directness and degree. The effect must be collateral to the act’s stated purpose, as in the difference between “all schoolchildren shall be bused to school” and “all parochial schoolchildren shall receive free busing.” And the benefit, economic or otherwise, must be negligible. In other words, the difference is between intended and significant; and unintended and insignificant. One example of this principle is the result in *Johnson*, 137 Cal. Rptr. at 49, where the issue was whether school officials of a tax-supported high school could permit a student Bible study club to meet on the school campus during the school day under regulations governing student clubs. The court concluded that the practice was invalid under federal and state law, as it violated both the Lemon test and article XVI, section 5.

burdens on private religious exercise.”²⁹⁴ Thus, comparable accommodations must be evenly available among different faiths that are similarly situated.²⁹⁵ The outside limit for such benevolent accommodation is reached when accommodation devolves into “an unlawful fostering of religion.”²⁹⁶ A law that has such a benevolent accommodation as its purpose is not invalid under the first “secular purpose” element of the *Lemon* test:

Lemon requires first that the law at issue serve a “secular legislative purpose.” This does not mean that the law’s purpose must be unrelated to religion—that would amount to a requirement “that the government show a callous indifference to religious groups,” and the Establishment Clause has never been so interpreted. Rather, *Lemon*’s “purpose” requirement aims at preventing the relevant governmental decisionmaker—in this case, Congress—from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.

Under the *Lemon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.²⁹⁷

Accordingly, federal law permits a relatively broad range of government acts with the specific intent of aiding religion, as justified by the principles of benevolent neutrality and accommodation. Such acts become an “unlawful fostering of religion” only when “the government itself has advanced religion through its own activities and influence” by providing “sponsorship, financial support, and active involvement of the sovereign in religious activity.”²⁹⁸

294. *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (government need not “be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice”) *Bd. of Educ. v. Grumet*, 512 U.S. 687, 705 (1994).

295. *Cutter*, 544 U.S. at 720.

296. *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 144–45 (1987). *See also* *Widmar v. Vincent*, 454 U.S. 263, 273 n.13 (1981) (“Neither do we reach the questions that would arise if state accommodation of free exercise and free speech rights should, in a particular case, conflict with the prohibitions of the Establishment Clause”).

297. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987) (internal citation omitted).

298. *Id.* at 334–35, 337. These federal cases may be viewed as favoring the individual’s freedom of religion rights over the ban on the state establishing a religion, in the context of ensuring that religious speech and secular speech are accorded the same treatment. Leaving aside the question of whether religious observance is a speech act, the principle used to decide such cases is of little utility in the scenario where a religious person will receive a public benefit solely because of the person’s religion—and a secular person lacking that religious justification would not receive the benefit. *See* Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict* 41 U. PITT. L. REV. 673, 690–95 (1980).

Similarly, the stricter California incidental-benefits standard does not mean that government and religion must be completely sealed off from each other. First, as the Supreme Court pointed out, that would be impossible.²⁹⁹ Second, taken to its logical extreme, such a rule would conflict with free-exercise principles.³⁰⁰ Third, under *Lee v. Weisman*, the government may act to lift a discernible burden placed on free exercise of religion.³⁰¹ Indeed, under *Cutter v. Wilkinson*, sometimes the government *must* so act.³⁰² Such an accommodation must be neutral in the sense that it is comparably available to all similarly burdened religions; while government ordinarily is not required to subsidize the exercise of fundamental rights, if it does so with the justification of accommodation the government still must observe viewpoint neutrality.³⁰³ But it is also true that under *California Education Facilities Authority*, when the state enacts laws of general application, only incidental benefits may accrue to religious organizations. And under article XVI, section 5, ordinarily the state government is barred from providing any direct aid to religious organizations at all.

As a result, the incidental-benefits standard still allows the state government to alleviate burdened religious exercise—it simply requires the state government to be significantly more parsimonious in handing those benefits out than federal law would permit. This approach still complies with *Lemon* to the extent that it is required. The first element of the *Lemon* test requires that a law must, among other things, serve a secular legislative purpose to comply with the Establishment Clause.³⁰⁴ But the requirement of a secular legislative purpose “does not mean that the law’s purpose must be unrelated to religion”³⁰⁵ Instead, alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions is a permissible secular legislative purpose.³⁰⁶ In this

299. *Roemer v. Md. Pub. Works Bd.*, 426 U.S. 736, 745–46 (1976). *Cf. Hustedt v. Workers’ Comp. Appeals Bd.*, 636 P.2d 1139, 1143 (Cal. 1981) (separation of powers does not require hermetic sealing off of the branches of government).

300. *Walz v. Tax Comm’n*, 397 U.S. 664, 668–69 (1970) (Free exercise and Establishment Clauses are both cast in absolute terms, “either of which, if expanded to a logical extreme, would tend to clash with the other”).

301. *Lee v. Weisman*, 505 U.S. 577, 629 (1992) (Souter, J., concurring).

302. 544 U.S. 709, 720 (2005) (“[C]ourts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries”).

303. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995).

304. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987).

