To the Graduate Council:

I am submitting herewith a dissertation written by Richard Alan Glenn entitled "Of Myth and Reality: Constitutional Doctrine and the Establishment Clause." I have examined the final copy of this dissertation for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, with a major in Political Science.

Otis H. Stephens, Major Professor

We have read this dissertation
and recommend its acceptance:

Accepted for the Council:

Associate Vice Chancellor
and Dean of the Graduate School

OF MYTH AND REALITY: CONSTITUTIONAL DOCTRINE AND THE ESTABLISHMENT CLAUSE

A Dissertation

Presented for the

Doctor of Philosophy

Degree

The University of Tennessee, Knoxville

Richard Alan Glenn

May 1995

Copyright © Richard Alan Glenn, 1995

All rights reserved

DEDICATION

To my parents

Kenneth and Beth Glenn

from whom I learned of God's love,

and to my wife

Lorena

with whom I hope to forever share that love.

ACKNOWLEDGMENTS

In an endeavor such as this volume, there are numerous people who deserve credit. My greatest intellectual debt is to the chairperson of my dissertation committee, Otis H. Stephens, Jr. More than any other person, he has shaped my understanding of the discipline. His patience and enthusiasm helped bring this project to realization. His knowledge and critiques undoubtedly improved the quality of the final product. I would also like to thank the members of my committee: Thomas Ungs, John Scheb II, Grady Bogue, and Dwight Teeter, Jr. I am indebted to them for their valuable insights, helpful suggestions, and encouragement.

Other faculty members provided wise council. I am appreciative of Joe Anderson, Bob Cunningham, Michael Gant, David Houston, Tony Nownes, and Lilliard Richardson. Several staff members that deserve special recognition are Sue Howerton, Debby McCauley, and Phyllis Moyers. To each of them I owe an extra "thank you."

Many people have made my years in graduate school immensely enjoyable. They include the best friends I have: Todd Freeman, Todd Hare, Brian Howard, Robby Jones, Doug Renalds, Glenn Robins, and Todd Young. Their friendship has been, and remains, invaluable.

Most importantly, I am thankful for my family. My parents, Kenneth and Beth, my sister, Stephanie, and my brother, Andy, have shown me the immeasurable worth of a caring family. My parents often quoted the inscription carved over the front door of my mother's high school: "Education is a possession of which man cannot be robbed." Hopefully, this manuscript reveals the emphasis my parents have placed on education, hard work, and dedication. And finally, my wife Lorena. I cannot thank her enough for the unfailing support she has given so this volume could be completed.

ABSTRACT

Courts formulate doctrines to promote judicial consistency and foster stability. In *Lemon v. Kurtzman* (403 U.S. 602 [1971]), the Supreme Court articulated a three-pronged test to guide Establishment Clause jurisprudence. Since 1971, the Court generally has responded to the church-state question by applying this so-called *Lemon* doctrine (or *Lemon* test). First, the questioned government action must have a "secular legislative purpose." Second, the "primary effect" of the action must not be to advance or inhibit religion. Third, the action must not lead to an "excessive entanglement" between government and religion.

Through an analysis of Supreme Court decisions, this dissertation examines the evolution, alteration, and arguable devolution of the *Lemon* doctrine to determine whether it has been applied consistently over time, to judge whether it has any predictive value, to identify some of the factors that have led to its modification, to explore the future of the *Lemon* doctrine, and to anticipate some general trends in Establishment Clause jurisprudence.

This research concludes that the *Lemon* doctrine has not been interpreted consistently by the Court. Therefore, it has little predictive value. In recent years, the justices have retreated from a mechanical application of the doctrine, thus leading many scholars to conclude that the doctrine teeters on the brink of extinction. However, upon closer examination, it is not clear that the justices will soon part with the *Lemon* doctrine. The animating principles of the doctrine--government's noninvolvement and neutrality in matters of religion--do not appear to be nearing repudiation. Furthermore, the doctrine provides the justices with the necessary discretion to deal with the sensitive matters arising from the Establishment Clause. Barring some personnel changes in the Court or major ideological shifts among the present justices, it is wholly premature to forecast the impending demise of the *Lemon* doctrine.

TABLE OF CONTENTS

CHAPTER PAGE

1. INTRODUCTION 1

Statement of Objectives 2

The Nature and Uses of Constitutional Doctrine 2

Literature Review 11

Thesis 22

Assertions 23

Methods 23

Mode of Analysis 23

Chapter Outline 25

Contributions of the Research 27

2. BRICKS AND MORTAR: THE CONSTRUCTION OF THE WALL 28

Introduction 28

The Puritan Period, 1607-1720 30

Deism and the Great Awakening, 1720-1775 37

The Colonial Period, 1775-1787 39

Virginia 41

Connecticut 45

Delaware 46

Georgia 46

Maryland 46

Massachusetts 47

New Hampshire 47

New Jersey 47
New York 48
North Carolina 48
Pennsylvania 48
Rhode Island 49
South Carolina 49
Vermont 49
The Constitutional Period, 1787-1791 50
The Nineteenth Century Experience 55
Summary 57
3. EVOLUTION OF THE *LEMON* DOCTRINE 58
Introduction 58
Incorporation of the Establishment Clause 60
Everson v. Board of Education (330 U.S. 1 [1947]) 60
Government Aid to Religion 63
Board of Education v. Allen (392 U.S. 236 [1968]) 63
Walz v. Tax Commission (397 U.S. 664 [1970]) 65
Religion in the Public Schools 67
McCollum v. Board of Education (333 U.S. 203 [1948]) 67
Zorach v. Clausen (343 U.S. 306 [1952]) 71
Engel v. Vitale (370 U.S. 421 [1962]) 74
Abington v. Schempp (374 U.S. 203 [1963]) 76
Epperson v. Arkansas (393 U.S. 97 [1968]) 80
Summary and Conclusions 81
4. A PROPOSED RESOLUTION: THE *LEMON* DOCTRINE 84

Introduction 84

Competing Judicial Theories on Separation of Church and State 85

Strict Separation 85

Neutrality 85

Accommodation 87

The *Lemon* Doctrine 88

Lemon v. Kurtzman (403 U.S. 602 [1971]) 88

Summary and Conclusions 101

5. AN OPAQUE DOCTRINE: *LEMON* IN THE 1970s 103

Introduction 103

Government Aid to Religion 103

Tilton v. Richardson (403 U.S. 672 [1971]) 104

Hunt v. McNair (413 U.S. 734 [1973]) 109

Committee for Public Education v. Nyquist (413 U.S. 756 [1973]) 112

Meek v. Pittenger (421 U.S. 329 [1975]) 118

Roemer v. Board of Public Works of Maryland (426 U.S. 736 [1976]) 124

Wolman v. Walter (433 U.S. 229 [1977]) 128

Committee for Public Education v. Regan (444 U.S. 646 [1980]) 131

Summary and Conclusions 135

6. ARGUABLE DEVOLUTION OF THE DOCTRINE: *LEMON* IN THE 1980s 139

Introduction 139

Government Aid to Religion 140

Mueller v. Allen (463 U.S. 688 [1983]) 141

Aguilar v. Felton (473 U.S. 402 [1985]) 144

Witters v. Washington Department of Services for the Blind (474 U.S. 481 [1986]) 148

Religion in the Public Schools 149

Widmar v. Vincent (454 U.S. 263 [1981]) 150

Wallace v. Jaffree (472 U.S. 78 [1985]) 153

Edwards v. Aguillard (482 U.S. 578 [1987]) 159

Religion in the Public Domain 163

Marsh v. Chambers (463 U.S. 783 [1983]) 163

Lynch v. Donnelly (465 U.S. 668 [1985]) 168

Allegheny County v. Greater Pittsburgh ACLU (492 U.S. 573 [1989]) 173

Summary and Conclusions 179

7. THE ENERGIZER DOCTRINE...IT JUST KEEPS GOING...AND GOING...AND GOING: *LEMON* IN THE 1990s 184

Introduction 184

Government Aid to Religion 185

Zobrest v. Catalina Foothills School District (125 L.Ed.2d 1 [1993]) 185

Religion in the Public Schools 188

Westside Community Schools v. Mergens (496 U.S. 226 [1990]) 188

Lee v. Weisman (120 L.Ed.2d 467 [1992]) 193

Board of Education of Kiryas Joel v. Grumet (129 L.Ed.2d 564 [1994]) 199

Rosenberger v. Rector (No. 94-329 [1995]) 205

Religion in the Public Domain 208

Lamb's Chapel v. Center Moriches (124 L.Ed.2d 352 [1993]) 209

Summary and Conclusions 212

8. CONCLUSION: OF MYTH AND REALITY 216

Introduction 216

Analysis of the Three *Lemon* Criteria 217

"Secular Purpose" 218

"Primary Effect" 221

"Excessive Entanglement" 225

Alignment of the Justices with Regard to the *Lemon* Doctrine 230

Factors Contributing to Changes in Establishment Clause Jurisprudence 241

Changes in American Religious Life 242

Changes in American Politics 244

The Future of Establishment Clause Jurisprudence 245

Conclusions 251

BIBLIOGRAPHY 254

VITA 268

LIST OF TABLES

TABLE		PAGE
1.1	List of Supreme Court Decisions to be Examined	24
3.1	Supreme Court Establishment Clause Jurisprudence, 1947-1970	82
5.1	Supreme Court Establishment Clause Jurisprudence, 1971-1980	136
6.1	Supreme Court Establishment Clause Jurisprudence, 1981-1989	180
7.1	Supreme Court Establishment Clause Jurisprudence, 1990-1995	213

CHAPTER 1

INTRODUCTION

Courts formulate doctrines to promote consistency in decision-making. In *Lemon v. Kurtzman* (403 U.S. 602 [1971]), in an opinion written by Chief Justice Warren E. Burger, the Supreme Court articulated a three-pronged test to guide Establishment Clause jurisprudence. The so-called *Lemon* doctrine (or *Lemon* test) provided a framework for judicial decisions concerning the Establishment Clause of the First Amendment to the Constitution, applied to the states through the Fourteenth Amendment. Since 1971, the Court generally has responded to the church-state question by applying this tripartite test. First, the questioned government action must have a "secular legislative purpose." Merely because the action has a purpose of aiding religion, in and of itself, is not grounds for a violation as long as a legitimate secular purpose can be found. Second, the "primary effect" of the action must not be to advance or inhibit religion. Incidental advancement or obstruction will not result in the policy's invalidation. Third, the action must not lead to an "excessive entanglement" between government and religion. If the policy requires an ongoing relationship between these two parties, the likelihood of that policy being struck down increases. This study will examine the evolution, alteration, and arguable devolution of the *Lemon* doctrine to determine whether it has been applied consistently over time, to judge whether it has any predictive value, to identify some of the factors that have led to its modification, to explore the future of the *Lemon* doctrine, and to anticipate some general trends in Establishment Clause jurisprudence.

1. Statement of Objectives

This study has the following objectives:

(1) to explore in general terms the nature and uses of constitutional doctrine as expounded by the Supreme Court;

(2) to examine critically the scholarly literature dealing with the Establishment Clause of the First Amendment, emphasizing research on the doctrine articulated in *Lemon v. Kurtzman* (1971);

(3) to assess the Supreme Court's reliance on the *Lemon* doctrine through a systematic analysis of Supreme Court decisions;

(4) to identify and elucidate some factors that have lead to the evolution, alteration, and arguable devolution of the *Lemon* doctrine; and

(5) to speculate some general trends in Establishment Clause jurisprudence.

2. The Nature and Uses of Constitutional Doctrine

Before addressing the central theme of this dissertation, it is necessary to place this subject in the broader context of constitutional development. The Supreme Court's reliance on doctrine in decision-making has long been an important part of that development. Consistent with this trend, the *Lemon* doctrine was adopted to provide direction in decisions concerning the "establishment of religion." American constitutional history is laden with doctrine. The Court uses doctrine in many areas of constitutional law to help guide decision-making. Indeed, the genesis of constitutional doctrine is almost as ancient as the document itself. Written more than two hundred years ago, the Constitution remains the cornerstone of the American political system. From the perspective of the Federalists, the Constitution was a document that sought to strike a balance between "governmental

power to accomplish the great ends of civil society and...individual liberty."[1] Thus, the Constitution provided a "framework for balancing liberty against power" (Tribe and Dorf, 1991: 6). Perhaps this contention was best stated by James Madison (1788: 87):

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

The Constitution--the self-proclaimed "supreme Law of the Land"--is hardly self-defining. The First Amendment prohibits the passage of laws "respecting an establishment of religion," but fails to define terms such as "establishment" and "religion." The Eighth Amendment proscribes "cruel and unusual punishments," yet declines to specify just what constitutes such punishment. The framers of the Fourteenth Amendment fail to define "privileges and immunities," "equal protection of the law," and "life, liberty, and property." As a result, academicians, lawyers, judges, and others differ in opinion as to the precise meaning and application of the Constitution.

The Constitution assigns the task of adjudicating legal disputes to the judiciary. Article III, Section 2 stipulates: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority...." As a result of this charge, the Supreme Court has been assigned the enormous responsibility of settling constitutional disputes.

American judges inherited the common law methodology from Britain. In a common law system, judges are the most important actors because they formulate legal rules through their decisions. But judges are not unencumbered policy makers. They are not completely free to select

---

[1] Many feel that American constitutional history has been interpreted from a Federalist perpspective, that is, "by the winning side." Subsequently, constitutional history has often given short shrift to the agenda of the Anti-Federalists. For further examination, see, e.g., Main (1961), Jensen (1964), Miller, (1969) Fischer (1970), and Ferguson (1975).

their own preferences in interpreting laws. Settled rules constrain choices. Precedents serve to guide decision-making and prevent arbitrary and inconsistent reasoning. By identifying previous decisions that address similar issues, judges can apply established principles to determine outcome. This concept is commonly referred to as *stare decisis*, which translates "to let the decision stand" *Stare decisis* consolidates the bias in the legal system in favor of preserving established judicial precedent (Barnum, 1993: 236). It is worth noting that the entire phrase is *stare decisis et quieta non movera*, meaning "stand by things already decided and do not disturb the calm."

Because of this reliance on precedent, traditional judicial decision-making has been characterized as a three-step process (Levi, 1948: 1-2). First the judge identifies facts concerning the present case and locates prior cases with similar facts. Next the judge locates the relevant legal principle from the prior case or cases. Finally the judge makes application to the present case, yielding the appropriate result. Judges rely heavily on precedent--the way similar cases were handled in the past--as a guide to decision-making, thus "narrow[ing] the range of alternatives" (Stumpf, 1988: 403). Expressing his belief in this process of decision-making, Justice Benjamin Cardozo wrote: "*Stare decisis* is at least the everyday working rule of the law....Adherence to precedent should be the rule and not the exception" (Cardozo, 1921: 20, 149). Without question, *stare decisis* is a fundamental principle in American jurisprudence.

Through this seemingly mechanical process, a judge may do little more than announce the existing law on the subject. The judicial task is essentially deductive. As summarized by Stumpf (1988: 10):

> Major premise: The command of the sovereign (extant written law usually legislatively enacted)
> Minor premise: The circumstances of the present dispute
> Conclusion: The ruling emerging by force of logic

This "ratiocination of the judicial process," in which the judge simply discovers the law and then announces his discovery became the conventional view of the American judicial process (Stumpf,

1988: 10). However, most scholars and many judges have not accepted this view. Constitutional scholar Roscoe Pound denounced this approach to the law as "mechanical jurisprudence," defined as an objectification of the law with emphasis on formal rules.[2] Pound and others, including Justices Benjamin N. Cardozo and Oliver Wendell Holmes, Jr., and Judge Learned Hand, understood the law to have a greater sociological, political, economical, and behavioral component. Law encompassed more than merely deduction. These scholars favored an approach that emphasized the dual responsibility of judges to preserve continuity and to respond to change (e.g., Holmes, 1881; Cardozo, 1921; Hand, 1953; Pound, 1954).[3] Pound loosely termed this approach to judicial decision-making as "sociological jurisprudence."[4]

Although *stare decisis* is a primary principle of legal decision-making, it is not, nor has it ever been, an ironclad rule (Monaghan, 1988: 727). Every year the U.S. Supreme Court overrules a number of its own precedents. In fact, the practice of overruling precedent is said to be common in constitutional law because if the Court will not change its interpretation of the Constitution, the cumbersome amendment process is the only alternative (e.g., Pritchett, 1971: 77; Bork, 1990: 156). Justices have also commented on the necessity to ignore precedent. According to Justice Lewis F. Powell, Jr., it is not only the Court's "prerogative but also [its] duty to reexamine a precedent where its reasoning or understanding of the Constitution is fairly called into question" (*Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 627-28 [1974] [concurring opinion]). As explained by Justice Felix Frankfurter, "*stare decisis* is a principle of policy and not of a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by

---

[2]The term was apparently first employed by Pound in 1908. See Pound (1908: 605).

[3]This was not to imply that these individuals were opposed to *stare decisis*. Rather, the role of the judge was to balance the need for *stare decisis* with other sociological concerns.

[4]Pound first used the term in 1907. See Pound (1907: 607).

experience (*Helvering v. Hallock*, 309 U.S. 106, 119 [1940])." Justice Louis D. Brandeis once wrote:

> *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right....This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function (*Burnet v. Coronado Oil & Gas Co.*, 205 U.S. 393, 406-408 [1932] [dissenting opinion]).

Many authors have addressed the advantages and disadvantages of judicial reliance on precedent (e.g., Holmes, 1881; Cardozo, 1921; Hughes, 1928; Sprecher, 1945; Pritchett, 1948; Hart, 1961; Murphy, 1964; Schubert, 1965; Ely, 1980; Maltz, 1980; Carter, 1985; Abraham, 1986; Monaghan, 1988; Bork, 1990). Regardless of the debate over the merits of precedent, it is commonly agreed upon that a judge looking at an issue for the second time is, and should be, less free than one who makes the initial observation. "In constitutional law, there is great virtue in stability" (Bork, 1990: 157).

The judicial principle of *stare decisis* promotes stability and continuity in the law, favoring predictability over spontaneity. Closely coupled with precedent is doctrine. According to Black's Law Dictionary, doctrine is "a rule, principle, theory, or tenet of the law." Webster's Unabridged Dictionary defines the term as "a principle or position, or the body of principles, in any branch of knowledge." For purposes of this research, doctrine will be defined as principles of legal interpretation established through past decision. In their efforts to advance fixedness and minimize extemporaneous decision-making, judges have often articulated doctrines by which to guide future cases and controversies. Adherence to doctrine promotes judicial consistency and constrains case-by-case decision-making. The development and study of constitutional doctrine has been the focus of many dissertations (e.g., Twiss, 1938; Stone, 1964; Horan, 1967; Levy, 1973; Graber, 1990; Lind, 1991; Lagon, 1992; Harwood, 1993; Spiceland, 1993; Keating, 1993). Many dissertations

have examined the doctrines of individual justices (e.g., Clark, 1914; Richardson, 1920; Shipman, 1931; Trimble, 1934; Hartman, 1936; Lardner, 1938; Kise, 1938; Carson, 1939; Leavelle, 1941; Trapp, 1943; Steamer, 1954; Binion, 1977).

Jurisprudence is saturated with doctrines. Prior to having one's case or controversy heard by a court, one must pass the threshold requirements of justiciability as stated in the Constitution. Article III restricts the scope of federal judicial power by limiting jurisdiction to cases which either raise certain subjects or involve certain parties. The power of the federal judiciary is limited to "cases" and "controversies." It is from these two words that a number of doctrines prescribing the circumstances under which federal courts may exercise their jurisdiction have emerged. These are known as doctrines of justiciability (or limiting doctrines) and determine which controversies will be addressed by the courts. Justice William J. Brennan surmised that for the threshold requirements to be met, the case must "present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted" (*Poe v. Ullman*, 367 U.S. 497, 509 [1961] [concurring opinion]). These limiting doctrines address such matters as advisory opinions, "standing," "ripeness," "mootness," "political questions," and "exhaustion of remedies" and have received much attention in the scholarly literature (e.g., Post, 1936; Strum, 1974; Radcliffe, 1978; Spann, 1983; Fallon, 1984; Floyd, 1985; Shapiro, 1985).

Yet these limiting doctrines differ sharply from constitutional doctrines that guide decision-making in specific areas. Similar to the principle of *stare decisis*, most doctrines are formulated to serve as benchmarks for congruity in law. In the case of *Plessy v. Ferguson*, the Supreme Court, per Justice Henry B. Brown, set forth the "separate-but-equal" doctrine, which upheld "equal but separate accommodations for the white and colored races" (163 U.S. 537, 540 [1896]). Justice Brown reasoned that the Fourteenth Amendment "could not have been intended in the nature of things...[to] abolish distinction based upon color, or to enforce social, as distinct from political equality, or a commingling of the two races upon terms unsatisfactory to either" (163 U.S. at 544).

This doctrine remained law for fifty-eight years. It was not until *Brown v. Board of Education* (347 U.S. 483 [1954]) that the Court expressly rejected the language of *Plessy* (at least in regard to public schools). In *Brown*, the Court finally readressed this doctrine, having avoided it in its preceding public education cases. Between 1896 and 1954, the Court relied heavily on the separate-but-equal doctrine, using it as justification to repeatedly "humiliate citizens...of a particular race." (163 U.S. at 563, [Harlan, J., dissenting opinion]). The evolution and devolution of this doctrine has been repeatedly and eloquently traced by authors in scholarly literature (e.g., Myrdal, 1944; Frazier, 1949; Bickel, 1955; Wechsler, 1959; Black, 1960; Harris, 1960; Woodward, 1968; Kluger, 1975; Franklin, 1980; Dworkin, 1986; Lofgren, 1987). Many students of the Supreme Court have written dissertations on this doctrine (e.g., Simpson, 1953; Stone, 1964; Preer, 1980; White, 1984; White, 1988; Dugas, 1990; Squib, 1992).

In *Schenck v. United States* (249 U.S. 47 [1919]), the Supreme Court, in an opinion written by Justice Oliver Wendell Holmes, Jr., first articulated a doctrine of "clear and present danger." This doctrine meant that a defendant had the authority to challenge a statute as an unconstitutional abridgment of one's freedom of speech, press, or assembly, and to ask the court or jury to decide "whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction imposed by the legislature" (Konvitz, 1957: 259). In his opinion, Justice Holmes virtually rewrote the First Amendment: "Congress can pass no law..." except when there is a "clear and present danger." This test was formulated with the hope of providing some firm foundation for the ever-present debate over subversive speech. Because this test was not restrictive enough to a Supreme Court majority yielding to war hysteria (and its aftermath), the "clear and present danger" test was replaced by the "bad tendency" test, articulated by the Court in *Abrams v. United States* (250 U.S. 616 [1919]). In *Dennis v. United States* (341 U.S. 494 [1951]), the Court modified this test, promulgating a "clear and probable danger" test. Since 1969, the "clear and

present danger" doctrine has been replaced by the doctrine of "imminent lawless action" (B*randenburg v. Ohio*, 395 U.S. 444 [1969]). This important First Amendment doctrine has received much attention in scholarly literature (e.g., Chafee, 1941; Freund, 1949; Smith, 1956; Konvitz, 1957; Gunther, 1975; Berns, 1976; Bollinger, 1986; Polenberg, 1987; Kalven, 1988).

Another doctrine closely aligned with freedom of speech is the "fighting words" doctrine, first articulated in *Chaplinsky v. New Hampshire* (315 U.S. 568 [1942]). Justice Frank Murphy, writing for the Court, concluded:

> There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words--those which by their utterance inflict injury and tend to incite an immediate breach of the peace (315 U.S. at 572).

This doctrine has spawned many other constitutional questions, including matters such as hostile audiences, offensive language, pornography, obscenity, and hate speech. Scholars have given much attention to this doctrine (e.g., Chafee, 1948; Wade, 1950; Emerson, 1970; Rutzick, 1974; Bickel, 1975; Cox, 1976; Farber, 1980; Redish, 1982; Polenberg, 1987). Several students have also chosen "fighting words" for dissertation topics (e.g., Vibert, 1981; McEnter, 1990; Roppa, 1993).

Another doctrine of note is "compelling state interest." In the name of national or public interest, states have often curtailed the activities of members of a certain race or ancestry. One example of a "compelling state interest" derived from the internment of Japanese-Americans during World War II (*Korematsu v. United States*, 323 U.S. 214 [1944]). In *Korematsu*, the Court, speaking through Justice Hugo Black, recognized that racial classifications were inherently suspect, but concluded that the dangers of war presented the government with a compelling interest for such extreme matters as internment based solely on nationality. Black declared that "all legal restrictions which curtail the civil rights of a single group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the

most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can" (323 U.S. at 216). This doctrine held that government must, in order to meet the required burden, show that its policy was necessary to the achievement of a compelling interest.

It was not until *Loving v. Virginia* (388 U.S. 1 [1967]) that the Court, in an opinion written by Chief Justice Earl Warren, retreated somewhat from this doctrine. Acting under the "suspect classification" doctrine, the Court determined that laws imposing invidious racial discrimination required a very heavy burden of state justification. Thus, if they are to be upheld, the laws "must be shown to be necessary to the accomplishment of some permissible state objective" (388 U.S. at 9). Authors (e.g., Wechsler, 1959; Bickel, 1962; Gunther, 1964; Phillips, 1971; Gunther, 1972; Wilkinson, 1975; Cover, 1982) and dissertations (e.g., Romans, 1981; Brandly, 1986; Neeley, 1989) have examined the doctrine of "compelling state interest" at great length.

Most of the enforceable guarantees of individual rights protect individuals from impermissible government action, and not from private action. This is known as the "state action" doctrine and limits constitutional prohibitions to official government or government-sponsored action, as opposed to action that is merely private in character. This doctrine was originally announced in *The Civil Rights Cases* (109 U.S. 3 [1883]) and remains good law to this day. The Court's initial statement was that the Fourteenth Amendment forbade only those denials of due process or equal protection "sanctioned in some way by a state" or "done under state authority." Justice Joseph Bradley wrote: "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment [Fourteenth]...." (109 U.S. at 11). The Supreme Court and federal courts have used this doctrine to regulate election fraud (*Classic v. U.S.*, 313 U.S. 299 [1941]), police brutality (*Screws v. U.S.*, 325 U.S. 91

[1945]), police inaction (*Lynch v. U. S.*, 189 F.2d 476 [1951]),[5] primary elections (*Terry v. Adams*, 345 U.S. 461 [1953]), and discrimination in public accommodations (*Burton v. Wilmington Parking Authority*, 365 U.S. 715 [1961]). As with most constitutional doctrines, "state action" has received much scholarly attention (e.g., Wechsler, 1959; Lewis, 1961; Williams, 1963; Van Alstyne, 1965; Bickel, 1970; Fairman, 1971; Burke and Reber, 1973; Nozick, 1974; Brown, 1976; Nerken, 1977; Choper, 1979; Stephens and Bowen, 1991). Many dissertations have addressed "state action" (e.g., Graves, 1936; Moreland, 1969; Levy, 1973; Harris, 1978; Makau, 1979; Murphy, 1979; Davis, 1981; Fleetwood-Bartee, 1982; Jackson, 1982; Yow, 1982; Walden, 1991; Harwood, 1992; Bodie, 1993).

As easily can be seen, the Supreme Court often articulates constitutional doctrines to assist in its decision-making process. Other doctrines not discussed, but which have affected legal adjudication, include the doctrines of "fairness," "incorporation," "marketplace of ideas," "original package," "overbreadth," "prior restraint," "public interest," and "vagueness," to name a few. These doctrinal efforts by the Court have not gone unnoticed by authors in their publications or by scholars in the dissertation pursuits. As previously noted, legal doctrine plays an important role in Supreme Court jurisprudence. The Court articulates doctrines in an effort to provide some consistency to adjudication. Doctrines promote consistency and foster stability.

3. Literature Review

Concern for religious liberty has been present on the North American continent since the arrival of the Puritans in the seventeenth century. From that concern, a vast body of literature has emerged addressing the relationship between religion and government. Puritan theologians such as

[5]There was a time, the Court reasoned, when the denial of equal protection of the law was confined to affirmative acts. However, in this and future cases, culpable official inaction also constituted a violation of equal protection.

Roger Williams and Cotton Mather explored this issue as far back as the seventeenth century. Williams (Gausted, 1957; Morgan, 1965; Gey, 1966; Morgan, 1967) did not fear, as later some would, that religion would infect the state but rather that the state would corrupt and destroy religion, should the two become intertwined. Thus, he advocated that religion be divorced from government.

Yet theologians were not the only individuals to examine this matter. Thomas Jefferson believed that a separation between church and state was necessary, because he, juxtaposed to Williams, feared that religion would corrupt the state. Many colonists echoed these sentiments, as evidenced by the inclusion of some type of mechanism to promote religious freedom and protect individual liberty found in a majority of the state constitutions of the 1770s. It was also during this period that Thomas Jefferson penned the Virginia Bill for Religious Liberty, passed in 1786. This Bill was perhaps the forerunner to the Establishment Clause of the First Amendment and the "wall of separation" principle.[6] The opening paragraph of the Virginia Bill stated:

> Well aware that the opinions and belief of men depend not upon their own free will but follow involuntary from the evidence proposed to their minds; that Almighty God has created the mind free, and manifested His supreme will that free it shall remain by making it altogether insusceptible of restraint; that all attempts to influence it by temporal punishments, or burdens, or by civil incapacitation tend only to begat 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, as was in His almighty power to do, but to extend it by its influence on reason alone.

The Constitution of the United States, framed in 1787, did not include a Bill of Rights.[7] Many persons deemed the inclusion unnecessary because they regarded the newly established government as one of enumerated powers only. It soon became evident that those in control at the Constitutional Convention had erred. Seeking to correct that oversight, the First Congress, under

---

[6]This phrase was apparantly first used by Jefferson in a letter addressed to the Danbury Baptist Convention of Connecticut in 1802.

[7]It should be noted that supporters of the Constitution agreed during the ratification process to add a Bill of Rights in exchange for support of the new Constitution.

the leadership of James Madison, passed the first ten amendments to the Constitution. Ratified by the states on December 15, 1791, those first ten amendments have become known as the Bill of Rights, perhaps the most precious part of the American legal heritage. These 462 words provide an ample statement of fundamental libertarian principles.

The First Amendment to the Constitution provided: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; of abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition government for a redress of grievances." Of all the guarantees found in the Bill of Rights, "the forty-five words that comprise the First Amendment are...the most precious of all....Taken together,...the guarantees of the First Amendment freedoms of religion, speech, press, and assembly...are the bedrock of American freedom" (Konvitz, 1957: vii).

The historical importance of religion in America was evidenced not only by its inclusion among the guarantees in the Bill of Rights, but also through the writings of such statesmen as Thomas Jefferson and James Madison.[8] Jefferson (Koch, 1943; Healy, 1962; Padover, 1965) was suspicious of institutionalized religion, fearing that it might lead to a corrupting influence on politics. Religion was deeply imbedded in human feeling and, thus, a matter of sacred privacy. According to Jefferson, "Genuine religion could be maintained only through the free volition of the individual, giving no ruler or organized body the right to intermeddle in the sacred privacy of personal belief" (quoted in Padover, 1965: 71).

Madison is largely credited with the wording found in the Bill of Rights. He believed that religion fostered civic virtue, yet favored religious freedom through the preservation and encouragement of multiple denominations. Madison wrote in *The Federalist No. 51*: "In a free government the security for civil rights must be the same as that for religious rights. It consists in

[8]These two philosophers, even to this day, are generally considered to have exerted formative influence on the legal relationship between religion and politics in America.

the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects" (Madison, 1788: 91-92). During the early years of the United States, the framers of the First Amendment gave Americans the direction "to embark on a bold new journey through democracy based on religion free of government, and government free of religion" (Morokuma, Nelson, and Newton, 1993: 1).

Several Authors have identified the importance of religion in the history of America (e.g., Toqueville, 1945; Bainton, 1958; Allport, 1962; Katz, 1964; Stokes and Pfeffer, 1964; Burke, 1965; Morgan, 1967; Gausted, 1968; Kendall and Carey, 1970; Morgan, 1972). One of the clearest and earliest accounts of this heritage can be found in Toqueville's assessment of the principle causes that rendered religion powerful in America. Toqueville (1945: 319) noted that "while in America, one of the freest and most enlightened nations in the world, the people fill with fervor all the outward duties of religion." Toqueville, a Frenchman visiting America in the 1830s, further wrote that upon his arrival in the United States that "the religious aspect of the country was the first thing that struck my attention; and the longer I stayed there the more I perceived the great political consequences resulting from this new state of things" (1945: 319). He concluded: "In America, religion is less powerful than it has been at certain periods and among certain nations; but its influence is more lasting" (1945: 323).

The relationship between religion and the law has also been heavily chronicled (e.g., Kurland, 1962; Tussman, 1962; Oaks, 1963; Kauper, 1964; Stedman; 1964; Howe, 1965; Morgan, 1968; Morgan, 1972; Sorauf, 1976). With regard to the Establishment Clause, Kurland believed that much of what the Court had done in this area was muddled in misunderstanding. He (1962: 25) referred to several decisions of the Court as the "apocrypha" of church-state law--the established doctrines believed to be what they in reality were not. Kurland did an exemplary job of clarifying some of the ambiguities and misconceptions surrounding the Establishment Clause.

One detailed, historical account of the relationship between religion and law was conducted by Morgan (1972). Morgan's work was important for at least four reasons. First, it constituted a "basic history" of court decisions concerning the First Amendment religion clauses absent political and legal analysis. Morgan (1972: vii) readily admitted in his introduction: "The journal literature is far superior, but it is not easily accessible to university students and is not accessible at all to that beau ideal of authors, the general reader." Second, his account provided a short description, analytically sound yet possible to understand, of an intrinsically important area of constitutional law. Third, it investigated the tension between doctrinal consistency and political acceptability, specifically with regard to the religion clauses. Morgan (1972: 3) noted that the Court's work with the religion clauses is an "excellent illustration of why the debate over the importance of doctrinal consistency is fully as important as the debates over whether the policy outputs in particular areas are wise or acceptable." Finally, Morgan's work, coupled with the timing of the Supreme Court decision in *Lemon v. Kurtzman* (1971), has stimulated subsequent analysis and further review of the religion clauses, with specific emphasis on the Establishment Clause.

After a brief history of religion in the American experience, Morgan detailed the Free Exercise and Establishment Clause controversies that came before the Supreme Court, beginning with the Mormon polygamy case of *Reynolds v. U.S.* (98 U.S. 145 [1879]) and concluding with the seminal case in this study, *Lemon v. Kurtzman* (1971). Morgan concluded as to the Establishment Clause: "The Court has done well to the extent it has retreated from the quite sweeping theory of separation [in] *Everson* [*v. Board of Education,* 330 U.S. 1 (1947)]" But his analysis included some caution: "*Lemon* was a step backward" (1972: 206). Timing prevented Morgan from further analysis as to the Court's adherence to the newly established doctrine in *Lemon.*

The Establishment Clause of the First Amendment has been interpreted in many different and often conflicting ways. There is still heated debate among judges, historians, and other constitutional scholars concerning the original meaning and present application of this clause.

Much of the debate is fueled by differing opinions concerning the clause. Speaking in general terms, authors and justices can be classified as falling into one of three categories: strict separation, neutrality, or accommodation.

Strict separation is best characterized as the evolution of Jefferson's doctrine of separation of church and state. In *Everson v. Board of Education* (330 U.S. 1 [1947]), the first true Establishment Clause case to reach the Court and the one that applied the Establishment Clause of the First Amendment to the individual states through the Fourteenth Amendment, Justice Hugo Black claimed that the First Amendment meant "neither [a state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another....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'" (330 U.S. at 15-16). This approach maintains that government and religion operate in separate arenas, and the excessive influence of either need not be imposed on the other.

Kurland (1962: 18) argued that formal neutrality should be the measure of whether government action violates the First Amendment. The two religion clauses, taken together, formulate the precept that government may not "utilize religion as a standard of action or inaction because these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden." This understanding holds formal neutrality to be the seminal requirement of government. It is difficult, indeed impossible, for government to be completely immune from religion, for religion is a social phenomenon. Thus, neutrality is the proper approach.

Accommodationist theory believes that government has a responsibility to accommodate the history and desires of its people. McConnell (1985: 14) noted:

> The nation is understood not as secular but as pluralistic. Religion is under no special disability in public life; indeed, it is at least as protected and encouraged as any other form of belief or association--in some ways more so. The idea of accommodation of religion, which is foreign to interpretations of the Religion Clauses based on strict neutrality or separation follows naturally from the pluralistic understanding.

As expressed by Justice William O. Douglas: "We are a religious people whose institutions presuppose a Supreme Being." As a result, the Court does not have to read into the Establishment Clause a "philosophy of hostility to religion" for there is

> no constitutional requirement which makes it necessary for government to be hostile to religion and throw its weight against efforts to widen the effective scope of religious influence....When a state encourages religious instruction or cooperates with religious authorities...it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs" (*Zorach v. Clauson*, 343 U.S. 306, 313-314 [1952]).

Numerous dissertations have also focused on some aspect of separation of church and state, as framed by the mandates of the First Amendment (e.g., Johnson, 1966; Morgan, 1967; West, 1971; Dowdall, 1977; Frey, 1982; Morrison, 1983; Lyen, 1986; McNeely, 1986; Goldsmith, 1987; Knight, 1987; Meier, 1987; Tilley, 1987; Drakeman, 1989; Bauer, 1990; Guliuzza, 1990; Ignagni, 1990; Temple, 1990; Wilson; 1990; Mandel, 1991; Gunn, 1992). For purposes of this study, four recent dissertations merit consideration: Guliuzza (1990), Ignagni (1990), Mandel (1991), and Gunn (1992).

Guliuzza (1990) prefaced his research with his belief that the Court has failed to interpret the religion clauses consistently, often applying differing standards. He further presupposed that Establishment Clause analysis was suspect and the legal reasoning counterintuitive. The purpose of the dissertation was to identify inconsistencies in establishment decisions and to propose a way to "rescue" the Supreme Court from those inconsistencies. Guiliuzza's thesis was that the Court's inconsistency resulted from a misunderstanding of the framers' intent for the Establishment Clause.

Ignagni (1990) examined this issue with respect to the tenure of Warren Burger as Chief Justice. His dissertation attempted to refute the claims of many scholars as to the unpredictability of the Court's decisions during this time. To demonstrate the Court's predictability in Establishment Clause adjudication, he used a fact-attitudinal model derived from judicial behavior theory, cybernetic decision making theory, and the writings of the justices themselves. Ignagni

concluded that his model had explanatory and predictive value and that Establishment Clause decisions were much more consistent than current scholarly opinion maintained.

Mandel (1990) probed the fluidity of Establishment Clause decisions by focusing on the religion issue not only in the courts, but also in Congress. His thesis hypothesized that inconsistency was not the result of ongoing "checking and balancing" among governmental branches but rather a product of policy conflicts within the judiciary. He concluded that interested parties had greater input through litigation efforts before the courts than through legislative channels. In other words, the Supreme Court was more accessible to certain parties than Congress. Thus, the justices were policy-makers, heavily influenced by certain constituents.

The accommodationist perspective posits that the Establishment Clause permits the government to promote and encourage religion. Gunn (1991) challenged this position by questioning the adequacy of the theory's historical analysis. He concluded that the Establishment Clause cannot be interpreted solely by the text, but rather must be interpreted with respect to the broader philosophy championed by the Constitution, including the right of citizens to be treated equally by the government.

Professional journal articles on the *Lemon* doctrine are too numerous to discuss in full detail. Authors have dealt with the *Lemon* test in regard to compulsory school attendance (e.g., Dent, 1993), school (classroom, graduation, and athletic event) prayers (e.g., Johansen, 1993; Martin, 1993), financial aid (e.g., Segall, 1991), public school chaplains (e.g., Titus, 1991), access to school facilities (e.g., Goldsmith, 1990), national holidays (e.g., Blackburn, 1990), school curricula (e.g., Brownstein, 1990; Blewitt, 1988; Polifka, 1988; Schimmelpfennig, 1987), nativity scenes (e.g., Judges, 1989; Fairchild, 1985)), Christmas programs (e.g., Schedler, 1987), and school funding (e.g., Killian, 1986). In the past ten years, over seventy-five scholarly articles (on the *Lemon* doctrine) have appeared in law reviews alone. Similarly, other scholarly journals

have analyzed the controversial doctrine. Scholarly approaches to the study of this doctrine, as well as opinions on the current state of the doctrine, are diverse and varied.

For example, Cox (1984: 1176) held: "Although the members of the Court have not always agreed on the way that courts should apply these criteria [*Lemon's* prongs], the Court consistently has acknowledged the *Lemon* test as the foundation of Establishment Clause analysis." However, Cox believed that two decisions of the Court, *Marsh v. Chambers* (463 U.S. 783 [1983]) and *Lynch v. Donnelly* (465 U.S. 668 [1984]) casted some serious doubt on the validity of the *Lemon* test. Both of these decisions relied heavily on the historical significance of religious symbols rather than upon established doctrine. He (1984: 1177) argued that the Court's trend "toward basing Establishment Clause analysis on the historical significance of government-sponsored religious activities represented an undesirable move away from the strict examination of the questionable law or activity under the *Lemon* test." Cox (1984: 1202) concluded that the recent decisions of the Court demonstrated the Court's willingness to exclude from the scope of Establishment Clause protection "minor encroachments that the Court believes either do not pose that actual dangers which the Framers feared in the eighteenth century church, or that merely constitute the government's routine historical recognition of religion in American society." Accordingly the Court desperately needed to reaffirm its devotion to the strict tripartite test articulated in *Lemon*.

Three years later, Simson acknowledged that the decisions in *Marsh* and *Lynch* seemed to indicate that the *Lemon* test was "headed for obsolescence."[9] But here he diverged from Cox's proposition and held that just the opposite had occurred. In his opinion, the *Lemon* test emerged from those decisions not only intact, "but to some extent revitalized in substance....Very simply, the promotion of religion is something that most people--judges included--have difficulty seeing as bad" (1987: 907-908). Simson urged the Court to promote a new interpretation of the test--one

[9]Simson (1987: 906) accused then Chief Justice Burger of spearheading the attack.

that provided consistency. He then offered his advice to the justices (1987: 935). The first prong should be revised "to require that the decision not to adopt a law not depend upon the consideration of nonsecular purposes." The second prong should be amended "to require that a law not have a substantial effect adverse to the clause unless the law is necessary to serve a substantial governmental interest." And that the third prong should be completely eliminated.

Esbeck (1990: 515) explored the difficulty that the Court has encountered in attempting to balance the *Lemon* doctrine with free speech and political rights, while at the same time refraining from upholding laws that violated the establishment of religion. He concluded that the Court has used the *Lemon* doctrine to protect free speech and political participation by applying "greater or lesser rigor in the purpose and effect prongs" depending on whether the law in question was considered "inherently religious" (1990: 543). Esbeck (1990: 547) further offered reasons for the failure of the *Lemon* doctrine. The primary reason for its failure was the vagueness of the wording found in the *Lemon* opinion. He concluded that "reliance upon a doctrinal test that hinges on the word 'accommodation' is almost useless in legal argument." According to this author (1990: 548), the Court has failed to embrace a new approach to the Establishment Clause because it was "better to live with the devil we do know, than the devil we don't."

Massey (1993) examined the *Lemon* doctrine following the Court decision in *Lee v. Weisman* (120 L.Ed.2d. 467 [1992]). Following this decision, Massey (1993: 107) noted that a majority of the Court members (Chief Justice Rehnquist and Justices White, O'Connor, Scalia, Kennedy, and Souter) had expressed dissatisfaction with the *Lemon* test. He noted that most of the controversy with *Lemon* was contained within its "secular purpose" and "excessive entanglement" prongs. Also, while the precise language of the "primary effect" prong was not directly under attack, the application of that prong was subjected to serious questions. Because of these infirmities, two alternative tests had been proposed: Justice Sandra Day O'Connor formulated an "endorsement" test and Justice Anthony M. Kennedy promulgated a test based on "coercion."

