D. STATE AID TO PAROCHIAL SCHOOLS

One of the ways chosen by some religious groups to inculcate their faith in the children of the faithful was through parish schools of general elementary and secondary education, which functioned alongside the public schools with similar curriculum and methods, except that the "parochial" schools included religious instruction and practices, either as separate subjects or incorporated in the presentation of "secular" subjects or both. The right of private schools to exist was announced by the U.S. Supreme Court in *Pierce v. Society of Sisters* (1925),[1] and the case law dealing with state efforts to regulate church schools was reviewed in Part B above.

This section deals with a rather specialized category of litigation arising from the use of tax funds for the assistance or support of such schools. This category has produced an extensive body of case law, discussion of which has been deferred to this point because of its unique character.

From 1925 on, some patrons of church-related schools had pointed out that they had to pay taxes for public schools, to which they could not for reasons of conscience send their children, and then also had to pay tuition to the private schools, a condition they contended was tantamount to "double taxation." When opponents of tax aid to parochial schools objected that they didn't want to be required to pay taxes for the support of parochial schools which taught religious tenets they did not believe, the reply was, in effect, "We don't want *your* tax money; we just want *ours*!"

This controversy raged inconclusively for decades, with the campaign for tax aid for parochial schools gaining here and losing there. Various states and localities tried compromise arrangements such as the "Faribault plan," under which the public school board operated the parochial school during regular school hours, employing members of the sponsoring church as teachers on the public-school payroll. The pupils attended a service at the church prior to the school day and had an hour's religious instruction after the regular school day ended. This plan was instituted in 1891 in Faribault, Minnesota, as an unwritten agreement between Roman Catholic and public school educators. It was imitated here and there through the first half of the twentieth century. In Dixon, New Mexico, a federal judge ruled against such an arrangement in 1948,[2] and in most localities such patterns have since disappeared,

1. 268 U.S. 510 (1925); see discussion of church schools at § A3 above.

2. Cf. Stokes, A.P., *Church and State in the United States*, II (New York: Harper & Bros. 1950), pp. 650 ff.

due less to constitutional considerations than to the facts of increasing religious pluralism throughout the land and the unsatisfactoriness of the compromise both to churches and the public: i.e., the opportunities for religious inculcation were considered insufficient by the former and obtrusive by the latter.

Although several religious groups have chosen to develop parochial schools as their preferred method of inculcation (though not all of their members patronize them), many others have not, and the latter tend to see public aid to parochial schools as a governmental preference for one mode of religious inculcation over others.

1. Early Cases

As long as education was primarily an obligation of the states—and before the First Amendment was made applicable to the states through the Fourteenth Amendment—there was relatively little federal case law on the subject of state aid for parochial schools, although there was some in various states under state law. After *Everson* (1947) declared the Establishment Clause binding on the states as well as Congress, federal law has tended to eclipse or supersede state constitutions on this subject, with the result that the U.S. Supreme Court has been preoccupied with this question almost to the degree that it used to be around the turn of the century with litigation involving railroads.

a. *Quick Bear v. Leupp* (1908). One of the earliest cases involved payments from the federal government to the Bureau of Catholic Indian Missions for schooling for Sioux Indians, a case that came under the federal constitution because Indians are wards of the federal government. Plaintiffs, in challenging such payments, referred to a declaration of policy by act of Congress of June 7, 1897, to the effect that the federal government "shall make no appropriation whatever for education in any sectarian schools," and insisted that such policy would rule out payments to a sectarian body for education of Indians. But the U.S. Supreme Court observed that the payments were made from treaty funds held by the government as trustee for the Indians, and concluded, "We cannot concede the proposition that Indians cannot be allowed to use their own money to educate their children in the schools of their own choice...."[3] Because the money expended belonged to the Indians and not to the government, it was not subject to the legal strictures that would presumably bind the government in the use of public funds.

b. *Cochran v. Louisiana State Board of Education* (1930). The state of Louisiana had adopted a law to the effect that the severance tax fund of the state would be used to supply schoolbooks to the schoolchildren of the state. The law was challenged, not under the Establishment Clause, which was not then considered applicable to the states, but under the Guaranty (of a Republican Form of Government) Clause of

3. *Quick Bear v. Leupp*, 210 U.S 510 (1908).

Article IV, Section 4. The opponents of the law argued that it was a taking of private property for a private purpose.

> Taxes levied by a State must be for a public purpose.
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> The test... is whether the public has a common and equal right to the use and benefit....
>
> Private schools do not come under the category of public use....
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> [A] use which is denominated a "public use," as justifying the taking of private property under either the taxing power or the power of eminent domain, requires a right secured to the public to enjoy the objects for which the tax is levied upon such terms as the public itself may lay down, and the control of which the public has reserved even after the aid has passed to the object to which it is granted.
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> A private school may limit its patrons in any manner that it chooses. It may limit them to persons of the Ethiopian race; or to persons of Japanese extraction;... or to persons of a certain sect; or to a limited number of persons such as ten or five; and the State cannot restrain such action....
>
> The furnishing of textbooks free by the State to school children attending private schools... is an aid to such private institutions by furnishing a part of their equipment... [without] securing to the public [either] public control [or] common and equal right of use.[4]

Chief Justice Charles Evans Hughes wrote the opinion of the U.S. Supreme Court, affirming the supreme court of Louisiana, which had affirmed the trial court's refusal to grant an injunction against the state.

> "One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or nonsectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them.... It is also true that the sectarian schools, which some of the children attend, instruct their pupils in religion, and books are used for that purpose, but one may search diligently the acts, though without result, in an effort to find anything to the effect that it is the purpose of the state to furnish religious books for the use of such children.... What the statutes contemplate is that the same books that are furnished children attending public schools shall be furnished children attending private schools.... Among these books, naturally, none is to be expected, adapted to religious instruction.... [O]nly

4. *Cochran v. Louisiana*, 281 U.S. 370 (1930), statement of appellants' argument.

> the use of the books... is granted to the children, or, in other words, the books are lent to them."
>
> Viewing the statute as having the effect thus attributed to it, we can not doubt that the taxing power of the State is exerted for a public purpose....[5]

Cochran not only initiated the federal line of cases on state aid to parochial schools but advanced the "child-benefit theory" that was to play a prominent part in that sequence. The essence of that theory was that the state may extend to all children certain benefits if those benefits are secular, are available to children irrespective of the school they attend, and do not increase the property or resources of the religious school.

2. *Everson v. Board of Education* (1947)

Volume 330 of *United States Reports*, the compendium of the deliverances of the U.S. Supreme Court, began with a watershed decision in the law of church and state, *Everson v. Board of Education of Ewing Township* (New Jersey). It not only announced that the Establishment Clause was applicable to the states via the Fourteenth Amendment but set forth the first comprehensive definition of "establishment," which has dominated the field—whether in concord or discord—ever since.[6]

The case arose from an arrangement under which a township board of education had agreed to reimburse parents for money expended by them for transportation of their children to private nonprofit schools on regular buses operated by the public transportation system. All of the children whose travel to private schools was thus reimbursed were pupils at Roman Catholic parochial schools, where instruction in their faith was given. A taxpayer sued the board for expending tax funds on parochial education, and the trial court agreed with the taxpayer. The New Jersey Court of Errors and Appeals reversed, and the U.S. Supreme Court entertained an appeal to determine (1) whether the state was taking by taxation the private property of some to give to others for their own private purposes or (2) whether the state was taxing people for the support of schools teaching a particular religious faith.

a. The Court's Opinion by Justice Black. The majority opinion was written by Justice Hugo Black, and it has been much praised and much criticized, depending upon commentators' views of his use of history and their agreement or disagreement with the outcome. Justice Black disposed of the due process argument as follows:

> [T]he New Jersey legislature has decided that a public purpose will be served by using tax-raised funds to pay the bus fares of all school children, including those who attend parochial schools.... The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the

5. Ibid., p. 375. All but the last sentence is the U.S. Supreme Court's quotation of the Louisiana Supreme Court.

6. For a discussion ot the concept of "incorporation," see IIA2a.

> individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need.
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> * * *
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> It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose. The same thing is no less true of legislation to reimburse needy parents, or all parents, for payment of the fares of their children so that they can ride in public busses to and from schools rather than run the risk of traffic and other hazards incident to walking or "hitchhiking." Nor does it follow that a law has a private rather than a public purpose because it provides that tax-raised funds will be paid to reimburse individuals on account of money spent by them in a way which furthers a public program.[7]

The Establishment Clause argument required a much more extensive treatment. Justice Black approached it by way of what he conceived to be the evils the Founders were seeking to avoid, and he derived that understanding mainly from the struggle over a bill to support Christian teachers in Virginia in 1785-86, which evoked James Madison's great "Memorial and Remonstrance."

> [The] words of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity. Doubtless their goal has not been entirely reached; but so far has the Nation moved toward it that the expression "law respecting an establishment of religion," probably does not so vividly remind present-day Americans of the evils, fears and political problems that caused that expression to be written into our Bill of Rights....
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> A large proportion of the early settlers of this country came here from England to escape the bondage of laws which compelled them to support and attend government-favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishment had been inflicted were such things as speaking disrespectfully of the views of government-established churches, non-attendance at those churches,

7. *Everson v. Board of Education*, 330 U.S. 1 (1947).

expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them.

These practices of the old world were transplanted to and began to thrive in the soil of the new America. The very charters granted by the English Crown... authorized... [the erection of] religious establishment which all, whether believers or non-believers, would be required to support and attend. An exercise of this authority was accompanied by a repetition of many of the old-world practices and persecutions.... [D]issenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters.

These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment. No one locality and no one group throughout the Colonies can rightly be given entire credit for having roused the sentiment that culminated in adoption of the Bill of Rights' provisions embracing religious liberty. But Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, to interfere with the beliefs of any religious individual or group.

The movement toward this end reached its dramatic climax in Virginia in 1785-86 when the Virginia legislative body was about to renew Virginia's tax levy for the support of the established church. Thomas Jefferson and James Madison led the fight against this tax. Madison wrote his great Memorial and Remonstrance against the law. In it, he argued that a true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions.... When the proposal came up for consideration... it not only died in committee, but the Assembly enacted the famous "Virginia Bill for Religious Liberty" originally written by Thomas Jefferson. The preamble to that Bill stated among other things that

> "Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either...; that to compel a man to furnish contributions

> of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern...."
>
> And the statute itself enacted
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> "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief...."
>
> This Court has previously recognized[8] that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles,[9] had the same objective and were intended to provide the same protection against governmental intrusion as the Virginia statute.

Noting that the court had construed the Fourteenth Amendment to prohibit "state action abridging religious freedom,"[10] Black announced, "There is every reason to give the same application and broad interpretation to the `establishment of religion' clause." Thus, with little more than a terse *ipse dixit*, Black promulgated the often-criticized "incorporation" of the Establishment Clause into the term "liberty" in the Due Process Clause of the Fourteenth Amendment, making it applicable to the states and unleashing a torrent of church-state cases upon the Supreme Court that had previously been dealt with mainly under the provisions of state constitutions.

But what did "establishment" mean? In a famous formula, often referred to as the no-aid test, Black enunciated the first test of Establishment, which was reiterated verbatim in five subsequent decisions, once by a unanimous court:[11]

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

8. Reference is to *Reynolds v. U.S.*, 98 U.S. 145 (1879), treating of Mormon polygamy under the Free Exercise Clause.

9. Jefferson was out of the country as ambassador to France at the time.

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

11. Cf. *McCollum v. Bd. of Ed.*, 333 U.S. 203 (1948); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Torcaso v. Watkins*, 367 U.S. 488 (1961)(without dissent); *Allegheny County v. ACLU*, 492 U.S. 573 (1989).

> secretly, participate in the affairs of any religious organizations or groups and *vice versa*. 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."[12]

Particular criticism has been directed against the phrase "aid all religions" and the reference to Jefferson's "wall of separation" at the end. This bold and sweeping definition of establishment contrasts strikingly with its application to the case at bar, as the dissenters did not hesitate to point out, but it was not the first time the court had enunciated a major principle while tempering it in its first application.[13]

> We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the State's constitutional power even though it approaches the verge of that power. New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard for their religious belief.
>
> Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State.... Of course, cutting off church schools from these services... would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its

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12. *Everson, supra,* 330 U.S. at 116-117.

13. Cf. *Marbury v. Madison*, in which the court assumed the power to review the constitutionality of acts of Congress. But it first used that power to decline the congressionally approved authority to issue a writ of mandamus to enforce the seating of Marbury as one of President John Adams' "midnight judges," appointed just before the defeated president left office. Thus the court mollified Jefferson's supporters, who formed a majority of the incoming Congress.

> relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them....
>
> 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. New Jersey has not breached it here.[14]

b. Justice Jackson's Dissent. Justice Jackson wrote one of his typically trenchant dissents, in which he pointed out that the majority's judgment (upholding the New Jersey bus law) seemed "utterly discordant" with the opinion's advocacy of "complete and uncompromising separation of Church and State."

> The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, "whispering `I will ne'er consent,'—consented."

Justice Jackson pointed out that the majority had not taken into account the facts of the case. The Township of Ewing was not providing transportation to children who otherwise could not get to school; it was simply reimbursing *some* of them for fares paid on the regular public transportation system that they would have taken anyway.

> This expenditure of tax funds has no possible effect on the child's safety or expedition in transit. As passengers on the public busses they travel as fast and no faster, and are as safe and no safer, since their parents are reimbursed as before [the law was passed].

Furthermore, the Act did not represent the solicitude of the state for *all* children going to school. "[T]he Act does not authorize reimbursement to those who choose any alternative to the public school except Catholic Church schools."[15] Bus travel to private, nonreligious schools or to parochial schools operated by other faith-groups was not reimbursed by the Township. The Act thus represented state assistance to children classified, not on the basis of their need, but on the basis of the particular schools they attended, and on the basis of the religious sponsorship of those schools. This, in Justice Jackson's view, was a form of aid to the schools of a particular church and thus to the church itself. He pointed out that the Roman Catholic Church relied heavily on "early and indelible indoctrination in the faith and order of the Church by the word and example of persons consecrated to the task," and, in his view, that was a wise policy. "Its growth and cohesion, discipline and loyalty, spring from its schools." Aiding the school was thus indistinguishable from aiding the church. He couched the "establishment" issue as a basic right of every individual.

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14. *Everson, supra,* emphasis in original.

15. Actually, it was the Township's application of the Act that was limited to Catholic schools, possibly because there were no other private schools within its bounds.

One of our basic rights is to be free of taxation to support a transgression of the constitutional command that the authorities "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."

* * *

It is of no importance in this situation whether the beneficiary of this expenditure of tax-raised funds is primarily the parochial school and incidentally the pupil, or whether the aid is directly bestowed on the pupil with indirect benefit to the school. The State cannot maintain a Church and it can no more tax its citizens to furnish free carriage to those who attend a Church. The prohibition against establishment of religion cannot be circumvented by a subsidy, bonus or reimbursement of expenses to individuals for receiving religious instruction and indoctrination.

* * *

There is no answer to the proposition, more fully expounded by Mr. Justice Rutledge, that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. That is a difference which the constitution sets up between religion and almost every other subject matter of legislation, a difference which goes to the very root of religious freedom and which the Court is overlooking today. This freedom was first in the Bill of Rights because it was first in the forefathers' minds;[16] it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and, above all, to keep bitter religious controversy out of public life by denying to every denomination an advantage from getting control of public policy or the public purse....

This policy of our Federal Constitution has never been wholly pleasing to most religious groups. They all are quick to invoke its protections; they all are irked when they feel its restraints. This court has gone a long way, if not an unreasonable way, to hold that public business... may not be pursued by a state in a way that even indirectly will interfere with religious proselytizing.

But we cannot have it both ways. Religious teaching cannot be a private affair when the state seeks to impose regulations which infringe on it indirectly, and a public affair when it comes to taxing citizens of one faith to aid another, or those of no faith to aid all.... If the state may aid these religious schools, it may therefore regulate them. Many groups have sought aid from tax funds only to find that it carried political controls with

16. Justice Jackson perpetuated a common error in this striking statement: What we know as the First Amendment was actually *third* in the series submitted by the First Congress to the states, but it became *first* when the preceding two failed of ratification. That does not mean that they were listed in rank-order of importance by the Founders or the ratifiers.

> it. Indeed this Court has declared that "It is hardly lack of due process for the Government to regulate that which it subsidizes."[17]

Justice Frankfurter joined in that opinion as well as in the dissent by Justice Rutledge, in which Justices Jackson and Burton also joined. The majority thus consisted of Chief Justice Vinson and Associate Justices Black, Douglas, Reed and Murphy, a slender majority for so important a decision. It should be noted, however, that *none of the dissenters objected to the "no-aid" formula*, but to the Julia-like acceptance of the New Jersey bus law; that is, they were stricter separationists than the majority.

c. Justice Rutledge's Dissent. That was apparent in the dissent of Justice Rutledge, in which all four dissenters joined. It represented a kind of manifesto of strict separationism that was entirely consistent with the "no-aid" formula for defining the Establishment Clause.

> Not simply an established church, but any law respecting an establishment of religion is forbidden.... In Madison's own words characterizing Jefferson's Bill for Establishing Religious Freedom, the guaranty he put in our national charter, like the bill he piloted through the Virginia Assembly, was "a Model of technical precision, and perspicuous brevity." Madison could not have confused "church" and "religion" or "an established church" and "an establishment of religion."
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> The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion....
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> "Religion" appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment" and another, much broader for securing "the free exercise thereof." "Thereof" brings down "religion" with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other.[18]

This was one of the clearest statements of the "unitary" meaning of "religion" in the two clauses, which was echoed by Judge Arlin Adams in his important concurrence in *Malnak v. Yogi*.[19] The logic of "thereof," as Professor Tribe recognized, makes very difficult the task of those who contend that the term

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17. *Everson, supra,* Jackson dissent, quoting *Wickard v. Filburn*, 317 U.S. 111 (1942), which dealt with control of wheat production under the (interstate) Commerce Clause.

18. Ibid., Rutledge dissent.

19. 592 F.2d 197 (CA3 1979), discussed at § C2d(8) above.

"religion" should have a broad scope for the Free Exercise Clause but a narrow one for the Establishment Clause.[20]

Justice Black has been criticized for deriving the meaning of the Establishment Clause solely from the writings and actions of Madison and Jefferson and the Virginia struggle against its Anglican establishment and thus neglecting other views, interests and understandings that went into the formation of the First Amendment. Whatever the merits of that criticism, and they are not great, the blame—if any—might more properly be placed at the door of Justice Rutledge and the "minority report," which laid far greater stress on the Virginia sources than did Black. In fact, Rutledge appended to his opinion the full text of Madison's "Memorial and Remonstrance Against Religious Assessments" and of Patrick Henry's Bill Establishing a Provision for Teachers of the Christian Religion against which it was addressed (though they might equally well have been an appendage to the majority opinion). For several pages, Rutledge recounted the Virginia struggle and Madison's central role in it, as well as in the drafting and revising of the federal First Amendment.

> All the great instruments of the Virginia struggle for religious liberty thus become warp and woof of our constitutional tradition, not simply by the course of history, but by the common unifying force of Madison's life, thought and sponsorship....
>
> As the Remonstrance discloses throughout, Madison opposed every form and degree of official relation between religion and civil authority. For him religion was a wholly private matter beyond the scope of civil power either to restrain or to support....
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> In no phase was he more unrelentingly absolute than in opposing state support or aid by taxation. Not even "three pence" contribution was to be exacted from any citizen for such a purpose.... Not the amount but "the principle of assessment was wrong...."

This equating of the Establishment Clause with Madison's "Memorial and Remonstrance" and Jefferson's Bill for Establishing Religious Freedom may be unjust to all the other Founders and their varying views on establishment, but it recognizes the preeminence of the two who were most concerned, active and articulate on the subject, and whose arguments seem to have carried the day in the formulation of the First Amendment. Samuel Livermore of New Hampshire, who suggested the ingenious phraseology, "Congress shall make no laws *touching* religion," thus finessing the supposed threat to states with religious establishments (later changed to "respecting"), may not have received the honor he deserves.[21] But others, like Elbridge Gerry, Elias Boudinot and Samuel Huntington, did not prevail in their various demurrers, and so cannot be said to have been co-formulators of this basic

20. Tribe, Laurence H., *American Constitutional Law*, 2d ed. (Mineola, N.Y.: Fndn. Press, 1988), pp. 1186 - 1187.

21. See Stokes, *supra*, I, p. 543, on this matter.

law of the land. It is not inappropriate to look to the central figures in the formation of the First Amendment as the primary sources of its meaning and to conclude that they expressed in general the views that persuaded those who approved the proposal and those who ratified it.

The experience of the nation has been moving in the direction envisioned by Madison and Jefferson. Those states that had establishments of religion eventually abolished them, and some states adopted constitutional provisions against establishment that were stricter than the federal First Amendment. Justice Rutledge continued:

> Compulsory attendance upon religious exercises went out early in the process of separating church and state, together with forced observance of religious forms and ceremonies. Test oaths and religious qualifications for office followed later. These things none devoted to our great tradition of religious liberty would think of bringing back. Hence today, apart from efforts to inject religious training or exercises and sectarian issues into the public schools, the only serious surviving threat to maintaining that complete and permanent separation of religion and civil power which the First Amendment commands is through the use of the taxing power to support religion....
>
> Does New Jersey's action furnish support for religion by use of the taxing power? Certainly it does, if the test remains undiluted as Jefferson and Madison made it, that money taken by taxation from one is not to be used or given to support another's religious training or belief, or indeed one's own....
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> These funds used here were raised by taxation. The Court does not dispute, nor could it, that their use does in fact give aid and encouragement to religious instruction. It only concludes that this aid is not "support" in law. But Madison and Jefferson were concerned with aid and support in fact, not as a legal conclusion "entangled in precedents." Here parents pay money to send their children to parochial schools and funds raised by taxation are used to reimburse them. This not only helps the children get to school and the parents to send them, it aids them in a substantial way to get the very thing they are sent to the particular school to secure, namely, religious training and teaching.
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> * * *
>
> New Jersey's action therefore exactly fits the type of exaction and the kind of evil at which Madison and Jefferson struck. Under the test they framed it cannot be said that the cost of transportation is no part of the cost of education or of the religious instruction given. That it is a substantial and a necessary element is shown most plainly by the continuing and increasing demand for the state to assume it....
>
> * * *
>
> An appropriation from the public treasury to pay the cost of transportation to Sunday school... could not withstand the constitutional attack.... If such an appropriation could not stand, then it is hard to see

> how one becomes valid for the same things upon the more extended scale of daily instruction. Surely constitutionality does not turn on where or how often the mixed teaching occurs.
>
> * * *
>
> If the fact alone be determinative that religious schools are engaged in education, thus promoting the general and individual welfare,... I can see no possible basis, except one of dubious legislative policy, for the state's refusal to make full appropriation for support of private, religious schools, just as is done for public instruction....
>
> * * *
>
> In truth this view contradicts the whole purpose and effect of the First Amendment as heretofore conceived. The "public function"—"public welfare"—"social legislation" argument seeks, in Madison's words, to "employ Religion [that is, here, religious education] as an engine of Civil policy...."
>
> Our constitutional policy is exactly the opposite. It 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 twofold 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. It cannot be made a public one by legislative act....
>
> * * *
>
> [W]e have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.[22]

d. An Assessment of *Everson*. The *Everson* decision stands for at least three important principles in the law of church and state as it has evolved in the United States:

1. The Establishment Clause applies to the states as well as to the federal government. This principle was emphatically reaffirmed in subsequent decisions, such as *Abington v. Schempp* (1963) and *Wallace v. Jaffree* (1985). Although Justice Rehnquist, in his dissent in *Jaffree*, suggested reexamining the current test(s) of Establishment, he did not evince any doubt whatever that the Establishment Clause applied to the states.[23]

2. The no-aid formula may well be considered to have expressed the view of the entire court at that time, derived almost entirely from the eloquent "Memorial and Remonstrance" of James Madison. The minority of four did not dissent from that concept of the meaning of Establishment but from what they saw as failure to apply it to the facts of the case.

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22. *Everson, supra,* Rutledge dissent; brackets in original.
23. 472 U.S. 38 (1985).

3. The child-benefit theory was a shield that the majority[24] erected against the full rigors of the no-aid formula, much to the irritation of the minority. They did so with the help of a polite (or pious) fiction that the New Jersey law and its application in Ewing Township were just neutral "public welfare" enactments designed to help all children get to school safely. Of course that was not actually the case. They were responses to the political pressures of a large Roman Catholic population for some kind of help for parochial schools. The state law did not embrace *all* school children, since it excluded those attending private for-profit schools, and the township's regulation benefited only children attending public schools and four parochial schools—all Roman Catholic. Whether the latter was simply an artifact of the township's having only those four parochial schools and no others, the majority did not inquire.

Despite its just having trumpeted that government(s) may not "prefer one religion over another," the court chose to see the statute in ideal terms and to erect upon it the equitable doctrine that children should not be excluded from general public-welfare benefits available to all merely because of their choice in matters of religion, so long as the benefits redounded mainly to the children and their families and did not dictate or unduly induce that choice. The majority was even willing to concede that the benefits might assist some children to go to parochial rather than public schools, but felt that that was preferable to excluding them from such general benefit programs, since that would serve as an inducement *away* from a choice in favor of religious training.

Whether the fiction was polite or pious, it was not only exasperating to the minority but probably infuriating to the complaining taxpayer, Mr. Everson, whose name has been immortalized in books on constitutional law, although he lost when the highest court in the land failed to take account of the actual wrong he felt he had suffered. This was one of those difficult decisions in which there are weighty arguments and cogent considerations on each side, and choosing between them is bound to inflict some undeserved injustice on the loser. The struggle continued between competing claims for "justice" as the "child-benefit" theory unfolded. Some state courts accepted the view of *Everson*, but others held busing pupils to parochial schools impermissible under state constitutions.

3. *Board of Education v. Allen* (1968)

Twenty-one years passed between *Everson* and the next decisions in this line of cases, *Board of Education of Central School District No. 1, (N.Y.) v. James E. Allen, Commissioner of Education of New York State* and *Flast v. Cohen*, both announced

24. It should be remembered that Justice Douglas later repented having voted with the majority on this basis (see his comments in *Engel v. Vitale* discussed in § C2b(1) above), but of course that does not change the effect of the vote at the time; that is, *Everson* remains the law until overruled by a subsequent majority, though its no-aid formula seemed to have fallen into some neglect until arguably resuscitated in *Allegheny County v. ACLU* (1989).

on June 10, 1968. Earl Warren had been chief justice since 1953; Justices Jackson, Rutledge, Reed, Burton, Frankfurter and Murphy were gone; of the *Everson* court, only Justices Black and Douglas remained. The new justices were Potter Stewart, William Brennan, Thurgood Marshall, John Marshall Harlan (II), Abe Fortas and Byron White. Decisions in other areas of church-state law had come and gone.[25]

With the seeming encouragement of *Everson*, efforts to obtain various forms of "aid" for parochial schools increased. Cardinal Spellman and Eleanor Roosevelt had their famous tiff over the exclusion of non-public schools from the Barden Bill, designed to launch federal aid to education in 1948, which was impeded mainly by this issue.[26] It continued to block any significant program of federal aid until 1965, when President Lyndon Johnson was able to push through Congress the Elementary and Secondary Education Act by including provisions for educationally deprived children attending private (including parochial) schools along the lines of the "child-benefit" theory outlined in *Cochran* and *Everson*—of which, more later.[27]

Meanwhile various states with large Roman Catholic populations made efforts to accommodate their complaints of "double taxation" by offering various forms of aid, such as bus transportation and the loan of secular textbooks. One of the latter programs came before the Supreme Court from the State of New York in 1967. The court upheld it in an opinion written by Justice White.

The law in question required local public school authorities to lend textbooks free of charge to all students in grades 7 through 12, including students attending private schools. The textbooks were to be only those approved for use in public schools and thus secular in content.

Justice White pointed to *Everson* as the closest antecedent to the current case, but noted that in *Abington v. Schempp* the court had agreed on a two-part test of Establishment that required a secular purpose and a primary effect that neither advanced nor inhibited religion.[28] The purpose of the New York law was said by the legislature to be "furtherance of the educational opportunities available to the young."

> Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. The law merely makes available to all children the benefits of a general program to lend books free of charge. Books are furnished at the request of the pupil and

25. *McCollum v. Bd. of Ed.,* 333 U.S. 203 (1948), discussed at § C1a above; *Zorach v. Clauson*, 343 U.S. 306 (1952), discussed at § C1b above; *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), discussed at IB3; *McGowan v. Maryland*, 366 U.S. 420 (1961) and companion cases, discussed at IVA7; *Torcaso v. Watkins*, 367 U.S. 488 (1961), discussed at VB2; *Engel v. Vitale*, 370 U.S. 421 (1962), discussed at § C2b(1) above; *Abington v. Schempp*, 374 U.S. 203 (1963), discussed at § C2b(2) above; *Sherbert v. Verner*. 374 U.S. 398 (1963), discussed at IVA7c; *U.S. v Seeger*, discussed at IVA5h; and *Epperson v. Arkansas*, 393 U.S. 97 (1968), discussed at § C3b(2) above, along with several others not listed here.

26. See Stokes, *supra*, II, pp. 744-758.

27. See discussion of *Flast v. Cohen* at § D4 immediately below.

28. See § C2b(2) above.

> ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools. Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution.
>
> Of course books are different from buses. Most bus rides have no inherent religious significance, while religious books are common. However, the [statute] does not authorize the loan of religious books, and the State claims no right to distribute religious literature. Although the books loaned are those required by the parochial school for use in specific courses, each book loaned must be approved by the public school authorities; only secular books may receive approval....
>
> The major reason offered by appellants for distinguishing free textbooks from free bus fares is that books, but not buses, are critical to the teaching process, and in a sectarian school that process is employed to teach religion. However, this Court has long recognized that religious schools pursue two goals, religious instruction and secular education.[29]

Citing *Pierce v. Society of Sisters*,[30] the court noted that it had upheld the right of private schools to exist on the basis that "the state's interest in education would be served sufficiently by reliance on the secular teaching that accompanied religious training in the schools maintained by the Society of Sisters." To this end states were justified in regulating private schools with respect to minimum hours of instruction, qualifications of teachers and prescribed subjects of instruction.[31]

A corollary of this principle was expressed in *Cochran v. Louisiana*,[32] which held that that state's provision of textbooks to students attending private schools served a public purpose and thus did not offend the Fourteenth Amendment.[33]

> [T]he continued willingness [of Americans] to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education.

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29. *Board of Education v. Allen*, 392 U.S. 236 (1968).

30. 268 U.S. 510 (1925), discussed at § B1b above.

31. See discussion of such regulation at § B3 above.

32. 281 U.S. 370 (1930), discussed at § D1b above.

33. The main difference between *Cochran* (1930) and *Allen* (1968) was that the earlier case came on before the Establishment Clause was made applicable to the states in *Everson* (1947), and so was decided on the basis of the Due Process Clause of the Fourteenth Amendment concerning the taking of property for a private rather than a public purpose, whereas *Allen* was decided under the Establishment Clause, though with much the same reasoning and effect.

> Against this background of judgment and experience, unchallenged in the meager record before us in this case, we cannot agree with appellants either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion.... Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history or literature, are used by the parochial schools to teach religion.... We are unable to hold, based solely on judicial notice, that this statute results in unconstitutional involvement of the State with religious instruction or that [the statute], for this or the other reasons urged, is a law respecting the establishment of religion within the meaning of the First Amendment.[34]

Justice Harlan entered a brief concurrence suggesting a slightly different characterization of "neutrality" of government toward religion:

> I would hold that where the contested governmental activity is calculated to achieve nonreligious purposes otherwise within the competence of the State, and where the activity does not involve the State "so significantly and directly in the realm of the sectarian as to give rise to divisive influences and inhibitions of freedom," it is not forbidden by the religion clauses of the First Amendment.[35]

Justices Black, Douglas and Fortas filed separate and vehement dissents. Justice Black announced, in no uncertain terms:

> I believe the New York law held valid [by the majority] is a flat, flagrant, open violation of the First and Fourteenth Amendments which together forbid Congress or state legislatures to enact any law "respecting an establishment of religion."

He repeated, word for word, the "no-aid" formula that he had set forth in *Everson* and repeated in *McCollum*, and sought to call the court back to fidelity to that formula (though it had not served to prohibit the bus transportation arrangement at issue in *Everson* and relied on by the majority in *Allen* as being analogous to loan of secular textbooks).

> The *Everson* and *McCollum* cases plainly interpret the First and Fourteenth Amendments as protecting the taxpayers of a State from being compelled to pay taxes to their government to support the agencies of private religious organizations the taxpayers oppose. To authorize a State to tax its residents for such church purposes is to put the State squarely in the religious activities of certain religious groups that happen to be strong enough politically to write their own religious preferences and prejudices

34. *Allen, supra.*

35. Ibid., Harlan concurrence, quoting *Abington v. Schempp,* 374 U.S. 203, 307, Goldberg concurrence.

> into the laws. This links state and churches together in controlling the lives and destinies of our citizenship—a citizenship composed of people of myriad religious faiths, some of them bitterly hostile to and completely intolerant of the others. It was to escape laws precisely like this that a large part of the Nation's early immigrants fled to this country. It was also to escape such laws and such consequences that the First Amendment was written in language strong and clear barring passage of any law "respecting establishment of religion."

While admitting that he was the author of the *Everson* decision, on which the New York court had purported to rely, he rejected that application, insisting that bus transportation is religiously neutral, whereas "[b]ooks are the most essential tool of education since they contain the resources of knowledge which the educational process is designed to exploit." He admitted that the New York law did not quite amount to a complete state establishment of religion, but foresaw that on the same arguments used to justify the provision of textbooks more substantial benefits to parochial schools could be upheld. "I still subscribe to the belief that tax-raised funds cannot constitutionally be used to support religious schools, buy their school books, erect their buildings, pay their teachers, or pay any other of their maintenance expenses, even to the extent of one penny.... The Court's affirmance here bodes nothing but evil to religious peace in this country."

Justice Douglas took aim at the majority's rather glib treatment of the textbook selection process: "only secular books may receive approval." According to his reading of the situation, as gleaned from the record and oral argument, the individual pupil did not apply for the loan of textbooks listed in a statewide listing of books already approved for use in the public schools of the state, receive the state-owned book for the year or semester and then return it to the state, as would presumably be the case in a pure child-benefit arrangement. That was the pious fiction on which the majority decision was based, but the reality was somewhat different.

Actually, the private school decided what textbooks would be assigned during the year, made out a "textbook requisition" *on behalf of* individual students who would be taking the courses for which the textbooks were assigned, and submitted the requisition form (a copy of which was appended to Justice Douglas' dissent) to the local public school board.

> The role of the local public school board is to decide whether to veto the selection made by the parochial school. This is done by determining first whether the text has been or should be "approved" for use in public schools and second whether the text is "secular," "non-religious" or "non-sectarian." The local boards apparently have broad discretion in exercising this veto power.

(A footnote at this point indicated that the State Department of Education had not defined the terms "non-sectarian," etc., nor had the largest local board in the state, that of New York City.)

> Thus the statutory system provides that the parochial school will ask for the books that it wants. Can there be the slightest doubt that the head of the parochial school will select the book or books that best promote its sectarian creed?
>
> If the board of education supinely submits by approving and supplying the sectarian or sectarian-oriented textbooks, the struggle to keep church and state separate has been lost. If the board resists, then the battle line between church and state will have been drawn and the contest will be on to keep the school board independent or to put it under church domination and control.

Douglas, too, distinguished textbooks from the bus transportation approved in *Everson*:

> [T]here is nothing ideological about a bus... The textbook goes to the very heart of education in a parochial school. It is the chief, though not solitary, instrumentality for propagating a particular religious creed or faith. How can we possibly approve such state aid to a religion? A parochial school textbook may contain many, many more seeds of creed and dogma than a prayer....

The main burden of Douglas' dissent, however, focused on the ideological and religious biases of various textbooks in ostensibly "secular" subjects. He noted that three dissenters in New York's highest court had said that the difficulty with the textbook loan program "`is that there is no reliable standard by which secular and religious textbooks can be distinguished from each other.'" And he quoted from John M. Scott's *Adventures in Science* (1963) a paragraph on embryology:

> "The body of a human being grows in the same way, but it is much more remarkable than that of any animal, for the embryo has a human soul infused into the body by God. Human parents are partners with God in creation. They have very great powers and great responsibilities, for through their cooperation with God souls are born for heaven." (pp. 618-619)

In a footnote, Justice Douglas added, "Although the author of this textbook is a priest, the text contains no imprimatur and no nihil obstat.... Accordingly, under Opinion of Counsel No. 181, the only document approaching a `regulation' on the issue involved here, Adventures in Science would qualify as `non-sectarian.'"

Justice Douglas also cited a lengthy excerpt from a general history text, *Man in Time* by Arthur J. Hughes, which criticized socialism as unchristian. He observed that this book did have an imprimatur and nihil obstat and thus would be ruled out under Opinion of Counsel No. 181. But that opinion was only "advisory" to local school boards, and besides, the publisher could simply remove the religious endorsements at the next printing.

> Even where the treatment given to a particular topic in a school textbook is not blatantly sectarian, it will necessarily have certain shadings that will lead a parochial school to prefer one text over another.
>
> The Crusades, for example, may be taught as a Christian undertaking to "save the Holy Land" from the Moslem Turks who "became a threat to Christianity and its holy places," which "they did not treat... with respect." (Wilson, Wilson, Erb and Clucas, Out of the Past 284 (1954)), or as essentially a series of wars born out of political and materialistic motives (see Leinwand, The Pageant of World History 136-137 (1965)).
>
> Is the dawn of man to be explained in the words, "God created man and made man master of the earth" (Furlong, The Old World and America 5 (1937)), or in the language of evolution (see Wallbank, Man's Story 32-35 (1961))?