305. *Id.*

306. *Id.*

regard, the state government may distinguish between religious entities and activities that are entitled to accommodation and secular entities and activities that are not.³⁰⁷

The second “primary effect” element of *Lemon* is still taken into account under the independently developed incidental-benefits rule.³⁰⁸ In *California Education Facilities Authority*, the state supreme court applied the principles of the federal “purpose and effects” test in discussing the “substantial effect” and “primary purpose” of the law at issue, and held that article XVI, section 5 “forbids more than the appropriation or payment of public funds to support sectarian institutions. It bans any official involvement, whatever its form, which has the direct, immediate, and substantial effect of promoting religious purposes.”³⁰⁹ The third “excessive entanglement” element also is covered by the incidental-benefits analysis. Modern California decisions explicitly acknowledge that the entanglement element is concerned with determining “the *degree* of governmental involvement in the af-

307. *Catholic Charities v. Superior Court*, 85 P.3d 67, 79 (Cal. 2004). *See also* *E. Bay Asian Local Dev. Corp. v. State*, 13 P.3d 1122 (Cal. 2000) (upholding statutes with the purpose of exempting religious associations from burdens imposed by a landmark preservation ordinance). Indeed, without some provision for the stated (or unstated) purpose of a law appearing to be of general application, it is possible that legislation can be passed ostensibly for the public benefit, but which is so tailored as to truly or principally benefit religious organizations. Consider, for example, school uniforms—not for students, but for the teachers. In the modern era it is somewhat more common in the past for public secular schools to require student uniforms, as parochial schools traditionally have done. Thus, a law that subsidized the cost of student uniforms could have both the purpose and effect of benefiting students compelled to wear uniforms generally, without a religious or antireligious bias. But while it is common for teachers in religious institutions to wear a habit, it is equally common that secular teachers do not. Despite its textual neutrality, a law that subsidized the cost of a teacher’s uniform could have the purpose, and certainly would have the effect, of disproportionately benefiting religious educational institutions.

308. *Cal. Educ. Facilities Auth. v. Priest*, 526 P.2d 513, 521 (Cal. 1974) (Article XVI, section 5 has not been interpreted to “prohibit a religious institution from receiving an indirect, remote, and incidental benefit from a statute which has a secular primary purpose.”); *Mandel v. Hodges*, 127 Cal. Rptr. 244, 255 (Ct. App. 1976) (Governor’s order granting Good Friday time off is “directly beneficial to religious institutions” as the state’s recognition is an observance by the state; thus its “primary effect” “advances religion”).

309. *Cal. Educ. Facilities Auth.*, 26 P.2d at 522 n.12. The incidental-benefits analysis, similar to the effects element of *Lemon*, does not require that religious organizations be excluded from generally available benefits; on the contrary, such incidental benefits are expressly permitted. *See Gordon v. Bd. of Educ.*, 178 P.2d 488, 498 (Cal. Dist. Ct. App. 1947) (White, J., concurring) (“[T]he doctrine of separation of church and state does not mean that there is any conflict between religion and state in this country or any disfavor of any kind upon religion as such.”); *Bowker v. Baker*, 167 P.2d 256, 261 (Cal. Dist. Ct. App. 1946) (“where the main purpose of an enactment is lawful, and an incidental or immaterial benefit results to some person or organization, which benefit is not directly permitted by law, this incidental benefit alone will not defeat the legislation, its main purpose being lawful”).

fairs of religion.”³¹⁰ This concept is based on yet another borrowed Supreme Court conclusion, that “total separation is not possible in an absolute sense, and that some relationship between government and religious organizations is inevitable,” and thus that “only excessive government entanglement” is prohibited.³¹¹ By maintaining focus on the prohibition in article XVI, section 5 of more than incidental benefits, government entanglement with religion is maintained at an acceptably low level.

The accommodation justification only applies in the union of the Free Exercise and Establishment Clauses under federal law, and under California law for accommodation to apply the case must arise in the union of the no preference, establishment, and no aid clauses.³¹² The greater the accommodation, the greater must be the justifying burden lest the practice violate the incidental-benefits rule. Conversely, accommodation may be required where a government-imposed burden needs lifting, but it only applies where there is a free exercise right in the first instance to engage in the conduct claimed to be burdened.³¹³ If there is no constitutional right to engage in public prayer vigils in a government building, for example, then there is no basis for arguing that government must lift a barrier to permit the exercise. But even accommodation alone may not be a sufficient justification for a benefit that aids religion, even if it aids all religions equally, because the government must be neutral between the religious and secular as well as among religions.³¹⁴

As a result, while “alleviation of significant governmentally created burdens on religious exercise is a permissible legislative purpose that does not offend the [E]stablishment [C]lause,”³¹⁵ that does nothing to resolve the no preference and no aid issues presented by an accommodation. This then leads to the discussion in *Catholic Charities* regarding the three possible tests that the state Supreme Court potentially could apply to the article I, section 4 NPC: “A future case might lead us to choose the rule of *Sherbert*, the rule of *Smith*, or an as-yet unidentified rule that more precisely reflects the language and history

310. Cal. Sch. Emps. Ass’n v. Sequoia Union High Sch. Dist., 136 Cal. Rptr. 594, 596 (Ct. App. 1977) (emphasis added).

311. *Id.*

312. See *supra* Figure 1.

313. Sands v. Morongo Unified Sch. Dist., 809 P.2d 809, 816 (Cal. 1991).

314. McCreary Cnty. v. ACLU, 545 U.S. 844, 860 (2005); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) .

315. Catholic Charities v. Superior Court, 85 P.3d 67, 79 (Cal. 2004).

of the California Constitution and our own understanding of its import.”³¹⁶

C. The Three Paths Left Open by *Catholic Charities*

The decision in *Catholic Charities* left open the possibility that the California Supreme Court might adopt either *Sherbert*, *Smith*, or a California-specific analysis. Because neither *Sherbert* nor *Smith* adequately accounts for the distinct terms and history of the California Constitution religion clauses, adopting a state-specific analysis is the best course.