While the goal of both tests was simplification, neither of the newly articulated tests had achieved a majority on the justices' support. As a result, *Lemon* remained good law, only nobody knew "to what extent." The *Lemon* doctrine somehow survived from "case to case" (1993: 122).

Finally, in a symposium addressing religion and the public schools, Paulsen (1993) and Concklc (1993) debated the pulse of the *Lemon* doctrine. Paulsen's proposition (1993: 797) was that the Court had interred the *Lemon* test and replaced it with a "coercion" test, even though it was a test with uncertain parameters and an unclear future. Paulsen applauded the passing of *Lemon*, and placed his faith in its successor. He (1993: 797) summarized this new test in light of *Lee v. Weisman*: "Government may not, through direct legal sanction (or threat thereof) or as a condition of some other right, benefit, or privilege, require individuals to engage in acts of worship, expression, or affirmation, nor may it require individuals to attend or give their direct and personal financial support to a church or religious body or ministry." This definition excluded the fatal flaw of *Lemon*--the imposition of a constitutional disability of religion (1993: 801). Paulsen's thesis was that *Lemon* has not been applied in any of the last four Establishment Clause cases, and *Weisman* revealed that the doctrine had few, if any, supporters. Hence, *Lemon* was dead.

In a response to this assertion, Conkle (1993) disagreed. This author (1993: 866-867) did not see *Lemon* as being hostile to religion.

> While others see hostility to religion, I see something more complex. While others see unworkable incoherence, I see the exercise of judgment. I see the Court attempting to protect the sensibilities of religious and irreligious minorities. I see the Court attempting to promote a religiously inclusive political community, not by mindlessly excluding religion from American life, but rather by a context-specific, case-by-case analysis of particular problems.

The doctrine of *Lemon* was never meant to be a "talismanic rule of law" (1993: 867). It was merely meant to guide the Court in a complex area of adjudication. "Establishment Clause analysis is a matter of degree" (1993: 869). *Lemon* was a pragmatic test for evaluating challenges to the Establishment Clause, and was better than the "coercion" test because the "coercion" test

divorced the Court's analysis of "various relevant factors, including the presence or absence of noncoercive injuries" (1993: 873). Conkle (1993: 882) believed that Paulsen's assessment concerning the effect of *Weisman* on the doctrine was misguided. The Court did not kill *Lemon*; instead, they honored it by applying a "multiple-variable, context-specific approach," which was the essence of the *Lemon* doctrine.

At the very least, it is clear that interpretation of the Establishment Clause is somewhat confusing. The review of the literature indicates that many questions remain unanswered. The *Lemon* doctrine was established to provide some consistency to decision-making in the Establishment Clause area. Most authors conclude that it has not done so.

4. Thesis

Courts formulate doctrines to provide consistency and promote stability in decision-making. The *Lemon* doctrine has done neither. Thus, with respect to the Establishment Clause, doctrinal consistency and stability is a myth. In recent years, the justices have refused to even apply the doctrine, thus leading many scholars to conclude that it teeters on the brink of extinction. However, upon closer examination, it is not clear that the justices will soon part with the *Lemon* doctrine. The animating principles of the doctrine--government's noninvolvement and neutrality in matters of religion--do not appear to be nearing repudiation. Moreover, the doctrine provides the justices with an adequate framework and the necessary discretion to deal with the sensitive matters arising from the Establishment Clause. Barring some personnel changes in the Court or major ideological shifts among the present justices, it is wholly premature to forecast the impending demise of the *Lemon* doctrine.

5. Assertions

This research will test the following assertions.

A1: The *Lemon* doctrine has not been interpreted consistently by the Court and thus has little predictive value.

A2: The justices have retreated from a mechanical application of the *Lemon* doctrine, yet do not appear poised to abandon the doctrine.

A3: The *Lemon* doctrine's animating principles--government's noninvolvement and neutrality in matters of religion--appear firmly entrenched.

6. Methods

The method employed will be a systematic, empirical analysis of Establishment Clause jurisprudence. The data are Supreme Court decisions and scholarly commentary.

7. Mode of Analysis

To test the first assertion (A1), I will examine Supreme Court decisions dealing with the Establishment Clause since incorporation in 1947. Table 1.1 provides a list of the decisions that will be analyzed. While primary attention will be directed toward decisions rendered between 1971 and 1995, it is necessary to address some establishment cases prior to 1971 in order to analyze the evolution of the doctrine articulated in *Lemon*. These cases demonstrate the differing results engendered by the doctrine. Accordingly, the doctrine's predictive value has been greatly reduced.

The debate over the proper parameters between church and state has not been resolved in the public square or firmly articulated by the Court. In the 1994-1995 term, the Supreme Court agreed to hear an Establishment Clause case. This case confronts the justices with the issue of the

Table 1.1 List of Supreme Court Decisions to be Examined

Year	Title of Case	Citation
1947	*Everson v. Board of Education*	330 U.S. 1
1948	*McCollum v. Board of Education*	333 U.S. 203
1952	*Zorach v. Clausen*	343 U.S. 306
1962	*Engel v. Vitale*	370 U.S. 421
1963	*Abington v. Schempp*	374 U.S. 203
1968	*Board of Education v. Allen*	392 U.S. 236
1968	*Epperson v. Arkansas*	393 U.S. 97
1970	*Walz v. Tax Commission*	397 U.S. 664
1971	*Lemon v. Kurtzman*	403 U.S. 602
1971	*Tilton v. Richardson*	403 U.S. 672
1973	*Hunt v. McNair*	413 U.S. 734
1973	*Committee For Public Education v. Nyquist*	413 U.S. 756
1975	*Meek v. Pittenger*	421 U.S. 329
1976	*Roemer v. Board of Public Works of Maryland*	426 U.S. 736
1977	*Wolman v. Walter*	433 U.S. 229
1980	*Committee For Public Education v. Regan*	444 U.S. 646
1981	*Widmar v. Vincent*	454 U.S. 263
1983	*Mueller v. Allen*	463 U.S. 388
1983	*Marsh v. Chambers*	463 U.S. 783
1985	*Lynch v. Donnelly*	465 U.S. 668
1985	*Wallace v. Jaffree*	472 U.S. 38
1985	*Aguilar v. Felton*	473 U.S. 402
1986	*Witters v. Washington Department of Services for the Blind*	474 U.S. 481
1987	*Edwards v. Aguillard*	482 U.S. 578
1989	*Allegheny County v. Greater Pittsburgh ACLU*	492 U.S. 573
1990	*Westside Community Schools v. Mergens*	496 U.S. 226
1992	*Lee v. Weisman*	120 L.Ed.2d 467
1993	*Lamb's Chapel v. Center Moriches*	124 L.Ed.2d 352
1993	*Zobrest v. Catalina Foothills*	125 L.Ed.2d 1
1994	*Board of Education of Kiryas Joel v. Grumet*	129 L.Ed.2d 546

extent to which government must accommodate religious desires. The seminal question is whether the University of Virginia properly applied the Establishment Clause when it refused to expend public funds to subsidize a student publication of a Christian magazine. This case symbolizes the Court's current struggle in Establishment Clause jurisprudence and society's interest in the constitutional boundaries between church and state.

To test the second assertion (A2), I will analyze the Court's more recent efforts in adjudicating Establishment Clause matters. In the 1990s, the Court has backed away from a perfunctory, unconscious, mechanical application of the doctrine. At least five justices have expressed some reservations about the doctrine. Many justices have suggested modifications to the test. Two justices have proposed separate alternatives to the doctrine. Others have recommended that the *Lemon* precedent be wholly discarded. Nonetheless, *Lemon* remains the only doctrine ever agreed upon by a majority of justices with respect to this matter. The doctrine's application has been modified, yet the present Court does not appear poised to abandon its yardstick for measuring violations of the Establishment Clause. I will also explore the argument that the justices appear willing to "sacrifice clarity for flexibility." In such a sensitive area of constitutional law, discretion may well trump consistency. And resiliency may outweigh the judicial interest in stability.

To test the third assertion (A3), I will evaluate the major modifications and alternatives proposed to the doctrine. Even though these have modified *Lemon's* application, the fundamental premise of the doctrine--government's noninvolvement and neutrality in matters of religion--remains the commitment of a majority of justices.

8. Chapter Outline

This dissertation will be divided into eight chapters. This first chapter will serve as the introduction--an examination in general terms the nature and uses of constitutional doctrine

coupled with a dissertation overview. Chapter 2 retraces the development of the "wall of separation" between government and religion in America. This chapter examines some of the early influences on church and state relations (e.g., Roger Williams, William Penn), but focuses primarily on the subject matter during the colonial period (e.g., state constitutions, bills of rights, bills of religious liberty, U.S. Constitution, First Amendment, Establishment Clause, "intent of the framers," Thomas Jefferson, James Madison).

Chapter 3 looks at the evolution of the *Lemon* doctrine, beginning with the application of the Establishment Clause to the states through the Fourteenth Amendment in 1947. This chapter includes Establishment Clause cases preceding *Lemon*. Many scholars believe that the roots of the *Lemon* doctrine can be traced to the school prayer decisions of the early 1960s. Chapter 4 addresses in greater detail the competing theories of separation of church and state--strict separation, formal neutrality, and accommodation. This chapter will also examine the decision in *Lemon v. Kurtzman* and illuminate upon the articulated doctrine. The fifth chapter analyzes the expansion of *Lemon* doctrine and its application to cases other than those dealing with school aid. Many of these cases were decided in the 1970s. Chapter 6 explores some of the difficulties that the Court has found with application of *Lemon*, and its arguable devolution, by honing in on cases during the 1980s. The seventh chapter discusses the present status of the *Lemon* doctrine by looking at the cases during the first five years of the 1990s, as well as an upcoming case to be decided in the 1994-1995 term.

Chapter 8 offers a "status report" on the viability of the doctrine, including a look at the various positions of the sitting justices. This chapter summarizes the scholarly criticism on the doctrine, addresses some factors that have contributed to changes in Establishment Clause adjudication, and anticipates some trends in Establishment Clause jurisprudence. This final chapter also confronts the "myths and realities" of constitutional doctrine.

9. Contributions of the Research

Religious wars are only slightly younger than religion itself and America is not immune to those battles. It is the assertion of some that religious liberty in America is at a crossroads (Morokuma, Nelson, and Newton, 1990). Growing cultural diversity pulls at America's freedoms. Misunderstanding, ignorance, fear, and arrogance threaten the fabric of our religious freedom.

This research is important to the study of Establishment Clause jurisprudence for the following reasons.

(1) This research adds to the current literature which emphasizes the importance of understanding constitutional doctrines.

(2) This study defines doctrine pragmatically through an analysis of one particular doctrine's haphazard journey over a period of years.

(3) This analysis addresses the factors which have lead to alterations in adjudication in this convoluted area of constitutional law.

(4) This dissertation clarifies the continuing impact of the *Lemon* doctrine.

(5) This study offers some general speculations regarding Establishment Clause jurisprudence.

(6) This dissertation advances some implications that the *Lemon* doctrine might have for constitutional doctrine in general.

CHAPTER 2

BRICKS AND MORTAR: THE CONSTRUCTION OF THE WALL

1. Introduction

"Give to Caesar what is Caesar's, and to God what is God's."[1] The previous statement is attributed to Jesus Christ as his response to a question concerning the relationship between government and religion. But his answer was not abundantly clear. Just what exactly was to be rendered unto Caesar? And what was to be rendered unto God? Two thousand years later, the relationship between church and state similarly remains unclear.

Of all the liberties a person might be offered, perhaps none are more important than those in the area of religion. In the human experience, religion is perhaps the most profound influence, and likewise, a most cherished freedom. Broadly speaking, religion includes forms of belief in the "existence of superior beings exercising power over humans and imposing rules of conduct with future rewards and punishments" (Torpey, 1948: 3). A government that will coerce its citizens in this domain will hardly think twice about temporal coercion. Should it dictate to citizens in the most personal of all relationships--namely, the relationship between individual and Creator--it is not too much of a stretch to assume that government possesses the authority to mandate all other types of relationships; or, if taken to the extreme, to dictate the whole of life.

In constitutional disputes, of which separation of church and state is one, appeals to the "intent of the framers" are made early and often. In order to understand the scope of religious freedom found in America today, it is not only desirable, but necessary to have some knowledge of the historical events and circumstances which led to the promulgation of the religion clauses of the

[1] *Matthew* 22: 21 (New International Version).

First Amendment. There is much more in the history of church-state relations than merely the Constitution and decisions of the Supreme Court. There is a history vivid with helpful insights for understanding this relationship. Of particular significance are the contributions of Roger Williams, William Penn, Thomas Jefferson, and James Madison. Today, many Americans take for granted that religion is a private matter and of no concern to the state. They fail to recognize the infancy of the doctrine of separation of church and state in the annals of history (Pfeffer, 1953: 3).

Ask any junior high student why the Puritans came to America and the answer will almost certainly be: "To secure religious freedom." Clearly, the history of the North American continent is replete with religious overtones. From the settlements at Plymouth Rock to the theocratic constitutions of various states lasting well into the nineteenth century, religion was a social phenomenon of great magnitude. However, this phenomenon cannot be fully explained in terms of a "quest for religious freedom." Indeed, the forces of intolerance and exclusivity were no less important in the religious life of colonial America. "Nowhere...at the beginning of the American colonization was there anything like religious toleration...that is, the right of any person to join any church he or she pleased, or none at all, and to express his or her opinions freely on matters of religion" (Beard, 1944: 12). While religious toleration served as a rallying cry for those seeking refuge in America, it was not to become a tenet for their newly established society. Many of those who came to the New World to escape religious persecution soon persecuted. History has recorded the bitter struggles of humanity concerning the efforts of religious zealots who sought to impose their beliefs upon the unwilling, often using government as a means to accomplish their objectives. The early American experience was no different.

This chapter examines the influence of religion on American political culture. It retraces the development of the "wall of separation" between church and state. This chapter briefly addresses some of the contributions of early religious separatists, but focuses primarily on church and state relations during the colonial period.

2. The Puritan Period, 1607-1720

Broadly speaking, in the seventeenth and eighteenth centuries, theology and politics were woven together not only in Europe, but also on the North American continent.[2] Some colonies favored the establishment of one particular religion, as in Virginia, the Carolinas, and Georgia. Others favored multiple establishments--New York, New Jersey, and Maryland. Still a third component favored no establishment whatsoever and included Rhode Island, Pennsylvania, and Delaware.

In the early seventeenth century, the Anglican establishment (the Church of England) required all English citizens, regardless of their personal religious beliefs, to attend church and pay taxes to support the church. The establishment also prohibited unorthodox worship and punished dissenters. Religious dissenters were even barred from holding public office. At the first permanent English settlement in America--Jamestown, Virginia--settlers were convinced to enact similar requirements. One's conformity to the established church was indicative of good citizenship; nonconformity led to expulsion. The initial Virginia charter, granted in 1606, mandated church attendance and compelled monetary support for the church and clergy. These laws of establishment affirmed the idea that the settlers were "one people organized into two coordinate bodies: church and state" (Miller, 1988: 1369). At least in Virginia, the Anglican church not only received financial support from the state, but also various legal privileges that were not afforded to other faiths. What was acceptable and appropriate in Virginia was primarily true in other southern colonial settlements in the Carolinas and Georgia: the church was a department of the state and religious dissent was civil disorder (Torpey, 1948: 9).

---

[2]Roche (1964: 7-11) provides an excellent overview of the early colonist's original conceptions concerning religious toleration and intoleration.

Several years later, a Puritan establishment emerged. This establishment adhered closely to the teachings of John Calvin, the reformationist who turned Geneva into a church state, and the Congregationalist Church, which taught that the state existed to enforce true religion. These early colonist did not accept the Anglican doctrine that the civil government was the supreme authority in all religious affairs. They feared that the crown might be unaccepting of their orthodoxy. In spite of their objections to governmental intervention in matters of religion, however, the colonists did not favor the separation of church and state. The *Mayflower Compact*, written in 1620 prior to the colonists going ashore in New England, evidenced their hope for a marriage between church and state.[3] The very document began: "In the name of God...." This signified that the new compact was to be one not absent divine intervention. In fact, many of the immigrating colonists came with the hopes and plans of establishing theocracies where their own approach to religion would not only be dominant, but exclusive. Thus, the Puritan establishment differed only nominally from that of the Anglicans. In Massachusetts Bay, Connecticut, and New Hampshire, colonial governments levied taxes to support the church, compelled church attendance, and denied equal rights for unorthodox worshippers. In the seventeenth century, the union of church and state meant, at a very minimum, two things in principle and practice. First, the state would lend support for religion through public funds. Second, the state would support one church through legal enforcement of orthodox religious beliefs (Butts, 1974: 19-20).

In New York, New Jersey, Maryland (and for a twenty year period, Georgia), no church was the single establishment. Yet this did not imply that church and state were not inexorably interwoven. In order to promote freedom of religion, these states provided financial and legal support to multiple religious establishments.

---

[3]For a thorough analysis of the Mayflower Compact, see Kendall and Carey (1970).

In 1683, New York adopted a policy that, while not establishing an individual church, recognized religion (at least in Christian forms) in general. The *Charter of Liberties* reaffirmed this broad support of religion:

> No person professing faith in God by Christ Jesus is to be molested or called into question for any difference of opinion in matters of religion, [and that] the Churches in New York appear to be privileged Churches....Provided also that all other Christian Churches, that shall hereafter come and settle in the province, shall have the same privileges (quoted in Pfeffer, 1967: 80).

In New Jersey, no single church was ever established despite the ardent efforts of Episcopal clergymen. Likewise, Georgia proved to be a battleground for the Church of England in its efforts to be established as the single church. In 1732, Georgia received a charter guaranteeing religious freedom to all persons "except papists." However, this charter was rescinded in 1752 and the Church of England finally became the official church of the colony (Butts, 1950: 27).

Perhaps the primary reasons for the settling of Maryland was to provide a haven for persecuted religious groups. Lord George Calvert and his son, Lord Cecilius, founders of the Maryland colony, were converts to Catholicism and wanted to make available a place where persecuted Catholics could live in peace. The result of the Calverts' efforts was a colony where people of differing views could practice their faiths with minimal governmental interference. Lord Baltimore, in 1636, articulated an oath to be taken by all Maryland governors: "If any person or officer shall molest any person, professing to believe in Jesus Christ, on account of his religion, I will protect the person molested and punish the offender."[4] For the following fifteen years, no instances of religious persecution were reported (Clinchy, 1934: 40). In 1649, Maryland passed the *Act of Toleration*. Though this act failed to grant complete religious freedom, it was seminal to the development of church and state in America. One provision of that act noted:

> And whereas the enforcing of the conscience in matters of religion hath frequently fallen out to be of dangerous consequence in those commonwealths where it has been practiced,

[4]For a full discussion of the importance of Maryland's contribution to religious freedom in America, see Cobb (1968).

> and for the more quiet and peacable government of this province and the better to preserve mutual love and unity among the inhabitants, no person or persons whatsoever within this province...professing to believe in Jesus Christ, shall henceforth be in any ways troubled, molested or discountenanced for or in respect of his or her religion, nor in the free exercise thereof...nor anyway compelled to the belief or exercise of any other religion against his or her consent... (quoted in Pfeffer, 1967: 83).

While this arrangement left ample room for improvement, it established Maryland (for the seventeenth century) as an "oasis of tolerance in a desert of religious persecution" (Pfeffer, 1967: 81-82).[5]

It is evident from the above discussion that church and state were allies in early America. However, an opposing tradition, one that was uniquely American, also unfolded during this same period. This tradition advocated the divorce of church and state and had early roots in some of the smaller Protestant sects of Europe, notably the Anabaptists of Switzerland. In an effort to keep their government from imposing unanimity in religious realms, Anabaptists proposed the separation of matters of governance and matters of religion. These early roots would spring into full bloom in America.

The most famous separatist in early America was Roger Williams, who immigrated to America in 1631. Williams believed and articulated then, as many would later, that the only true way to achieve absolute religious freedom was to completely segregate religion and politics, thus severing all ties between civil and religious entities. Williams' ideas threatened the basic principles upon which many of the colonies were founded and alienated religious and civil leaders. In the Massachusetts Bay Colony, the Congregationalist Church was the established church and the unification of church and state was not only expected, but legally required. As a result, during the Winter of 1635-1636, Williams was banished from the Massachusetts Bay Colony. Having supported the Narragansett Indians in their efforts to remain aloof from colonial control, Williams received some land from these natives so that he could build a colony beyond the control of the

[5]It is worth noting that this tolerance extended only to those of the Christian faith. In fact, the denial of the Christian Trinity was a capital offense in Maryland.

Puritan law. In 1636, Roger Williams founded Rhode Island, which quickly became a settlement for unorthodox thinkers of every stripe. In this colony, religious toleration would be a governmental benchmark.[6]

While in England to obtain a colonial charter, Williams penned *The Bloody Tenet of Persecution for Cause of Conscience*, written in 1646 as an attack on John Cotton (who advocated the alliance of ecclesiastical and civil authority) and Puritan theology. In this pamphlet, Williams observed: "God requireth not a uniformity of religion to be enacted and enforced in any civil state; which enforced uniformity (sooner or later) is the greatest occasion of civil war, ravishing of conscience, persecution of Jesus Christ in his servants, and of the hypocrisy and destruction of millions of souls."[7] In the same year, Williams secured from England a charter for the united "Providence Plantations in Narragansett Bay." Three years later, the providence enacted a civil code granting complete liberty of conscience. In 1654, after Williams had been elected to lead the Providence settlement, difficulties led to the writing of the *Ship Letter*, a brilliant explication of the importance of separation of church and state.

> There goes many a ship to sea, with many hundred souls in one ship, whose weal and woe is common, and is a true picture of a commonwealth, or a human combination or society. It hath fallen out sometimes, that both papists and protestants, Jews and Turks, may be embarked in one ship; upon which supposal I affirm, that all the liberty of conscience, that ever I pleaded for, turns upon these two hinges--that none of the papists, protestants, Jews, or Turks, be forced to come to the ship's prayers or worship, nor compelled from their own particular prayers or worship, if they practice any. I further add, that I never denied, that notwithstanding this liberty, the commander of this ship ought to command the ship's course, yea, and also command that justice, peace and sobriety, be kept and practiced, both among the seamen and all the passengers. If any of the seamen refuse to perform their services, or passengers to pay their freight; if any refuse to help, in person or purse, towards the common charges or defence; if any refuse to obey the common laws and orders of the ship, concerning their common peace of preservation; if any shall mutiny and rise up against their commanders and officers; if any should preach or write that there

---

[6]Even the Quakers, whom Williams despised, were allowed in Rhode Island. Williams incorporated his separatist beliefs into governing policies.

[7]For a summary of this pamphlet, see Commager (1951: 499-500).

> ought to be no commanders or officers, because all are equal in Christ, therefore no masters nor officers, no laws nor orders, nor corrections nor punishments;--I say, I never denied, but in such cases, whatever is pretended, the commander or commanders may judge, resist, compel, and punish such transgressors, according to their deserts and merits (quoted in Lee, 1986: 9).

This passage "set forth in clarity and brevity the three basic principles upon which a religious pluralistic society could best survive and flourish according to the assumptions of the great American experiment of religious liberty and the separation of [c]hurch and [s]tate" (Stokes and Pfeffer, 1975: 15). First, there was a difference between the sacred and the secular, as evidenced by the ship's prayer and worship in contrast to the command of the ship's course and administration of justice. Second, compulsion was exercised by the authorities in the area of the secular alone. Finally, because safety and security were community concerns, religious conscience was not justification for refusal to obey the laws of the state. These premises would later surface in the First Amendment.

For these reasons, Roger Williams is hailed as being the impetus for separation and church and state in America. A later generation in Rhode Island would stray from this principle by denying full citizenship to Jews and Catholics, but Williams' commitment to this principle was unwavering. Perhaps William Warren Sweet (1942: 326) best summarized Williams' contribution: "The principles upon which Rhode Island was established were not original with Roger Williams, but his distinction lies in the fact that he was the first to try them out successfully and to guide others in their application."

Pennsylvania would take a similar approach to religious liberty. In 1681, William Penn, a Quaker, accepted a parcel of wooded land west of the Delaware River in lieu of a specie payment from Charles II for debts owed his family. Penn's primary motivation for the establishment of a colony was religious. He hoped to build the ideal Christian society (i.e., a tolerant one) for the world to model.[8] Many years prior to the founding of his colony, Penn expressed his sentiments on

[8]For a complete study of William Penn's contributions to American religious thought and practice, see Besse (1974).

religious liberty in *The Great Case of Liberty of Conscience...Briefly Debated and Defended*, written in 1670. Penn opposed religious coercion because "imposition, restraint, and persecution for conscience sake, highly invaded the Divine prerogative." He wanted to establish a colony free of coercion in matters of conscience. That colony would become Pennsylvania.

Once established, Penn decreed religious toleration for the colony, joining Rhode Island as a haven for religiously oppressed colonists and foreigners. This freedom of conscience was incorporated in Penn's *Frame of Government*, written in 1682, which held that all believers in God would not be harassed about their faith nor required to frequent any particular church. This freedom or religious conscience would find legal support in the *Great Law*, adopted by Pennsylvania in December of 1682.

> That no person, now or at any time hereafter, Living in this Province, who shall confess and acknowledge one Almighty God to be the Creator, Upholder and Ruler of the World, And who professes, him or herself Obliged in Conscience to Live peaceably and quietly under the civil government, shall in any case be molested or prejudiced for his, or her Conscientious persuasion or practice. Nor shall hee or shee at any time be compelled to frequent or Maintain religious worship, place or Ministry whatever, contrary to his, or her mind, but shall freely and fully enjoy his, or her Christian Liberty in that respect, without any Interruption or reflection. And if any person shall abuse or deride any other, for his, or her different persuasion and practice in matters of religion, such person shall be lookt upon as a Disturber of the peace, and be punished accordingly (quoted in Stokes and Pfeffer, 1964: 19).

While this legislation covered all those who believed in God and was arguably broad enough to include Catholics and Jews, certain political privileges were reserved to mainstream Judeo-Christians. Nevertheless, dissenters could build churches and worship freely--liberties not granted to unorthodox believers in most colonies at that time. Later, under political pressure from the British government, Catholics were forbidden to hold public office in Pennsylvania. While Penn believed that society was to be founded on Christian principles, state conformity was not to be encouraged or permitted. Freedom of religious conscience meant that one was not obligated to attend public worship or to support anyone else's religion through taxation. The growth and

prosperity of Pennsylvania contributed to the experimentation by other colonies with varying degrees of religious freedom. In 1702, a eastern portion of the Pennsylvania Colony would separate and become Delaware. Delaware followed a similar pattern of religious toleration, never establishing any particular religion as official.

Pursuit of religious freedom was one of the factors influencing migration to the New World. Many immigrants wanted to escape the ecclesiatical tyranny of English and other European governments. This is not to imply, however, that all colonists accorded primary importance to religion. The multitude of sects coming to America seemed to create a conflict conducive to the promotion of religious liberty. To echo the words of Voltaire in his *Lettres sur les Anglais*: "If there were one religion in America, its despotism would be terrible; if there were only two, they would destroy each other; but there are thirty, and therefore they live in peace and happiness" (quoted in Ruffini, 1912: 199). While some colonists practiced intolerance, others embarked upon the journey that would become one of the most definitive characteristics of the American political experience--the separation of religion and politics.

3. Deism and the Great Awakening, 1720-1775

During the eighteenth century, two currents of thought had profound effects on the movement for religious liberty: Deism and the Great Awakening. The traditional theology of the established churches was called into question by Deists, specifically those from the "intellectual" community. To these supporters of Deism, of whom many are considered America's "founding fathers," the doctrine of an intervening God was remote and outdated.[9] Instead, Deism advanced

[9]It is worth noting that three of the first four presidents of the United States of America--John Adams, Thomas Jefferson, and James Madison--were most probably Deists.

the understanding that God was excluded from ordinary, day-to-day experiences. God had created the world, spun it on its axis, and retired.

The middle of the eighteenth century also witnessed great revivals in New England and New Jersey, later extending to Virginia and the Carolinas. These revivals became known as the Great Awakening and were led by protestant ministers, the two most notable being Presbyterian Johnathan Edwards and Methodist George Whitfield. These and other ministers advocated a personal, emotional religion which appealed to individual conscience and reason, and more importantly, individual responsibility. Each individual was responsible to engage in personal worship and, if circumstances dictated, forsake the established church. God was concerned with souls and not churches.[10] While the early revivalists had no penetrating quarrel with the established churches at that time, later groups which would define this movement strongly lobbied for the divorce of religion from politics.

John Locke, who had supported the coup of James II in the Glorious Revolution of 1688 in England believed that individuals entered into a constitutional monarchy--a fiduciary arrangement--in which the people transferred their trust to authorities who subsequently acted on their behalf. Each individual, however, had certain natural rights beyond the jurisdiction of government. One of these was religious freedom. Locke noted in his *Letter Concerning Toleration*, written in 1685:

> Now that the whole jurisdiction of the magistrate reaches only to these civil concernments; and that all civil power, right and dominion, is bounded and confined to the only care of promoting these things; and that it neither can nor ought in any manner to be extended to the salvation of souls, these following considerations seem to me abundantly to demonstrate,
>
> First, Because the care of souls is not committed to the civil magistrate, any more than to other men. It is not committed unto him, I say, by God; because it appears not that God has ever given any such authority to one man over another, as to compel any one to his religion....

[10]For a further discussion of the Great Awakening, see Mecklin (1934).

> In the second place, The care of souls cannot belong to the civil magistrate because his power consists only in outward force, but true and saving religion consists in the inward persuasion of the mind... (quoted in Locke, 1950: 20).

During this "enlightened" period, many found religion to be synonymous with inner belief and conscience. Since no authority should control one's inner beliefs, it necessarily followed that the quest for religion should be free of all external controls. No person ought to be required to surrender dominion of his conscience to another. It is somewhat ironic that a call for separation of church and state came out of movements characterized by reason and a personal relationship with God. But such was the case. Both were united by a single principle--namely, religion was not the concern of government. By 1760, much of the leadership in North America was committed to this philosophy. The impact of these movements would not be completely visible until the imperial crisis with England forced many of the colonies to draft state constitutions in the 1770s and 1780s. Religious freedom, advanced through the separation of religion and politics, would be a staple in most of those documents.

4. The Colonial Period, 1775-1787

In the years immediately preceding the American Revolution, prominent leaders in politics, most notably Thomas Jefferson and James Madison, advanced a basic idea shared by the early Anabaptists, Roger Williams, and John Locke: civil governments lacked the authority and competence to judge matters of spiritual concern. By the dawn of the American Revolution in the mid-1770s, there existed a growing sentiment throughout the colonies that it would be desirable to afford greater religious freedom and to accomplish this objective through the dichotomization of religion and politics. Nevertheless, there was no general principle of religious freedom to which all colonies would ascribe. The formal separation with England provided an opportunity for the colonists that had not before existed. The necessity to replace the outdated colonial political

institutions with newly established state governments served as impetus for the advancement and official incorporation of religious liberty as a fundamental principle into state constitutions. Indeed, the year 1776 was arguably the most seminal year in the history of the evolution of religious liberty, not only because of the divorce from the English Crown, but also for the official formulation of the principles that would serve to guide the legal separation of church and state following the Revolutionary War (Smith, 1972: 35-36). This principle, fought for on a worldwide scale, was soon to become a reality in the states of the new American nation.

As previously noted, many leaders of the Revolution were influenced by Deism and the Great Awakening. Accordingly, sympathies for established churches and institutionalized religion were scarce. Thomas Paine, whose pamphlet *Common Sense* hastened the separation from England, wrote: "As to religion, I hold it to be the indispensable duty of government to protect all conscientious professors thereof, and I know of no other business which government hath to do therewith" (1992: 47). The beliefs of the traditional orthodoxy were no longer accepted by many political leaders. Demonstrating this blow to the established church, Charles and Mary Beard (1933: 449) noted:

> When the crisis came, [Thomas] Jefferson, [Thomas] Paine, John Adams, [George] Washington, [Benjamin] Franklin, [James] Madison and many lesser lights were to be reckoned among either the Unitarians or the Deists. It was not Cotton Mather's God to whom the authors of the Declaration of Independence appealed; it was to "Nature's God." From whatever source derived, the effect of both Unitarianism and Deism was to hasten the retirement of historic theology from its empire over the intellect of American leaders and to clear the atmosphere for secular interests.

In keeping with the philosophy of John Locke--who had written that a revolution severed all social, economic, and political ties and thus permitted the establishment of new constitutions or charters--the states, acting as independents, began to promulgate new charters of government absent any and all British control. By 1787, all states except Rhode Island and Connecticut adopted new constitutions.

Virginia

The battle for separation of religion and politics at the state level can be most clearly demonstrated in Virginia. The word "revolutionary" has been used to describe this state's metamorphose from an establishment philosophy of severe oppression and zero tolerance to one advocating complete separation and freedom (Pfeffer, 1967: 105). This rapid change occurred in only a little more than a decade. Virginia's efforts in this area would be of utmost importance for the eventual proclamation of religious liberty found in the First Amendment. Indeed, Virginia's unprecedented contribution to this debate made it the first state in the history of the world to decree an absolute divorce between church and state. Its struggle was indicative of many of the early struggles for religious freedom in other states during the colonial period.

At the Virginia Convention of 1776, a committee which included George Mason and James Madison was appointed to draft a constitution and a *Declaration of Rights* for Virginia. Upon hearing of a minor disagreement between Mason and Madison over religious liberty, Jefferson, absent from the Convention because he was in Philadelphia drafting another document (the Declaration of Independence), proposed that Virginia adopt his suggestions for the *Declaration*: "All persons shall have full and free liberty or religious opinion; nor shall any be compelled to frequent or maintain any religious institution."[11] In these words are the two major tenets of Jefferson's philosophy concerning church and state: the absolute guarantee of religious freedom and the prohibiting of compulsory support for any religious institutions.[12] Relying on these principles, the *Declaration of Rights*, as approved by the Virginia delegates, commanded:

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

[11]For a penetrating discussion of Mason and Madison's argument over semantics, see Butts (1974: 45-49).

[12]It was this second principle that served as the foundation for his *Bill for Religious Freedom* in 1779.

> conscience; and that is the mutual duty of all to practice Christian forbearance, love, and charity towards each other (quoted in Thorpe, 1909: 3819).

This passage proved to be an impasse in the fight for securing religious liberty.

Shortly after writing the Declaration of Independence, Thomas Jefferson articulated some thoughts about religious liberty in his *Notes on Virginia*.

> But our rulers can have no authority over such natural rights, only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God....Reason and free inquiry are the only effectual agents against error. Give a loose to them, they will support true religion by bringing every false one to their tribunal, to the test of their investigation. They are the natural enemies of error, and of error only.
>
> ...Subject opinions to coercion: whom will you make your inquisitors? Fallible men; men governed by bad passions, by private as well as public reasons. And why subject it to coercion? To produce uniformity....
>
> Is uniformity attainable? Millions of innocent men, women and children, since the introduction of Christianity, have been burnt, tortured, fined, imprisoned; yet we have not advanced one inch toward uniformity. What has been the effect of coercion? To make one half the world fools, and the other half hypocrites. To support roguery and error all over the earth (quoted in Pfeffer, 1967: 106).

Arguably, Jefferson would never again express with such confidence his convictions on this matter.

The Virginia delegates followed up the *Declaration of Rights* with the *Act of 1776*, passed on December 9, 1776. This *Act* was designed to disestablish the Anglican Church that for more than hundred years had operated with the approval and support of the Virginia colonial government. This bill accomplished three objectives. First, all governmental acts that forced religious belief, mandatory church attendance, or a particular method of worship were dissolved. Second, it exempted all religious dissenters from the payment of taxes for the support of the Anglican Church. Finally, church members were exempted from mandatory taxes to support the Clergy.[13]

In 1779, Jefferson, taking advantage of the momentum his philosophy had gathered, introduced a *Bill for Establishing Religious Freedom*.[14] Unfortunately for Jefferson, many

---

[13]For a more complete analysis of the *Act of 1776*, see Eckenrode (1910: 41-53).

[14]This bill is also referred to as the *Statute for Religious Liberty*.

delegates found this proposal extreme and it was defeated. Religious conservatives, rallying out of a fear of complete separation, counter-proposed that Virginia abolish its support of a single establishment (as Jefferson had called for), and simply constitute Christianity--and not any particular sect--as the official religion of the state. The *Act of 1779* called for "the encouragement of Religion and virtue," by extending support to "all persons and Religious Societies who acknowledge that there is one God."[15] It was further noted: "The Christian religion shall in all times coming be deemed and held to be the established Religion of this Commonwealth...." Against the judgments of Jefferson and Madison, this *Act* was passed.[16]

During the next few years, there were no major pieces of legislation. Nonetheless, Jefferson continued to champion separation through his *Notes on the State of Virginia*, published in 1782. Perhaps the most telling blow against the state's assessment for the general support of Christianity came not from Jefferson, but from James Madison's *Memorial and Remonstrance against Religious Assessments*, written in 1785 at the urging of George Mason.[17] This *Memorial* was quite lengthy and clearly exposed Madison's feelings on the matter. It was evident from this undertaking that Madison opposed any connections between church and state--including multiple support for all churches and the establishment of a single church. Moreover, the state possessed no authority to define what was appropriate or inappropriate belief in religious realms.[18] Arguably

---

[15] Generally speaking, this was a thinly veiled attempt to hold on to multiple establishments by expanding the "establishment" of a church to encompass other "like-minded" churches.

[16] A detailed and pragmatic analysis of this Act and its impact on the colonists can be found in Semple (1810).

[17] While this passage has not received the widespread attention as have some of Jefferson's writings, Madison's *Memorial* remains a great document in the history of religious liberty. As said by one scholar (Pfeffer, 1967: 111), it ought to be required reading in every American school. The importance of this *Memorial* can be seen as it is repeatedly referenced in the Supreme Court case of *Everson v. Board of Education* (330 U.S. 1 [1947]). This case will be discussed in the following chapter.

[18] Arguments that question Madison's commitment to these values later surfaced, often at the behest of Supreme Court justices.

the most poignant statement in the *Memorial* was Madison's insistence that religion was a basic civil liberty:

> If all men are by nature free and independent, all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all, they are considered to be retaining an equal title to the free exercise of Religion according to the dictates of the conscience. Whilst we assert for a ourselves a freedom to embrace, to profess, and to observe Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yielded to the evidence which has convinced us (quoted in Alley, 1988: 20).

Madison's argument for religious liberty was grounded in his resentment of persecution, of which Virginia had seen plenty. The foundation of this liberty was one's conscience. Coercion handicapped man's authority to respond freely to his inward moral commands. Since conscience was to be the sole determinant of action, encroachment in any form needed to be strictly forbidden. Later in his *Memorial*, Madison wrote: "We hold it for a fundamental and undeniable truth that Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only be reason and conviction, not by force or violence." The support for Madison's *Memorial* was overwhelming.

Virginia's struggle for religious liberty was completed with the passage of Jefferson's *Bill for Establishing Religious Freedom* in January, 1786.[19] The bill consisted of three sections: a preamble, a body, and a warning. Pfeffer (1967: 114) dissected the preamble into six distinctive parts. First, God made man's mind free; therefore, reason, not coercion, should determine religious beliefs. Second, legislatures have improperly assumed dominion over religion. Third, it was an act of tyranny to compel contributions for the dissemination of opinions that one disbelieved or found abhorrent. Fourth, imposing religious qualifications for office led to corruption. Fifth, the

[19]This bill was originally introduced in 1779. Jefferson referred to the struggle for this bill's adoption as "the most severest contest to which I have ever engaged." For a full discussion of Jefferson's contributions to separation of church and state in Virginia and on a national scale, see Padover (1965).

opinions of men were not the object or within the jurisdiction of civil government. Finally, truth always prevailed if given oxygen to breathe.

The body followed:

> Be it therefore enacted by the General Assembly of Virginia that no man shall be compelled to frequent or support any religious worship place or ministry whatsoever, nor shall be enforced, restrained, molested or burdened in his body or goods, not shall otherwise suffer on account of his religious opinions or beliefs, but that all men should be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no ways diminish, enlarge or affect their civil capacities (quoted in Pfeffer, 1967: 114).

The warning was to future legislative bodies. While later delegates would have the authority to overturn such principles or relax such standards, to do so would be an "infringement of natural right." To this day, Jefferson's *Bill for Establishing Religious Freedom* remains the *magnum opus* in the history of literature on separation of church and state. Over a thirteen year period, Virginia had evolved from a single state establishment to a state legally committed to separation between the "garden of the church and the wilderness of the world."[20] Many other states would take a similar course of action in colonial America.

Connecticut

Like Virginia, the struggle for religious independence in Connecticut was long--indeed even longer than in Virginia--and bitter. The colonial charter of Connecticut, granted in 1662, remained intact and became Connecticut's first state constitution in 1776. As with most colonial charters, Connecticut's incorporated little religious toleration. It was not until forty-two years later that full religious freedom would be granted. The new constitution, adopted in 1818, provided that the "exercise and enjoyment of religious profession and worship without discrimination, shall forever be free to all persons in this State."

---

[20]This phrase is attributed to Roger Williams. See Howe (1965: vi).

Delaware

Delaware, having a close association with Pennsylvania, never adopted a single establishment of religion. The original constitution in Delaware, written in 1776, mandated an profession of Jesus Christ as a prerequisite for office, but provided that "there shall be no establishment of any one religious sect in the State in preference to another." A new constitution was adopted in 1792. Article I, Section I declared that "no man ought to be compelled to attend any religious worship...and no power shall or ought to be vested...that shall in any case interfere with, or in any manner control, the rights of conscience, in the free exercise of religious worship, not a preference be given by law to any religion."

Georgia

Georgia's first constitution was adopted in 1777. Article LVI offered: "All persons whatever shall have the free exercise of their religion," yet somewhat qualified this premise with "provided it not be repugnant to the peace and safety of the State." In 1798, a new constitution forbade any and all compulsory contributions to religion and the denial of civil rights on account of religious principles.

Maryland

Maryland's constitution, adopted in 1776, included a *Declaration of Rights* which provided that "all persons professing the Christian religion...are equally entitled to protection in their religious liberty." However, this protection did not extend to cover all persons as non-Christians were prohibited from holding public office until 1826.

Massachusetts

The first major step toward religious freedom in Massachusetts was taken in 1780 with the adoption of the first state constitution. Its *Declaration of Rights*, largely articulated by John Adams, provided: "It is the right as well as the duty of all men in society...to worship the SUPREME BEING...And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience...." However, in the same constitution was a grant of authority to the legislature to support the "public worship of God and for the support and maintenance of public Protestant teachers of piety, religion, and morality" through taxation. It was not until 1833 that religious freedom was secured in Massachusetts. By a margin of ten to one, voters in the Puritan bedrock chose to officially separate church and state. From that time forward, religious organizations were to be self-sufficient. Massachusetts was the last major colony to afford religious protection.

New Hampshire

The original constitution in New Hampshire, adopted in 1783, was similar to the constitution in Massachusetts in that it authorized state agencies to provide for "public Protestant teachers of piety, religion, and morality." It also restricted eligibility for public office to Protestants. This restriction was not removed until 1852.

New Jersey

New Jersey's first constitution, adopted in 1776, declared that no person "shall be compelled to attend any place of worship...[or]...obliged to pay tithes, taxes, or any other rates" for any religious purposes. However, that same constitution excluded non-Protestants from eligibility for public office. It was not until 1874 that this requirement was abandoned.