Similar contrasting examples were cited of accounts of the slaughter of the Aztecs by Cortes and the revolution of Francisco Franco in Spain, in which the religious schools might well prefer a book that could be viewed as unsatisfactory by the general public. (Whether the Crusades were properly interpreted to be *only* "a series of wars born out of political and materialistic motives" is also historically questionable.)

> The initiative to select and requisition "the books desired" is with the parochial school. Powerful religious-political pressures will therefore be on the state agencies to provide the books that are desired.
>
> These then are the battlegounds where control of textbook distribution will be won or lost. Now that "secular" textbooks will pour into religious schools, we can rest assured that a contest will be on to provide those books for religious schools which the dominant religious group concludes best reflect the theocentric or other philosophy of the particular church.[36]

Justice Fortas added a brief dissent in which he echoed Douglas' concern.

> [D]espite the transparent camouflage that the books are furnished to students, the reality is that they are selected and their use is prescribed by the sectarian authorities. The child must use the prescribed book. He cannot use a different book prescribed for use in the public school. The State cannot choose the book to be used....
>
> This is not a "general" program. It is a specific program to use state funds to buy books prescribed by sectarian schools which in New York, are primarily Catholic, Jewish, and Lutheran sponsored schools. It could be called a "general" program only if the school books made available to all children were precisely the same—the books selected for and used in the public school. But this program is not one in which all children are treated alike, regardless of where they go to school. This program, in its unconstitutional features, is hand-tailored to satisfy the specific needs of

36. Ibid., Douglas dissent.

> sectarian schools. Children attending such schools are given *special* books—books selected by the sectarian authorities. How can this be other than the use of public money to aid those sectarian establishments?[37]

Once again, the majority seemed to be relying to some degree upon an idealized fiction of what the aid program *ought* to be rather than what—at least according to the minority—it actually was. The result was an extension and reinforcement of the "child-benefit" theory.

4. *Flast v. Cohen* (1968)

On the same day that it announced *Board of Education v. Allen* (above), the court also delivered its opinion in *Flast v. Cohen*, a case included here because it dealt with the threshold procedural question of "standing" as it applied to challenges under the Establishment Clause arising from an issue in education. As has been mentioned in the preceding section, federal aid to education had been blocked for many years in part by an impasse between members of Congress who would not support a federal program of general aid to education unless it included a provision benefiting students in parochial schools and members who would not support a bill if it did include such a provision. Under President Lyndon Johnson's "War on Poverty," that impasse was resolved by targeting the aid to "educationally deprived" children, whether in public or in private schools.

The child-benefit theory was central to that resolution, and it formed the model for the inclusion of parochial pupils in the Elementary and Secondary Education Act of 1965 (ESEA). A number of the moderate "separationist" groups, such as the National Council of Churches and the Baptist Joint Committee on Public Affairs, moved to support ESEA when Congress modified the original proposal to include several safeguards to insure that the aid went to children rather than to schools. Those safeguards were referred to by members of Congress at the time as the "Flemming Amendments" after former Secretary of Health, Education and Welfare Arthur S. Flemming, who as a witness for the National Council of Churches (of which he was then First Vice President and subsequently President) proposed them in his testimony to Congress.

The Flemming Amendments included wording designed to insure that Title II, which provided instructional materials to students in both public and parochial schools, would operate with respect to the latter on the model of a public library. Individual students could obtain the loan of textbooks from the public schools or a public school warehouse, but not of encyclopedias or large maps or audio-visual materials, since these were not the kinds of things a library could or would normally loan to individual students. Loans of such large, institutional items were not to be

37. Ibid., Fortas dissent, emphasis in original.

made to private or parochial schools, since that would be conferring aid to the school more than to individual pupils.

Under Title I, "special educational services" were to be provided for "educationally deprived children" attending nonpublic schools only if the services were of a health, therapeutic or remedial character. Regular curricular instruction was not to be provided by public teachers on nonpublic school premises, as that would serve to augment the regular faculty of the nonpublic school. Thus public employees could teach *remedial* reading on nonpublic school premises to children specifically selected because of reading deficits, but could not teach regular reading to existing classes in the nonpublic schools. Public schools were encouraged to set up "dual enrollment" programs, however, in which pupils from nonpublic schools could participate *on public school premises*, where they could enroll in regular reading or other academic classes.

The supporters of this concept worked out a mutual understanding with the leadership of the Roman Catholic church on what the ESEA would and would not provide. Opponents in Congress and out tried to break up the coalition by misrepresenting or caricaturing the child-benefit provisions, but they did not succeed, and the bill was enacted as had been agreed.[38]

After it had been put into effect, and millions of dollars had begun to flow out to the states and localities, a careful analysis determined that the church-state safeguards so grimly struggled for in Congress—without which the bill might well not have been enacted, at least not without great political cost—were not being implemented by the U.S. Office of Education and were not included in the regulations drawn up by most of the states for utilization of ESEA funds.[39] What was actually happening "on the ground" was very different from what had been envisioned by the designers of the Flemming Amendments, not because of calculated duplicity on anyone's part but because of the ways the bureaucratic mind works, whether in public or private bureaucracies. It was "inconvenient" for parochial school pupils to travel to public schools to take regular school subjects, so the public teachers often were sent to the parochial schools to teach them. And once on the premises of the parochial schools, the teachers came under the effective supervision of the administrator of that school because the public school administrator was not going to infringe on the authority of his parochial peer by trying to give orders to people working in the latter's domain, even though they were public employees![40]

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38. For a detailed account of this struggle see Kelley, D.M., and George R. LaNoue, Jr., "The Church-State Settlement in the Federal Aid to Education Act," in Gianella, Donald A., ed., *Religion and the Public Order, 1965* (Villanova, Pa.: Villanova University), 1966, pp. 110-160.

39. See Kelley, D.M., "State Regulation of the Participation of Pupils of Private Schools in Title I of the Federal Aid to Education Act of 1965," *Journal of Church and State*, Vol. VIII, No. 3, Autumn, 1966.

40. See LaNoue, George R., Jr., "Church-State Problems in New Jersey: The Implementation of Title I (ESEA) in Sixty Cities," *Rutgers Law Rev.,* Vol. 22, No. 2, Winter 1968, pp. 219-280.

It was in an effort to try to correct some of these abuses that suits were filed against the administration of the Elementary and Secondary Education Act, one of them in New York City, brought by the Committee for Public Education and Religious Liberty (PEARL) and taking its name from the lead plaintiff, the redoubtable chairman of PEARL, Florence Flast. Leo Pfeffer, counsel to PEARL and the dean of strict-separationist advocates, handled the suit, and a friend-of-the court brief was filed in support of it jointly by the National Council of Churches and the American Civil Liberties Union, written by Norman Dorsen and Charles H. Tuttle.

The first hurdle the suit had to overcome was the question of "standing," and it went all the way up to the U.S. Supreme Court on that question, so that *Flast v. Cohen* is known in constitutional law, not for its church-state implications, but for its revision of *Frothingham v. Mellon*,[41] the barrier to suits by federal taxpayers challenging congressional appropriations. That 1923 decision had held that a federal taxpayer's "interest in the moneys of the Treasury... is comparatively minute and indeterminable" and "the effect upon future taxation of any payment out of the [Treasury's] funds,... [is] remote, fluctuating and uncertain." Therefore, federal taxpayers as such did not experience the "direct injury" necessary to confer standing.

Since questions of "standing" and "justiciability" are somewhat tangential to this work, only the outcome will be summarized—which is difficult enough. In an opinion written by Chief Justice Earl Warren, the Supreme Court, with only Justice Harlan dissenting, agreed to reconsider the *Frothingham* rule and found that federal taxpayers *could* challenge the constitutionality of a federal spending program if they could demonstrate the necessary stake in the outcome of the litigation sufficient to satisfy the requirement of a genuine "case or controversy" of Article III of the Constitution.

> The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, Section 8, of the Constitution.... Secondly the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged.... When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction.
>
> The taxpayer-appellants in this case have satisfied both nexuses to support their claim of standing under the test we announce today. Their constitutional challenge is made to an exercise by Congress of its power... to spend for the general welfare, and the challenged program involves a substantial expenditure of federal tax funds. In addition, appellants have alleged that the challenged expenditures violate the Establishment and

41. 262 U.S. 447 (1923).

> Free Exercise Clauses of the First Amendment. Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general.... The Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power....
>
> While we express no view at all on the merits of appellants' claims in this case, their complaint contains sufficient allegations under the criteria we have outlined to give them standing to invoke a federal court's jurisdiction for an adjudication on the merits.[42]

Thus the case was returned to the trial court for "adjudication on the merits," and then— silence. No further proceedings were had in *Flast v. Cohen*. The subject was not raised again for twenty years, when a similar suit came up under ESEA in New York City, which will be discussed in due course.[43] (Further development of the doctrine of standing in Establishment Clause cases emerged in a 1982 case that was even more abstruse than *Flast*, viz., *Valley Forge Christian College v. Americans United*.[44])

5. *Lemon v. Kurtzman* (1971)

During the 1950s and 1960s a "propaganda struggle" raged between those advocating public aid for parochial schools and those resisting it. This struggle was waged over the Elementary and Secondary Education Act, and a settlement of sorts was reached in that instance on the basis of the child-benefit theory.[45] But other "solutions" were being sought—and sometimes attained—in various states, and as soon as a legislature had authorized one or another of these solutions, it would be challenged in court. Two state courts in the early 1960s ruled that bus transportation of parochial pupils violated their state constitutions,[46] and another ruled that the loan of secular textbooks was impermissible when it was shown that study guides prepared by the religious body imparted religious interpretations to the secular subject matter dealt with in the textbooks.[47] A Vermont court held that payment of tuition by public school districts that did not have high schools for students to attend parochial high schools offended the federal First Amendment.[48] These (and others

42. *Flast v. Cohen*, 391 U.S. 83 (1968).
43. See *Aguilar v. Felton*, 473 U.S. 402 (1985), discussed at § D7m below.
44. 454 U.S. 464 (1982), discussed at § D8c below.)
45. See discussion in section immediately preceding.
46. *Matthews v. Quinton*, 362 P.2d 932 (Alaska, 1961) and *Reynolds v. Nussbaum*, 115 N.W.2d 761 (Wisconsin, 1962).
47. *Dickman v. Oregon City*, 366 P.2d 533 (Oregon, 1961).
48. *Swart v. South Burlington*, 167 A.2d 514 (Vt. 1961).

like them) were scattered skirmishes in no-man's-land before the main battle broke out, and partisans on both sides wished that the U.S. Supreme Court would decide the question so that time and energy need not be wasted on issues that were of uncertain result. But the high court declined to entertain any such cases—aside from *Everson* and *Allen*, which were of limited application—until 1971, when it agreed to hear several, beginning a long line of decisions that has produced increasing fragmentation within the court on the question of permissible forms of public aid to parochial schools.

The court consolidated cases from two states involving aid to parochial schools. One from Rhode Island provided a 15 percent salary supplement for teachers in nonpublic schools at which the average per-pupil expenditure on secular education fell below the average in public schools. Only teachers who taught courses offered in public schools, used only materials used in public schools, and agreed not to teach courses in religion were eligible. One-quarter of the state's elementary students attended nonpublic schools, and of this number 95 percent were in schools of the Roman Catholic Church. About 250 teachers in those schools were the sole beneficiaries under the Act at the time of trial. A three-judge federal court of the District of Rhode Island held that the Act fostered "excessive entanglement" between government and religion and therefore violated the Establishment Clause of the First Amendment.[49] (The quality of "excessive entanglement" was first enunciated by Chief Justice Burger, writing for the court in *Walz v. Tax Commission*, an important 1970 case holding property tax exemption of houses of worship to be constitutional.[50])

Pennsylvania had passed a law in 1968 under which the superintendent of public instruction (whose name at the time was Kurtzman) could "purchase" certain "secular educational services" from nonpublic schools, reimbursing the schools for teachers' salaries, textbooks and instructional materials used to provide that "service." No payment was to be made for any course containing "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." The superintendent had entered into contracts for the "purchase" of such services from nonpublic schools enrolling 20 percent of the children in the state, most of them schools connected with the Roman Catholic Church. A three-judge federal district court granted the state's motion to dismiss the complaint on the ground that it did not violate the Establishment Clause of the First Amendment.[51]

Chief Justice Burger wrote the opinion for a nearly unanimous court (Justice White concurred in the judgment on the Pennsylvania case, but dissented on the Rhode Island case.) As he had in the *Walz* decision the previous year, the chief justice professed to find the task of applying the religion clauses very difficult.

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49. *Earley v. DiCenso*, 316 F.Supp. 112.
50. *Walz v. Tax Commission*, 397 U.S. 664 (1970), discussed at VC6b(3).
51. *Lemon v. Kurtzman*, 310 F.Supp. 35.

> Candor compels acknowledgement... that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.
>
> The language of the Religion Clauses of the First Amendment is at best opaque.... Its authors did not simply prohibit the establishment of a state church or a state religion,... [but] they commanded that there should be "no law *respecting* an establishment of religion...." A given law might not *establish* a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.
>
> In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support and active involvement of the sovereign in religious activity."
>
> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, 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."[52]

This was the famed "three-pronged test" of Establishment, often called the *Lemon* test. The first two prongs were from *Schempp*, the third from *Walz*. (It is interesting that none of these was "gleaned" from the "no-aid" formula of the *Everson-McGowan-Torcaso* era, which seemed to have fallen from favor.)

The court found that the Rhode Island and Pennsylvania statutes had a legitimate secular purpose of attempting "to enhance the quality of secular education in all schools covered by the compulsory attendance laws."[53] Recognizing that the church-related schools had a religious mission, the legislatures of the two states adopted "statutory restrictions designed to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former." Whether the principal or primary effect of the legislation was to advance religion apparently turned on whether that distinction between the religious and the secular elements could be discerned to an extent that would enable the state to confine its aid to the secular elements.

The court distinguished the aid afforded by the instant programs from the textbooks approved in *Allen*:

> [T]eachers have a substantially different ideological character than books.... [A] textbook's content is ascertainable, but a teacher's handling of

52. *Lemon v. Kurtzman,* 403 U.S. 602 (1971), quoting *Walz v. Tax Commission, supra*; emphasis in original.

53. Chief Justice Burger's characterization.

> a subject is not. We cannot ignore the dangers that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college[54] education....
>
> We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not advanced by neutrals....
>
> [T]he potential for impermissible fostering of religion is present.... The state must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion....
>
> A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed.... Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church....
>
> [In order to determine whether] the average per pupil expenditures for secular education exceed the comparable figures for public schools, the [statutory] program requires the government to examine the school's records in order to determine how much of the total expenditures are attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches.... [W]e cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses.

With this rationale, the court caught the aid programs in a scissors-hold between the second and third "prongs" of the three-prong test outlined at the beginning of the opinion: in order to make sure that the state did not aid the religious function, as required by the second prong, it must maintain a close scrutiny of all aided teaching, thus falling into the "excessive entanglement" forbidden by the third prong! This outcome may have seemed a kind of "Catch 22" to some—or "heads I win, tails you lose"—but it may also have been a way of spelling out the essential incompatibility of the aid programs and the Establishment Clause.[55] (It might have been simpler to have stayed with the "no aid" formula of *Everson* than to have gone through the

54. Distinguishing *Tilton v. Richardson*, 403 U.S. 672, announced the same day and allowing state aid to church-related higher education; discussed immediately below.

55. See the comment by Justice Blackmun, dissenting in *Bowen v. Kendrick*, 487 U.S. 589 (1988), rejecting the "Catch-22 characterization," discussed at IID2d.

elaborate logic of the three-pronged test, which was to become increasingly convoluted as time passed.)

The foregoing excerpt from *Lemon* applied specifically to the Rhode Island program, but similar defects were found in the Pennsylvania statute, plus an additional one: it provided state financial aid directly to the church-related school. "This factor distinguished both *Everson* and *Allen*, for in both those cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school."

In part IV of the opinion, the chief justice explained another aspect of entanglement that has caused much scholarly turmoil.

> A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs. In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity.... Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.
>
> Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.[56] The potential divisiveness of such conflict is a threat to the normal political process.... The history of many countries attests to the hazards of religion intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief.
>
> Of course, as the Court noted in *Walz*, "adherents of particular faiths and individual churches frequently take strong positions on public issues." We could not expect otherwise, for religious values pervade the fabric of our national life. But... [h]ere we are confronted with successive and very likely permanent annual appropriations which benefit relatively few religious groups. Political fragmentation and divisiveness is thus likely to be intensified.

This characterization of the purpose of the First Amendment's being to prevent "political division along religious lines" was borrowed from the law-review comment by Professor Paul Freund of the Harvard Law School. It has been sharply criticized by Professor Edward McGlynn Gaffney, then of Notre Dame Law School and subsequently Dean of Valparaiso University Law School, as being simply without foundation in historical fact.[57] There is no evidence that the Founders had in mind preventing this supposed evil, he contended; quite the contrary. One of them at least,

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56. Citing Freund, Paul, "Comment: Public Aid to Parochial Schools," *Harvard Law Rev.*, Vol. 82, (1969), p. 1692.

57. Gaffney, E.M., "Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy," *St. Louis Univ. Law J.*, 24:205 (1980).

James Madison, writing in the *Federalist Papers*, saw the peace and order of the nation to be insured by the multiplicity of factions in the political realm and the multiplicity of sects in the religious realm, suggesting that "divisiveness" among such groups kept any one of them from carrying the whole commonwealth out of its course.

In the last section of the court's opinion, the chief justice dealt with the type of argument that is sometimes referred to as "the camel's nose," which if once admitted to the tent would be followed by the whole camel. In *Walz* that line of argument had been rejected, since tax exemption of churches there at issue had not led to the "establishment" of state churches or state religion though carried on for more than 200 years of almost universal practice.

> The progression argument, however, is more persuasive here. We have no long history of state aid to church-related educational institutions comparable to 200 years of tax exemption for churches. Indeed, the... programs before us today represent something of an innovation... [I]n constitutional adjudication some steps, which when taken were thought to approach "the verge," have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a "downhill thrust" easily set in motion but difficult to retard or stop.... The dangers are increased by the difficulty of perceiving in advance exactly where the "verge" of the precipice lies. As well as constituting an independent evil against which the Religion Clauses were intended to protect, involvement or entanglement between government and religion serves as a warning signal....
>
> Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution declares that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement is inevitable, lines must be drawn.[58]

The references to "the verge" are to *Everson*, where that term was used to characterize the permissibility of bus transportation, which then became a justification of such further provisions as those in the instant cases. The last sentence quoted and the words immediately preceding it have troubling overtones of a kind of "privatization" of religion and its exclusion from public life, which are discussed in another section.[59]

Justice Douglas wrote a seventeen-page concurrence in which Justice Black joined, as did Justice Marshall with respect to the Rhode Island case. In it he described in some detail the purpose and method of instruction in parochial schools, contending

58. *Lemon, supra.*
59. See Part IIE.

that it was impossible for the state to fund any part of it without contributing to religious teaching.

Justice Brennan filed a twenty-page opinion in which he concurred in the Rhode Island and Pennsylvania cases but dissented in the higher education case, *Tilton v. Richardson*, decided the same day, discussed next below. He traced the early controversies over state support of church-related education in New York at the beginning of the nineteenth century, which resulted in the development of public schools. Since then virtually all states in the Union had adopted prohibitions against aid to sectarian schools, and that consensus should be respected at the federal level as well. State support of church-related schools requires regulation that can produce self-censorship of religious teaching by such schools, and so should be unacceptable for that reason as well. Even though the state may claim to be obtaining secular education for its money, it violates the precept that government should not use "essentially religious means to serve governmental ends where secular means would suffice"—a useful concept he had suggested in *Schempp*, but which had never been adopted by the court as a whole.[60]

Justice White dissented in the Rhode Island case, saying the plan at issue there did not violate the Establishment Clause: "That religion may indirectly benefit from governmental aid to the secular activities of churches does not convert that aid into an impermissible establishment of religion." He noted that the court found unconstitutional the kind of aid to parochial schools that it found constitutional with respect to church-related higher education in the companion case of *Tilton v. Richardson, infra*. And he thought that teachers could and would be able to avoid giving religious instruction in state-aided teaching, contrary to the suspicions of the court. In a footnote, he added that "if the evidence in any of these cases showed that any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith... the legislation would to that extent be unconstitutional."[61]

6. *Tilton v. Richardson* (1971)

On the same day it announced *Lemon*, June 28,1971, the court also decided *Tilton v. Richardson*, a higher education case involving many of the same issues, arising from the federal Higher Education Facilities Act of 1963, which provided grants for construction of buildings at private or public colleges and universities—except those "used for sectarian instruction or as a place of religious instruction or in connection with any part of the program of a school or department of divinity." The federal government retained a twenty-year interest in the facilities constructed with its

60. *Abington v. Schempp*, 374 U.S. at 265.

61. *Lemon v. Kurtzman, supra*, White dissent, n. 2. The majority in this case consisted of Chief Justice Burger and Associate Justices Black, Blackmun, Brennan, Douglas, Harlan, Marshall (as to the Rhode Island case), Stewart, and White (as to the Pennsylvania case).

funds, but at the end of that time the buildings could be used for any purpose. Four church-related colleges in Connecticut received such funds, and suit was filed against Elliott Richardson as Secretary of Health, Education and Welfare, charging that the recipient institutions were sectarian in character, and the grants therefore violated the Establishment Clause.

Chief Justice Burger announced the court's judgment and wrote an opinion in which Justices Harlan, Stewart and Blackmun joined. Justice White concurred in the judgment, thus making a slender majority of five, but he did not join in the chief justice's opinion. Burger's opinion reiterated the theme he had expressed in *Walz* and *Lemon* about the difficulty of discerning Establishment questions:

> Every analysis must begin with the candid acknowledgment that there is no single constitutional caliper which can be used to measure the precise degree to which [Establishment is] present or absent.... There are always risks in treating criteria discussed by the Court from time to time as "tests" in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics. The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired.[62]

Although brimming over with candid acknowledgements of the difficulty of the task, the chief justice, as he had in *Lemon*, forged through to a decision that commanded (barely) the necessary majority. He found that Congress had expressed a "legitimate secular objective" for the Higher Education Facilities Act, viz.:

> "[T]he security and welfare of the United States require that this and future generations of American youth be assured ample opportunity for the fullest development of their intellectual capacities, and that this opportunity will be jeopardized unless the Nation's colleges and universities are encouraged and assisted in their efforts to accommodate rapidly growing numbers of youth who aspire to a higher education."[63]

He noted that it was not impermissible if some religious institutions benefitted in the attaining of that secular objective: "The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Bradfield v. Roberts*."[64] He also cited *Everson*, *Allen*, and *Walz* as reminders that transportation, textbooks and tax exemptions were found to be permissible.[65]

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

63. Ibid., quoting 20 U.S.C. § 701.

64. Ibid., referring to a program that aided hospitals, *Bradfield v. Roberts*, 175 U.S. 291 (1899), discussed at IID2b.

65. *Everson v. Bd. of Ed.,* 330 U.S. 1 (1947), discussed at § D2 above; *Bd. of Ed. v. Allen*, 392 U.S. 1236 (1968), discussed at § D3 above, and *Walz v. Tax Commission*, 397 U.S. 644 (1970), discussed at VC6b(3).

> The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion.... The Act itself was carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions. It authorizes grants and loans only for academic facilities that will be used for defined secular purposes and expressly prohibits their use for religious instruction, training, or worship.... [N]one of the four church-related institutions in this case has violated the statutory restrictions....
>
> There is no evidence that religion seeps into the use of any of these facilities.... Although appellants introduced several institutional documents which stated certain religious restrictions on what could be taught, other evidence showed that these restrictions were not in fact enforced and that the schools were characterized by an atmosphere of academic freedom rather than religious indoctrination....
>
> Rather than focus on the four defendant colleges and universities involved in this case, however, appellants seek to shift our attention to a "composite profile" that they have constructed of the "typical sectarian" institution of higher education.... Perhaps some church-related schools fit the pattern..., [b]ut appellants do not contend that these four institutions fall within this category.... We cannot... strike down an Act of Congress on the basis of a hypothetical "profile."[66]

Although upholding the Act in general as to the four Roman Catholic institutions in Connecticut, the court struck down one particular aspect of the legislative scheme: the proviso that the facilities built with federal funds should not be used for sectarian instruction or worship for twenty years, the "period of Federal interest."

> If, at the end of 20 years the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion.
>
> To this extent the Act therefore trespasses on the Religion Clauses. The restrictive obligations... cannot... expire while the building [still] has substantial value.

The court had yet to apply the third "prong" of the *Lemon* test enunciated in the preceding decision, but it had already appeared unlikely that the Act would fail that test, and indeed the court used that rubric to explain the not-immediately-obvious distinctions between higher education and lower that enabled it to approve for colleges and universities direct financial aid that it had just denied to parochial schools.

> [T]hree factors substantially diminish the extent and the potential danger of the entanglement....

66. *Tilton, supra.*

There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools.... There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination.... Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Finally, many church-related colleges and universities seek to evoke free and critical responses from their students and are characterized by a high degree of academic freedom.... [In the four schools in question] non-Catholics were admitted as students and given faculty appointments. Not one of these four institutions requires its students to attend religious services. Although all four schools require their students to take theology courses, the parties stipulated that these courses are taught according to the academic requirements of the subject matter and the teacher's concept of professional standards. The parties also stipulated that the courses covered a range of human religious experiences and are not limited to courses about the Roman Catholic religion. The schools introduced evidence that they made no attempt to indoctrinate students or to proselytize. Indeed, some of the required theology courses at Albertus Magnus and Sacred Heart are taught by rabbis.... In short, the evidence show institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education.

Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities. Correspondingly the necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened. Such inspection as may be necessary to ascertain that the facilities are devoted to secular education is minimal and indeed hardly more than the inspections that States impose over all private schools within the reach of the compulsory education laws.

The entanglement between church and state is also lessened here by the non-ideological character of the aid which the government provides.... [T]he government provides facilities that are themselves religiously neutral. The risks of government aid to religion and the corresponding need for surveillance are therefore reduced.

Finally, government entanglements with religion are reduced by the circumstance that, unlike the direct and continuing payments under the Pennsylvania program, and all the incidents of regulation and surveillance, the government aid here is a one-time, single-purpose construction grant. There are no continuing financial relationships or dependencies, no annual audits, and no governmental analysis of an institution's expenditures on secular as distinguished from religious activities. Inspection as to use is a minimal contact.

The court dealt with one final contention in even briefer fashion.

> Appellants claim that the Free Exercise Clause is violated because they are compelled to pay taxes, the proceeds of which in part finance grants under the Act. Appellants, however, are unable to identify any coercion directed at the practice or exercise of their religious beliefs.... Their share of the cost of the grants under the Act is not fundamentally distinguishable from the impact of the tax exemption sustained in *Walz* or the provision of textbooks upheld in *Allen*.

This remarkable outcome, upholding the award of large educational buildings to church colleges, certainly does not fit under the "child-benefit" theory, although the "secular purpose" was to assist students to obtain a secular education. The buildings were not given to students nor, in the nature of things, could they be. They were given, lock, stock and barrel, in fee simple, to the colleges, thereby augmenting their real estate. The proviso that the buildings were not to be used for religious instruction or worship—whether for twenty years or in perpetuity—seems trivial in comparison to the vast institutional aggrandizement justified—or disregarded—by the court. The dissenters were not slow in drawing attention to this surprising feat of logic. In an opinion written by Justice Douglas and joined by Justices Black and Marshall, some vigorous criticisms were expressed.

> The public purpose in secular education is, to be sure, furthered by the program. Yet the sectarian purpose is aided by making the parochial system viable.... The Federal Government is giving religious schools a block grant to build certain facilities. The fact that money is given once at the beginning of a program rather than apportioned annually... is without constitutional significance.... The majority's distinction is in effect that small violations of the First Amendment over a period of years are unconstitutional (see *Lemon* and *DiCenso*) while a huge violation occurring only once is *de minimus*. I cannot agree with such sophistry.... [T]he fact that there are no religious observances in federally financed facilities is not controlling because required religious observances will take place in other buildings.... Once these schools become federally funded they become bound by federal standards... and accordingly adherence to *Engel [v. Vitale]* would require an end to required religious exercises. That kind of surveillance and control will certainly be obnoxious to the church authorities and if done will radically change the character of the parochial school. Yet if that surveillance is not searching and continuous, this federal financing is obnoxious under the Establishment and Free Exercise Clauses all for the reasons stated in the companion cases.
>
> In other words, surveillance creates an entanglement of government and religion which the First Amendment was designed to avoid.... How can the Government know what is taught in the federally financed building without a continuous auditing of classroom instruction? Yet both the Free Exercise Clause and academic freedom are violated when the Government

> agent must be present to determine whether the course content is satisfactory.
>
> * * *
>
> It is almost unbelievable that we have made the radical departure from Madison's Remonstrance memorialized in today's decision.
>
> I dissent not because of any lack of respect for parochial schools but out of a feeling of despair that the respect which through history has been accorded the First Amendment is this day lost.... The million-dollar grants sustained today put Madison's miserable "three pence" to shame. But he even thought, as I do, that even a small amount coming out of the pocket of taxpayers and going into the coffers of a church was not in keeping with our constitutional ideal.[67]

Justice Brennan added his dissent in his opinion concurring in *Lemon* and *DiCenso*.

> I dissent in *[Tilton]* insofar as the plurality opinion and the opinion of my Brother White sustain the constitutionality, as applied to sectarian institutions, of the Federal Higher Education Facilities Act.... In my view that Act is unconstitutional insofar as it authorizes grants of federal tax monies to sectarian institutions, but is unconstitutional only to that extent.
>
> * * *
>
> I believe that the Establishment Clause forbids the Federal Government to provide funds to sectarian universities in which the propagation and advancement of a particular religion is a function or purpose of the institution....
>
> At the risk of repetition, I emphasize that a sectarian university is the equivalent in the realm of higher education of the Catholic elementary schools...; it is an educational institution in which the propagation and advancement of a particular religion is a primary function of the institution. I do not believe that construction grants to such a sectarian institution are permissible. The reason is not that religion "permeates" the secular education that is provided. Rather, it is that the secular education is provided within the environment of religion; the institution is dedicated to two goals, secular education *and* religious instruction. When aid flows directly to the institution, both functions benefit. The plurality would examine only the activities that occur within the federally assisted building and ignore the religious nature of the school of which it is a part.... I do not see any significant difference in the Federal Government telling the sectarian university not to teach any nonsecular subjects in a certain building, and Rhode Island telling the Catholic school teacher not to teach religion. The vice is the creation through subsidy of a relationship in which the government polices the teaching practices of a religious school or university.... [T]he plurality suggests that the "non-ideological" nature of a building, as contrasted with a teacher, reduces the need for

67. Ibid., Douglas dissent, citing *Engel v. Vitale*, 370 U.S. 421 (1962), discussed at § C2b1 above.

> policing. But the Federal Government imposes restrictions on every class taught in the federally-assisted building. It is therefore not the "non-ideological" building which is policed; rather it is the courses given there and the teachers who teach them. Thus the policing is precisely the same as under the state statutes [in *Lemon* and *DiCenso*], and that is what offends the Constitution.[68]

Justice White, too, was perplexed at the distinctions between *Lemon* and *Tilton*, but he would have decided all cases *for* the schools rather than *against* them, chiefly because he thought the concept of aiding only secular functions was viable and that the parochial schools should have been *trusted* not to use the aid for teaching religion, as the colleges and universities in actuality were, so that he seemed to see no need for policing in either instance.

Even though decided by a very narrow vote, each of these cases set the pattern for a long line of decisions in which any substantial forms of aid to *parochial schools* were held to violate the Establishment Clause, while various forms of aid—some more direct than the ones struck down in the parochial school cases—were permitted to flow to church-related *colleges and universities*. First discussed below are the cases that are progeny of *Lemon*, and then those of *Tilton* that between them provided the occasions for repeated battles in the ongoing war to define the limits of the Establishment Clause.

7. A Long String of State Aid Cases: To Elementary and Secondary Schools

For several decades, those who favored state aid to parochial schools had been agitating against the no-aid formula of *Everson*, while those who opposed such aid had been exasperated by the Supreme Court's failure to *apply* the no-aid rule to the various forms of aid that were springing up in some of the Eastern states with large Roman Catholic populations. During the 1960s there was a flood of propaganda pouring forth from both sides, but the court was silent. Then in 1971 the court spoke, fashioning a new formula for determining whether the Establishment Clause had been violated—the three-prong *Lemon* test—and initiating a series of a dozen decisions that eliminated most of the forms of state aid then existing and several new variations that subsequently sprang from the fertile minds of state legislators seeking to mollify parochial school patrons in their districts. In time, some of those who had yearned for the court to speak on this issue began to feel that it was speaking too much. Some members of the court, too, became disenchanted with the *Lemon* test, particularly the chief justice who fashioned it, so that in some of the later decisions—i.e., *Wolman v. Walter*—the court fragmented into several different pluralities on the several forms of aid considered.

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68. *Lemon v. Kurtzman, supra,* Brennan concurrence (and dissent with respect to *Tilton v. Richardson*).

a. *PEARL v. Nyquist* (1973). A handful of decisions was announced on the last day of the October 1972 term that effectively dashed many of the hopes for public aid to parochial schools. On June 25, 1973, the Supreme Court decided *Committee for Public Education and Religious Liberty v. Nyquist, Sloan v. Lemon*, and *Levitt v. PEARL*, as well as one higher-education case, *Hunt v. McNair*. The first-named case was itself a consolidation of several New York cases brought by the Committee for Public Education and Religious Liberty, known hereinafter by the acronym PEARL.[69]

PEARL v. Nyquist challenged a statute passed by the New York state legislature after *Lemon*, which was designed to provide aid to low- and middle-income parents who sent their children to nonpublic schools and to meet some of the maintenance costs of those schools. The statute provided direct grants to nonpublic schools to be used for the maintenance and repair of buildings to ensure the students' "health, welfare and safety." It also reimbursed parents with a taxable income under $5,000 (who therefore paid no state income tax) for nonpublic school tuition at $50 per grade school child and $100 per high school student (up to 50% of tuition actually paid). Finally, the statute benefitted parents with taxable incomes higher than $5,000 per year by permitting them to deduct a stipulated sum from adjusted gross income for each child attending a nonpublic school, the sum decreasing as income increased and bearing no relation to the amount of tuition actually paid.

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69. PEARL was a coalition of opponents of parochial aid that included the American Association of School Administrators, American Civil Liberties Union, American Ethical Union, American Humanist Association, American Jewish Congress, Americans United for Separation of Church and State, Anti-Defamation League of B'nai B'rith, Baptist Joint Committee on Public Affairs, Board of Church and Society of the United Methodist Church, Central Conference of American Rabbis, National Association of Catholic Laity, National Education Association, Union of American Hebrew Congregations, and the Unitarian Universalist Association, among others. (This was the array of national organizations that eventually composed the national PEARL. The New York case was brought by a New York coalition that preceded the national coalition and included an even broader array of state and local groups, such as the American Jewish Committee [New York Chapter], A. Philip Randolph Institute, Community Service Society, New York City and New York State Councils of Churches, New York State Congress of Parents and Teachers, United Federation of Teachers, Women's City Club of New York, Workmen's Circle, etc.) Florence Flast was the president of the coalition, and Leo Pfeffer was its redoubtable legal counsel, who argued the cases bearing the title "PEARL."

For those who are observers of organizational dynamics, it may be worth noting that the American Jewish Committee did not join the national coalition, nor did the National Council of Churches nor any of its members (except one Methodist agency) nor the Lutheran Council nor the National Association of Evangelicals nor the General Conference of Seventh-day Adventists—all of which had separationist leanings on various issues, particularly on public aid to parochial schools. Some of them supported some of the PEARL cases as *amici* (as the National Council of Churches did *Flast v. Cohen*, which was a pre-PEARL lawsuit involving many of the same interests), but evidently they were not drawn to the litigation strategy of PEARL, or felt that they would rather identify with individual cases than with the strategy as a whole.

The District Court found the first and second sections unconstitutional but upheld the third. The U.S. Supreme Court found all three unconstitutional. In an opinion by Justice Powell, in which Justices Douglas, Brennan, Stewart, Marshall and Blackmun joined, the court found the statute to be "adequately supported by legitimate, nonsectarian state interests," thus satisfying the "secular purpose" prong of the *Lemon* test. But the statute failed the remaining two parts of the test. The court evaluated the "primary effect" of each of the three forms of aid. The "maintenance and repair" provision was found wanting because

> No attempt is made to restrict payments [to nonpublic schools] to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions.... Absent appropriate restrictions on expenditures for [religious] purposes, it simply cannot be denied that this section [of the law] has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools.... If the State may not erect buildings in which religious activities are to take place [citing *Tilton*, *supra*], it may not maintain such buildings or renovate them when they fall into disrepair.[70]

The court turned to the provision for tuition reimbursement to low-income parents of nonpublic school students.