The superseded *Sherbert* rule comes from *Sherbert v. Verner* and *Wisconsin v. Yoder*, wherein the Supreme Court reviewed laws of general application claimed to burden free exercise under strict scrutiny, reasoning that a law substantially burdening religious practice must be narrowly tailored to serve a compelling state interest.³¹⁷ The current *Smith* rule comes from *Employment Division v. Smith*, which articulated the general rule that religious beliefs do not excuse compliance with otherwise valid laws regulating matters that the state is free to regulate.³¹⁸ The government may not regulate religious beliefs as such by compelling or punishing their affirmation, nor may it target conduct for regulation only because it is undertaken for religious reasons.³¹⁹ But “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”³²⁰

For cases arising under the religion clauses of the California Constitution, the better rule is the incidental benefits analysis discussed above. Compared with the two federal tests in *Sherbert* and *Smith*, it more precisely reflects the language and history of the California Constitution. *Sherbert* has the least application to California law, as it was abandoned by the Supreme Court in 1990³²¹ and because it conflicts

316. *Id.* at 91 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Emp’t Div. v. Smith*, 494 U.S. 872 (1990)). *See also* *N. Coast Women’s Care Med. Grp., Inc. v. San Diego Cnty. Superior Court*, 189 P.3d 959, 968–69 (Cal. 2008).

317. *Sherbert*, 374 U.S. at 403–09; *Wisconsin v. Yoder*, 406 U.S. 205, 220–29 (1972).

318. 494 U.S. 872 (1990).

319. *Id.* at 877.

320. *Id.* at 879 (citing *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)). *See also* *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (reaffirming *Smith*, holding that “a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice”).

321. *Smith*, 494 U.S. at 879, 882–90.

with the rule in *Larson* that only laws that facially discriminate against religion are subject to strict scrutiny.³²² The *Smith* rule has some initial appeal, as under federal law a legislative accommodation benefiting religion is tested “not under the [F]ree [E]xercise [C]ause but under the [E]stablishment [C]ause.”³²³ Under federal law, the default *Lemon* test would apply.³²⁴ And under *East Bay Asian*, California courts will apply federal law to establishment claims.³²⁵ Thus, the end result of adopting *Smith* would simply be to adopt *Lemon* as the California analysis in laws-of-general-application religion cases.

The problem with that facile train of thought is that it neglects the no preference and no aid provisions of the California Constitution, rendering them a nullity in violation of article I, section 24 (“Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution”) and article I, section 26 (“The provisions of this Constitution are mandatory and prohibitory”).³²⁶ It disregards the plain terms of article I, section 4 and article XVI, section 5. It also disregards the clearly expressed intent of the 1849 and 1878 drafters. And it would ignore the constitutional duty of the state Supreme Court to perform its judicial function in giving effect to the state charter:

[A]s the highest court of this state, we are independently responsible for safeguarding the rights of our citizens. State courts are, and should be, the first line of defense for individual liberties in the federal system. It is unnecessary to rest our decision on federal authority when the California Constitution alone provides an independent and adequate state constitutional basis on which to decide.

• • • •

[The California Supreme Court is] not a branch of the federal judiciary; [it is] a court created by the Constitution of California and [owes its] primary obligation to that fundamental document. Only if an issue cannot be determined with finality under state constitutional doctrine [does it] turn to federal authority for assistance.³²⁷

322. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338–39 (1987) (citing *Larson v. Valente*, 456 U.S. 228, 252 (1982)).

323. *Catholic Charities v. Superior Court*, 85 P.3d 67, 83 (Cal. 2004) (citing *Amos*, 483 U.S. at 334–36 (1987)).

324. *Catholic Charities*, 85 P.3d at 83.

325. *E. Bay Asian Local Dev. Corp. v. State*, 13 P.3d 1122, 1139 (Cal. 2000).

326. *See People v. Brisendine*, 531 P.2d 1099, 1112 (Cal. 1975).

327. *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809, 836 (Cal. 1991) (Mosk, J., concurring).