New York

The original draft of the New York Constitution in 1777 provided that "free toleration be forever allowed." However, before adoption, that phrase was altered to read "free exercise and enjoyment of religious profession and worship." The New York Constitution provided that it was the responsibility of civil authority "not only to expel civil tyranny but also to guard against that spiritual aggression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind." Contrary to other colonies, New York did not permit ministers of the gospel to hold public office because they were "by profession, dedicated to the service of God and the care of souls, and ought not to be diverted from the great duties of their function."

North Carolina

Article XXXIV of the North Carolina Constitution, adopted in 1776, guaranteed that "there shall be no establishment of any one religious church or denomination in this State, in preference to any other...." However, Article XXXII of that same constitution declared that "no person who shall deny the being of God or the truth of the protestant religion, or the divine authority of the Old or New Testaments...shall be capable of holding any office or place of trust or profit in the civil department within the state." This provision was not repealed until 1868, thus abolishing all religious disabilities.

Pennsylvania

In the tradition of William Penn, Pennsylvania's constitution, written in 1776, guaranteed religious freedom to all except for a provision that required public officials to express a belief in God in their 1776 constitution. This religious qualification for public office was eliminated in

1790, but a clause was added that announced the inability of all persons who did not acknowledge "the being of a God and a future state of rewards and punishments" to hold public office.[21]

Rhode Island

As with Connecticut, the original charter in Rhode Island, the birthplace of religious freedom in America, lasted well into the nineteenth century. In keeping with its tradition, the new constitution in Rhode Island, adopted in 1842, reemphasized the importance of religious freedom.

South Carolina

The constitution of South Carolina, adopted in 1778, expressed the following: "The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State." As expected, all public office holders were required to be of Protestant belief. The constitution dictated:

> Ist. That there is one eternal God, and a future state of rewards and punishments.
> 2d. That God is publicly to be worshipped.
> 3d. That the Christian religion is the true religion.
> 4th. That the holy scriptures of the Old and New Testaments are of divine inspiration, and are the rule of faith and practice.
> 5th. That it is lawful and the duty of every man being thereunto called by those that govern, to bear witness to the truth (quoted in Butts, 1950: 35).

In 1790, the new constitution of South Carolina abolished its earlier principles, guaranteeing religious freedom "without distinction or tolerance."

Vermont

The constitution in Vermont, adopted in 1777, mirrored closely Pennsylvania's religious provisions. Vermont, however, limited eligibility for public office to Protestants. It was not until

[21]This portion of the Pennsylvania Constitution has never been repealed, even though it is no longer practiced. A similar provision in the Maryland was struck down by the Supreme Court in 1961.

1793 that this provision was eliminated.

5. The Constitutional Period, 1787-1791

The issue of church-state relations was also defined on a national scale in America. For the most part, Congress abstained from delving too deeply into matters of religion. John Adams (1853: 402), representing the ideas of many of his congressional colleagues, remarked: "I hope that Congress will never meddle with religion further than to say their own prayers and to give thanks once a year. Let every colony have its own religion without molestation." Religion was to be a matter left up to the individual states. In 1783, the Papal Nuncio in Paris asked Benjamin Franklin if Congress would allow for the establishment of a Catholic Bishop in America. Congress' response demonstrated its reluctance to assert itself in religious matters: "The subject...being purely spiritual, it is without the jurisdiction and powers of Congress, who have no authority to admit or refuse it, these powers being reserved to the states individually" (quoted in Humphrey, 1924: 432).

Any scholarly reading of the debates which took place in the summer of 1787 will reveal that most of the framers approached their task with an eye on the secular. In fact, very little was even said about religion. Representative of their culture, the delegates afforded religion a place of high esteem, yet strove to create a document that would not simply govern religious activity, but govern the total lives of all people (Maddox, 1987: 59). Indeed the convention would convene for four months without ever offering a prayer unto God (or any Creator) and the final product of that summer's toils would only make one reference to God (or any Creator) and that coming in its conclusion, where it was written that the Constitution was "[d]one...in the Year of our Lord...."[22]

---

[22]By contrast, the Declaration of Independence, written in 1776 and much smaller than the Constitution, makes four references to the Deity.

The fifty-five men at the Constitutional Convention composed a document that provided for noninvolvement in matters of religion. Like the earlier Congress, religion was to be a matter of local concern. Most of the states had adopted some position on religious liberty and apparently the delegates did not want to enter into another arena of divisiveness and potential destruction. There was enough rigorous debate at the convention absent a lengthy debate on matters of religion. The single reference to religion in the Constitution was is Article VI, Section III: "No religious test shall ever be required as a qualification to any office or public trust under the United States."[23] James Madison, who probably would have preferred a more forceful statement concerning religious liberty be included, acceded, but expressed his "optimistic" belief that this phrasing implied the complete separation of church and state. Article VI was passed without much debate, delivering a damaging blow to the ecclesiastical control of government.

At the conclusion of the convention, many state delegations were disgruntled with the minimal standards of protection afforded religion. New York, New Hampshire, and Virginia ratified the Constitution, yet proposed the adoption of a bill of rights to strengthen religious liberty and disestablishment. North Carolina and Rhode Island refused to ratify the Constitution until a bill of rights guaranteeing religious liberty was adopted. The public sentiment for the separation of church and state was so immense that Madison and others could only persuade some states to ratify the Constitution by promising the immediate passage of a bill of rights. In a letter to Madison in December, 1787, Jefferson noted: "Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, & what no government should refuse or rest on inferences" (quoted in Ford, 1904: 371-372). Jefferson further believed that the U.S. Constitution should contain religious provisions similar to those he had advanced in Virginia. As was true in Virginia, the national government should not inhibit the free exercise of

[23]Most of the individual states soon adopted bills with similar language prohibiting religious tests as a prerequisite to holding public office.

religion nor require mandatory support of religion. Jefferson felt that no legislative body had authority to take away the "natural rights" of any person. Inherent in those "natural rights" was freedom of religion.

Following ratification of the Constitution, the First Congress convened in March, 1789. In June, Madison introduced into the House of Representatives a dozen proposed constitutional amendments. The prominence of the religious debate is evidenced by its inclusion as the first guarantee found in these amendments. On June 8, 1789, Madison advanced a proposal concerning religion which held that neither the federal nor state governments should be allowed to establish religion, nor infringe the rights of conscience.[24] Officially it stated: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed" (reprinted in Gales, 1834: 451). It is from this initial proposal that the First Amendment to the United States Constitution was born.[25]

On September 24, 1789, the House of Representatives adopted Madison's final version concerning religion: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;...."[26] The ensuing struggle in the Senate revealed the determination of the founding fathers. The first motion in the Senate was to strike the words "religion, or prohibiting the free exercise thereof," and insert "one religious sect or society in preference to others." *That motion was defeated.* The second motion was to abolish the

---

[24]It is paramount to fully understand that Madison's original proposal did not only restrict the federal government, but also the states. The House of Representatives would approve of this approach, but the Senate would elect only to prohibit the federal government from intervention in matters of religious freedom and separation between church and the state.

[25]From its introduction by Madison through its final adoption, the wording of the First Amendment experienced a tremendous amount of editing and revising. For a complete yet concise explication of these changes, see Butts (1950: 78-91).

[26]The First Amendment also provided for protection in the areas of freedom of speech and of the press, and the right of the people peaceably to assemble and to petition government for a redress of grievances.

amendment altogether. *That motion was defeated.* The third motion was to adopt the following: "Congress shall not make any law infringing the rights of conscience, or establishing any religious sect or society." *That motion was defeated.* A final motion was made to alter the amendment to read: "Congress shall make no law establishing any particular denomination or religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." *That motion was defeated.* The wording of the First Amendment was not accidental nor carelessly formulated.[27]

The First Amendment and the aforementioned Article VI, Section III are the only utterances in the U.S. Constitution that deal with religion. While the brevity of these provisions was in marked contrast to the elaborate verbiage of many state constitutions, they served as the beginning of a constitutional policy of restraint by the national government in matters of religion (Cobb, 1968: 509). The First Amendment was the legal culmination of decades of efforts to separate religion from the reigns of government. It was the "Magna Carta of religious liberty" (Torpey, 1948: 25). The First Amendment codified the beliefs of the early separatist Roger Williams. In it was embodied the experiment unique in the history of civilization--government had no authority to legislate in matters of religion.[28] The First Amendment, coupled with nine other amendments and collectively referred to as the Bill of Rights, was ratified by the states on December 15, 1791.[29]

---

[27]It is clear from this analysis that the framers did not intend to permit the support of religion in general. This was offered to the Senate, yet decisively rejected. For a further explication of this debate, see Stokes and Pfeffer (1964: 98).

[28]An analysis of the House and Senate debates will lead to the conclusion that the phrase "establishment of religion" at very minimum included the prohibition of a single established church as well as plural support for many or all religions.

[29]The Bill of Rights was intended to serve as a restriction on the federal government and not upon the individual states. It was not until the ratification of the Fourteenth Amendment in 1868 that restrictions upon states would even become a possibility. As for religion, it was not until the mid-1940s that the provisions found in the First Amendment were made applicable to the states. A more detailed analysis of this expansion will follow in Chapter 3.

In most constitutional areas, appeals to "original intent" are made often. The primary objective of this quest is to uncover that which was intended when the policy was initially adopted with the hope that the search will lead to a more accurate understanding. Accordingly, the meaning of the Establishment Clause can only come from its historical context. The advantages and disadvantages of the search for "original intent" have been explored at some length by commentators. Some feel that original intent is the only way to interpret the Constitution in a manner that is fair and consistent to all. Others feel that all legal interpretations of intent are speculative and inconclusive.

The constitutional questions dealing with the religion clauses have been subjected to much historical scrutiny.[30] But the result of this has often produced differing results, leading one to conclude that the historical record is, at times, ambiguous.[31] In deciphering the "original intent" of the Establishment Clause, one can at a minimum look to three influences previously discussed in this chapter--Roger Williams, Thomas Jefferson, and James Madison. Roger Williams held that "worldly corruptions...might consume the churches if sturdy fences against the wilderness [government] were not maintained" (Howe, 1965: 6). Thomas Jefferson demanded a wall of separation to safeguard public and private interests "against ecclesiastical depredations and incursions" (Howe, 1965: 6). Madison believed that religion and government could best operate and achieve their individual objectives if they did so in completely separate arenas. Thus, each could be advanced without interference from the other. The Supreme Court has not overlooked these influences.

---

[30]In many of the cases to be discussed later in this dissertation, the Supreme Court has taken considerable time and effort in attempting to uncover the intent of the religion clauses of the First Amendment. For example, Justice Brennan, concurring in the decision of *Abington School District v. Schempp* (374 U.S. 203, 237 [1963]) warned ardent "originalists" that "too literal [a] quest for the advice of the Founding Fathers" often resulted in futility. For a useful discussion of the Court's use of history, see Miller (1969).

[31]Compare, for example, the historical references found in *Everson v. Board of Education* (330 U.S. 1, 11-13 [1947]) with *McCollum v. Board of Education* (333 U.S. 203, 244-248 [1948]).

Most every attempt to excavate constitutional "original intent" is somewhat speculative. Nevertheless, assuming that intent of the religion clauses can be accurately traced back to the drafters of the First Amendment, one must then debate whether or not applying that intent is even desirable.[32] Merely finding the "original intent" will not settle the issue if one concludes that the context of the debate has changed. Perhaps some credence can be given to the argument which holds that there is no way the framers could have possible envisioned every possible dilemma that would arise from the religion clauses. Therefore, their intent was basic--to have nothing to do with religion.[33] What better way to express that than with the wording of the First Amendment: "Congress shall make no law...." No laws that advance religion. No laws that inhibit religion.

6. The Nineteenth Century Experience

In the year 1802, President Thomas Jefferson articulated his interpretation of the religion clauses in a letter to the Danbury Baptist Convention of Connecticut.

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and state (quoted in Stokes and Pfeffer, 1964: 53).

This oft spoken quip was more than a catchy metaphor. It arguably best reflected the philosophy behind the Establishment Clause.[34] James Madison succeeded Jefferson to the presidency and

---

[32]Many hold that it is impossible to recover a meaning of a rule in the historical setting in which it was enacted that can logically determine answers to the range of questions in the present. See, e.g., Carter (1985: 7).

[33]In an address entitled "The Meaning of the First Amendment" given to the United States Senate on April 23, 1971, Senator Sam J. Ervin, Jr. (D., N.C.) reflected this "hands-off" approach: "When religion controls government, political liberty dies; and when government controls religion, religious liberty perishes."

[34]Even though Jefferson was not present at the debates, his influence can be traced through his correspondence with James Madison. His absence should not be considered to reflect any apathy or distanced influence on this fight for disestablishment.

continued in this tradition of separatism. Upon his retirement from public office, Madison believed that all of the following were violations of the principle of separation found in the First Amendment: tax exemptions for churches, chaplains for Congress when paid by public funds, chaplains for the army and navy when supported with public funds, and religious proclamations by the chief executive.[35]

Formal religious establishments in the states were dissolving early in the nineteenth century.[36] But mere abolishment of the religious establishments did not translate into full and free religious liberty. In spite of the First Amendment and the official dissolving of state establishments in the nineteenth century, suffice it to say that the "extent to which one enjoyed freedom of religion depended on the degree to which his religious sentiments offended his neighbors" (Roche, 1964: 19-20).

Any critical examination of church and state in the nineteenth century must include a look at the Fourteenth Amendment, ratified in 1868. One section provided: "No...State shall deprive any person of life, liberty, or property, without due process of law;...." Prior to the passage of this amendment, and indeed for many years afterward, the First Amendment applied only as a restriction on the federal government. State governments were not constitutionally bound to afford religious liberty to their citizens. The gradual evolution of this amendment, itself the subject of seemingly endless debate, served as the impetus for extending the guarantees of the First Amendment.[37] In the twentieth century, the Supreme Court used the Fourteenth Amendment as a

---

[35]A more thorough analysis would have demonstrated Madison's belief that even Thanksgiving proclamations improperly commingled church and state. For further explication, see Fleet (1946: 560-562) and Butts (1950: 96-101).

[36]Connecticut dissolved hers in 1818, and Massachusetts, the last state to do so, abolished laws of establishment in 1833. See earlier discussion in this chapter for an explication of state responses to religious liberty.

[37]In fact some evidence does exist that would lead one to conclude that the framers of the Fourteenth Amendment did not intend for it to be used to force state compliance to the Bill of Rights. Seven years after the states ratified the Fourteenth Amendment, Congress debated a constitutional amendment that would have expressly subjected the states to the religion clauses of the First Amendment. That amendment proposed:

> No state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools or derived from any public

means to extend religious liberties by making the restrictions of the First Amendment binding upon the states.[38]

7. Summary

As noted by Clarke Cochran (1990: 180): "America is at the same time modernity's most religious and most secular nation." The development of this "separation" between church and state in America cannot be traced to any particular event or person. Many individuals contributed to the effort. Numerous events hastened its adoption. In summary, the concept of separation of church and state was based upon the foundation that separation benefitted both parties. In a country as diverse and heterogeneous as the United States, it behooved government to keep the peace between multiple religious factions through a policy of abstinence. Perhaps this concept was best expressed by John Dewey: "The cause [of separation of church and state] lay largely in the diversity and vitality of the various denominations, each fairly sure that, with a fair field and no favor, it could make its own way; and each animated by a jealous fear that, if any connection of State and Church were permitted, some rival denomination would get an unfair advantage" (quoted in Fellman, 1965: 7-8).

---

fund therefor, nor any public lands devoted thereto, shall ever be under the control on any religious sect or denomination; not shall any money there raised or lands so devoted be divided between religious sects and denominations.

This debate could logically lead some to conclude that the framers of the Fourteenth Amendment never intended it to be used as a mechanism to force state compliance to the Bill of Rights. For a further discussion of this premise, see Meyer (1951).

[38]For a thorough discussion of the use and importance of the Fourteenth Amendment as a means of securing religious liberty, see Sutherland (1965). "Incorporation" will be discussed in greater detail in the following chapter.

CHAPTER 3

EVOLUTION OF THE *LEMON* DOCTRINE

1. Introduction

As noted in Chapter 2, the First Amendment placed restrictions on the national government alone. Accordingly, states were exempted from providing the guarantees of disestablishment and religious liberty embodied in the first two clauses of that amendment. While the "Jefferson-Madison prescriptions against linking religion and politics found expression in the 'no establishment' clause[] of the First Amendment,...this clause posed no serious challenge to religion's privileged position in American society until well into the twentieth century" (Ungs, 1993: 464). Indeed, it would be more than one hundred and fifty years before the U.S. Supreme Court provided systematic interpration of the phrase: "Congress shall make no law respecting an establishment of religion."[1] In principle, separation of church and state was a basic tenet of society. In practice, this delineation raised numerous questions with minimal answers.

Between ratification of the First Amendment and *Everson* (1947), the Supreme Court gave little attention to the relationship between church and state. The Court determined in *Barron v. Baltimore* (32 U.S. 243 [1833]), in an opinion written by Chief Justice John Marshall, that the Bill of Rights did not apply as a restriction on the states. Accordingly, challenges brought against state violations of religious liberty were effectively prohibited. Congress also distanced itself from the issue and the Supreme Court only heard of handful of cases concerning religious liberty--few of which were to have national implications. The first case to reach the Supreme Court that was decided on First Amendment grounds was *Permoli v. First Municipality of New Orleans* (45 U.S.

[1] *Everson v. Board of Education* (330 U.S. 1 [1947]).

489 [1845]), in which the Court, resting its decision upon the First Amendment, determined that nothing in the Constitution or any subsequent amendments provided for the protection of religious liberties from state encroachment.[2]

Ratification of the Fourteenth Amendment in 1868 introduced the possibility of a formal linkage between the federal Bill of Rights and the states.[3] However, some years before the Court "incorporated" the Establishment Clause into the Fourteenth Amendment, it had occasion to address the relationship between religious practices and policies of the federal government. In *Reynolds v. United States* (98 U.S. 145 [1878]), a criminal defendant challenged a federal antipolygamy statute on the ground that his Mormon beliefs mandated participation in plural marriages. The Court, per Chief Justice Morrison R. Waite, rejected Reynolds' contention, stating that the First Amendment did not prevent Congress from enacting laws to regulate actions that were deemed detrimental to good social order. To allow such exemptions would, according to the Court, make each citizen a law unto himself. In a second Mormon case, *Davis v. Beason* (133 U.S. 333 [1890]), the Court echoed its earlier sentiments noting that the First Amendment was not designed to prevent legislation in religious areas that had the effect of destroying the peace, good order, and morals of society. These cases established the early precedent that religious convictions would not be permitted to run roughshod over the federal government where compelling justification for social order could be made.[4]

---

[2]Two previously decided cases, *Terrett v. Taylor* (13 U.S. 43 [1815]) and *Vidal v. Girard's Executors* (44 U.S. 127 [1844]), dealt with the establishment of religion, but were not decided on First Amendment grounds.

[3]The first case in which a provision of the Bill of Rights was incorporated into the Fourteenth Amendment was *Chicago, Burlington & Quincy Railroad v. City of Chicago* (166 U.S. 226 [1897]). This case applied with the Just Compensation Clause of the Fifth Amendment.

[4]The Supreme Court also addressed state sponsorship of religious organizations. In *Bradfield v. Roberts* (175 U.S. 291 [1899]), the Court, speaking through Justice Rufus Peckham, sustained a $30,000 payment from Congress to a hospital owned and operated by an order of Catholic nuns. Peckham concluded that such a subsidy was constitutional so long as the hospital operated in a religiously non-exclusive fashion.

In 1925, the Supreme Court acknowledged that the First Amendment "freedom of speech" was a fundamental right entitled to protection.[5] One by one, other specific guarantees of the First Amendment were recognized as equally fundamental. Thus, "freedom of the press" and "freedom of assembly" were incorporated into the Fourteenth Amendment in the 1930s.[6] In 1940, the Supreme Court applied the Free Exercise Clause to the states in *Cantwell v. Connecticut* (310 U.S. 296). Seven years later, the process of First Amendment incorporation was complete with the Court's Establishment Clause decision in *Everson v. Board of Education* (330 U.S. 1 [1947]).

2. Incorporation of the Establishment Clause

Everson v. Board of Education (330 U.S. 1 [1947])

A New Jersey statute adopted in 1947 authorized local school districts to offset the costs incurred by parents in transporting their children to and from accredited schools. Each district was free to decide whether to subsidize the transportation expenses of parents who elected to enroll their children in parochial schools. The board of education in Ewing Township authorized reimbursement of expenses incurred by parents for transportation of their children to and from school on public buses. Arch R. Everson, a taxpayer in Ewing Township, contended that the statute authorized activity that violated the Establishment Clause because public funds were doled out to parents who had enrolled their children in Catholic schools.[7] The plaintiff further alleged that the Establishment Clause was applicable to the states through the Fourteenth Amendment.

---

[5] *Gitlow v. New York* (268 U.S. 652 [1925]).

[6] *Near v. Minnesota* (283 U.S. 697 [1931]) and *De Jonge v. Oregon* (299 U.S. 353 [1937]), respectively.

[7] At these schools, religious instruction conforming to the religious tenets of the Catholic faith occurred. The superintendents of these schools were Catholic priests.

The trial court upheld Everson's contentions but the New Jersey Court of Errors and Appeals reversed. Everson appealed.

In *Everson v. Board of Education* (330 U.S. 1 [1947]), Justice Hugo Black delivered the majority opinion for a Court divided 5-4. Justice Robert Jackson wrote a dissenting opinion joined by Justice Felix Frankfurter. Justice Wiley Rutledge also wrote a dissent, in which Justices Frankfurter, Jackson, and Harold Burton joined. Justice Black noted that there was ample reason to interpret the Establishment Clause in the same broad manner in which the Court had interpreted the Free Exercise Clause. Accordingly, the Establishment Clause was binding on the states. After a lengthy elaboration of the background and history of the Establishment Clause,[8] Black concluded (330 U.S. at 15-16):

> 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....No tax in any amount, large or small, can be levied to support any religious activities of institutions, whatever they may be called, or whatever form they may adopt to teach and practice religion....In the words of Jefferson, the clause against establishment or religion by law was intended to "erect a wall of separation between Church and State."

After reading this, one might logically conclude that the New Jersey statute would be struck down. But such was not the case. Black opposed aid to religion, but concluded that monetary reimbursement for transportation costs to and from educational facilities did not constitute an aid to religion. Instead, the statute accomplished another objective--transportation safety for schoolchildren. The primary beneficiaries of this program were individuals and not religious institutions. Accordingly, no Establishment Clause violation occurred.[9]

Justices Jackson, Frankfurter, Rutledge, and Burton found no historical fallacy in Black's argument, yet concluded that the policy of reimbursement for parochial school transportation

---

[8]In this historical examination, Black did not once refer to the debates concerning the ratification of the First Amendment, instead choosing to rely on the writings of Thomas Jefferson and James Madison.

[9]Black maintained, however, that this statute bordered on unconstitutionality (330 U.S. at 16).

violated the Establishment Clause. Justice Rutledge contended that the First Amendment's purpose 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" (330 U.S. at 31-32).

The immediate result of the Court's opinion was that parents in Ewing Township could be reimbursed for transportation expenses, even if their children attended parochial schools. A more encompassing result was the incorporation of the Establishment Clause into the Fourteenth Amendment. One of the most important aspects of Justice Black's opinion was the use of historical analysis as a tool for interpreting the Establishment Clause. While the justices did not agree as to the proper holding, they were united in recognizing that the key to understanding the meaning of the religion clauses was to be found in the writings of Jefferson and Madison. Not a single mention was made of Roger Williams or any of the others who played significant parts in securing the principle of separation of church and state. Apparently, all of the justices who wrote opinions in this case accepted the primacy of the views of Jefferson and Madison regarding the "original intent" of the framers.

In summation, Black's articulation of the principles of separation of church and state provided the foundation on which all subsequent jurisprudence in this field would be built. The precedential value of *Everson* persists and cannot be overlooked in any analysis of Establishment Clause history for two reasons. First, it incorporated the Establishment Clause into the Fourteenth Amendment. Second, and more important for purposes of this dissertation, Black enunciated a basic principle of "neutrality" as the proper approach for government in matters of religion. This principle of neutrality would later resurface, in a somewhat altered appearance, as the "secular purpose" prong of the *Lemon* test.

Between 1947 and 1971, a number of cases dealing with the Establishment Clause made their way to the Supreme Court. The major areas of controversy included financial assistance

provided by the government to church-related institutions and religious practices in public schools (released time programs, prayer recitation, Bible reading, and the teaching of evolution).

3. Government Aid to Religion

Board of Education v. Allen (392 U.S. 236 [1968])

The issue of aid to parochial schools did not surface after *Everson* until 1968. Three years earlier, the legislature of New York passed a bill requiring local school districts to loan textbooks chosen from a state-approved list to private and public schools within their jurisdiction.[10] In grades seven through twelve, textbooks were "lent" without charge to students enrolled in church-related schools. The books remained in possession of the school until "wear and tear" mandated their retirement. Once given to private schools, these textbooks never again come under the control of public authorities.

The board of education in East Greenbush sued the state Commissioner of Education, Dr. James A. Allen, seeking to enjoin him from forcing local school boards to expend funds in this manner.[11] East Greenbush argued that such a provision violated the Establishment Clause of the First Amendment. The trial court upheld East Greenbush's contentions, but the Appellate Division and the Court of Appeals, the highest court in New York, found no constitutional violation. On appeal, the U.S. Supreme Court agreed to hear *Board of Education v. Allen* (392 U.S. 236 [1968]). Speaking through Justice Byron White, the Court, dividing 6-3, held that the plan of

---

[10]This law was passed in the wake of the Elementary and Secondary Education Act (ESEA) which allowed the federal government to loan textbooks to parochial schools. If the federal government could do it, so thought New York, the individual states could as well. Governor Nelson Rockefeller indicated that if this textbook scheme was to make it "past the courts," he would press further accommodationist arrangements with private schools (Morgan, 1972: 100).

[11]Thus, the issue of standing was not based on taxpayer status, but rather on intergovernmental relations between two separate state entities.

lending state-approved textbooks to secondary school children was not violative of the Establishment Clause because it had a "secular legislative purpose and a primary effect that neither advance[d] nor inhibit[ed] religion" (392 U.S. at 243).[12] The purpose was secular; namely, to further the educational opportunities of students.[13] Justice White wrote:

> The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and the 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 (392 U.S. at 242-243).

In dissent, Justice Black conceded that the New York law did not formally establish a state religion, but asserted that it took a "great stride in that direction." Furthermore, he predicted: "The same powerful sectarian propagandists who have succeeded in securing passage of the present law to help religious schools carry on their sectarian religious purposes can and doubtless will continue their propaganda, looking toward complete domination and supremacy of their particular brand of religion." Black concluded that it was nearly always by these "insidious approaches that the citadels of liberty are most successfully attacked" (392 U.S at 251-252).[14]

Justice Douglas noted in his dissent that the majority placed its stamp of approval on parochial school subsidies. Douglas reasoned: "The statutory system provides that the parochial school system will ask for the books it wants. Can there be the slightest doubt that the head of the parochial school will select the...books that best promote its sectarian creed?...If the board [of

---

[12]Justice White used the "purpose and primary effect" test that had been articulated in *Abington v. Schempp* (374 U.S. 203 [1963]). This case will be discussed later in this chapter.

[13]White made multiple references to the decision in *Everson*, and even felt that his reasoning was consistent with *Everson*. Justice Black disagreed and filed a sharply worded dissent.

[14]Justice Black obviously feared that his "individual benefit theory" was being misconstrued to give impetus to those who favored government accommodation of religion.

education] resists, then the battleline between church and state will have been drawn" (392 U.S. at 256).[15]

Clearly, the decision in *Allen* was a step toward governmental accommodation of religion. The issue of aid to parochial schools received substantial attention from varying state and local judicial bodies in the years following *Allen*. While accommodationists praised the Court's rationale, few were convinced that the Court had adopted a general accommodationist position. School boards were uncertain as to whether the Court would go further in accommodating religion. The Court did not delay long in clarifying its position.

Walz v. Tax Commission (397 U.S. 664 [1970])

While most of church-state cases before the Supreme Court concerned educational establishments, one raised the issue of tax exemptions. Historically, churches (and other charitable organizations) have been exempted from local property taxes. The constitutionality of such policies was challenged by Frederick Walz, a New York resident. In May, 1967, Walz purchased a small tract of land for $25 and was assessed an annual property tax of $5.24. In June, Walz sought an injunction to prevent the local tax commission from extending tax exemptions to church-owned property. Because of these exemptions, Walz was required to pay a greater property tax. He contended that the New York City Tax Commission thus forced him to support the establishment of religion. Following adverse state court rulings, Walz appealed to the Supreme Court.

In *Walz v. Tax Commission* (397 U.S. 664 [1970]), Chief Justice Warren Burger wrote the decision for a Court dividing 8-1 in affirming the New York courts. At the outset, the majority determined that the legislative purpose of the tax exemptions was not to establish, sponsor, or

[15]Douglas envisoned that if the doctrine in *Allen* was taken to extremes, the separation of church and state could be coming to an end.

support religion. But Burger cautioned: "We must also be sure that the end result--the effect--is not an excessive government entanglement with religion" (397 U.S. at 674). While recognizing that property tax exemptions carried some indirect economic benefits for religious institutions, Burger noted that to force taxation upon religious institutions would require a considerable amount of governmental intervention, thus leading to an "entanglement" between church and state. This "entanglement" would resurface the following term as the third prong of the *Lemon* test. Instead, Burger articulated a "benevolent neutrality" approach towards religion. "Few concepts are more deeply embedded in the fabric of our national life...than for the government to exercise...benevolent neutrality toward churches and religious exercise so long as none were favored over others and none suffered interference" (397 U.S. at 676-677). Chief Justice Burger appeared to have been choosing between two evils--of which tax exemptions were the lesser.[16]

Justice Brennan, in a concurring opinion, relied heavily on the history of tax exemptions for church bodies and noted that this policy in no way constituted governmental favor toward religious organizations. He pointed out that tax exemptions were often granted to secular establishments.[17] Justice John Harlan, also concurring, expressed his understanding that the particular policy in *Walz* did not have the effect of encouraging or discouraging religious participation.[18] Justice Douglas vehemently dissented. The Establishment Clause, he insisted, mandated that government treat religion and irreligion indiscriminately and the majority had not done so.[19]

---

[16]Burger also noted the Court's traditional deference to the legislature in matters of taxation.

[17]Justice Brennan also trusted in the legislature's ability to determine which organizations merited tax exemption status.

[18]But, "Harlan left open the possibility that some sort of exemptions might involve government so deeply with religious institutions as to contravene the Establishment Clause" (Morgan 1972: 107).

[19]In investigating the practice in New York, Douglas did not find that anti-religious groups were afforded tax exemption.

> If believers are entitled to financial support, so are nonbelievers. A believer and nonbeliever under the present law are treated differently because of the articles of their faith. Believers are doubtless comforted that the cause of religion is being fostered by this legislation. Yet one of the mandates of the First Amendment is to promote a viable, pluralistic society and to keep government neutral, not only between sects but also between believers and nonbelievers (397 U.S. at 716).[20]

Questions immediately surfaced concerning the impact of *Walz*; specifically, whether the "secular purpose" test originally articulated in *Schempp* (to be discussed later in this chapter) and used in *Allen* had been abandoned. One commentator (Duval, 1970: 349) noted that the decision in *Walz* was not based on the "secular purpose" test, but rather on whether the effect of the legislation advanced or inhibited religion. According to *Walz* (but not *Allen*), if neither the purpose nor effect of the challenged policy was to advance or inhibit religion, it was immaterial whether the legislation served a secular objective.

4. Religion in the Public Schools

McCollum v. Board of Education (333 U.S. 203 [1948])

On the heels of the decision in *Everson*, the Supreme Court heard a case that dealt with separation of church and state in the public educational setting--*McCollum v. Board of Education* (333 U.S. 203 [1948]). The board of education in Champaign, Illinois granted permission to the Champaign Council on Religious Education, an interfaith organization, to offer classes in religious instruction to students at local public schools. For a student to enroll in these various courses, individual parents were required to sign cards requesting released time to allow their children to attend religious classes. The class sessions lasted for thirty or forty-five minutes per week (depending upon one's school grade), took place on school grounds during school hours, and were taught by individuals in the employ of the Council at no expense to the city. School

[20]Douglas' dissenting opinion here did not appear to be consistent with his majority opinion in *Zorach* (to be discussed below). He apparently altered his stance from accommodation (in *Zorach*) to strict neutrality (in *Walz*).

superintendents, however, did possess the authority to accept or reject teachers of the Council. If children opted not to attend, those pupils were required to depart the classroom and pursue their secular studies elsewhere within the confines of the school building.

Vashti McCollum, mother of two public school students, objected to this program. Under Illinois law, parents were required, with some noted exceptions, to send their children ages seven through sixteen to tax-supported public schools. McCollum sued to enjoin the continuation of this operation on the ground that it was a violation of the First and Fourteenth Amendments. Through the utilization of the state's compulsory education law, the board of education was, in effect, compelling attendance at religious instruction.

Her contentions were threefold. First, certain faiths had obtained an unfair advantage in propagating their views over those of other sects. Second, the program was voluntary only in name and not in practice. On this point, she further alleged that subtle pressures were brought to coerce students to attend religious classes. Finally, McCollum argued that the powers given to the superintendent to reject teachers and those given to the Council to determine which faiths could participate in the program was a prior censorship of religion. The trial court and Illinois Supreme Court found no constitutional violation. McCollum appealed to the Supreme Court.

The Court displayed little disagreement in deciding this case.[21] Justice Hugo Black expressed the opinion of the Court.[22] Justice Stanley Reed was the lone dissenter. An analysis of Black's opinion indicates the decision was based on the sheer principle of separation rather than on any of the specific contentions advanced by McCollum. He pointed out: "Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provided pupils for their religious classes through the use of the State's compulsory public school machinery" (333 U.S. at

[21] As compared the Court in *Everson*, which was divided 5-4, only a year before.

[22] Justices Frankfurter and Jackson wrote concurring opinions.

212). Black summarily dismissed the actions of the school board and bluntly concluded that "the wall...must be kept high and impregnable....This is not separation of Church and State" (333 U.S. at 212).[23]

While supporting the judgment, Justice Frankfurter found the problem more complex.[24] Frankfurter emphasized the psychological impact that Champaign's released-time program could have upon children.[25]

> The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend...The children belonging to these non-participating sects will thus have inculcated in them a feeling of separatism when the school should be the training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents. As a result, the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in that process sharpens the consciousness of religious differences at least among some of the children committed to its care (333 U.S. at 227-228).

Justice Jackson also wrote a concurring opinion in which he chastised his colleagues for answering the question too broadly and for failing to provide any standards by which the state courts may determine the question for themselves. Jackson wrote: "To lay down a sweeping constitutional doctrine...applicable to all school boards of the nation...is to decree a uniform, rigid and...unchanging standard for countless school boards representing and serving highly localized groups which not only differ from each other but which themselves from time to time change attitudes" (333 U.S. at 237). To do so would be to "allow zeal for our own ideas of what is good in public instruction to induce us to accept the role of super board of education for every school district in the nation" (333 U.S. at 237).

---

[23]Black's majority opinion was replete with references to *Everson*. The language and reasoning of the two cases were very similar.

[24]Frankfurter was joined by Justices Jackson, Rutledge, and Burton, the latter two also joined the majority opinion.

[25]One scholar (Kurland: 1962: 87) wrote that the language employed by Frankfurter was similar to that later used by Chief Justice Earl Warren in the school desegregation cases of the 1950s.

Justice Reed penned the lone dissent in which he identified what he deemed the fatal flaw of the released time program. Reed was unsure of just what the majority believed to constitute a violation of the First and Fourteenth Amendments. Was it the use of school buildings? Was it because the program was during school hours? Was it because the superintendent had veto control over teachers? Reed argued that the program did not constitute an "establishment of religion" or "aid to religion" in a manner sufficient to justify the Court's intervention with local legislation. This lone dissent would turn into a majority opinion only a few years later in a second released time case.

The *McCollum* Court did not see its holding as expressing hostility toward religion, for that would have been at odds with American history. Alternatively, the Court advanced the century-old adage that government and religion could best work to achieve their lofty goals if they were free from each other.[26] The decision in *McCollum* was greeted with protests from many different religious groups. These protests focused on the alleged misinterpretation of the First Amendment--a misinterpretation that led the justices to a false understanding of the relationship between church and state. Indeed, much confusion surfaced concerning other released time cases as many citizens clamored for the continuation of religious instruction. *McCollum* did not explicitely determine whether all released time programs were unconstitutional or merely those that were designed exactly like the one in Illinois. Due to this ambiguity, local courts wavered on the legality of other released time programs.[27]

---

[26]For an excellent explication of the *McCollum* decision, see Swancara (1950).

[27]In New York in 1948, a local court ruled in *Lewis v. Spauding* (85 N.Y.S.2d 682) that a released time program in New York was sufficiently different from the one in Champaign, Illinois and thus not prohibited by the *McCollum* decision. The specific difference between the two programs was that in New York the students left the school building to receive religious instruction. The Court further argued that the decision in *McCollum* did not require all released time programs to be struck down. Instead, each "program [was] to be tested by a consideration of the factual aspects of the particular program under scrutiny" (85 N.Y.S.2d at 686).

A court in St. Louis in 1948 prohibited the continuance of a released time program even though the pupils in question departed the school building for their religious instruction. In this case, *Balazs v. Board of Education of St. Louis* (Circuit Court, St. Louis, Mo., May 25, 1948), the court that the public school system was being used to advance sectarian doctrine. Thus, an injunction prohibiting the released time program was granted on November 22, 1948.

Zorach v. Clausen (343 U.S. 306 [1952])

The Supreme Court would readdress the issue of released time programs four years later in *Zorach v. Clausen* (343 U.S. 306 [1948]). The public school system in New York City authorized a released time program that permitted students to attend religious instruction classes during school hours. Attending students were released on written request by their parents and non-participating pupils were grouped together in study halls until their classmates returned from religious instruction. The one noted difference between the program in *McCollum* and this one was that the religious instruction took place off school premises. Religious instructors remained at local churches while volunteering parents transported students to and from the sectarian institutions. This released time program provided no religious instruction on public school campuses nor did it require the expenditure of public funds.

Taxpayers in New York City and parents of public school children challenged this policy on the ground that this program was no different than the one that had been struck down in *McCollum*. The plaintiffs alleged that the public school system was illegally exercising its influence to promote religious instruction, thus violating the Establishment Clause. Lower courts in New York rejected this contention. The taxpayers appealed.

By the time *Zorach* reached the Supreme Court, the question of whether the Court would distinguish this case from *McCollum* had interested many parties.[28] Six justices found this system sufficiently different from that of *McCollum* and concluded that no Establishment Clause violation had occurred. Justice William O. Douglas, in writing the opinion for the Court, stressed the need to differentiate this case from *McCollum*.

> In the *McCollum* case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here...the public schools do no

[28]Groups questioning the constitutionality of this program included members of the American Civil Liberties Union, the American Jewish Congress, and the American Jewish Committee. The issue raised enough questions that attorney generals from eight states filed *amicus* briefs hoping to protect similar programs in their respective jurisdictions.

> more than accommodate their schedules to a program of outside religious instruction. We follow the *McCollum* case. But we cannot expand it to cover the present released-time program unless separation of Church and State means that the public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion (343 U.S. at 315).

Douglas' majority opinion appeared to rest on the assumption that the "wall of separation" was not impregnable. He implied that a philosophy of strict separation between church and state lacked common sense and practicality.[29] Douglas quickly dismissed the claim of "coercion," noting that each person was left to his or her own preference in regard to the manner and timing of religious devotion, if any religious devotion was desired (343 U.S at 311). A policy of accommodation was preferable to hostility. In his now famous words: "We are a religious people whose institutions presuppose a Supreme Being...When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions" (343 U.S. at 313-314).

Three justices--Black, Frankfurter, and Jackson--wrote dissenting opinions sharply criticizing the majority opinion. Black found no substantial difference with *McCollum* and concluded that the state was improperly using its policy of compulsory school attendance to promote religious instruction. He warned of the danger that would follow this aberration of church-state policy: "State help to religion injects political and party prejudices into a holy field. It too often substitutes force for prayer, hate for love, and persecution for persuasion. Government

---

[29]Douglas wrote that strict separation would make the state and religion aliens toward each other--"hostile, suspicious, and even unfriendly." If such were the case,

> [c]hurches could not be required to even pay property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishoners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday;...these and other references to the Almighty that run through our laws, our public rituals, our ceremonies would by flouting the First Amendment....We would have to press the concept of separation of Church and State to these extremes to condemn the present law on constitutional grounds (343 U.S. at 312-313).

should not be allowed, under cover of the soft euphemism of 'co-operation,' to steal into the sacred area of religious choice" (343 U.S. at 320).[30]

Perhaps the most blistering criticism of Douglas' majority opinion came from Justice Jackson, who wrote that the challenged released time program was "founded upon a use of the State's power of coercion" (343 U.S. at 323). That premise alone determined its unconstitutionality.[31] He further noted:

> Here schooling is more or less suspended during the "released time" so the nonreligious attendants will not forge ahead of the churchgoing absentees. But it serves as a temporary jail for a pupil who will not go to Church. It takes more subtlety of mind than I possess to deny that this is governmental constraint in support of religion. It is as unconstitutional, in my view, when exerted by indirection as when exercised forthrightly (343 U.S. at 324).

Justice Jackson concluded that the distinction between this program and the one in *McCollum* was "trivial almost to the point of cynicism" (343 U.S. at 325).

The decision in *Zorach* encouraged many who felt that the strict separation advanced earlier by the Court was too hostile toward religion. Apparently, the Court was poised to abdicate its tough, rigid approach to separation of church and state, alternatively favoring a philosophy of accommodation. That philosophy was short-lived. In the spring of 1961, the Supreme Court retreated from its accommodationist approach in *Zorach*. In *Torcaso v. Watkins* (367 U.S. 488 [1961]), Justice Black wrote that neither the federal nor any state government could enact a law that discriminated between believers and non-believers or between theists or non-theists.[32] Black's majority opinion in *Torcaso* led to a further consideration of the role of religion in public schools.

---

[30]Justice Black also addressed the issue of equality, writing that "the First Amendment has lost much if the religious follower and the atheist are no longer to be judicially regarded as entitled to equal justice under the law" (343 U.S. at 320).

[31]Justice Jackson admonished the majority for its "warp[ing]" and "twist[ing]" of the relationship between church and state (343 U.S. at 325).

[32]The law struck down in *Torcaso* required prospective office holders to affirm the existence of God as a precondition to assuming office in the state of Maryland.

Engel v. Vitale (370 U.S. 421 [1962])

The New York Board of Regents authored a short, non-denominational prayer to be recited at the beginning of each school day in public schools. The prayer went as follows: "Almighty God we acknowledge our dependence upon Thee, and beg Thy blessings upon us, our teachers, and our Country." School officials were not required to conduct prayers prior to each day's activities, but if they chose to offer an invocation, the prayer established by the Regents had to be used. The prayer's observance on the part of the students was voluntary. Those who chose not to participate were excused from the classroom for the brief period. Unitarian and Jewish parents of public school children in the village of New Hyde Park challenged this program on the ground that a state law authorizing the school district to direct the use of the prayer in public schools violated the Establishment Clause. The plaintiffs sought to prevent this activity through a writ of mandamus, but were denied by the New York courts. On petition, the Supreme Court granted certiorari in the case of *Engel v. Vitale* (370 U.S. 421 [1962]).