> There can be no question that these grants [of $50 or $100 per child] could not, consistent with the Establishment Clause, be given directly to sectarian schools, since they would suffer from the same deficiency that renders invalid the grants for maintenance and repair.... [I]t is clear from our cases that direct aid in whatever form is invalid. As Mr. Justice Black put it quite simply in *Everson*:
>
> "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."
>
> The controlling question here, then, is whether the fact that the grants are delivered to parents rather than schools is of such significance as to compel a contrary result.... But... the fact that aid is disbursed to parents rather than to schools is only one among many factors to be considered.... [I]t is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian... [and] the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions....
>
> [I]f the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into sectarian institutions. Whether

70. *PEARL v. Nyquist*, 413 U.S. 756 (1973).

> the grant is labeled a reimbursement, a reward or a subsidy, its substantive impact is still the same.

The income tax benefits for parents of parochial school pupils earning between $5,000 and $25,000 per year fared no better. The court had some difficulty characterizing the arrangement, but nonetheless found it impermissible.

> It is, at least in its form, a tax deduction since it is an amount subtracted from adjusted gross income, prior to computation of the tax due. Its effect... is more like that of a tax credit since the deduction is not related to the amount actually spent for tuition and is apparently designed to yield a predetermined amount of tax "forgiveness" in exchange for performing a specific act which the State desires to encourage—the usual attribute of a tax credit....
>
> In practical terms there would appear to be little difference... between the tax benefit allowed here and the tuition grant [just discussed]. The qualifying parent under either program receives the same form of encouragement and reward for sending his children to nonpublic schools....
>
> We know of no historical precedent for New York's recently promulgated tax relief program.... [T]ax benefits for parents whose children attend parochial schools are a recent innovation, occasioned by the growing financial plight of such nonpublic institutions and designed, albeit unsuccessfully, to tailor state aid in a manner not incompatible with the recent decisions of this Court.... [I]nsofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions.

The court did not need to reach the third element of the *Lemon* test, excessive entanglement of government with religion, but did devote some attention to one aspect of entanglement, the difficult question of political divisiveness.

> [A]ssistance of the sort here involved carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion.... [C]ompetition among religious sects for political and religious supremacy has occasioned considerable civil strife, "generated in large part" by competing efforts to gain or maintain the support of government.... And while the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a "warning signal" not to be ignored.

Once again a kind of "Catch 22" element seemed to appear in the court's reasoning, since on one page it pointed out that benefits flowing only to a limited segment of the public were suspect: "in terms of the potential divisiveness of any legislative measure the *narrowness* of the benefitted class would be an important factor," and a few pages later it suggested the opposite: "the *larger* the class of recipients, the greater

the pressure for accelerated increases." So if the benefited class is *small*, it can lead to political divisiveness, while if the benefited class is *large*, the political divisiveness can be more massive, suggesting a "heads-I-win, tails-you-lose" predicament.

In a footnote, the court left open a possibility that would arise ten years later in *Mueller v. Allen.*[71]

> 49. Since the program here does not have the elements of a genuine tax deduction, such as for charitable contributions, we do not have before us, and do not decide, whether that form of tax benefit is constitutionally acceptable....

Justice Rehnquist filed a rather mild (for him) dissent, which was joined by Chief Justice Burger and Justice White, in which he disagreed with the majority's contention that the tax benefit would serve as an incentive for parents to send their children to parochial schools.

> Surely neither the standard deduction, usable by those taxpayers who do not itemize their deductions, nor personal or dependency deductions, for example, bears any relationship whatsoever to the actual expenses accrued in earning any of them. Yet none of these could properly be called a reimbursement from the State. And it would take more of a record than is present in this case to prove the possibility of a slightly lower aggregate tax bill accorded New York taxpayers who send their dependents to nonpublic schools provides any more incentive to send children to such schools than personal exemptions provide for getting married and having children.
>
> * * *
>
> In *Everson* and *Allen*... the Court was guided by the fact that any effect from state aid to parents has a necessarily attenuated impact on religious institutions when compared to direct aid to such institutions.... New York has recognized that parents who are sending their children to nonpublic schools are rendering the State a service by decreasing the costs of public education and by physically relieving an already overburdened public school system. Such parents are nonetheless compelled to support public school services unused by them and to pay for their own children's education. Rather than offering "an incentive to send their children to sectarian schools,"... as the majority suggests, New York is effectuating the secular purpose of the equalization of the costs of educating New York children that are borne by parents who send their children to nonpublic schools.[72]

He did not dissent as to the maintenance grants. Other dissents were directed to *Sloan* and *Levitt* as well, and will be discussed following those cases.

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71. 463 U.S. 388 (1983), discussed at § j below.

72. Ibid., Rehnquist dissent.

b. *Sloan v. Lemon* (1973). Justice Powell also delivered the opinion of the court in a Pennsylvania case dealing with a law enacted following *Lemon v. Kurtzman*, entitled Parent Reimbursement Act for Nonpublic Education that reimbursed a portion of tuition payments to nonpublic schools, more than 90 percent of which were parochial schools.[73] The Supreme Court found the Pennsylvania plan indistinguishable from the tuition-reimbursement scheme struck down in *PEARL v. Nyquist*.[74]

> The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions.... We hold that Pennsylvania's tuition grant scheme violates the constitutional mandate against the "sponsorship" or "financial support" of religion or religious institutions.

c. *Levitt v. PEARL* (1973). Another New York stratagem engaged the court in *Levitt v. Committee for Public Education and Religious Liberty*. An appropriation of $28,000,000 had been made by the legislature of New York State to reimburse nonpublic schools "for expenses of services for examination and inspection" required by the state. Tests and examinations were the most extensive and expensive of these mandated services, and they were of two kinds: (1) state-prepared or standardized tests such as the "Regents' Examinations" and (2) traditional teacher-prepared tests, which made up by far the greatest quantity of testing in nonpublic schools. Those schools were reimbursed by the state $27 per pupil per year in grades 1-6 and $45 per pupil per year in grades 7-12.

Chief Justice Burger delivered the opinion of the court. He viewed the reimbursement program as analogous to the maintenance grants struck down in *Nyquist* because they did not differentiate between the secular and the religious functions of sectarian schools in the reimbursement program.

> [D]espite the obviously integral role of testing in the total teaching process, no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction.
>
> We cannot ignore the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church.... [W]e are left with no choice under *Nyquist* but to hold that [this law] constitutes an impermissible aid to religion; this is so because the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities.
>
> * * *

73. *Sloan v. Lemon*, 413 U.S. 825 (1973), finding of the district court.

74. See preceding section.

> To the extent that appellants argue that the State is permitted to pay for any activity "mandated" by state law or regulation, we must reject the contention. State or local law might, for example, "mandate" minimum lighting or sanitary facilities for all school buildings, but such commands would not authorize a State to provide support for those facilities in church-sponsored schools.[75]

Only Justice White dissented in this case, though Justices Douglas, Brennan and Marshall, rather than joining the chief justice's view, simply announced that affirmance of the district court's holding of unconstitutionality was required by the decisions of the same day in *Nyquist* and *Sloan*.

Justice White dissented in all three cases, announcing:

> I am quite unreconciled to the Court's decision in *Lemon v. Kurtzman*.... I thought then, and I think now, that the Court's conclusion there was not required by the First Amendment and is contrary to the long range interests of the country....
>
> No one contends that he can discern from the sparse language of the Establishment Clause that a State is forbidden to aid religion in any manner whatsoever or, if it does not mean that, what kind of or how much aid is permissible. And one cannot seriously believe that the history of the First Amendment furnishes unequivocal answers to many of the fundamental issues of church-state relations. In the end the courts have fashioned answers to these questions as best they can, the language of the Constitution and its history having left them a wide range of choice among many alternatives. But decision has been unavoidable; and, in choosing, the courts necessarily have carved out what they deemed to be the most desirable national policy governing various aspects of church-state relationships.

He pointed out that various kinds of "aid" or benefits to religion had been deemed compatible with the First Amendment: bus transportation and textbook loans for parochial school pupils, tax exemption for churches, etc. So not all kinds of "aid" were barred. But the current test required a secular purpose, which the laws at issue were conceded by the majority to have, a primary effect that did not aid or hinder religion, and the absence of excessive entanglement, which he felt was not an issue in the tuition grants or tax credits at bar. So only the second prong was offended by the Pennsylvania and New York programs, and it was on this ground that the majority had concluded that the statute would have an effect of advancing the religious mission of the schools.

> But the test is one of "primary" effect, not *any* effect. The Court makes no attempt at that ultimate judgment....
>
> There is no doubt here that Pennsylvania and New York have sought in the challenged laws to keep their parochial schools system alive and

75. *Levitt v. PEARL*, 413 U.S. 472 (1973).

> capable of providing adequate secular education to substantial numbers of students. This purpose satisfied the Court, even though to rescue schools that would otherwise fail will inevitably enable those schools to continue whatever religious functions they perform. By the same token, it seems to me, preserving the secular functions of these schools is the overriding consequence of these laws and the resulting, but incidental, benefit to religion should not invalidate them.[76]

The chief justice and Justice Rehnquist joined in this dissent insofar as it related to the New York and Pennsylvania tuition grant program and the New York tax-credit plan.

The chief justice wrote his own opinion in *Nyquist* and *Sloan*, concurring with respect to the "maintenance and repair" grants in the New York law, but dissenting as to the tuition-grant and tax-relief programs of New York and Pennsylvania.

> While there is no straight line running through our decisions interpreting the Establishment and Free Exercise clauses of the First Amendment, our cases do, it seems to me, lay down one solid, basic principle: that the Establishment Clause does not forbid governments, state or federal, from enacting a program of general welfare under which benefits are distributed to private individuals, even though many of those individuals may elect to use those benefits in ways that "aid" religious instruction or worship....
>
> The essence of all these decisions, I suggest, is that government aid to individuals generally stands on an entirely different footing from direct aid to religious institutions.... [T]he balance between the policies of free exercise and establishment of religion tips in favor of the former when the legislation moves away from direct aid to religious institutions and takes on the character of general aid to individual families.... It is no more than simple equity to grant partial relief to parents who support the public schools they do not use...
>
> I fear that the Court has in reality followed the unsupportable approach of measuring the "effect" of the law by the percentage of the recipients who choose to use the money for religious, rather than secular, education. Indeed... the Court's opinion argues that "the tax reductions... flow primarily to the parents of children attending sectarian, nonpublic schools...."
>
> With all due respect, I submit that such a consideration is irrelevant to a constitutional determination of the "effect" of a statute. For purposes of constitutional adjudication of that issue, it should make no difference whether 5%, 20%, or 80% of the beneficiaries of an educational program of general application elect to utilize their benefits for religious purposes.[77]

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76. *PEARL v. Nyquist*, *supra*, White dissent.
77. Ibid., Burger dissent.

Justice Rehnquist joined in this dissent, as did Justice White insofar as it related to the tuition-grant and tax-relief statues. The chief justice's argument that constitutionality should not turn on the proportion of beneficiaries patronizing religious schools became the position of the court in 1983.[78]

d. *Wheeler v. Barrera* (1974). The Elementary and Secondary Education Act of 1965, discussed earlier,[79] came before the U.S. Supreme Court in 1974 in a suit brought in Missouri by parents of children attending nonpublic schools charging that they were not receiving services "comparable" to those offered eligible public school students, as required by Title I of the Act, since the state education agencies had not arranged for special teaching services on the premises of nonpublic schools such as it had in public schools. The court held that the question was premature, since state courts had not yet determined whether Missouri's (strict) constitution prohibited such aid. If it did, the Act required that the state law be respected. That left other possible forms of aid to be considered, and until a program involving on-premises teaching was instituted, the court would not rule on it. The court did make clear, however, that the form of aid to students in nonpublic schools was to be "comparable" to that in public schools, but that did not mean *identical*, and the form of aid selected by the local public education officials was not subject to veto by the nonpublic school recipients. This issue would arise again in *Aguilar v. Felton* (1985).[80] Justice Brennan wrote the opinion of the court. Although several justices wrote short concurrences only, only Justice Douglas dissented, arguing that the Title I. program was unconstitutional as applied to parochial schools.[81]

e. *Public Funds for Public Schools v. Marburger* (1974). New Jersey enacted a statute that furnished state aid, in amounts up to $10 for elementary school students and up to $20 for high school students to the parents of nonpublic school students as *reimbursement* for the cost of "secular, non-ideological textbooks, instructional materials and supplies."

A three-judge federal district court held:

> [B]ecause the language of [the statute] limits the assistance provided therein only to parents of children who attend nonpublic, predominantly religiously-affiliated schools and not to parents of all school children, we are satisfied that its primary effect is to advance religion and that it is thereby unconstitutional.[82]

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78. See *Mueller v. Allen*, 463 U.S. 388 (1983), discussed at § 7j below.

79. See § D4 above.

80. See § 7m below.

81. *Wheeler v. Barrera*, 417 U.S. 402 (1974).

82. *Public Funds for Public Schools v. Marburger*, 358 F.Supp. 29 at 36 (N.J., 1973), aff'd 417 U.S. 961 (1974). The characterization of the case is drawn from Justice Brennan's separate opinion in *Meek v. Pittenger*, below.

The New Jersey statute also provided instructional materials and equipment to nonpublic elementary and secondary schools. The district court found that the nonpublic schools aided were predominantly church-related or religiously affiliated and that the primary effect of the law was the advancement of religion.

The Supreme Court in 1974 summarily affirmed the district court's decision (over the lone dissent of Justice White). The Court remarked in a later decision that its affirmance in *Marburger* was on the merits and entitled to precedential weight.[83]

f. *Meek v. Pittenger* (1975). The next year the court dealt more directly with a Pennsylvania program of aid to nonpublic education that was very similar to the New Jersey program struck down in *Marburger*. The judgment of the court was announced by Justice Potter Stewart in an opinion that commanded varying degrees of support from other members of the court.

The Pennsylvania statute(s) provided several types of aid, which for purposes of understanding the court's decision(s) can be divided into four categories:

a. The loan of *textbooks* approved for use in public schools to students attending nonpublic schools;

b. The loan to nonpublic schools of instructional *materials* such as maps, charts, globes, recordings, slides, films;

c. The loan to nonpublic schools of instructional *equipment* such as projection, recording or laboratory equipment.

d. The provision by public employees on nonpublic school premises of "*auxiliary services*" such as guidance, counselling and testing services, psychological services, remedial and therapeutic services, services for exceptional children, speech and hearing services, and services for the improvement of the educationally disadvantaged (including, but not limited to, teaching English as a second language) to children individually selected because of their need for such services.

All of these were to be of a "secular, neutral, non-ideological" character.

These aid programs were immediately challenged by a group of individual and organizational plaintiffs.[84] The case was heard by a three-judge federal district court that unanimously upheld the textbook loan provision. It also upheld, by a divided

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83. *Meek v. Pittenger*, 421 U.S. 349 (1974), nn. 12, 16, 20.

84. Plaintiffs included the American Civil Liberties Union, The National Association for the Advancement of Colored People, the Pennsylvania Jewish Community Relations Council, and Americans United for Separation of Church and State) represented by Leo Pfeffer. Defendants included John C. Pittenger, Secretary of Education of Pennsylvania, Grace M. Sloan, Treasurer of Pennsylvania, and a number of persons and groups who were permitted by the District Court to intervene as defendants, including a nonpublic, nonsectarian school and an association of such schools. The intervenor-defendants were represented by William Bentley Ball of Harrisburg, Pennsylvania, counsel to the Pennsylvania Catholic Welfare Conference and—one suspects—a participant in the drafting of the statutes in question. Both Leo Pfeffer and Bill Ball were esteemed friends of the author, and of each other, and this case was but one of many of their encounters across the "wall of separation."

vote, the provision of auxiliary services and the loan of instructional materials. It struck down the provision for the loan of instructional equipment that could be "diverted to religious purposes," but upheld the statute as to other equipment that could not readily be so diverted.[85] The state did not seek review of that part of the decision holding unconstitutional the loan of instructional equipment capable of being diverted to religious purposes, so it in effect conceded that point, and the Supreme Court, therefore, did not consider it.

The plaintiffs relied upon a characterization or profile of the sectarian schools which, they contended, were the primary beneficiaries of the Pennsylvania programs. This was, in essence, the same characterization that Leo Pfeffer had used in earlier cases, beginning with *Horace Mann League*,[86] *Lemon v. Kurtzman*[87] and *PEARL v. Nyquist*.[88] Such schools were alleged to be those that:

1. Are controlled by churches or religious organizations;
2. Have as their purpose the teaching, propagation and promotion of a particular religious faith;
3. Conduct their operations, curriculums and programs to fulfill that purpose;
4. Impose religious restrictions on admissions;
5. Require attendance at instruction in theology and religious doctrine;
6. Require attendance at or participation in religious worship;
7. Are an integral part of the religious mission of the sponsoring church;
8. Have as a substantial or dominant purpose the inculcation of religious values;
9. Impose religious restrictions on faculty appointments;
10. Impose religious restriction on what the faculty may teach.[89]

The Supreme Court again relied on the three-pronged test of *Lemon v. Kurtzman*, but with even less agreement on the result than in *Nyquist*, *Sloan* and *Levitt*. The majority agreed with the district court that the textbook-loan program was indistinguishable from the New York program found constitutional in *Allen*[90] and therefore upheld it, but three justices dissented, as will be noted below. The other aspects of the Pennsylvania program did not fare as well.

> Although textbooks are lent only to students, [the statute] authorizes the loan of instructional materials and equipment directly to qualifying nonpublic elementary and secondary schools.... [T]he direct loan of instructional materials and equipment [to the schools] has the unconstitutional primary effect of advancing religion because of the

85. *Meek v. Pittenger*, 374 F.Supp. 639 (1973).
86. *Horace Mann League v. Maryland Board of Public Works*, 242 Md. 645, 220 A.2d 51 (1966).
87. 403 U.S. 602 (1971), discussed at § D5 above.
88. 410 U.S. 907 (1973), discussed at § D7a above.
89. *Meek v. Pittenger,* 421 U.S. 349 (1974), quoting the complaint.
90. *Bd. of Ed. v Allen,* 392 U.S. 236 (1968), discussed at § D3 above.

> predominantly religious character of the schools benefitting from the Act.... Commonwealth officials, as a matter of state policy, do not inquire into the religious characteristics, if any, of the nonpublic schools requesting aid.... [A] school would not be barred... even though its dominant purpose was the inculcation of religious values, even if it imposed religious restrictions on admissions or on faculty appointments, and even if it required attendance at classes in theology or at religious services. In fact, of the 1,320 nonpublic schools in Pennsylvania that comply with...the compulsory education law and thus qualify for aid under [the statute], more than 75% are church-related or religiously-affiliated educational institutions. Thus, the primary beneficiaries... are nonpublic schools with a predominant sectarian character.... [T]he massive aid provided the church-related nonpublic schools... is neither indirect nor incidental....
>
> [I]t would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related... schools and to then characterize [the Act] as channeling aid to the secular without providing direct aid to the sectarian.... The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief.... Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole.... For this reason, [The Act's] direct aid to Pennsylvania's predominantly church-related nonpublic elementary and secondary schools, even though ostensibly limited to wholly neutral, secular instructional material and equipment, inescapably results in the direct and substantial advancement of religious activity... and thus constitutes an impermissible establishment of religion.

Thus the court struck down the entire provision for instructional materials and equipment, even that ostensibly not capable of being "diverted to religious use." In this outcome, a different set of six justices joined, as will be sorted out below.

With respect to "auxiliary services," the majority observed that these were to be "provided only on the nonpublic school premises, and only when `requested by nonpublic school representatives."[91] As in the preceding programs, the court conceded the validity of the secular purposes asserted by the legislature, but—as in *Lemon* and *Nyquist*—it caught the programs between the "primary effect" and "entanglement" blades of the *Lemon* shears. The district court had held that no continuing supervision of the public employees providing auxiliary services would be necesary to prevent the "sectarianization" of their professional work. But this, said the majority of the Supreme Court, would not do.

91. Ibid., quoting State Department of Education Guidelines.

> [T]he District Court erred in relying entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to insure that a strictly nonideological posture is maintained.... [This] Court [in *Earley v. DiCenso*] expressly rejected the proposition... that it was sufficient for the State to assume that teachers in church-related schools would succeed in segregating their religious duties from their secular educational duties....
>
> The prophylactic contacts required to ensure that teachers play a strictly non-ideological role, the Court held, necessarily give rise to a constitutionally intolerable degree of entanglement between church and state.... The same excessive entanglement would be required for Pennsylvania to be "certain," as it must be, that [public] personnel do not advance the religious mission of the church-related schools in which they serve....
>
> That [the Act] authorizes state-funding of teachers only for remedial and exceptional students, and not for normal students participating in the core curriculum, does not distinguish the case from *Earley*... and *Lemon*.... Whether the subject is "remedial reading," "advanced reading," or simply "reading," a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists.... And a state-subsidized guidance counsellor is surely as likely as a state-subsidized chemistry teacher to fail on occasion to separate religious instruction and the advancement of religious beliefs from his secular educational responsibilities....
>
> The fact that the teachers and counsellors providing auxiliary services are employees of the public... rather than of the church-related schools in which they work, does not substantially eliminate the need for continuing surveillance. To be sure, [they] are not directly subject to the discipline of a religious authority.... But they are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained.... The potential for impermissible fostering of religion under these circumstances, although somewhat relaxed, is nonetheless present. To be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that those restrictions were being followed.

As a final fillip to its argument, the court added that the Pennsylvania statute(s) had a "serious potential for divisive conflict over the issue of aid to religion"—the question of political divisiveness along religious lines—"one of the principal evils against which the Establishment Clause was designed to protect."[92]

92. Ibid., repeating the contention found in *Lemon* that has been criticized as having no basis in history. See discussion toward the end of § 5 above.

The court thus upheld only the district court's decision that the textbook loan provision was constitutional. The justices sharing this view were Stewart, Blackmun and Powell, joined by three who dissented on the other issues, Burger, White and Rehnquist, for a total of six. The three dissenters on this issue were Brennan, Douglas and Marshall. The majority shifted to a different constellation of six in striking down the provisions of instructional materials, equipment (not susceptible to diversion for religious purposes) and auxiliary services. On these issues, Stewart, Powell and Blackmun were joined by Brennan, Douglas and Marshall, while Burger, White and Rehnquist were in dissent. Perhaps Table 1 will clarify this outcome.

Table 1: How the Justices Voted in *Meek v. Pittenger*

Program:	Textbooks	Materials	Equipment	Auxil. Svces.
Burger	Y	Y	Y	Y
White	Y	Y	Y	Y
Rehnquist	Y	Y	Y	Y
Stewart	Y	N	N	N
Blackmun	Y	N	N	N
Powell	Y	N	N	N
Douglas	N	N	N	N
Brennan	N	N	N	N
Marshall	N	N	N	N
Y-N:	6-3	3-6	3-6	3-6

(Y indicates the justice voted to hold the program constitutional; N, unconstitutional.)

The court's argument about public-school employees' succumbing to the irresistible urge to slip a little religious teaching into their remedial arithmetic seemed a bit strained. It is all the parochial school can do to get its regular religiously committed teachers to remember to permeate their teaching of all subjects with religious interpretation and insight, and the result is too often crude and superficial devices like "three priests plus five priests is eight priests." Public-school teachers generally would not have the inclination—or energy—necessary to attempt to teach religion along with remedial subjects, let alone to be effective at it. And if some such teacher—by a rare chance—did do so, it might more likely be a zealous Southern Baptist or Jehovah's Witness than a crypto-Catholic! Public school teachers operating on parochial school premises would be more likely to shade or suppress material to avoid offending supposed religious sensibities (with regard to abortion, evolution, gender equality, etc.).

The real vice in these programs from a constitutional standpoint may be not their potential for clandestine inculcating of religion at public expense, as the court contended, but that they augment the faculty and increase the instructional resources of the religious school at public expense, thus building up the *church institution* as *institution* through contributions made unwillingly or unwittingly by the entire community under duress of tax law. The adoption of this kind of rationale would not change the judgment in this case, but it might make the argument more realistic.

The chief justice agreed with the majority only insofar as it affirmed the judgment of the district court (that is, only in upholding the loan of textbooks). On the other issues, and especially on auxiliary services, he dissented vigorously.

> There is absolutely no support in this record or, for that matter, in ordinary human experience to support the concern some see with respect to the "dangers" lurking in extending common, nonsectarian tools of the educational process—especially remedial tools— to students in private schools....
>
> If the consequence of the Court's holding operated only to penalize *institutions* with a religious affiliation, the result would be grievous enough.... But this holding does more: it penalizes *children*—children who have the misfortune to have to cope with the learning process under extraordinary heavy physical and psychological burdens, for the most part congenital. This penalty strikes them not because of any act of theirs but because of their parents' choice of religious exercise....
>
> To hold, as the Court now does, that the Constitution permits the States to give special assistance to some of its children whose handicaps prevent their deriving the benefit normally anticipated from the education required to become a productive member of society and, at the same time, to deny those benefits to other children *only because* they attend a Lutheran, Catholic or other church-sponsored school does not simply tilt the Constitution against religion, it literally turns the Religion Clause on its head.[93]

The majority responded to this allegation somewhat obliquely in a footnote:

> The appellants do not challenge, and we do not question, the authority of the Pennsylvania General Assembly to make free auxiliary services available to all students in the Commonwealth, including those who attend church-related schools. Contrary to the argument advanced in a separate opinion filed today, therefore, this case presents no question whether "the Constitution permits the States to give special assistance to some of its children..., and, at the same time, to deny those benefits to other children *only because* they attend a Lutheran, Catholic or other church-sponsored school...."[94]

93. *Meek, supra,* Burger dissent, emphasis in original.

94. Ibid., majority opinion, n. 17, emphasis in original, elipsis added.

Justice Rehnquist wrote a dissent similar to the chief justice's, in which he was joined by Justice White. They, too, would affirm the judgment of the district court, thus agreeing with Justice Stewart only in upholding the loan of textbooks. They dissented on the other issues; that is, they would have ruled the auxiliary services and the "loan" of instructional materials and equipment (to the extent it was an issue) to be constitutional.

Justice Rehnquist particularly objected to the notion that constitutionality could turn on a nose-count of the beneficiaries of a program.

> The Court thus again appears to follow "the unsupportable approach of measuring the `effect' of a law by the percentage of" sectarian schools benefitted.... I find that approach to the "primary effect" branch of our three-pronged test no more satisfactory in the context of this instructional materials and equipment program than it was in the context of the tuition reimbursement and tax relief programs involved in *Nyquist*... and *Sloan*....[95]

If the number of beneficiary sectarian schools were measured against the total number of *all* schools in Pennsylvania, he continued, then they would form only a very tiny fraction. But since the court measured them against only the number of *nonpublic* schools, they were seen as a *large* (75 percent) proportion, and thus the court considered the "primary effect" to be that of impermissibly advancing religion because of the "*predominantly* religious character of the schools benefitting from the Act." Why the total of *all* schools, public and private, was not the proper denominator was not explained, and thus the conclusion seemed arbitrary, wrote Justice Rehnquist.

With respect to the auxiliary services program, he continued:

> As a matter of constitutional law, the holding by the majority that this case is controlled by *Lemon v. Kurtzman*... marks a significant *sub silentio* extension of that 1971 decision.... The auxiliary services program [in the Pennsylvania Act] differs from the programs struck down in *Lemon* in two important respects. First the opportunities for religious instruction through the auxiliary services program are greatly reduced because of the considerably more limited reach of the Act..., [which] embrace[s] a narrower range of services....
>
> Even if the distinction between these services and core curricula is thought to be a matter of degree, the second distinction between the programs involved in *Lemon* and [this Act] is a difference in kind. [It] provides that these auxiliary services shall be provided by personnel of the *public* school system. Since the danger of entanglement articulated in *Lemon* flowed from the susceptibility of parochial school teachers to "religious control and discipline," I would have assumed that exorcisation of that constitutional "evil" would lead to a different constitutional

95. Ibid., Rehnquist dissent, quoting Burger dissent in *Nyquist*, q.v., at end of § 7a above.

> result.... The decision of the Court that [this Act] is unconstitutional rests ultimately upon the unsubstantiated factual proposition that "[t]he potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present...." [I]f the Court is free to ignore the record, then appellees are left to wonder, with good reason, whether the possibility of meeting the entanglement test is now anything more than "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will."[96]

Justice Brennan, joined by Justices Douglas and Marshall, concurred in the Stewart opinion except for the textbook loan provision. Although Brennan and Marshall had joined the majority in upholding the New York textbook loan program in *Allen*, they had come to regret that view, ostensibly because of the new consideration introduced since *Allen* (1968) in *Lemon* (1971), which Brennan characterized as "a significant fourth factor"—"[a] broader basis of entanglement of yet a different character is presented by the divisive political potential of these programs." "[G]iving [that] factor the weight that *Kurtzman* and *Nyquist* require compels, in my view, the conclusion that the textbook loan program... violates the Establishment Clause."[97]

The majority had distinguished the textbook loans from the loan of instructional materials on the ground that the former went to students and the latter to sectarian schools, but Brennan contended, "That answer will not withstand analysis."

> First, it is pure fantasy to treat the textbook program as a loan to students.... [T]he Court acknowledges that "the administrative practice is to have student requests for the books filed initially with the nonpublic school and to have the school authorities prepare collective summaries of these requests which they forward to the appropriate public officials...." Further, "the nonpublic schools are permitted to store on their premises the textbooks being lent to students...." [T]he nonpublic school in Pennsylvania is something more than a conduit between the State and the pupil.... The whole business is handled by the schools and the public authorities and neither parents nor students have a say.... [A]lthough in terms the form provided by the Commonwealth for parents of nonpublic school students states that the parents of these pupils request the loan of textbooks directly from the State, the form is not returnable to the State, but to the nonpublic school, which tabulates the requests and submits its total to the State. Then after the submission by the nonpublic school is approved by the appropriate state official, the books are transported not to the children whose parents ostensibly made the requests, but directly to the nonpublic school, where they are physically retained when not in use in the classroom.

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96. Ibid., Rehnquist dissent, quoting the majority opinion and *Edwards v. California*, 314 U.S. 160, 186 (1941), Justice Jackson, concurring.

97. Ibid., Brennan opinion.

> Indeed, the [State] Guidelines make no attempt to mask the true nature of the loan transaction: "Textbooks *loaned to the nonpublic schools*: (a) shall be maintained on an inventory by the nonpublic school." (Emphasis added.).... "It is presumed that textbooks on *loan to nonpublic schools* after a period of time will be lost, missing, obsolete or worn out.... After a period of six years, textbooks shall be declared unserviceable and the disposal of such shall be at the discretion of the Secretary of Education." (Emphasis added.) Thus, the loan of the texts is treated by the regulations as what it in fact is: a loan from the State directly to the nonpublic school.... In this regard, it should be observed that sophisticated attempts to avoid the Constitution are just as invalid as simple-minded ones....

This material, gleaned from the record, demonstrated the fictional elements in the textbook-loan program. What does it mean to say that the loan is to the student when it operates in actuality in a way that is virtually indistinguishable from a *grant* of textbooks from the state to the church school? There was no indication that any of these "loaned" textbooks were ever actually *returned* to the state. In fact, if they were lost, damaged or superseded, neither the pupil, the parent nor the school was obliged to *pay* for a replacement, as would be the case with a book borrowed from a public library. Instead, the state *replaced* the book without charge! The bland assertion by the court that "ownership remained, *at least technically*, in the State" (emphasis added) was a perfect example of a judicial fiction.

Some supporters of the child-benefit theory embraced by the court in *Everson* and *Allen* were distressed to see it manipulated into the *opposite* of *child benefit* and then accepted by the court as though it were still the intended arrangement. Under a genuine child-benefit program, every child in the state would be entitled to free use of textbooks approved for use in the public schools. Each child, after being informed by the school, public or private, which books would be needed for the courses scheduled in the next term, would apply directly to the state for those textbooks and would receive them directly from the state for the period of that term and return them directly to the state when the period of the loan expired. Pupils failing to do so would be obliged to indemnify the state for the loss (minus depreciation) of books entrusted to their care. The differences between this model and the one described by Justice Brennan are the measure of the departures from a true child-benefit textbook-loan program, and they are all departures in the direction of a *school*-benefit arrangement, in which the church school becomes in actuality the proprietor and dispenser of the state-provided textbooks, again operating to enhance the presence and puissance of the church institution.

It might have been better if Justice Brennan had focused entirely upon these transparent fictions, but he felt obliged to rely upon the "political divisiveness" test—a weak reed both historically and otherwise—perhaps to justify his change of stance since *Allen*. "[This Act] is intended solely as a financial aid program to relieve the desperate financial plight of nonpublic, primarily parochial, schools.... [I]ts

limitation of its financial support to aid to nonpublic school children exacerbates the potential for political divisiveness....” Justice Brennan's elevation of the “political divisiveness” point into a “fourth factor of the test” that had supposedly been “key” in the outcome of *Lemon v. Kurtzman* was belied by his and other Justices' treatment of that factor as not being independent or of major importance, but a “signal” of establishment, an auxiliary indication, a “kicker” (not the court's term) for the “entanglement” factor rather than an equal factor in its own right.[98]

g. *Wolman v. Walter* (1977). The increasing differences within the U.S. Supreme Court over the application of the Establishment Clause to various forms of state aid to parochial schools reached a point of virtual chaos on an Ohio program that provided six different forms of aid, over which the court splintered in five different constellations that can only be adequately portrayed in a fifty-four-fold table, such as that appearing later in this section.

The six kinds of aid provided by the state of Ohio were the following:

1. Loan of secular textbooks;
2. Supplying of standardized tests and scoring services used in public schools;
3. Provision of speech, hearing and psychological diagnostic services by public employees on nonpublic school premises;
4. Provision of therapeutic, remedial and guidance services to selected nonpublic school students, but not on the premises of the nonpublic school;
5. Loan of instructional materials and equipment;
6. Provision of transportation for field trips.[99]

Justice Blackmun delivered the opinion of the court with respect to some of the programs. The textbook-loan provision was upheld as being substantially the same as programs upheld in *Allen* and *Meek*.[100] A program for reimbursing nonpublic schools in New York for cost of testing students had been struck down in *Levitt*[101] because the tests were prepared and scored by nonpublic school teachers and therefore could have been used for teaching religion, but the Ohio plan provided that standardized tests used in public schools would be provided to nonpublic schools and scored by the public school. “Nonpublic school personnel are not involved in either the drafting or scoring of the tests. The statute does not authorize any payment to nonpublic school personnel for the costs of administering the tests.”[102] Therefore, the Ohio testing program was found constitutional, a result in which Chief Justice Burger,

98. Cf. Justice Powell in *Nyquist* and Brennan himself in *McDaniel v. Paty*, 435 U.S. 618 (1978), discussed at IIE4k.

99. *Wolman v. Walter*, 433 U.S. 229 (1977), syllabus.

100. *Board of Education v. Allen*, 392 U.S. 236 (1968), discussed at § D3 above, and *Meek v. Pittenger*, 421 U.S. 349 (1975), discussed at § D7f above.

101. *Levitt v. PEARL*, 413 U.S. 472 (1973), discussed at § D7c above.

102. *Wolman v. Walter, supra,* Blackmun opinion, at 238.

Justices Stewart and Powell joined, and Justices White and Rehnquist concurred in the judgment.

The diagnostic services involving speech, hearing and psychological problems, though rendered on nonpublic school premises by public employees, were found to be constitutional.

> The reason for considering diagnostic services to be different from teaching or counselling is readily apparent. First, diagnostic services, unlike teaching or counselling, have little or no educational content and are not closely associated with the educational mission of the nonpublic school. Accordingly, any pressure on the public diagnostician to allow the intrusion of sectarian views is greatly reduced. Second, the diagnostician has only limited contact with the child, and that contact involves chiefly the use of objective and professional testing methods to detect students in need of treatment. The nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counsellor and student.

Only Justice Brennan dissented from this section of the decision, for reasons indicated in his dissent, discussed below.

In *Meek*, therapeutic services performed on parochial school premises had been struck down, but in the Ohio program such services were to be performed at sites that were "neither physically nor educationally involved with the functions of the nonpublic school."[103]

> We recognize that, unlike the diagnostician, the therapist may establish a relationship with the pupil in which there might be opportunities to transmit ideological views.... But... the Court [in *Meek*] emphasized that this danger arose from the fact that the services were performed in the pervasively sectarian atmosphere of the church-related school. The danger existed there not because the public employee was likely deliberately to subvert his task to the service of religion, but rather because the pressures of the environment might alter his behavior from its normal course. So long as these types of services are offered at truly religiously neutral locations, the danger perceived in *Meek* does not arise.

Thus the therapeutic services program was held constitutional, with only Justices Brennan and Marshall dissenting.

The loan of instructional materials and equipment consisted of "projectors, tape recorders, record players, maps and globes, science kits, weather forecasting charts, and the like." Such a program had been held unconstitutional in *Meek* because "even though the loan ostensibly was limited to neutral and secular instructional material and equipment, it inescapably had the primary effect of providing a direct and

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103 . The quoted phrase has spawned much controversy over whether private-school parking-lots or on-street parking adjacent to such schools are neutral sites for providing therapeutic services.

substantial advancement of the sectarian enterprise."[104] The Ohio statute had been amended to avoid the effect of *Meek* by providing that the loans of instructional materials and equipment was to be to pupils and parents rather than to nonpublic schools—a palpable fiction, since such objects are normally the attributes of institutions, not of individual pupils or their parents. The court found it unconvincing.

> In our view... it would exalt form over substance if this distinction were found to justify a result different from that in *Meek*.... Despite the technical change in legal bailee, the program in substance is the same as before: the equipment is substantially the same; it will receive the same use by the students; and it may still be stored and distributed on the nonpublic school premises. In view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools.