Indeed, members of the Supreme Court have pointed to the independent duty of state judiciaries to develop their own body of state constitutional law.³²⁸ And at least one justice of the California Supreme Court has acknowledged that applying the state constitution is a state judge's responsibility and that the California Constitution should be the first step in a state court's review of a religion issue:

The Chief Justice suggests that after federal review we may possibly consider state constitutional issues. This is not only the horse trailing the cart, it results in unnecessary delay, additional costs to the parties . . . and a duplicative burden on judicial resources. *State law and state constitutional principles should be our first, not our last, referent.*³²⁹

Accordingly, *Smith* can hardly be the rule that California courts will turn to first as the one that best “reflects the language and history of the California Constitution.”³³⁰ Limiting the California analysis to a rote application of *Lemon*—itself the subject of much criticism—ignores the need for development of a standard that accounts for the California Constitution. It further neglects a task the Supreme Court itself has avoided, which is “to frame a principle for constitutional adjudication that is not only grounded in the history and language of the first amendment, but one that is also capable of consistent application to the relevant problems.”³³¹ Aside from having the benefit of complying with state constitutional provisions, the Federal Constitution, and Supreme Court precedent, the incidental-benefits analysis has the benefit of applying in all of the various factual contexts that have resisted Supreme Court efforts at crafting a single federal analytical approach.³³²

328. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (States may grant “individual liberties more expansive than those conferred by the Federal Constitution.”); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (“[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law.”).

329. *Sands*, 809 P.2d at 836 (Mosk, J., concurring).

330. *Catholic Charities v. Superior Court*, 85 P.3d 67, 91 (Cal. 2004). *See also* *N. Coast Women’s Care Med. Grp., Inc. v. San Diego Cnty. Superior Court*, 189 P.3d 959, 968 (Cal. 2008) (“[C]onstruing a state constitution is a matter left exclusively to the states.”).

331. *Wallace v. Jaffree*, 472 U.S. 38, 68–69 (1985) (O’Connor, J., concurring) (citing *Choper*, *supra* note 298, at 332–33).

332. Of course, due to the diverse nature of contexts in which religion cases arise and the related differences in the strengths of the competing concerns, at least some variance in the emphasis to be placed on particular factors, or the weight to be given to particular concerns, must be permitted to adjust to the circumstances of the individual case.

The California incidental-benefits analysis recognizes that the Federal Establishment and Free Exercise clauses are not exactly equivalent. As a prohibition on government action, the Establishment Clause should be more strictly enforced to preserve the Free Exercise Clause as a protection of individual liberty. Deceptively, this should mean that in a society that values freedom of conscience as an individual liberty, the tie should go to the religious in a conflict between establishment and free exercise values and that a claimed free-exercise justification for a government act accommodating religion should resolve all objections. Not so. The Establishment Clause fundamentally is intended to *protect* freedom of individual belief by preventing state approval or disapproval of any one religion:

“Our constitutional policy . . . does not deny the value or the necessity for religious training, teaching or observance. Rather it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree. For this reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the two fold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function. The dual prohibition makes that function altogether private.”³³³

This circumstance is even more true in California, where the NPC expressly codifies the principle that to prefer one religion is to discriminate against others. Viewed from that perspective, preventing government participation in a particular public exercise of religion to the greatest permissible degree is a *protection* of individual freedom of religious belief. This explains why school-sponsored Bible study groups (certainly an expression of individual belief) must be barred:

The Free Exercise Clause of the federal Constitution embodies two rights: Freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Under the Free Exercise Clause, freedom of conscience and freedom to adhere to such religious organizations or beliefs as the individual may choose is secured against governmental interference. This is not to say, however, that religion may be exercised wherever and whenever the adherent chooses. The inevitable consequence of the Establishment Clause when applied to religious ritual on school property is to restrict that activity to preserve the wall between church and state.³³⁴

333. Sch. Dist. v. Schempp, 374 U.S. 203, 218–19 (1963) (quoting Everson v. Bd. of Educ., 330 U.S. 1, 52 (1947)) (Rutledge, J., dissenting).

334. Johnson v. Huntington Beach Union High Sch. Dist., 137 Cal. Rptr. 43, 52 (Ct. App. 1977) (internal citations and quotation omitted).

Thus, in the religion context, California courts are equally concerned with appearances and inferences, with the indirect and small, as with the direct, intentional, and substantial.³³⁵ Even seemingly trivial aid that gives only the appearance of preference still provides the same mental satisfaction to the supported—and the same dispiriting rejection to the excluded—as does the explicit endorsement. Accordingly, only the incidental-benefits analysis accounts for and harmonizes all of the applicable federal and state constitutional provisions and principles.

IV. The California Incidental-Benefits Standard in Action

What ordinarily would be suspect under an Establishment Clause or incidental-benefits analysis can be constitutional when justified as a free-exercise accommodation, particularly where participation is voluntary and nonparticipants are not denied any benefit. Consider, for example, the following hypothetical example.

Assume for the sake of argument that California employs chaplains in its prison system to serve the religious needs of religious inmates. Assume further that such chaplains are from five denominations, corresponding to some of the faiths represented among the inmate population statewide. This raises two questions: first, whether the state may employ such chaplains, and second, whether the state is required to provide a chaplain for every religious inmate regardless of circumstances such as how many inmates subscribe to a particular religion and whether that religion actually needs a chaplain. As discussed below, under both federal and state law, the answers are that the state indeed may employ chaplains to alleviate government-imposed burdens on inmate free-exercise rights, and the state may only, and need only, provide chaplains to the extent reasonably necessary to alleviate such burdens. As a result, only some chaplains will be permitted, and chaplains for every inmate regardless of need would not be required. As discussed below, such a program would be lawful under federal law and the California incidental-benefits analysis.