Of all the Establishment Clause cases decided in the modern period, probably none have raised as much public sentiment as the school prayer case of 1962--*Engel v. Vitale* (especially when coupled with the Bible reading case of *Abington v. Schempp* the following year). After lengthy oral arguments and the filing of numerous *amicus* briefs,[33] the Supreme Court decided in favor of the parents, ruling that all state-sponsored school prayer violated the Establishment Clause.[34] The Court was divided 6-1, and Justice Black wrote the majority opinion.[35] After a

[33]Submitting *amicus* briefs for the disgruntled parents were members of the American Ethical Union, the American Jewish Council, and the American Jewish Committee. As in *Zorach*, state attorney generals rushed to defend the program of the New York Board of Regents. In all, twenty-one state attorney generals were represented on the Court's agenda.

[34]Perhaps the most piercing of criticism came from members of Congress. Representative L. Mendel Rivers (D., S.C.) accused the justices of "legislating--they never adjudicate-with one eye on the Kremlin and the other on the National Association for the Advancement of Colored People." Another Representative, Frank Becker (R., N.Y.) called *Engel* "the most tragic decision in the history of the United States." There were also calls for a constitutional amendment to overturn this decision. See Burnham (1962) and Lewis (1962).

[35]Justices Frankfurter and Byron White did not participate in this decision.

lengthy excursion into American history, Black rejected the claim that the prayer exercises were part of a larger program of moral instruction and opined that the state of New York had adopted a policy "wholly inconsistent with the Establishment Clause" (370 U.S. at 424).[36] He summarized his opinion: "The constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government" (370 U.S. at 425).[37]

Echoing Madison, Black concluded that religion was "too personal, too sacred, [and] too holy" to permit its "unhallowed perversion" by government (370 U.S. at 432). He insisted that this decision did not display hostility toward religion or prayer: "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance" (370 U.S. at 435).

Justice Douglas, author of the *Zorach* opinion, concurred.[38] He noted:

> The price of religious freedom is double. It is that the church and religion shall live both within and upon that freedom. There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largess. The great condition of religious liberty is that it be maintained free from sustenance as also from other interferences by the state. For when it comes to rest upon that secular foundation it vanishes with the resting (370 U.S. at 444).

The lone dissenting voice was that of Justice Potter Stewart, who compared the Regents' prayer to various other recognitions to the Almighty and religion.[39] In his opinion, New York had

---

[36]One scholar (Morgan, 1972: 132) wrote that Justice Black spoke for the Court "as if *Zorach* had never happened." He simply continued the "separationist line of *Everson* and *McCollum*."

[37]It is worth noting that Justice Black and those who joined his majority opinion never attempted to ban prayer in public schools. Black recognized that the government was unable to stop anyone from praying. *Engel* was directed at prescribed prayers conducted under the auspices of the state.

[38]Morgan (1972: 133) wrote that Douglas' concurrence in *Engel* left *Zorach* "high and dry."

[39]Stewart cited the opening daily statement of the Supreme Court ("God save the United States and this Honorable Court"), the opening prayers of the Congress, the president's oath of office, the pledge of allegiance ("One

only recognized and followed "the deeply entrenched and highly cherished spiritual traditions of our Nation" (370 U.S. at 450). Also, Stewart was unable to conclude that the state had engaged in coercion. The non-mandatory nature of the program was sufficient to overcome any First Amendment barrier.

Following *Engel*, it was apparent that the Court had recommitted itself to a course of strict separation between government and politics. Governmentally sponsored religious activities would not stand against the prohibitions of the Establishment Clause. If any doubts existed, they were answered the following year.

Abington v. Schempp (374 U.S. 203 [1963])

The Commonwealth of Pennsylvania required that at the beginning of each public school day "at least ten verses from the Holy Bible shall be read, without comment." Upon written request of parent or guardian, any student could be excused from the Bible reading. Edward and Sydney Schempp, Unitarians and parents of two Abington Senior High School students, sought to enjoin the practice of Bible reading on the ground that it violated the Establishment Clause. A special three-judge U.S. District Court for the Eastern District of Pennsylvania found the statute unconstitutional (201 F.Supp. 815 [1962]). The Supreme Court granted an appeal in *Abington v. Schempp* (374 U.S. 203 [1963]). This case was consolidated with a similar challenge from Baltimore, Maryland.[40]

---

nation under God"), the national anthem ("In God is our trust"), and the impressions on U.S. coins ("In God we trust").

[40]The Supreme Court granted certiorari in *Murray v. Curlett* (179 A.2d 698 [1962]). This case involved a 1905 Maryland school board regulation that required Bible reading and the recitation of the Lord's Prayer at the beginning of each school day. Maryland's policy was challenged by avowed atheist Madalyn Murray on behalf of her son, William. The Maryland courts upheld the practice.

In an 8-1 decision, the Court, per Justice Tom Clark, found both the Pennsylvania and Maryland policies in violation of the Establishment Clause.[41] Clark maintained that religion, although an integral part of American society, should be sustained not through state action, but by individuals and religious institutions. "The wholesome neutrality of which this Court's cases speak...stems from the teachings of history...that powerful sects or groups might bring about a fusion of governmental and religious functions...to the end that official support of the State or Federal Government would be placed behind the tenets of one or all orthodoxies" (374 U.S. at 222). Clark used this opportunity to articulate a test for unconstitutionality in Establishment Clause jurisprudence. Conceding that the Court had addressed the matter eight times in the past twenty years, Clark laid down a principle that had not appeared previously.

> What are the purpose and primary effect of the enactment? If either is the advancement or the inhibition of religion then the enactment exceeds the scope of the legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular purpose and a primary effect that neither advances nor inhibits religion (374 U.S. at 222).

These two components would resurface eight years later in the *Lemon* test.

In conclusion, Clark advanced this principle of neutrality. "The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind" (374 U.S. at 226). Bitter experience had taught us that it was not the role of the government to "invade that citadel," regardless of whether its "purpose or effect be to aid or oppose, to advance or retard." Rather, in the relationship between church and state, government must be neutral.[42]

---

[41]This decision was apparently an effort to clarify some of the Court's earlier pronouncements. Five justices wrote opinions, totalling 115 pages. Joining with Clark, and also writing concurring opinions, were Justices Douglas, William Brennan, and Arthur J. Goldberg. Justice Stewart wrote a dissenting opinion.

[42]Choper (1963: 330) wrote that *Schempp* established the standard that there was an Establishment Clause violation when "the state engage[d] in what may fairly be characterized as solely religious activity that [was] likely to result in (1) compromising the student's religious or conscientious beliefs or (2) influencing the student's freedom of religious or conscientious choice."

Justice Douglas penned a short concurring opinion in which he focused not so much on the religious exercises in question, but on the problem of aid to religious institutions. "The most effective way to establish any institution," Douglas wrote, "is to finance it" (374 U.S. at 229). Justice Brennan filed a longer concurring opinion. After an excellent review of the case law, Brennan announced that the Establishment Clause was "designed comprehensively to prevent those official involvements of religion which would tend to foster or discourage religious worship or belief" (374 U.S. at 234).[43] He summarized his long and eloquent concurrence with a quote from Jeremiah S. Black, former Chief Justice of the Commonwealth of Pennsylvania: "The manifest object of the men who framed the institutions of this country, was to have State without religion, and a Church without politics--that is to say, they meant that one should never be used as an engine for purpose of the other, and that no man's rights in one should be tested by his opinions about the other" (374 U.S. at 304). Justice Arthur Goldberg, joined by Harlan, offered a brief concurrence in which he cautiously expressed his preference for a policy of neutrality.

> I agree that the attitude of government toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious....Such results are not only not compelled by the Constitution, but...are prohibited by it (374 U.S. at 306).

As in *Engel*, the lone dissent was written by Justice Stewart. He recognized that the Constitution did not delineate between "Jew or Agnostic, Christian or Atheist, Buddhist or

---

[43]Justice Brennan also reconciled the Court's action in *Zorach* with its decision in *McCollum*. Brennan distinguished the two cases because of the difference in public expenditures involved. He noted (374 U.S. at 261-262):

> True, the *McCollum* program involved the regular use of school facilities, classrooms, heat and light and time from the regular school day--even though the actual incremental cost may have been neglible. All religious instruction under the *Zorach* program, by contrast, was carried on entirely off the school premises, and the teacher's part was simply to facilitate the children's release to the churches. The deeper difference was that the *McCollum* program placed the religious instruction in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects, while the *Zorach* program did not. The *McCollum* program, in lending to the support of sectarian instruction all the authority of the governmentally operated public school system, brought government and religion into the proximity which the Establishment Clause forbids.

Freethinker, to believe or disbelieve, to worship or not worship, to pray or keep silent, according to his own conscience, uncoerced and unrestrained by government" (374 U.S. at 319-320). But in this case, there was no coercion. Without coercion, there could be no Establishment Clause violation.

As with *Engel*, the decision in *Schempp* was met with much criticism. Those who favored accommodation of religion saw this decision as another retreat from the principles articulated in *Zorach* eleven years prior.[44] Some in Congress proposed constitutional amendments to reverse what they saw as a diabolical and sinister trend of the Court. *Schempp* had apparently fortified the wall between church and state.[45] *Engel* and *Schempp* are perhaps the most discussed and vigorously debated Establishment Clause cases.[46]

---

[44]John J. Voight, Secretary for Education of the New York Archdiocese, regretted the Court's decision by remarking that *Schempp* would "bring about the complete secularization of public education...and because it disregards...the wishes of a large segment of American parents." Dr. Mark Murphy, National Vice-President of Citizens for Education Freedom, claimed that *Schempp* established "Godless schools" and was "another step toward the elimination of God from all public life." See Dugan (1963) and Hechinger (1963).

[45]While most believe that *Schempp* was a furthering of the principle of strict separation between church and state, some have called into question Clark's rhetoric concerning coercion and have held that such indicated a relaxing of the strict separation principle. Consider Kauper (1964: 72):

> [Justice Clark] did not find it [coercion] enough to say that here the government was sanctioning a proactice directed to religious ends, but went on to emphasize the elements of compulsion in this case. He noted that the prayer was approved by state authorities, was prescribed for daily use in a public school for children required to attend under the compulsory education laws, and was supervised by [a] public school teacher. If strict neutrality were the criterion, then it should have been unnecessary for the Court to discuss the elements of compulsion.

[46]To demonstrate the ongoing discussion over this case, the following appeared in the editorial section of the New York Times on September 24, 1994 (p. A14), over thirty years after the original ruling. The letter was written by Stephen A. Sand of Lakewood, Colorado.

> To the Editor:
>
> Growing up in the late 1950s allowed me to experience public school prayer. Not being religious, I refused to participate in this ritual. While the other students had their head bowed and I did not, some took notice. As a result, I was paid with verbal and physical abuse.
>
> The only benefit I received from public school prayer was an education of hatred and bigotry. I do not know what my classmates gained from it except an illusion of reghteousness and morality. They did not learn love, dignity or understanding, but intolerance and discrimination. Finally, on June 17, 1963, the Supreme Court declared public school prayer unconstitutional.
>
> The religious right is trying to bring prayer back into our public schools. The principle of separation of church and state must be maintained in America to guarantee freedom of religion and prevent such religious persecution of children as I experienced.

Epperson v. Arkansas (393 U.S. 97 [1968])

In 1925, in the immediate aftermath of the Scopes "Monkey Trial," Arkansas passed antievolution laws that made it illegal to teach the theory or doctrine that mankind ascended or descended from a lower order of animals or to adopt or use in any public institution a textbook that advanced the theory of evolution.[47] It was not until forty years later that a public high school biology teacher at Central High School in Little Rock, Arkansas challenged this statute.[48] The Arkansas trial court found in favor of the teacher, Susan Epperson, yet the Arkansas Supreme Court reversed. On appeal, the U.S. Supreme Court agreed to rule on the matter in *Epperson v. Arkansas* (393 U.S. 97 [1968]).

Writing for an unanimous Court, Justice Abe Fortas found the Arkansas statute in violation of the Establishment Clause because the "primary purpose" of the statute was to prevent the teaching of that which was contradictory to Christian orthodoxy.[49] Fortas concluded that the statute in question was prescribed "for the sole reason that it [was] deemed to conflict with a particular religious doctrine" (393 U.S. at 103).[50] The Arkansas statute could not be deemed "as an act of religious neutrality" because Arkansas had not sought to "excise from the curricula of its schools and universities all discussion of the origin of man" (393 U.S. at 109). The state merely

---

[47]In 1925, biology teacher John T. Scopes of Dayton, Tennessee was convicted of teaching evolution to his public school students in violation of a state statute. On technical grounds, the Tennessee Supreme Court reversed Scopes' conviction, thus barring the U.S. Supreme Court from hearing the matter, but did hold that the statute was a legitimate exercise of state authority in matters of curriculum. See *Scopes v. State of Tennessee* (154 Tenn. 105 [1927]).

[48]Epperson received assistance in the form of *amicus* briefs from the American Civil Liberties Union and the National Education Association.

[49]Fortas was able to underscore the principle that government may not favor religious doctrine, yet did not diminish the state's authority to prescribe curriculum for public schools. Morgan (1968: 157) called this "a neat twist."

[50]Fortas cited newspaper advertisements and letters from the late 1920s that advocated the passage of this "Monkey Law." Thus, the Court determined it was "clear that the fundamentalist sectarian conviction was...the law's reason for existence" (393 U.S. at 107-108). There also seemed to be overtones of the "primary purpose" test articulated in *Schempp*. The "primary purpose" of this statute advanced religion. As such, it violated the Establishment Clause.

wanted to eliminate that which was offensive to the Christian faith. According to the majority, a state could not choose to embody a particular religious belief and ban all others.

The decision in *Epperson* was, broadly speaking, a furthering of the neutrality principle advocated in *Schempp*. Fortas' opinion was laden with references to the proper role of government in matters of religion--neutrality. Government may not "promote one religion or religious theory against another or even against the militant opposite" (393 U.S. at 104).[51]

5. Summary and Conclusions

Between 1947 and 1971, the Supreme Court was confronted with a substantial number of Establishment Clause cases, of which eight have been discussed in this chapter (Table 3.1).[52] With regard to governmental assistance to religion, the *Everson* Court (1947) used the philosopophy of Jefferson to construct a "wall of separation" between church and state, yet upheld a policy of reimbursing expenses incurred in transporting students to and from private schools under the "public purpose" and "individual benefit" rationales. *Allen* (1968) reasserted that "individual benefit" theory in permitting the state of New York to require local school boards to distribute free of charge textbooks to students in public and private schools. The Court also upheld a New York statute that offered tax exemption to churches in *Walz* (1970), even though the questioned policy clearly offered economic benefit to religious organizations. While the Court did permit various indirect assistance to religion during this period, the Court was more protective of

---

[51]Choper (1980: 686-687) wrote that there was no evidence in the *Epperson* case that "religious beliefs were either coerced, compromised, or influenced. That is, it was not shown...that the anti-evolution statute law either (1) induced children of fundamentalist religions to accept the biblical theory of creation, or (2) conditioned other children for conversion to fundamentalism." Thus, *Epperson* should have "survived" the constitutional challenge.

[52]Other notable establishment cases not discussed in this chapter included *Kedroff v. St. Nicholas Cathedral* (344 U.S. 94 [1952]), which dealt with a church property issue of the Russian Orthodox Church, and *McGowan v. Maryland* (366 U.S. 420 [1961]), which dealt with Sunday closing laws.

Table 3.1 Supreme Court Establishment Clause Jurisprudence, 1947-1970

Year	Case	Vote	Holding
1947	*Everson v. Board of Education*	5-4	Upheld New Jersey statute that reimbursed parents of nonpublic school students for expenses incurred transporting students to and from school under the "public purpose" and "individual benefit theory." Court still required "strict separation" between church and state.
1948	*McCollum v. Board of Education*	8-1	Illinois released time program for religious instruction in public school classrooms during school hours held unconstitutional. Government could not intervene in religous affairs.
1952	*Zorach v. Clausen*	6-3	New York released time program in which public school students were released from campus for religious instruction upheld because government needed to accommodate religion.
1962	*Engel v. Vitale*	6-1	New York law requiring public students to recite a brief, non-denominational prayer prior to each school day held unconstitutional because government and religion were to operate in separate spheres.
1963	*Abington v. Schempp*	8-1	Pennsylvania law requiring a Bible reading at the start of each public day violated the Establishment Clause because its "purpose and primary effect" was to advance religion.
1968	*Board of Education v. Allen*	6-3	New York statute requiring school boards to loan textbooks to public and nonpublic secondary school students upheld because primary recipients were individuals and not religion in general.
1968	*Epperson v. Arkansas*	9-0	Arkansas law that forbade the teaching of evolution in public schools struck down because it supported a particular segment of religious belief and proscribed others.
1970	*Walz v. Tax Commission*	7-1	New York policy that allowed tax-exemption for church-owned property upheld on the basis of government's "benevolent neutrality" toward religion. Taxing religious organizations led to a greater peril– "excessive entanglement."

religion infiltrating the public school system. In *McCollum* (1948), the Court disallowed a released time program in a public high school because it violated the principle of nonintervention between church and state, only to allow a similar released time program four years later in *Zorach* (1952) on the ground that government needed to accommodate religion. The Court in *Epperson* (1968) disallowed an Arkansas statute mandating that creationism be taught in public schools because its "purpose and primary effect" were religious.

The Court was adamant on the subject of public school prayer. In *Engel* (1962), the Court disallowed a non-denominational prayer with the near unanimous agreement that government and religion were best served if left to operate in different spheres of influence. The following year in *Schempp* (1963), the Court laid down a "purpose and primary effect" test which held that no government may engage in activity that has as its "purpose or primary effect" the advancement or inhibition of religion. According to *Schempp*, government had to be neutral in regard to religion.

Prior to 1971, the three prongs of the *Lemon* test had been developed by the Court.[53] It was time, however, for the Court to consolidate these requirements into a coherent doctrine. By 1971, the time was ripe for the Court to articulate a judicial doctrine adressing the Establishment Clause. *Lemon v. Kurtzman* (403 U.S. 602 [1971]) provided that opportunity.

[53]The "secular purpose" and "primary effect" prongs were articulated in *Abington v. Schempp* (1963). The "excessive entanglement" inquiry originated in *Walz v. Tax Commission* (1970).

CHAPTER 4

A PROPOSED RESOLUTION: THE *LEMON* DOCTRINE

1. Introduction

From *Everson* (1947) to *Walz* (1970), the Supreme Court waffled on the issue of church and state. At times, the Court seemed to encourage a closer relationship; at other times, the Court erected barriers between the two. While separate doctrinal strands were articulated during this period, the Court did not succeed in fashioning a comprehensive constitutional doctrine to guide adjudication in Establishment Clause matters. This failure may be explained in part by the Court's simultaneous recognition of conflicting theories of church-state relations. Although the separation of church-state was implicit in the First Amendment, sharp differences as to the nature of this separation persisted. Most scholars have divided these clashing viewpoints into three categories: strict separation, neutrality, and accommodation. Each of these viewpoints has an historical legacy, a logical line of reasoning, and numerous supporters in the legal, academic, and religious communities. In 1971, the Supreme Court, once again, addressed church-state relations. Its "principle" was derived from these competing theories.[1]

[1]For purposes of this discussion, I briefly will examine these theories as they existed prior to 1971. Since *Lemon*, these theories have found support in decisions of the Court and in scholarly literature. In the next three chapters, I will analyze these theories through Supreme Court decisions.

2. *Competing Judicial Theories on Separation of Church and State*

Strict Separation

The theory of strict separation between religion and politics can be traced to the writings of Roger Williams, Thomas Jefferson, and James Madison. Its premise is simple. As discussed in more detail in Chapter 2, in the words of Jefferson, "a wall of separation" must be erected between church and state. Government operates most effectively absent religious intervention and religion is best served without government. The state cannot punish for belief or disbelief, levy taxes to support the church, participate in the affairs of religious bodies, prefer one religion to another or all religions to no religion, or engage in religious instruction.

This theory of separation was originally adopted by the Supreme Court in *Everson* (1947). Even though the Court allowed New Jersey to adopt a program that reimbursed parents of parochial schoolchildren for transportation costs, its separationist language was unequivocal.[2] Justice Black's broad interpretation of the Establishment Clause rested on the premise that the advancement of religion should come only from the ranks of voluntarism and not from financial or theoretical support from the state. The state should leave religion to prosper or fail by itself.[3]

Neutrality

In his 1962 book, *Religion and the Law*, Phillip Kurland provided a path to doctrinal coherence in regard to relations between church and state. According to Kurland, doctrinal

---

[2]It is worth noting that Justice Rutledge and three other dissenters felt that this decision advanced a philosophy of accommodation and not strict separation. Regardless of Black's separationist rhetoric, Rutledge prophesied that Black's "public welfare" exception would eventually lead to accommodation.

[3]Arguably, this principle was best demonstrated between 1947 and 1971 by the Court in *McCollum v. Board of Education* (1948). In this case, the Court unequivocally stated that government was not to intervene in religious matters.

coherence could be achieved only through a policy of governmental neutrality. Accordingly, the dispositive factor in church-state cases should be government's nonpartisanship. This position permits state action irrespective of the burden imposed on, or the advancement given to, religion. Instead, government is required to remain indifferent to the consequences of its action (or perhaps, its inaction). As such, the Court should focus on whether the government action was intended to be neutral toward religion. If so, no violation occurred.[4]

The motivation for this theory, according to Kurland, was the inability of strict separation to resolve the contradiction between the Establishment and Free Exercise Clauses. Strict separation, while consistent with the Establishment Clause, contradicted to the Free Exercise Clause.[5] These two clauses, read together, led to the conclusion that government should be prohibited from using religion "as a standard for action or inaction because [the religion clauses] prohibit classification in terms of religion either to confer a benefit or impose a burden" (Kurland, 1962: 112).[6]

Douglas Laycock (1990: 1001), another advocate of neutrality, wrote that the religion clauses required government "to minimize the extent to which it either encourage[d] or discourage[d] religious belief or disbelief, practice or non-practice, observance or non-observance." Generally speaking, the principle of neutrality holds that government may not aid or hinder

---

[4]This philosophy does not hold that *Everson* should be reversed. In that case, government was neutral in matters of religion. As long as the state does not employ religious classifications (and the state of New Jersey did not), even those governmental programs that included direct subsidies to religion were not Establishment Clause violations. For further development of this idea, see Kurland (1962: 80-85).

[5]Tribe (1988: 1189) noted: "The Framers, whatever specific applications they may have intended [for the religion clauses], clearly envisioned religion as something special; they enacted that vision into law by guaranteeing the free exercise of *religion* but not, say, of philosophy or science. The strict neutrality approach all but erases this distinction."

[6]However, Kurland (1962: 17) noted: "The objectives of the provisions were clear, but the means of their attainment were still to be developed and, indeed, are still in the course of development. Thus, like the other great clauses of the Constitution, the religion clauses cannot be now confined to the application they might have received in 1789."

religion. Several decisions of the Supreme Court have reflected this philosophy.[7] Perhaps the seminal case between 1947 and 1970 that most demonstrably applied this principle was *Schempp* (1963). Justice Clark wrote that in the relationship between government and religion, "the state is committed to a position of neutrality" (374 U.S. at 226).[8] Seven years later in *Walz v. Tax Commission* (1970), the Court, per Chief Justice Burger, echoed these sentiments in referring to government's "benevolent neutrality" toward religion.

Accommodation

A third philosophical perspective on church-state relations stresses accommodation. Best expressed by Justice Douglas in *Zorach* (343 U.S. 306, 314 [1952]), accommodationists hold that government must "respect[] the religious nature of [its] people." Not to do so is to read into the Constitution "a requirement that the government show a callous indifference to religious groups." Nothing in the constitution required government to be hostile to religion or "to throw its weight against efforts to widen the effective scope of religious influence." Summarized, religion is a fundamental benchmark of American society. Accordingly, government's role is to "accommodate the religious needs of the people" (343 U.S. 306, 315).

Michael McConnell (1985) went further and argued that government had a responsibility to foster religion. Simply stated: "Religious pluralism and diversity--not separatism and secularism--were the ascendant values" of the religion clauses (1985: 2). As such, religion deserved a special place under the law--a place much more respected than other liberties; indeed, a place so distinct that it was set apart through its inclusion as the very first guarantee found in the

---

[7] A careful observation of Establishment Clause jurisprudence will demonstrate the Court's frequent use of the language of neutrality.

[8] For more discussion of this case, see Chapter 3. Abraham (1988: 340) noted that all five concurring opinions in this case referred to government's neutrality as the "*sine qua non* of the problem."

Bill of Rights. Thus, when the Court allowed religion to occupy a different place under the Constitution, it adhered to the intentions of the framers and respected the desires of the people.

3. The Lemon Doctrine

Prior to 1971, the Supreme Court wavered between these competing theories. As a result, Establishment Clause adjudication was in flux. Finally, in *Lemon v. Kurtzman* (403 U.S. 602 [1971]), the Court addressed its inconsistencies and articulated a new standard for determining whether legislation violated the Establishment Clause.

Lemon v. Kurtzman (403 U.S. 602 [1971])

Lemon v. Kurtzman--a challenge from Pennsylvania--was consolidated with two similarly situated cases from Rhode Island--*Early v. Di Censo* and *Robinson v. Di Censo*. These cases called into question Pennsylvania and Rhode Island statutes that provided state aid to church-related elementary and secondary schools. Both of these statutes were challenged as violative of the Establishment Clause.

The Pennsylvania Nonpublic Elementary and Secondary Education Act, passed in 1968, authorized the state to purchase secular educational services from nonpublic schools. According to contracts drawn pursuant to the Act, the state of Pennsylvania reimbursed nonpublic schools for their expenditures for teachers' salaries, textbooks, and other instructional material. Individual schools were required to keep accounting records to identify the "secular educational services" for which reimbursement was given.[9] Reimbursement was not given for all "secular educational

[9]The accounts of nonpublic schools participating in this program were subjected to state audit. Also, the funds for this program were initially derived from a tax on horse and harness racing. By the time this case reached the Supreme Court, the Act provided that the revenue be raised through a state tax on cigarettes.

services." First, reimbursement was limited to courses that were also offered in the curricula only in the subjects of mathematics, modern foreign languages, physical sciences, and physical education. Furthermore, all textbooks and instructional materials were subjected to approval by the state Superintendent of Public Instruction. Finally, the Act disallowed reimbursement for courses that contained "any subject matter expressing religious teaching, or the morals or forms of worship of any sect."

By 1971, Pennsylvania had entered into contracts with 1,181 nonpublic schools that enrolled 535,215 students--more than twenty percent of the total student population in the state. More than ninety-six percent of those students attended church-related schools. Alton J. Lemon, on behalf of Pennsylvania residents and taxpayers, filed suit in the United States District Court for the Eastern District of Pennsylvania claiming that this program violated the First Amendment (310 F.Supp. 35 [1970]).[10] Lemon's primary complaint was that the principal beneficiaries of the program were church-related schools controlled by religious organizations that existed for the sole purpose of propagating a religious faith. He further alleged that by purchasing a ticket to a horse racing event, he had paid a specific tax supporting a religious establishment. The District Court rejected these contentions.[11] Lemon appealed.

In 1969, the Rhode Island Salary Supplement Act was adopted. This Act permitted the state to supplement the salaries of teachers who taught secular subjects in nonpublic elementary schools. These supplements came in the form of direct monetary payments to the individual instructors. All teachers accepting supplemental payments were required to agree in writing "not to teach a course in religion for so long as or during such time as he or she receive[d] any salary supplements."

---

[10]Lemon was also the father of a child attending public schools in Pennsylvania.

[11]The three-judge District Court divided 2-1 in reaching this decision.

Citizens and taxpayers of Rhode Island, per Joan Di Censo, challenged the Act on the ground that it violated the religion clauses of the First Amendment. The United States District Court for the District of Rhode Island (316 F.Supp. 112 [1970]) sided with the plaintiffs in concluding that the Act was repugnant to the Establishment and Free Exercise Clauses. The underlying reason was that the Act fostered "excessive entanglement" between government and religion. The District Court found that approximately twenty-five percent of Rhode Island's pupils were enrolled in nonpublic elementary schools. Moreover, about ninety-five percent of those nonpublic schoolchildren were enrolled in church-related elementary schools. At the time of the District Court's hearing, two hundred and fifty teachers, all employed in Roman Catholic schools, had applied for supplementary income under the Act. Further, the District Court concluded that the parochial school system was "an integral part of the religious mission of the Catholic church" (quoted in *Lemon*, 403 U.S. at 609). The state of Rhode Island appealed.

Recognizing the unique questions posed by these cases, coupled with the Court's prior inconsistencies on matters of church and state, the Supreme Court consolidated these cases and granted appeal in *Lemon v. Kurtzman* (403 U.S. 602 [1971]). These cases raised the issue whether the religion clauses of the First Amendment were violated when states provided aid to church-related elementary and secondary schools through monetary reimbursements for instructional materials and salary supplements. Chief Justice Warren Burger, expressing the views of eight members of the Court, wrote the opinion.[12] The majority opinion held that both statutes were unconstitutional because they promoted an "excessive entanglement" between church and state. Thus, the Court reversed the decision coming from the District Court for the Eastern District of Pennsylvania (*Lemon v. Kurtzman*) and affirmed the decision of the District Court for the District of Rhode Island (*Earley v. Di Censo* and *Robinson v. Di Censo*). More importantly, the

[12]Justice Thurgood Marshall did not participate in the *Lemon* decision, but did take part in the consideration of the *Di Censo* case. Justice White dissented in *Di Censo*.

Court was able to draft a doctrine to guide future decision-making in the area of separation of church and state. Prior to addressing the specific issues in the companion cases, Burger articulated this new test.

Burger candidly acknowledged that church-state relations were murky, observing that the Court could "only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law" Nonetheless, the Court was required to identify some boundaries with respect 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'" (403 U.S. at 612).[13] In defining those boundaries, Burger applied some seemingly pragmatic rules for adjudication in this area. Making reference to *Allen* (392 U.S. 236, 243 [1968]), Burger promulgated the first two components of the *Lemon* doctrine. First, the statute in question must have a "secular legislative purpose." Second, the "principle or primary effect" of the challenged statute must neither advance nor inhibit religion.[14] Adding to that criteria, Burger noted a third prong that came directly from *Walz* (397 U.S. 664, 674 [1970]): the statute must not foster an "excessive entanglement" between government and religion. If a statute encroached upon *any* of these restrictions, it violated the Establishment Clause. A challenged statute did not have to fall to all of *Lemon's* requirements to be unconstitutional, just one. Armed with this three-pronged test, the Court was prepared to judge *Lemon* and *Di Censo*.

As for the required "secular legislative purpose," Burger uncovered no evidence that suggested the purpose was anything other than the enhancement of quality for all schools. Maintaining standards of quality was a legitimate state concern.

---

[13]Burger was parroting the Court's opinion in *Walz* (397 U.S. 664, 668 [1970]).

[14]Arguably, these two prongs originated in *Schempp* (374 U.S. 203, 222 [1963]). In this instance, however, Burger referenced similar rhetoric from *Allen*.

The Court then referenced the second prong of the *Lemon* test. The majority concluded that there was no need to quarrel with the finding of both state legislatures that secular and religious education were identifiable and separable (403 U.S. at 602). Furthermore, the state legislatures had provided adequate statutory restrictions to guarantee that state funds were only expended on secular functions. However, the Court was not forced to determine whether the "principle or primary effect" of the practices advanced or inhibited religion because they found a certain violation elsewhere--"excessive entanglement" between government and religion.

The crux of this decision rested on the "excessive entanglement" prong. The objective of this prong was to prevent the intrusion of government into the precincts of religion, and religion into the precincts of government. In these cases, that intrusion had occurred. Burger concluded (403 U.S. at 614) that the "cumulative impact of the entire relationship" constituted "excessive entanglement between government and religion." Burger then qualified the "excessive" component of the entanglement prong. In the twenty-four years of modern Supreme Court Establishment Clause jurisprudence, Burger noted, complete and total separation between church and state had never been advocated. Absolute separation was not possible. Some relationship between government and religion was inevitable.[15] Summarizing this concept, he wrote:

> Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship....In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority (403 U.S. at 614-615).

In applying this principle, the majority found that both state activities created an impermissible degree of entanglement. Burger then addressed the programs individually.

---

[15]Here, Burger was reemphasizing one of the many findings of the Court in *Zorach* (343 U.S. 306, 312 [1952]). Burger was not on the Court when this case was decided.

For the Pennsylvania program, the restrictions and surveillance necessary to ensure that teachers played a strictly nonideological role gave rise to impermissible entanglements (403 U.S. at 620-621). The factor that distinguished this case from *Everson* and *Allen* was that in the latter cases, the state aid was provided in the form of payments to the individual student and his or her parents. In this case, the aid went directly to the church-related school.[16] Thus, the statutes created an "intimate and continuing relationship between church and state" (403 U.S. at 622).[17]

Similarly, the Court found a First Amendment violation in the Rhode Island program. Burger's evaluation began with a reference to the district court's conclusion that the schools in question were "powerful vehicle[s] for transmitting the Catholic faith to the next generation." The majority thus accepted the district court's findings that the parochial schools in question were engaged in "substantial religious activity" (403 U.S. at 616).

Acknowledging that the Court had previously permitted states to provide parochial schools with services, facilities, and materials, Burger drew some distinctions between *Di Censo* and cases where provisions were allowed and the present cases.[18] In *Allen* (1968), the Court permitted New York to loan textbooks to all secondary school students, including those enrolled in parochial schools. *Di Censo* involved cash subsidies to teachers. Because of this differentiation, the Court was unwilling to accept the recipients (in one case, students; in the other, teachers) as being the same. Recognizing that teachers have different ideological perspectives than books, Burger declared: "In terms of potential for involving some aspect of faith or morals in secular subjects, a

---

[16]Burger reiterated one of the major premises of *Walz*: there are some major dangers in direct payments to religious organizations. In *Walz* (397 U.S. 664, 675 [1970]), the Court stated: "Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards."

[17]In particular, Burger was referring to the government's post-audit power to inspect and evaluate a church-related school's financial records to determine religious and secular expenditures.

[18]Burger made specific reference to provisions for bus transportation, school lunches, public health services, and secular textbooks (403 U.S. at 616).

textbook's content is ascertainable, but a teacher's handling of a subject is not" (403 U.S. at 617). The Court was not willing to ignore the danger that teachers under religious discipline might pose to the separation of religious and secular education. In Rhode Island, that danger was present "to a substantial degree" (403 U.S. at 617).

The Roman Catholic elementary schools in Rhode Island were generally supervised by the Bishop of Providence and his representative, the Diocesan Superintendent of Schools. However, most individual parishes were granted much latitude in respect to the financial responsibilities of the schools. The parish priest allocated school funds. With rare exception, school principles were nuns. The superintendent, principle, and parish priest were all involved in the hiring processes and in the determination of salaries. All of the schools were subjected to the "Handbook of School Regulations," which unequivocally stated that religious instruction was "not confined to formal courses, nor...restricted to a single subject area" (quoted in *Lemon*, 403 U.S. at 618). Also, teachers were advised to stimulate interest in religious vocations and missionary efforts.

The Supreme Court could not accept this entanglement between church and state. The dangers that arose from this subsidization were too great to ignore. The danger was not in "what was," but rather in "what might be." The bottom line in *Di Censo* was easily ascertained: "The teacher [was] employed by a religious organization, subject[ed] to the direction and discipline of religious authorities, and work[ed] in a system dedicated to rearing children in a particular faith....Inevitably some of a teacher's responsibilities hover[ed] on the border between secular and religious orientation" (403 U.S. at 618). Burger conceded that parochial school teachers were not necessarily guilty of attempting to evade First Amendment requirements, yet recognized "that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to

inculcate its tenets, will inevitable experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals" (403 U.S. at 618).[19]

As for the subsidies, the Court determined that the Rhode Island Legislature could not provide state aid on the simple and unsupported assumption that secular education was completely separated from religious education. The state had to be certain that the subsidized teachers did not inculcate religious values in their teaching. The state placed numerous conditions on the subsidies, but those conditions were not enough. Absent continuous state surveillance, there was no way to guarantee that religious inculcation would not take place in the teaching of secular subjects. "Unlike a book," the Court noted, "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" (403 U.S. at 619).[20]

The Court also made some general references applicable to both the Pennsylvania and Rhode Island programs. Because private schools enrolled a sizable proportion of the student population in both states, the Court concluded that state assistance would invariably entail political activity.[21] As a result, political candidates would be forced to declare their opinions, and voters would be forced to choose. Too often when people are faced with these types of issues, their "votes [are] aligned with their faith" (403 U.S. at 621). While recognizing that vigorous political debate was symbolic of a healthy democracy, the majority insisted that certain religious battles were not to be waged in the political arena.[22] Furthermore, Burger asserted (403 U.S. at 622-623):

---

[19]The Court did not say that the teachers were unable to separate the secular from the religious, but rather that the "potential for impermissible fostering of religion" was present (403 U.S. at 619).

[20]Apparently, the Court was making reference to *Allen* (1968).

[21]In Pennsylvania, rising costs forced the state legislature to include a portion of state revenues from cigarette taxes in the state aid program. In Rhode Island, the District Court found, the parochial school's "monumental and deepening financial crisis" required larger annual appropriations (403 U.S. at 623-624).

[22]Justices Brennan and Marshall would later argued that "political divisiveness" inquiry was a fourth prong of the *Lemon* doctrine.

> political division among religious lines was one of the principal evils against which the First Amendment was intended to protect....To have States and communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great importance....It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues of problems that confront every level of government.

Burger, not wanting to disparage the role of nonpublic schools, acknowledged their contributions to society as "enormous" (403 U.S. at 625). But that was not the issue. The issue was whether the policies of Pennsylvania and Rhode Island could be squared with the religion clauses. And they could not, for government was to be excluded from areas of religious instruction and churches were to similarly be excluded from the affairs of the government. Burger added: "The Constitution decreed 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 [was] inevitable, lines [had to be] drawn" (403 U.S. at 625).

Justice Douglas, joined by Justice Black, concurred.[23] His opinion was based on the "obvious fact that the raison d'etre of parochial schools [was] the propagation of religious faith" (403 U.S. at 628).[24] Douglas believed, as did the majority, that the state surveillance and supervision required to make certain the separation of religious and secular instruction constituted a violation of the Establishment Clause.[25] If the state fulfilled its obligation, Douglas wrote, it "puts a public investigator into every classroom and entails a pervasive monitoring of these church

---

[23]Justice Marshall joined Douglas' concurrence with regard to *Di Censo*.

[24]Douglas cited the Reverend Joseph H. Fichter, Sr. (1958: 86): "It is a commonplace observation that in the parochial school religion permeates the whole curriculum...."

[25]Douglas seemed to imply that making such a distinction was very difficult for the state. He noted (403 U.S. at 634-635):

> What is palpably a sectarian course can be marked for deletion. But the problem only starts here. Sectarian instruction, in which of course, a State may not indulge, can take place in a course on Shakespeare or in one on mathematics. No matter what the curriculum offers, the question is, what is *taught*? We do not deal with evil teachers but with zealous ones who may use any opportunity to indoctrinate a class.

agencies by the secular authorities" (403 U.S. at 627). The state then became duty-bound to make certain the school operated within the provisions of the statute, an arrangement that "would breed only rancor and dissension" (403 U.S. at 639).

Furthermore, these subsidies, in effect, permitted the schools to use their own funds for religious training while using taxpayer dollars to educate in secular subjects. Quoting from *Everson* (330 U.S. 1, 16 [1947]), Douglas asserted: "No tax in any amount, large or small, can be levied to support any religious activity or institutions, whatever they may be called, or whatever form they adopt to teach or practice religion."[26] He chastised those who supported the notion that a state could subsidize only the secular component of education, concluding that this distinction could not be made because the school operated as an organic whole "living on one budget."[27] Douglas also found a violation of the Free Exercise Clause. By requiring taxpayers of many faiths (or taxpayers of no faith) to contribute finances to the advancement and propagation of one particular faith, both states violated the second component of the religion clauses. Forced contribution was the antithesis of freedom of religion.

Justice Brennan offered another concurrence. He (403 U.S. at 643) began by succinctly summarizing his interpretation of the intent of the authors of the First Amendment.[28]

> What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements or 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.

---

[26]The Court had reaffirmed this policy in many cases since *Everson*: *Zorach* (343 U.S 306, 314 [1952]), *McCollum* (333 U.S. 203, 210 [1952]) *McGowan v. Maryland* (366 U.S. 420, 443 [1961]), and *Torcaso v. Watkins* (367 U.S. 488, 493 [1961]).

[27]Douglas sarcastically remarked that this distinction "makes a grave constitutional decision turn merely on cost accounting and bookkeeping entries." He later referred to this as a "sophisticated attempt[] to avoid the Constitution" (403 U.S. at 641).

[28]This was the same justice who had previously written in *Schempp* (374 U.S. 203, 237 [1963]) that "too literal a quest for the advice of the Founding Fathers" often resulted in futility.

The challenged statutes violated these basic principles as well as the three-pronged test articulated at the outset of the Court's opinion.

Brennan distinguished *Lemon* and *Di Censo* from *Everson* and *Allen*. Unlike the latter, *Lemon* and *Di Censo* involved direct subsidies from public funds for activities carried on by sectarian educational institutions. Brennan opined (403 U.S at 648-649):

> for more than a century, the consensus...has been that public subsidy of sectarian schools constitutes an impermissible involvement of secular with religious institutions. Based on this understanding, the statutes of Pennsylvania and Rhode Island cannot be deemed constitutional, for they require "too close a proximity" of government to the subsidized sectarian institution, creating real dangers of "the secularization of a creed" (403 U.S at 649).

After detailing the multiple requirements, regulations, and surveillance tactics imposed by the states, Brennan found them, strictly speaking, irrelevant.[29] Their elimination would not save the programs. In *Walz*, Burger had noted: "General subsidies of religious activities would, of course, constitute impermissible state involvement with religion" (397 U.S. 664, 690 [1970]). Merely because the Pennsylvania and Rhode Island statutes were restricted to support the teaching of secular subjects did not mean that they fell outside of "general subsidies of religious activities."[30] To support this conclusion, Brennan applied the three-pronged test. "The common ingredient of the three prongs of the test," he summarized (403 U.S at 657-658):

> is whether the statutes involve government in the "essentially religious activities" of religious institutions. My analysis of the operation, purposes, and effects of these statutes leads me inescapably to the conclusion that they do impermissibly involve the states and the federal government with the "essentially religious activities" of sectarian educational institutions.

---

[29]Those aspects that Brennan made specific reference to included the promise of teachers not to teach religion or to inject religious teaching into their secular courses and the state's extensive standardization of the content of secular courses, teaching materials, and textbooks (403 U.S. at 650-652).

[30]Brennan seemed to imply that the majority was too narrow-minded in looking for specific reasons to invalidate the questioned policies. In essence, Brennan argued that the Court did not need to look at the specific dictates of the statutes, but rather at the fundamental premise on which the statutes were based--a "general subsidy of religious activity." In and of itself, that was ample to find an Establishment Clause violation.

It was not just that religion "permeated" secular education, but rather that "the secular education [was] provided within the environment of religion; the institution [was] dedicated to two goals, secular education *and* religious instruction. When aid [flowed] directly to the institution, both functions [secular and sectarian] benefit[ed]" (403 U.S. at 660). Accordingly, the states were providing funds to sectarian institutions committed to the propagation and fostering of a particular faith.[31]

Justice Byron White concurred in *Lemon*, but dissented in *Di Censo*. To frame his opinion, White referenced earlier decisions of the Court that acknowledged the ongoing relationship between church and state.[32] Any analysis of those cases led to the obvious conclusion that parochial schools performed *both* religious *and* secular functions. Those same cases also recognized that governmental assistance to sectarian schools did not necessarily constitute an Establishment Clause violation (403 U.S at 663). Merely because religion indirectly benefited from governmental aid to secular instruction, it did not follow that an impermissible establishment of religion was created. White was content to conclude that the states were financing a separable function--secular education.