Consequently, the loan of instructional materials and equipment was found unconstitutional. On this question Justice Blackmun recruited a different majority. Justices Brennan and Marshall joined the opinion of the court, but Justices Rehnquist and White and Chief Justice Burger dissented.

The district court had found the arrangement for field trips indistinguishable from the bus transportation approved in *Everson*,[105] but the Supreme Court thought otherwise.

> [T]he bus fare program in *Everson* passed constitutional muster because the [nonpublic] school did not determine how often the pupil travelled between home and school—every child must make one round trip every day—and because the travel was unrelated to any aspect of the curriculum.
>
> The Ohio situation is in sharp contrast. First, the nonpublic school controls the timing of the trips and, within a certain range, their frequency and destinations. Thus, the schools, rather than the children, truly are the recipients of the service and... this fact alone may be sufficient to invalidate the program as impermissible direct aid.... Second, although a trip may be to a location that would be of interest to those in public schools, it is the individual teacher who makes a field trip meaningful. The experience begins with the study and discussion of the place to be visited; it continues on location with the teacher pointing out items of interest and stimulating the imagination; and it ends with a discussion of the experience. The field trips are an integral part of the educational experience, and where the teacher works within and for a sectarian institution, an unacceptable risk of fostering of religion is an inevitable byproduct.

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104 . The *Wolman* court's characterization of *Meek*.

105 . *Everson v. Bd. of Ed.,* 330 U.S. 1 (1947), discussed at § D2 above.

Thus field trips were found unconstitutional. Justice Powell abandoned the majority on this point and joined the chief justice and Justices White and Rehnquist in dissent—one of the few instances in church-state decisions of the Supreme Court in which Justice Powell was not on the prevailing side!

The upshot of these shifting constellations was that the provisions for textbooks and testing were found constitutional by a vote of six to three; those for diagnostic services were found constitutional by a vote of eight to one; those for therapeutic services were found constitutional by a vote of seven to two; while the loan of instructional materials and equipment was found to be unconstitutional by a vote of six to three, and the provision of field trips was found to be unconstitutional by a vote of five to four. This disarray was noted by Justice Rehnquist in his dissent in *Jaffree*: "[T]he *Lemon* test has caused this Court to fracture into unworkable plurality opinions... depending upon how each of the three factors applies to a certain state action."[106]

Justice Rehnquist cited his separate opinion in *Meek* as his reason for dissenting on the last two items, and Justice White cited his dissent in *Nyquist*[107] as explaining his reasons for dissenting on the same two issues. The chief justice noted his dissent on those two sections without opinion or comment. Justice Brennan took the position that *all* the forms of aid in the statute were unconstitutional:

> [I]ngenuity in [legislative] draftsmanship cannot obscure the fact that this subsidy to sectarian schools amounts to $88,800,000... just for the initial biennium. [This] compels in my view the conclusion that a divisive political potential of unusual magnitude inheres in the Ohio program. This suffices without more to require the conclusion that the Ohio statute in its entirety offends the First Amendment's prohibition against laws "respecting an establishment of religion."

Justice Marshall wrote a rather lengthy (for him) dissent against the court's approval of textbook loans, testing programs and therapeutic services. He felt that the court's reliance on *Allen* in upholding the textbook-loan program suggested that *Allen* should be overruled, since it rested on the premise that a sectarian school's religious function could be separated from its work of secular education, and that premise had been undermined by *Meek*'s insistence that the two functions were "intertwined," and aid to the one invariably aided the other. He also agreed with Brennan that the amount of aid for textbooks created a danger of political divisiveness along religious lines.

In place of the existing Establishment Clause rationales, he suggested another:

> By overruling *Allen*, we would free ourselves to draw a line between acceptable and unacceptable forms of aid that would be both capable of

106. *Wallace v. Jaffree*, 472 U.S. 38 (1985), discussed at § C2d(8) above.
107. *PEARL v. Nyquist* 413 U.S. 756 (1973), discussed at § D7a above.

> consistent application and responsive to the concerns discussed above. That line, I believe, should be placed between general welfare programs that serve children in sectarian schools because the schools happen to be a convenient place to reach the program's target populations and programs of educational assistance. General welfare programs, in contrast to programs of educational assistance, do not provide "[s]ubstantial aid to the educational function" of schools, whether secular or sectarian, and therefore do not provide the kind of assistance to the religious mission of sectarian schools we found impermissible in *Meek*.

He viewed the speech, hearing and psychological diagnostic services as being on the permissible side of this line, but the loan of instructional materials and equipment and the provision for field trips were impermissible: "There can be no contention that these programs provide anything other than educational assistance."

The therapeutic services accepted as constitutional by the court were on the wrong side of the Marshall line.

> The parties stipulated that the functions to be performed by the guidance and counselling personnel would include assisting students in "developing meaningful educational and career goals," and "planning school programs of study." In addition, these personnel will discuss with parents "their children's a) educational progress and needs, b) course selections, c) educational and vocational opportunities and plans, and d) study skills." The counsellors will also collect and organize information for use by parents, teachers and students. This description makes clear that [the statute] authorizes services that would directly support the educational programs of sectarian schools. It is, therefore, in violation of the First Amendment.
>
> [Further sections] provide remedial services and programs for disabled children. The stipulation of the parties indicates that these paragraphs will fund specialized teachers who will both provide instruction themselves and create instructional plans for use in the students' regular classrooms. These "therapeutic services" are clearly intended to aid the sectarian schools to improve the performance of their students in the classroom. I would not treat them as if they were programs of physical or psychological therapy.

Lastly, Justice Marshall disagreed with the majority on testing and scoring services, contending that the state of Ohio was not setting standards of performance that students were required to meet.

> [I]f Ohio required students to obtain specified scores on certain tests before being promoted or graduated, I would agree that it could administer those tests to sectarian school students to ensure that its standards were being met. The record indicates, however, only that the tests "are used to measure the progress of students in secular subjects." It contains no indication that the measurements are taken to assure compliance with state standards rather than for internal administrative purposes of schools.

> To the extent that the testing is done to serve the purposes of the sectarian schools rather than the State, I would hold that its provision by the State violates the First Amendment.

Justice Powell was unwilling to accept the prophylactic views of Justices Brennan, Marshall and Stevens (see below), particularly the idea that the religious could not be separated from the secular function.

> If we took that course, it would become impossible to sustain state aid of any kind even if the aid is wholly secular in character and is supplied to the pupils rather than the institutions. *Meek* itself would have to be overruled, along with *Board of Education v. Allen*, and even perhaps *Everson*.... This Court has not yet thought that such a harsh result is required by the Establishment Clause. Certainly few would consider it in the public interest....
>
> It is important to keep these issues in perspective. At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court. Our decisions have sought to establish principles that preserve the cherished safeguard of the Establishment Clause without resort to blind absolutism. If this endeavor means a loss of some analytical tidiness, then that too is entirely tolerable.

Justice Powell therefore joined the majority in upholding the first four forms of aid. On the fifth, the loan of instructional materials and equipment, he concurred in the judgment that these were not permissible.

> The Ohio statute includes some materials such as wall maps, charts and other classroom paraphernalia for which the concept of a loan to individuals is a transparent fiction. A loan of these items is indistinguishable from forbidden "direct aid" to the sectarian institution itself, whoever the technical bailee. Since the provision makes no attempt to separate these instructional materials from others meaningfully lent to individuals, I agree with the Court that it cannot be sustained under our precedents.

He disagreed with the majority, which held field trips to be unconstitutional, however, saying that it seemed to him indistinguishable from the bus transportation upheld in *Everson*.

Justice John Paul Stevens made his debut in church-state decisions on the Supreme Court with a separate opinion that showed him to be a stricter separationist than those currently on the court.

> The distinction between the religious and the secular is a fundamental one. To quote from Clarence Darrow's argument in the Scopes case:
>
> "The realm of religion... is where knowledge leaves off, and where faith begins, and it never has needed the arm of the State for support, and wherever it has received it, it has harmed both the public and the religion that it would pretend to serve."
>
> The line drawn by the Establishment Clause of the First Amendment must also have a fundamental character. It should not differentiate between direct and indirect subsidies, or between instructional materials like globes and maps on the one hand and instructional materials like textbooks on the other. For that reason, rather than the three-part test described in... the Court's opinion, I would adhere to the test enunciated for the Court by Mr. Justice Black:
>
> "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 religions." *Everson v. Board of Education*...
>
> Under that test, a state subsidy of sectarian schools is invalid regardless of the form it takes. The financing of buildings, field trips, instructional materials, educational tests, and school books are all equally invalid. For all give aid to the school's educational mission, which is at heart religious. On the other hand, I am not prepared to exclude the possibility that some parts of the statute before us may be administered in a constitutional manner. The State can plainly provide public health services to children attending nonpublic schools....
>
> This Court's efforts to improve on the *Everson* test have not proved successful. "Corrosive precedents" have left us without firm principles on which to decide these cases. As this case demonstrates, the States have been encouraged to search for new ways of achieving forbidden ends.

So Justice Stevens considered textbooks, testing, educational materials and equipment, and field trips impermissible, but he did not view diagnostic and therapeutic services as unconstitutional. Thus the Court ranged from Burger, Rehnquist and White, who would have approved all six types of aid, to Brennan, who would have approved none, Marshall one, and Stevens two, with Blackmun and Stewart in the middle, approving all but the last two programs, and Powell approving all but one. This result can be charted on a fifty-four-fold table (see next page):

Table 2: How the Justices Voted in *Wolman v. Walter*

Program:	Textbooks	Testing	Diagnostic	Therapeutic	Materials	Field Trips	Ys
Burger	Y	Y	Y	Y	Y	Y	6
Rehnquist	Y	Y	Y	Y	Y	Y	6
White	Y	Y	Y	Y	Y	Y	6
Powell	Y	Y	Y	Y	N	Y	5
Stewart	Y	Y	Y	Y	N	N	4
Blackmun	Y	Y	Y	Y	N	N	4
Stevens	N	N	Y	Y	N	N	2
Marshall	N	N	Y	N	N	N	1
Brennan	N	N	N	N	N	N	0
Y-N	6-3	6-3	8-1	7-2	3-6	4-5	

(Y indicates the justice voted to hold the program constitutional; N, unconstitutional.)

h. ***New York v. Cathedral Academy*** **(1977).** Later in 1977, the court dealt with a case that had arisen in New York as a consequence of *Levitt v. PEARL*.[108] In that case the court had upheld the ruling of a three-judge district court declaring unconstitutional New York's Mandated Services Act of 1970, which authorized fixed payments to nonpublic schools as purported reimbursement for the cost of certain record-keeping and testing services required by the state. The district court had enjoined any payments under the Act, including reimbursements for expenses incurred in the last half of the 1971-72 school year and not yet paid by the state. In June 1972 the New York legislature passed a new act authorizing payment of expenses incurred in reliance upon the invalidated act prior to June 13, 1972. Cathedral Academy sued in the Court of Claims, as provided in the new act, and the state defended on the ground that the new act, like the old one, was unconstitutional! The Court of Claims agreed with the state, and so did the Appellate Division, but the Court of Appeals reversed. An appeal was taken to the U.S. Supreme Court, and it reversed New York's highest court, saying:

> The state legislature thus took action inconsistent with the [district] court's order...upon its own determination that because schools like the Academy had relied to their detriment on the State's promise of payment... the equities of the case demanded retroactive reimbursement. To approve [this theory]... would thus... hold that a state legislature may effectively modify a federal court's injunction whenever a balancing of constitutional

108 . *Levitt, supra,* discussed at § D7c above.

> equities might conceivably have justified the court's granting similar relief in the first place.... This rule would mean that every such unconstitutional statute, like every dog, gets one bite, if anyone has relied on the statute to his detriment. Nothing [in our decisions] suggests such a broad general principle.[109]

The court considered that the new act authorized payments for the same purposes as the previous one, and "it is for the identical reasons invalid." But Cathedral Academy contended that the Court of Appeals had construed the new statute "to require a detailed audit in the Court of Claims to `establish whether or not the amounts claimed for mandated services constitute a furtherance of the religious purposes of the claimant.'" That did not seem to the Supreme Court to improve the situation at all:

> We find nothing in the opinions of the state courts to indicate that such an audit is authorized [by the statute].
>
> But even if such an audit were contemplated, we agree with the appellant that this sort of detailed inquiry into the subtle implications of in-class examinations and other teaching activities would itself constitute a significant encroachment on the protections of the First and Fourteenth Amendments. In order to prove their claims for reimbursement, sectarian schools would be placed in the position of trying to disprove any religious content in various classroom materials.... [T]he State as defendant would have to undertake a search for religious meaning in every classroom examination offered in support of a claim. And to decide the case, the Court of Claims would be cast in the role of arbiter of the essentially religious dispute.
>
> The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying it will happen only once.... When it is considered that [the statute] contemplates claims by approximately 2000 schools in amounts totalling over $11 million, the constitutional violation is clear.

The opinion of the court was delivered by Justice Stewart for himself and Justices Brennan, Marshall, Blackmun, Powell, and Stevens. Chief Justice Burger and Justices Rehnquist and White dissented.

i. *Committee for Public Education and Religious Liberty v. Regan* (1980). In 1974 the legislature of New York State passed a law to replace the one struck down in *Levitt*.[110] The new law authorized payment to nonpublic schools of reimbursement for the actual costs incurred for compliance with state-mandated requirements, the largest item being the giving and scoring of tests provided by the state, such as the famed Regents' Examinations. When this case reached the U.S. Supreme Court, it

109 . *New York v. Cathedral Academy*, 434 U.S. 125 at 130 (1977).

110 . *Levitt v. PEARL*, 413 U.S. 472 (1973), discussed at § D7c above.

held in an opinion written by Justice Byron White that the question was controlled by its earlier decision that similar testing and scoring services in Ohio were constitutional (*Wolman v. Walter*[111]). As in the Ohio statute,

> The New York plan calls for tests that are prepared by the State and administered on the premises by nonpublic school personnel. The nonpublic school thus has no control whatsoever over the content of the tests. The Ohio tests were graded by the State; here there are three types of tests involved, one graded by the State and the other two by nonpublic school personnel, with the costs of the grading service, as well as the cost of administering all three tests, being reimbursed by the State. In view of the nature of the tests... the grading of the examinations by nonpublic school employees afforded no control over the outcome of any of the tests.[112]

Pupil evaluation tests were composed entirely of objective, multiple-choice questions that could be "graded by machine and, even if graded by hand, afford the schools no more control over the results than if the tests were graded by the State." The third type of test was similar but did contain "an essay question or two"; however, the court did not feel that "grading the answers to state-drafted questions in secular subjects could or would be used to gauge a student's grasp of religious ideas," especially since the graded tests were turned over to the state for review. The New York system provided for direct cash reimbursement to the nonpublic schools, which troubled the dissenters, but Justice White and the majority said this was permissible.

> [A]s we have already concluded, grading the secular tests furnished by the State in this case is a function that has a secular purpose and primarily a secular effect. This conclusion is not changed simply because the State pays the school for performing the grading function....
>
> A contrary view would insist on drawing a constitutional distinction between paying the nonpublic school to do the grading and paying state employees or some independent service to perform the task, even though the grading function is the same regardless of who performs it and would not have the primary effect of aiding religion whether or not performed by nonpublic school personnel.... We decline to embrace a formalistic dichotomy that bears so little relationship either to common sense or to the realities of school finance. None of our cases requires us to invalidate these reimbursements simply because they involve payments in cash.

The court was reassured that the reimbursement would cover only secular services actually performed because of the rigorous audit provisions of the law that required schools seeking reimbursement to keep separate accounts for the reimbursable services and to submit vouchers or other documents to substantiate their claims for reimbursement.

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111 . *Wolman v. Walter,* 433 U.S. 229 (1977), discussed at § D7g above.

112 . *PEARL v. Regan*, 444 U.S. 646 (1980).

> The reimbursement process... is straightforward and susceptible to the routinization that characterizes most reimbursement schemes. On its face, therefore, the New York plan suggests no excessive entanglement, and we are not prepared to read into the plan as an inevitability the bad faith upon which any future excessive entanglement would be predicated.

The majority sparred with the minority a bit over the force of earlier decisions.

> It is urged that the District Court judgment is unsupportable under *Meek v. Pittenger*, which is said to have held that any aid to even secular educational functions of a sectarian school is forbidden, or more broadly still, that any aid to a sectarian school is suspect since its religious teaching is so pervasively intermixed with each and every one of its activities. The difficulty with this position is that a majority of the Court, including the author of *Meek v. Pittenger* [Justice Stewart], upheld in *Wolman* a state statute under which the State, by preparing and grading tests in secular subjects, relieved sectarian schools of the cost of these functions.... Yet the *Wolman* opinion at no point suggested that this holding was inconsistent with the decision in *Meek*.

In conclusion, the majority observed that the court's record in this area was not a model of logic or illumination.

> This is not to say that this case, any more than past cases, will furnish a litmus-paper test to distinguish permissible from impermissible aid to religious- oriented schools. But Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the states—the former charged with interpreting and upholding the Constitution and the latter seeking to provide education for their youth—produces a single, more encompassing construction of the Establishment Clause.

The main dissent was written by Justice Blackmun, author of *Wolman*, who was joined by Justices Brennan and Marshall.

> The Court in this case, I fear, takes a long step backwards in the inevitable controversy that emerges when a state legislature continues to insist on providing public aid to parochial schools.
>
> I thought that the Court's judgments in *Meek v. Pittenger* and *Wolman v. Walter* (which the Court concedes is the controlling authority here), at last had fixed the line between that which is constitutionally appropriate and that which is not. The line necessarily was not a straight one.... But... the line, wavering though it may be, was indeed drawn in *Meek* and *Wolman*, albeit with different combinations of justices, those who would rule in

> favor of almost any aid a state legislature saw fit to provide, on the one hand, and those who... would rule against aid of almost any kind, on the other hand, in turn joining justices in the center on these issues to make order and a consensus out of the earlier decisions. Now, some of those who joined in *Lemon, Levitt...*, *Meek* and *Wolman* in invalidating depart and validate. I am able to attribute this defection only to a concern about the continuing and emotional controversy and to a persuasion that a good-faith attempt on the part of a state legislature is worth a nod of approval.

Justice Blackmun undertook a closer scrutiny of the New York law and discerned that "8-10 million annually" was expected to be expended under it, amounting to "from 1% to 5.4% of the personnel budget of an individual religious school."

> And the money paid sectarian schools... is designated to reimburse costs that are incurred by religious schools... to meet basic state testing and reporting requirements, costs that would have been incurred regardless of the availability of reimbursement from the State....
>
> [I]n *Wolman* the Court approved that portion of the Ohio statute that provided to religious schools the standardized tests and scoring services furnished to public schools. But... Ohio's statute provided only the tests themselves and scoring by employees of neutral testing organizations. It did not authorize direct financial aid of any type to religious schools....
>
> At the very least, then, the Court's holding today goes further in approving state assistance to sectarian schools than the Court had gone in past decisions.... Under the principles announced in these decided cases, I am compelled to conclude that [New York's law], by providing substantial financial assistance directly to sectarian schools, has a primary effect of advancing religion....
>
> It is also true that the keeping of pupil attendance records is essential to the religious mission of sectarian schools. To ensure that the school is fulfilling its religious mission properly, it is necessary to provide a way to determine whether pupils are attending the sectarian classes required of them. Accordingly, [the law] not only advances religion by aiding the educational mission of the sectarian school as a whole; it also subsidizes directly the religious mission of such schools....
>
> Beyond this, [the law] also fosters government entanglement with religion to an impermissible extent.... The State must make sure that it reimburses sectarian schools only for those personnel costs attributable to the sectarian employees' secular activities.... It is difficult to see how the State adequately may discover whether the time for which reimbursement is made available was devoted only to secular activities without some type of ongoing surveillance of the sectarian employees and religious schools at issue. It is this type of extensive entanglement that the Establishment Clause forbids. I fail to see, and I am uncomfortable with, the so-called

> "ample safeguards" upon which the Court... [is] content to rest so assured.[113]

Justice Stevens, as in *Wolman*, was in favor of a harder line.

> Although I agree with Mr. Justice Blackmun's demonstration of why today's holding is not compelled by precedent, my vote also rests on a more fundamental disagreement with the Court. The Court's approval of a direct subsidy to sectarian schools to reimburse them for staff time spent in taking attendance and grading standardized tests is but another in a long line of cases making largely ad hoc decisions about what payments may or may not be constitutionally made to nonpublic schools....
>
> The Court's adoption of such a position confirms my view... that the entire enterprise of trying to justify various types of subsidies to nonpublic schools should be abandoned. Rather than continuing with the sisyphean task of trying to patch together the "blurred, indistinct, and variable barrier" described in Lemon v. Kurtzman, I would resurrect the "high and impregnable" wall between church and state constructed by the Framers of the First Amendment.[114]

j. *Mueller v. Allen* (1983). The next episode in this series involved a Minnesota statute that permitted taxpayers to deduct from their taxable income for state income tax purposes expenditures for "tuition, textbooks and transportation" incurred in sending their children to any elementary or secondary school, public or private, up to $500 per child in elementary or $700 per child in secondary grades. The district court granted summary judgment in favor of the state, and the Court of Appeals affirmed. The U.S. Supreme Court also affirmed in an opinion written by Justice Rehnquist.

> One fixed principle in this field is our consistent rejection of the argument that "any program which in some manner aids an institution with a religious affiliation" violates the Establishment Clause.... Petitioners place particular reliance on our decision in... *Nyquist*, where we held invalid a New York statute providing... thinly disguised "tax benefits," actually amounting to tuition grants, to the parents of children attending private schools.... [W]e conclude that [the law in question] bears less resemblance to the arrangement struck down in *Nyquist* than it does to assistance programs upheld in our prior decisions....[115]

Using the three-pronged *Lemon* test, Justice Rehnquist quickly concluded that the Minnesota law had a secular purpose.

> A state's decision to defray the cost of educational expenses incurred by parents— regardless of the type of schools their children attend— evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any

113 . *PEARL v. Regan, supra*, Blackmun dissent.

114 . *Regan, supra*, Stevens dissent.

115 . *Mueller v. Allen*, 463 U.S. 388 (1983).

> community, and a state's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the state's citizenry is well-educated. Similarly, Minnesota, like other states, could conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and non-sectarian. By educating a substantial number of students such schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers. In addition, private schools may serve as a benchmark for public schools, in a manner analogous to the "TVA yardstick" for private power companies.[116]

He turned to the second prong of the *Lemon* test.

> [W]e find several features of the Minnesota tax deduction particularly significant. First, [it]... is only one among many deductions—such as those for medical expenses... and charitable contributions...—available under the Minnesota tax laws.... Most importantly, the deduction is available for educational expenses incurred by all parents, including those whose children attend public schools.... "[T]he provision of benefits to so broad a spectrum of groups is an important index of secular effect...."
>
> * * *
>
> We also agree with the Court of Appeals that, by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject.... [P]ublic funds become available only as a result of numerous, private choices of individual parents of school-age children.... Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no "imprimatur of State approval"... can be deemed to have been conferred on any particular religion, or on religion generally.

The court reflected briefly on the thrust of the Establishment Clause, quoting Justice Powell's thoughts on that subject in his separate opinion in *Wolman v. Walter*,[116] and continuing:

> The Establishment Clause of course extends beyond prohibition of a state church or payment of state funds to one or more churches. We do not think, however, that its prohibition extends to the type of tax deduction established by Minnesota. The historic purposes of the Clause simply do not encompass the sort of attenuated financial benefit ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.

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116 . This sentence represents the closest the court has come to applying balancing in an Establishment Clause case.

116 . *Wolman v. Walter*, 433 U.S. 229 (1977), discussed at § D7g above.

The Minnesota Civil Liberties Union, which brought the case, had argued that although the statute might seem neutral on its face, it actually benefitted parochial school patrons disproportionately. But the court was not impressed.

> [They] rely... on a statistical analysis of the type of persons claiming the tax deduction. They contend that most parents of public school children incur no tuition expenses,... and that other expenses deductible under [this law] are negligible in value; moreover, they claim that 96% of the children in private schools in 1978-1979 attended religiously-affiliated institutions. Because of all this, they reason, the bulk of deductions taken under [this law] will be claimed by parents of children in sectarian schools...
>
> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.... Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled—under a facially neutral statute—should be of little importance in determining the constitutionality of the statute permitting such relief.

This was a significant contention: that constitutionality does not turn on periodic nosecounts; otherwise a statute that was held constitutional one year might not be so the next.

The court turned to the third prong of the *Lemon* test and concluded that the statute did not excessively entangle the state with religion. The only conceivable ground for "comprehensive, discriminating, and continuing state surveillance" (quoting *Lemon*) would be in determining whether the purchase of certain textbooks qualified for the deduction, and that sort of question was not substantially different from the comparable inquiry in the court's earlier decisions upholding the loan of secular textbooks to parochial school pupils.[117]

A final footnote dealt with the troublesome issue of "political divisiveness" and suggested a significant limitation on that concept.

> 11. No party to this litigation has urged that the Minnesota plan is invalid because it runs afoul of the rather elusive inquiry, subsumed under the third part of the *Lemon* test, whether the Minnesota statute partakes of the "divisive political potential" condemned in *Lemon*.... The argument is advanced, however, by amicus National Committee for Public Education and Religious Liberty *et al*.... The Court's language in *Lemon*... respecting political divisiveness was made in the context of... statutes which provided for either direct payments of, or reimbursement of, a proportion of teachers' salaries in parochial schools. We think... the language must be regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools.

117 . E.g., *Bd. of Ed. v. Allen,* 392 U.S. 236 (1968), discussed at § D3 above.

Justice Marshall wrote a fourteen-page dissent, which was joined by the other "separationist" members of the court, Justices Brennan, Blackmun and Stevens. In it he asserted that the Minnesota law was essentially indistinguishable from the tuition tax credit struck down in *Nyquist*, and therefore the case should be controlled by *Nyquist*.[118]

> That decision established that a state may not support religious education either through direct grants to parochial schools or through financial aid to parents of parochial school students.... *Nyquist* also established that financial aid to parents of students attending parochial schools is no more permissible if it is provided in the form of a tax credit than if provided in the form of cash payments.

He rejected the differences claimed by the majority between the Minnesota law and the New York statute struck down in *Nyquist*.

> That the Minnesota statute makes some small benefit available to all parents cannot alter the fact that the most substantial benefit provided by the statute is available only to those parents who send their children to schools that charge tuition. It is simply undeniable that the largest single expense that may be deducted under the Minnesota statute is tuition. The statute is little more than a subsidy of tuition masquerading as a subsidy of general educational expenses. The other deductible expenses are *de minimis* in comparison to tuition expenses.
>
> Contrary to the majority's suggestion,... the bulk of the tax benefits afforded by the Minnesota scheme are enjoyed by parents of parochial school children not because parents of public school children fail to claim deductions to which they are entitled, but because the latter are simply *unable* to claim the largest tax deduction that Minnesota authorizes.... Parents who send their children to free public schools are simply ineligible to obtain the full benefit of the deduction except in the unlikely event that they buy $700 worth of pencils, notebooks and bus rides for their school-age children.
>
> That this deduction has a primary effect of promoting religion can easily be determined without resort to the type of "statistical evidence" that the majority fears would lead to constitutional uncertainty.... The only factual inquiry necessary is the same as that employed in *Nyquist* and *Sloan v. Lemon*...: whether the deduction permitted for tuition expenses primarily benefits those who send their children to religious schools. In *Nyquist* we unequivocally rejected any suggestion that, in determining the effect of a tax statute, this Court should look exclusively to what the statute on its face purports to do and ignore the actual operation of the challenged provision.

118 . *PEARL v. Nyquist*, 413 U.S. 756 (1973), discussed at § D7a above.

The second distinction was that the Minnesota law provided a "genuine tax deduction," whereas the New York law struck down in *Nyquist* had features of a "tax credit":

> This is a distinction without a difference. Our previous decisions have rejected the relevance of the majority's formalistic distinction between tax deduction and the tax benefit at issue in *Nyquist*.... [T]he "economic consequence" of these programs is the same..., for in each case the "financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools".... It was precisely the substantive impact of the financial support, and not its particular form, that rendered the programs in *Nyquist* and *Sloan v. Lemon* unconstitutional.

Justice Marshall also took aim at the provision for deductibility of the costs of purchasing textbooks, noting that it could not be presumed that the textbooks so purchased would be secular in content: quite the contrary.

> [Unlike the New York statute approved in *Allen*] the Minnesota statute does not limit the tax deduction to those books which the State has approved for use in public schools. Rather, it permits a deduction for books that are chosen by the parochial schools themselves. Indeed, under the Minnesota statutory scheme, textbooks chosen by parochial schools but not used by public schools are likely to be precisely the ones purchased by parents for their children's use. Like the law upheld in... *Allen*,... [two other Minnesota statutes] authorize the state board of education to provide textbooks used in public schools to nonpublic school students. Parents have little reason to purchase textbooks that can be borrowed under this provision.

With this cogent fillip, Justice Marshall reached his peroration.

> In my view the lines drawn in *Nyquist* were drawn on a reasoned basis with appropriate regard for the principles of neutrality embodied by the Establishment Clause. I do not believe that the same can be said of the lines drawn by the majority today. For the first time, the Court has upheld financial support for religious schools without any reason at all to assume that the support will be restricted to the secular functions of those schools and will not be used to support religious instruction. This result is flatly at odds with the fundamental principle that a State may provide no financial support whatsoever to promote religion.[119]

k. Dispute About the Test of Establishment: *Wallace v. Jaffree* (cont'd) (1985). Just as observers of the court were concluding—after *Mueller*, *Marsh v.*

119 . *Mueller v. Allen, supra*, Marshall dissent.

Chambers[120] and *Lynch v. Donnelly*[121]—that the court had swung into an accommodationist mode, the 1985 term brought some surprises, notably *Wallace v. Jaffree*,[122] turning down Alabama's "silent prayer" statute, with vehement protests against the *Lemon* test by the minority, and two parochial school-aid cases, *Grand Rapids School District v. Ball* and *Aguilar v. Felton*, both announced on July 1, 1985. With Justice Stevens, the strongest "separationist" on the court, writing the *Jaffree* decision reasserting the vitality of the *Lemon* test for five justices, with Justice O'Connor concurring in the judgment, and Justice Brennan writing the *Ball* and *Aguilar* opinions for five justices, it appeared that the separationist wing was in command again. This turn of events was brought about by the shift of Justice Powell from one side to the other, not because of a change of heart, but because—in his view—the facts of *Ball* and *Aguilar* were different from *Mueller*.

Before proceeding to *Ball* and *Aguilar*, however, it is important to an understanding of the development of the Establishment Clause doctrine to glance briefly at *Wallace v. Jaffree*, since—although it was a school-prayer rather than a school-aid case—it elicited some of the sharpest disagreement over the (usually) prevailing *Lemon* test of establishment. It will be recalled—from the discussion of the school-prayer cases above—that *Wallace v. Jaffree* held unconstitutional Alabama's law authorizing a period of silence in public school classrooms "for meditation or voluntary prayer" because the statute had no secular purpose.[123]

Chief Justice Burger, in a rather exasperated dissent, chided the majority for its adherence to the *Lemon* test—of which he himself was the author!—with these words:

> The Court's extended treatment of the "test" of *Lemon v. Kurtzman*... suggests a naive preoccupation with an easy, bright-line approach for addressing constitutional issues. We have repeatedly cautioned that *Lemon* did not establish a rigid caliper capable of resolving every Establishment Clause issue, but that it sought only to provide "signposts...." In any event, our responsibility is not to apply tidy formulas by rote; our duty is to determine whether the statute or practice at issue is a step toward establishing a state religion.... The notion that the Alabama statute is a step toward creating an established church borders on, if it does not trespass into, the ridiculous. The statute does not remotely threaten religious liberty; it affirmatively furthers the values of religious freedom and tolerance that the Establishment Clause was designed to protect.[124]

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120. *Marsh v. Chambers*, 463 U.S. 783 (1983), upholding Nebraska's legislative chaplaincy, discussed at VD3.

121. *Lynch v. Donnelly*, 465 U.S. 668 (1984), upholding Pawtucket, R.I.'s municipal Nativity Shrine, discussed at VE2d.

122. 472 U.S. 38 (1985), discussed at § C2d(7) above.

123. See discussion at § C2d(8) above.

124. *Wallace v. Jaffree*, *supra*, Burger dissent.

It is ironic that the majority opinion by Justice Stevens devoted only its Part III, less than a page-and-a-half in length, to the *Lemon* test, whereas most of Justice Powell's six-page concurring opinion is aimed "to respond to criticism of the three-pronged *Lemon* test." The chief justice may have been reacting resentfully to the crucial defection of Justice Powell, which had made the Brennan wing of the court the majority in this instance. Powell took a very strong stand in defense of the *Lemon* test, which had been first articulated by the chief justice before Powell came onto the court.

> *Lemon*... identifies standards that have proven useful in analyzing case after case both in our decisions and in those of other courts. It is the only coherent test a majority of the Court has ever adopted. Only once since our decision in *Lemon*... have we addressed an Establishment Clause issue without resort to its three-pronged test [in *Marsh v. Chambers*].... *Lemon*... has not been overruled or its test modified. Yet, continued criticism of it could encourage other courts to feel free to decide Establishment Clause cases on an *ad hoc* basis.

And Justice O'Connor, writing a separate opinion concurring in the judgment but not in the majority opinion, observed:

> Perhaps because I am new to the struggle, I am not ready to abandon all aspects of the *Lemon* test. I do believe, however, that the standards announced in *Lemon* should be re-examined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment. We must strive to do more than erect a constitutional "signpost...." Instead, our goal should be "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...." Last term, I proposed a refinement of the *Lemon* test with this goal in mind....
>
> The *Lynch*[125] concurrence suggested that the religious liberty protected by the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community.... Under this view, *Lemon*'s inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement.

Justice O'Connor also expressed a helpful analysis of one type of tension between the two religion clauses:

> It is difficult to square any notion of "complete neutrality" [of government toward religion]... with the mandate of the Free Exercise Clause that government must sometimes exempt a religious observer from an

125 . *Lynch v. Donnelly*, 465 U.S. 668 (1984), discussed at VE2d.

> otherwise generally applicable obligation. A government that confers a benefit on an explicitly religious basis is not neutral toward religion....
>
> The solution to the conflict between the religion clauses lies not in "neutrality," but rather in identifying workable limits to the Government's license to promote the free exercise of religion.... [O]ne can plausibly assert that government pursues free exercise clause values when it lifts a government-imposed burden on the free exercise of religion. If a statute falls within this category, then the standard Establishment Clause test should be modified accordingly. It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden. Instead, the Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause....
>
> While this "accommodation" analysis would help reconcile our Free Exercise and Establishment Clause standards, it would not save Alabama's moment of silence law.... [I]t is difficult to discern any state-imposed burden on [silent prayer] that is lifted by [the law in question]. No law prevents a student who is so inclined from praying silently in public schools.... Of course, the state might argue that [it] protects not silent prayer, but rather group silent prayer under State sponsorship. Phrased in those terms, the burden lifted by the statute is not one imposed by the State of Alabama but by the Establishment Clause as interpreted in *Engel* and *Abington*. In my view, it is beyond the authority of the State of Alabama to remove burdens imposed by the Constitution itself.[126]

Justice Rehnquist filed a lengthy dissent rejecting the court's line of Establishment Clause analysis from *Everson* on and proposing a thoroughgoing reassessment of the court's understanding of Establishment, in which he was seconded by Justice White, who wrote in his brief dissent, "Of course, I have been out of step with many of the Court's decisions dealing with this subject matter, and it is thus not surprising that I would support a basic reconsideration of our precedents."

Justice Rehnquist devoted nearly fourteen pages to a review of history, following in the path of Judge Brevard Hand[127] and authors cited by him, in contending that the purpose of the Establishment Clause was to prevent the setting up of a national church. He quoted at length from Justice Joseph Story's 1833 *Commentaries on the Constitution* and Thomas Cooley's *Constitutional Limitations* (1868) to similar effect, summarizing as follows:

> It would seem from this evidence that the Establishment Clause of the First Amendment had acquired a well-accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations... [It] did not require governmental neutrality between religion and irreligion nor did it prohibit the federal

126 . *Wallace v. Jaffree, supra*, O'Connor concurrence.

127 . *Jaffree v. Board of School Commissioners*, 554 F.Supp. 1104 (S.D.Ala. 1983).

government from providing non-discriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson*.

Notwithstanding the absence of an historical basis for this theory of rigid separation, the wall idea might well have served as a useful albeit misguided analytical concept, had it led this Court to unified and principled results in Establishment Clause cases. The opposite, unfortunately, has been true; in the 38 years since *Everson*, our Establishment Clause cases have been neither principled nor unified. Our recent opinions, many of them hopelessly divided pluralities, have with embarrassing candor conceded that the "wall of separation" is merely a "blurred, indistinct, and variable barrier," which "is not wholly accurate" and can only be "dimly perceived...."

Whether due to its lack of historical support or its practical unworkability, the *Everson* "wall" has proven all but useless as a guide to sound constitutional adjudication.... [I]t is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.

The Court has more recently attempted to add some mortar to *Everson*'s wall through the three-part test of *Lemon v. Kurtzman*.... [But] the purpose and effect prongs have the same historical deficiencies as the wall concept itself: they are in no way based on either the language or intent of the drafters.... The purpose prong means little if it only requires the legislature to express any secular purpose and omit all sectarian references, because legislators might do just that.... However, if the purpose prong is aimed to void all statutes enacted with the intent to aid sectarian institutions, whether stated or not, then most statutes providing any aid, such as textbooks or bus rides for sectarian school children will fail because one of the purposes behind every statute, whether stated or not, is to aid the target of its largesse. In other words, if the purpose prong requires an absence of *any* intent to aid sectarian institutions, whether or not expressed, few state laws in this area could pass the test, and we would be required to void some state aids to religion which we have already upheld.