Supreme Court religion doctrine leaves no doubt that “in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state

335. See *Feminist Women’s Health Ctr., Inc v. Philibosian*, 203 Cal. Rptr 918, 925 (Ct. App. 1984) (state required to avoid appearance of religious partiality).

power may place on religious belief and practice.”³³⁶ As a result, federal courts have consistently held that the Establishment Clause is not violated when a prison employs chaplains to accommodate the burden that imprisonment places on inmates’ rights to free exercise of their religion.³³⁷

The hypothetical prison chaplaincy is compatible with the state and Federal Establishment Clauses because the state is accommodating a fundamental constitutional right of prisoners to exercise their religions.³³⁸ Incarceration prevents a prisoner from freely choosing with whom and where to worship, and the government has the obligation to provide reasonable accommodations that alleviate the burdens placed on a prisoner’s free exercise rights. In *Cutter*, the Supreme Court described appropriate government religious accommodations that do not violate the Establishment Clause, which include a state’s accommodation of “traditionally recognized” religions, and a state’s providing “inmates with chaplains.”³³⁹ Such accommodation is permissible even if some advancement of religion results.³⁴⁰

Such a chaplaincy would be constitutional under *Lemon* because it has a secular, religion-neutral purpose (accommodating inmate free-exercise rights), because its pluralistic approach lacks the appearance of endorsing a religion or religion in general, and because it reduces entanglement to the greatest degree consistent with accommodating inmate free exercise rights. There are few circumstances where the government has the degree of control over a citizen as it

336. *Bd. of Educ. v. Grumet*, 512 U.S. 687, 705 (1994).

337. *Schempp*, 374 U.S. at 296–98 (Brennan J., concurring) (“It is argued that [paid-chaplaincy] provisions may be assumed to contravene the Establishment Clause, yet be sustained on constitutional grounds as necessary to secure to . . . prisoners those rights of worship guaranteed under the Free Exercise Clause.”); *Johnson-Bey v. Lane*, 863 F.2d 1308, 1312 (7th Cir. 1988) (“Prisons are entitled to employ chaplains”); *Theriault v. Silber*, 547 F.2d 1279 (5th Cir. 1977) (federal prison chaplains do not violate the Establishment Clause); *Horn v. California*, 321 F. Supp. 961, 965 (E.D. Cal. 1968) (claim that state-paid chaplains violate the Establishment Clause is “without merit”). *See also* *Duffy v. Cal. State Pers. Bd.*, 283 Cal. Rptr. 622 (Ct. App. 1991) (limiting paid chaplain positions to persons accredited by Catholic church did not violate Establishment Clause or equal protection).

338. *See Cutter v. Wilkinson*, 544 U.S. 709, 719–20 (2005).

339. *Id.* at 724–25.

340. *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984). Other prison systems, state and federal, employ chaplains. *See, e.g., Theriault v. Carlson*, 339 F. Supp. 375, 380–81 (N.D. Ga. 1972), *aff’d sub nom, Theriault v. Silber*, 547 F.2d 1279, 1280 (5th Cir. 1977); *Freeman v. Tex. Dep’t of Criminal Justice*, 369 F.3d 854 (5th Cir. 2004); *Smith v. Kyler*, No. 08-1731, 2008 WL 4516695, at 481 (3d Cir. Oct. 9, 2008); *Bolton v. Goord*, 992 F. Supp. 604 (S.D.N.Y. 1998), *Muhammad v. City of N.Y. Dep’t of Corr.*, 904 F. Supp. 161, 173–74 (S.D.N.Y. 1995).

does in the prison or the military, and consequently the concomitant responsibility and ability to provide a religious accommodation are equivalently greater. In such special contexts, when the two religion clauses sharply conflict, the right answer can be counterintuitive: “spending government money on the clergy looks like establishing religion, but if the government cannot pay for military chaplains a good many soldiers and sailors would be kept from the opportunity to exercise their chosen religions.”³⁴¹

But the state and federal religion clauses do not require a prison to provide a chaplain to every religious inmate, as neutrality permits alleviation of government-imposed burdens on free exercise.³⁴² Requiring a state prison to accommodate every religious prisoner with a chaplain, regardless of the actual need or availability of resources, would “spawn a cottage industry of litigation and could have a negative impact on prison staff, inmates and prison resources.”³⁴³ The fact that different sects of religious inmates are differently situated from each other is a proper basis for distinguishing among them in providing religious accommodations. As a result, a state prison may provide different religious accommodations to different religious groups when the policy for providing such accommodations is religion-neutral and reasonably related to legitimate penological interests, such as needs, numbers, and cost.³⁴⁴ Prisons are not required to provide in-

341. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 875 (2005) (citing *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005)).

342. *Bd. of Educ. v. Grumet*, 512 U.S. 687, 705 (1994).