White rejected the rationale in *Lemon*, but supported the judgment. The majority accepted the district court's allegations that the schools in question were controlled by religious organization and operated to promote a particular faith. From these allegations, the majority concluded that excessive entanglement necessarily followed. White disagreed. Nothing in the record supported the majority's claim that "sectarian teaching does or would invade secular classes" (403 U.S. at

---

[31]Brennan concluded his thoughts on this particular matter by reciting a quote from his opinion in *Schempp* (374 U.S. 203, 265 [1963]): "government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice."

[32]Specifically, White referred to compulsory attendance laws for private school students (*Pierce v. Society of Sisters*, 268 U.S. 510 [1925]), reimbursement for transportation expenses for private school students (*Everson*), loaning textbooks to private school students (*Allen*), and released time programs in public schools (*Zorach*).

670). White subtly chided the majority for substituting "presumption for proof" in assuming that religion pervaded all secular education (403 U.S at 670). If that could be proved, White reasoned, the result would be an Establishment Clause violation. However, it was presumptuous for the Court to invalidate the statute on its face because such a finding might not have been true of all schools. Hence, White agreed with the majority but would have remanded the case for trial, holding the Pennsylvania statute valid on its face, but leaving open the question of its validity as applied in light of particular facts.[33]

Justice White dissented in *Di Censo*. He contended: "No fault was found with the secular purpose of the program; there [was] no suggestion that the purpose of the program was aid to religion disguised in secular attire. Nor [did] the Court find that the primary effect of the program [was] to aid religion rather than to implement secular goals" (403 U.S at 665). Nonetheless, the Court still somehow found an "impermissible entanglement."[34] White offered an explanation: the majority opinion accepted the finding of the district court that education was an integral part of the religious mission of the Catholic Church, yet interposed its own finding--one that the district court expressly renounced--that "nuns, clerics, and dedicated Catholic laymen unavoidably posed a grave risk in that they might not be able to put aside their religion in the secular classroom" (403 U.S at 666). Nothing in the record indicated that secular instruction could not be separated from religious instruction or that entanglement difficulties necessarily arose in regard to the salary supplement program. Therefore, to reject the statute because of "excessive entanglement" was to engage in chance and speculation.

---

[33]Apparently, White felt that the Court pronounced a judgment that was too sweeping. Instead, he advocated hearing each particular case on its individual merits. There was nothing constitutionally wrong with the statute, merely its application in some cases.

[34]White referred to this as "curious and mystifying" (403 U.S. at 666).

In conclusion, White acknowledged the difficulty in Establishment Clause jurisprudence by echoing Chief Justice Burger's observation: "Judicial caveats against entanglement" are a "blurred, indistinct, and variable barrier" (403 U.S at 671). In deciding *Lemon* and *Di Censo*, the Court grappled with that barrier. Its conclusions and subsequent doctrine were presumably intended to clarify the uncertain and ambiguous field of Establishment Clause jurisprudence.

4. Summary and Conclusions

The principle articulated by Chief Justice Burger in *Lemon* was to guide decision-making in Establishment Clause cases or controversies at law. As all legal doctrines are designed to do, this tripartite test was to limit arbitrary discretion and promote consistency. From this point forward, all cases dealing with the Establishment Clause of the First Amendment were to be analyzed in light of *Lemon's* doctrine. To reiterate, that doctrine was threefold. First, the questioned government action must have a "secular legislative purpose." Merely because the action had a purpose that aided religion, in and of itself, was not grounds for a violation as long as a legitimate secular purpose could be found. Second, the "principle or primary effect" of the challenged government action must have been one that neither advanced nor inhibited religion. Incidental advancement or obstruction would not result in the policy's invalidation. Third, the action could not lead to an "excessive entanglement" between government and religion. If the policy required an ongoing relationship between the two parties, the likelihood of that policy being struck down increased.

While *Lemon* might have crystallized the Establishment Clause debate, it did not completely resolve the issue. Many questions were raised in regard to the semantics and purpose of *Lemon*. What constituted a "secular legislative purpose?" How would the courts determine a statute's "principle or primary effect?" What constituted an advancement or restraint of religion?

In *Lemon*, the Court made only cursory reference to these inquiries, instead choosing to focus on the third prong--"excessive entanglement" Thus, no meaningful guidance was offered in regard to the application of these inquiries.

In the aftermath of *Lemon*, there was still "some play in the joints of the Establishment Clause" (Morgan, 1972: 112). *Lemon* provided a written structure--a reference point for judicial inquiries into matters of church and state. The Court had articulated a standard by which to judge government's intrusion into the religious domain. But that standard did not answer every question. It did not resolve the debate. An analysis of Establishment Clause adjudication in the 1970s clearly demonstrates that the three-pronged *Lemon* doctrine was not refined to the point of perfection. In fact, it could be argued that this new doctrine further complicated this convoluted area of constitutional law.

CHAPTER 5

AN OPAQUE DOCTRINE: *LEMON* IN THE 1970s

1. Introduction

In the decade following *Lemon*, the Court employed the three-pronged test as its canon for determining the constitutionality of questionable relations between church and state.[1] During the seventies (and well into the eighties), the *Lemon* doctrine was the generally agreed upon precedent in Establishment Clause jurisprudence and was applied with great regularity. With a newly articulated precedent, the Court's responsibility was to compare all challenged legislation in this area to the *Lemon* standard in order to determine the legislation's constitutionality.

2. Government Aid to Religion

On the same day the Supreme Court handed down its decision in *Lemon* and *Di Censo*, *Tilton v. Richardson* (403 U.S. 672 [1971]) was decided. Arguably, this decision provided the first opportunity for the Court to employ its new doctrine. In *Lemon*, the Court had struck down a statute that permitted public funds to pay salaries of parochial school teachers. In *Tilton*, and in *Hunt v. McNair* (413 U.S. 734 [1973]), decided two years later, the Court answered the question whether government aid to parochial schools was constitutional when that aid was in the form of construction and maintenance grants.

---

[1] According to Olshan (1989: 313), the *Lemon* standard served as the "predominant test" employed by the Supreme Court on this matter up until the mid-eighties.

Tilton v. Richardson (403 U.S. 672 [1971])

Trying to meet the needs for more buildings for colleges and universities facing burgeoning enrollment, Congress passed the Higher Education Facilities Act in 1963. Title I of the Act provided construction grants to institutions for buildings and other facilities that were to be used exclusively for secular educational purposes.[2] The Act was to be administered by the United States Commissioner of Education.

Eleanor Taft Tilton and other taxpaying citizens of the United States and residents of Connecticut brought suit against the administrators of the Act and four church-related colleges and universities in Connecticut that received Title I funds.[3] A federal district court initially ruled that the Higher Education Facilities Act of 1963 was constitutional because it had neither the purpose nor the effect of promoting religion. Tilton appealed to the U.S. Supreme Court, which agreed to hear the case.

Dividing 5-4, the Court upheld the decision of the district court, though it did not declare all provisions of the Act constitutional. But, five of the nine justices could not agree on any single opinion. The plurality opinion was written by Chief Justice Burger, who was joined by Justices Harlan, Stewart, and Blackmun. Justice White concurred in the judgment.

As applied to the permissible recipients of federal aid, Burger noted that the Act made no reference to religious affiliation or nonaffiliation. Thus, the Court was "satisfied that Congress intended the Act to include all colleges and universities regardless of any affiliation with or

---

[2]Specifically, the Act provided grants for the construction of a wide variety of "academic facilities," but clearly excluded "any facility used or to be used for sectarian instruction or as a place for religious worship, or...any facility which...is used or to be used primarily in connection with any part of the program of a school or department of divinity...." For further reference, see the Higher Education Facilities Act of 1963, 77 Stat. 364, 20 USC, Sections 711-721.

[3]Federal funds were used for five projects at four sectarian institutions in Connecticut: (1) a library at Sacred Heart University in Bridgeport; (2) a music, drama, and arts building at Annherst College; (3) a science building at Fairfield University in Fairfield; (4) a library at Fairfield University; and (5) a language laboratory at Albertus Magnus College in New Haven.

sponsorship by a religious body..." (403 U.S. at 676).[4] Prior to turning his attention to the tripartite test of *Lemon*, Burger reiterated the ambiguity in adjudicating matters involving religion and government. He candidly acknowledged that "no single constitutional caliper" existed to precisely measure church-state relations.[5] Constitutional adjudication did not lend itself to the "absolutes of the physical sciences or mathematics" (403 U.S. at 678).[6]

The plurality opinion then placed the *Lemon* doctrine next to the challenged statute, presumably to see if the latter squared with the former. The plurality quickly found a "secular purpose." The Act's objective was the promotion of education, and that alone made government action "entirely appropriate" (403 U.S. at 679).[7]

Burger conceded that federal construction grants aided individual institutions by assisting them in performing various functions, but so did bus transportation, textbooks, and tax exemptions, and the Supreme Court had permitted these forms of governmental assistance.[8] Moreover, under *Lemon*, a statute could not be deemed unconstitutional solely because it *indirectly* advanced religion. The *Lemon* doctrine specified that a statute would fail to meet constitutional muster if its *primary* or *principal* effect was to advance religion. The Court determined that Congress had taken sufficient precautions to ensure that the "primary effect" was not the

---

[4]Burger noted that amendments aimed at excluding church-related schools were defeated by Congress.

[5]Burger was referencing *Walz* (397 U.S. 664, 668 [1970]).

[6]Apparently, Burger was already conceding that the *Lemon* doctrine was not a "save-all" in Establishment Clause jurisprudence. He further noted (403 U.S. at 678) that *Lemon's* "standards" should be viewed merely as "guidelines."

[7]The preamble to the Act read: "The 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 (20 USC, Section 701).

[8]Burger was referencing, respectively, *Everson* (1947), *Allen* (1968), and *Walz* (1970). Furthermore, a precedent on federal construction grants existed. In 1899, the Court had determined in *Bradfield v. Roberts* (175 U.S. 291) that a hospital operated by a religious order could receive a federal construction grant.

advancement of religion.[9] The individual institutions had also fully adhered to the statutory conditions.

The Court did determine, however, that a certain provision of the Higher Education Facilities Act trespassed on the Establishment Clause. According to the Act, the institution receiving the federal grant was required to provide assurances that the constructed facility would not be used for sectarian instruction or religious worship "during at least the period of the Federal interest therein," defined elsewhere in the Act as twenty years. According to the plurality, limiting the prohibition for religious use to twenty years opened up the possibility that at the conclusion of that period, the building could be used primarily for the advancement of religion.[10] This was not permissible under *Lemon*.[11]

The third stipulation of *Lemon* prohibited "excessive entanglement" between church and government. In *Tilton*, the evidence demonstrated that the predominant higher education mission of the four schools in question was a quality, secular education.[12] Because religious indoctrination was not the purpose of these institutions, the risk that government aid would support religious

---

[9]Burger noted that several institutions had disobeyed the statutory conditions and been forced to disgorge the federal benefits.

[10]Burger reasoned that even after twenty years, the structure possessed some tangible worth. If that structure were to be converted into a chapel or otherwise used to promote religion, then the original federal grant would have the effect of advancing religion.

[11]After analyzing the debate in Congress concerning this Act, the plurality concluded that passage would not have failed even if it had not included the twenty-year provision. Furthermore, Burger noted, the excision of the twenty-year period did not significantly impair the operation or administration of the Act (403 U.S. at 683-684).

[12]The evidence showed that while all four schools were operated by Catholic organizations and the majority of faculty and students were of Catholic background, non-Catholics were hired as faculty and admitted as students. Also, none of the schools required attendance at religious services. All students, regardless of religious affiliation, were required to take courses in theology, yet the courses were taught according to the academic requirements of the subject matter and the individual instructor's concept of professional standards. Those courses covered a wide range of human experiences, and no evidence was admitted demonstrating that the goal of the institutions was to proselytize or indoctrinate. Finally, Burger also noted, all four schools strongly adhered to principles of academic freedom (403 U.S. at 686-687).

activity was minimized. Thus, intensive government surveillance was not necessary to ensure statutory obedience.

The plurality opinion distinguished *Tilton* from *Lemon* for several reasons. In the latter, the state subsidies went to teachers--individuals not necessarily religiously neutral. Thus, greater entanglement was required to make certain that the subsidies did not advance religion. In *Tilton*, government was providing facilities--structures that were themselves religiously neutral. "Excessive entanglement" was also avoided because the distribution of aid was a one-time, single-purpose construction grant. In *Lemon*, the payments were continuous. Additionally, the plurality distinguished *Tilton* from *Lemon* because of the difference in the levels of impressionability of elementary and secondary school students and college students. It was a "substant[ive]...contention" that the latter were less impressionable and less susceptible to religious indoctrination.

In a somewhat sarcastic dissent, Justice Douglas, joined by Justices Black and Marshall, invoked the separationist position. Regardless of whether it was a one-time gift (as in *Tilton*) or a continual offering (as in *Lemon*), the unconstitutionality persisted.[13] Furthermore, religious training and secular education were indistinguishable in parochial institutions. To prevent encroachment between church and state required strict surveillance, which created "excessive entanglement." Douglas also believed that the Act advanced religion because the school operated under one budget. Money saved from one item of the budget was free to be used elsewhere.[14]

Finally, Douglas despaired at the loss of respect he believed the First Amendment had sustained. James Madison had warned in his *Remonstrance* that even a small amount ("three

---

[13]Commenting critically on this matter, Douglas noted that the plurality's distinction was "in effect that small violations of the First Amendment over a period of years are unconstitutional (see *Lemon* and *Di Censo*) while a huge violation occurring only once is de minimus." Douglas could not accept this "sophistry" (403 U.S. at 693).

[14]The logic here was simple. If a religious school saved money by accepting financial construction grants (to be used for non-sectarian purposes), then the money that the institution saved could easily and without restriction be exhausted on religious matters (403 U.S at 693).

pence") coming from the taxpayers and going into the pockets of a church was unconstitutional. Douglas concluded: "The million dollar grants sustained today put Madison's miserable 'three pence' to shame" (403 U.S. at 697).

Justice Brennan also dissented. He chastised the Court for permitting the secularizing impact of public assistance on church schools. By accepting public funds, the sectarian institutions subjected themselves to state supervision, policing, and, ultimately, state control. In his view, the Establishment Clause prevented the federal government from providing any funds to universities in which "the propagation and advancement of a particular religion [was] a function or purpose" (403 U.S. at 689).

While the decision in *Lemon* was unanimous, it was immediately apparent in *Tilton* that application of this new doctrine was not so generally agreed upon. The Court had articulated new criteria, but failed to furnish precise guidelines. *Tilton* indicated that the Court would interpret the "primary effect" prong somewhat loosely. Under *Tilton*, to have an impermissible "primary effect," the very assistance provided had to advance religion. In effect, government assistance could benefit religious institutions without benefiting religion in general.[15] The *Tilton* Court thus distinguished a government policy that had the "primary effect" of assisting religious institutions from a government policy that had the "primary effect" of advancing religion.

This distinction, however, ignored the practical reality that construction grants to nonpublic institutions permitted these institutions to spend money on the advancement, or even inculcation, or religion even though that money perhaps had been earmarked for facility construction on the advancement, or even inculcation, of religion. The *Tilton* Court differentiated between a *direct* subsidy to religion and an *indirect* subsidy to religion. Regardless, the effect could easily have been the advancement of religion. *Tilton* seemed to imply that the Court would

[15]Assistance could be granted to religious institutions, so long as it was only to the secular undertakings of those institutions.

grant substantive weight to the various methods of subsidization, perhaps even more weight than given to the end result of that subsidization. *Everson* rejected every form of religious subsidization. *Tilton* relaxed that standard.

For "excessive entanglement," *Tilton* did not answer the critical question. What constituted "excessiveness?" The *Tilton* Court left open the possibility that entanglement was less "excessive" if the assistance was in the form of a one-time offering. Under this rationale, the timing and frequency of assistance could feasibly make an unconstitutional practice constitutional. Also, *Lemon* established "political divisiveness" as a criteria to be considered in determining "excessive entanglement." The Court in *Tilton* quickly dismissed this possibility, without even acknowledging that the Act authorized individual state agencies to help coordinate the operations--an obvious opportunity for "political divisiveness."

Thus, in its very first application of the new test, the Court failed to provide the pragmatism that the *Lemon* doctrine needed. In applying the unanimously-endorsed *Lemon* doctrine to the facts of *Tilton*, the justices split 5-4. Perhaps this new Establishment Clause doctrine was not, after all, as helpful as the Court had anticipated.

Hunt v. McNair (413 U.S. 734 [1973])

The South Carolina Educational Facilities Authority Act, passed in 1971, established a state entity "to assist institutions for higher education in the construction, financing and refinancing of projects," primarily through the issuance of revenue bonds.[16] To steer clear of possible Establishment Clause violations, the Act stipulated that the revenue bonds were not to be issued for any facility used or to be used for sectarian purposes. In 1970, the Baptist College of Charleston submitted a proposal to the Authority seeking the issuance of revenue bonds for $1,250,000 for

[16]SC Code, Sections 22-41, et seq.

capital improvements.[17] Prior to the issuance of revenue bonds, Richard W. Hunt and other South Carolina taxpayers sued the Authority on the ground that the operation violated the Establishment Clause.[18] The trial court and state Supreme Court denied Hunt relief. The Supreme Court agreed to hear the case on appeal.

The justices, dividing 6-3, held that the South Carolina Educational Facilities Act was not in violation of the Establishment Clause, thus upholding the lower courts' decisions. Justice Powell authored the majority opinion.[19] Justice Brennan, joined by Justices Douglas and Marshall, wrote a dissenting opinion. Recognizing that the standards of *Lemon* were "no more than helpful signposts," the majority, nonetheless, considered the statute in terms of purpose, effect, and entanglement. The Court quickly determined the statute's "secular purpose."[20] Furthermore, the benefits of the statute were available to all institutions of higher education, regardless of religious or secular affiliation.

To qualify his response to the "primary effect" prong of *Lemon*, Powell noted that the Court had previously rejected the argument that all aid to religious organizations was forbidden on the ground that it freed up other money to spend on religious ends.[21] He found nothing in the

---

[17]Under this proposal, the Authority issued the bonds, making the proceeds available to the Baptist College of Charleston for the completion of the particular project. In return, the college conveyed the project to the Authority, who leased the property back to the college. After complete repayment, the property was reconveyed to the college. It was further noted that using a state-created Authority to seek revenue bonds as opposed to a private authority permitted for tax-exempt status on the revenue bonds.

[18]The individual named in the suit was Robert E. McNair, Governor of South Carolina.

[19]Powell was joined by Chief Justice Burger and Justices Blackmun, White, Stewart, and Rehnquist.

[20]Stated in the Act:
[I]t is essential that this and future generations...be given the fullest opportunity to learn and to develop their intellectual and mental capacities; that it is essential that institutions...be provided with appropriate additional means to assist...in achieving the required levels or learning and development...; and that it is the purpose of this [Act] to provide a measure of assistance...to provide the facilities and structures which are sorely needed to accomplish the purposes of this [Act], all to the public benefit and good, to the extent and manner provided herein (SC Code, Section 22.41).

[21]Powell referenced *Bradfield v. Roberts* (175 U.S. 291 [1899]), *Walz* (1970), and *Tilton* (1973).

record to indicated that the institution's operations were "oriented significantly towards sectarian rather than secular education" (413 U.S. at 744). The "primary effect" was solely confined to secular education.

For "excessive entanglement," Hunt argued that the relationship created by this Act encroached upon the Establishment Clause for two reasons. First, the government was required to regularly inspect the institution to be assured of compliance with the Act. Second, the government was directly participating in the management decisions of the college. Powell rejected both claims. Entanglement resulting from inspections relied heavily on the "extent to which religion permeate[d] the institution" (413 U.S. at 746).[22] In this case, the majority concluded that religious indoctrination was not a substantial purpose; thus, state inspection did not create "excessive entanglement." The Authority's participation in management decisions of the college likewise did not create "excessive entanglement," for its participation was limited to ensuring that the college's fees sufficed to meet bond payments.

Justice Brennan, joined by Justices Douglas and Marshall, asserted that the state's scheme violated the Establishment Clause for three primary reasons (413 U.S. at 750). Instead of applying the *Lemon* doctrine, Brennan articulated his own test: a statute was unconstitutional if it served the essentially religious activities of religious institutions, employed the instruments of government for essentially religious purposes, or used essentially religious means to serve governmental ends, where secular means would have sufficed.[23] In this instance, the challenged statute failed all three. Thus, three members of the Court refused to recognize the *Lemon* doctrine as controlling.

---

[22]Powell distinguished *Lemon* and *Tilton*. In the former, Burger found "substantial religious character" (413 U.S. at 616). In the latter, Burger found that "religious indoctrination" was not a "substantial purpose" (413 U.S. at 687).

[23]For all three reasons, Brennan referenced his separate opinions in *Schempp* (1963), *Walz* (1970) and *Lemon* (1971).

Apparently, Brennan, Douglas, and Marshall were unhappy with the loose manner in which the Court had interpreted the "primary effect" and "excessive entanglement" inquiries.

The *Hunt* Court did very little to clarify the elusive "excessive entanglement" prong. In *Tilton*, the Court had found that "excessive entanglement" was not present because "there was no continuing financial relationship or dependencies, no annual audits, and no government analysis of an institutions expenditures on secular as distinguished from religious activities" (403 U.S. 672, 688 [1971]). Yet, in *Hunt*, the Court permitted a practice that had as its core features "continuing financial relationships or dependencies," "annual audits," "government analysis," and "government regulation." The *Hunt* Court, just as its predecessor in *Tilton*, was unable to articulate any comprehensive understanding of the third inquiry of *Lemon*. In effect, the Court permitted South Carolina to employ its agencies in the essentially religious activities of religious institutions. The good intentions of the doctrine's framers were somehow lost through the justices inabilities to collectively interpret that doctrine.

Committee for Public Education v. Nyquist (413 U.S. 756 [1973])

Having addressed federal and state construction grants to parochial colleges, the Court turned its attention to aid in the form of school maintenance to sectarian elementary and secondary schools, and tuition reimbursements and state income tax relief to parents of parochial schoolchildren. *Committee for Public Education and Religious Liberty v. Nyquist* (413 U.S. 756 [1973]) clearly demonstrated the persistent divisions of the justices regarding application of the *Lemon* doctrine.[24]

---

[24]The case consolidated four cases coming from lower courts in New York: (1) *Committee v. Nyquist*; (2) *Anderson v. Committee for Public Education and Religious Liberty*; (3) *Nyquist v. Committee for Public Education and Religious Liberty*; and (4) *Cherry v. Committee for Public Education and Religious Liberty*. Ewald B. Nyquist was the Commissioner of Education of the State of New York. Warren M. Anderson was the Majority Leader and President pro tem of the New York Senate, acting as an intervenor for the state. Priscella L. Cherry was an intervenor for the parents of nonpublic school children.

In 1972, the Governor of New York endorsed several amendments to the State's Education and Tax Laws. The first five sections of these amendments established three separate financial aid programs for nonpublic elementary and secondary schools. The first section, entitled "Health and Safety Grants for Nonpublic School Children," provided money grants from the state to qualifying nonpublic schools for "maintenance and repair of...school facilities and equipment to ensure the health, welfare and safety of enrolled pupils."[25] Each receiving school was required to prepare an audited statement for the Commissioner of Education detailing maintenance and repair expenditures. Sections two through five were packaged together as the "Elementary and Secondary Education Opportunity Program."[26] The second section provided tuition reimbursements to parents of children enrolled in elementary or secondary nonpublic schools.[27] Sections three through five provided tax relief to parents who failed to qualify for tuition reimbursements. Under these sections, parents could subtract for state income tax purposes a designated amount from their gross income for nonpublic school tuition.

Complaints challenging these three forms of aid as violative of the Establishment Clause were filed by an unincorporated association known as the Committee for Public Education and Religious Liberty and by several New York taxpayers. The district court determined that the first

---

[25]For a full explication, see New York Education Law, Article 12, Sections 549-553, 1972. According to the legislative findings, this amendment was passed for three reasons. First, the state had the "primary responsibility to ensure the health, welfare and safety of children attending...nonpublic schools." Second, the "fiscal crisis in nonpublic education...caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children." Finally, a "healthy and safe school environment" contributed "to the stability of urban neighborhoods." Maintenance and repair included "the provision of heat, light, water, ventilation, and sanitary facilities; cleaning, janitorial and custodial services; snow removal; necessary upkeep of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem" (Section 550).

[26]See New York Education Law, Article 12-A, Sections 559-563, 1972.

[27]To qualify for this reimbursement, a parent must have a taxable income of less than $5,000. The amount of reimbursement was $50 for each grade school child and $100 for each high school student, not to exceed fifty percent of the tuition bill. Each recipient was required to submit to the Commissioner of Education a verified receipt for the payment for tuition. Upon presentation of the receipt, reimbursement was granted with no restrictions on the use of that money.

(maintenance and repair) and second (tuition reimbursement) sections of the Act were invalid, but that the third, fourth, and fifth sections (income tax deduction) were not in violation of the Establishment Clause (350 F.Supp. 650 [1972]). The Committee for Public Education and Religious Liberty appealed the validation of the third segment. The state officials appealed the invalidation of the first two segments. The intervening parents of nonpublic school children appealed the invalidation of the second segment. The Supreme Court noted probable jurisdiction and granted appellate review.

In a 6-3 decision written by Justice Powell, the Court struck down all three segments of the Act.[28] Chief Justice Burger and Justice Rehnquist concurred with the judgment regarding the unconstitutionality of the maintenance and repair provisions, but dissented regarding the tuition reimbursement and tax deductions. Justice White dissented, concluding that all three segments were constitutional.

Powell directed the Court's attention to *Lemon*. The majority had no difficulty in identifying a "secular purpose." Each provision was adequately supported by "legitimate, nonsectarian state interests" (413 U.S. at 773). The majority candidly acknowledged New York's interest in preserving the health, welfare, and safety of school children, promoting pluralism and diversity in public and nonpublic education, and protecting an overburdened public school system from the crisis that would ensue if all nonpublic students enrolled in public schools.

In regard to the maintenance and repair provision, it was simply undeniable, Powell stipulated for eight members of the Court, that its "primary effect" advanced religion because it directly subsidized the religious activities of sectarian schools (413 U.S. at 774).[29] Nothing in the Act restricted payments for the upkeep of facilities used exclusively for secular purposes. Nothing in the Act prohibited a sectarian school from paying out of state funds the salaries of chapel

---

[28]The majority opinion was joined by Justices Douglas, Brennan, Stewart, Marshall and Blackmun.

[29]Burger and Rehnquist agreed with the majority on this issue. Only Justice White dissented.

caretakers. Nothing in the Act prevented the state funds from being allocated to renovate classrooms where religion was taught. Because appropriate restrictions were absent, it was too easy for the "primary effect" to be the advancement of religion.[30] The criterion for government aid to sectarian institutions was whether the aid could be channeled to the secular without providing assistance to the sectarian. That channel, Powell specified, was "narrow" (413 U.S. at 775).

For much the same reasons, the tuition reimbursements failed the "primary effect" test.[31] Without question, the tuition grants would have been impermissible had they been given directly to the nonpublic schools.[32] However, in this case, the grants were given to parents. The controlling question would thus whether that difference was enough to validate this program. *Everson* permitted direct aid to parents of parochial school students for transportation expenses. There, Justice Black said that such services were analogous to police and fire protection for parochial schools; they were "so separate and so indisputably marked off from the religious function" (330 U.S. 1, 18 [1947]). *Allen* provided assistance in the form of textbooks, but only secular ones, and stipulations were in place to guarantee institutional compliance. But in this case, the tuition grants were subjected to no restrictions. While Powell acknowledged that the state's motives were quite possibly legitimate, the bottom line was *effect*. The effect of the aid was "unmistakably to provide desired financial support to nonpublic, sectarian institutions" (413 U.S at 783). Regardless of whether the grant was categorized as "a reimbursement, a reward, or a subsidy," its substantive impact was still the same--the advancement of religion (413 U.S. at 786).

---

[30]New York officials argued that maintenance and repair expenditures were consistent with other expenditures approved by the Court. Powell disagreed. *Everson* (1947) permitted a reimbursement to parents for transportation costs. *Allen* (1968) authorized the provision of secular textbooks. *Tilton* (1971) upheld federal grants for construction of secular facilities, but not religious facilities. All three former cases had substantive differences from this case. Perhaps the most glaring fallacy in upholding the maintenance and repair provision arose when compared to *Tilton*. "[I]f the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair" (403 U.S. at 777).

[31]For tuition reimbursements, Powell only spoke for six justices. Burger, Rehnquist, and White dissented.

[32]As previously established in *Everson* (1947), all direct aid to educational institutional was unconstitutional.

The third segment of the Act provided tax benefits to parents in the form of deductions from their adjusted gross income. Practically speaking, there was little difference between the tax benefit and the tuition grant. But the state objected to this comparison because New York granted a tax exemption for church property.[33] The Court, however, distinguished tax exemptions for church property and tax credits for parents. One did not advance religion; the other did. The program of tax credits was not sufficiently restricted to the point where the Court could be assured it would not have the "primary effect" of advancing religion.

Having concluding that all three segments of the Act violated the "primary effect" prong of *Lemon*, the Court found it unnecessary to address "excessive entanglement."[34] In conclusion, Powell offered an olive branch to New York by recognizing that its intentions were noble. But those intentions had to "be weighed against the relevant provisions and purposes of the First Amendment, which safeguard the separation of Church from State..." (413 U.S. at 795).[35]

Three justices wrote dissenting opinions. Chief Justice Burger and Justice Rehnquist agreed with the invalidation of the maintenance and repair program, yet dissented in regard to the invalidation of the tuition reimbursement and tax relief policies. Burger believed that the program was valid in spite of the incidental benefit to religious schools.[36] Justice Rehnquist maintained that tax deductions and exemptions to parents of nonpublic school children were legitimate under the

---

[33]The state relied on *Walz* (1970) for support.

[34]Powell did remark that such assistance "carried grave potential for entanglement in the broader sense of continuing political strife over aid to religion" (413 U.S. at 794).

[35]Abraham (1988: 357) remarked that *Nyquist* conclusively demonstrated that the applicable test for church and state relations was the "'purpose-effect-entanglement' trilogy yardstick."

[36]Chief Justice Burger relied on the principles established in *Everson* and *Allen*: indirect and incidental benefits to religion (in the form of aid to parents) were not conclusive violations. "[G]overnment aid to individuals," he wrote, "generally stands on an entirely different footing from direct aid to religious institutions" (413 U.S. at 801).

Establishment Clause.[37] Justice White dissented in regard to all three programs, believing that the benefit to religion was only incidental.[38]

The *Nyquist* decision was the first in which the Court struck down a government practice because it violated the "primary effect" prong of *Lemon*. Previously, the Court had articulated what *did not* constitute a "primary effect." In this case, some explanation was offered as to what *did* constitute a "primary effect." These provisions were struck down not because their "primary effect" advanced religion, but because of their potential to advance religion. The Court never accused New York of advancing religion. The Court did accost the state for failing to provide adequate safeguards to assure that the provisions did not have this effect. Apparently, *Lemon* not only forbade practices that had as their "primary effect" the advancement of religion, but also forbade practices that were not properly restricted from the possibility of advancement.

The *Nyquist* Court implied that the *Lemon* doctrine did not forbid all assistance to religious institutions. If the institution could effectively segregate the secular from the sectarian, state aid might be permitted. Accordingly, under *Nyquist*, a state could finance a religious institution so long as that assistance only advanced the sectarian functions of the school. Through this implication, the *Nyquist* Court seemed to indicate that the character of the recipient institution was as important as the type of aid. In doing so, the *Nyquist* Court apparently rejected Brennan's position, expressed in *Lemon*, that all direct subsidies to religious institutions inevitably benefited both the religious and the secular functions. The only forbidden aid was that which *directly*

---

[37]Justice Rehnquist believed that programs for tax reimbursement and tax relief were consistent with *Everson*, *Allen*, and the long-adhered principle of governmental "neutrality" toward religion (413 U.S. at 812).

[38]Justice White's dissent was based on the understanding that "it should be wholly acceptable for the State to contribute to the secular education of children rather than to insist that if parents want to provide their children with religious as well as secular education, the State will refuse to contribute anything to their secular training" (413 U.S. at 814-815). Furthermore, White was concerned why the "primary effect" was to advance religion and not to advance education in general (413 U.S at 824).

assisted the religious functions of the institutions. Unfortunately, the *Nyquist* Court did not concretely define *direct* and *indirect* assistance.

The Court also did not recognize a distinction between subsidization of religious institutions (maintenance and repair provisions) and subsidization of parents of nonpublic schoolchildren (tuition reimbursements and tax deductions). Both advanced religion, in spite of the fact that, at least in regard to the parental subsidization, no monetary aid was directly given to the nonpublic institutions. The only incidental benefit given to the schools was an increase in enrollment if parents were more likely to enroll their children in parochial schools because of a tax break.[39] Furthermore, the Court also failed to distinguish between various general welfare programs. In *Everson*, the Court permitted bus transportation for parochial schoolchildren because it was a general program offered to all students. Yet in *Nyquist*, school maintenance was not a general welfare program available to all schoolchildren. Surely the Court would not have argued that the *Lemon* doctrine mandated the overturning of *Everson*.

Meek v. Pittenger (421 U.S 349 [1975])

Two years after *Nyquist*, the Court was again faced with determining whether a state law providing assistance to church-related elementary and secondary schools violated the Establishment Clause. In 1972, the Pennsylvania General Assembly adopted Acts 194 and 195 to the Pennsylvania Public School Code of 1949. The purpose of the statutes was to assure that all schoolchildren in the Commonwealth would equitably share in the benefits of auxiliary services, textbooks, and instructional material.[40] Act 194 authorized the Commonwealth to provide

---

[39] If taken to the extreme, the Court's rationale would prevent the state of New York from providing tax benefits to churches. Some people might be more likely to contribute to churches if those contributions were tax deductible.

[40] For a full explication of these acts, see Act 194, Pa. Stat. Ann., Tit. 24, Sections 9-972(a), and Act 195, Pa. Stat. Ann., Tit. 24, Sections 9-972(a).

"auxiliary services" to all children enrolled in nonpublic elementary and secondary schools meeting the state's compulsory attendance requirements.[41] Act 195 authorized the loaning of textbooks and instructional materials and equipment to children attending nonpublic elementary and secondary schools that meet the same requirements.[42]

Three individuals and four organizations challenged the constitutionality of Acts 194 and 195 on the ground that each constituted a "law respecting the establishment of religion."[43] More specifically, the plaintiffs alleged that the recipient schools were controlled by religious organizations, and had as their purpose the inculcation of religious values and the propagation of a particular faith. After considering these complaints, the district court unanimously upheld the textbook loan;[44] upheld the auxiliary services and instructional materials provisions by a divided vote;[45] and unanimously invalidated the instructional equipment provision (374 F.Supp. 639

---

[41]"Auxiliary services" included counseling, testing, psychological services, speech and hearing therapy, teaching and related services for exceptional and remedial students, "and such other secular, non-ideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth."

[42]The lending of textbooks was limited to those books which were "acceptable for use in any public elementary, or secondary school of the Commonwealth." "Instructional materials" included periodicals, photographs, maps, charts, sound recordings, films, "or any other printed and published materials of a similar nature." "Instructional equipment" was defined by the Act as including projection, recording, and laboratory equipment.

[43]The individual plaintiffs were Sylvia Meek, Bertha G. Myers, and Charles A. Weatherly. The organizational plaintiffs were 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. All of the individual plaintiffs were Pennsylvania taxpayers and all of the organizational plaintiffs had members who were taxpayers in the Commonwealth. The original defendants were John C. Pittenger, Secretary of Education in Pennsylvania and Grace M. Sloan, Treasurer of Pennsylvania.

[44]The district court conceded that the textbook loan provisions of Act 195 were indistinguishable from the New York textbook loan upheld in *Allen* (1968). Like the New York program, Act 195 extended to all children the benefits of Pennsylvania's well-established policy of lending textbooks free of charge to elementary and secondary school children. Furthermore, the textbooks were loaned to the students and not directly to the nonpublic schools, and were limited to those textbooks that were readily acceptable in public schools.

[45]The district court reasoned that the "auxiliary services" were provided directly to the children involved and were expressly limited to those services that were secular, neutral and non-ideological. Any benefits for church-related schools were "incidental and indirect" (374 F.Supp. at 656-657). Furthermore, the court concluded that no continuing supervision was necessary to ensure that the staff providing auxiliary services did not "succumb to sectarianization of his or her professional work" (374 F.Supp. at 657).

[1973]).[46] On appeal, the Supreme Court noted probable jurisdiction and agreed to hear *Meek v. Pittenger* (421 U.S. 349 [1975]).

In a five part opinion written by Justice Stewart, the Court affirmed the constitutionality of the textbook loan provision, but reversed the judgments concerning the other provisions.[47] Acknowledging at the outset that the *Lemon* test was the "proper framework of analysis," Stewart conceded that the test must not be viewed as "setting the precise limits to the necessary constitutional inquiry," but must serve only as a "guideline[] with which to identify instances in which the objectives of the Establishment Clause have been impaired" (421 U.S. at 358-359).

As for the loaning of textbooks, the Court found no substantial difference between the New York policy upheld in *Allen* (1968) and the proposed Pennsylvania program. The two programs were, "in every material respect identical" (421 U.S. at 360).[48] Hence, the practice was sustained.

Act 195 also provided for the loaning of instructional material and equipment so that all students would have the opportunity to develop their intellectual capabilities. The Court readily accepted this as a "secular purpose," but found that the "primary effect" of this policy was the advancement of religion because most of the beneficiaries were "nonpublic schools with a predominant sectarian character" (421 U.S. at 364).[49]

---

[46]The reason for invalidating the instructional equipment provision was that the equipment "could be diverted to religious purposes" (374 F.Supp. at 662).

[47]The majority also included Justices Blackmun and Powell. Justices Brennan, Douglas, and Marshall (in a separate opinion written by Brennan) concurred in part and dissented in part. Chief Justice Burger (in a separate opinion) and Justices Rehnquist and White (in an opinion written by Justice Rehnquist) concurred in part and dissented in part. Justices Stewart, Blackmun, Powell, Rehnquist, White, and Chief Justice Burger upheld the textbook provision. Justices Stewart, Powell, Blackmun, Brennan, Douglas, and Marshall voted to strike down the other provisions.

[48]The two programs were identical because: (1) ownership of the books remained in the state; (2) no funds or books were furnished to parochial schools; (3) the financial benefit was to parents and children, not schools; (4) textbooks that could be lent were restricted to those which were "designated for use in any public, elementary or secondary schools of the state or were approved by any board of education, trustees or other school authorities;" and (5) the Pennsylvania statute merely made available to all children the benefits of a general program to lend school books free of charge.

[49]The only requirement imposed on nonpublic schools was to meet compulsory-attendance laws in the state. The state officials only needed documentation that nonpublic schools were providing subjects and activities

Stewart recognized that other secular and non-ideological services, namely bus transportation, school lunches, and public health facilities, had been previously sustained by the Court. These services provided only "indirect and incidental" benefits to church-related schools. However, this assistance at issue in *Meek* was neither "indirect nor incidental" (421 U.S. at 365).[50] Characterizing the recipient schools as "religion-pervasive," Stewart concluded: "Substantial aid to the educational function of such schools...necessarily results in aid to the sectarian school enterprise as a whole" (421 U.S. at 366).[51] For these reasons, the instructional material and equipment provisions constituted an impermissible establishment of religion.

Act 194 authorized the Secretary of Education to provide auxiliary services to nonpublic elementary and secondary schools. Similar services were furnished free of charge to public school students. The Court concluded that state surveillance was necessary to make "certain" that personnel did not advance religion. This surveillance, however, created "excessive entanglement."[52] In addition, the Court did not discount the possibility that such an arrangement also violated the "primary effect" test of *Lemon*. This potential, coupled with the "excessive

---

prescribed by the State Board of Education. No inquiries were made into the religious characteristics of the individual schools. Of the 1,320 nonpublic schools that complied with the compulsory-attendance law, more than 75% were religiously affiliated.

[50]Pennsylvania authorized just under $12 million of direct aid to religiously affiliated schools during the 1972-1973 school year.

[51]Stewart referenced *Hunt* (413 U.S. 734, 743 [1973]): "when [direct aid] flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission," the state aid had the impermissible primary effect of advancing religion. Stewart also referenced *Lemon* (403 U.S. 602, 616-617 [1971]): "The secular education [that religion-pervasive] schools provide goes hand in hand with the religious mission that is the only reason for the school's existence. Within the institution, the two [secular and sectarian education] are inextricable intertwined." The Court retreated from its assumption made in *Nyquist* (1973) that the secular and the sectarian could be separated.

[52]Reciting from the companion case in *Lemon–Earley v. Di Censo* (403 U.S. 602, 618-619 [1971])– Stewart reminded the district court of the precedent: "The State must be certain...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...." The word "certain" might be an inappropriate standard for the justices to apply with respect to "excessive entanglement." Absolute certainty is an impossibility. Even in public schools, no state can be certain that religious indoctrination will not take place. The Court may have interpreted *Lemon* somewhat too literally here. Perhaps a "reasonable probability" of religious inculcation would have been a better standard to apply.

entanglement" necessary to ensure neutral "auxiliary services," compelled the conclusion that Act 194 violated the Establishment Clause.

In summary, Acts 194 and 195 (with the exception of the textbook loan provision) were found to be in violation of the Establishment Clause.[53] However, by permitting the textbook loan, the Court potentially created a "small crack in the wall," opening up the door for renewed legal strife in the ongoing debate over state aid to religious educational institutions.[54]

Justice Brennan, joined by Justices Douglas and Marshall, concurred with the Court in striking down the loaning of instructional material and equipment and the furnishing of "auxiliary services." Yet he dissented from Stewart's finding regarding the textbook provision. The textbook provision, according to Brennan, created serious potential for "political divisiveness" over the aid to religion.[55] In fact, Brennan asserted that "political divisiveness" was a fourth prong of *Lemon*. Moreover, it was "pure fantasy" to maintain that schools did not benefit when the state provided them with textbooks (421 U.S. at 379).[56]

Chief Justice Burger authored a separate opinion, concurring with regard to the textbooks, but dissenting with regard to the provisions of instructional materials and equipment and auxiliary services. He accused the Court of stifling religious activity and "penaliz[ing] children because of their parents choice of religious exercise" (421 U.S. at 386).[57] The Court improperly applied the

---

[53]Therefore, the judgment of the district court as to Act 194 was reversed. The judgment as to the textbook loan provision of Act 195 was upheld. The judgment as to the remainder of Act 195 was reversed.

[54]Indeed, the Court's docket for the following term included several cases dealing with these matters.

[55]Brennan further noted that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect" (421 U.S. at 374). Brennan did not address the valid argument that all programs assisting religion were potentially politically explosive. Furthermore, Brennan distinguished this case from *Allen*. *Allen* was decided prior to *Lemon*, which, according to Brennan, ordained that political divisiveness was a factor to be consideration. Brennan even questioned whether the decision in *Allen* could be sustained in light of the mandates of *Lemon* (421 U.S at 378).

[56]The Court had previously held in *Nyquist* (413 U.S. 756, 783 [1973]) that the state could not "relieve [parent's] financial burdens sufficiently to assure that they continue to have the option to send their children to religious-oriented schools."

[57]The Chief Justice lambasted his colleagues:

religion clauses of the First Amendment as a means to discriminate against protected religious activities. In concluding his scathing dissent, Burger expressed his hope "that, at some future date, the Court will come to a more enlightened and tolerant view of the First Amendment guarantees of free exercise of religion" (421 U.S. at 387). This line of reasoning was elaborated on in future opinions and contributed to a stronger foundation for the "accommodationist" perspective.