(—Which, of course, was the contention of Justices Douglas and Stevens and other members of the court from time to time, including the dissenters in *Everson* itself.)

The entanglement prong of the *Lemon* test came from *Walz v. Tax Commission*... [where it] was consistent with that case's broad survey of the relationship between state taxation and religious property.

We have not always followed *Walz*'s reflective inquiry into entanglement, however. One of the difficulties with the entanglement prong is that... it creates "an insoluble paradox" in school aid cases: we have required aid to parochial schools to be closely watched lest it be put to sectarian use, yet this close supervision itself will create an entanglement.... This type of self-defeating result is certainly not required to ensure that States do not establish religion....

> These difficulties arise because the *Lemon* test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests.... The three-part test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize. Even worse, the *Lemon* test has caused this Court to fracture into unworkable plurality opinions... depending upon how each of the factors applies to a certain state action.

Remarkably, Justice Rehnquist, while rejecting the court's long-standing view that the Establishment Clause prohibits aid to all religions, did not question the other often-contested conclusion of *Everson*: that it applied to the states as well as to Congress.

> The Framers intended the Establishment Clause to prohibit the designation of any church as a "national" one. The Clause was also designed to stop the Federal government from asserting a preference for one religious denomination or sect over others. Given the "incorporation" of the Establishment Clause as against the States via the Fourteenth Amendment in *Everson*, States are prohibited as well from establishing a religion or discriminating between sects.[128]

Rehnquist's twenty-four-page dissent was the most sweeping criticism of the *Lemon* test to that date, and probably precipitated Justice Powell's defense of that test and Justice O'Connor's demurrer from jettisoning it *in toto*. It was apparent that deep dissension was stirring in the court during the first half of 1985 to have produced such basic and comprehensive disagreements as were expressed in *Jaffree* (announced June 4, 1985), though they were more muted in *Ball* and *Aguilar* (both announced July 1, 1985).

l. *Grand Rapids v. Ball* (1985). At issue in this case were two programs adopted by the School District of the City of Grand Rapids, Michigan, that provided classes to nonpublic school students at public expense in classrooms located in and leased from the nonpublic schools.

> 1. A Shared Time program offered classes during the regular school day intended to supplement the "core curriculum" courses required by the State.
> 2. A Community Education program offered classes at the conclusion of the regular school day in voluntary courses, some of which were offered in public schools, but others were not.

The teachers in the Shared Time program were full-time employees of the public schools, while teachers in the other program were for the most part regular full-time teachers in the nonpublic school who were paid by the public school district as

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128. *Wallace v. Jaffree*, *supra,* Rehnquist dissent. For a strong refutation of the Rehnquist thesis, see *Lee v, Weisman*, 505 U.S. 577 (1992) (Souter, J., concurring), discussed at § C2d(10)(c) above.

part-time public employees to teach Community Education courses in those nonpublic schools.

Both programs were challenged by Grand Rapids taxpayers as violative of the Establishment Clause. Both were ruled unconstitutional by the district court, applying the three-part *Lemon* test, and the Sixth Circuit Court of Appeals affirmed. In an opinion written by Justice Brennan for a majority of five, the Supreme Court affirmed the courts below. Justice Brennan took the occasion to respond to the dissenters in *Jaffree* (without referring to them or the earlier decision discussed above):

> The First Amendment's guarantee that "Congress shall make no law respecting an establishment of religion," as our cases demonstrate, is more than a pledge that no single religion will be designated as a state religion.... It is also more than a mere injunction that governmental programs discriminating among religions are unconstitutional.... The Establishment Clause instead primarily proscribes "sponsorship, financial support, and active involvement of the sovereign in religious activity...." As Justice Black, writing for the Court in *Everson v. Board of Education*... stated: "Neither [a State nor the Federal Government] can pass laws which aid one religion, aid all religions, or prefer one religion over another.... 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."
>
> Since *Everson* made clear that the guarantees of the Establishment Clause apply to the States, we have often grappled with the problem of state aid to nonpublic, religious schools.... Providing for the education of school children is surely a praiseworthy purpose. But our cases have consistently recognized that even such a praiseworthy, secular purpose cannot validate government aid to parochial schools when the aid has the effect of promoting a single religion or religion generally or when the aid unduly entangles the government in matters religious. For just as religion throughout history has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religious sects that have from time to time achieved dominance. The solution to this problem adopted by the Framers and consistently recognized by this Court is jealously to guard the right of every individual to worship according to the dictates of conscience while requiring the government to maintain a course of neutrality among religions and between religion and nonreligion....
>
> We have noted that the three-part test first articulated in *Lemon v. Kurtzman*... guides "[t]he general nature of our inquiry in this area...." We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children. The government's activities in this area can have a magnified impact on impressionable young minds, and the occasional rivalry of

> parallel public and private school systems offers an all-too-ready opportunity for divisive rifts along religious lines in the body politic.... The *Lemon* test concentrates attention on the issues— purposes, effect, entanglement—that determine whether a particular state action is an improper "law respecting an establishment of religion." We therefore reaffirm that state action alleged to violate the Establishment Clause should be measured against the *Lemon* criteria.[129]

Having reasserted the vitality of the *Lemon* test, Justice Brennan proceeded to apply it.

> As has often been true in school aid cases, there is no dispute as to the first test. Both the District Court and the Court of Appeals found that the purpose of the...programs was "manifestly secular...."
>
> Given that 40 of the 41 schools in this case are... "pervasively sectarian," the challenged public-school programs operating in the religious schools may impermissibly advance religion in three different ways. First, the teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs. Second, the programs may provide a crucial symbolic link between government and religion, thereby enlisting—at least in the eyes of impressionable youngsters—the powers of government to the support of the religious denomination operating the school. Third, the programs may have the effect of directly promoting religion by impermissibly providing a subsidy to the primary religious mission of the institutions affected.
>
> * * *
>
> (1)
>
> The programs before us today share the defect that we identified in *Meek* [of permitting state-sponsored indoctrination of religion]. With respect to the Community Education Program, the District Court found that "virtually every... course conducted on facilities leased from nonpublic schools has an instructor otherwise employed full time by the same nonpublic school...." These instructors, many of whom no doubt teach in the religious schools precisely because they are adherents of the controlling denomination and want to serve their religious community zealously, are expected during the regular school day to inculcate their students with the tenets and beliefs of their particular religious faith. Yet the premise of the program is that those instructors can put aside their religious convictions and engage in entirely secular Community Education instruction as soon as the school day is over. Moreover, they are expected to do so before the same religious-school students and in the same religious-school classrooms that they employed to advance religious purposes during the "official" school day. Nonetheless,... [these] classes are not specifically monitored for religious content.
>
> We do not question that the dedicated and professional religious school teachers... will attempt in good faith to perform their secular mission

129 . *Grand Rapids v. Ball*, 473 U.S. 373 (1985).

conscientiously.... Nonetheless, there is a substantial risk that, overtly or subtly, the religious message they are expected to convey during the regular school day will infuse the supposedly secular classes they teach after school.... "The conflict of functions inheres in the situation." *Lemon v. Kurtzman*.

The Shared Time program, though structured somewhat differently, nonetheless also poses substantial risk of state-sponsored indoctrination. "[A] significant portion" of the Shared Time instructors previously worked in the religious schools. Nonetheless, as with the Community Education program, no attempt was made to monitor the Shared Time courses for religious content.... Shared Time instructors are teaching academic subjects in religious schools in courses virtually indistinguishable from the other courses offered during the regular religious-school day.... Teachers in such an atmosphere may well subtly (or overtly) conform their instruction to the environment in which they teach, while students will perceive the instruction provided in the context of the dominantly religious message of the institution, thus reinforcing the indoctrinating effect....

The Court of Appeals of course recognized that respondents adduced no evidence of specific incidents of religious indoctrination in this case.... But the absence of proof of specific incidents is not dispositive. When conducting a supposedly secular class in the pervasively sectarian environment of a religious school, the teacher may knowingly or unwillingly [unwittingly?] tailor the content of the course to fit the school's announced goals. If so, there is no reason to believe that this kind of ideological influence would be detected or reported by students, by parents, or by the school system itself.... Neither their parents nor the parochial schools would have cause to complain if the effect of the publicly-supported instruction were to advance the schools' sectarian mission. And the public school system itself has no incentive to detect or report any specific incidents of improper state-sponsored indoctrination. Thus, the lack of evidence of specific incidents of indoctrination is of little significance.

* * *

(2)

Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any or all religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated.... It follows that an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.... The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose

beliefs consequently are the function of environment as much as of free and voluntary choice.[130]

* * *

In the programs challenged in this case, the religious school students spend their typical school day moving between religious-school and "public-school" classes. Both types of classes take place in the same religious-school building and both are largely composed of students who are adherents of the same denomination. In this environment, the students would be unlikely to discern the crucial difference between the religious-school classes and the "public-school" classes, even if the latter were successfully kept free of religious indoctrination.... Consequently, even the student who notices the "public school" sign temporarily posted would have before him a powerful symbol of state endorsement and encouragement of the religious beliefs taught in the same class at some other time during the day.

* * *

(3)

With but one exception [*Regan, supra*], our... cases have struck down attempts by States to make payments out of public tax dollars directly to primary or secondary religious educational institutions....

Aside from cash payments, the Court has distinguished between two categories of programs in which public funds are used to finance secular activities that religious schools would otherwise fund from their own resources. In the first category... the government has used primarily secular means to accomplish a primarily secular end, and no "primary effect" of advancing religion has thus been found. On this rationale, the Court has upheld programs providing for loan of secular textbooks to nonpublic school students... and for programs providing bus transportation for nonpublic school children....

In the second category of cases, the Court has relied on the Establishment Clause prohibition of forms of aid that provide "direct and substantial advancement of the sectarian enterprise...." In such "direct aid" cases, the government, although acting for a secular purpose, has done so by directly supporting a religious institution....

Thus the Court has never accepted the mere possibility of subsidization... as sufficient to invalidate an aid program. On the other hand this effect is not wholly unimportant for Establishment Clause purposes. If it were, the public schools could gradually take on themselves the entire responsibility for teaching secular subjects on religious school premises.... [T]he programs [in question] in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects.[131]

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130. In this passage, Justice Brennan was utilizing Justice O'Connor's "endorsement" test of Establishment first offered in *Lynch v. Donnelly*, 465 U.S. 668 (1984)(concurrence).

131. *Grand Rapids v. Ball*, *supra*.

Therefore the court affirmed the lower courts in holding both programs unconstitutional. In addition to the five justices who joined in the majority opinion, both Chief Justice Burger and Justice O'Connor agreed that the Community Education program in Grand Rapids was in violation of the Establishment Clause. Justice O'Connor commented:

> When full-time parochial school teachers receive public funds to teach secular courses to their parochial school students under parochial school supervision, I agree that the program has the perceived and actual effect of advancing the religious aims of the church-related schools.

Thus there were seven justices agreeing that the Community Education program was unconstitutional, while only five agreed that the Shared Time program (on parochial school premises) was unconstitutional.

Justices White and Rehnquist dissented as to both programs, the latter stating:

> I dissent for the reasons stated in my dissenting opinion in *Wallace v. Jaffree*.... In [the instant case], the Court relies heavily on the principles of *Everson* and *McCollum*,... but declines to discuss the faulty "wall" premise upon which those cases rest. In doing so the Court blinds itself to the first 150 years history of the Establishment Clause.
>
> The Court today attempts to give content to the "effects" prong of the *Lemon* test by holding that a "symbolic link between government and religion" creates an impermissible effect.... But one wonders how the teaching of "Math Topics," "Spanish," and "Gymnastics," which is struck down today, creates a greater "symbolic link" than the municipal creche upheld in *Lynch v. Donnelly*... or the legislative chaplain upheld in *Marsh v. Chambers*....[132]
>
> A most unfortunate result of *Grand Rapids* is that to support its holding the Court, despite its disclaimers, impugns the integrity of public school teachers. Contrary to the law and the teachers' promises, they are assumed to be eager inculcators of religious dogma requiring, in the Court's words, "ongoing supervision."

Justice O'Connor, in the dissenting portion of her separate opinion, remarked:

> Nothing in the record indicates that Shared Time instructors have attempted to proselytize their students....
>
> The Court relies on the District Court's finding that a "significant portion of the Shared Time instructors previously taught in nonpublic schools, and many of these had been assigned to the same nonpublic schools where they were previously employed...." In fact, only 13 Shared Time teachers have ever been employed by any parochial school, and only a fraction of those 13 now work in a parochial school where they were previously employed.... The experience of these few teachers does not

132. *Lynch v. Donnelly*, 465 U.S. 668 (1984), discussed at VE2d; *Marsh v. Chambers*, 463 U.S. 783 (1983), discussed at VD3.

> significantly increase the risk that the perceived or actual effect of the Shared Time program will be to inculcate religion at public expense. I would uphold the Shared Time program.

Justice White's dissent applied also to the case of *Aguilar v. Felton*, announced the same day, which follows.

m. *Aguilar v. Felton* (1985). Seventeen years after the Supreme Court had consented to hear a federal taxpayer's challenge under the Establishment Clause to the Elementary and Secondary Education Act as administered in New York (*Flast v. Cohen*, 1968[133]), such a challenge finally reached the court on the merits. It involved a program similar to the Grand Rapids Shared Time program, which was why the two cases were considered in tandem, but separate opinions were written for the court, both by Justice Brennan for the same combination of justices: himself, Marshall, Blackmun, Stevens and Powell.

Title I of the Elementary and Secondary Education Act of 1965 provided that substantial amounts of federal aid could be dispensed by the Secretary of Education to local education agencies to meet the educational needs of educationally deprived children from low income families, provided that the local education agency made arrangements for educationally deprived children attending nonpublic schools in its territory to receive comparable educational services designed to serve their particular educational needs. New York City had long provided instructional services funded by Title I to parochial school students on the premises of parochial schools. Of the students entitled to receive Title I services, 13.2 percent were enrolled in nonpublic schools, and of these schools 84 percent were affiliated with the Roman Catholic Church and 8 percent were Hebrew day schools.

The Title I programs conducted in such schools included remedial reading, reading skills, remedial mathematics, English as a second language and guidance services. They were provided by regular full-time employees of the public schools who had volunteered to teach in parochial schools. The teachers were supervised by field supervisors who undertook to make one unannounced visit to each remedial class each month. All material and equipment used in the program were supplied by the government and used only in the Title I programs. Students were selected solely by the professional personnel for participation in the program on the basis of their individual needs and deficiencies. The publicly employed professionals were instructed to keep contact with private school personnel at a minimum. All religious symbols were removed from parochial-school classrooms used for the Title I programs.

Justice Brennan observed that the New York program was very similar to the Grand Rapids program of Shared Time held unconstitutional the same day, except that the New York program provided for regular monitoring by supervisory personnel. This did not save the New York program "because the supervisory

133 . 392 U.S. 83 (1968), discussed at § D4 above.

system... inevitably results in the excessive entanglement of church and state, an Establishment Clause concern distinct from that addressed by the effects doctrine."

> The principle that the state should not become too closely entangled with the church in the administration of assistance is rooted in two concerns. When the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers, even when the governmental purpose underlying the involvement is largely secular. In addition, the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters.[134]

Here Justice Brennan seemed to be trying to "unpack" some of the considerations underlying the "entanglement" test and to do so in a way that might echo Justice O'Connor's concern about "endorsement,"[135] but he did not succeed in attracting her support. He continued:

> The critical elements of the entanglement proscribed in *Lemon* and *Meek* are thus present in this case. First,... the aid is provided in a pervasively sectarian environment. Second, because assistance is provided in the form of teachers, ongoing inspection is required to insure the absence of a religious message.... [T]he religious school... must endure the ongoing presence of state personnel whose primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought....
>
> Administrative personnel of the public and parochial school systems must work together in resolving matters related to schedules, classroom assignments, problems that arise in the implementation of the program, requests for additional services, and the dissemination of information regarding the program. Furthermore, the program necessitates "frequent contacts between the regular and the remedial teachers (or other professional), in which each side reports on individual student needs, problems encountered, and results achieved...."
>
> The numerous judgments that must be made by agents of the state concern matters that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations. As government agents must make these judgments, the dangers of political divisiveness along religious lines increase. At the same time, "[t]he picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction surely raises more than an imagined specter of governmental `secularization of a creed.'"

Justice Powell wrote a concurring opinion pertaining to both *Grand Rapids* and *Aguilar*.

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134. *Aguilar v. Felton*, 473 U.S. 402 (1985).

135. See her separate opinions in *Lynch v. Donnelly*, 465 U.S. 668 (1984), discussed at VE2d(1), and *Grand Rapids v. Ball*, immediately above.

> I do not suggest that at this point in our history the Title I program or similar parochial aid plans could result in the establishment of a state religion. There likewise is small chance that these programs would result in significant religious or denominational control over our democratic processes.... Nonetheless, there remains a considerable risk of continuing political strife over the propriety of direct aid to religious schools and the proper allocation of limited government resources.... In states such as New York that have large and varied sectarian populations, one can be assured that politics will enter into any state decision to aid parochial schools.... In short, aid to parochial schools of the sort at issue here potentially leads to "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."

He added that the Title I program also offends the "primary effect" prong of the *Lemon* test by relieving parochial schools of "the duty to provide remedial and supplemental education their children require."

> This is not the type of "indirect and incidental effect beneficial to [the] religious institutions" that we suggested in *Nyquist* would survive Establishment Clause scrutiny.... Rather, by directly assuming part of the parochial schools' education function, the effect of Title I aid is "inevitably... to subsidize and advance the religious mission of [the] sectarian schools...."

Chief Justice Warren Burger dissented vehemently.

> Under the guise of protecting Americans from the evils of an Established Church such as those of the Eighteenth Century and earlier times today's decision will deny countless school children desperately needed remedial teaching services funded under Title I.... The "remedial reading" portion of this program, for example, reaches children who suffer from dyslexia, a disease known to be difficult to diagnose and treat. Many of these children now will not receive the special training they need, simply because their parents desire that they attend religiously affiliated schools.... As I wrote in *Wallace v. Jaffree*, "our responsibility is not to apply tidy formulas by rote; our duty is to determine whether the statute or practice at issue is a step toward establishing a state religion." Federal programs designed to prevent a generation of children from growing up without being able to read effectively are not remotely steps in that direction. It borders on paranoia to perceive the Archbishop of Canterbury or the Bishop of Rome lurking behind the programs that are just as vital to the nation's school children as textbooks..., transportation to and from school,... and school nursing services....
>
> I cannot join in striking down a program that, in the words of the Court of Appeals, "has done so much good and little, if any, detectable harm." The notion that denying these services to students in religious schools is a neutral act to protect us from an Established Church has no support in

> logic, experience or history. Rather than showing the neutrality the Court boasts of, it exhibits nothing less than hostility toward religion and the children who attend church-sponsored schools.

Justice White filed a very brief dissent noting his disagreement with both the *Grand Rapids* and *Aguilar* decisions. Justice Rehnquist likewise entered a very brief dissent.

> In *Aguilar v. Felton*, the Court takes advantage of the "Catch-22" paradox of its own creation... whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement. The Court... strikes down nondiscriminatory nonsectarian aid to educationally deprived children from low income families. The Establishment Clause does not prohibit such sorely needed assistance; we have indeed travelled far afield from the concerns which prompted the adoption of the First Amendment when we rely on gossamer abstractions to invalidate a law which obviously meets an entirely secular need.

Justice O'Connor undertook a rather long dissent, in parts II and III of which Justice Rehnquist joined.

> The Court greatly exaggerates the degree of supervision necessary to prevent public school teachers from inculcating religion, and thereby demonstrates the flaws of a test that condemns benign cooperation between church and state. I would uphold Congress' efforts to afford remedial instruction to disadvantaged school children in both public and parochial schools....
>
> Under *Lemon* and its progeny, direct state aid to parochial schools that has the purpose or effect of furthering the religious mission of the schools is unconstitutional. I agree with that principle.... I disagree with the Court's analysis of entanglement and I question the utility of entanglement as a separate Establishment Clause standard in most cases....
>
> Congress permitted remedial instruction by public school teachers on parochial school premises only if such instruction "is not normally provided by the nonpublic school" and would "contribute particularly to meeting the special educational needs of educationally deprived children..." [T]he record demonstrates that New York City public school teachers offer Title I classes on the premises of parochial schools solely because alternative means to reach the disadvantaged parochial school students—such as instruction for parochial school students at the nearest public school... were unsuccessful....
>
> New York City's public Title I instructors are professional educators who can and do follow instructions not to inculcate religion in their classes. They are unlikely to be influenced by the sectarian nature of the parochial schools where they teach, not only because they are carefully supervised by public officials, but also because the vast majority of them visit several different schools each week and are not of the same religion as their parochial students.

* * *

> The Court concludes that [the] degree of supervision of public school employees by other public school employees constitutes excessive entanglement of church and state. I cannot agree.... Pervasive institutional involvement of church and state may remain relevant in deciding the *effect* of a statute which is alleged to violate the Establishment Clause..., but state efforts to ensure that public resources are used only for nonsectarian ends should not in themselves serve to invalidate an otherwise valid statute.

Curiously, the majority did not cite the view of Judge Friendly, who wrote the opinion of the Circuit Court below, (although Brennan quoted it in the *Grand Rapids* opinion):

> Under the City's plan public school teachers are, so far as appearance is concerned, a regular adjunct of the religious school. They pace the same halls, use classrooms in the same building, teach the same students, and confer with the teachers hired by the religious schools, many of them members of religious orders. The religious school appears to the public as a joint enterprise staffed with some teachers paid by its religious sponsor and others by the public.[136]

This paragraph came closer to stating the true Establishment Clause objections than the strained efforts by both Brennan and Powell to find persuasive explanations in the rather threadbare precedents under the *Lemon* test. As Justice O'Connor contended, the argument that public schoolteachers would bootleg religion into their classes just because they are held on parochial premises is simply not convincing. It is hard enough to get *parochial* schoolteachers to advance religious education in their classes in secular subjects! Perhaps more likely is the possibility that teachers employed by the public would tend to soft-pedal or omit material that they thought might be objectionable to the parochial school's leaders or pupils (or their parents), or worse, that they might take the opportunity to "correct" the views and teachings of the parochial schools that they deemed mistaken!

A more substantial objection to sending public schoolteachers onto parochial school premises was not that they would surreptitiously teach religion in conjunction with remedial arithmetic but that they would in appearance and in effect constitute an addition to the faculty of the parochial school, an adjunct augmentation of the instructional personnel available to the parochial institution. They would thus increase and enhance the scope and substance of the church operation at public expense *whatever they taught* and even if they *didn't teach* (as in the case of therapists, guidance counsellors, etc.).

That was the reason the Protestant groups who supported the child-benefit theory that underlay Title I of ESEA—and without whose support of that concept it might

136. *Felton v. Secretary*, 739 F.Supp. 48, at 67-68, quoted by Brennan in *Grand Rapids v. Ball, supra.*

well not have been enacted—insisted that the "Shared Time" option included in that Title must be made available on *public-school premises*, or at least not on the premises of parochial schools. That insistence was not as stringent with respect to *remedial* instruction, which accounted for the tenor of the Education Department's guidelines quoted by Justice O'Connor, expressing a preference, a norm, for nonparochial premises for remedial instruction.

What happened, however, in all too many instances, was that parochial schools decided that it was too inconvenient to arrange for their students to take Title I instruction anywhere but on their own premises, and too many public-school authorities capitulated to that view as the line of least resistance. One notable exception was the Missouri case decided by the court in 1974, *Wheeler v. Barrera*,[137] in which the public-school authority was sued because it had not capitulated to that demand under the ESEA, and the court made clear that the *form* of aid was to be determined by the public agency and was not subject to veto by the non-public-school recipients.

The *Aguilar* majority might have been able to make a more persuasive argument for their conclusion if they had followed the lead of Judge Friendly in pointing out the tendency to aggrandizement of religious institutions at public expense that is a very important effect of such legislation that violates the Establishment Clause.

n. *Zobrest v. Catalina Foothills School District* (1993) (Sign Language Interpreter). With the coming to the Supreme Court of Justices Scalia and Kennedy, increasing complaints were noted in the court's decisions about the three-prong test of establishment erected in *Lemon v. Kurtzman*,[138] though no consensus was reached on a substitute for that test. In 1993 the court returned to the subject of public aid to students attending parochial schools. In this instance it was special educational assistance for a deaf student, James Zobrest, who had been provided the services of a sign-language interpreter while attending the sixth through eighth grades of the Catalina Foothills (public) school district in Arizona. As a totally and congenitally deaf child, there was no question that he qualified for such assistance under the Individuals with Disabilities Education Act (IDEA) and its Arizona counterpart, at least while attending public schools. For religious reasons, when he reached high school age, his parents entered him in Salpointe Catholic High School, a sectarian institution. They asked the public school district to continue providing the sign-language interpreter, but the district—after taking legal advice from the county attorney and the state's attorney general—declined to do so, and the parents sued the school board. The district court and the Ninth Circuit Court of Appeals agreed with

137. See § D7d above.

138. See *Edwards v. Aguillard*, 482 U.S. 578 (1987), Scalia dissenting, discussed at § C3b(6); *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), Scalia dissenting, discussed at VC6b(4); *Allegheny County v. ACLU*, 492 U.S. 573 (1989), Kennedy dissenting, discussed at VE2i(2); *Lee v. Weisman*, 505 U.S. 577 (1992), Scalia dissenting, discussed at § C2d(11) above.

the school district and its legal advice to the effect that granting such aid in a parochial school setting would advance religion in violation of the Establishment Clause. The United States Supreme Court granted *certiorari* and rendered its opinion per Chief Justice Rehnquist.

> We have never said that "religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs."[139] For if the Establishment Clause did bar religious groups from receiving general government benefits, then "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair."[140] Given that a contrary rule would lead to such absurd results, we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.[141]...
>
> * * *
>
> In [*Witters*], we upheld against an Establishment Clause challenge the State of Washington's extension of vocational assistance, as part of a general state program, to a blind person studying at a private Christian college to become a pastor, missionary, or youth director. Looking at the statute as a whole, we observed that "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." The program, we said, "creates no financial incentive for students to undertake sectarian instruction."... In light of these factors, we held that Washington's program—even as applied to a student who sought state assistance so that he could become a pastor—would not advance religion in a manner inconsistent with the Establishment Clause.
>
> That same reasoning applies with equal force here. The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as "handicapped" under the IDEA, without regard to the "sectarian-nonsectarian, or public-nonpublic nature" of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decision-

139. Citing *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988), discussed at IID2d. By introducing its discussion with this quotation, the court telegraphed that it saw the assistance as more "welfare" than "education" and thus falling under the train of thought characterizing the welfare field—*Bradfield v. Roberts, Kendrick*, etc.

140. Quoting *Widmar v. Vincent*, 454 U.S. 263, 274-275 (1981), discussed at § E3b below.

141. Citing *Mueller v. Allen*, 463 U.S. 388 (1983), discussed at § j above, and *Witters v. Washington*, 474 U.S. 481 (1986), discussed at § 8d below.

> making.... Indeed, this is an even easier case than *Mueller* and *Witters* in the sense that, under the IDEA, no funds traceable to the government ever find their way into sectarian schools' coffers....
>
> [The school district] contends, however, that this case differs from *Mueller* and *Witters*, in that [Zobrest's parents] seek to have a public employee physically present in a sectarian school to assist in James' religious education.... According to [the school district], if the government could not place a tape recorder in a sectarian school in *Meek*,[142] then it surely cannot place an interpreter in Salpointe.... [The] reliance on *Meek*... is misplaced for two reasons. First, the programs in *Meek*... relieved sectarian schools of costs they otherwise would have borne in educating their students.... The extension of aid to [Zobrests], however, does not amount to "an impermissible `direct subsidy'" of Salpointe. For [it] is not relieved of an expense that it otherwise would have assumed in educating its students.... Handicapped children, not sectarian schools, are the primary beneficiaries of the IDEA.
>
> Second, the task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor.... [T]he Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school. Such a flat rule, smacking of antiquated notions of "taint," would indeed exalt form over substance. Nothing in this record suggests that a sign-language interpreter would do more than accurately interpret whatever material is presented to the class as a whole.... James' parents have chosen of their own free will to place him in a pervasively sectarian environment. The sign-language interpreter they have requested will neither add to nor subtract from that environment, and hence the provision of such assistance is not barred by the Establishment Clause.[143]

The Chief Justice was joined in this opinion by Justices White, Scalia, Kennedy and Thomas. A vigorous dissent was entered by Justice Blackmun, joined by Justice Souter. He prefaced it with a procedural disagreement with the majority, contending that there were several statutory grounds on which the court should have rested its holding without reaching the constitutional questions. In that view, he was joined also by Justices O'Connor and Stevens. In his further dissent, he and Justice Souter reached the constitutional question only because the majority had.

> Until now, the Court never has authorized a public employee to participate directly in religious indoctrination. Yet that is the consequence of today's decision.
>
> Let us be clear about exactly what is going on here. The parties have stipulated to the following facts. [James Zobrest] requested the State to supply him with a sign-language interpreter at Salpointe High School, a private Roman Catholic school operated by the Carmelite Order of the

142 . *Meek v. Pittenger*, 421 U.S. 349 (1975), discussed at § f above.

143 . *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993).

Catholic Church. Salpointe is a "pervasively religious" institution where "[t]he two functions of secular education and advancement of religious values or beliefs are inextricable intertwined."... Religion is a required subject at Salpointe, and Catholic students are "strongly encouraged" to attend daily Mass each morning....

At Salpointe, where the secular and the sectarian are "inextricably intertwined," governmental assistance to the educational function of the school necessarily entails governmental participation in the school's inculcation of religion. A state-employed sign-language interpreter would be required to communicate the material covered in religion class, the nominally secular subjects that are taught from a religious perspective, and the daily Masses at which Salpointe encourages attendance for Catholic students. In an environment so pervaded by discussion of the divine, the interpreter's every gesture would be infused with religious significance....

The majority attempts to elude the impact of the record by offering three reasons why this sort of aid... survives Establishment Clause scrutiny. First, the majority observes that provision of a sign-language interpreter occurs as "part of a general government program that distributes benefits neutrally to any child qualifying as `handicapped' under the IDEA, without regard to the... nature of the school the child attends." Second, the majority finds significant the fact that aid is provided to pupils and their parents, rather than directly to sectarian schools.... And, finally, the majority opines that "the task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor."

But the majority's arguments are unavailing. As to the first two, even a general welfare program may have specific applications that are constitutionally forbidden under the Establishment Clause.... For example, a general program granting remedial assistance to disadvantaged schoolchildren attending public and private, secular and sectarian schools alike would clearly offend the Establishment Clause insofar as it authorized the provision of teachers.[144] Such a program would not be saved simply because it supplied teachers to secular as well as sectarian schools. Nor would the fact that teachers were furnished to pupils and their parents, rather than directly to sectarian schools, immunize such a program from Establishment Clause scrutiny[145].... The majority's decision must turn, then, upon the distinction between a teacher and a sign-language interpreter.

"Although Establishment Clause jurisprudence is characterized by few absolutes," at a minimum "the Clause does absolutely prohibit

144. Citing *Aguilar v. Felton*, 473 U.S. 402, 410 (1985); *Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985); and *Meek v. Pittenger*, 421 U.S. 349, 371 91975), discussed at §§ m, l and f above, respectively.

145. Citing language from *Witters, supra,* and *Wolman v. Walter*, 433 U.S. 229, 250 (1977), discussed at § g above.

government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."[146]...

Thus, the Court has upheld the use of public school buses to transport children to and from school,[147] while striking down the employment of publicly funded buses for field trips controlled by parochial school teachers.[148] Similarly, the Court has permitted the provision of secular textbooks whose content is immutable and can be ascertained in advance,[149] while prohibiting the provision of any instructional materials or equipment that could be used to convey a religious message, such as slide projectors, tape recorders, record players, and the like.[150] State-paid speech and hearing therapists have been allowed to administer diagnostic testing on the premises of parochial schools,[151] whereas state-paid remedial teachers and counselors have not been authorized to offer their services because of the risk that they may inculcate religious beliefs.[152]

These distinctions perhaps are somewhat fine, but "`lines must be drawn.'"[153] And our cases make clear that government crosses the boundary when it furnishes the medium for communication of a religious message. If [Zobrests] receive the relief they seek, it is beyond question that a state-employed sign-language interpreter would serve as the conduit for [James'] religious education, thereby assisting Salpointe in its mission of religious indoctrination. But the Establishment Clause is violated when a sectarian school enlists "the machinery of the State to enforce a religious orthodoxy."[154]

[The two cases the Court relies on] are not to the contrary. Those cases dealt with the payment of cash or a tax deduction, where governmental involvement ended with the disbursement of funds or lessening of tax. This case, on the other hand, involves ongoing, daily, and intimate governmental participation in the teaching and propagation of religious doctrine. When government dispenses public funds to individuals who employ them to finance private choices, it is difficult to argue that government is actually endorsing religion. But the graphic symbol of the concert of church and state that results when a public employee or instrumentality mouths a religious message is likely to "enlist—at least in the eyes of impressionable youngsters—the powers of government to the support of the religious denomination operating the school."[155] And the

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146. Quoting *Grand Rapids v. Ball, supra*, at 385, and similar statements from *Bowen v. Kendrick*, 487 U.S. 589 (1988), O'Connor, J., concurring; *Meek, supra*, and *Levitt v. PEARL*, 413 U.S. 472, 480 (1973), discussed at § c above.

147. Citing *Everson v. Bd. of Ed.*, 330 U.S. 1 (1947).

148. Citing *Wolman, supra.*

149. Citing *Bd. of Ed. v. Allen*, 392 U.S. 236 (1968), discussed at § D3 above.

150. Citing *Wolman, supra.*

151. Citing *Wolman, supra.*

152. Citing *Meek, supra.*

153. *Grand Rapids, supra.*

154. Quoting *Lee v. Weisman*, 505 U.S. 577 (1992).

155. *Grand Rapids, supra.*

> union of church and state in pursuit of a common enterprise is likely to place the imprimatur of governmental approval upon the favored religion, conveying a message of exclusion to all those who do not adhere to its tenets.
>
> Moreover, this distinction between the provision of funds and the provision of a human being is not merely one of form. It goes to the heart of the principles animating the Establishment Clause. As *Amicus* Council on Religious Freedom points out, the provision of a state-paid sign-language interpreter may pose serious problems for the church as well as for the state. Many sectarian schools impose religiously based rules of conduct, as Salpointe has in this case. A traditional Hindu school would be likely to instruct its students and staff to dress modestly, avoiding any display of their bodies. And an orthodox Jewish yeshiva might well forbid all but kosher food upon its premises. To require public employees to obey such rules would impermissibly threaten individual liberty, but to fail to do so might endanger religious autonomy.... The Establishment Clause was designed to avert exactly this sort of conflict.... I would not stray, as the Court does today, from the course set by nearly five decades of Establishment Clause jurisprudence. Accordingly, I dissent.[156]

Justice O'Connor, joined by Justice Stevens, penned a brief dissent confining their opposition to the court's reaching the constitutional question before exhausting the threshold problems, statutory and regulatory, that should have been used to dispose of the case, remanding to the lower courts if necessary for exploration of those issues. But the majority opinion—by one vote—established the law of the case, despite the advice from the dissenters, and widened the departure begun by *Mueller, Witters,* and *Kendrick* from the strict-separationist "wall" of *Lemon—Felton*. The next year the balance shifted in the other direction in *Kiryas Joel*, below.

Some have seen in the majority's eagerness to reach the constitutional issues, and in so doing to widen the application of the accommodationist *Mueller-Witters* rationale, a heralding of receptivity in the court to the various "voucher" proposals being pressed by advocates of public aid to parochial schools and by critics of public schools. Such proposals involve a general and "neutral" program of distribution to all parents of school-age children "vouchers" that can be redeemed for stipulated amounts by whatever schools—public or private—the children may attend. That proposal would seem to resonate to the rationale expressed in *Mueller* and *Witters* and reiterated in *Zobrest*—that the Establishment Clause does not follow public funds that pass through the hands of individuals selected without regard to religion who make "independent" decisions on how to use the funds for the educational purpose specified.

The instant case seemed to turn on a question hardly touched by the majority opinion and barely explored at the end of Justice Blackmun's dissent: the character of

156 . *Zobrest, supra*, Blackmun dissent.

a sign-language interpreter for Establishment Clause concerns. The majority treated that person as a mechanical device for "accurately" transmitting whatever messages were addressed to the class as a whole, irrespective of that person's own views, prejudices, predilections or religious affinities (if any). "The sign-language interpreter... will neither add to nor subtract from that environment," announced the majority, substituting assertion for empirical knowledge. A tape recorder or record player might be viewed in that way, though Justice Blackmun insisted that even those mechanical devices were constitutionally impermissible as a governmentally furnished "medium" for conveying a religious message. *A fortiori*, a human being would be a more refractory channel, augmenting or diminishing, deforming or distorting the message, perhaps unconsciously, with respect to its religious content or implications. The religious school and the parents seeking the sign-language interpreter might well enetrtain some misgivings about the possibility of latent aberrations that might lurk in the "relief" sought in this case.[157]

One should not suppose from Justice Blackmun's misgivings that the educational objectives and milieu sought to be attained at Salpointe are in any way reprehensible; indeed, they seem highly commendable and such as might well be desired by many parents for their children. But the school's faith-inspired intentionality is vulnerable to the stipulations that sooner or later follow the flow of public funds. That intentionality can be maintained only if the school is able to require commitments of faith and conduct from its faculty and students. Selectivity with respect to these attributes could lead to charges of "discrimination," "invasion of privacy" and violation of "academic freedom" such as have already been directed against some church-related institutions of higher education. The key to Salpointe's ability to preserve its unique and attractive character is to retain its independence from support by sources that do not necessarily treasure those attributes, or that view them as secondary to more "politically correct" qualities.