343. *Baranowski v. Hart*, 486 F.3d 112, 122 (5th Cir. 2007) (quoting *Freeman v. Tex. Dep’t of Criminal Justice*, 369 F.3d 854, 862 (5th Cir. 2004)). The Equal Protection Clause does not compel a different result, as it is well-established that equal protection does not require prisons to employ chaplains representing every faith to which a prisoner might subscribe. *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972); *Allen v. Toombs*, 827 F.2d 563, 569 (9th Cir. 1987) (“prison administration is not under an affirmative duty to provide each inmate with the spiritual counselor of his choice”); *Al-Alamin v. Gramley*, 926 F.2d 680, 686 (7th Cir. 1991) (economic constraints “may require that the needs of inmates adhering to one faith be accommodated differently from those adhering to another”); *Johnson-Bey v. Lane*, 863 F.2d 1308, 1310 (7th Cir. 1988); *Card v. Dugger*, 709 F. Supp. 1098, 1107–08 (M.D. Fla. 1988); *Gittlemacker v. Prasse*, 428 F.2d 1, 4–5 (3d Cir. 1970) (noting that the state has no affirmative duty to supply every inmate with a clergyman of his choice). When the inmates who follow a particular religion are small in number, they need only be afforded “a reasonable opportunity” to pursue their faith that is “comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts.” *Cruz*, 405 U.S. at 322 (emphasis added). See also *Adkins v. Kaspar*, 393 F.3d 559, 564 (5th Cir. 2004) (not providing volunteer supervisors as often as prisoners request is not a violation of free exercise of religion).

344. See *Shakur v. Schriro* 514 F.3d 878, 891 (9th Cir. 2008) (noting that penological interests can be balanced against the equal treatment of prisoners). See also *Milton v. Hubbard*, No. C09-4644, 2009 WL 3429651, at *2 (N.D. Cal. Oct 22, 2009).

mates of every religious group with a special place of worship, “nor must a chaplain, priest, or minister be provided without regard to the extent of the demand.”³⁴⁵ Accordingly, employing a prison chaplain is not constitutionally required for religious groups that lack the liturgical need for a chaplain, exist in small numbers, or are adequately accommodated by other means (such as by volunteer chaplains). The state’s prisons have no duty to provide each inmate with the spiritual counselor of his or her choice,³⁴⁶ and the free-exercise rights of a member of a small religion are not substantially burdened even when volunteer chaplains appear less frequently than the inmate would like.³⁴⁷

Providing prison chaplains would be subject only to rational-basis review under *Turner*, rather than the strict scrutiny under *Larson v. Valente* for three reasons.³⁴⁸ First, *Larson* only applies in Establishment Clause claims when evidence of a discriminatory purpose exists.³⁴⁹ Indeed, *Larson* itself indicates that only laws discriminating *among* religions are subject to strict scrutiny, and that laws “affording a uniform benefit to *all* religions” should be analyzed under *Lemon*.³⁵⁰ Second, *Larson*, which concerned a state’s application of its charitable solicitation statute to religious organizations, does not apply to the prison setting because prisons have a unique, compelling interest in accommodating inmate free-exercise rights that does not exist in the ordinary public context. While the general neutrality principle applies insofar as it limits the outer extent of the permissible accommodation, the neutrality principle alone is inadequate to resolve the complex issues that arise in the nexus of competing establishment and free-exercise concerns related to providing religious accommodation to prisoners.³⁵¹ Prison, where inmates’ free exercise rights require government accommodation, is a special context similar to the military, where hiring chaplains has been upheld against establishment chal-

345. *Cruz*, 405 U.S. at 322 n.2.

346. *Allen*, 827 F.2d at 569.

347. *Sossamon v. Lone Star State*, 560 F.3d 316, 334 (5th Cir. 2009); *Adkins*, 393 F.3d at 564.

348. 456 U.S. 228 (1982).

349. *Larson*, 456 U.S. at 246–47. *See also* *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (discriminatory purpose raises level of scrutiny required in free exercise claim).

350. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338–39 (1987) (citing *Larson v. Valente*, 456 U.S. 228, 252 (1982)).

351. *See McCreary Cnty. v. ACLU*, 545 U.S. 844, 875–76 (2005) (noting that “an appeal to neutrality alone cannot possibly law every issue to rest.”).

lenges.³⁵² Where there are such special reasons to defer to the government's discretion, strict scrutiny is inappropriate.³⁵³

Finally, *Larson* was decided five years before the Supreme Court held in *O'Lone v. Estate of Shabazz*³⁵⁴ that all prisoner First Amendment claims should be judged by the *Turner v. Safley*³⁵⁵ rational relationship standard. The *Turner* standard applies to all circumstances where the needs of prison administration implicate constitutional rights.³⁵⁶ Under *Turner*, prison regulations are valid if reasonably related to legitimate penological interests.³⁵⁷ This "reasonableness" test is less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights.³⁵⁸ Courts generally owe "substantial deference to the professional judgment of prison administrators,"³⁵⁹ and when "'difficult and sensitive matters of institutional administration'" are at issue, courts ordinarily will not substitute their judgment for that of prison officials, even where the claim is made under the First Amendment.³⁶⁰

A prison chaplaincy program that is reasonably related to the legitimate, penological interest of accommodating inmates' free-exercise rights is constitutionally justified because complying with such a constitutional requirement is a secular and compelling purpose.³⁶¹ A reasonably necessary chaplaincy is a neutral system, as even the concept of neutrality allows a prison to draw distinctions when those distinctions flow from the government's legitimate penological interest.³⁶² Indeed, the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.³⁶³ Accord-

352. *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985); *Larsen v. U.S. Navy*, 486 F. Supp. 2d 11, 27–28 (D.D.C. 2007). See also *Sch. Dist. v. Schempp*, 374 U.S. 203, 299 (1963) (Brennan, J., concurring) ("[H]ostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion").

353. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 570 n.5 (Souter, J., concurring).

354. 482 U.S. 342 (1987).

355. 482 U.S. 78 (1987).

356. *Washington v. Harper*, 494 U.S. 210, 223–24 (1990); *Ward v. Walsh*, 1 F.3d 873, 877 (9th Cir. 1993).

357. *Turner v. Safley*, 482 U.S. 78, 89 (1987).

358. *O'Lone*, 482 U.S. at 349.

359. *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003).

360. *O'Lone*, 482 U.S. at 353 (quoting *Block v. Rutherford*, 468 U.S. 576, 588 (1984)).

361. *Widmar v. Vincent*, 454 U.S. 263, 271 (1981).

362. *Thornburgh v. Abbott*, 490 U.S. 401, 415–16 (1989).

363. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 839 (1995).

ingly, this hypothetical prison chaplaincy program would be constitutional under federal law.

Under the California incidental-benefits analysis, such a hypothetical program is equally well justified. Some provisions (article IX, sections 8, 9(f); article XIII, sections 3, 4, 5) drop out of the analysis immediately, as no sectarian education, property taxes, or orphans are involved. Even if the state Establishment Clause is considered in isolation, meaning that under *East Bay Asian* federal law applies, it passes for the reasons discussed above. The NPC is satisfied because the program is made equally available to all similarly situated religious groups. Finally, incidental benefits under article XVI, section 5 are not implicated because at most the individual chaplains (not their respective religions) are receiving a benefit, so that any benefit to the religious organizations themselves is at most indirect and insubstantial.

The hypothetical program would also be sufficiently neutral under state law. A law granting religious accommodation may confer the benefit only on those religious organizations that are actually affected. In other words, the government may distinguish between those religions that require a legislative accommodation to alleviate a government-imposed burden on religious exercise and those that do not.³⁶⁴ The religious organizations that need no accommodation, and so receive no special benefit, are treated precisely the same as all other entities, whether religious or nonreligious. Thus, while the program may appear to treat some religions more favorably than others, it does not treat the unburdened religions less favorably than anyone else whose exercise is unburdened, and so the program would be facially neutral.³⁶⁵

Conclusion

Federal law provides the boundaries within which California may operate when regulating the interaction of government and religion. Within those limits, an independent state-law analysis is permitted. Indeed, strong reasons exist for a California religion analysis to account for the distinct terms and history of the state constitution religion provisions. As discussed above, considered in isolation, either the history or text of the individual California religion provisions might support government action that gives the appearance of preferring one or all

364. *Catholic Charities v. Superior Court*, 85 P.3d 67, 85 (Cal. 2004).

365. *Id.*

religions. Considered together, the text and history of all the religion provisions in the California Constitution require application of the incidental-benefits standard, which bars even the appearance of a preference. To remain consistent with the federal constitutional requirements, and to maintain internal consistency, there remain state-law requirements for alleviating any government-imposed burdens on religious observance—but without the more liberal federal standard that government may do more than is strictly necessary to remove the burden. In the end, this stricter California standard is *more* protective of religious freedoms, as “faith flourishes more freely in a sanctuary protected from the dictates of the majority.”³⁶⁶

There are two rationales for assigning a meaning to the religion clauses that are not necessarily tied to the likely intent of the drafters. First, the constitutional provisions should be viewed from the perspective of the natural scope and meaning of the principle established. It is the constitutional principle—embodied in the fair meaning of the text itself—that should control the result. If even the Framers acknowledged their lack of prescience and omniscience, then a slavish devotion to their statements of intent may be unwarranted, especially where they are ambiguous.³⁶⁷ Thus, although the drafters of the Fourteenth Amendment did not necessarily intend “equal protection” to mean such equality requires black and white children to attend school together, the plain meaning of the text itself contains a broad general principle that indeed does compel such a result.³⁶⁸ Second, constitutional provisions commonly evolve and expand to accommodate new applications in a changing society.³⁶⁹ Constitutions, after all,

366. *Fox v. City of L.A.*, 587 P.2d 663, 670 (Cal. 1978) (Bird, C.J., concurring).

367. *LAZARUS*, *supra* note 80, at 242.

368. *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954). The Court noted:

The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among ‘all persons born or naturalized in the United States.’ Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

Id.

Van Orden v. Perry, 545 U.S. 677, 734 (2005) (Stevens, J., dissenting) (“Fortunately, we are not bound by the Framers’ expectations—we are bound by the legal principles they enshrined in our Constitution”). Even the noted originalist scholar Robert Bork maintained that *Brown* was correctly decided based on the general principle of racial equality embodied in the Fourteenth Amendment, despite the contrary expressed intent of its drafters. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 82 (1990).