Justice Rehnquist, along with Justice White, concurred in the judgment insofar as it upheld the textbook provision, but dissented from the other holdings of unconstitutionality. The majority had not distinguished the textbook provision from the instructional materials and equipment provision.[58] Rehnquist was not convinced that "excessive entanglement" was required to prevent the staff from inculcating religious values.[59] Like Burger, Rehnquist concluded with a direct jab at his colleagues:

> I am disturbed as much by the overtones of the Court's opinion as by its actual holding. The Court apparently believes that the Establishment Clause of the First Amendment not only mandates religious neutrality on the part of government but also requires that this Court go further and throw its weight on the side of those who believe that our society as a whole should be a purely secular one (421 U.S. at 395).

The *Meek* Court simply extended the holding of *Nyquist* (1973); namely, government could not subsidize the religious activities of sectarian schools. But *Meek* also added a new dimension to the "excessive entanglement" inquiry. For government assistance to be constitutional, the state had

---

> 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 them from 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 Clauses on their heads (421 U.S. at 386-387).

[58] In both cases, Rehnquist noted, ownership remained in the state (421 U.S. at 391). Thus, a "danger of diversion" did not exist.

[59] Rehnquist found this case to be substantially different from the salary supplement program struck down in *Lemon*. In *Lemon*, the teachers were employees of parochial schools, and taught core curriculum classes. In this case, the professional staff were public employees, not necessarily subjected to whims of a parochial school. Thus, *Lemon's* facts were substantially different.

to be "certain" that no advancement of religion would occur. This presented the states with a catch-22 situation. To be "certain," the state was forced to strictly regulate parochial schools. But strict regulation created "excessive entanglement." The court would back away from this demand of "certainty" in future Establishment Clause cases.

Roemer v. Board of Public Works of Maryland (421 U.S. 736 [1976])

In 1971, the Maryland Legislature authorized the payment of noncategorical grants to private colleges, among them church-related institutions. Fearing a constitutional challenge, Maryland amended the statute to prohibit funds from being used for sectarian purposes. Four taxpayers in Maryland challenged this statute as violative of the Establishment Clause. A federal district court found the statute constitutional (387 F.Supp. 1282 [1974]). On appeal, the Supreme Court agreed to hear *Roemer v. Board of Public Works* (426 U.S. 736 [1976]). Justice Blackmun delivered the judgment of the Court and was joined by Chief Justice Burger and Justice Powell. Justice White, joined by Justice Rehnquist, wrote a concurrence. Justices Brennan, Marshall, Stewart, and Stevens dissented.

Ignoring the "secular purpose," the plurality focused on the other inquiries of *Lemon* and concluded that the character of the receiving institutions was of great importance in analyzing the statute's "primary effect." In this case, none of institutions was "pervasively sectarian." Accordingly, Blackmun was convinced that the secular education could be effectively separated from the sectarian, and that state funds would go only to support the former. As for "excessive entanglement," Blackmun acknowledged that close government surveillance was unnecessary to ensure that the state expenditures did not advance religion. Blackmun concluded that the religious character of the institution was a better determinant of entanglement than the actual funding. Because of the "nonpervasively sectarian" nature of the schools, the danger was greatly reduced. Indeed, reduced enough to allow a lump-sum grant to a church-related institution.

It was on this entanglement issue that Justices White and Rehnquist departed from plurality opinion, even though they concurred in the judgment. This entanglement analysis, according to White, was without any constitutional support whatsoever. Instead, he favored abolishing *Lemon's* "excessive entanglement" prong--which he referred to as "insolubly paradoxical"--and resting Establishment Clause adjudication solely on *Lemon's* first two inquiries. White further chided the Court for strongly adhering to the *Lemon* test, which he called an "unnecessary...and superfluous test for establishing when the state's involvement with religion passes the peril point" (426 U.S. at 768-769). The tone of this concurrence might lead one to believe that had it not been for the plurality's reliance on *Lemon*, *Roemer* would have been a majority decision.

Justices Brennan, Stewart, and Stevens wrote dissenting opinions. The most stinging criticism came from Brennan, who castigated his brethren for relying on institutional character analysis as opposed to substantive First Amendment precedents. According to Brennan, any and all general subsidies to church-related institutions were unconstitutional because they *inevitably* benefited both that secular *and* the sectarian functions. Justice Stewart dissented because theology courses were mandatory at several of the institutions.

Roemer's affirmation of direct aid to sectarian institutions was an aberration from earlier Court decisions. The plurality's adherence to the type of institution rather than the form of the state aid was novel, and left open the possibility that level of "religious permeation" was a judicial canon in determining the extent to which states might fund sectarian institutions. This departure allowed Blackmun to, in effect, bypass to the elusive "primary effect" and "excessive entanglement" inquiries. While the *Lemon* doctrine was given lip service by the *Roemer* Court, it was undeniable that the justices were in disarray concerning the application of this doctrine to the state's involvement with religious education.

Wolman v. Walter (433 U.S. 229 [1977])

In an obvious effort to conform to the dictates of *Meek*, the legislative assembly in Ohio authorized various forms of aid to nonpublic schools, most of which were sectarian. The statute authorized the state to provide nonpublic school students with textbooks, standardized testing and scoring services, diagnostic services, therapeutic and remedial services, instructional materials and equipment, and field trip transportation. Ohio residents and taxpayers challenged the constitutionality of these provisions, claiming that they constituted "law[s] respecting an establishment of religion." The United States District Court for the Southern District of Ohio held the statute constitutional in all respects (417 F.Supp. 1113 [1976]). Ohio residents and taxpayers appealed the decision. The Supreme Court noted probable jurisdiction.

Seven justices authored opinions in *Wolman v. Walter* (433 U.S. 229 [1977]).[60] In essence, they upheld those portions of the statute providing textbooks, standardized testing and scoring services, diagnostic services, and therapeutic and remedial services. They struck down those portions providing instructional materials and equipment and field trip transportation. Justice Blackmun delivered the judgment of the Court, with the justices splitting five ways, ranging in voting blocs from 8-1 to 6-3.[61] After establishing the proper mode of analysis--the three-part *Lemon* test--Blackmun had "no difficulty" in finding the "secular legislative purpose." The statute reflected a legitimate state interest in "protecting the health of its youth and in providing a fertile educational environment for all the schoolchildren of the State" (433 U.S. at 236). As usual, the

---

[60] Justice Blackmun wrote the opinion of the Court. Justice Stewart joined Blackmun's opinion. Justices Brennan, Marshall, Powell, Stevens, White and Chief Justice Burger all concurred in part and dissented in part. Justice Rehnquist, who also concurred in part and dissented in part, did not write a separate opinion, but joined White's. Abraham (1988: 359) noted that these opinions were "hardly models of clarity."

[61] The justices split 6-3 in allowing the textbook loans, 6-3 in upholding standardized testing and scoring services, 8-1 in permitting diagnostic services, and 7-2 in allowing therapeutic services. The Court divided 6-3 in disallowing the instructional materials and 5-4 in striking down the provision for field trip transportation. In Part II of Justice Blackmun's opinion--the part in which he applied the three-pronged *Lemon* test--he did not secure a majority of justices. Justices White and Rehnquist refused to join. Justices Brennan and Marshall did not join because the opinion did not include the "imaginary" fourth factor--political divisiveness.

difficulty would come in analyzing the "effect" and "entanglement" criteria. The Court addressed each provision separately.

As for the textbooks, six members of the Court agreed that this provision was not unconstitutional, even though they could not come to any single opinion.[62] The part of the Court's opinion that addressed the textbook provision made no mention to *Lemon*. Instead, the Court relied solely on the earlier decisions of *Allen* (1968) and *Meek* (1975).[63] The loaning of textbooks in this case bore "a striking resemblance to the systems approved in [the two earlier cases]" (433 U.S. at 237-238).[64] Since the Ohio statute also provided virtually identical protections against abuse, the textbook provision of this program was constitutional.[65]

In regard to standardized testing and scoring, the same six justices found this provision constitutional, yet again failed to collaborate on any single opinion. The "secular purpose" was obvious: to ensure that state educational standards were met. In addressing the more complicated requirements of *Lemon*, the Court, once again, relied on precedent--*Levitt v. Committee for Public Education* (413 U.S. 472 [1973]).[66] But this Ohio provision was somewhat different than that ruled on in *Levitt*. In *Wolman* (1978), the nonpublic school did not control the content or result of

---

[62]The six who agreed to the constitutionality of the textbook provision, albeit for different reasons, were Chief Justice Burger and Justices Blackmun, Stewart, Powell, White, and Rehnquist. Justice Marshall, who dissented on this matter, indicated that he would now vote to overturn the similar textbook provision upheld in *Allen*.

[63]*Allen* (1968) was decided prior to *Lemon*. *Meek* (1975) was decided after *Lemon*. At least one justice had earlier argued that *Allen* probably could not pass constitutional muster if held to the standards of *Lemon*. The Court did not even contemplate Justice Marshall's assertions.

[64]In fact, the only distinction offered by appellants was that the respective states in *Allen* and *Meek* provided only textbooks, while Ohio defined "textbook" as "any book or book substitute." Appellants argued that "substitute" might possibly include auxiliary materials and equipment. Since Ohio's statute had a separate segment dealing with this matter, the Court dismissed this claim.

[65]In the aftermath of the decision, appellants urged the Court to overturn *Allen* and *Meek*. The Court declined.

[66]In *Levitt*, the Supreme Court invalidated a New York statutory scheme that reimbursed church-sponsored schools for expenses of teacher-prepared testing. The reasoning was crude: "no means [were] available to assure that internally prepared tests [were] free of religious instruction" (413 U.S. 472, 480). To make certain that these tests were free of religious instruction required surveillance that inevitably created "excessive entanglement."

the test, and was thus prevented from using the test as a part of religious training (433 U.S at 240). Additionally, since the nonpublic school had no control over the test, the need for state supervision was eliminated; thus any potential for entanglement between church and state was removed. The plurality opinion did not address the "primary effect" prong of *Lemon* on this matter.

Eight members of the Court agreed that the diagnostic services did not constitute an impermissible establishment of religion.[67] Previous Supreme Court decisions contained "a common thread:" providing health services to schoolchildren did not have the "primary effect" of aiding religion (433 U.S. at 242).[68] The Court distinguished diagnostic services from teaching or counseling services. First, diagnostic services had little or no educational content; thus, they were not closely associated with educational missions of nonpublic schools. Second, the diagnostician had only limited contact with the student; thus, the opportunity for the transmission of sectarian views was diminished.

Seven justices found the therapeutic and remedial services to be constitutional.[69] The Court found that these provisions did not impermissibly foster ideological views because the statute demanded that authorized services be offered only on sites that were "neither physically nor educationally identified with the functions of the nonpublic school" (433 U.S. at 246-247).[70] Furthermore, the services were provided by public employees.

---

[67]Justice Brennan was the only dissenter on this matter.

[68]Quoting from *Lemon* (403 U.S. 602, 616-617), Brennan noted: "Our decisions from *Everson*...to *Allen* have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches, ***public health services***, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause."

[69]Justices Brennan and Marshall found these provisions in violation of the Establishment Clause.

[70]Appellants did not challenge the state's authority to provide such services. Their challenge was to whether such services could be provided in facilities (such as mobile units) where only nonpublic students were serviced.

As for the instructional materials and equipment, six members of the court agreed that this provision violated the Establishment Clause.[71] Relying on *Meek* (1975), Blackmun determined that instructional materials and equipment constituted substantial aid to the *educational* mission of the nonpublic schools and "necessarily result[ed] in aid to the sectarian school enterprise as a whole" (433 U.S. at 250).[72] Even though the provisions were "ostensibly...limited to neutral and secular instructional materials and equipment," they "inescapably" had the "primary effect" of aiding religion (433 U.S. at 250).[73]

The provision for field trip transportation was also found unconstitutional by a majority of five justices.[74] An impermissible advancement of religion existed for several reasons. First, the nonpublic school controlled the timing, frequency and destination of the trips.[75] Second, the role of the individual teacher often determined the meaningfulness of the entire experience. Furthermore, school authorities would be unable to know with certainty that state funds were used in a secular manner absent close surveillance, which created "excessive entanglement."

Not surprisingly, Justice Brennan found the entire statute unconstitutional. He chastised his brethren for failing to evaluate the appropriation in light of the potential for political divisiveness. Brennan concluded that a divisive political potential "of unusual magnitude inhere[d] in the Ohio program" (433 U.S. at 256).

---

[71]The dissenters on this matter were Chief Justice Burger and Justices White and Rehnquist.

[72]Citing Justice Brennan's opinion in *Lemon* (403 U.S. 602, 657 [1971]), Blackmun noted that "the secular education...goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two [secular and sectarian] are inextricable intertwined."

[73]Ohio tried to justify these provisions on the ground that they were entitlements to students and not sectarian institutions. *Nyquist* (1973) held that tuition grants, while technically given to parents and not schools, still had the impermissible effect of assisting religion. The Court could not justify a difference between tuition reimbursement grants and material and equipment grants. The sectarian institutions were the primary beneficiaries of these provisions.

[74]The dissenters on this issue were Chief Justice Burger and Justices Powell, White, and Rehnquist.

[75]Blackmun noted that this fact alone might be enough to invalidate the entire provision.

Justice Marshall found all parts of the statute *except* for the diagnostic services provision to be in violation of the Establishment Clause. His reasoning was straightforward. General welfare programs did not provide impermissible assistance to the religious mission of sectarian schools (433 U.S. at 259-260).[76] But, textbook loans, loans of instructional material and equipment, field trip transportation, therapeutic services, and standardized testing and scoring services were not general welfare programs. Therefore, they should be considered unconstitutional.

Justice Powell believed that the provision for field trip transportation should have been upheld. He criticized his colleagues for overstating the connection between the state and the teacher conducting the field trip. The state was not, according to Powell, in any way funding the teacher. The state was merely providing a bus and driver for the "limited purpose of physical movement between the school and the secular destination of the field trip" (433 U.S. at 264). Powell failed to address the majority's argument that "secular certainty" would create "excessive entanglement."

Justice Stevens dissented because he found the provisions of textbook loans and standardized testing and scoring services impermissible. In sweeping language, Stevens advocated the prohibition of any state subsidy of sectarian schools, regardless of the form.[77] Financing buildings, field trips, textbooks, testing services, and instructional materials and equipment all aided the school's educational mission. The state could, however, legitimately provide general health services, including diagnostic and therapeutic services. Stevens further advocated scrapping all Establishment Clause "tests" and returning to the principle of "strict separation" established in

---

[76] In this opinion, Marshall advocated the separation of general welfare programs and programs of educational assistance. The former should be permitted; the latter prohibited. In doing so, Marshall called for the overturning of *Allen*.

[77] Here, Stevens relied on the famous words of Justice Black in *Everson* (330 U.S. 1, 16 [1947]): "No tax in any amount, large or small,...whatever they may be called, or whatever form they may adopt to teach or practice religion."

Everson. This would discourage states from searching for "new ways of achieving forbidden ends" (433 U.S. at 266).

With regard to instructional material and equipment and field trip transportation, Justices White and Rehnquist, adhering to their respective opinions in *Nyquist* and *Meek*, dissented. These two justices found none of the provisions unconstitutional. Chief Justice Burger also dissented on these matters.

The *Wolman* decision perhaps best demonstrated the difficulty of the Court during the 1970s to come to any consensus on the *Lemon* doctrine. Seven justices authored opinions, each offering a different interpretation of the requirements of *Lemon*. The *Wolman* Court held that *Lemon's* "primary effect" inquiry did not necessarily prevent state services that had little or no educational content. The Court had previously determined that it was impossible to separate the secular education function from the sectarian, but now it was possible. Assistance to the educational function of parochial schools impermissibly advanced religion. Assistance to the noneducational function did not impermissibly advance religion. This distinction had not been previously recognized by the Court. The *Wolman* Court also provided a way around "excessive entanglement." If public employees provided noneducational services to parochial schools, "excessive entanglement" could be avoided. In their efforts to articulate the proper scope of the Establishment Clause, the justices were hamstrung by the difficulty that existed in formulating general principles on a case-by-case basis. As Justice Stevens remarked: "Corrosive precedents have left us without firm principles....What should be a 'high and impregnable wall' between church and state has been reduced to a 'blurred, indistinct, and variable barrier'" (433 U.S. at 266).

Committee for Public Education v. Regan (444 U.S. 646 [1980])

As previously noted, the Supreme Court, in *Levitt v. Committee for Public Education* (413 U.S. 472 [1973]), struck down a New York statute that appropriated public funds to

reimburse nonpublic schools for expenses incurred in performing various state-mandated testing services. In response to its statute being declared unconstitutional, the New York Legislature enacted a new statute directing the Commissioner of Education to reimburse nonpublic schools for costs incurred by them in complying with state-mandated services.[78] Of seminal importance, the new statute, unlike the earlier one, did not reimburse nonpublic schools for the preparation, administration, or grading of teacher-prepared tests. In addition, it provided a means by which all state payments were audited to ensure that only the actual costs in providing the covered *secular* services were reimbursed out of state funds.

In an action challenging the constitutionality of this legislation, the District Court for the Southern District of New York concluded, in light of *Wolman* (1977), that there existed a "high degree of certainty" that the aid would only benefit secular interests and would not be used to transmit religious values (461 F.Supp. 1123, 1127 [1978]). As such, the statutory scheme did not violate the Establishment Clause. On direct appeal, the Supreme Court noted probable jurisdiction in *Committee for Public Education and Religious Liberty v. Regan* (444 U.S. 646 [1980]).[79]

In a 5-4 decision, the Supreme Court affirmed the judgment of the district court. Justice White, arguably the most ardent and consistent supporter of "accommodation," authored the majority opinion and was joined by Chief Justice Burger and Justices Stewart, Powell, and Rehnquist. Justice Blackmun, joined by Justices Brennan and Marshall, and Justice Stevens penned dissents. After acknowledging the precedential value of the *Lemon* doctrine, which he had expressly repudiated only five years earlier in *Roemer* (1975), and the controlling interest of

---

[78]Chapter 507 of New York Laws of 1974 permitted reimbursement for costs incurred as a result of "the requirements of the state's pupil evaluation program, the basic educational data system, regents examination, the statewide evaluation plan, the uniform procedure for pupil attendance reporting, and other similar state prepared examinations and reporting procedures."

[79]In a case decided three years earlier, *New York v. Cathedral Academy* (434 U.S. 125 [1977]), the Supreme Court struck down a similar statute that provided reimbursement to nonpublic schools for providing state-mandated services. In applying the *Lemon* doctrine, the Court found that the practice had the "primary effect" of advancing religion and resulted in "excessive entanglement."

Wolman (1977), White assessed the New York statute.[80] In comparing *Regan* with *Wolman*, White noted that the differences between the two statutes were so minute that they were "not of constitutional dimension" (444 U.S. at 654).

The Court applied the three-pronged test of *Lemon*. First, there was clearly a "secular purpose." Stated in the legislative enactment, that purpose was the provision of quality educational opportunities. Looking further, the Court did not find a "primary effect" that fostered religion or "excessive entanglement." To support these claims, White made several observations. First, the nonpublic school had no control "whatsoever" over the content or the outcome of the tests (444 U.S. at 654). Second, each of the tests addressed a secular subject; none dealt with religious subject matters. As such, there could be no danger that the tests would be used "as a part of religious teaching" (444 U.S. at 656). Additionally, the recordkeeping and reporting services (for which the state reimbursed the nonpublic schools) were not part of the teaching process and could not be used to foster an ideological outlook. Therefore, they had "primarily a secular, rather than religious...effect" (444 U.S. at 657).[81] The fact that reimbursement was in the form of direct cash payments was irrelevant. There was no need to draw a distinction, White reasoned, between paying nonpublic schools to grade the required examinations and paying state employees or some independent agency to perform the same task.

Finally, the Supreme Court rejected the argument that reimbursement funds could easily be excessive or misdirected.[82] The New York statute provided ample protection against such activity:

---

[80]White wearily conceded that the Court's course of adjudication on these sensitive matters "sacrifice[d] clarity and predictability for flexibility" (444 U.S. at 662).

[81]Under the statute, schools submitted to the state each year a report containing information regarding the student body, faculty, support staff, physical facilities, curriculum, and attendance records.

[82]The district court had stated: "The services for which the private schools would be reimbursed are discreet and clearly identifiable" (461 F.Supp. 1123, 1131).

schools seeking reimbursement had to substantiate their claims and the state conducted audits to verify actual costs of reimbursable services.[83]

Justice Blackmun, joined by Justices Brennan and Marshall, dissented, stating that the Court's decision "takes a long step backward in the inevitable controversy that emerges when a state legislature continues to insist on providing public aid to parochial schools" (444 U.S. at 662). While agreeing with the majority that a "secular purpose" was present, he found an impermissible "primary effect" and "excessive entanglement." To analyze this case properly, Blackmun focused on the nature of the assistance (444 U.S. at 665). In this case, the assistance was "religious."[84] By permitting this assistance, the Court ignored the importance of *Wolman* and *Meek*; namely that "substantial direct financial aid to a religious school, even though ostensibly for secular purposes, runs the great risk of furthering the religious mission of the school as a whole because that religious mission so pervades the functioning of the school" (444 U.S. at 667). "Excessive entanglement" was also created because the state was required to continually evaluate the examinations and to continually audit the activity of parochial schools (to ensure that only

---

[83]White noted that the Court was not going to read into the plan any "bad faith" on behalf of New York or the nonpublic schools. Some justices contended that *Meek* invalidated any aid to the secular educational functions of a sectarian school because religious teaching was so intermixed with all of the school's activities. Instead of such a broad reading of *Meek*, White relied on Justice Powell's separate and narrow reading of *Meek*: "I am not persuaded, nor did *Meek* hold, that all loans of secular instructional material and equipment inescapably have the effect of direct advancement of religion" (quoted in *Wolman*, 433 U.S. 229, 263 [1977]).

[84]Under the New York Statute, the state spent $8-$10 million annually on nonpublic schools, with a great majority of the funds going to parochial schools. The district court further concluded that these payments accounted for 1% to 5.4% of the personnel budget of the individual parochial schools. Moreover, the payments were in the form of direct cash payments to the schools and not to the third parties who rendered services. This assistance differed "significantly" from *Wolman*, where "none of the programs upheld provided direct financial support to sectarian schools." (444 U.S. at 665-666).

expenses for secular, state-mandated activities were reimbursed).[85] According to Blackmun, this case further blurred the wavering line between church and state.[86]

Justice Stevens also dissented, characterizing the Court's decision as "ad hoc." Stevens lambasted the majority for "groping for a rationale to support [this] decision" (444 U.S. at 671).[87] Rather than continuing with the "sisyphean task of trying to patch together" the standard established in *Lemon*, Stevens preferred resurrecting the "high and impregnable" wall between church and state (444 U.S. at 671).

Stevens' scathing dissent was demonstrative of a Court that had grown weary of constantly arguing over the application of the *Lemon* doctrine. In each case, the Court toyed and manipulated the doctrine to formulate some new consideration. The results were unpredictable. The *Lemon* doctrine had been written to provide consistency in Establishment Clause adjudication. But, the justices could not agree on its interpretation.

3. Summary and Conclusions

In the decade immediately following the articulation of the *Lemon* doctrine, the Court applied, with great regularity, the prongs of *Lemon* in matters of church and state (Table 5.1). A simple review of the cases analyzed in this chapter led to the conclusion that *Lemon* was the

---

[85] It was impossible for the state, Blackmun argued, to honestly determine what was reimbursable without an "ongoing surveillance of the sectarian employees and religious schools at issue" (444 U.S. at 670).

[86] Blackmun noted that some of the justices who invalidated similar state statutes in *Lemon*, *Levitt*, *Meek*, and *Wolman*, validated the statute in *Regan*. Blackmun's only explanation was that the Court now gave a "nod of approval" to state legislatures' "good-faith attempts" at assisting nonpublic schools (444 U.S. at 664).

[87] Stevens noted that the Court's position "could equally be used to support a subsidy to pay for staff time attributable to conducting fire drills or even for constructing and maintaining fireproof premises in which to conduct classes" (444 U.S. at 671).

Table 5.1 Supreme Court Establishment Clause Jurisprudence, 1971-1980

Year	Case	Vote	Holding
1971	*Tilton v. Richardson*	5-4	U.S. Congress' Higher Education Facilities Act, which funded construction of academic buildings on private sectarian and secular colleges, upheld (except for 20-year "quit claim") because of minimal "entanglement."
1973	*Hunt v. McNair*	6-3	South Carolina bond program designed to help construct and maintain secular buildings and facilities on parochial college campus upheld on the basis of *Tilton*. Recipient college was not "an instrument of religious indoctrination."
1973	*Committee v. Nyquist*	6-3	New York statute providing maintenance and repair provisions to nonpublic schools, and tuition reimbursements and tax relief to parents of nonpublic school students struck down because provisions subsidized "the religious activities of sectarian schools." Thus, the "primary effect" was religious.
1975	*Meek v. Pittenger*	6-3	Pennsylvania statute to provide textbooks, instructional materials and equipment, and auxiliary services to nonpublic school students invalidated (except for textbooks, which was approved 6-3) because the provisions created "serious potential for political entanglement and divisiveness along religious lines."
1976	*Roemer v. Board of Public Works*	5-4	Upheld Maryland statute providing lump-sum grants to nonpublic colleges, so long as the funds were only used for sectarian purposes (in spite of the fact that religion and theology were required courses). The Court recognized that schools could effectively separate the secular from the sectarian.
1977	*Wolman v. Walter*	6-3 6-3 8-1 7-2 6-3 6-3	Upheld Ohio statute providing textbooks (6-3), standardized testing services (6-3), and diagnostic (8-1) and therapeutic (7-2) services to nonpublic schools on the ground of legitimate state educational interests. Struck down provisions for instructional materials and equipment (6-3) and field trip transportation (6-3) because they advanced sectarian education.
1980	*Committee v. Regan*	5-4	New York policy to reimburse nonpublic schools for providing state-required services upheld on the ground that the state had provided ample safeguards against religious indoctrination.

controlling principle.[88] For a challenged statute to stand, it had to have a "secular legislative purpose;" its "primary purpose" could not inhibit or advance religion; and its result could not create "excessive entanglement."

During the ten years after *Lemon*, the doctrine was applied to a broad range of issues involving church and state relations. Originally articulated in the context of the subsidization of parochial school teachers, the doctrine was also applied to private institutions of higher education receiving federal and state construction, maintenance, and repair grants; to nonpublic, sectarian schools seeking tuition reimbursements and tax relief for parents of their pupils; to state statutes providing church-related schools and students with textbooks, instructional material, instructional equipment, auxiliary services, standardized testing, diagnostic services, therapeutic services, and reimbursement for administering state-required services.

Although it was generally agreed that the *Lemon* doctrine was the controlling precedent in Establishment Clause jurisprudence, its interpretation was not uniform. Justices had strong differing opinions as to the questions posed by the *Lemon* test. For instance, how was the Court to determine with certainty a "secular purpose?" How could the Court distinguish between a "primary effect" and a secondary one? What was the appropriate line between "excessive entanglement" of state and religion and "acceptable entanglement?" The justice's opinions during this decade reflected their struggle to come to a consensus on the pragmatic application of the doctrine.[89] While the theory of *Lemon* was accepted, its interpretation was yet to be generally

[88]Virtually all Supreme Court cases dealing with this matter during this time began with a look at the principles established in *Lemon*. The justices recognized its controlling importance. White, Rehnquist, and Stevens expressed some dissatisfaction with the *Lemon* doctrine, but for the most part, the validity of *Lemon* went unchallenged during the decade of the seventies.

[89]For example, in *Meek* (1975), the Court disallowed a state provision for auxiliary services. Two years later in *Wolman* (1977), the Court permitted state provisions for standardized testing, diagnostic services, and therapeutic services. In *Cathedral Academy* (1977), the Court struck down a statutory scheme designed to reimburse nonpublic schools for state-mandated services; three years later in *Regan* (1980), the Court permitted a similar reimbursement program. A 1979 *per curium* opinion--*Byrne v. Public Funds for Public Schools* (442 U.S. 907)--also demonstrated these apparent inconsistencies. In *Byrne*, six members of the Court (Justices Brennan, Stewart, Marshall, Blackmun, Powell, and Stevens) made apparent their belief that none of the following were constitutional: tax credits, tax deductions, tax exemptions, tax rebates, or any form of direct financial aid to parents or teachers. In

agreed upon. During the next decade, apparent inconsistencies in the application of the *Lemon* doctrine would lead some scholars to question its precedential value.[90]

dissent, Chief Justice Burger and Justices White and Rehnquist appeared ready to "accommodate" religion if they could merely find some kind of "secular purpose." In particular, Justice White ignored both the "primary effect" and "excessive entanglement" prongs of *Lemon*. Apparently, these Court members were prepared to uphold action merely if it had a "secular purpose," thus reducing the controlling three-pronged test to a single prong.

[90]Abraham (1988: 278) noted that jurisprudence in this area had "proved to be a hornet's nest."

CHAPTER 6

ARGUABLE DEVOLUTION OF THE DOCTRINE: *LEMON* IN THE 1980s

1. Introduction

Similar to the 1970s, the 1980s was a period in which the Supreme Court wrestled with the task of interpreting the Establishment Clause. During the seventies, the *Lemon* doctrine was the predominant test employed by the Supreme Court on church-state relations. In the mid-eighties, however, the application of this doctrine fell upon difficult times. Onlookers of the Court were unsure of what criterion the justices would use to determine their results. Even after forty years of labor, the Court's efforts to fashion a clear, predictable, and consistent framework for drawing the line between government and religion were "highly unsuccessful" (Janocski, 1989: 447). One justice, Antonin Scalia, went further and referred to Establishment Clause jurisprudence as "embarrassing."[1] The problem remained the same as it was in 1963, when Justice William J. Brennan remarked in *Schempp* (374 U.S. 203, 231):

> The fact is that the line that separates the secular from the sectarian in American life is elusive. The difficulty with defining the line with precision inheres in a paradox central to our scheme of liberty. While our institutions reflect a firm conviction that we are a religious people, these institutions by solemn constitutional injunction may not officially involve religion in such a way as to prefer, discriminate against, or oppress, a particular sect or religion.

During the eighties, the Court again heard numerous cases concerning the relationship between church and state. In these cases, the justices engaged in heated debate over what constituted "primary effect" and "excessive entanglement." Nevertheless, the Court applied the

[1] *Edwards v. Aguillard* (482 U.S. 578, 639 [1987]).

Lemon framework in all but one Establishment Clause case.[2] Apparently, the doctrine was still binding. However, an analysis of these cases will inevitably lead to the conclusion that the standards of *Lemon* were relaxed and its predictive value greatly diminished.[3] To the consternation of religious minorities, the Court was more inclined to permit governmental accommodation of religion. In doing so, the Court substantially altered the purpose-effect-entanglement test of *Lemon*, leading some to conclude that the doctrine teetered on the brink of extinction.

2. Government Aid to Religion

As previously noted, the 1970s was a period in which the Court continually disallowed direct public assistance to parochial schools. The Court was willing, however, to permit certain types of aid to religion, so long as it was in the form of indirect assistance to nonpublic schoolchildren and their parents, assuming, of course, that public schoolchildren and their parents were also eligible for similar benefits. The Court's first major decision during this decade regarding government aid to religion came in 1983 from the state of Minnesota. The justices waited until the last week of the 1982-1983 term to hand down their decision on this matter, thus evidencing its importance.[4]

---

[2] *Marsh v. Chambers* (463 U.S. 783 [1983]).

[3] A review of the scholarly literature revealed the extent to which some felt the *Lemon* doctrine had been, for all practical purposes, abolished. Words used to describe the doctrine included "sour" and "dead." See, e.g., Paulsen (1993), Mykkeltvedt (1993), Calabrese (1990), and Hersman (1985).

[4] The justices reserved the last day of the term to hand down another, perhaps even more controversial, Establishment Clause decision--*Marsh v. Chambers* (1983). That case is discussed later in this chapter.

Mueller v. Allen (463 U.S. 388 [1983])

Under Minnesota law, parents were permitted to deduct from their state income tax certain expenses incurred in providing for the elementary and secondary education of their children.[5] Minnesota taxpayers claimed that this practice violated the Establishment Clause by providing financial assistance to sectarian institutions.[6] A federal district court concluded that the statute did not have the "primary effect of either advancing or inhibiting religion" (514 F.Supp. 998, 1003 [1981]). The appellate court affirmed, finding that the challenged statute benefited a "broad class of Minnesota citizens" (676 F.2d 1195, 1205 [1982]). On petition, the Supreme Court granted certiorari and agreed to hear *Mueller v. Allen* (463 U.S. 388 [1983]).

In a 5-4 decision, the Supreme Court, per Justice Rehnquist, affirmed the lower courts' holdings, finding that the statute did not violate the Establishment Clause.[7] After alluding to *Lemon*, Rehnquist (463 U.S. at 394) immediately qualified its worth: the doctrine provided "no more than a helpful signpos[t]" in dealing with the Establishment Clause.[8] That stated, Rehnquist turned his attention to the three principles of *Lemon*. The Court spent little time satisfying the first inquiry of *Lemon*. The state's decision to defray the cost of educational expenses incurred by

---

[5]Under Minnesota Statute 290.09 (1982), parents could deduct expenses incurred in providing "tuition, textbooks, and transportation." Textbooks and transportation did not provide a serious constitutional question. The Court had previously upheld similar practices. Tuition, however, was a new battleground.

[6]During the 1981-1982 academic year, approximately 91,000 elementary and secondary school students attended over 500 nonpublic schools, of which about 95% were sectarian.

[7]The very fact that Justice Rehnquist was the author of the majority opinion signified the changing perceptions of the Court on this matter. Rehnquist was joined by Chief Justice Burger, and Justices White, Powell, and O'Connor. Abraham (1988: 363) noted that Powell's alignment with this majority was "surprising." O'Connor had joined the Court one and a half years earlier, replacing the retiring Justice Potter Stewart.

[8]Rehnquist was quoting from *Hunt* (413 U.S. 734, 741 [1973]) He also noted that while little in this area of adjudication was stable, there was "one fixed principle." That principle was the Court's "consistent rejection that any program which in some manner aids an institution with a religious affiliation violates the Establishment Clause" (463 U.S. at 393).

parents, without regard to the type of schools their children attended, demonstrated a purpose that was "both secular and understandable" (463 U.S. at 395).[9]

The Court also concluded that the statute satisfied the "primary effect" inquiry. State legislators were generally afforded ample leeway in creating classifications and distinctions in tax statutes so as to achieve an equitable tax burden on all residents. Minnesota provided deductions for numerous other activities, including medical expenses and charitable contributions. Accordingly, the judgment of the Minnesota Legislature "that a deduction for educational expenses fairly equalizes the tax burden of its citizens and encourages desirable expenditures for educational purposes is entitled to substantial deference" (463 U.S. at 396). Furthermore, the deductions were available to parents whose children attended public and private schools.[10] As noted in *Widmar* (454 U.S. 263, 274 [1981]), a state policy that neutrally provided assistance to a broad class of citizens was not readily subject to challenge.[11]

Regarding the third inquiry, the majority had "no difficulty" concluding that the statute did not create "excessive entanglement" between church and state. The only potential entanglement was in the fact that state officials determined which textbooks and materials qualified for a deduction. This type of marginal oversight did not create impermissible entanglement.[12]

---

[9]These secular purposes included an educated citizenry, the public interest in assuring the continued financial health of nonpublic schools, the relief subsequently granted to public schools and, thus, taxpayers, and a wholesome competition between public and nonpublic schools.

[10]This was the primary difference between the Minnesota statute and the New York statute struck down in *Nyquist* (1973). The *Nyquist* program provided tax exemptions to parents of children in nonpublic schools *only*. In the words of Rehnquist, this fact had "considerable bearing" on the decision (463 U.S. at 398).

[11]Interestingly, Rehnquist noted that in the Court's recent cases invalidating state aid to parochial schools, all but one involved the state directly transmitting funds to the school. The exception, of course, was *Nyquist* (1973), where the Court opined that financial assistance provided to parents ultimately had an economic effect comparable to that of aid given directly to the individual school. Rehnquist conceded (463 U.S. at 399) that the means by which state assistance flowed to the school was "of some importance;" but it was "only one among many factors to be considered." In this case, Minnesota had taken necessary steps to ensure that public aid to parochial schools was the result of numerous, private choices of individual parents, and conveyed no "imprimatur of state approval" on any religion or on religion in general.

[12]Rehnquist referred to *Allen* (1968), *Meek* (1975), and *W olman* (1977).

Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, dissented. He expressed the view that the Establishment Clause prohibited a state from subsidizing religious education whether it did so "directly or indirectly." That prohibition included any tax benefits or deductions (463 U.S. at 404). Furthermore, the "primary effect" of this statute was the advancement of religion.[13] Even though this deduction was available to parents of all schoolchildren, the "vast majority" of parents eligible to receive the benefits were parents whose children attended religious schools.[14] This indirect assistance was also unconstitutional because it was not subjected to restrictions that guaranteed that the state financial aid would only be used to support secular educational functions.[15] Moreover, according to *Nyquist* (413 U.S. 756, 790-791 [1973]), it made no difference whether the qualifying parent "receives an actual cash payment [or] is allowed to reduce...the sum he would otherwise be obliged to pay over to the state." The diminutive distinctions between this case and *Nyquist* were not substantive enough to merit a different conclusion. Rather, they were "distinctions without a difference" (463 U.S. at 411). "For the first time," Marshall (463 U.S. at 416-417) concluded in a stinging criticism of his colleagues:

> 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.

Without question, the *Mueller* case signified that the constitutional pendulum between church and state had swung in favor of permitting a commingling between the two institutions.

---

[13] In effect, Marshall argued that the majority opinion ignored the precedent of *Nyquist* (1973), which 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.

[14] Marshall noted that 95% of nonpublic school students attended sectarian schools. Public schools in Minnesota were generally prohibited from charging tuition. In fact, only 79 public school students, out of over 815,000, were charged tuition expenses. As such, the parents of those 815,000 public school children were ineligible for tax deductions.

[15] Marshall even questioned whether the secular and religious educational functions could be separated.

Since the articulation of the *Lemon* doctrine, the Court had generally prohibited most forms of indirect or direct aid to parochial schools. The *Mueller* Court indicated that the justices were willing to retreat from this prohibition, in return accepting a more sympathetic view toward government aid to parochial schools. According to *Mueller*, *Lemon* permitted certain types of aid to church-related schools. Apparently, assistance was permissible if it benefited a broad class of nonpublic *and* public schoolchildren and parents and was channeled through private individuals (so that any benefit to religion was indirect). But the justices were not willing to permit all types of assistance to church-related schools. *Mueller* did not authorize direct, unrestricted assistance to religion. Indeed, while this call for accommodation between government and religious schools received further support from the justices later in the decade, the Court's next decision in this area addressed the *limitations* of government assistance to parochial schools.

Aguilar v. Felton (473 U.S. 402 [1985])

On the last day of the 1983-1984 term, the Court addressed two cases that dealt with the extent to which state governments could provide courses to nonpublic school students at public expense. One of these cases came from New York--*Aguilar v. Felton* (473 U.S. 402 [1985]).[16] Under Title I of the Elementary and Secondary Education Act of 1965, the state Secretary of Education was authorized to provide financial assistance to local educational institutions in order to meet the needs of "educationally deprived children from low income families."[17] The assistance was delivered through various remedial educational programs and guidance services conducted by

[16]In the other case, *Grand Rapids v. Ball* (473 U.S. 373 [1985]), the Court applied the *Lemon* doctrine to strike down two school district programs that supplemented the "core curriculum" offered to private school students.

[17]It was further stipulated that the programs were to supplement, not supplant, programs that existed without Title I funding (Title I, Sections 3804-3805).

public school employees on public and nonpublic school campuses.[18] Of the students eligible to receive funding, 13.2% were enrolled in private schools.[19]

In 1978, six New York taxpayers filed suit in the U.S. District Court for the Eastern District of New York alleging that the Title I program violated the Establishment Clause. In 1980, that court affirmed the constitutionality of the program. The Court of Appeals for the Second Circuit reversed, expressing the view that the Establishment Clause erected an "insurmountable barrier to the use of federal funds to send public school teachers...into religious schools to carry out instruction, remedial or otherwise, or to provide clinical or guidance services of the sort at issue here" (739 F.2d 48, 49-50 [1984]). The Supreme Court granted certiorari.

Notwithstanding the worthy goals of the federal program, the Supreme Court, in a 5-4 decision written by Justice Brennan, struck down New York's practice because it created "excessive entanglement" between church and state. Because the challenged aid was provided in a pervasively sectarian environment, assistance was provided in the form of teachers, and surveillance was required to ensure no religious indoctrination, "excessive entanglement" followed.

Justice Powell, concurring in the judgment, offered a separate opinion to emphasize the importance of precedent. In *Meek* (421 U.S. 349, 371 [1975]), the Court opined that the state must be "certain" that state-subsidized teachers refrained from inculcating religious values. Therefore, in applying *Meek* to *Aguilar*, the logical conclusion was that the only way to ensure that no religious inculcation took place was for the state to closely supervise all of the parochial school activities. This necessarily created "excessive entanglement." This entanglement was further manifested by the political divisiveness and strife that accompanied "direct aid to religious schools

---

[18] All materials used in these programs were supplied by the government. The professionals who conducted the program were instructed to avoid involvement with religious activities, bar religious materials in their classrooms, and keep contact with school personnel to a minimum. The recipient schools were required to clear all classrooms of religious symbols.

[19] Of those 13.2%, approximately 84% were affiliated with Roman Catholic schools and 8% with Hebrew schools.

and the proper allocation of limited governmental resources" (473 U.S. at 416). Disagreement was a virtual concomitant of any proposal that allocated public funds to parochial schools. While the majority did not consider the statute's "primary effect," Powell did. Because of the pervasively religious nature of the parochial schools, any state subsidy necessarily resulted in the subsidization of religion.

Chief Justice Burger and Justices White, Rehnquist, and O'Connor dissented.[20] Burger, appealing to his colleagues' humanity, concluded that the Court's decision had the ill-effect of depriving schoolchildren of necessary educational services.[21] Since the majority failed to articulate any threat to religious liberty, the decision was not neutral, but "exhibited hostility toward religion and the children who attend church-sponsored schools" (473 U.S. at 420).

Justice O'Connor disagreed with the Court for three reasons. First, the program had no "purpose" or "effect" that promoted religion. The "purpose" was obvious: to provide secular educational functions to disadvantaged students. The "effect" of the program was not the inculcation of religious values or the symbolic enmeshing of church and state, but rather exactly what Congress intended the "effect" to be: "impoverished schoolchildren...being helped to overcome learning deficits, improving their test scores, and receiving a significant boost in their struggle to obtain both a thorough education and the opportunities that flow from it" (473 U.S. at 425).[22] Second, "excessive entanglement" was not created by the state surveillance. It was in her

---

[20]Justices White and Rehnquist did not write full dissenting opinions. White referred readers to his dissent in *Grand Rapids* (1985), in which he concluded that the Court's interpretation of the Establishment Clause was "contrary to the long-range interest of the country" (473 U.S. 373, 400). Rehnquist, framing his argument on the Court's misapplication of history, deflected readers to his dissent in *Jaffree* (472 U.S. 38, 91-114 [1985]), which will be discussed later in this chapter. He also, somewhat acerbically, accused the Court of creating a "Catch 22 paradox." Government aid had to be supervised to ensure that no advancement of religion took place. However, that supervision often created "excessive entanglement" (473 U.S. at 420).

[21]Burger stated that the remedial reading program, for example, addressed needs arising from dyslexia. The end result of the Court's decision was that children who desperately needed special training would be denied that training simply because their parents opted to provide them with a religious education.