The groves of academe are crowded with formerly unique and highly aspiring schools— many of them of religious origin—that have become increasingly indistinguishable from public and state schools because they have come to rely upon the same sources for support—the general public and/or the tax fisc—and have therefore been obliged to meet the expectations of those sources. The force of law accompanying tax funds has only made the process of homogenization faster and more binding. The attenuation provided by parents as intermediaries or channels of

157. It was reported that the school district settled the case for $98,000, presumably reimbursement to the Zobrests for expenses long since incurred in providing their son with a sign-language interpreter during his high school career. It would not begin to cover the $200,000 in legal costs carrying the case through the Supreme Court. Information from Christian Legal Society, recorded in *Minutes of the Religious Liberty Committee of the National Council of Churches*, July 12, 1993.

tax support may provide some insulation from this pressure, but it is at best a holding action.[158]

o. *Village of Kiryas Joel v. Grumet* (1994). With the retirement of Justice White and his replacement by Justice Ruth Bader Ginsburg, the revisionist wing of the court—at least in Establishment Clause cases—seemed to have lost ground in the only church-state case decided by the court in the 1993-94 term. That case was precipitated by a unique chain of events in New York, where a community of Orthodox Jewish Satmar Hasidim called Kiryas Joel (the Village of Joel, named after their Grand Rebbe, Joel Teitelbaum) found itself in a quandary because of an earlier church-state decision of the Supreme Court, and in trying to solve that perplexity created another one, which the Supreme Court in turn sought to sort out. The Satmars were a strictly orthodox branch of Judaism, whose adherents came to the United States after World War II and settled in Brooklyn, from whence in the 1970s many of them moved to an area in Orange County where they settled in close proximity to one another. Eventually, they petitioned the Town of Monroe in which they were situated to permit them to form a new village within the town—a not uncommon step permitted by New York law.

> Neighbors who did not wish to secede with the Satmars objected strenuously, and after arduous negotiations the proposed boundaries of the Village of Kiryas Joel were drawn to include just the 320 acres owned and inhabited entirely by Satmars. The village, incorporated in 1977, has a population of about 8,500 today. Rabbi Aaron Teitelbaum, eldest son of the current Grand Rebbe, serves as the village rov (chief rabbi) and rosh yeshivah (chief authority in the parochial schools).
>
> The residents of Kiryas Joel are vigorously religious people who make few concessions to the modern world and go to great lengths to avoid assimilation into it. They interpret the Torah strictly; segregate the sexes outside the home; speak Yiddish as their primary language; eschew television, radio, and English-language publications; and dress in distinctive ways that include headcoverings and special garments for boys and modest dresses for girls. Children are educated in private religious schools.[159]

The private religious schools, however, did not have any provision for educating children with learning disabilities or other handicaps, although those children were entitled under state and federal laws (such as IDEA, encountered in *Zobrest, supra*) to special educational services at public expense even if attending private schools. For a year or so such services were provided by the Monroe-Woodbury Central School District (within whose boundaries Kiryas Joel was located) at an annex to one of the parochial schools in that village. But then the Supreme Court's decisions in *Aguilar v.*

158 . See Kelley, D.M., "Religious Access to Public Programs and Government Funding," 8 *BYU J. Pub. Law* 417 (1994).

159 . *Kiryas Joel v. Grumet*, 512 U.S. 687 (1994).

Felton and *Grand Rapids v. Ball*[160] held that sending public teachers onto parochial school premises was constitutionally impermissible, and so that arrangement came to an end. Some of the children in need of special education were sent to such programs in the public schools of Monroe-Woodbury, but that proved to be highly unsatisfactory.

> Parents of most of these children withdrew them from the Monroe-Woodbury secular schools, citing "the panic, fear and trauma [the children] suffered in leaving their own community and being with people whose ways were so different."[161]

The Monroe-Woodbury school district refused to provide special educational services outside the regular public schools of the district, although the New York Court of Appeals held that they were legally free to set up a separate public school (on a neutral site) in Kiryas Joel for special education, but they were not obliged to do so. This impasse was addressed by the state legislature in 1989, which created a union free public school district coterminous with the Village of Kiryas Joel, having all the powers of a public school district—a locally elected school board authorized to collect property taxes for educational operations, open and close schools, hire and fire teachers, select and purchase textbooks and supplies, etc. In signing the bill, Governor Mario Cuomo recognized that the residents of the new public school district were "all members of the same religious sect," but the legislature had made a "good faith effort to solve th[e] unique problem" of providing special educational services to handicapped children in the village.[162] Although the new district controlled the public elementary and secondary education of all school-aged children within its bounds, it ran only a special educational program for handicapped children, where only secular instruction was given, the sexes were not segregated, and the tax-paid teachers were nonresidents of the district. All the nonhandicapped children in the district remained in the parochial schools, relying on the new district only for transportation, remedial education, and health and welfare services. Several neighboring districts sent their handicapped Hasidic children to the Kiryas Joel special education program, paying tuition for them, so that some two-thirds of the forty or so full-time students in the village's public school came from outside the district. Two or three times as many were part-time students from the parochial schools of the district.

(1) Justice Souter's Opinion. This arrangement was challenged by the New York State School Boards Association and its officers, Louis Grumet and Richard Hawk, who brought suit charging violation of the federal and state prohibitions of

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160. 473 U.S. 402 and 473 U.S. 373 (1985), discussed at §§ l and m above, respectively.

161. *Kiryas Joel, supra*, quoting *Bd. of Ed. of Monroe-Woodbury Central School Dist. v. Wieder*, 527 N.E.2d 767, 770 (1988).

162. Quotations are from the Governor's Memorandum filed with Assembly Bill No. 8747, July 24, 1989.

establishment of religion. The lower courts all agreed that the Kiryas Joel public school district was unconstitutional. The U. S. Supreme Court agreed to hear the case, and in due course rendered a decision per Justice Souter, whose opinion on the merits began with a discussion of *Larkin v. Grendel's Den*,[163] in which he was joined only by Justices Blackmun, Stevens and Ginsburg. Justice O'Connor did not join that portion of the opinion, so it is not the law.

> "A proper respect for both the Free Exercise and the Establishment Clause compels the State to pursue a course of `neutrality' toward religion,"[164] favoring neither one religion over others nor religious adherents over nonadherents. Chapter 748, the statute creating the Kiryas Joel Village School District, departs from this constitutional command by delegating the State's discretionary authority over public schools to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally.
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> *Larkin v. Grendel's Den, Inc.*[165] provides an instructive comparison with the litigation before us. There, the Court was requested to strike down a Massachusetts statute granting religious bodies veto power over applications for liquor licenses. Under the statute, the governing body of any church, synagogue, or school located within 500 feet of an applicant's premises could... prevent the Alcohol Beverage Commission from issuing a license.... [T]he Court found that in two respects the statute violated "the wholesome `neutrality' of which this Court's cases speak."[166] The Act brought about "a fusion of governmental and religious functions" by delegating "important discretionary governmental powers" to religious bodies, thus impermissibly entangling government and religion. And it lacked "any `effective means of guaranteeing' that the delegated power `[would] be used exclusively for secular, neutral, and nonideological purposes.'" [T]his, along with the "significant symbolic benefit to religion" associated with "the mere appearance of a joint exercise of legislative authority by Church and State," led the Court to conclude that the statute had a "primary and principal effect of advancing religion." Comparable constitutional problems inhere in the statute before us.
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> *Larkin* presented an example of united civic and religious authority, an establishment rarely found in such straightforward form in modern America.... The Establishment Clause problem presented by [the New York statute] is more subtle, but it resembles the issue raised in *Larkin* to the extent that the earlier case teaches that a State may not delegate its civic authority to a group chosen according to a religious criterion. Authority over public schools belongs to the State... and cannot be delegated to a local school district defined by the State in order to grant

163 . 459 U.S. 116 (1982), discussed at VB4.

164 . Quoting *PEARL v. Nyquist*, 413 U.S. 756, 792-3 (1973), discussed at § 7a above.

165 . 459 U.S. 116, *supra*.

166 . Quoting *Abington v. Schempp*, 374 U.S. 203, 222 (1963), discussed at § C2b(2) above.

political control to a religious group. What makes this litigation different from *Larkin* is the delegation here of civic power to the "qualified voters of the village of Kiryas Joel," as distinct from a religious leader such as the village rov, or an institution of religious government like the formally constituted parish council in *Larkin*. In light of the circumstances of this case, however, this distinction turns out to lack constitutional significance.

It is, first, not dispositive that the recipients of state power in this case are a group of religious individuals united by common doctrine, not the group's leaders or officers. Although some school district franchise is common to all voters, the State's manipulation of the franchise for this district limited it to Satmars, giving the sect exclusive control of the political subdivision.... That individuals who happen to be religious may hold public office does not mean that a state may deliberately delegate discretionary power to an individual, institution, or community on the ground of religious identity. If New York were to delegate civic authority to "the Grand Rebbe," *Larkin* would obviously require invalidation (even though under *McDaniel [v. Paty]* the Grand Rebbe may run for, and serve on his local school board), and the same is true if New York delegates political authority by reference to religious belief....

Of course, [the statute] delegates power not by express reference to the religious belief of the Satmar community, but to the residents of the "territory of the village of Kiryas Joel." Thus the second (and arguably more important distinction between this case and *Larkin* is the identification here of the group to exercise civil authority in terms not expressly religious. But our analysis does not end with the text of the statute at issue..., and the context here persuades us that [this statute] effectively identifies these recipients of governmental authority by reference to doctrinal adherence, even though it does not do so expressly. We find this to be the better view of the facts because of the way the boundary lines of the school district divide residents according to religious affiliation, under the terms of an unusual and special legislative act.

It is undisputed that those who negotiated the village boundaries when applying the general village incorporation statute drew them so as to exclude all but Satmars, and that the New York Legislature was well aware that the village remained exclusively Satmar in 1989 when it adopted [this statute].... The significance of this fact to the state legislature is indicated by the further fact that carving out the village school district ran counter to customary districting practice in the State. Indeed, the trend in New York is not toward dividing school districts but toward consolidating them.... Most of these [modern districts] cover several towns, many of them cross county boundaries, and only one remains precisely coterminous with an incorporated village.... The Kiryas Joel Village School District... has only 13 local, full-time students in all, and... makes no pretense of being a full-service district.

The origin of the district in a special act of the legislature, rather than the State's general laws governing school district reorganization, is likewise anomalous. Although the legislature has established some 20 existing

> school districts by special act, all but one of these are districts in name only, having been designed to be run by private organizations serving institutionalized children.... Thus the Kiryas Joel Village School District is exceptional to the point of singularity, as the only district coming to our notice that the legislature carved from a single existing district to serve local residents....
>
> Because the district's creation ran uniquely counter to state practice, following the lines of a religious community where the customary and neutral principles would not have dictated the same result, we have good reason to treat this district as the reflection of a religious criterion for identifying the recipients of civil authority. Not even the special needs of the children in this community can explain the legislature's unusual Act, for the State could have responded to the concerns of the Satmar parents without implicating the Establishment Clause, as we explain in some detail further on. We therefore find the legislature's Act to be substantially equivalent to defining a political subdivision and hence the qualification for its franchise by a religious test, resulting in a purposeful and forbidden "fusion of governmental and religious functions."[167]

(2) The Court's Opinion. Justice O'Connor joined the remainder of the opinion announced by Justice Souter, making that remainder the opinion of the court and therefore the law of the land.

> The fact that this school district was created by a special and unusual Act of the legislature also gives reason for concern whether the benefit received by the Satmar community is one that the legislature will provide equally to other religious (and nonreligious) groups....The anomalously case-specific nature of the legislature's exercise of state authority in creating this district for a religious community leaves the Court without any direct way to review such state action for the purpose of safeguarding a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion.[168] Because the religious community of Kiryas Joel did not receive its new governmental authority simply as one of many communities eligible for equal treatment under a general law, we have no assurance that the next similarly situated group seeking a school district of its own will receive one; unlike an administrative ageny's denial of an exemption from a generally applicable law, a legislature's failure to enact a special law is itself unreviewable. Nor can the historical context in this case furnish us with any reason to suppose that the Satmars are merely one in a series of communities receiving the benefit of special school district laws. Early on in the development of public education in New York, the State rejected highly localized school districts for New York City when they were

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167 . *Kiryas Joel v. Grumet, supra*, plurality opinion.

168 . Citing *Wallace v. Jaffree*, 472 U.S. 38, 52-4 (1985), discussed at § C2d(8) above; *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), discussed at § C3b(2) above; *Abington v. Schempp, supra*, at 216-217.

promoted as a way to allow separate schooling for Roman Catholic children. And in more recent history, the special Act in this case stands alone.... Here the benefit flows only to a single sect, but aiding this single, small religious group causes no less a constitutional problem than would follow from aiding a sect with more members or religion as a whole..., and we are forced to conclude that the State of New York has violated the Establishment Clause.

In [so] finding..., we do not deny that the Constitution allows the state to accommodate religious needs by alleviating special burdens. Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice. Rather, there is "ample room under the Establishment Clause for `benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'"[169]...

But accommodation is not a principle without limits, and what [Kiryas Joel] seeks is an adjustment to the Satmar's religiously grounded preferences that our cases do not countenance. Prior decisions have allowed religious communities and institutions to pursue their own interests free from governmental interference..., but we have never hinted that an otherwise unconstitutional delegation of political power to a religious group could be saved as a religious accommodation. [The Village's] proposed accommodation singles out a particular religious sect for special treatment, and whatever the limits of permissible legislative accommodation may be..., it is clear that neutrality as among religions must be honored.[170]

This conclusion does not, however, bring the Satmar parents, the Monroe-Woodbury school district, or the State of New York to the end of the road in seeking ways to respond to the parents' concerns.... [T]here are several alternatives here for providing bilingual and bicultural special education to Satmar children. Such services can perfectly well be offered to village children through the Monroe-Woodbury Central School District. Since the Satmars do not claim that separatism is religiously mandated, their children may receive bilingual and bicultural instruction at a public school already run by the Monroe-Woodbury district. Or if the educationally appropriate offering by Monroe-Woodbury should turn out to be a separate program of bilingual and bicultural education at a neutral site near one of the village's parochial schools, this Court has already made it clear that no Establishment Clause difficulty would inhere in such a scheme, administered in accordance with neutral principles that would not necessarily confine special treatment to Satmars.[171]

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169. Citing *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327,334 (1987), discussed at ID4b.

170. Citing *Larson v. Valente*, 456 U.S. 228, 244-246 (1982), discussed at IIC5c.

171. Citing *Wolman v. Walter, supra*, at 247-248.

> To be sure, the parties disagree on whether the service Monroe-Woodbury actually provided in the late 1980's were appropriately tailored to the needs of Satmar children, but this dispute is of only limited relevance to the question whether such services could have been provided, had adjustments been made. As we understand New York law, parents who are dissatisfied with their handicapped child's program have recourse through administrative review proceedings (a process that appears not to have run its course prior to resort to [legislation]...), and if the New York Legislature should remain dissatisfied with the responsiveness of the local school district, it could certainly enact general legislation tightening the mandate to school districts on matters of special education or bilingual and bicultural offerings.[172]

The remainder of the court's opinion was a vigorous rebuttal to the dissent, so it can best be discussed after giving attention in due course to the dissent.

(3) Justice Blackmun's Opinion. Justice Blackmun entered a concurring opinion as well as joining those stated by Justice Souter (above) and Justice Stevens (below).

> I write separately only to note my disagreement with any suggestion that today's decision signals a departure from the principles described in *Lemon v. Kurtzman*.[173] The opinion of the Court (and of the plurality with respect to [*Larkin*]) relies upon several decisions... that explicitly rested on the criteria set forth in *Lemon*. Indeed, the two principles on which the opinion bases its conclusion that the legislative act is constitutionally invalid essentially are the second and third *Lemon* criteria.... I have no quarrel with the observation of Justice O'Connor that the application of constitutional principles, including those articulated in *Lemon*, must be sensitive to particular contexts. But I remain convinced of the general validity of the basic principles stated in *Lemon*, which have guided this Court's Establishment Clause decisions in over 30 cases.[174]

(4) Justice Stevens' Opinion. Justice Stevens also wrote separately, joined by Justices Blackmun and Ginsburg, concurring with the court's opinion.

> New York created a special school district for the members of the Satmar religious sect in response to parental concern that children suffered "panic, fear and trauma" when "leaving their own community and being with people whose ways were so different." To meet these concerns, the State could have taken steps to alleviate the children's fear by teaching their schoolmates to be tolerant and respectful of Satmar customs. Action of that kind would raise no constitutional concerns and would further the strong public interest in promoting diversity and understanding in the public schools.

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172 . *Kiryas Joel v. Grumet, supra*, the court's opinion.

173 . 403 U.S. 602 (1971), discussed at § D5 above.

174 . *Kiryas Joel, supra*, Blackmun concurrence.

> Instead, the State responded with a solution that affirmatively supports a religious sect's interest in segregating itself and preventing its children from associating with their neighbors. The isolation of these children, while it may protect them from "panic, fear and trauma," also unquestionably increased the likelihood that they would remain within the fold, faithful adherents of their parents' religious faith. By creating a school district that is specifically intended to shield children from contact with others who have "different ways," the State provided official support to cement the attachment of young adherents to a particular faith. It is telling, in this regard, that two thirds of the school's full-time students are Hasidic handicapped children from *outside* the village; the Kiryas Joel school thus serves a population far wider than the village—one defined less by geography than by religion.
>
> Affirmative state action in aid of segregation of this character is unlike the evenhanded distribution of a public benefit or service, a "release time" program for public school students involving no public premises or funds, or a decision to grant an exemption from a burdensome general rule. It is, I believe, fairly characterized as establishing, rather than merely accommodating religion.[175]

Justice Stevens had a valid point that the Kiryas Joel special education classes had become a haven for handicapped Hasidic children—of whom there were many in Orange and Rockland counties[176]—and thus was serving a uniquely religious population in a way that preserved their religious isolation. However, his opinion came very close to suggesting that it is improper for a religious group to try to "segregate" itself from the rest of society, or to keep its children from being contaminated by the depraved ways of the world outside its cloistered community. The same sentiments were sounded by critics of the court's decision in *Wisconsin v. Yoder*, some of whom thought that children of such religious communities should be made to "rub elbows" with other children so as to be enabled to choose another way of life if they wished. But the *Yoder* court struck down the efforts of Wisconsin to do just that because it would destroy the religious community by subjecting its children to the "requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards." The court, in fact, upheld the right of a religious community (at its own expense) to sequester itself away from the rest of society for religious reasons—children and all—as against the state's right to insist on compulsory (classroom) education to age sixteen.[177]

The difference between the Amish situation and the instant case is important: the Amish were bearing the cost and the legal responsibility of their educational isolation themselves, whereas the Satmars were relying on state sanction, administrative empowerment and delegation of taxing authority to support the isolation of their

175 . Ibid., Stevens concurrence.

176 . The author lived for a dozen years in a Rockland County area with a large Hasidic population.

177 . *Wisconsin v. Yoder*, 406 U.S. 205, 217 (1972), discussed at § B2 above.

thirteen educationally handicapped children. Such sequestration by state action is entirely different from such an arrangement brought about solely by private action. Justice Stevens' concurrence can be read to refer to this latter distinction rather than to the idea that religious self-segregation is legally or morally unacceptable.

(5) Justice O'Connor's Opinion. Justice O'Connor wrote an opinion concurring in all but the *Larkin* portion of Justice Souter's opinion. Her opinion was mainly a thoughtful wrestling with the riddle of the proper test of Establishment that divided the court on this and many decisions of the 1980s and 1990s.

> The question at the heart of this case is: What may the government do, consistently with the Establishment Clause, to accommodate people's religious beliefs? The history of the Satmars in Orange County is especially instructive in this, because they have been involved in at least three accommodation problems, of which this case is only the most recent.
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> The first problem related to zoning law, and arose shortly after the Satmars moved to the town of Monroe in the early 1970's. Though the area in which they lived was zoned for single-family homes, the Satmars subdivided their houses into several apartments, apparently in part because of their traditionally close-knit extended family groups. The Satmars also used basements of some of their buildings as schools and synagogues, which according to the town was also a zoning violation.
>
> Fortunately for the Satmars, New York state law had a way of accommodating their concerns. New York allows virtually any group of residents to incorporate their own village, with broad powers of self-government. The Satmars followed this course, incorporating their community as the village of Kiryas Joel, and their zoning problems, at least, were solved.
>
> The Satmars' next need for accommodation arose in the mid-1980's. Satmar education is pervasively religious, and is provided through entirely private schooling. But though [they] could afford to educate most of their children, educating the handicapped is a difficult and expensive business. Moreover, it is a business that the government generally funds, with tax moneys that come from the Satmars as well as from everyone else. In 1984, therefore, the Monroe-Woodbury Central School District began providing handicapped education services to the Satmar children at an annex to the Satmar religious school. The curriculum and the environment of the services were entirely secular....
>
> In 1985, however, we held that publicly funded classes on religious school premises violate the Establishment Clause. Based on these decisions, the... School District stopped providing services at the Kiryas Joel site, and required the Satmar children to attend public schools outside the village. This, however, was not a satisfactory arrangement for the Satmars, in part because the Satmar children had a hard time dealing with immersion in the non-Satmar world. By 1989, only one handicapped Kiryas Joel child was going to the public school—the others were getting either privately-funded services or no special education at all. Though the

Satmars tried to reach some other arrangement with the Monroe-Woodbury School District, the problem was not resolved.

In response to these difficulties came the third accommodation. In 1989 the New York Legislature passed a statute to create a special school district covering only the village of Kiryas Joel. This school district could, of course, only operate secular schools, and the Satmars therefore wanted to use it only to provide education for the handicapped.... It is the constitutionality of the law creating this district that we are now called on to decide.

The three situations outlined above shed light on an important aspect of accommodation under the First Amendment. Religious needs can be accommodated through laws that are neutral with regard to religion. The Satmar's living arrangements were accommodated by their right—a right shared with all other communities, religious or not, throughout New York—to incorporate themselves as a village. From 1984 to 1985, the Satmar handicapped children's educational needs were accommodated by special education programs like those available to all handicapped children, religious or not. Other examples of such accommodations abound: The Constitution itself, for instance, accommodates the religious desires of those who were opposed to oaths by allowing any officeholder—of any religion, or none—to take either an oath of office or an affirmation.[178] Likewise, the selective service laws provide exemptions for conscientious objectors whether or not the objection is based on religious beliefs.[179]

We have time and again held that the government may not treat people differently based on the God or gods they worship, or don't worship [citations omitted].... This emphasis on equal treatment is, I think, an eminently sound approach. In my view, the Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits....

That the government is acting to accommodate religion should generally not change this analysis. What makes accommodation permissible, even praiseworthy, is not that the government is making life easier for some particular religious group as such. Rather, it is that the government is accommodating a deeply held belief. Accommodations may thus justify treating those who share this belief differently from those who do not; but they do not justify discrimination based on sect. A state law prohibiting the consumption of alcohol may exempt sacramental wines, but it may not exempt sacramental wine use by Catholics but not by Jews. A draft law may exempt conscientious objectors, but it may not exempt conscientious objectors whose objections are based on theistic beliefs (such as Quakers) as opposed to nontheistic belief (such as Buddhists) or atheistic belief....

178 . Art. II, §1, cl. 8; Art. VI, cl. 3; see also Amdt. 4.

179 . Citing *Welsh v. U.S.*, 398 U.S. 333, 356 (1970), Harlan, J., concurring in result.

The Constitution permits "*nondiscriminatory* religious-practice exemption[s]," not sectarian ones.

I join... the Court's opinion [with the exception noted above] because I think this law, rather than being a general accommodation, singles out a particular religious group for favorable treatment.... On its face, this statute benefits one group—the residents of Kiryas Joel. Because this benefit was given to this group based on its religion, it seems proper to treat it as a legislatively drawn religious classification. I realize this is a close question, because the Satmars may be the only group who currently need this particular accommodation. The legislature may well be acting without any favoritism, so that if another group came to ask for a similar district, the group might get it on the same terms as the Satmars. But the nature of the legislative process makes it impossible to be sure of this. A legislature, unlike the judiciary or many administrative decisionmakers, has no obligation to respond to any group's requests.... Such a legislative refusal to act would not normally be reviewable by a court. Under these circumstances, it seems dangerous to validate what appears to me a clear religious preference.

Our invalidation of this statute in no way means that the Satmars' needs cannot be accommodated. There is nothing improper about a legislative intention to accommodate a religious group, so long as it is implemented through generally applicable legislation. New York may, for instance, allow all villages to operate their own school districts. If it does not want to act so broadly, it may set forth neutral criteria that a village must meet to have a school district of its own.... A district created under a generally applicable scheme would be acceptable even though it coincides with a village which was consciously created by its voters as an enclave for their religious group. I do not think the Court's opinion holds the contrary.

I also think there is one other accommodation that would be entirely permissible: the 1984 scheme, which was discontinued because of our decision in *Aguilar*. The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion. All handicapped children are entitled by law to government-funded special education. If the government provides this education on-site at public schools and at nonsectarian private schools, it is only fair that it provide it on-site at sectarian schools as well.

I thought this to be true in *Aguilar*, and I still believe it today. The Establishment Clause does not demand hostility to religion, religious ideas, religious people, or religious schools. It is the Court's insistence on disfavoring religion in *Aguilar* that led New York to favor it here. The court should, in a proper case, be prepared to reconsider *Aguilar*, in order to bring our Establishment Clause jurisprudence back to what I think is the proper track—government impartiality, not animosity, towards religion.

One aspect of the Court's opinion in this case is worth noting: Like the opinions in two recent cases,[180] and the case I think is most relevant to this one, *Larson v. Valente*, the Court's opinion does not focus on the Establishment Clause test we set forth in *Lemon v. Kurtzman*.

It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular clause.... But the same constitutional principle may operate very differently in different contexts. We have, for instance, no one Free Speech Clause test. We have different tests for content-based speech restrictions, for content-neutral speech restrictions, for restrictions imposed by government acting as employer, for restrictions on nonpublic fora, and so on. This simply reflects the necessary recognition that the interests relevant to the Free Speech Clause inquiry—personal liberty, an informed citizenry, government efficiency, public order, and so on—are present in different degrees in each context.

And setting forth a unitary test for a broad set of cases may sometimes do more harm than good. Any test that must deal with widely disparate situations risks being so vague as to be useless.... *Lemon* has, with some justice, been criticized on this score. Moreover, shoehorning new problems into a test that does not reflect the special concerns raised by those problems tends to deform the language of the test. Relatively simple phrases like "primary effect... that neither advances nor inhibits religion" and "entanglement" acquire more and more complicated definitions which stray ever further from their literal meaning. Distinctions are drawn between statutes whose effect is to advance religion and statutes whose effect is to allow religious organizations to advance religion.[181]... Alternatives to *Lemon* suffer from a similar failing when they lead us to find "coercive pressure" to pray when a school asks listeners—with no threat of legal sanction—to stand or remain silent during a graduation prayer.[182] Some of the results and perhaps even some of the reasoning in these cases may have been right. I joined two of the cases cited above, *Larkin* and *Lee*, and continue to believe they were correctly decided. But I think it is more useful to recognize the relevant concerns in each case on their own terms, rather than trying to squeeze them into language that does not really apply to them.

Finally, another danger to keep in mind is that the bad test may drive out the good. Rather than taking the opportunity to derive narrower, more precise tests from the case law, courts tend to continually try to patch up the broad test, making it more and more amorphous and distorted. This, I am afraid, has happened to *Lemon*.

Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different

180 . *Lee v. Weisman, supra*, and *Zobrest v. Catalina Foothills School Dist., supra*.

181 . Citing *Corporation of the Presiding Bishop v. Amos, supra*.

182 . Citing *Lee v. Weisman, supra*.

> approaches. Some cases, like this one, involve government actions targeted at particular individuals or groups, imposing special duties or giving special benefits. Cases involving government speech on religious topics... seem to me to fall into a different category and to require an analysis focusing on whether the speech endorses or disapproves of religion, rather than on whether the government action is neutral with regard to religion.
>
> Another category encompasses cases in which the government must make decisions about matters of religious doctrine and religious law.[183] These cases, which often arise in the application of otherwise neutral property or contract principles to religious institutions, involve complicated questions not present in other situations.... Government delegations of power to religious bodies may make up yet another category....
>
> As the Court's opinion today shows, the slide away from *Lemon*'s unitary approach is well under way. A return to *Lemon*, even if possible, would likely be futile, regardless of where one stands on the substantive Establishment Clause questions. I think a less unitary approach provides a better structure for analysis.... And abandoning the *Lemon* framework need not mean abandoning some of the insights that the test reflected, nor the insights of the cases that applied it.[184]

Several of the *amici* who submitted briefs in this case aimed their remarks at the prospect that *Lemon* might be abandoned and urged possible replacements. As in other recent instances, however, the court seemed indisposed to tackle the difficult task of formulating a substitute for *Lemon*, so it proceeded on its way without invoking *Lemon*—for or against.

(6) Justice Kennedy's Opinion. Somewhat surprisingly, Justice Kennedy concurred in the judgment rather than joining the dissenters, in whose company he was sometimes—though not always—found in Religion Clause cases.

> The Court's ruling that the Kiryas Joel School District violates the Establishment Clause is in my view correct, but my reservations about what the Court's reasoning implies for religious accommodations in general are sufficient to require a separate writing. As the Court recognizes, a legislative accommodation that discriminates among religions may become an establishment of religion. But the Court's opinion can be interpreted to say that an accommodation for a particular religious group is invalid because of the risk that the legislature will not grant the same accommodation to another religious group suffering some similar burden. This rationale seems to me without grounding in our precedents and a needless restriction upon the legislature's ability to respond to the unique problems of a particular religious group. The real vice of the school district, in my estimation, is that New York created it by drawing political boundaries on the basis of religion. I would decide the issue we confront

183 . Citing *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

184 . *Kiryas Joel, supra*, O'Connor concurrence.

upon this narrower theory, though in accord with many of the Court's general observations about the State's actions in this case.

.... I agree that a religious accommodation demands careful scrutiny to ensure that it does not so burden nonadherents or discriminate against other religions as to become an establishment. But for the forbidden manner in which the New York Legislature sought to go about it, the State's attempt to accommodate the special needs of the handicapped Satmar children would have been valid....

* * *

First, by creating the district, New York sought to alleviate a specific and identifiable burden on the Satmar's religious practice. The Satmars' way of life, which springs out of their strict religious beliefs, conflicts in many respects with mainstream American culture.... New York was entitled to relieve these significant burdens, even though mainstream public schooling does not conflict with any specific tenet of the Satmar's religious faith....

Second, by creating the district, New York did not impose or increase any burden on non-Satmars, compared to the burden it lifted from the Satmars, that might disqualify the District as a genuine accommodation.... There is a point, to be sure, at which an accommodation may impose a burden on nonadherents so great that it becomes an establishment.[185]...

Third, the creation of the school district to alleviate the special burdens born by the handicapped Satmar children cannot be said, for that reason alone, to favor the Satmar religion to the exclusion of any other. "The clearest command of the Establishment Clause... is that one religious denomination cannot be officially preferred over another."[186] I disagree, however, with the Court's conclusion that the school district breaches this command.... This reasoning reverses the usual presumption that a statute is constitutional and, in essence, judges the New York Legislature guilty until it proves itself innocent. No party has adduced any evidence that the legislature has denied another religious community like the Satmars its own school district under analogous circumstances. The legislature, like the judiciary, is sworn to uphold the Constitution, and we have no reason to presume that the New York Legislature would not grant the same accommodation to a similar future case. The fact that New York singled out the Satmars for this special treatment indicates nothing other than the uniqueness of the handicapped Satmar children's plight. It is normal for legislatures to respond to problems as they arise—no less so when the issue is religious accommodation....

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185. Citing *Thornton v. Caldor*, 472 U.S. 703, 709-710 (1985) (invalidating mandatory Sabbath day off because it provided "no exception when honoring the dictates of Sabbath observers would cause the employer substantial economic burdens or when the employer's compliance would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers"), discussed at IVA7h.

186. Quoting *Larson v. Valente, supra*, at 244.

Nor is it true that New York's failure to accommodate another religious community facing similar burdens would be insulated from challenge in the courts. The burdened community could sue the State of New York, contending that New York's discriminatory treatment of the two religious communities violated the Establishment Clause.... Without further evidence that New York has denied the same accommodation to religious groups bearing similar burdens, we could not presume from the particularity of the accommodation that the New York Legislature acted with discriminatory intent.

This particularity takes on a different cast, however, when the accommodation requires the government to draw political or electoral boundaries. "The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause,"[187] and in my view one such fundamental limitation is that government may not use religion as a criterion to draw political or electoral lines. Whether or not the purpose is accommodation and whether or not the government provides similar gerrymanders to people of all religious faiths, the Establishment Clause forbids the government to use religion as a line-drawing criterion.... Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial.... I agree with the Court insofar as it invalidates the school district for being drawn along religious lines.... [T]he New York Legislature knew that everyone within the village was Satmar when it drew the school district along the village lines, and it determined who was to be included in the district by imposing, in effect, a religious test.... This explicit religious gerrymandering violates the First Amendment Establishment Clause.

It is important to recognize the limits of this principle. We do not confront the constitutionality of the Kiryas Joel Village itself, and the formation of the village appears to differ from the formation of the school district in one critical respect.... [T]he village was formed pursuant to a religion-neutral self-incorporation scheme.... People who share a common religious belief or lifestyle may live together without sacrificing the basic rights of self-governance that all Americans enjoy, so long as they do not use those rights to establish their religious faith. Religion flourishes in community, and the Establishment Clause must not be construed as some sort of homogenizing solvent that forces unconventional religious groups to choose between assimilating to mainstream American culture or losing their political rights. There is more than a fine line, however, between the voluntary association that leads to a political community comprised of people who share a common religious faith, and the forced separation that occurs when the government draws explicit political boundaries on the

187 . Quoting *Lee v. Weisman, supra*.

> basis of peoples' faith. In creating the Kiryas Joel Village School District, New York crossed that line, and so we must hold the district invalid.[188]

Justice Kennedy added that he had misgivings about the court's earlier decisions in *Grand Rapids* and *Aguilar* that had helped to create the problem the New York legislature tried to solve, and he suggested that the court reconsider those decisions in the future.

(7) The Dissent. Justice Scalia wrote a scathing dissent in his own inimitable fashion, joined by Chief Justice Rehnquist and Justice Thomas.

> The Court today finds that the Powers That Be, up in Albany, have conspired to effect an establishment of the Satmar Hasidim. I do not know who would be more surprised at this discovery: the Founders of our Nation or Grand Rebbe Joel Teitelbaum, founder of the Satmar. The Grand Rebbe would be astounded to learn that after escaping brutal persecution and coming to America with the modest hope of religious toleration for their ascetic form of Judaism, the Satmar had become so powerful, so closely allied with Mammon, as to have become an "establishment" of the Empire State. And the Founding Fathers would be astonished to find that the Establishment Clause—which they designed "to insure that no one powerful sect or combination of sects could use political or governmental power to punish dissenters,"[189]—has been employed to prohibit characteristically and admirably American accommodation of the religious practices (or more precisely, cultural peculiarities) of a tiny minority sect. *I*, however, am *not* surprised. Once this Court has abandoned text and history as guides, nothing prevents it from calling religious toleration an establishment of religion.
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> Unlike most of our Establishment Clause cases involving education, these cases involve no public funding, however slight or indirect, to private religious schools. They do not involve private schools at all. The school under scrutiny is a public school specifically designed to provide a public secular education to handicapped students. The superintendent of the school, who is not Hasidic, is a 20-year veteran of the New York City public school system, with expertise in the area of bilingual, bicultural, special education. The teachers and therapists at the school all live outside the village of Kiryas Joel. While the village's private schools are profoundly religious and strictly segregated by sex, classes at the public school are co-ed and the curriculum secular.... In sum, these cases involve only public aid to a school that is public as can be. The only thing distinctive about the school is that all the students share the same religion.
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> None of our cases has ever suggested that there is anything wrong with that. In fact, the Court has specifically *approved* the education of students of

188. *Kiryas Joel, supra*, Kennedy opinion.

189. Quoting *Zorach v. Clauson*, 343 U.S. 306, 319 (1952) (Black, J, dissenting), discussed at § C1b above.

a single religion on a neutral site adjacent to a private religious school.[190] In that case, the Court rejected the argument that "any program that isolates the sectarian pupils is impermissible".... If a State can furnish services to a group of sectarian students on a neutral site adjacent to a private religious school, or even *within* such a school,[191] how can there be any defect in educating those same students in a public school?...

For these very good reasons, JUSTICE SOUTER's opinion does not focus upon the school, but rather upon the school district and the New York Legislature that created it. His arguments, though sometimes intermingled, are two: that reposing governmental power in the Kiryas Joel School District is the same as reposing governmental power in a religious group; and that in enacting the statute creating the district, the New York State Legislature was discriminating on the basis of religion, *i.e.*, favoring the Satmar Hasidim over others.