369. *See M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819) (“[W]e must never forget, that it is a *constitution* we are expounding” that is intended to “endure for ages

are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, “designed to approach immortality as nearly as human institutions can approach it.” The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas.³⁷⁰

Regarding the religion clauses of the Federal Constitution, in particular, “the purpose was to state an objective not to write a statute.”³⁷¹ Reading the text of the religion clauses in the California Constitution, reviewing the history of their development, and considering the statements of the 1849 and 1879 drafters, there can be little doubt that the religion clauses collectively contain broad principles of neutrality, separation, and as near an absolute ban on public aid to religion as can be made.

In a country that currently retains a majority ethnicity and a majority religion, it is seductive to think that the preferences of the majority should have some weight in California religion cases. Indeed, to allow the offended sensibilities of minority religions to dictate the nature and extent of public devotional opportunities for the largest segment of the community may seem counterintuitive, or at least unfair.³⁷² But neutrality is necessary to maintain a truly pluralistic society, and if government must be neutral in matters of religion, then neutrality surely requires honoring the beliefs of the quiet as well as the vocal minorities.³⁷³ Like the other individual rights contained in the state and federal constitutions, these rights also exist to protect

to come, and, consequently, to be adapted to the various *crises* of human affairs.”). Opponents of the living constitution theory can take heart from the fact that constitutional principles do not necessarily always expand with time, as the Establishment Clause has contracted from the time of the founding: “*Marsh* plainly does not stand for the sweeping proposition . . . that all accepted practices 200 years old and their equivalents are constitutional today. . . . [This] reading of *Marsh* would gut the core of the Establishment Clause, as this Court understands it.” *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 603 (2002).

370. *Weems v. United States*, 217 U.S. 349, 373 (1910).

371. *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970).

372. See *Johnson v. Huntington Beach Union High Sch. Dist.*, 137 Cal. Rptr. 43, 63 (Ct. App. 1977) (McDaniel, J., dissenting) (overconcern for establishment issues has led to “tyranny of the minority”).

373. *Fox v. City of L.A.*, 587 P.2d 663, 666 (Cal. 1978).

the *individual* against the community or the government.³⁷⁴ The essence of any individual right necessarily is counter-majoritarian—otherwise it would either be only a collective right, or no right at all. Religion, like privacy and equal protection, is not a principle that can be defined by collective action or majority vote; barring a federal constitutional amendment, the nature of the establishment and free-exercise principles is a legal matter, not a democratic one. Indeed, it risks a basic tenet of the republican bargain for a temporary majority to establish discriminatory religious principles, as today’s majority may well be tomorrow’s minority.³⁷⁵ In the same way, a rule allowing the religion of the day to receive special benefits only raises the specter of future discrimination: “Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?”³⁷⁶

Religion in the state polity is not an unqualified good—like anything else in public life, it can be a positive or negative factor. Consequently, it is not necessarily beneficial to society for the state government to take a so-called “benevolent” attitude towards religion. In the best case, such benevolence has a high risk of preference and excess entanglement. In the worst case, it is a euphemism for preferential treatment and discrimination. Preserving government neutrality in religion is a difficult and thankless task, but it unquestionably belongs to the judiciary:

Religious freedom is one of our most cherished heritages. As judges sworn to uphold the constitution, we have no more solemn duty than to preserve this heritage for our children just as our ancestors preserved it for us. This we can only do by guarding against

374. *Id.* at 670–71 (Bird, C.J., concurring) (“The guarantees of this state’s Constitution exist to protect the lone dissenter, just as they exist to protect the religious freedom of the majority.”).

375. *See, e.g.*, BROWNE, *supra* note 102, at 360, comments by Mr. Stuart (“I think it is necessary, in order to show our love for the rights of the people, that we should endeavor to show it for the whole people; for the minority as well as the majority. I think we should protect minorities against any factious majority got up for party purposes or political speculation”), at 22 (comments by Mr. Gwin), at 309 (comments by Mr. Botts), at 359 (comments by Mr. Lippitt), at 366 (comments by Mr. Tefft). In the race relations context, for example, California in 2009 was a majority-minority state, meaning that whites of non-Hispanic origin were outnumbered by all other minorities. The 2009 U.S. Census Bureau estimates for California white persons not of Hispanic descent as a percent of the overall state population in 2009 was 41.7%, compared to a 65.1% figure nationwide. California QuickFacts, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/06000.html> (last updated Nov. 4, 2010).

376. *Engel v. Vitale*, 370 U.S. 421, 436 (1962) (internal citation omitted).

every governmental intrusion, large or small, into the inner sanctum of conscience.³⁷⁷

This does not mean that the judiciary must be sectarian hall monitors—on the contrary, the California Supreme Court rightly has rejected attempts to make it into a “standing committee on approved theology,” as that is a task for which the courts are, “to say the least, not well equipped.”³⁷⁸ But the courts will continue to be presented with these difficult questions. If the gestalt of the religion provisions in the California Constitution is to keep government out of sectarian divisions to the greatest possible extent, then the California courts would be well served by a unified religion analysis such as the one proposed here for maintaining the delicate balance between secular government and religious observance.

377. *Fox*, 587 P.2d at 676 (Bird, C.J., concurring).

378. *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809, 818–19 n.8 (Cal. 1991).