[22]O'Connor cited that in the nineteen year history of the Title I program in New York, there had not been one teacher accused of subtly or overtly inculcating religious values. The reason for this "unblemished record" was

analysis of this inquiry that she delivered a stinging blow to the *Lemon* doctrine. By exaggerating the state supervision necessary to ensure that public teachers did not inculcate religious beliefs, the Court demonstrated "the flaws of a test that condemn[ed] benign cooperation between church and state." O'Connor rejected Powell's argument that required the state to be "certain" that public funds were not expended on sectarian education. To do so, she sarcastically noted, required the state to close all public schools because there always existed "some chance" that public school teachers would bring religion into the classroom. (473 U.S. at 429). New York had taken adequate steps to prevent religious indoctrination. Furthermore, O'Connor rejected the "primary effect-entanglement" paradox created by the Court: "state efforts to ensure that public resources are used for nonsectarian ends should not in themselves serve to invalidate an otherwise valid statute" (473 U.S. at 430). O'Connor's third reason was much the same as Burger's: it was "tragic" that the Court would deny schoolchildren a "meaningful chance at success in life" (473 U.S. at 431).

While *Aguilar* drew sharp debate among the justices, the general principle that the *Lemon* doctrine prohibited governmental aid to parochial schools was reaffirmed. The general reason for this sweeping prohibition was the inherent danger created by state-sponsored teaching in religious schools. This risk could not be overlooked, nor could it be outweighed by the deprivation of general programs for nonpublic schools students. The Establishment Clause prohibited state aid to religious schools. Apparently, *Mueller* (1983) had been an isolated incident where the Court permitted this type of assistance.[23]

---

the professionalism and willingness of teachers to adhere to instructions and not to be swayed by the sectarian nature of the schools in which they taught (473 U.S. at 424-425).

[23] Justice Powell was the swing vote in *Aguilar*. In *Mueller*, he had voted with the majority to permit public aid to parochial schools. Yet, in *Aguilar*, he joined the four *Mueller* dissenters to provide the necessary fifth vote to strike down the practice. Two years later, Justice Powell resigned. Justice Kennedy replaced him and initially positioned himself with those who favored greater "accommodation."

Witters v. Washington Department of Services for the Blind (474 U.S. 481 [1986])

According to Washington Revenue Code, Section 74.16.181 (1981), the Washington Commission for the Blind possessed the authority to provide special educational and training services "to assist visually handicapped persons to overcome vocational handicaps." Larry Witters, a ministerial student attending a Christian college in Washington, suffered from a degenerative eye disease and applied for the benefits. The Commission denied him assistance on the ground that the state was prohibited from disbursing public funds for religious instruction.

Witters then instigated legal action in the State Superior Court, where he was denied relief because the Washington Constitution prohibited state-sponsored religious instruction. The State Supreme Court, applying *Lemon*, affirmed the lower court's ruling in concluding that the state's provision of financial assistance to enable someone to become a minister "clearly" had the primary effect of advancing religion (689 P.2d 53, 56 [1984]). On certiorari, the Supreme Court agreed to hear Witters v. *Washington Department of Services for the Blind* (474 U.S. 481 [1986]).

In a unanimous opinion, the Court, per Justice Marshall, applied the *Lemon* doctrine and found the state assistance not in violation of the Establishment Clause. The Court did not have to look far to uncover a "secular purpose"--the promotion of the well-being of the visually handicapped. In rejecting Washington's claim that this assistance had the "primary effect" of advancing religion, Marshall made several observations. First, all assistance was provided directly to the student. Second, any assistance that flowed to religious institutions was the result of the "genuinely independent and private choices of aid recipients" (474 U.S. at 487).[24] Third, Washington's policy was made available without any consideration given to the nature of the school. Accordingly, any assistance that ultimately flowed to the religious school was indirect.

[24]Marshall distinguished this assistance from the kind proscribed in *Grand Rapids* (1985). In that case, "no meaningful distinction [could] be made between aid to the student and aid to the school" (473 U.S. 373, 396 [1985]).

Several justices authored concurring opinions. Justice White, perhaps shocked by the Court's decision, wrote to remind his colleagues that he still generally disagreed with their interpretation of the Establishment Clause, but nonetheless, agreed with this decision.[25] Justice Powell, joined by the Chief Justice and Justice Rehnquist, wrote separately to invoke the Court's holding in *Mueller* (1983). The holding of that case was fully applicable in the present one: "state programs that are wholly neutral in offering educational assistance to a class defined without reference do not violate the second prong of the *Lemon*...test...because any aid to religion results from the private choices of individual beneficiaries" (474 U.S. at 490-491). O'Connor reiterated that "no reasonable observer" could infer from this program that the state was endorsing religion (474 U.S. at 493).

While *Witters* did not necessarily confirm the decision of *Mueller*, it did signal the Court's willingness to interpret the *Lemon* doctrine somewhat less stringently in regard to state sponsorship of religious education. Apparently, state subsidies to religious education were permissible, so long as they were generally available to all and couched in the form of grants to individuals as opposed to religious institutions. If provided in this manner, any religious advancement was the result of private, not state, decisions. For the first time in a number of years, the Court unanimously agreed on an Establishment Clause matter. Not only was the *Lemon* doctrine accepted as the guiding principle, it was also applied uniformly by the justices. This agreement would not last for long.

3. Religion in the Public Schools

The 1970s was a period of relative inaction for the Court on matters of religion in the public school setting. *Engel* (1962) and *Schempp* (1963) had firmly established the principle that

[25]White referred to the Court's past decisions as "disserv[ing] of the public interest" (474 U.S. at 490). While he agreed with the majority on this case, he did not want to be clumped together with some of his other colleagues on matters of the Establishment Clause.

religion was not to be a regimented part of the public school experience. The dangers of inculcation were too great. But in the 1980s, the political climate seemingly shifted, embracing the idea of religion and prayer in public schools. With President Reagan's encouragement, Congress proposed a constitutional amendment permitting school prayer.[26] While the amendment was eventually defeated 56-44, it demonstrated the willingness of at least some members of Congress (and many others in the nation) to support religious intervention in the public school system. New challenges to settled Establishment Clause doctrine surfaced in the 1980s dealing with the issue of religion in the public schools.

Widmar v. Vincent (454 U.S. 263 [1981])

The University of Missouri at Kansas City provided the use of its facilities to registered student organizations for meetings and other activities. In 1977, members of a religious organization were informed by university officials that they could no longer use university facilities because of a regulation that prohibited the use of university facilities "for purposes of religious worship or religious teaching." Eleven students brought suit in the U.S. District Court for the Western District of Missouri challenging the university policy (480 F.Supp. 907 [1979]).[27] That court upheld the university policy, concluding that the policy was not only justified, but mandated by the Establishment Clause.[28] The Court of Appeals for the Eighth Circuit reversed, viewing the

---

[26]That proposed amendment read: "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. Neither the United States nor any State shall compose the words of any prayer to be said in the public schools."

[27]Their initial claim alleged that the university's discrimination against religious activity violated their First Amendment rights to free exercise of religion and freedom of speech, as well as their Fourteenth Amendment right to equal protection.

[28]The district court relied on the holding of *Tilton* (1971), which held that a state could not provide facilities for religious use without giving prohibited support to an institution of religion. Accordingly, religious speech was entitled to less protection than other types of expression (480 F.Supp. 907, 918).

regulation as content-based discrimination against religious speech. (635 F.2d 1310 [1980]).[29] Recognizing the existing controversy, the Supreme Court granted certiorari in *Widmar v. Vincent* (454 U.S. 263 [1981]).

Justice Powell, joined by Chief Justice Burger and Justices Brennan, Marshall, Blackmun, Rehnquist, and O'Connor, wrote the Court's opinion. The majority concluded that the university policy violated the fundamental principle that state regulation of speech had to be content-neutral. Justice Stevens offered a concurring opinion. Justice White dissented.

According to Powell, the dispositive question was not whether the creation of a religious forum violated the Establishment Clause, but rather if the university, once it had opened its facilities for use by student groups, could exclude groups based on the content of their speech. In other words, the university had he obligation to justify any discrimination toward religious groups. In this case, the university's "compelling state interest" was in maintaining the separation of church and state. Powell conceded that this justification might be "compelling," but concluded that an "equal access" policy would not have the "primary effect" of advancing religion for two reasons.[30] First, an open forum at a university did not confer any "imprimatur of State approval on religious sects or practices."[31] Second, the forum was available to a broad class of nonreligious as well as religious groups and speakers (454 U.S. at 274).[32]

---

[29]The appellate court further held that the Establishment Clause did not bar a policy of equal access to university facilities for groups and speakers. The "primary effect" of such a policy was not religious, but rather to further the neutral purpose of developing students' "social and cultural awareness as well as [their] intellectual curiosity" (635 F.2d 1310, 1317).

[30]Powell, in response to the district courts reliance on *Tilton* (1971) remarked: "We do not believe that *Tilton* can be read so broadly....[N]othing in *Tilton* suggested a limitation of the State's capacity to maintain forums equally open to religious and other discussions" (454 U.S. at 272, n.12).

[31]Powell granted that religion may receive some benefits from an open-forum policy, but reiterated one of the holdings of *Nyquist* (1973). In *Nyquist* (413 U.S. 756, 771) the Court explained that a religious organization's enjoyment of merely "incidental" benefits did not violate the prohibition against the "primary advancement" of religion.

[32]Powell distinguished, however, college and secondary school students. The former were far less impressionable. In the college environment, it was less likely that religion would have a coercive effect, for religious

Justice Stevens concurred in the judgment, yet felt obligated to limit his agreement. Because of limited resources, institutional officials were routinely called upon to make decisions concerning the use of time and space for institutional facilities. In some situations, he reasoned, content ought to be a determining factor.[33] Some judgments "should be made by academicians, not by federal judges" (454 U.S. at 279). Accordingly, a university "may regard some subjects as more relevant to its educational mission than others" (454 U.S. at 280).[34] In this case, however, no sufficient justification for the exclusion of the student religious group was present.

Justice White dissented. A "compelling state interest," he reasoned, was unnecessary. Because the burden on the religious group was minimal, "the State need do no more than demonstrate that the regulation furthers some permissible state end." (454 U.S. at 289). White believed that the state interest--maintaining separation of church and state--was sufficient to justify a minimal burden on the free exercise of religion.

Widmar raised the issue of conflict between the Establishment Clause and other constitutional protections, namely freedom of speech and free exercise of religion. The Court, in effect, acknowledged that the Establishment Clause might not be first in the pecking order of First Amendment rights. Others were equally important, and the Court would continue its efforts at balancing important civil liberties. The *Widmar* Court was careful not to interpret the *Lemon* doctrine as mandating hostility toward religion. The animating purpose of *Lemon*, as reiterated in this decision, was government's neutrality toward religion. The *Lemon* doctrine's "primary effect"

---

speech was merely one of many components of an intellectual community. This distinction would be further blurred in *Mergens* (496 U.S. 226 [1990]), to be discussed in the next chapter.

[33]For instance, Stevens believed that if two groups of twenty-five students requested the use of a room at a particular time--one to view Mickey Mouse cartoons and the other to rehearse an performance of Hamlet--the First Amendment would not require that the university adhere to a "first come, first serve" basis. Content, at times, was a legitimate ground on which to make decisions.

[34]Stevens noted that blatant institutional discrimination was not permissible. "Quite obviously, the University could not allow a group of Republicans or Presbyterians to meet while denying Democrats or Mormons the same privilege" (454 U.S. at 281).

inquiry not only prohibited the advancement of religion, but also proscribed practices that inhibited religion. This was the first case in which the Court applied the *Lemon* doctrine to disallow a state statute that exhibited hostility toward religion.

Wallace v. Jaffree (472 U.S. 38 [1985])

In 1978, the Alabama Legislature enacted a statute that provided: "At the commencement of the first class of each day in the first through the sixth grades in all public schools...a period of silence, not to exceed one minute in duration, shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in" (Alabama Code, Section 16-1-20 [1978]). In 1981, that statute was amended to permit a moment of silence "for meditation or voluntary prayer" (Alabama Code, Section 16-1-20.1 [1981]). In 1982, the Alabama Legislatures authorized teachers to lead "willing students" in a prescribed prayer to the "Almighty God...the Creator and Supreme Judge of the world" (Alabama Code, Section 16-1-20.2 [1982]).

In 1982, Ishmael Jaffree filed a complaint on behalf of his children against the Mobile County Public Schools, alleging that the state's action violated the Establishment Clause.[35] The U.S. District Court, after reviewing what it perceived to be newly discovered historical evidence, concluded that the statutes were a legitimate exercise of Alabama's authority because the Establishment Clause did not prohibit the state "from establishing a religion" (544 F.Supp. 1104, 1128 [1983]). Not surprisingly, the U.S. Court of Appeals, rejecting the newly discovered historical evidence and chastising the lower court for a misapplication of the doctrine of *stare decisis*, concluded that the two amended statutes constituted "state involvement respecting an

[35]More specifically, he alleged that his children were subjected to various acts of religious indoctrination (as teachers daily led their classes in saying certain prayers), and that his children were ostracized for not participating.

establishment of religion" (705 F.2d 1526, 1535 [1983]). On appeal, the Supreme Court noted probable jurisdiction.[36]

In *Wallace v. Jaffree* (472 U.S. 38 [1985]), the Court, dividing 6-3, held that the Alabama statute authorizing a moment of silence "for meditation or voluntary prayer" violated the Establishment Clause.[37] Justice Stevens, joined by Justices Brennan, Marshall, Blackmun, and Powell, authored the Court's opinion. Justice O'Connor concurred in the judgment. Chief Justice Burger and Justices White and Rehnquist dissented.

In applying *Lemon*, Stevens recognized that it was the "secular purpose" prong that was "most plainly implicated" in this case. If Alabama's statute failed to meet this inquiry, no consideration of the other criteria was necessary (472 U.S. at 56). He concluded: "The statute ha[s] *no* secular purpose" (472 U.S. at 56).[38] Accordingly, the Court could only surmise that: (1) the statute was designed to convey a message of Alabama's endorsement and promotion of prayer; or (2) the statute had no purpose whatsoever. Since no one suggested that the statute was meaningless, the majority concluded that the statute had no "secular purpose."[39]

Justice Powell concurred in the judgment, yet wrote separately to inform lower courts that the *Lemon* doctrine was still the caliper used by the Supreme Court to measure cases involving the Establishment Clause. He further noted that *Lemon* was the "only test a majority of the Court ever

---

[36]The Supreme Court only granted certiorari for Section 16-1-20.1 (moment of silence for "meditation or voluntary prayer) because appellees had not challenged the validity of Section 16-1-20 (one-minute period of silence) and the Supreme Court had already affirmed the U.S. Court of Appeals holding that invalidated Section 16-1-20.2 (classroom prayer led by teachers).

[37]The Court acknowledged (472 U.S. at 59) that some moment-of-silence statutes might be constitutional, just not those specifically designed to promote religion.

[38]In response to the question whether there was any purpose for the statue other than returning voluntary prayer to the public schools, the prime sponsor of the bill responded to the U.S. District Court: "No, I did not have no other purpose in mind" (quoted in *Jaffree*, 472 U.S. at 56).

[39]Alabama's addition of "or voluntary prayer" further indicated that it intended to "characterize prayer as the favored practice" (472 U.S. at 60).

adopted." In spite of the abundant criticism of the test, other courts should not "feel free to decide Establishment Clause cases on an ad hoc basis" (472 U.S. at 63).

Justice O'Connor wrote separately "to identify the peculiar features of the Alabama law that render it invalid,...to explain why other moment of silence laws...do not necessarily manifest the same infirmity, [and]...to explain why neither history nor the First Amendment validate the Alabama law struck down by the Court" (472 U.S. at 67). However, her opinion reads more like a report on the *Lemon* doctrine.[40] Alabama's statute crossed the fine line between "creating a quiet moment during which those so inclined may pray, and affirmatively endorsing the particular religious practice of prayer" (472 U.S. at 84). On the other hand, a carefully drafted moment of silence law that permitted prayer without endorsing it would pass the constitutional test for two reasons. First, a moment of silence was not "inherently religious" or "associated with a religious exercise." Second, a student who participated in a moment of silence "need not compromise his or her beliefs" (472 U.S. at 72). O'Connor noted that twenty-five states had moment of silence statutes, many of which would pass constitutional muster because they did not endorse religion. Comparing all moment of silence statutes with *Engel* (1962) and *Schempp* (1963) was faulty because, in those two cases, teachers led their students in religious exercises. She also rejected Alabama's claim that it was merely promoting free exercise of religion.[41]

---

[40]O'Connor noted that the Court in *Lemon* developed a "workable standard by which to identify impermissible government regulation." But, she added: "Despite its initial promise, the *Lemon* test has proven problematic." To illustrate these problems, O'Connor noted that the author of the test, Chief Justice Burger, had questioned its general applicability in *Lynch* (1984) and Justice Rehnquist had suggested that *Lemon* be abandoned entirely. O'Connor was not prepared to abandon "all aspects" of *Lemon*, but expressed her view that the standards should be "reexamined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment" (472 U.S. at 68-69). O'Connor cited constitutional scholar Jesse Choper (1963: 332-333): the goal of *Lemon* 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." Her "endorsement" test, proposed in *Lynch* (to be discussed later in this chapter), was a step in this direction because it did not "preclude government from acknowledging religion or from taking religion into account in making law and policy" (472 U.S. at 70).

[41]O'Connor added: "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" (472 U.S. at 83).

After insinuating that perhaps members of the Judiciary and Congress were "more in need of Divine Guidance than...schoolchildren," Chief Justice Burger articulated several reasons for his dissent. First, he noticed what he perceived to be an inconsistency in the Court's attitude toward religion. "To suggest that a moment-of-silence statute that includes the word 'prayer' unconstitutionally endorses religion, while one that provides for a moment of silence does not, manifests not neutrality but hostility toward religion" (472 U.S. at 85).[42] Second, the majority erred by only considering the comments of the prime sponsor of Alabama's statute in determining its "purpose." According to Burger, there was no evidence that "the legislature as a whole or that a majority in either House was even aware of the sponsor's view of the bill" (472 U.S. at 86-87). Most importantly for purposes of this dissertation, he advocated a "loose" interpretation of the *Lemon* doctrine. Instead of "apply[ing] tidy formulas by root" the Court's duty was simply to determine whether the practice at issue was "a step toward establishing a state religion." In this case, it was "ridiculous" to conclude that Alabama had done so.[43] Acknowledging that he was "out of step" with the Court's Establishment Clause adjudication, Justice White also dissented.[44]

Perhaps the most stinging criticism of the *Lemon* doctrine came from Justice Rehnquist. Calling Thomas Jefferson a "detached observer [and] less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment," he concluded that the Court had developed a "sound constitutional doctrine upon a mistaken understanding of

---

[42]Burger compared Alabama's challenged "voluntary prayer" practice with the Court's accepted policy of legislative chaplains. Even further, he noted (472 U.S. at 85-86) that Alabama had no more endorsed religion than had the Supreme Court when it opened its session with an invocation to God.

[43]Burger, recalling the rhetoric of Justice Goldberg in *Schempp* (374 U.S. 203, 308 [1963]), noted that the Court, in striking down Alabama's statute, failed to distinguish between "real threat and mere shadow." He concluded (472 U.S. at 90) his dissent with a somewhat witty response to Justice Blackmun's "Pyrrhic victory" comment from Lynch (465 U.S. at 727), to be discussed later in this chapter: "The mountains have labored and brought forth a mouse."

[44]Justice White contemplated the response of a teacher to the student-asked question, "May I pray?" White understood Alabama's inclusion of the words "or voluntary prayer" to be the legislative answer to that question. Thus, no endorsement of religion was present.

constitutional history" (472 U.S. at 92).[45] After an exhaustive 18-page explication of the intentions of the framers, Rehnquist assessed the damage resulting from the Court's acceptance of Jeffersonian interpretation: "The greatest injury of the 'wall' notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights" (472 U.S. at 107). Therefore, the Court's interpretation in *Everson* (1947), which Rehnquist called "useless as a guide to sound constitutional adjudication," and its subsequent adoption of the *Lemon* doctrine were inconsistent with the purposes of the Establishment Clause (472 U.S. at 107).[46]

As a result, Rehnquist called for the outright abandonment of the *Lemon* doctrine. The failure of *Everson's* "wall" and the *Lemon* doctrine clearly illustrated the observation of former Supreme Court Justice Benjamin Cardozo: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."[47] Rehnquist followed this warning with a meticulous analysis of the perils of the *Lemon* doctrine. He believed that the "secular purpose" and "primary effect" prongs were "in no way based on either the language or intent of the drafters" (472 U.S. at 108).[48] For the "excessive entanglement" inquiry of *Lemon*, Rehnquist recognized an "insoluble paradox." Government required that aid to parochial schools

---

[45]Rehnquist was referring to Jefferson's absence from Congress during the time of the passage of the First Amendment. For some reason, however, the Court had accepted Jefferson's interpretation. As a result, Establishment Clause adjudication had been "expressly freighted with Jefferson's misleading metaphor for nearly forty years" (472 U.S. at 92).

[46]Rehnquist accused the Court of adding "mortar to *Everson's* wall through the three-part test of *Lemon*" (472 U.S. at 108). It is worth noting that the Court decided *Lemon* unanimously. Two of Rehnquist's fellow dissenters in this case--Chief Justice Burger and Justice White--voted with the majority in *Lemon*. Chief Justice Burger authored the opinion.

[47]Cardozo wrote this six years prior to his joining the Supreme Court, while serving as Chief Judge of the New York Court of Appeals. See *Berkey v. Third Avenue Railroad Company* (155 N.E. 58, 61 [1926]).

[48]Rehnquist (472 U.S. at 108) called the "secular purpose" prong "mercurial in application" because it had never been fully defined. The prong "meant little if it only required the legislature to express any secular purpose and omit all sectarian references." As to "primary effect" Rehnquist reasoned (472 U.S. at 108-109): "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 [textbooks, bus rides, etc.] will fail because one of the purposes...is to aid the target of its largesse."

be closely supervised lest it be put to sectarian use. Yet this supervision created impermissible entanglement (472 U.S. at 109). These and other problems with *Lemon* were the direct result of the *Lemon* test having "no more grounding of the First Amendment than does the wall theory upon which it rests" (472 U.S. at 110).[49] Constitutional doctrines (*Lemon*) not grounded in the history of the amendment that it seeks to interpret (First Amendment) inevitably produced "unprincipled results" (472 U.S. at 112). For doctrines that produced these results, Rehnquist had "little use for [them]."[50] If the justices were to "properly" interpret the Establishment Clause, they would conclude, as he had, that a "generalized endorsement of prayer" was not in violation of the First Amendment.

The decision in *Jaffree* was a *temporary* setback for those who favored accommodation.[51] While the *Jaffree* Court reasserted its long-standing principle that government must remain neutral in matters of religion and cautiously reaffirmed its allegiance to the *Lemon* test, it did not elucidate the boundaries that *Lemon* placed on public school prayer. The holding merely proscribed state-sponsored prayers in public schools. It did not address the issue of whether a state could permit public prayers in public schools. In fact, O'Connor's opinion provided, in great detail, a method by which states could allow for public prayer without endorsing it. By basing its decision on the

---

[49]Among the other faults of *Lemon* asserted by Rehnquist: (1) it represented a determined effort to craft a workable rule from a historically faulty doctrine (and the rule can only be as sound as the doctrine upon which it was founded); (2) it has not provided adequate standards for deciding Establishment Clause cases; (3) it has caused the Court to fracture into unworkable plurality opinions; (4) it has not been generally agreed upon as a viable doctrine in recent opinions of the Court.

[50]He (472 U.S. at 112) chronicled the demise of the *Lemon* doctrine. In *Tilton* (1971), the test provided helpful assistance. In *Nyquist* (413 U.S. 756, 799 [1973]), the test was only a "guideline." In *Mueller* (463 U.S. 388, 394 [1983]), the Court described the test as "no more than [a] useful signpos[t]." In *Meek* (421 U.S. 329, 358 [1975], the justices noted that the test was "not easily applied." Justice White noted in *Regan* (444 U.S. 646, 662 [1980]) that under the test, the Court "sacrificed clarity and predictability for flexibility." In *Lynch* (465 U.S. 668, 679 [1984]), the Court recognized that *Lemon* had never been binding on the Court. And in *Marsh* (1983), the justices did not even apply the doctrine. It is no wonder Rehnquist concluded that the perception of the Court had been clouded "not by the Constitution but by the mists of an unnecessary metaphor [*Lemon*]" (472 U.S. at 113).

[51]The word "temporary" is used here because five of the justices insinuated that certain moment-of-silence statutes (those that permitted prayer without encouraging it) would not conflict with the *Lemon* doctrine.

intentions of the legislature and not squarely on the fundamental principle behind the Establishment Clause and the *Lemon* doctrine, the *Jaffree* Court missed an opportunity to renew its adherence to a principle of governmental nonintervention in religious matters. Arguably, states could still endorse prayer. They only had to disguise their intentions.

Edwards v. Aguillard (482 U.S. 578 [1987])

The teaching of evolution has long been a controversial issue in American education. Some states adopted statutes that ban the teaching of evolution altogether. As previously noted in *Epperson v. Arkansas* (1968), the Supreme Court struck down an Arkansas "Monkey Law" that made it unlawful to teach evolution because it embodied the idea of some religious beliefs and proscribed others. In response to this action, several states adopted policies attempting to balance the teaching of evolution with the teaching of creation science. The Court addressed one of these in *Edwards v. Aguillard* (482 U.S. 578 [1987]).

In 1982, Louisiana passed the "Balanced Treatment for Creation Science and Evolution Science in Public School Instruction" Act. This "Creationism Act" forbade the teaching of evolution in public schools unless it was accompanied by the teaching of "creation science."[52] Public school teachers and parents of public schoolchildren challenged the constitutionality of the Act. The United States District Court for the Eastern District of Louisiana found the Act to be in violation of the Establishment Clause for two reasons: (1) there existed no valid "secular purpose" for prohibiting the teaching of evolution; and (2) requiring schools to instruct students in creation science advanced a particular religious doctrine (634 F.Supp. 426 [1985]). The U.S. Court of Appeals for the Fifth Circuit affirmed, concluding that the actual intent of the Act was "to discredit

[52]Schools were not required to teach evolution or creation science. But if they chose to teach evolution, creation science had to be taught. Nothing required teachers who taught creation science to teach evolution, however.

evolution by counterbalancing its teaching at every turn with the teaching of creationism, a religious belief" (765 F.2d 1251, 1257 [1985]).

On appeal, the Supreme Court, dividing 7-2, struck down the Act as a gross violation of separation. Justice Brennan penned the majority opinion and rested the decision on the merits of *Lemon*. Instead of simply looking for a "secular purpose," the Court adhered to O'Connor's advice from *Lynch* (1984) and asked whether government's purpose was to endorse or disapprove of religion. Louisiana argued that the "secular purpose" of the Act was to promote academic freedom, provide a more comprehensive science curriculum, and foster basic "fairness." Brennan not only rejected these claims, but insinuated that Louisiana's stated purposes might be "[an] [in]sincere sham" (482 U.S. at 586-587).[53] The majority concluded that the Louisiana Legislature's purpose was "preeminent[ly] religious...to advance the religious viewpoint that a supernatural being created humankind" (482 U.S. at 590-591).

Justice Powell, joined by Justice O'Connor, concurred, yet wrote separately to reaffirm his allegiance to the view that states and local school officials should retain the responsibility for determining educational policies of public schools in their district (482 U.S. at 605). Apparently, he did not want the Court to get mired down in educational policy-making for the entire nation. Intervention by the Court was merited, however, when the actions of school boards were overtly religious. Justice White also concurred, expressing procedural matters.

Justice Scalia, joined by Chief Justice Rehnquist, dissented for several reasons. First, the Court rejected the legislature's stated purpose with only a "visceral knowledge" of the legislators'

---

[53]Brennan considered some of the statements of the bill's legislative sponsor, Bill Keith. During the hearings, Keith responded: "My preference would be that neither be taught." Brennan thus concluded that the stated purpose of expanding the science curriculum was perhaps a front. Moreover, academic freedom could hardly be advanced by requiring teachers to instruct pupils in certain areas. Mandating certain subjects to be taught was the antithesis of academic freedom. And to the claim of basic "fairness," nothing in the Act prevented teachers from teaching creation science and ignoring evolution. The Act was weighted to protect those instructors who opted to teach creation science only, while not similarly protecting those who only wanted to teach evolution. Furthermore, the Act forbade school boards from discriminating against employees who chose to teach creation science, while offering no protection to those who chose to teach evolution or those who refuse to teach any creation science.

motivation (482 U.S. at 610).[54] The Act had never been interpreted in a full evidentiary hearing or been implemented, yet the Court was somehow able to determine its "purpose." In doing so, the majority falsely concluded that the purpose stated by the prime sponsor was necessarily the same purpose of the individual legislators who voted for the Act. It was impossible, Scalia reasoned, to determine with any degree of accuracy the legislators' individual purposes for supporting the Act. Scalia quoted approvingly from Chief Justice Warren's majority opinion in *U.S. v. O'Brien* (391 U.S. 367, 384 [1968]): "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it."

The crux of Scalia's dissent rested on the inability of the Court to come to some generally agreed upon conclusions concerning the "secular purpose" prong of *Lemon*.[55] According to Scalia, the Court had replaced "secular purpose" with "secular motive." In other words, the purpose of the statute was not as important as the motives of the legislators who enacted the statute. This was a misapplication of the "secular purpose" inquiry. In effect, the Court had struck down this Act solely on the stated motives of one individual, with no regard to the purpose of the Act. To illustrate this absurdity, he commented that the justices "surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved" (482 U.S. at 615). Furthermore, even if the Act fostered religion, that alone would not suffice to invalidate the Act assuming that a genuine "secular purpose" existed. It was an accepted premise, Scalia reasoned (482 U.S. at 616), that government could improve the position of religion without necessarily

---

[54]Scalia accosted his colleagues for their judicial activism. "Striking down a law approved by the democratically elected representatives of the people is not a minor matter" (482 U.S. at 626).

[55]He noted: "Almost invariably, we have effortless discovered a secular purpose for measures challenged under the Establishment Clause, typically devoting no more than a sentence or two to the matter" (482 U.S. at 637).

advancing it. In fact, some scenarios mandated that government advance religion.[56] Since the Court had continually misapplied the "secular purpose" inquiry of *Lemon*, Scalia advocated abandoning it.[57] Abandoning this prong would provide "clarity and predictability" to Establishment Clause jurisprudence (482 U.S. at 640).

The *Aguillard* decision did not put an end to the debate over the teaching of creationism in public schools. Moreover, the Court did not fully articulate the limitations placed on creationism by the *Lemon* doctrine. The *Aguillard* Court struck down Louisiana's Creationism Act, but not in a manner that other states would interpret as being settled constitutional precedent. By solely focusing on the legislative purpose (*Lemon's* first inquiry) of the Act and not its effects (*Lemon's* second inquiry), the *Aguillard* Court, as it had done in *Jaffree* with moment of silence statutes, simply provided a blueprint for states on how to frame or disguise their religious efforts in regard to creationism. The *Lemon* doctrine could have been strengthened if the Court had discussed the primary effects of teaching creationism, as opposed to merely citing one legislator's statements indicating his religious motivation for proposing the statute. Indeed, if the justices had determined that the teaching of creation science in public schools conveyed a message of endorsement of religion, perhaps the issue of religion, evolution, and creationism in the public school system would have been resolved.

In *Aguillard*, seven members of the Court reaffirmed their support for the *Lemon* doctrine. Their decision marginally indicated that the Court was not willing to retreat from the principles it had set down many years prior in *Epperson* (1968): public schools could not support patently religious beliefs. Yet the *Lemon* doctrine did not survive the *Aguillard* decision unscathed. Justice

---

[56]The Establishment Clause forbade not only state action that advanced religion, but also state action that was intended to "disapprove, inhibit, or evince hostility toward religion" (482 U.S. at 616). Also, the Free Exercise Clause often required government to advance religion.

[57]As interpreted by the Court, Scalia believed that the "secular purpose" inquiry "exacerbate[d] the tension between the Free Exercise and Establishment Clauses, and had no basis in the language or history of the Amendment" (482 U.S. at 640).

Scalia's blistering dissent, which was his first written opinion in an Establishment Clause case, clearly indicated to his colleagues where he sided on matters concerning the relationship between church and state: he favored governmental accommodation of religion and rejected the *Lemon* doctrine. While his dissent did not garner much support from fellow justices on this case, his influence would increase in future decisions.

4. Religion in the Public Domain

Prior to the 1980s, most of the Court's efforts regarding the Establishment Clause came from the ranks of education--the boundaries on government aid to private, church-related schools and the limitations on religion and religious influences in public schools. But in the 1980s, the Court heard several cases dealing with religion in public places--specifically, government-funded chaplains and prayer in state legislatures, government's display of religious symbols on private property, and government's allowance for the display of religious symbols on public property. These issues raised new constitutional problems for the Court to address as well as new areas for the Court to apply the embattled *Lemon* doctrine. As with government aid to religion and religion in public schools, these issues generated a tremendous amount of controversy.

Marsh v. Chambers (463 U.S. 783 [1983])

A 1983 decision confirmed the suspicions of many that the Court would further erode the "wall of separation." Indeed, many scholars of the Court concluded, in the wake of *Marsh v. Chambers* (463 U.S. 783 [1983]), that the Court was on the verge of abolishing the tripartite test of *Lemon*. In this case, the Supreme Court ruled on the long-standing tradition of prayer in state legislatures. The Nebraska Legislature began each session with an invocation. Robert E. Palmer, a Presbyterian minister, served as the legislative chaplain and was reimbursed for his services from

state funds.[58] Ernest Chambers, a member of the Nebraska Legislature, challenged this chaplaincy practice on the ground that the policy violated the Establishment Clause. The United States District Court for the District of Nebraska determined that the Establishment Clause was not breached by the invocation of prayers, but was violated by paying a chaplain from state funds (504 F.Supp. 585 [1980]). It thus enjoined the Nebraska Legislature from using public funds to pay the chaplain. The United States Court of Appeals for the Eighth Circuit held that the chaplaincy program violated all three tenets of the *Lemon* test (675 F.2d 228 [1982]).[59] The Supreme Court granted certiorari limited to the challenge of the practice of opening legislative sessions with prayer.

In an opinion written by Chief Justice Burger, the Court, dividing 6-3, held that the chaplaincy program was not unconstitutional. Burger was joined by Justices White, Blackmun, Powell, Rehnquist, and O'Connor. Justices Brennan and Stevens authored dissenting opinions, Justice Marshall joining the former. Instead of applying the *Lemon* test and making the appropriate determinations, Burger relied on history, the intentions of the framers of the First Amendment, and the need to accommodate popular religious beliefs. Opening legislative sessions with prayer, he reasoned, was "deeply embedded in the history and tradition of this country...[and] coexisted with the principles of disestablishment and religious freedom" (463 U.S. at 786).[60] Any

---

[58]Palmer had served as chaplain since 1965 at a salary of $319.75 per month for each month that the legislature was in session.

[59]A "secular purpose" was not found. The "primary effect" of selecting the same minister for 16 years and publishing his prayers was to promote religious expression. Using state money to pay the chaplain led to "excessive entanglement."

[60]To support this claim, Burger noted the following historical facts: (1) court proceedings opened with an announcement that concluded, "God save the United States and this Honorable Court;" (2) the Continental Congress of 1774 opened its sessions with an prayer offered by a paid chaplain; (3) the First Congress adopted the policy of selecting a chaplain to open each legislative session with prayer; (4) on April 25, 1789, the Senate elected its first chaplain; (5) on May 1, 1789, the House of Representatives appointed its first chaplain; (6) on September 22, 1789, Congress enacted legislation that provided for the payment of legislative chaplains; and (7) three days later, on September 25, 1789, the final wording of the Bill of Rights was reached. Thus, he was able to conclude: "Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as violation of that Amendment" (463 U.S. at 788). Furthermore, he noted (463 U.S. at 792) that the First

proper analysis of the framer's intentions inevitably led to the conclusion that the Establishment Clause was not violated when legislative sessions of the U.S. Congress were opened with prayers offered by paid chaplains.[61] Furthermore, if the U.S. Congress permitted legislative prayers, it necessarily followed that individual states should likewise be permitted a similar practice. Burger noted that "it would be incongruous to interpret [the Establishment] Clause as imposing more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government" Nebraska's practice was "consistent with two centuries of national practice" (463 U.S. at 790-791).

The historical legacy aside, the majority reiterated the importance of accommodating religion. Religion was "part of the fabric of society;" thus, upholding Nebraska's policy was merely a "tolerable acknowledgment of beliefs widely held among the people of this country" (463 U.S. at 792). Quoting Justice Douglas, Burger contended: "We are a religious people whose institutions presuppose a Supreme Being."[62]

After acknowledging the legitimacy of legislative prayers--without any reference to the tripartite *Lemon* test--the Court dismissed other claims of Establishment Clause violations: first, that a clergyman of one denomination had been selected for sixteen years; second, that the chaplain was paid from a state treasury; and third, that the prayers offered were only in the Judeo-Christian tradition. As to the "single denomination," nothing in the record demonstrated that the beliefs of a particular church were advanced. As to the allocation of state funds, he referred to the historical legacy of the early legislatures. And as to content of the prayer, there was no indication that the

---

Amendment's authors did not consider opening prayers as a "proselytizing activity" or as placing the government's "official seal of approval on one religious view."

[61]Burger also concluded (463 U.S. at 791) that the potential for establishment created by opening legislative sessions with prayer was not any greater than in the permitted policies of school transportation (*Everson*), beneficial grants for higher education (*Tilton*), or tax exemptions for religious organizations (*Walz*).

[62]Justice Douglas offered this remark in *Zorach* (343 U.S. 306, 313 [1952]).

prayer opportunity had been "exploited to proselytize or advance any one, or to disparage any other, faith or belief" (463 U.S. at 794-795). Therefore, the practice of the Nebraska Legislature opening sessions with prayers voiced by a paid chaplain was not violative of the Establishment Clause.[63]

In a dissent joined by Justice Marshall, Justice Brennan ridiculed the majority for replacing constitutional doctrine with historical analysis and lambasted his colleagues for making "no pretense" of subjecting Nebraska's practice of legislative prayer to the "most commonly cited formulation of prevailing Establishment Clause doctrine" (463 U.S. at 795-796). The purpose was "self-evident." "To invoke Divine Guidance on a public body entrusted with making laws [was] nothing but a religious act" (463 U.S. at 797).[64] The "primary effect" of Nebraska's policy was clearly religious: "invocations...explicitly link religious belief and observance to the power and prestige of the State" (463 U.S. at 798).[65] Finally, legislative prayer impermissibly created "excessive entanglement" for two reasons. First, the process of selecting a chaplain and insuring that his or her prayers were "suitable" involved the state in monitoring and overseeing religious affairs. Second, "excessive entanglement" was present because of the "rancor" and disagreement prevalent among the Nebraska legislators over this matter.[66] Finally, the practice of legislative prayer in America was more "divisive" than the majority had hastily concluded.

---

[63]It is interesting to note that the majority opinion makes no reference to *Lemon*, except in their review of the findings of the lower court. It is hard to imagine this as an oversight. Every majority opinion since 1971 had invoked the doctrine of *Lemon*. Some have surmised that this decision was based on pragmatic considerations because the Court would "inevitably be embarrassed if it were to attempt to strike down a practice that occurs in nearly every legislature in the United States, including the U.S. Congress" (Stephens and Scheb, 1993: 757).

[64]Furthermore, Brennan recognized (463 U.S. at 797) that any secular purpose that a prayer might afford, such as quieting down members or imbuing the members with a sense of seriousness and purpose, could easily be accomplished through purely nonreligious means.

[65]Brennan offered a quote from an earlier Supreme Court Establishment Clause case, *Larkin v. Grendel's Den* (459 U.S. 116, 125 [1982]): "The mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some be reason of the power conferred."

[66]Apparently, Senator Chambers was not the only one to express disagreement with this controversial practice.

After his cursory comparison of Nebraska's policy to the mandates of *Lemon*, Brennan sarcastically concluded: "I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional" (463 U.S. at 800-801). According to Brennan, by permitting this challenged policy, the state had: (1) intruded on the right to conscience by forcing legislators to either participate or make their objections a matter of public comment; (2) forced all state residents of Nebraska to support a religious exercise that may be opposed to personal beliefs; (3) required itself to commit on theological matters; (4) degraded religion by intermeshing a call to worship with a call to order; and (5) injected religion in the sphere of politics by creating the potential that every selection of a chaplain or consideration of a prayer would provoke a political battle along religious lines that would ultimately alienate some religious groups. In sum, legislative prayer clearly violated the "principles of neutrality and strict separation that [were] embedded with the Establishment Clause" (463 U.S. at 808).[67]

Justice Stevens also dissented, expressing the view that the denomination of the selected chaplain and the content of his or her prayers were of significance in determining a constitutional violation. Noting that a Catholic priest would be expected in the Massachusetts Legislature or a Presbyterian minister in the Nebraska Legislature, Stevens accepted the premise that the religious beliefs of legislative chaplains tended "to reflect the faith of the majority of the lawmaker's constituents" (463 U.S. at 822-823). Accordingly, he would not expect a Jehovah's Witness or a disciple of Mary Baker Eddy or the Reverend Moon to serve as a chaplain in any state legislature. It seemed apparent, therefore, that the "designation of a member of one religious faith to serve as

[67]According to Brennan, the governmental policy of strict separation between church and state did not "rob[]the nation of its spiritual identity" (463 U.S. at 821). Rather, it gave the nation a genuine spiritual identity, absent government approval or disapproval.

the sole chaplain of a state legislature for a period of sixteen years," was, in effect, the state, expressing preference of one faith over another (463 U.S. at 823).[68]

The *Marsh* Court offered no justification for its wholesale abandonment of the *Lemon* doctrine. Therefore, following the decision in *Marsh*, many onlookers of the Court predicted the coming demise of the *Lemon* doctrine. After all, the Court had just permitted a state to invoke divine guidance in the halls of its legislative chambers with no reference to the established doctrine. The Court's decision, which was arguably at complete odds with the ideal of separation, supported the principle of accommodation. Apparently, a judicial doctrine of twelve years paled when compared to a two-hundred year history.[69]

After *Marsh*, it was unclear what measure the Court would use in determining the constitutionality of historic practices arising under the Establishment Clause. Some justices favored the more stringent *Lemon* test; others preferred the standard applied in *Marsh*--one of historical analysis and fit. While proponents of the *Lemon* doctrine had ample reason for concern, the predictions of *Lemon's* demise were somewhat premature. The *Marsh* decision proved to be an aberrant departure from the settled method of Establishment Clause adjudication and the Court reaffirmed its allegiance to the *Lemon* doctrine during its next term in the case of *Lynch v. Donnelly* (465 U.S. 668 [1984]).

Lynch v. Donnelly (465 U.S. 668 [1984])

The city of Pawtucket, Rhode Island erected a crèche in a private park as part of the city's Christmas display. The crèche included life-size figures of the infant Jesus, Mary and Joseph,

---

[68]Stevens' choice of words might lead one to conclude that hiring several chaplains, each of different faiths, might not necessarily constitute an Establishment Clause violation.

[69]The Court's refusal to acknowledge the *Lemon* doctrine as controlling was confusing. The Court did apply the *Lemon* doctrine in another Establishment Clause case decided previously in the same term as *Marsh*. In *Larkin v. Grendel's Den* (459 U.S. 116 [1982]), the Court used the *Lemon* doctrine to strike down a Massachusetts statute that gave churches "veto rights" over neighboring establishments that served alcoholic beverages.

angles, shepherds, kings, and animals. The nativity scene was placed in a private, downtown shopping district and also included a Santa Claus, several reindeer, a sleigh, candy striped poles, clowns, elephants, teddy bears, and a banner reading "Seasons Greetings." All objects in the display were owned by the city.