For his thesis that New York has unconstitutionally conferred governmental authority upon the Satmar sect, JUSTICE SOUTER relies extensively, and virtually exclusively, upon *Larkin v. Grendel's Den*.... JUSTICE SOUTER believes that the present case "resembles" *Grendel's Den* because that case "teaches that a state may not delegate its civic authority *to a group chosen according to a religious criterion*." That misdescribes both what that case taught (which is that a state may not delegate its civil authority *to a church*), and what this case involves (which is a group chosen according to cultural characteristics)....

JUSTICE SOUTER concedes that *Grendel's Den* "presented an example of united civic and religious authority, an establishment rarely found in such straightforward form in modern America." The uniqueness of the case stemmed from the grant of governmental power directly to a religious institution.... Astonishingly, however, JUSTICE SOUTER dismisses the difference between a transfer of government power to citizens who share a common religion as opposed to "the officers of its sectarian organization"—the critical factor that made *Grendel's Den* unique and "rar[e]"—as being "one of form, not substance."

JUSTICE SOUTER's steamrolling of the difference between civil authority held by a church, and civil authority held by members of a church, is breathtaking. To accept it, one must believe that large portions of the civil authority exercised during most of our history were unconstitutional, and that much more of it than merely the Kiryas Joel School District is unconstitutional today. The history of the populating of North America is in no small measure the story of groups of people sharing a common religious and cultural heritage striking out to form their own communities. It is preposterous to suggest that the civil institutions of these communities, separate from their churches, were constitutionally suspect. And if they were, surely JUSTICE SOUTER cannot mean that the inclusion of one or two nonbelievers in the community would have been enough to

190 . Citing *Wolman v. Walter, supra*, at 247-8.

191 . Citing *Zobrest v. Catalina Foothills School Dist., supra*, discussed immediately above.

eliminate the constitutional vice.... That [theory] might have made the entire States of Utah and New Mexico unconstitutional at the time of their admission to the Union,[192] and would undoubtedly make many units of local government unconstitutional today.

JUSTICE SOUTER's position boils down to the quite novel proposition that any group of citizens (say, the residents of Kiryas Joel) can be invested with political power, but not if they all belong to the same religion. Of course, such *disfavoring* of religion is positively antagonistic to the purposes of the Religion Clauses, and we have rejected it before. In *McDaniel v. Paty*, we invalidated a state constitutional amendment that would have permitted all persons to participate in political conventions, except ministers. We adopted James Madison's view that the State could not "`punish a religious profession with the privation of a civil right.'"... I see no reason why it is any less pernicious to deprive a group rather than an individual of its rights simply because of its religious beliefs.

Perhaps appreciating the startling implications for our constitutional jurisprudence of collapsing the distinction between religious institutions and their members, JUSTICE SOUTER tries to limit his "unconstitutional conferral of authority" holding by pointing out several features supposedly unique to the present case: That the "boundary lines of the school district divide residents *according to* religious affiliation," (emphasis added); that the school district was created by "a special act of the legislature," and that the formation of the school district ran counter to the legislature's trend of consolidating districts in recent years. Assuming all these points to be true (and they are not), they would certainly bear upon whether the legislature had an impermissible religious motivation in creating the district (which is JUSTICE SOUTER's *next* point, in the discussion of which I shall reply to these arguments). But they have nothing to do with whether conferral of power upon a group of citizens can be the conferral of power upon a religious institution. It can not. Or if it can, our Establishment Clause jurisprudence has been transformed.

I turn, next, to JUSTICE SOUTER's second justification for finding an establishment of religion: his facile conclusion that the New York Legislature's creation of the Kiryas Joel School District was religiously motivated. But in the Land of the Free, democratically adopted laws are not so easily impeached by unelected judges. To establish the unconstitutionality of a facially neutral law on the mere basis of its asserted religiously preferential (or discriminatory) effects—or at least to establish it in conformity with our precedents— JUSTICE SOUTER "must be able to show the absence of a neutral, secular basis" for the law.[193]

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192. In the margin, Justice Scalia noted that the census of 1906 showed that 87.7 percent of all church members in Utah were Mormons, and 88.7 percent of all church members in New Mexico were Roman Catholic. His note does not report how many inhabitants of those states were *not* church members at all, which might reduce the percentages.

193. Citing *Gillette v. U.S.*, 401 U.S. 437, 452 (1971), discussed at IVA5k.

There is of course no possible doubt of a secular basis here. The New York Legislature faced a unique problem in Kiryas Joel: a community in which all the handicapped children attend private schools, and the physically and mentally disabled children who attend public school suffer the additional handicap of cultural distinctiveness. It would be troublesome enough if these peculiarly dressed, handicapped students were sent to the next town, accompanied by their similarly clad but unimpaired classmates. But all the unimpaired children of Kiryas Joel attend private school. The handicapped children suffered sufficient emotional trauma from their predicament that their parents kept them home from school. Surely the legislature could target this problem, and provide a public education for these students, in the same way it addressed, *by a similar law*, the unique needs of children institutionalized in a hospital....

Since the obvious presence of a neutral, secular basis renders the asserted preferential effect of this law inadequate to invalidate it, JUSTICE SOUTER is required to come forward with direct evidence that religious preference was the objective. His case could scarcely by weaker. It consists, briefly, of this: The People of New York created the Kiryas Joel Village School District in order to further the Satmar religion, rather than for any proper secular purpose, because (1) they created the district in an extraordinary manner—by special Act of the legislature, rather than under the State's general laws governing school-district reorganization; (2) the creation of the district ran counter to a State trend towards consolidation of school districts; and (3) the District includes only adherents of the Satmar religion. On this indictment, no jury would convict.

One difficulty with the first point is that it is not true. There was really nothing so "special" about the formation of a school district by an Act of the New York Legislature. The State has created both large school districts... (...the Gananda School District out of land previously in two other districts), and small specialized school districts for institutionalized children..., through these special Acts. But in any event all that the first point proves, and the second point as well (countering the trend toward consolidation), is that New York regarded Kiryas Joel as a special case, requiring special measures. I should think it *obvious* that it did, and obvious that it *should have*. But even if the New York Legislature had never before created a school district by special statute (which is not true), and even if it had done nothing but consolidate school districts for over a century (which is not true), how could the departure from those past practices possibly demonstrate that the legislature had religious favoritism in mind? It could not. To be sure, when there is no special treatment there is no possibility of religious favoritism; but it is not logical to suggest that when there *is* special treatment there is *proof* of religious favoritism.

JUSTICE SOUTER's case against the statute comes down to nothing more, therefore, than his third point: the fact that all the residents of the Kiryas Joel Village School District are Satmars. But all its residents also wear unusual dress, have unusual civic customs, and have not much to do with

people who are culturally different from them.... On what basis does JUSTICE SOUTER conclude that it is the theological distinctiveness rather than the cultural distinctiveness that was the basis for New York's decision? The normal assumption would be that it was the latter, since it was not theology but dress, language, and cultural alienation that posed the educational problem for the children. JUSTICE SOUTER not only does not adopt the logical assumption, he does not even give the New York Legislature the benefit of the doubt.... In other words, we know the legislature must have been motivated by the desire to favor the Satmar Hasidim religion, because it *could* have met the needs of these children by a method that did not place the Satmar Hasidim in a separate school district. This is not a rational argument proving religious favoritism; it is rather a novel Establishment Clause principle to the effect that no secular objective may be pursued by a means that might also be used for religious favoritism if some other means are available.

I have little doubt that JUSTICE SOUTER would laud this humanitarian legislation if all of the distinctiveness of the students of Kiryas Joel were attributable to the fact that their parents were nonreligious commune-dwellers, or American Indians, or gypsies. The creation of a special, one-culture school district for the benefit of those children would pose no problem. The neutrality demanded by the Religion Clauses requires the same indulgence towards cultural characteristics that *are* accompanied by religious belief....

Even if JUSTICE SOUTER could successfully establish that the cultural distinctiveness of the Kiryas Joel students (which is the problem the New York Legislature addressed) was an *essential part* of their religious belief rather than merely an *accompaniment* of their religious belief, that would not discharge his heavy burden. In order to invalidate a facially neutral law, JUSTICE SOUTER would have to show not only that legislators were aware that religion caused the problems addressed, but also that the legislature's proposed solution was motivated by a desire to disadvantage or benefit a religious group (*i.e.*, to disadvantage or benefit them *because of their religion*).... Here a facially neutral statute extends an educational benefit to the one area where it was not effectively distributed. Whether or not the reason for the ineffective distribution had anything to do with religion, it is a remarkable stretch to say that the Act was motivated by a desire to favor or disfavor a particular religious group. The proper analogy to [this statute] is not the Court's hypothetical law providing school buses only to Christian students..., but a law providing extra buses to rural school districts (which happen to be predominantly Southern Baptist).

At various times JUSTICE SOUTER intimates, though he does not precisely say, that the boundaries of the school district were drawn on the basis of religion. He refers, for example, to "[t]he State's manipulation of the franchise for this district..., giving the sect exclusive control of the political subdivision," implying that the "giving" of political power to the religious sect was the object of the "manipulation." There is no evidence of that. The special district was created to meet the special educational needs of

distinctive handicapped children, and the geographic boundaries selected for that district were (quite logically) those that already existed for the village. It sometimes appears as though the shady "manipulation" JUSTICE SOUTER had in mind is that which occurred when the village was formed, so that the drawing of its boundaries infected the coterminous boundaries of the district. He says, for example, that "[i]t is undisputed that those who negotiated the village boundaries when applying the general village incorporation statute drew them so as to exclude all Satmars." It is indeed. But non-Satmars were excluded, not (as he intimates) because of their religion, but—as JUSTICE O'CONNOR clearly describes—because of their lack of desire for the high-density zoning that Satmars favored. It was a classic drawing of lines on the basis of communality of *secular governmental desires*, not communality of religion. What happened in the creation of the village is in fact precisely what happened in the creation of the school district, so that the former cannot possibly infect the latter, as JUSTICE SOUTER tries to suggest. Entirely secular reasons (zoning for the village, cultural alienation of students for the school district) produced a political unit whose members happened to share the same religion. There is *no* evidence (indeed, no plausible suspicion) of the legislature's desire to favor the Satmar religion, as opposed to meeting distinctive secular needs or desires of citizens who happened to be Satmars. If there were, JUSTICE SOUTER would say so; instead, he must merely insinuate.

But even if [this statute] were intended to create a special arrangement for the Satmars *because* of their religion (not including... any conferral of governmental power upon a religious entity), it would be a permissible accommodation. "This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."[194]... The Constitution itself contains an accommodation of sorts. Article VI, Cl. 3, prescribes that executive, legislative and judicial officers of the Federal and State Governments shall bind themselves to support the Constitution "by Oath or Affirmation." Although members of the most populous religions found no difficulty in swearing an oath to God, Quakers, Moravians, and Mennonites refused to take oaths based on Matthew 5:34's injunction "swear not at all." The option of affirmation was added to accommodate these minority religions and enable their members to serve in government. Congress, from its earliest sessions, passed laws accommodating religion by refunding duties paid by specific churches upon the importation of plates for the printing of Bibles, vestments, and bells. [citations omitted] Congress also exempted church property from the tax assessments it levied on residents of the District of Columbia; and all 50 States have had similar laws.

This Court has also long acknowledged the permissibility of legislative accommodation. In one of our early Establishment Clause cases, we upheld New York City's early release program, which allowed students to

194 . Quoting *Hobbie v. Florida*, 480 U.S. 136, 144-145 (1987), discussed at IVA7i.

be released from public schools during school hours to attend religious instruction or devotional exercises. We determined that the early release program "accommodates the public service to... spiritual needs," and noted that finding it unconstitutional would "show callous indifference to religious groups."[195]... And in *Presiding Bishop, supra*, we upheld a section of the Civil Rights Act of 1964 exempting religious groups from the antidiscrimination provisions of Title VII. We concluded that it was "a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religous missions."

In today's opinion, however, the Court seems uncomfortable with this aspect of our constitutional tradition. Although it acknowledges the concept of accommodation, it quickly points out that it is "not a principle without limits," and then gives reasons why the present case exceeds those limits, reasons which simply do not hold water.... [One] reason the Court finds accommodation impermissible is, astoundingly, the mere risk that the State will not offer accommodation to a similar group in the future, and that neutrality will therefore not be preserved.... At bottom, the Court's "no guarantee of neutrality" argument is an assertion of *this Court's* inability to control the New York Legislature's future denial of comparable accommodation.... The Court's demand for "up front" assurances of a neutral system is at war with both traditional accommodation doctrine and the judicial role.... As we have described, Congress's earliest accommodations exempted duties paid by specific churches on particular items.... Moreover, most efforts at accommodation seek to solve a problem that applies to members of only one or a few religions. Not every religion uses wine in its sacraments, but that does not make an exemption from Prohibition for sacramental wine-use impermissible..., nor does it require the State granting such an exemption to explain in advance how it will treat every other claim for dispensation from its controlled-substance laws.... The record is clear that the necessary guarantee can and will be provided, after the fact, *by the courts*....

Contrary to the Court's suggestion, I do not think that the Establishment Clause prohibits formally established "state" churches and nothing more. I have always believed, and all my opinions are consistent with the view, that the Establishment Clause prohibits the favoring of one religion over others. In this respect, it is the Court that attacks lions of straw. What I attack is the Court's imposition of novel "up front" procedural requirements on state legislatures. Making law (and making exceptions) one case at a time, whether through adjudications or through highly particularized rulemaking or legislation, violates, *ex ante*, no principle of fairness, equal protection, or neutrality, simply because it does not announce in advance how all future cases (and all future exceptions) will be disposed of. If it did, the manner of proceeding of this Court itself would be unconstitutional. It is presumptuous for this Court to impose—

195 . Quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952), discussed at § C1b above.

out of nowhere—an unheard-of prohibition against proceeding in this manner upon the Legislature of New York State. I never heard of such a principle, nor has anyone else, nor will it ever be heard of again. Unlike what the New York Legislature has done, this *is* a special rule to govern only the Satmar Hasidim.

A few words in response to the separate concurrences: JUSTICE STEVENS adopts, for these cases, a rationale that is almost without limit. The separate Kiryas Joel school district is problematic in his view because "the isolation of these children... increased the likelihood that they would remain within the fold, faithful adherents of their parents' religious faith." So much for family values. If the Constitution forbids any state action that incidentally helps parents to raise their children in their own religious faith, it would invalidate a release program permitting public school children to attend the religious-instruction program of their parents' choice, of the sort we approved in *Zorach, supra*; indeed, it would invalidate state laws according parents physical control over their children, at least insofar as that is used to take the little fellows to church or synagogue. JUSTICE STEVENS' statement is less a legal analysis than a manifesto of secularism. It surpasses mere rejection of accommodation, and announces a positive hostility to religion—which, unlike all other noncriminal values, the state must not assist parents in transmitting to their offspring.

JUSTICE KENNEDY's "political-line-drawing" approach founders on its own terms. He concedes that the Constitution does not prevent people who share a faith from forming their own villages and towns, and suggests that the formation of the village of Kiryas Joel was free from defect. He also notes that States are free to draw political lines on the basis of history and geography. I do not see, then, how a school district drawn to mirror the boundaries of an existing village (an existing geographical line), which itself is not infirm, can violate the Constitution....

Finally, JUSTICE O'CONNOR observes that the Court's opinion does not focus on the *Lemon* test..., and she urges that that test be abandoned, at least as a "unitary approach" to all Establishment Clause claims.... But the Court's snub of *Lemon* today (it receives only two "see also" citations...) is particularly noteworthy because all three courts below (who are not free to ignore Supreme Court precedents at will) relied on it, and the parties (also bound by our case law) dedicated over 80 pages of briefing to the application and continued vitality of the *Lemon* test.... In addition to the other sound reasons for abandoning *Lemon*..., it seems quite inefficient for this Court, which in reaching its decisions relies heavily on the briefing of the parties and, to a lesser extent, the opinions of lower courts, to mislead lower courts and the parties about the relevance of the *Lemon* test....

Unlike JUSTICE O'CONNOR, however, I would not replace *Lemon* with nothing, and let the case law "evolve" into a series of situation-specific rules (government speech on religious topics, government benefits to particular groups, *etc.*) unconstrained by any "rigid influence." The problem with (and the allure of) *Lemon* has not been that it is "rigid," but

> rather that in many applications it has been utterly meaningless, validating whatever result the Court would desire.... To replace *Lemon* with nothing is simply to announce that we are now so bold that we no longer feel the need even to pretend that our haphazard course of Establishment Clause decisions is governed by any principle. The foremost principle I would apply is fidelity to the longstanding traditions of our people, which surely provide the diversity of treatment that JUSTICE O'CONNOR seeks, but do not leave us to our own devices.
>
> The Court's decision today is astounding. [The statute] involves no public aid to private schools and does not mention religion. In order to invalidate it, the Court casts aside, on the flimsiest of evidence, the strong presumption of validity that attaches to facially neutral laws, and invalidates the present accommodation because it does not trust New York to be as accommodating toward other religions (presumably those less powerful than the Satmar Hasidim) in the future. This is unprecedented—except that it continues, and takes to new extremes, a recent tendency in the opinions of this Court to turn the Establishment Clause into a repealer of our Nation's tradition of religious toleration. I dissent.[196]

Justice Scalia, having laid about him vigorously at all differing viewpoints of the court, and having devoted special attention to Justice Souter personally,[197] as though he were solely responsible for the opinion that (with the exception of the section on *Larkin*, which represented only a plurality of four votes) commanded a majority of the court, utilizing his customary rich and colorful command of sarcasm, irony and *a fortiori*, for once was met by a reply—almost a rebuke—from Justice Souter, supported by the majority of the court.

(8) The Majority's Rejoinder. Justice Souter, in the conclusion of his opinion for the court, replied to the dissent with personal attention to its author, and gave at least as good as he got.

> Justice Cardozo once cast the dissenter as "the gladiator making a last stand against the lions." JUSTICE SCALIA's dissent is certainly the work of a gladiator, but he thrusts at lions of his own imagining. We do not disable a religiously homogeneous group from exercising political power conferred on it without regard to religion. Unlike the states of Utah and New Mexico (which were laid out according to traditional political methodologies taking account of lines of latitude and longitude and topographical features[198]), the reference line chosen for the Kiryas Village School District was one purposely drawn to separate Satmars from non-Satmars. Nor do

196. *Kiryas Joel, supra*, Scalia dissent, emphasis in original.

197. Justice Scalia referred to Justice Souter by name twenty-four times in his dissenting opinion rather than to "the Court" or "the majority," although he did turn to that more usual usage in the final seven pages of his dissent (before addressing the concurring opinions).

198. Citing "F. Van Zandt, *Boundaries of the United States and the Several States*, (1966), pp. 250-257."

> we impugn the motives of the New York Legislature, which no doubt intended to accommodate the Satmar community without violating the Establishment Clause; we simply refuse to ignore that the method it chose is one that aids a particular religious community, as such (Assembly sponsor thrice describe[d] the Act's beneficiaries as the "Hasidic" children or community), rather than all groups similarly interested in separate schooling. The dissent protests it is novel to insist "up front" that a statute not tailor its benefits to apply only to one religious group, but if this were so,... language in *Walz v. Tax Commission* and *Bowen v. Kendrick*, purporting to rely on the breadth of the statutory schemes [as including nonreligious as well as religious beneficiaries] would have been mere surplusage. Indeed, under the dissent's theory, if New York were to pass a law providing school buses only for children attending Christian day schools, we would be constrained to uphold the statute against Establishment Clause attack until faced by a request from a non-Christian family for equal treatment under the patently unequal law. And to end on the point with which JUSTICE SCALIA begins, the license he takes in suggesting that the Court holds the Satmar sect to be New York's established church... is only one symptom of his inability to accept the fact that this Court has long held that the First Amendment reaches more than classic, 18th century establishments.
>
> Our job, of course, would be easier if the dissent's position had prevailed with the Framers and with this Court over the years. An Establishment Clause diminished to the dimensions acceptable to JUSTICE SCALIA could be enforced by a few simple rules, and our docket would never see cases requiring the application of a principle like neutrality toward religion as well as among religious sects. But that would be as blind to history as to precedent, and the difference between JUSTICE SCALIA and the Court accordingly turns on the Court's recognition that the Establishment Clause does comprehend such a principle and obligates courts to exercise the judgment necessary to apply it.
>
> In this case we are clearly constrained to conclude that the statute before us fails the test of neutrality. It delegates a power this Court has said "ranks at the very apex of the function of a State"[199] to an electorate defined by common religious belief and practice, in a manner that fails to foreclose religious favoritism. It therefore crosses the line from permissible accommodation to impermissible establishment. The judgment of the Court of Appeals of the State of New York is accordingly
>
> *Affirmed.*

This was another battle in the long-running war to define or redefine the scope and thrust of the Establishment Clause. The "separationist" wing of the court—Justices Blackmun, Stevens, Souter and Ginsburg—prevailed in this instance over the statist/traditionalist/accommodationist wing—Chief Justice Rehnquist and Justices Scalia and Thomas—with the help of centrist Justices O'Connor and Kennedy. With

199 . Quoting *Wisconsin v. Yoder, supra* at 213.

the retirement of Justice Blackmun and his replacement by Justice Stephen Breyer, the balance seemed likely to remain relatively unchanged and the battles to continue.

Justice Scalia had put his pen on a possible vulnerability of the majority opinion—whether conferring governmental powers on a population of citizens inhabiting a political jurisdiction that happened to include only members of one religious adherence was equivalent to delegating civil authority to a religious entity, forbidden by *Larkin v. Grendel's Den, supra.* Perhaps it was because of this ambiguity that there was not a majority for the contention that the case was controlled by *Larkin*. What if the population of the school district was entirely composed of Satmar Hasidim: does that make it a theocracy? A sharp light was shed on that question by another friend-of-the-court brief filed by 500 residents of the village of Kiryas Joel who contended that "the district is unconstitutional because it permits the rabbis who control the village's religious life to control the affairs of the school district as well"!

> Joseph Waldman, the leader of the dissident group, was stripped of his membership in the synagogue and his six children were expelled from the parochial school after he challenged the rabbinical leadership in an unsuccessful race for the school board.

When this theocratic situation was brought to the attention of the Supreme Court at oral argument, Justice Ruth Bader Ginsburg cut it off with the point that the situation in the village was not before the court, since the New York State School Boards Association and its officers were challenging the statute "on its face," not how it was operating.[200] That may indeed have been true legally, but it was not immaterial to this discussion to recognize that one reason for thinking the Establishment Clause might not condone the Kiryas Joel arrangement was precisely because under it the rabbis' ability to control the political community as well as the religious community was more than a little theocratic, and that kind of arrangement was one of the ills that the Establishment Clause was designed to prevent.

Within a few days of the announcement of the decision in *Kiryas Joel v. Grumet*, the legislature of New York, then in session, adopted a new statute, general in nature, permitting the formation of new public school districts anywhere in the state, provided the economic level of the new district did not depart too widely from the level of the original district (to prevent high-income areas from seceding from lower-income areas). The New York State School Boards Association immediately challenged the new statute in court, and in due course, the New York Appellate Division found it, too, unconstitutional as a "subterfuge" and "camouflage" tailored to benefit the Satmar Hasidim in the same way that the earlier law had.[201]

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200 . *New York Times*, Mar. 31, 1994. This article was also the source of the quotation above.

201 . *New York Times*, August 27, 1996, p. B1.

8. A Short String of State Aid Cases: To Higher Education

In the wake of *Tilton v. Richardson*[202] there followed a series of cases that reinforced the Supreme Court's holding that higher education is significantly different from "lower" education (elementary and secondary schools, discussed in the preceding section). It is certainly true that colleges and universities are a unique institutional realm having its own norms and peers and purposes, whether church-related or not. Although some colleges and universities were founded by churches—usually to provide an educated clergy[203]—they soon began to resonate more to the beat of their "peer" institutions in higher education than to the cadence called by their founding church.

Because of the uniqueness of this realm, and because it has, or has taken on, purposes other than, or in addition to, the inculcation of the faith, it will not be a primary focus for consideration here. Rather, the reader is referred to an excellent body of literature already available on the relation of the state to church-related higher education.[204] It will be necessary here only to scan the Supreme Court cases that followed in the train of *Tilton v. Richardson*.

a. *Hunt v. McNair* (1973). Just as *Tilton* was a companion case to *Lemon*, perhaps "sweetening" the blow to church-related elementary and secondary schools, so *Hunt v. McNair* was a similarly sweetening companion to *PEARL v. Nyquist*, *Sloan v. Lemon*, and *Levitt v. PEARL,*[205] all being announced on June 25, 1973, the last day of the October 1972 term. *Hunt* challenged a South Carolina law authorizing the issuance of revenue bonds for the benefit of the (Southern) Baptist College at Charleston. The bonds were to be issued by the state's Educational Facilities Authority, but without the state's incurring any obligation toward them, the bonds to be paid off solely by the college. The advantage of this arrangement was that the interest earned by such bonds was not taxable to the bond-holder, enabling the state to market the bonds at a lower rate of interest than the college would have to pay if it borrowed the money from a bank. The terms of the agreement between the college and the state stipulated that the facilities constructed with the proceeds of the bonds were not to be used "for sectarian instruction or as a place of religious worship, or in

202. 403 U.S. 672 (1971), discussed at § D6 above.

203. E.g., Harvard, Yale, etc.; see discussion at § A2 above.

204. See Howard, A.E. Dick, *State Aid to Private Higher Education* (Charlotteville, Va.: The Michie Co., 1977); Moots, Philip R., and Edward M. Gaffney, *Church and Campus: Legal Issues in Religiously Affiliated Higher Education* (Notre Dame, Ind.: Univ. of Notre Dame Press, 1979); and Gaffney, E.M., and P.R.Moots, *Government and Campus; Federal Regulation of Religiously Affiliated Higher Education,* (Univ. of Notre Dame Press, 1982).

205. 413 U.S. 756 (1973), 413 U.S. 825 (1973) and 413 U.S. 472, discussed at §§ 7a, 7b and 7c, respectively.

connection with any part of the program of a school or department of divinity of any religious denomination."[206]

The trial court denied relief, the state supreme court affirmed, and the U.S. Supreme Court agreed, in an opinion written by Justice Powell, the author of *Nyquist* and *Sloan*. He found the statute to have a secular purpose of advancing education, not religion, since the issuance of construction bonds was available to all colleges in the state, whether church-affiliated or not. The primary effect test was prefaced with the reminder that "the Court has not accepted the recurrent argument that all aid is forbidden [an institution with a religious affiliation] because aid to one aspect of an institution frees it to spend its other resources on religious ends."

> Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.... Appellant has introduced no evidence in the present case placing the [Baptist] College in such a category. It is true that the members of the College Board of Trustees are elected by the South Carolina Baptist Convention, that the approval of the Convention is required for certain financial transactions, and that the charter of the College may be amended only by the Convention. But it was likewise true of the institutions involved in *Tilton* that they were "governed by Catholic religious organizations...." What little there is in the record concerning the College establishes that there are no religious qualifications for faculty membership or student admission, and that only 60% of the College student body is Baptist, a percentage roughly equivalent to the percentage of Baptists in that area of South Carolina.... On the record in this case there is no basis to conclude that the College's operations are oriented significantly toward sectarian rather than secular education.
>
> Nor can we conclude that the proposed transaction will place the Authority in the position of providing aid to the religious as opposed to the secular activities of the College.... [T]he Act specifically states that a project "shall not include" any buildings or facilities used for religious purposes.... In addition..., every lease agreement must contain a clause fobidding religious use and another allowing inspections to enforce the agreement. For these reasons, we are satisfied that implementation of the proposal will not have the primary effect of advancing or inhibiting religion.

The court noted in a footnote that:

> 7. The "state aid" involved in this case is of a very special sort. We have here no expenditure of public funds, either by grant or loan, no reimbursement by a State for expenditures made by a parochial school or college, and no extending or committing of a State's credit. Rather, the

206 . *Hunt v. McNair*, 413 U.S. 734 (1973).

> only state aid consists... of an instrumentality... through which educational institutions may borrow funds on the basis of their own credit and the security of their own property upon more favorable interest terms than otherwise would be available.

The only remaining question was that of excessive entanglement. The court disposed of it in this way:

> The Court's opinion in *Lemon* and the plurality opinion in *Tilton* are grounded on the proposition that the degree of entanglement arising from inspection of facilities as to use varies in large measure with the extent to which religion permeates the institution.... As we have indicated above, there is no evidence here to demonstrate that the College is any more an instrument of religious indoctrination than were the colleges and universities involved in *Tilton*.
>
> A closer issue under our precedents is presented by the contention that the Authority could become deeply involved in the day-to-day financial and policy decisions of the College.... [Its] powers are sweeping ones, and were there a realistic likelihood that they would be exercised in their full detail, the entanglement problems with the proposed transaction would not be insignificant....
>
> * * *
>
> Only if the College refused to meet rental payments or was unable to do so would the Authority... be obligated to take further action. In that event, the Authority... might either foreclose on the mortgage or take a hand in the setting of rules, charges, and fees. It may be argued that only the former would be consistent with the Establishment Clause, but we do not now have that situation before us.
>
> * * *
>
> Accordingly, we affirm the holding of the court below that the Act is constitutional as interpreted and applied in this case.

Justice Brennan dissented from the court's view, joined by Justices Douglas and Marshall. He reasserted his test of Establishment advanced in his separate opinions in *Schempp*, *Walz*, and *Lemon*: the Establishment Clause is violated by

> those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice.

Using that test, he concluded that the South Carolina arrangement violated the Establishment Clause because "the College turns over to the State Authority control of substantial parts of the fiscal operation of the school—its very life's blood." (It was not clear which of the three elements of the *Lemon* test this offended, and indeed the dissenting opinion proceeded to speak mainly in the terms of the "entanglement" aspect of the *Lemon* test.)

> [I]t is crystal clear, I think, that this scheme involves the State in a degree of policing of the affairs of the college far exceeding that called for by the statutes struck down in *Lemon*.... Indeed, under this scheme the policing by the State can become so extensive that the State may well end up in complete control of the operation of the College, at least for the life of the bonds. The College's freedom to engage in religious activities and to offer religious instruction is necessarily circumscribed by this pervasive state involvement forced upon the College if it is not to lose its benefits under the Act. For it seems inescapable that the content of courses taught in facilities financed under the agreement must be closely monitored by the State Authority in discharge of its duty to ensure that the facilities are not being used for sectarian instruction. The Authority must also involve itself deeply in the fiscal affairs of the College, even to the point of fixing tuition rates, as part of its duty to assure sufficient revenues to meet bond and interest obligations. And should the College find itself unable to meet these obligations, its continued existence as a viable sectarian institution is almost completely in the hands of the State Authority....
>
> The state forthrightly aids the College by permitting the College to avail itself of the State's unique ability to borrow money at low interest rates, and the College, in turn, surrenders to the State a comprehensive and continuing surveillance of the educational, religious, and fiscal affairs of the College. The conclusion is compelled that this involves the State in the "essentially religious activities of religious institutions" and "employ[s] the organs of government for essentially religious purposes."

b. *Roemer v. Board of Public Works* (1976). The third Supreme Court case dealing with state aid to church-related higher education arose in Maryland, the state in which the first suit challenging state aid to church-related higher education had occurred, *Horace Mann League v. Board of Public Works* (1966). In that earlier case, which did not reach the Supreme Court, Leo Pfeffer had represented the plaintiff organization, an unofficial association of public-school officials named after the Massachusetts educator who was instrumental in the development of the public school. Its leader at the time of the suit was Ed Fuller, executive of the Council of Chief State School Officers. Pfeffer undertook to show that the four Maryland colleges to which construction funds had been given were linked to churches and religion in a number of ways and that they were primarily agencies for the inculcation of the faith of the founding church. Maryland's highest court, the Court of Appeals, recognized six indicators of such relationship of college and church.

> (1) The stated purposes of the college;
> (2) The college personnel, which includes the governing board, the administrative officers, the faculty, and the student body (with considerable stress being laid on the substantiality of religious control over the governing board as a criterion of whether a college is sectarian);
> (3) The college's relationship with religious organizations and groups, which relationship includes the extent of ownership, financial assistance,

> the college's memberships and affiliations, religious purposes, and miscellaneous aspects of the college's relationship with its sponsoring church;
> (4) The place of religion in the college's program, which includes the extent of religious manifestation in the physical surroundings, the character and extent of religious observance sponsored or encouraged by the college, the required participation for any or all students, the extent to which the college sponsors or encourages religious activity of sects different from that of the college's own church, and the place of religion in the curriculum and in extra-curricular programs;
> (5) The result or "outcome" of the college program, such as accreditation and the nature and character of the activities of the alumni; and
> (6) The work and image of the college in the community.[207]

Separate statutes of the Maryland legislature made grants of funds aggregating $2,500,000 for construction of various campus buildings such as science buildings, dormitories or a dining hall at four church-related colleges in the state. Using the foregoing criteria to examine in detail the structure and operation of the four colleges, the *Horace Mann League* court determined that one of them, Hood College, related (very loosely) to the United Church of Christ (UCC), was entitled to its grant of $500,000.

> [I]t is obvious that neither the U.C.C. nor any other religion is running the institution, or has control over it.
> We hold, therefore, that the primary purpose of the grant here involved was not to aid or support religion....

The other three institutions were not as fortunate. Two were related to the Roman Catholic Church—Notre Dame College and St. Joseph College—and the third—Western Maryland College—to the Methodist Church. The court found that each of them was much more closely related to its founding church and that religion much more fully permeated its activities, curriculum and image. Therefore, it held the construction grants invalid as aiding religion. The U.S. Supreme Court declined to hear the case. (A similar sketch of sectarian character was drawn in subsequent college suits, and may have been the "profile" rejected in *Tilton v. Richardson*.[208])

From Maryland, then, came another program designed to aid private institutions of higher education in the state, including those related to churches. This program took the form of annual grants to such institutions amounting to a per-pupil payment equal to 15 percent of the amount appropriated per pupil for the state college system, thus reducing to some extent the economic advantage of the public institutions over the private. The grants could be used for any purpose other than a "sectarian" purpose, and the college had to attest, before and after receiving the grant,

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207. *Horace Mann League v. Board of Public Works of Maryland*, 242 A.2d 51 (1966), paragraphing different from original.

208. See § D6 above.

that none of it had been used for sectarian purposes. The school was required to report in detail each year what it had used the money for, and in case of doubt the state Council on Higher Education could make a brief audit of the separate account in which the college was required to keep the grant funds.

Four Maryland taxpayers challenged the grants to four church-related colleges, all Roman Catholic.[209] The three-judge federal district court held that the statute was not unconstitutional, and the U.S. Supreme Court noted probable jurisdiction of the appeal. Justice Blackmun announced the judgment of the court and delivered an opinion joined by Chief Justice Burger and Justice Powell. (Justices White and Rehnquist concurred in the judgment, thus providing a slim 5-4 majority.)

Justice Blackmun made several general observations on the subject matter.

> A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. In fact, our State and Federal Governments impose certain burdens upon, and impart certain benefits to, virtually all our activities, and religious activity is not an exception.... It long has been established, for example, that the State may send a cleric, indeed even a clerical order, to perform a wholly secular task. In *Bradfield v. Roberts*...(1899), the Court upheld the extension of public aid to a corporation which, although composed entirely of members of a Roman Catholic sisterhood... was limited by its corporate charter to the secular purpose of operating a charitable hospital.
>
> And religious institutions need not be quarantined from public benefits that are neutrally available to all.[210]

After reciting the more recent course of the Court's holdings in aid-to-education cases since *Lemon*, the justice turned to apply the three-part *Lemon* test to the Maryland grant program. Noting that the secular purpose of the statute had not been challenged, he reviewed the "primary effect" of the law in the light of *Hunt v. McNair, supra*.

> *Hunt* requires (1) that no state aid at all go to institutions that are so "pervasively sectarian" that secular activities cannot be separated from sectarian ones, and (2) that if secular activities *can* be separated out, they alone may be funded.

He reviewed the District Court's holding that the four colleges were not pervasively sectarian, based upon several subsidiary findings:

> (a) Despite their formal affiliation with the Roman Catholic Church, the colleges are "characterized by a high degree of institutional autonomy...." None of the four receives funds from, or makes reports to, the Catholic church. The church is represented on their governing boards, but... "no

209. A fifth college, Western Maryland College [Methodist], deprived of aid in *Horace Mann League, supra*, was dismissed as a defendant.

210. *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976).

instance of entry of church considerations into college decisions was shown...."

(b) The colleges employ Roman Catholic chaplains and hold Roman Catholic religious exercises on campus. Attendance at such is not required; the encouragment of spiritual development is only "one secondary objective" of each college;... "religious indoctrination is not a substantial purpose or activity of any of these defendants...."

(c) Mandatory religion or theology courses are taught at each of the colleges, primarily by Roman Catholic clerics, but these only supplement a curriculum covering "the spectrum of a liberal arts program." Nontheology courses are taught in an "atmosphere of intellectual freedom" and without "religious pressures." Each college subscribes to, and abides by, the 1940 Statement of Principles on Academic Freedom of the American Association of University professors....

(d) Some classes are begun with prayer. The percentage of classes in which this is done varies with the college, from a "miniscule" percentage at Loyola and Mount Saint Mary's, to a majority at Saint Joseph....[211] There is no "actual college policy" of encouraging the practice.... Classroom prayers were therefore regarded by the District Court as "peripheral to the subject of religious permeation," as were the facts that some instructors wear clerical garb and some classrooms have religious symbols.... The court concluded:

> "None of these facts impairs the clear and convincing evidence that courses at each [college] are taught `according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards.' [citing *Tilton v. Richardson*]...."

(e) The District Court found that, apart from the theology departments... faculty hiring decisions are not made on a religious basis. At two of the colleges... no inquiry at all is made into an applicant's religion.... Budgetary considerations lead the colleges generally to favor members of religious orders, who often receive less than full salary. Still, the District Court found that "academic quality" was the principal hiring criterion, and that any "hiring bias," or "effort... to stock its faculty with members of a particular religious group," would have been noticed by other faculty members, who had never been heard to complain.

(f) The great majority of students at each of the colleges are Roman Catholic, but the District Court concluded from a "thorough analysis of the student admission and recruiting criteria" that the student bodies "are chosen without regard to religion...."

We cannot say that the foregoing findings as to the role of religion in particular aspects of the colleges are clearly erroneous. Appellants ask us to set those findings aside in certain respects. Not surprisingly, they have gleaned from this record of thousands of pages, compiled during several weeks of trial, occasional evidence of a more sectarian character than the District Court ascribes to the colleges. It is not our place, however, to

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211 . St. Joseph's College had become defunct since the filing of the suit; n. 10.

> reappraise the evidence, unless it plainly fails to support the findings of the trier of facts. That is certainly not the case here, and it would make no difference even if we were to second-guess the District Court in certain particulars. To answer the question whether an institution is so "pervasively sectarian" that it may receive no direct state aid of any kind, it is necessary to paint a general picture of the institution, composed of many elements. The general picture that the District Court has painted of the appellee institutions is similar in almost all respects to that of the church-affiliated colleges considered in *Tilton* and *Hunt*.[212] We find no constitutionally significant distinction between them, at least for purposes of the "pervasive sectarianism" test.

The district court had then reviewed the second element of the *Hunt* assessment of primary effect: whether aid was actually given only to the secular aspect of the college's operations. It considered this requirement to be "satisfied by the statutory prohibition against sectarian use, and by the administrative enforcement of that prohibition through the Council for Higher Education." Justice Blackmun agreed with that conclusion.

> We must assume that the colleges, and the Council, will exercise their delegated control over use of the funds in compliance with the statutory, and therefore the constitutional mandate. It is to be expected that they will give a wide berth to "specifically religious activity," and thus minimize constitutional questions. Should such questions arise, the courts will consider them. It has not been the Court's practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds.

This stance represented a striking departure from that in the parochial-school-aid cases, where it was on the basis of precisely such prospective and hypothetical conjectures about illicit inculcation of religion with public funds that state statutes less sweeping than this one were struck down in *Lemon*, *Nyquist* and *Meek*.

In turning to the final "prong" of the *Lemon* test, Justice Blackmun observed:

> If the foregoing answer to the "primary effect" question seems easy, it serves to make the "excessive entanglement" problem more difficult. The statute itself clearly denies the use of public funds for "sectarian purposes." It seeks to avert such use, however, through a process of annual interchange—proposal and approval, expenditure and review—between the colleges and the Council. In answering the question whether this will be an "excessively entangling" relationship, we must consider the several relevant factors identified in prior decisions.

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212. And in *Horace Mann League, supra,* where an opposite result was reached. Curiously there is no reference to that apposite state-court case in this or the two preceding higher education cases, *Tilton* or *Hunt.*

Four factors were then examined: (1) the character of the aided institution, (2) the form of aid, (3) the periodicity of the funding process, and (4) the potential for political divisiveness. The second was disposed of by observing that "no particular use of state funds is before us in this case." Only the *process* by which the aid was disbursed was at issue, and that was addressed "as a matter of the resulting relationship of secular and religious authority"— presumably under the other three headings.

Under the third factor, the court recalled that "one-time, single-purpose" construction grants had been found acceptable in *Tilton*, but the state had retained a right to inspect the buildings thereafter, and the ongoing state responsibility had been even greater in *Hunt*, "where the State was actually the lessor of the subsidized facilities, retaining extensive powers to regulate their use."

> Occasional audits are possible here, but we must accept the District Court's finding that they would be "quick and nonjudgmental...." They and the other contacts between the Council and the colleges are not likely to be any more entangling than the inspections and audits incident to the normal process of the colleges' accreditations by the state.

Political divisiveness along religious lines was not seen as a threat because (a) the student constituency was not local but from a much broader area, thus not concentrated in one political jurisdiction, (b) the aid was given to private colleges generally, "more than two-thirds of which have no religious affiliation," and (3) "the substantial autonomy of the colleges was thought to mitigate political divisiveness, in that controversies surrounding the aid program are not likely to involve the Catholic Church itself, or even the religious character of the schools, but only their `fiscal responsibility and educational requirements.'"

Both the district court and the Supreme Court relied heavily upon "the character of the aided institutions" as a solution to the entanglement problem, since in the colleges in question the secular elements were thought to be clearly separable from the religious and thus subject to more cursory and arm's-length policing.

> [S]ecular activities, for the most part, can be taken at face value. There is no danger, or at least only a substantially reduced danger, that an ostensibly secular activity—the study of biology, the learning of a foreign language, an athletic event—will actually be infused with religious content or significance. The need for close surveillance of purportedly secular activities is correspondingly reduced.

One wonders if the court recalled the religious controversy swirling around the teaching of biology in *Scopes* and *Epperson*,[213] or the possibility of teaching Latin by study of Thomas Aquinas or papal encyclicals, or the religio-ethnic tensions aroused

213. Discussed at § C3b(2) above. Although these were not higher education cases, the parallel is not strained.

by athletic contests between, say, St. Olaf's and Notre Dame. The court seemed determined to rest its decision upon the wide differences supposedly distinguishing higher education from lower, and so lifted them up again in discussing the third factor (periodicity of funding):

> While the form-of-aid distinctions of *Tilton* are thus of questionable importance, the character-of-institution distinctions of *Lemon I* are most impressive. To reiterate a few of the relevant points: the elementary and secondary schooling in *Lemon* came at an impressionable age; the aided schools were "under the general supervision" of the Roman Catholic diocese; each had a local Catholic parish that assumed "ultimate financial responsibility" for it; the principals of the schools were usually appointed by church authorities; religion "pervade[d] the school system"; teachers were specifically instructed by the "Handbook of School Regulations" that "[r]eligious formation is not confined to the formal course; nor is it restricted to a single subject area." These things made impossible what is crucial to a nonentangling aid program: the ability of the State to identify and subsidize separate secular functions carried out at the school, without on-the-site inspections being necessary to prevent diversion of the funds to sectarian purposes. The District Court gave primary importance to this consideration, and we cannot say it erred.[214]

In large part the persuasiveness of the opinion rested upon the persuasiveness of these distinctions, and not all are persuaded. Some who are not persuaded believe that the same aid held permissible for colleges should be extended to parochial schools, and others believe that the same aid denied to parochial schools should be denied to colleges.

The separate opinions filed in *Roemer* suggested these two schools of thought. Justice White, joined by Justice Rehnquist, concurred in the judgment but not in the (plurality) opinion by Justice Blackmun. Justice White insisted that he was "no more reconciled now to *Lemon I* than I was when it was decided."

> "It is enough for me that the [State is] financing a separable secular function of overriding importance in order to sustain the legislation here challenged." *Lemon I*... (opinion of White, J.) As long as there is a secular legislative purpose, and as long as the primary effect of the legislation is neither to advance nor inhibit religion, I see no reason... to take the constitutional inquiry further.... However, since 1970, the Court has added a third element to the inquiry: whether there is "an excessive government entanglement with religion...." I have never understood the constitutional foundation for this added element; it is at once both insolubly paradoxical... and—as the Court has conceded from the outset—a "blurred, indistinct and variable barrier...." No one in this case challenges the District Court's finding that the purpose of the legislation here is secular.... And I do not disagree with the plurality that the primary effect

214 . *Roemer v. Board of Public Works, supra.*

> of the aid program is not advancement of religion. That is enough in my view to sustain the aid programs against constitutional challenge, and I would say no more.[215]

Justice Brennan, joined by Justice Marshall, filed a dissenting opinion, agreeing with Judge Bryan, who had dissented in the district court, that "the payment of the grants directly to the colleges unmarked in purpose... is simply a blunderbuss discharge of public funds to a church-affiliated or church-related college." Brennan reiterated his views that "general subsidies `tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent' [*Schempp*, concurring opinion]" and that "[t]he discrete interests of government and religion are mutually best served when each avoids too close a proximity to the other." Unlike Judge Bryan, however, he would have required the colleges to refund all the payments made to them under the Act.

Justice Stewart, who had joined the prevailing side in *Tilton* and *Hunt*, dissented in *Roemer*.

> In my view, the decisive differences between this case and *Tilton v. Richardson*... lie in the nature of the theology courses that are a compulsory part of the curriculum at each of the appellee institutions and the type of governmental assistance provided to these church-affiliated colleges. In *Tilton* the Court emphasized that the theology courses were taught as academic subjects.... Here, by contrast, the District Court was unable to find that the compulsory religion courses were taught as an academic discipline...
>
> "[A] department staffed mainly by clerics of the affiliated church and geared toward a limited array of the possible theology or religion courses affords a congenial means of furthering the secondary objective of fostering religious experience...."
>
> In the light of these findings, I cannot agree with the Court's assertion that there is "no constitutionally significant distinction" between the colleges in *Tilton* and those in the present case.

Justice Stevens, participating in his first aid-to-church-related-education decision on the court, entered a three-sentence dissent.

> My views are substantially those expressed by Mr. Justice Brennan. However, I would add emphasis to the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it. The disease of entanglement may infect a law discouraging wholesome religious activity as well as a law encouraging the propagation of a given faith.

In those brief lines, expressing an insight unexpected in one otherwise not notably sympathetic to religious claims, he may have made one of the more cogent

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215 . *Roemer, supra*, White concurrence in the judgment.

contribution of all of the myriad words the court had uttered on aid to church schools.

c. *Valley Forge Christian College v. Americans United* (1982). Another case must be discussed here that is different from the preceding in that it involved a gift of surplus property by the federal government to a college operated by the Assemblies of God. For some time strict separationists had been troubled by the disposition of "surplus" federal property to church-related institutions for a nominal fee (or none at all), and this transfer was seen as the occasion for challenging that pattern of largesse as a violation of the "separation of church and state." It also represents a further development in the doctrine of "standing" beyond the rule of *Flast v. Cohen*.[216]

In September 1976 an organization known as Americans United for Separation of Church and State, Inc.[217] and four of its employees filed suit in the federal district court where the college was located challenging the conveyance of the property from the government to the church college on the ground that it violated the Establishment Clause of the First Amendment.

The property in question was a 77-acre tract, part of the 181-acre site of Valley Forge General Hospital, operated by the U.S. Army from 1942 until 1973, when it was declared to be "surplus property." Under federal law, surplus property could be transferred to other public agencies or to private nonprofit, tax-exempt educational institutions for consideration proportionate to the benefit that would accrue to the United States from its prospective use for educational purposes. The 77-acre tract had an appraised value of $577,500 at the time of conveyance, which was discounted by the Secretary of Health, Education, and Welfare (HEW) at 100 percent "public benefit allowance," so that the college acquired the 77 acres without making *any* financial payment. The college had applied for the property with the promise that it would expand its offerings in the arts, humanities, psychology and counselling departments, and the deed from HEW required that the property be used for those purposes for at least thirty years.

The college was originally known as Northeast Bible College, and its purpose was and remained "to offer systematic training on the collegiate level to men and women for Christian service as either ministers or laymen." Its degree programs were designed "to train leaders for church related ministries." The members of its faculty must "have been baptized in the Holy Spirit and be living consistent Christian lives," and all of its administrators must be members of the Assemblies of God.[218]

Americans United asserted in its complaint that it was a nonprofit organization whose 90,000 "taxpayer members" would be "deprived of the fair and constitutional use of [their] tax dollar[s]... in violation of [their] constitutional rights under the First

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216. 392 U.S. 83 (1968), discussed at § D4 above.

217. Originally named "Protestants and Other Americans United for Separation of Church and State" (POAU); referred to hereinafter as "Americans United" (AU).

218. *Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982).

Amendment." The complaint sought the return of the property to the federal government. The district court dismissed the complaint because the plaintiffs lacked standing to sue as taxpayers (under *Flast v. Cohen*) and had "failed to allege that they have suffered any actual or concrete injury beyond a generalized grievance common to all taxpayers." The Third Circuit reversed, all members of the court agreeing that plaintiffs lacked standing as taxpayers under *Flast*, which recognized such standing only to challenge exercise of the congressional power to tax and spend, whereas the instant case arose under the Property Clause (of which more below). But a majority of the Third Circuit found standing to sue in plaintiffs' status as "citizens" claiming "`injury in fact' to their shared individuated right to a government that `shall make no law respecting the establishment of religion.'"

The Supreme Court granted *certiorari* "[b]ecause of the unusually broad and novel view of standing" expressed by the Third Circuit. The court's opinion was written by Justice Rehnquist, joined by Chief Justice Burger and Justices White, Powell and O'Connor.

> Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies...." The requirements of Article III are not satisfied merely because a party requests a court of the United States to declare its legal rights.... The judicial power of... Article III is not an unconditioned authority to determine the constitutionality of legislative or executive acts....
>
> As an incident to the elaboration of this bedrock requirement, this Court has always required that a litigant have "standing" to challenge the action sought to be adjudicated in the lawsuit.... [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant...," and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."
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> * * *
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> The federal courts have abjured appeals to their authority which would convert the judicial process into "no more than a vehicle for the vindication of the value interests of concerned bystanders." Were the federal courts merely publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding, the concept of "standing" would be quite unnecessary. But the "cases and controversies" language of Art. III forecloses the conversion of courts of the United States into judicial versions of college debating forums....

The court also expressed caution about overruling the actions of "coequal arms of the national government"—the Legislative and Executive branches—unless necessitated by the complaint of a party who had suffered a "cognizable injury."

The injury alleged by respondents... is the "depriv[ation] of the fair and constitutional use of [their] tax dollar." As a result, our discussion must begin with *Frothingham v. Mellon*. In that action a taxpayer brought suit challenging the constitutionality of the Maternity Act of 1921... which she characterized as a deprivation of property without due process.... Any tangible effect of the challenged statute on the plaintiff's tax burden was "remote, fluctuating, and uncertain." [The Court rejected] this as a cognizable injury sufficient to establish standing....

Following the decision in *Frothingham*, the Court confirmed that the expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing, even though the plaintiff contributes to the public coffers as a taxpayer. In *Doremus v. Board of Education*[219] plaintiffs brought suit as citizens and taxpayers, claiming that a New Jersey law which authorized public school teachers in the classroom to read passages from the Bible violated the Establishment Clause of the First Amendment. The Court dismissed the appeal for lack of standing:

> "This Court has held that the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect to furnish a basis for an appeal to the preventive powers of the Court over their expenditures.... [W]e reiterate what the Court said of a federal statute as equally true when a state Act is assailed...."

In short, the court found that plaintiffs' grievance was "not a direct dollars-and-cents injury but is a religious difference."[220]

> The Court again visited the problem of taxpayer standing in *Flast v. Cohen*.... The Court developed a two-part test to determine whether the plaintiffs had standing to sue. First, because a taxpayer alleges injury only by virtue of his liability for taxes, the Court held that "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, Section 8, of the Constitution." Second, the Court required the taxpayer to "show that the challenged enactment exceeds specific constitutional limitations upon the exercise of the taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, Section 8."
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> * * *
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> Unlike the plaintiffs in *Flast*, respondents fail the first prong of the test for taxpayer standing. Their claim is deficient in two respects. First, the source of their complaint is not a congressional action, but a decision by HEW to transfer a parcel of federal property....

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219. *Doremus v. Bd. of Ed.*, 342 U.S. 429 (1952).

220. Justice Rehnquist attributed the dismissal of *Doremus* to plaintiffs' lack of standing as taxpayers. Leo Pfeffer—lead counsel for plaintiffs in both *Doremus* and *Zorach*—maintained that dismissal was solely for *mootness* because of the graduation of the only student whose parents had sued, and cited a statement in *Zorach* that that was the sole ground for dismissal of *Doremus*. Pfeffer, L., *Church, State and Freedom* (Boston: Beacon Press, 1953), p. 386, n.34 (on p. 637).

> Second, and perhaps redundantly, the property transfer... was not an exercise of authority conferred by the taxing and spending clause of Art. I, Section 8. The authorizing legislation, the Federal Property and Administrative Services Act of 1949, was an evident exercise Congress' power under the Property Clause, Art. IV, Section 3, cl. 2. Respondents do not dispute this conclusion, and it is decisive of any claim of taxpayer standing under the *Flast* precedent.... It remains to be seen whether [they] have alleged any other basis for standing to bring this suit.
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> * * *
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> [Respondents] fail to identify any personal injury suffered... *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms. It is evident that respondents are firmly committed to the principle of separation of church and state, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy....

The court took to task the circuit court for its willingness to wink at the standing requirement for the sake of reaching the merits, administering a rebuke that in its bluntness is very unusual in judicial opinions.

> Implicit in the foregoing is the philosophy that the business of the federal courts is correcting constitutional errors, and that "cases and controversies" are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor. This philosophy has no place in our constitutional scheme. It does not become more palatable when the underlying merits concern the Establishment Clause.

And so the case was "thrown out of court" for lack of standing. Justice Rehnquist's minatory vehemence, though buttressed by quotations from earlier cases, was still only "judge-made law." It is not *required* by the Constitution. The references in Article III to "cases" and "controversies" do not necessitate the restrictions that the federal judiciary has placed upon them—restrictions that in most respects may be prudent and realistic. The federal courts are crowded with cases even under the current restrictions; they might be totally inundated if they accepted all "taxpayer's" or "citizen's" suits.

On the other hand, those states that do entertain such suits have not been totally incapacitated by a logjam of litigation, as Leo Pfeffer observed in a 1953 work:

> Even though the allowance of taxpayers' suits should entail "inconvenience" to the administration of appropriate laws..., that inconvenience must be weighed against the consideration that unless taxpayers' suits are allowed flagrant violations of the Constitution will remain unremedied....

> That the fear of a multitude of baseless suits if taxpayers' actions are allowed is exaggerated is shown by the fact that most states do not follow the restrictive policy of the Federal and New York courts, and do allow suits by taxpayers to enjoin illegal expenditures of state funds; and the courts in these states have not found the resulting inconvenience burdensome. Indeed, on occasion even the Federal courts have accepted taxpayers' suits.[221] Moreover, until the Doremus decision in 1952, it was the rule that the United States Supreme Court would review an appeal from a decision in a taxpayer's suit brought in a state allowing such suits, even though such a suit could not be brought originally in the Federal courts.[222]

Indeed, it was on that basis that the Supreme Court reviewed *Cochran v. Louisiana* and *Everson v. Board of Education*,[223] two important cases discussed earlier in this section. There is no mention of "standing to sue" in the Constitution, and little in statutory requirements. The fact that four justices of the Supreme Court vigorously dissented from Rehnquist's strictures was some indication that the rules of standing were not exactly cast in stone. Justice Brennan wrote a lengthy dissent, which was joined by Justices Marshall and Blackmun.

> A plaintiff's standing is a jurisdictional matter for Article III courts, and thus a "threshold question" to be resolved before turning attention to more "substantive" issues.... But in consequence there is an impulse to decide difficult questions of substantive law obliquely in the course of opinions purporting to do nothing more than determine what the Court labels "standing;" this accounts for the phenomenon of opinions, such as the one today, that tend merely to obfuscate, rather than inform, our understanding of rights under the law. The serious by-product of that practice is that the Court disregards its constitutional responsibility when, by failing to acknowledge the protections afforded by the Constitution, it uses "standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits."
>
> The opinion of the Court is a stark example of this unfortunate trend of resolving cases at the "threshold" while obscuring the nature of the underlying rights and interests at stake. The Court waxes eloquent on the blend of prudential and constitutional considerations that combine to create our misguided "standing" jurisprudence. *But not one word is said about the Establishment Clause right that the plaintiff seeks to enforce*. And despite its past recitation of our standing decision, the opinion fails, except by the sheerest form of *ipse dixit*, to explain why this case is unlike *Flast v. Cohen*, and is controlled instead by *Frothingham v. Mellon*.
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221 . *Bradfield v. Roberts,* 175 U.S. 291 (1899), discussed at IID2b.

222 . Pfeffer, L., *supra*, p. 169.

223 . 281 U.S. 370 (1930), discussed at § D1b above, and 330 U.S. 1 (1947), discussed at § D2 above.

The "case and controversy" limitation of Article III overrides no other provision of the Constitution. To construe that Article to deny standing "to the class for whose sake [a] constitutional protection is given..." simply turns the Constitution on its head. Article III was designed to provide a hospitable forum in which persons enjoying rights under the Constitution could assert those rights. How are we to discern whether a particular person is to be afforded a right of action in the courts? The Framers did not, of course, employ the modern vocabulary of standing. But this much is clear: The drafters of the Bill of Rights surely intended that the particular beneficiaries of their legacy should enjoy rights legally enforceable in courts of law.

With these observations in mind, I turn to the problem of taxpayer standing in general, and this case in particular.

* * *

Whatever its provenance, the general rule of *Frothingham* [against taxpayer suits] displays sound judgment: Courts must be circumspect in dealing with the taxing power in order to avoid unnecessary intrusion into the functions of the legislative and executive branches. Congress' *purpose* in taxing will not ordinarily effect the validity of the tax. Unless the tax *operates* unconstitutionally..., the taxpayer may not object to the use of his funds.... But in *Flast* the Court faced a different sort of constitutional claim, and found itself compelled to retreat from the general assertion in *Frothingham* that taxpayers have *no* interest in the disposition of their tax payments. To understand why *Frothingham*'s bar necessarily gave way in the face of an Establishment Clause claim, we must examine the right asserted by a taxpayer making such a claim.

In 1947, nine Justices of this Court recognized that the Establishment Clause does impose a very definite restriction on the power to tax. The Court held in *Everson v. Board of Education* that the "`establishment of religion' clause of the First Amendment means at least this:"

> "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."

The members of the Court could not have been more explicit. "One of our basic rights is to be free of taxation to support a transgression of the constitutional command that the authorities `shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....'" "[M]oney taken by taxation from one is not to be used or given to support another's religious training or belief, or indeed one's own."

* * *

Many of the early settlers of this Nation came here to escape the tyranny of laws that compelled the support of government-sponsored churches and that inflicted punishments for the failure to pay establishment taxes and tithes. But the inhabitants of the various colonies soon displayed a capacity to recreate the oppressive practices of the countries that they had fled....

Justice Brennan agreed with the *Everson* court that the Virginia experience that evoked James Madison's "Memorial and Remonstrance" and Thomas Jefferson's Bill for Establishing Religious Freedom had had a formative influence upon the drafters of the First Amendment (among whom Madison was prominent), and therefore provided guidance as to its sweep.

> It is clear in the light of this history, that one of the primary purposes of the Establishment Clause was to prevent the use of tax monies for religious purposes. *The taxpayer was the direct and intended beneficiary of the prohibition on financial aid to religion*.
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> * * *
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> It may be that Congress can tax for *almost* any reason, or for no reason at all. There is, so far as I have been able to discern, but one constitutionally imposed limit on that authority. Congress cannot use tax money to support a church, or to encourage religion. That is "*the* forbidden exaction." *Everson v. Board of Education* (emphasis added). In absolute terms the history of the Establishment Clause of the First Amendment makes this clear. History also makes it clear that the federal taxpayer is a singularly "proper and appropriate party to invoke a federal court's jurisdiction" to challenge a federal bestowal of largesse as a violation of the Establishment Clause. Each, and indeed every, federal taxpayer suffers precisely the injury that the Establishment Clause guards against when the Federal Government directs that funds be taken from the pocketbooks of the citizenry and placed into the coffers of the ministry.
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> A taxpayer cannot be asked to raise his objection to such use of his funds at the time he pays his tax. Apart from the unlikely circumstance in which the Government announced in advance that a particular levy would be used for religious subsidies, taxpayers could hardly assert that they were being injured until the Government actually lent its support to a religious venture.... Surely, then, a taxpayer must have standing at the time that he learns of the Government's alleged Establishment Clause violation to seek equitable relief in order to halt the continuing and intolerable burden on his pocketbook, his conscience, and his constitutional rights.[224]

Justice Brennan dealt with the majority's contentions that the plaintiffs did not qualify under the *Flast* rule because the expenditure at issue was an *executive* rather than a *congressional* action, and that it occurred under the Property Clause rather than the Taxing and Spending Clause.

> Blind to history, the Court attempts to distinguish this case from *Flast* by wrenching snippets of language from our opinions, and by perfunctorily applying that language under color of... *Flast*. The tortuous distinctions thus produced are specious, at best: at worst, they are pernicious to our constitutional heritage.

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224 . *Valley Forge Christian College, supra,* Brennan dissent, emphasis in original.

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> [N]o clear division can be drawn in this context between actions of the legislative branch and those of the executive branch. To be sure, the First Amendment is phrased as a restriction on Congress' legislative authority; this is only natural since the Constitution assigns the authority to legislate and appropriate only to Congress. But it is difficult to conceive of an expenditure for which the last governmental actor, either implementing directly the legislative will, or acting within the scope of legislatively delegated authority, is not an Executive Branch official. The First Amendment binds the Government as a whole, regardless of which branch is at work in a particular instance.
>
> The Court's second purported distinction between this case and *Flast* is equally unavailing.

* * *

> It can make no constitutional difference in the case before us whether the donation to the defendant here was in the form of a cash grant to build a facility [under the Spending Clause]... or in the nature of a gift of property including a facility already built [under the Property Clause].... The complaint here is precisely that, although the property at issue is actually being used for a sectarian purpose, the government has not received, nor demanded, full value payment. Whether undertaken pursuant to the Property Clause or the Spending Clause, the breach of the Establishment Clause, and the relationship of the taxpayer to that breach, is precisely the same.
>
> Plainly hostile to the Framers' understanding of the Establishment Clause, and *Flast*'s enforcement of that understanding, the Court vents that hostility under the guise of standing, "to slam the courthouse door against plaintiffs who [as the Framers intended] are entitled to full consideration of their [Establishment Clause] claims on the merits." Therefore, I dissent.[225]

Justice Stevens filed a separate dissent in which he indicated agreement with all but the final paragraph of Justice Brennan's dissent.

Valley Forge Christian College v. American United is treated at some length here because it stands as an almost insurmountable roadblock in the way of taxpayer challenges to violations of the Establishment Clause, almost closing the exception for that Clause opened by *Flast* in the *Frothingham* barrier. The slim majority of five justices (including Chief Justice Burger, author of *Flast*) thus put beyond all practical reach (except perhaps that of a nonsectarian competitor for the grant of surplus property) the government's giveaway of valuable property to an obviously sectarian college. The majority did not attempt to deny (because they did not need to reach the issue) that the government had flagrantly violated the precise limitation enforced in *Tilton*, that a building built with federal funds could not be used for sectarian

225 . Ibid., Brennan dissent.

purposes even after the lapse of twenty years. Here the government gave the church college the building and the land *gratis* for usage that could be sectarian after thirty years, and the majority in effect simply announced, "Sorry, but there's no way a taxpayer can challenge that action!" Perhaps the majority could not muster five votes to overrule *Flast*, but they certainly vitiated it with what to the nonlawyer (and to at least four lawyers on the court) can only be characterized as legalistic technicalities. Such sophistry, if spun out far enough, can reach beyond the average citizen's ability or willingness to follow. The double "nexus" of *Flast* was obscure enough; when to it is added the further complications of *Valley Forge*, the result is virtually deliberate obfuscation—obfuscation that has the effect (perhaps intended) of blocking off the relief necessary to preserve for taxpayers the promises of the Establishment Clause. If there is no remedy available, the government is free to violate the Establishment Clause at will with complete impunity, the court standing aloof and explaining, "There's nothing we can do about it!"[226]

d. *Witters v. Washington Department of Services for the Blind* (1986). Following *Mueller v. Allen*,[227] the contours of the federal Establishment Clause were further delineated by a case from the state of Washington that arose when a young man named Larry Witters applied for educational benefits available under state law to handicapped persons. Suffering from progressive visual impairment, he was eligible for assistance from the Commission for the Blind that would "provide for special education and/or training in the professions, business or trades" in order to "assist visually handicapped persons to overcome natural handicaps and to obtain the maximum degree of self-support and self-care."[228] The only difficulty was that Mr. Witters wanted to use the financial assistance available from the state to pursue studies at the Inland Empire School of the Bible to prepare himself to become a pastor or a missionary.

The aid was denied because the Washington State Constitution forbade the use of state funds for religious instruction. This ruling was upheld by the state supreme court for a federal reason—because it violated the second prong of the *Lemon* test of the Establishment Clause, i.e., its primary effect would be to aid religion.[229] The court expressly reserved judgment on the state ground. The U.S. Supreme Court granted *certiorari* and reached a decision per Justice Marshall from which there was no

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226. The *Flast* rule giving federal taxpayers standing to challenge alleged violations of the Establishment Clause may have gained new life—in spite of *Valley Forge*—when the Supreme Court—per Rehnquist, C.J.—accepted the ruling of the district court in *Bowen v. Kendrick*, 487 U.S. 589 (1988), at n.5, that accepted the standing of taxpayers under *Flast* to bring suit against the government. That principle was confirmed when Grumet and Hawk were accorded (state) taxpayer standing to challenge the New York State legislation in *Kiryas Joel v. Grumet* (1994).

227. 463 U.S. 388 (1983), discussed at § D7j above.

228. Wash. Rev. Code § 74.16.181 (1981), quoted in *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986).

229. Derived from *Lemon v. Kurtzman*, 403 U.S. 602, discussed at § D5 above.

dissent (although one justice did not concur in one part of it, and several justices wrote or joined separate concurring opinions).

After reciting the background of the case (summarized above), Justice Marshall reapplied the three-part *Lemon* test of Establishment, noting that "all parties concede the unmistakably secular purpose of the Washington program" of promoting the vocational rehabilitation of the visually handicapped. Very little aid, if any, he said, was likely to flow to religious education, and no one suggested that the state's purpose was to endorse religion, or that the secular purpose asserted by the state was a sham. But the second prong of the test—whether the primary effect of the aid was to advance or hinder religion (on which the Washington court had based its negative decision)—required closer analysis.

> It is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution. For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary. It is equally well-settled, on the other hand, that the State may not grant aid to a religious school, whether cash or in-kind, where the effect of the aid is "that of a direct subsidy to the religious school" from the State. *Grand Rapids School District v. Ball*. Aid may have that effect even though it takes the form of aid to students or parents. The question presented is whether, on the facts as they appear in the record before us, extension of aid to [Witters] and the use of that aid by [Witters] to support his religious education is a permissible transfer similar to the hypothetical salary donation described above, or is an impermissible "direct subsidy."
>
> Certain aspects of Washington's program are central to our inquiry. As far as the record shows, vocational assistance provided under the Washington program is paid directly to the student, who transmits it to the educational institution of his or her choice. Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choice of aid recipients. Washington's program is "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited,"[230] and is in no way skewed toward religion. It is not one of "the ingenious plans for channeling state aid to sectarian schools that periodically reaches this Court." It creates no financial incentive for students to undertake sectarian instruction.[231] It does not tend to provide greater or broader benefits for recipients who apply their aid for religious education, nor are the full benefits of the program limited, in large part or in whole, to students at sectarian institutions. On the contrary, aid recipients have full opportunity to expend vocational rehabilitation aid on

230 . *Committee for Public Education v. Nyquist*, 413 U.S., at 782-783, n.38.
231 . Ibid., at 785, 786.

> wholly secular education, and as a practical matter have rather greater prospects to do so. Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian. In this case, the fact that aid goes to individuals means that the decision to support religious education is made by individuals, not by the State.
>
> Further, and importantly, nothing in the record indicates that, if petitioner succeeds, any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education. The function of the Washington program is hardly "to provide desired financial support for nonpublic, sectarian institutions." The program, providing vocational assistance to the visually handicapped, does not seem well-suited to serve as the vehicle for such a subsidy. No evidence has been presented indicating that any other person has ever sought to finance religious education or activity pursuant to the State's program. The combination of these factors, we think, makes the link between the State and the school petitioner wishes to attend a highly attenuated one.
>
> On the facts we have set out, it does not seem appropriate to view any aid ultimately flowing to the Inland Empire School of the Bible as resulting from a *state* action sponsoring or subsidizing religion. Nor does the mere circumstance that [Witters] has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion. Thus, while *amici* supporting [the State] are correct in pointing out that aid to a religious institution unrestricted in its potential uses, if properly attributable to the State, is "clearly prohibited under the Establishment Clause," *Grand Rapids*, because it may subsidize the religious functions of that institution, that observation is not apposite to this case. On the facts present here, we think the Washington program works no state support of religion prohibited by the Establishment Clause.[232]

The court declined to address the third prong of the *Lemon* test despite the contention by the state that the provision of rehabilitation aid would actually involve governmental choices at each step of the rehabilitation process, since that argument had not been presented to the courts below. In the final part of the court's opinion, Justice Marshall left open the possibility that the state supreme court on remand might apply the "far stricter" state constitution to reach a different result, and he declined Witters' urging to hold that the Free Exercise Clause *required* Washington to aid him in the pursuit of a religious vocation regardless of the state constitution. The decision of the state supreme court denying aid to Witters was reversed, and the case was remanded to that court "for further proceedings not inconsistent with this opinion."

Justice Powell wrote a concurring opinion, joined by Chief Justice Burger and Justice Rehnquist, complaining that the majority had slighted the 1983 decision in

232 . *Witters v. Washington*, *supra*, part II.

Mueller v. Allen (from which Justices Marshall, Brennan, Blackmun and Stevens had vigorously dissented).

> The Court's omission of *Mueller v. Allen*[233] from its analysis may mislead courts and litigants by suggesting that *Mueller* is somehow inapplicable to cases such as this one. I write separately to emphasize that *Mueller* strongly supports the result we reach today....
>
> The State program at issue here provides aid to handicapped students when their studies are likely to lead to employment. Aid does not depend on whether the student wishes to attend a public university or a private college, nor does it turn on whether the student seeks training for a religious or a secular career. It follows that under *Mueller* the state's program does not have the "principal or primary effect" of advancing religion.
>
> The Washington Supreme Court reached a different conclusion because it found that the program had the practical effect of aiding religion *in this particular case*. In effect, the court analyzed the case as if the Washington legislature had passed a private bill that awarded [Witters] free tuition to pursue religious studies.
>
> Such an analysis conflicts with both common sense and established precedent. Nowhere in *Mueller* did we analyze the effect of Minnesota's tax deduction on the parents who were parties to the case; rather, we looked to the nature and consequences of the program *viewed as a whole*.... This is the appropriate perspective for this case as well. Viewed in the proper light, the Washington program easily satisfies the second prong of the *Lemon* test.[234]

The justices lined up again—as they had in *Mueller*—with five favoring the *Mueller* rationale (Burger, White, Rehnquist, Powell and O'Connor) and four rejecting it (Marshall, Brennan, Blackmun and Stevens). They all reached the same conclusion in *this* case. The *Mueller* dissenters were willing to take a view consonant with the rationale of *Mueller* (as cited by both Justices Powell and O'Connor) as long as they didn't have to credit *Mueller*! Justice Marshall reached the same result as *Mueller* by way of the illustration of the hypothetical state employee's right to donate his paycheck to a church without affronting the Establishment Clause. What the *Mueller* dissenters apparently were not willing to accept was the further implication—central to *Mueller*—that if the program of aid met the *Mueller* test of intervening independent private choices of beneficiaries *it did not matter how many beneficiaries chose a religious institution to receive that aid*.

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233 . 463 U.S. 388 (1983), discussed at § j above.

234 . *Witters, supra*, Powell concurrence, emphasis in original.

> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.[235]

That constitutionality should not turn on a nose-count was one of the strong points of *Mueller v. Allen* and one not accepted by its dissenters, who complained in their dissent (penned by Justice Marshall[236]) that most of the benefit of Minnesota's tax deduction went to parents whose children attended parochial schools. According to this line of reasoning, if a wave of evangelistic fervor should sweep the Pacific Northwest, and handicapped aspirants for religious careers should flood the sectarian institutions of higher learning, claiming assistance under Wash. Rev. Code § 74.16.181 (1981), that program would suddenly become unconstitutional. Even if the legislature had not *purposed* such an outcome, the primary *effect* might have become such as would supply significant aid to religious institutions. Should such a shift render the state program repugnant to the Establishment Clause? Using Justice Marshall's own analogy, would that clause be offended if, moved by a similar tide of pious zeal, a majority of state employees should decide to give a large portion of their paychecks to a particular church? Of course not, because *they would be spending their own money* that they had earned from the state. Though payroll entitlement may be different in some respects from other kinds of entitlements, the state's sole legislated requirement for the entitlement at issue in this case was that it be expended for vocational rehabilitation enabling a handicapped person to obtain employment, and that was a stipulation neutral with respect to religion, and one that Witters fulfilled. Therefore, the constitutionality of his receiving rehabilitative assistance from the state should not turn on how many others similarly situated made a similar choice. Given the views of five justices expressed in *Mueller* and again in *Witters*, that would seem to be the law of the land.

—Except in Washington, where the state supreme court on remand held that the aid claimed by Witters was impermissible under the "stricter" *state* constitution.[237]

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235. *Mueller v. Allen*, 463 U.S. at 401.

236. It is remarkable that Justice Marshall, one of the court's strictest separationists, was the author of the majority opinion in *Witters*.

237. 771 P.2d 1119 (1989), cert. denied Oct. 2, 1989, No. 89-94, 58 LW 3216.