Residents of the city, encouraged by the American Civil Liberties Union, claimed that the city's actions were in violation of the Establishment Clause. The plaintiffs, per Dennis Lynch, filed suit in the United States District Court for the District of Rhode Island. Through an application of the *Lemon* doctrine, the district court held that the inclusion of the crèche in the display was unconstitutional and enjoined the city from including the crèche in the display.[70] The United States Court of Appeals for the First Circuit affirmed (691 F.2d 1029 [1982]). The Supreme Court granted certiorari.

By a narrow 5-4 decision, the Supreme Court reversed. Chief Justice Burger wrote the majority opinion, stating that the Constitution "affirmatively mandate[d] accommodation...of all religions (465 U.S. at 673)." "Rather than mechanically invalidate all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith," he reasoned, the Court should scrutinize legislation "to determine whether, in reality, it establishes a religion or religious faith, or tends to do so" (465 U.S. at 678). To make such a determination required "line-drawing," and the line, albeit not a "fixed" one, had been drawn with the *Lemon* doctrine. However, Burger qualified the doctrine's use: "[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area" (465 U.S. at 679).[71]

---

[70]The U.S. District Court concluded that by including the crèche in the display, the city had "tried to endorse and promulgate religious beliefs" (525 F.Supp. 1150, 1173 [1981]).

[71]It is important to recall that Burger was the author of the *Lemon* doctrine. Here, he acknowledged that other factors may be equally as important for the Court to consider in its decision-making.

In applying the *Lemon* doctrine, the "secular purpose" was clear to the Court--advancing the celebration of the national holiday of Christmas. As to "primary effect," the majority stated that any benefit to religion was "indirect, remote and incidental" (465 U.S. at 683). Furthermore, the display was no "more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass,' or the exhibition of literally hundreds or religious paintings in governmentally sponsored museums" (465 U.S. at 683). As to the third prong, no "excessive entanglement" was present. To justify this inquiry, Burger noted that there was no contact between state and church officials over the content or design of the exhibit, no state expenditures for maintenance, no state surveillance, and no evidence that political divisiveness had existed in the forty-year history of the practice.[72]

While the Court used the traditional framework of *Lemon* in their analysis, it refused to do so with the same intensity as past Courts. As in *Marsh* (1983), the majority opinion again relied on other accepted traditions between church and state and not on *Lemon*. Burger devoted numerous pages of his opinion detailing other types of permissible activities that bordered on government's sponsorship of religion. His conclusion was that none of the challenged activities posed a danger to an establishment of a state church; to suggest that a danger existed was "farfetched" (465 U.S. at 686). Furthermore, to invalidate the crèche display would require a host of other recognitions and activities to likewise be struck down as being "equally offensive to the Constitution" (465 U.S. at 686).[73]

Acknowledging that "government practices...with religious significance must be subjected to careful judicial scrutiny" (465 U.S. at 694), Justice O'Connor concurred in the judgment, yet authored a separate opinion seeking to clarify the *Lemon* doctrine. The "secular purpose" inquiry

---

[72]He further noted that political divisiveness alone, or the possibility thereof, was not a sufficient reason for holding a practice unconstitutional.

[73]Perhaps this decision was one based on pragmatic considerations and not on any fundamental change in the philosophy of the justices.

of *Lemon* should not be satisfied, she reasoned, by the mere presence of some secular purpose. Instead, the proper inquiry was whether the intentions of the government were to convey a message of approval or disapproval of religion. If the Court were to do so, government practices would not be invalidated merely because their "primary effect" was the advancement or inhibition of religion.[74] The focus should rest on whether government was *intending* to endorse or inhibit religion, *regardless* of effect.[75]

While dissenters Brennan, Marshall, Blackmun, and Stevens were elated to witness the "return" of the *Lemon* doctrine, they implored the majority to abandon their "less-than-vigorous application" of the doctrine. In fact, Brennan called the majority's commitment to *Lemon's* standards as "superficial" (465 U.S. at 696).[76] Brennan was persuaded that the inclusion of the crèche had no "secular purpose" and that the "primary effect" was to place the "government's imprimatur of approval on the particular religious beliefs exemplified by the crèche" (465 U.S. at 701).[77] Brennan also speculated that as a result of this decision, other religious groups would petition for symbolic displays; thus, the potential for "excessive entanglement" existed. Brennan's vehement opposition to the Court's decision became evident in his concluding remarks.

> Because the Framers of the Establishment Clause understood that "religion is too personal, too sacred, too holy to permit its unhallowed perversion by civil authorities," the [Establishment] Clause demands that government play no role in this effort....The Court today brushes aside these concerns by insisting that Pawtuket has done nothing more than include a "traditional" symbol of Christmas in its celebration of this national holiday, thereby muting the religious content of the crèche. But the city's action should be

---

[74]To demonstrate this understanding, O'Connor relied on *Zorach* (1952) and *Walz* (1970). Both of the provisions upheld in these cases had a "primary effect" that advanced religion, but neither ran afoul of the Establishment Clause.

[75]Applied in this fashion, the city of Pawtucket still had not violated the Establishment Clause. Its intention was not to promote religion.

[76]Justices Brennan and Blackmun wrote dissenting opinions. Brennan was joined by Marshall, Blackmun, and Stevens. Only Stevens joined Blackmun.

[77]To minority religious groups, the conveyed message was that their views were "not worthy of public recognition nor entitled to public support." Brennan referred to this as "religious chauvinism" (465 U.S. at 701).

> recognized for what it is: a coercive, though perhaps small, step toward establishing the sectarian preferences of the majority at the expense of the majority...(465 U.S. at 725).

Justice Blackmun accused the majority of "mak[ing] light of [Supreme Court] precedents" (465 U.S. at 726). By declaring the presence of the crèche irrelevant, the Court relegated the role of a profoundly religious symbol to a "neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning and incapable of enhancing the religious tenor of a display of which it is an integral part" (465 U.S. at 727). Upset at the misuse of a sacred symbol, he disappointingly conceded a "Pyrrhic victory" to the city of Pawtucket.[78]

According to one scholar, *Lynch* demonstrated the continuous problem: how to maintain a secular government in an essentially religious society (Mooney, 1990: 12). The *Lynch* Court permitted government to acknowledge the role of religion in American life and history through the display of various religious symbols, but only after those "religious" symbols attained a "secular" status in society. They were thus able to effectively ignore the Christian symbolism of a nativity scene by focusing on that crèche as nothing more than a symbol of a national holiday and an important facet of American culture. In this effort to accommodate religion, the justices arguably "threw the baby out with the bath water."

For those who supported the *Lemon* doctrine, the justices reliance on the three-pronged test was a welcomed sight. Many had feared its immediate demise after *Marsh*. However, the *Lynch* Court considered many other factors in making their determination besides those articulated in the *Lemon* doctrine. While the Court employed the traditional framework of *Lemon*, it refused to be confined to any single test or criterion in the sensitive area of Establishment Clause jurisprudence. Almost forty years after the initial Supreme Court ruling on the Establishment Clause, the Court had yet to agree on the application of a substantive principle for which to guide its decision making in this area of church-state relations.

---

[78] Webster's Ninth New College Dictionary defines "Pyrrhic victory" as "a victory won at excessive cost."

Allegheny County v. Greater Pittsburgh ACLU (492 U.S. 573 [1989])

The constitutionality of nativity scenes and other Christmas symbols was addressed again in *Allegheny County v. Greater Pittsburgh ACLU* (492 U.S. 573 [1989]). Brought to the Supreme Court as one case, this case was essentially two separate and distinct lawsuits involving two separate holiday displays in two different buildings under the auspices of two separate government entities with simple and relatively undisputed facts (Janocski, 1989: 463).

On an annual basis since 1968, Allegheny County invited various choirs to participate in a Christmas-carol program. The choirs performed in two locations--the rotunda of the Greater Pittsburgh International Airport and the first floor of the County Courthouse. The overriding theme of the presentations was "Peace," and the performances included various choirs presenting a wide spectrum of tunes, religious and secular. Since 1981, a nativity scene was also displayed on the steps of the County Courthouse during the Christmas season. The display was owned by a private Catholic men's organization. Other than providing property for the crèche to rest (and a dolly for transportation), the County had no involvement with the nativity scene. In addition to serving as the locale for the Christmas carol program, the County Courthouse was also used throughout the year for various art displays and cultural events.

Like Allegheny County, the city of Pittsburgh allowed various holiday displays on government property. For years, the government of Pittsburgh erected a Christmas tree on the front steps of the main entrances of the City-County Building. Beginning in 1981, the city included a Chanukah menorah as part of the display. This menorah, eighteen feet in height, was owned by a private Jewish group.

In November, 1986, the American Civil Liberties Union requested removal of the displays on the ground that they violated the Establishment Clause. The County Commissioner and Mayor refused to comply with these requests. The U. S. District Court for the Western District of Pennsylvania concluded that the displays had a "secular purpose" and did not create "excessive

entanglement" between government and religion. The U. S. Court of Appeals for the Third Circuit reversed, holding that the crèche and the menorah had the impermissible effect of endorsing religion (842 F.2d 655 [1988]). The Supreme Court granted certiorari.

To say that the Supreme Court was deeply divided over this issue was, according to one scholar, "an understatement" (Janocski, 1989: 469). Five separate opinions were written. In a narrow 5-4 decision, the Court held that the nativity scene inside the courthouse violated the "primary effect" prong of the *Lemon* doctrine. Those justices in the majority on this matter included Blackmun (who wrote the Court's opinion), O'Connor, Brennan, Marshall, and Stevens. The Court, dividing 6-3, also held that the display of the Chanukah menorah outside of the City-County Building did not have the effect of endorsing religion. Justices Blackmun wrote the plurality opinion on this matter and was joined by Justice O'Connor. The four dissenters on the crèche--Chief Justice Rehnquist and Justices Kennedy, White, and Scalia--concurred in this judgment.

Justice Blackmun initially invoked the second inquiry of *Lemon*--"primary effect." He conceded that the Court had refined "primary effect" by focusing on "endorsement." Nevertheless, the essential principle set forth by the second prong of *Lemon* remained unchanged. At a bare minimum, the Establishment Clause prohibited government from "appearing to take a position on question of religious belief [and from] making adherence to a religion relevant in any way to a person's standing in the political community" (492 U.S. at 593-594).[79]

In applying that standard to the crèche at the courthouse, the majority held that the display sent an unmistakable message to the public of support and promotion of the crèche's religious message. Blackmun found the words on the banner (Gloria in Excelsis Deo!), the absence of non-religious items in the display, and the location of the crèche as having the combined effect of

[79]With respect to the latter prohibition, Blackmun was quoting from O'Connor's concurring opinion in *Lynch* (465 U.S. 668, 687 [1984]).

endorsing a patently Christian message: "Glory to God for the birth of Jesus Christ."[80] Accordingly, government's effect was "indisputably religious--indeed sectarian" (492 U.S. at 598). Blackmun clarified the circumstances under which government may become involved in the celebration of religious holidays. "[G]overnment may acknowledge Christmas as a cultural phenomenon, but...it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus Christ" (492 U.S. at 601). Finding a patently religious message, the Court did not analyze other inquiries of *Lemon*.

Before redirecting the Court to the menorah, Blackmun devoted a substantial piece of his opinion to refuting Justice Kennedy's assertion that the crèche display was not violative of the Establishment Clause. Kennedy had dissented from the Court's holding, referring to it as "unjustified hostility toward religion [and] inconsistent with...history and...precedents" (492 U.S. at 566). Instead, Kennedy concluded that government's display of religious symbols was constitutional unless it advanced religion to such a degree that it actually established a state religion or religious faith. In this case, the city sought no more than to celebrate the season. Furthermore, to disallow the celebration was to engage in religious discrimination. In meticulous detail, Blackmun rejected these contentions. First, government practices that demonstrated allegiance to a particular religious creed cannot be legitimized by history. Second, Kennedy had misapplied the Court's precedents. The decisions of the Court did not, Blackmun reasoned, mandate a judicial finding that government had favored a particular belief. Rather, earlier decisions implied that all government practices that even suggested a denominational preference were to be subjected to "strict scrutiny." Finally, nothing in the majority opinion should be construed to conclude that government was prohibited from celebrating Christmas. Government merely could not celebrate in a manner that expressed allegiance to Christian beliefs.

---

[80]Other objects in the display--Santa, Santa's house, and Santa's reindeer--were "objects of attention separate from the crèche." For constitutional purposes, the crèche stood alone as "the single element of the display" (492 U.S. at 598).

In applying the "primary effect" inquiry of *Lemon* to the menorah, the Court found no constitutional violation.[81] The display of the menorah and the Christmas tree, neither of which were "exclusively religious" symbols, did not have the effect of endorsing Judaism or Christianity because the city of Pittsburgh was not celebrating Chanukah and Christmas as religious holidays, but as secular ones.[82] The display simply recognized that both holidays had attained "secular status in society" (492 U.S. at 616). Given this consideration it was unlikely to conclude that residents of Pittsburgh would perceive the Christmas tree and menorah as either expressing an endorsement or disapproval of private religious choices. The "primary effect" of the display was not to endorse or inhibit religion.[83]

Justice O'Connor concurred in the judgment, yet opted to write separately to clarify some points. First, *Lynch* (1984) was not necessarily the controlling case because, in that case, the crèche was displayed on private property and included many traditional secular symbols. Second, the menorah symbolized not an endorsement of religion, but rather a message of pluralism and freedom of belief. Most importantly, O'Connor restated her allegiance to the "endorsement" test derived from *Lemon's* second inquiry. That test "captured the essential command of the Establishment Clause" and should not be replaced, as Justice Kennedy advocated, by a standard that prohibited only "coercive practices or overt efforts at government proselytization" (492 U.S. at 627).

---

[81] In regard to the menorah, the Court's plurality opinion was written by Justice Blackmun, joined by Justice O'Connor. Concurring in the judgment were Chief Justice Rehnquist and Justices Kennedy, White, and Scalia.

[82] It also followed that the city could not celebrate one holiday and omit a celebration of the other without discriminating of religious grounds. Both holidays were celebrated. Both were celebrated as "secular holidays." Thus, Pittsburgh's conduct was "beyond the reach of the Establishment Clause" (492 U.S. at 615).

[83] Blackmun did not preclude a violation of the *Lemon* doctrine. Rather, since the appellate court did not address either the "purpose" or "entanglement" prongs of *Lemon*, the Supreme Court refrained from analyzing these inquiries. However, he noted that the appellate court could address these matters on remand.

Justice Brennan, Marshall, and Stevens dissented from the Court's judgment with respect to the menorah.[84] In essence, their dissents were grounded in the assumption that the menorah, as with the crèche, possessed a strong religious association and the Establishment Clause established a "strong presumption against the display of religious symbols on government property" (492 U.S. at 651).[85] Also, the secular component of the menorah was not enough to overcome the presumption of an establishment of religion.

Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia, dissented with regard to the crèche. Kennedy cautiously expressed his faith in *Lemon*; he was "content...to remain within the *Lemon* framework, but [did] not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area" (492 U.S. at 655). Kennedy advocated a standard that prohibited only coercive practices or overt efforts at government proselytization. In this case, there existed no "realistic risk" that government was attempting to proselytize or establish religion because no individual was compelled to participate in a religious ceremony (492 U.S. at 664).

After accusing the Court of officially adopting Justice O'Connor's "endorsement" test, Kennedy called the test a "flawed,...unworkable,...[and] inappropriate" inquiry for establishment of religion cases that needed to be abolished for several reasons. First, the test yielded results that were inconsistent with precedent, traditions, and First Amendment history.[86] After detailing numerous instances in which the various branches of government recognized the central role of

---

[84]Justices Brennan and Stevens wrote dissenting opinion, each joining the other's opinion. Justice Marshall joined both opinions as well.

[85]Stevens concluded that by permitting religious symbols to be displayed on public property, it was likely that someone would be offended or consider the display disrespectful. Such was too great a risk for government to take.

[86]Kennedy lamented: "[T]he only Christmas the State can acknowledge is one in which references to religion have been left to a minimum. The Court thus lends its assistance to an Orwellian rewriting of history as many understand it." Kennedy could conceive of "nothing more antithetical to the First Amendment" (492 U.S. at 678).

religion in American culture, Kennedy deduced that in government's mandate to accommodate religion, "some endorsement [was] inherent" (492 U.S. at 672). A second reason to abandon the "endorsement" test was that it trivialized constitutional adjudication because the inquiry required the Court to become engaged in all of the intricacies of challenged programs. Kennedy referred to this test as a "jurisprudence of minutiae" (492 U.S. at 674). Concluding, Kennedy expressed the view that the Establishment Clause, coupled with America's historic traditions of diversity and pluralism, permitted communities to make reasonable judgments respecting religious and cultural holidays. No constitutional violation occurred when communities opted to do so through the display of religious symbols.[87]

While the Court in *Allegheny County* did not toss *Lynch* to the wind, it incorporated additional factors to be considered in the ongoing struggle to reconcile government's use of religious symbols. They included: (1) location of display (locating a display at or near a seat of central government would raise questions about the close identification between religion and government); (2) size an type of configuration (it seems quite mechanical that adding a few reindeer and a Santa Claus will make a display pass constitutional scrutiny; however, *Allegheny County* intimated that a crèche as part of a larger configuration with non-religious items might foster a milder religious message and focus attention away from the religious nature of the display); (3) religious intensity (the extent and type of symbol used might play a role; a Latin cross was prima facie evidence of a violation, while a crèche was intense only in relation to its placement; a crèche in a public building might be too intense, while one in a public park diminished its religious intensity); (4) connection with a secular holiday (a totally secular nature was not required, a display just needed to be in connection with some national holiday or secular occasion); (5) government participation (the less the government had to do, the less government entanglement

[87]Furthermore, Kennedy found nothing to distinguish the constitutionally relevant facts in *Lynch* from *Allegheny County*. Kennedy could not comprehend why the placement of a government-owned crèche on private property (*Lynch*) was lawful, while a privately-owned crèche on public property (*Allegheny County*) was not.

with the function of the display, the more the Court was likely to maintain the display; the more the public was involved, the greater the likelihood of a constitutional violation); and (6) a disclaimer (while the presence of a disclaimer will not automatically save a constitutionally suspect display, it could, however, help diffuse suspicion that would otherwise arise).

In looking at these considerations, as well as the divergent perspectives of the justices, it was easy to conclude that the Court did not view the *Lemon* doctrine as being the sole determinant for violations of the Establishment Clause. Its application was subjected to a variety of other considerations in addition to the three basic inquiries of *Lemon*. Depending upon the context of the situation, a different application of *Lemon* might be employed. What constituted an "advancement of religion" (or any other inquiry of the doctrine) was not easily determined by the simple mechanical application of precedent. While the "secular purpose" and "entanglement" prongs remained virtually unchanged in the wake of *Allegheny County*, the "primary effect" inquiry was greatly expanded to include various factors.[88] The Supreme Court incorporated an indeterminate analytical framework where everything bore some relevance, but nothing was singularly decisive. In the opinion of one author (Janocski, 1989: 487), *Allegheny County* expanded *Lemon* from a three-part test into one based on "totality of the circumstances."

5. Summary and Conclusions

During the 1980s, the *Lemon* doctrine was invoked in every establishment of religion case with the exception of *Marsh* (1983) (Table 6.1). At least in theoretical terms, the doctrine was accepted as the framework for decisions in this area. The *Lemon* doctrine was used to allow tax deductions for parochial educational purposes, to authorize states to indirectly finance the religious

[88] In fact, at least four justices, through their alignment with Justice Kennedy, expressed support for a new Establishment Clause test based on coercion.

Table 6.1 Supreme Court Establishment Clause Jurisprudence, 1981-1989

Year	Case	Vote	Holding
1981	*Widmar v. Vincent*	8-1	UM-KC statute prohibiting religious groups from access to open forum struck down as content-based exclusion of religious speech.
1983	*Mueller v. Allen*	5-4	Minnesota law permitting parents of schoolchildren tax deductions for educational purposes upheld as a neutral accommodation of parents of schoolchildren–public and private.
1983	*Marsh v. Chambers*	6-3	Nebraska policy of opening legislative sessions with a prayer upheld on the basis of historical practices and traditions. No reference to *Lemon*.
1985	*Lynch v. Donnelly*	5-4	Display of government-owned crèche on private property upheld as having only an indirect effect on religion. Furthermore, history mandated accommodation between church and state.
1985	*Wallace v. Jaffree*	6-3	Alabama statute calling for a moment of silence "for meditation or voluntary prayer" in public schools held unconstitutional because it had no clearly defined "secular purpose."
1985	*Aguilar v. Felton*	5-4	New York use of Title I funds to pay for parochial school instruction held unconstitutional because the risk of indoctrination overstepped the line between accommodation and direct financial aid.
1986	*Witters v. Washington*	9-0	State rehabilitation funds paid directly to disabled students could be used to finance religious studies of students as Christian colleges. The assistance to religion was the result of private choices.
1987	*Edwards v. Aguillard*	7-2	Louisiana law requiring that, in all public schools, instruction in evolution be accompanied with creation science held impermissible because it was an obvious effort to advance religion.
1989	*Allegheny County v. ACLU*	5-4 6-3	Crèche in Pennsylvania county courthouse held unconstitutional because it advanced religion. Menorah on steps of government building found permissible because its purpose was to celebrate a secular holiday.

education of disabled persons, to permit the display of a government-owned nativity scene on private property, and to approve of a city's choice to display a menorah in front of a public building. The *Lemon* doctrine was also employed as a means to ban content-based discrimination at a university, to enjoin a school district from using state funds in the instruction of nonpublic students, to prevent a state from using federal funds to pay the salaries of public employees who taught in parochial schools, to prohibit a moment of silence "for meditation or voluntary prayer," to disallow a state statute mandating that instruction of creation science accompany all teaching of evolution, and to forbid a city from erecting a crèche in the county courthouse. While the framework was generally agreed upon, its application was not, evidenced by the fact that only one case during this period was decided by a unanimous vote of the justices--*Witters* (1986).

In spite of its continual appearances in the opinions of the Court, the *Lemon* doctrine also began to face heavy criticism. That criticism came from constitutional scholars, religious leaders, and, most importantly, Supreme Court justices. As early as the mid-1980s, some justices called for a reassessment of *Lemon*, others advocated a reworking of the separate inquiries of *Lemon*, and still others called for the outright abandonment of the doctrine. Their reasons were varied.

In 1984 in *Lynch*, O'Connor suggested the Court reassess the "secular purpose" prong of *Lemon*. Instead of merely looking for some, perhaps hidden, "secular purpose," she suggested that the Court clarify the Establishment Clause doctrine to hold invalid any practice where the actual purpose of the government was to endorse or express disapproval toward religion, regardless of the effect. This was a fundamental change from the inception of the "secular purpose" prong back in *Schempp* (1963).[89] In *Jaffree* (1984), Rehnquist suggested that the doctrine was wholly inconsistent with the history of the First Amendment, and was thus not an adequate standard for matters of church and state. *Lemon* was built upon a mistaken understanding of constitutional history. While the First Amendment prohibited government from expressing denominational

[89]According to Justice Kennedy (492 U.S. 573, 668 [1989]), the Court officially adopted this revision of *Lemon* in *Allegheny County*.

preferences, it did not demand that government be neutral between religion and nonreligion. Thus, *Lemon* was couched in historical fallacies and unnecessarily prevented government from endorsing religion. Doctrines not soundly developed through historical analysis were incapable of providing proper results. Thus, *Lemon* served no purpose. As to the "excessive entanglement" inquiry, it was paradoxical that a state would be required to supervise certain financial contributions, yet that surveillance, in and of itself, would invalidate an entire program.

In *Aguilar* (1985), several members of the Court--Chief Justice Burger and Justice O'Connor--were prepared to relax the standards of *Lemon* to provide necessary educational services to nonpublic school students. According to Burger, the resulting effect of *Lemon* was hostility toward religion and not the neutrality that the doctrine was designed to accomplish. Justice Rehnquist accused the majority of misapplying the "excessive entanglement" prong of *Lemon* because it continually condemned benign cooperation between church and state. Also, Justice O'Connor noted the paradox created in the "excessive entanglement" prong. The state was required to ensure that funds were not spend to indoctrinate, but to ensure such demanded surveillance and supervision, which created impermissible entanglement. She, therefore, suggested that state efforts to ensure that public funds were not expended for nonsectarian purposes should not invalidate an otherwise permissible statute. In other words, O'Connor believed that the "primary effect" and "excessive entanglement" inquiries of *Lemon* were somewhat incompatible.

In 1987 in *Aguillard*, Justice Scalia and Chief Justice Rehnquist attacked the "secular purpose" inquiry of *Lemon*, claiming that its discovery was impossible. There was no legitimate means by which the Court could uncover the "purpose" that each and every legislator had in mind in regard to a statute's adoption. According to these two justices, the "secular purpose" prong of *Lemon* was only a weak effort to uncover not the purpose of a statute, but the motivation of those who were responsible for its passage. Moreover, it was dangerous for Court to use a judicially created, historically false doctrine to invalidate a law approved by a democratically elected

legislature. This inquiry exacerbated the tension between the religion clauses, served no purpose, and, therefore, should be discarded.

Finally, in *Allegheny County* (1989), four members of the Court--Chief Justice Rehnquist and Justices Kennedy, White, and Scalia--verbalized their disagreement with the historical foundation from which *Lemon* was derived, as well as the way in which it was applied. In their view, tradition and history trumped bad doctrine. *Lemon* was merely fostering a completely false understanding of the framers' intentions and of the central role that religion was supposed to play in American culture. Thus, *Lemon* needed to be abandoned and replaced with a test of "coercion"--government could accommodate religion so long as its accommodation did not compel any individual to participate in an religious exercise or ceremony. This test, according to Kennedy, was more consistent with the Establishment Clause than the historically flawed *Lemon* doctrine..

During its second decade of existence, the *Lemon* doctrine was hammered with extensive criticism, most of which came from those justices and individuals who favored government's accommodation of religion. Yet it continued to serve as the precedent in matters of church and state relations. The *Lemon* doctrine would limp into the 1990s--bruised, battered, and under constant criticism--but nonetheless alive.

CHAPTER 7

THE ENERGIZER DOCTRINE...IT JUST KEEPS GOING...AND GOING...AND GOING: *LEMON* IN THE 1990s

1. Introduction

The *Lemon* doctrine limped into the 1990s. As observers marked the doctrine's twentieth birthday, judges, scholars, and justices debated its maturity, helpfulness, and applicability. Nevertheless, the *Lemon* test remained the precedent in Establishment Clause adjudication. Lower courts interpreted *Lemon* in differing ways during the 1980s. For example, in 1980, the Kentucky Supreme Court upheld a state law that required the posting of a copy of the Ten Commandments in every public school classroom.[1] One year later, the U.S. Court of Appeals for the Fourth Circuit held that North Carolina's "Motorist's Prayer," which was printed on official state maps and blandly invoked the assistance of God in providing safety to persons traveling in the state, was a violation of the Establishment Clause.[2] In 1984, the U.S. Court of Appeals for the Second Circuit ruled that the Establishment Clause did not prohibit a private organization from erecting a nativity scene in a public park.[3]

As previously noted, the U.S. Supreme Court fared no better in clarifying the *Lemon* doctrine. At times, the Court strictly applied the test; at other times, the justices loosely interpreted the three inquiries. In one case, the Court did not even invoke the doctrine. All three prongs

---

[1]See *Stone v. Graham* (599 S.W. 157 [1980]). The U.S. Supreme Court rejected this holding in an unsigned 5-4 opinion–*Stone v. Graham* (449 U.S. 39 [1980]). According to the Court, this requirement furthered only sectarian purposes.

[2]See *Bradshaw v. North Carolina Department of Transportation* (630 F.2d 1018 [1980]). The U.S. Supreme Court denied certiorari in *Bradshaw v. Hall* (450 U.S. 965 [1981]).

[3]See *McCreary v. Stone* (739 F.2d 716 [1984]). The Supreme Court would later affirm the lower court's holding in a 4-4 *per curium* decision–*Board of Trustees of Scarsdale v. McCreary* (471 U.S. 83 [1985]).

underwent heavy criticism from scholars and justices. At least five justices expressed some concern with the Court's application of the doctrine. A few justices even called for the outright abolishment of *Lemon*. But the *Lemon* doctrine remained. Like the Energizer bunny, the doctrine "just kept going...and going...and going."[4]

Between 1990 and 1994, the Supreme Court heard five cases dealing with the Establishment Clause. In spite of the doctrine's perceived failures, it was not overturned by any of these cases.

2. Government Aid to Religion

So far, the Court has only ruled on one case in the 1990s dealing with assistance to religion. As with most other cases arising under the rubric of "government aid to religion," this case developed from a state practice that appropriated public funds for parochial education.

Zobrest v. Catalina Foothills School District (125 L.Ed.2d 1 [1993])

Pursuant to the federal Individuals with Disabilities Education Act, Catalina Foothills School District in Arizona provided James Zobrest, a deaf student enrolled in the public school system, with a sign-language interpreter.[5] After completing the eighth grade, James enrolled in a private Catholic high school. He requested that the public school district continue to provide him an interpreter. The school district denied this request, assuming that a state-supported interpreter would violate the Establishment Clause.

---

[4]In the early 1990s, the Energizer Battery Corporation aired television advertisements in which a "pink bunny," energized by batteries, appeared in successive commercials. The theme for the commercials was: "The Energizer bunny. It just keeps going...and going...and going." No explanation was ever offered for why the Energizer brand outlasted other types of batteries. But that was not important. The importance was, "it just kept going." Similarly, the *Lemon* doctrine "just kept going" without explanation.

[5]This Act required states to provide disabled students with special education and related services (20 USC, Sections 1400-1485 [1988]).

Believing that the First Amendment did not bar such activity, James' parents brought a constitutional challenge against the school district. The United States District Court for the District of Arizona rejected this contention, concluding that this provision created an impermissible entanglement between church and state because the state-supported interpreter would act as "a conduit for...religious inculcation," thereby promoting "religious development at government expense" (quoted in *Zobrest*, 125 L.Ed.2d at 8). The United States Court of Appeals for the Ninth Circuit affirmed (963 F.2d 1190 [1992]). In applying the three part *Lemon* test, the appellate court found that the interpreter would have the "primary effect" of advancing religion.

The Supreme Court granted certiorari in *Zobrest v. Catalina Foothills School District* (125 L.Ed.2d 1 [1993]) and reversed the lower courts' judgments. In a 5-4 decision, Chief Justice Rehnquist, joined by Justices White, Scalia, Kennedy, and Thomas, noted that the First Amendment did not automatically exclude religious organizations from the benefits of publicly-sponsored welfare programs. To do so was "absurd," for then the state could deny police or fire protection to churches (125 L.Ed.2d at 10).[6] In this case, the government distributed benefits neutrally to any handicapped child "without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school" (125 L.Ed.2d at 11). The presence of a state interpreter in a sectarian school was the result of a private decision, and thus could not be attributed to the state.[7]

Accusing the Court of disregarding longstanding principles of constitutional adjudication, Justice Blackmun, joined by Justice Souter, chided the Court for ignoring the ultimate consequence of its decision: authorizing government to participate directly in religious indoctrination (125

---

[6]Rehnquist chronicled the long line of Supreme Court cases that demonstrated the permissibility of general welfare programs. In *Mueller* (1983), the Court permitted parents to deduct expenses for their children's tuition, books, and transportation regardless of the sectarian or nonsectarian tilt of the school. This policy was constitutional because the benefits were available to all parents and any advancement to religion was the result of private choices. In *Witters* (1986), the Court permitted state assistance to a blind person who was studying to enter the ministry for the same reasons.

[7]Furthermore, Rehnquist noted, the provision did not provide any incentive for the parents to choose a sectarian school over a public school.

L.Ed.2d at 16). He stressed that not all general welfare programs were constitutional. For example, in *Meek* (1975) the Court struck down a provision for remedial aid because there was no guarantee that teachers would not convey religious messages. In *Wolman* (1977), the Court prohibited instructional materials and equipment because of their potential for religious inculcation. Accordingly, Blackmun concluded that the Court's precedents proscribed all aid that could possibly be used to transmit sectarian values. In this case, the Court had erroneously distinguished between an interpreter and a teacher. This differentiation was lacking in principle. The Establishment Clause prohibited government from "furnish[ing] the medium for communication of a religious message" (125 L.Ed.2d at 19).

Although the *Zobrest* decision was decided without reference to the *Lemon* doctrine, it nevertheless seemed to redirect the Court's focus on Establishment Clause matters. In its decisions following *Lemon*, the Court permitted government assistance that impartially distributed aid to sectarian and nonsectarian schools, while at the same time prohibiting assistance when it was given to directly support the religious functions of sectarian schools. Accordingly, the Court had adhered to its long-standing principle that government was to remain uninvolved in matters of religion. But in *Zobrest*, the Court advocated an approach of neutrality, not noninvolvement. In applying this "doctrine of impartiality," the Court placed only two issues at the forefront of Establishment Clause jurisprudence--the general applicability of government programs and the opportunity for private choices. In effect, *Zobrest* held that the Establishment Clause did not bar government from becoming directly involved in religious inculcation. It simply mandated that government must remain impartial in its assistance. All of this was done without invoking the *Lemon* doctrine. The *Zobrest* majority did not express its support for or disapproval of the *Lemon* doctrine. It merely ignored it.

3. Religion in the Public Schools

In the 1990s, several issues came before the Court concerning the influence of religion in public schools. So far, the Court has addressed the issues of equal access for Christian groups in public high schools, graduation prayers, and a specially-created, public, religious school district. As of this writing (May, 1995), the Court has agreed to decide a case concerning governmental subsidization of religious publications at the University of Virginia.

Westside Community Schools v. Mergens (496 U.S. 226 [1990])

In 1984, Congress passed the Equal Access Act. This Act prohibited public secondary schools that received federal financial assistance and maintained an "limited open forum" from denying equal access to school facilities to students on the basis of "religious, political, philosophical or other content of...speech."[8] The administration of Westside High School, a public school in Omaha, Nebraska, permitted students to join various groups, all of which met on school premises after school hours. However, student Bridget Mergens' request to form a Christian club was denied by the school's principal, as well as the Associate Superintendent and Superintendent of Westside Community School District.[9] The district's board of education upheld this denial.

Mergens challenged this denial in the United States District Court for the District of Nebraska, claiming that Westside had violated the Equal Access Act and her First Amendment rights to freedom of speech, association, and free exercise of religion. In response, the school argued that the Equal Access Act was not applicable, but that if applicable, the Act violated the Establishment Clause. The district court entered judgment for the school district, holding that the

---

[8]Equal Access Act, 98 Statute 1302, 20 USC, Sections 4071-4074.

[9]According to Mergens, the purpose of the club was to permit students to read and discuss the Bible, to have fellowship, and to pray together. Membership was voluntary and open to all students irrespective of religious denomination.

Act did not apply because Westside did not have a "limited open forum."[10] The United States Court of Appeals for the Eighth Circuit reversed, holding that the lower court had erred in concluding that Westside did not have a "limited access forum" (867 F.2d 1076 [1989])[11] Furthermore, the appellate court determined that the Act was not violative of the Establishment Clause. Westside petitioned the U.S. Supreme Court, which granted certiorari in *Westside Community Schools v. Mergens* (496 U.S. 226 [1990]).

In a near unanimous decision, the Court, per Justice O'Connor, held that the Equal Access Act prohibited the school from denying this request. While eight justices concurred in the judgment, Justices Marshall and Brennan did not join the majority opinion. Justice Stevens was the lone dissenter. After clarifying the purpose of the Equal Access Act, O'Connor addressed the question of whether the Act was applicable to the school.[12] Since the Act was limited to schools that had a "limited open forum," the Court first had to establish that Westside High School had a "limited open forum."[13] Finding a "limited open forum," the Court thus concluded that the Equal Access Act was applicable to the school.[14] Therefore, by denying Mergens' petition, Westside High School had encroached upon her statutory rights.

---

[10]The district court reasoned that all of the permitted clubs were curriculum-related and tied to the educational function of the school. This proposed Christian club was not.

[11]The appellate court found that many of the student clubs, including the chess club, were "noncurriculum-related" (867 F.2d 1076, 1079 [1989]).

[12]In *Widmar* (1981), the Court held that a policy of "equal access" in higher education was not violative of the Establishment Clause because it had a "secular purpose," did not have the "primary effect" of advancing religion, and did not lead to "excessive entanglement." According to O'Connor, this reasoning was extended to secondary schools by the Equal Access Act of 1984.

[13]A "limited open forum," as defined by the Act, existed when the school permitted one or more noncurriculum related student groups" to meet on campus before or after school (Equal Access Act, 98 Statute 1302, 20 USC, Section 4071(b) [1984]). The Supreme Court determined that a student group was "noncurriculum related" if it did not directly relate to the body of courses offered by the school (496 U.S. at 239).

[14]In the appendix to the majority opinion, O'Connor listed the student groups at Westside High School. These groups included, among others, the Chess Club and Scuba Diving Club.

The majority opinion then focused its attention on the more important issue: whether the Equal Access Act violated the Establishment Clause. As to this question, six justices (Chief Justice Rehnquist and Justices O'Connor, White, Blackmun, Scalia and Kennedy) agreed that it did not. O'Connor directly compared this case to one involving "equal access" at the university level--*Widmar* (1981). In *Widmar*, the Court determined that an "equal access" policy was not violative of the Establishment Clause.[15] Accordingly, the logic of *Widmar* applied in *Mergens*.

In applying the *Lemon* test, the Court quickly dismissed the "secular purpose" inquiry. The avowed purpose of the Act--to prohibit discrimination against religious and other types of speech--was "undeniably secular" (496 U.S. at 249).[16]

The Court also dismissed Westside's claim that by permitting the Christian organization to meet under school aegis, an objective observer would conclude that the state was conveying a message of support for religion. The Court offered three reasons for rejecting this inquiry. First, the majority distinguished between *government* speech that endorsed religion and *private* speech that endorsed religion. The Establishment Clause prohibited *government* speech; the Free Speech and Free Exercise Clauses protected *private* speech (496 U.S. at 250).[17] Second, little risk of

---

[15] In *Widmar* (1981), the Court applied the three-pronged *Lemon* test to an "equal access" policy and found no constitutional violation. A policy of this nature successfully avoided "excessive entanglement." The Court reasoned: "the University would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech' (454 U.S. 263, 272, n.11). Moreover, the Court also found that the incidental benefits given to religion did not constitute an establishment of religion because the message was one of neutrality and not endorsement. The university's forum did not "confer any imprimatur of state approval on religious sects or practices" (454 U.S. at 274). If the state had forbidden the religious group from meeting, then hostility toward religion would have been the state's message. The Court also noted that the benefits were available to a "broad...spectrum of groups," both religious and nonreligious (454 U.S. at 274).

[16] O'Connor addressed the earlier complaints concerning the "secular purpose" prong. In *Aguillard* (1987), Chief Justice Rehnquist and Justice Scalia blistered the Court for looking too carefully at the motives of the legislators instead of the purpose of the legislation. In this case, O'Connor (496 U.S. at 249) noted that "even if some legislators were motivated by a conviction that religious speech...was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law."

[17] The Court noted that secondary school students were mature enough to understand that permitting speech in an open forum was not necessarily an endorsement of that speech. Furthermore, Congress, in debating the Equal Access Act, had rejected that contention that high school students would confuse an "equal access" policy with state sponsorship of religion.

endorsement was present because no formal classroom activities were involved and no school officials participated in the meetings. Accordingly, the school's official recognition of the Christian club evinced neutrality, and not hostility, toward religion (496 U.S. at 251). Finally, the diversity among recognized groups at Westside counteracted any possible message of endorsement of religion or preference toward any particular religious belief. The Christian club was merely one of many recognized groups.

The majority opinion also rejected Westside's "excessive entanglement" claim. Westside argued that the Christian club required a faculty sponsor who was required to direct the activities, guide the leaders, and balance controversial religious issues. Presumably, this entangled government in the impermissible regulation of religion. However, this "custodial oversight," O'Connor concluded, did not entangle government in the surveillance or administration of religious activities (496 U.S. at 253).

Justice Kennedy, joined by Justice Scalia, concurred in the judgment. However, instead of applying the inadequate *Lemon* doctrine, he advanced a new test based upon two principles. First, government should be prohibited from giving direct benefits to religion "in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so'" (496 U.S. at 260).[18] Under this standard, any incidental benefits that accompanied official recognition of the Christian club did not lead to the establishment of religion. Second, government should be forbidden from coercing any student to participate in religious activities. In this case, no coercion was present. The Act did not authorize school authorities to encourage or require student attendance at the organization's meetings, nor were school officials compelled to participate in, or to attend, the club's meetings. The *Lemon* doctrine, Kennedy implied, was antiquated because the word "endorsement" had "insufficient content to be dispositive" (496 U.S. at 261). When a school recognized a religious group, it could be truthfully said that such was an "endorsement." However, "endorsement" could

[18]Kennedy was restating part of his opinion in *Allegheny County* (492 U.S. 573, 659 [1989]).

not be a constitutional inquiry because its literal application resulted in "neutrality in name but hostility in fact" (496 U.S. at 261). Accordingly, the proper inquiry was "coercion:" whether government imposed pressure upon any individual to participate in a religious activity.

Justice Marshall, joined by Justice Brennan, concurred, yet wrote separately to expound on the tension between freedom of speech and the Establishment Clause created by the introduction of religious speech in public schools. The danger, he surmised, was that the "failure of a school to stand apart from religious speech" could convey a message of endorsement rather than toleration (496 U.S. at 264). A real danger existed if the clubs were viewed as a government effort to inculcate religious values.[19] Marshall also distinguished *Widmar* (1981) from *Mergens*. In *Widmar*, the University of Missouri had taken "concrete steps" to ensure that they were not identified in any way with the organizations. By contrast, Westside High School actively promoted school organizations as "mechanisms for defining and transmitting fundamental values" (496 U.S. at 267).[20] Furthermore, Westside endorsed the extracurricular program as part of its educational mission. Because of the potential for "religious endorsement," Marshall believed that Westside needed to "effectively disassociate" itself from the religious speech (496 U.S. at 270).

Justice Stevens dissented, disagreeing with the Court's broad definition of "noncurriculum related" as a precursor to a "limited open forum."[21] A "noncurriculum related" organization, according to Stevens, was one the had as its purpose the advocacy of partisan theological, political, or ethical views. Under this interpretation, Westside had not created a "limited open forum" because the Christian club would have been the only "noncurriculum related" group. The Court

---

[19]Marshall noted that a school could encourage its students to become "well-rounded as student-athletes, student-musicians, and student-tutors," but not "student-worshippers" (496 U.S. at 265-266).

[20]Moreover, Marshall noted (496 U.S. at 268), the Christian club would be the only recognized organization that advocated a controversial viewpoint. As such, the potential for "endorsement" was much greater.

[21]Under the Act, a "limited open forum" was created if a school permitted "noncurriculum related" student groups.

had misconstrued this Act by defining "noncurriculum related" student groups as all organizations that were not directly in the schools curriculum. Merely because Westside recognized a "Swimming Timing Team and Subsurfers" did not correlate into a "limited open forum" because those groups were "no more controversial than a grilled cheese sandwich." Apart from the proposed Christian group, all of the recognized organizations were "consistent with the schools curricular mission" (496 U.S. at 276).

Stevens also disagreed with the majority's loose interpretation of the Equal Access Act. According to the majority, Congress had effectively forced schools to permit controversial religious groups to use school facilities if that school allowed "innocuous activities" such as chess, scuba diving, and cheerleading.[22] Furthermore, this Act, as construed by the majority, authorized religious organizations to meet on school premises even if teachers and administrators felt it unwise to permit any controversial or partisan group. This construction, Stevens noted, came "perilously close to an outright command to allow organized prayer...on school premises" (496 U.S. at 286-287). While Stevens never mentioned the *Lemon* doctrine, the tone of his dissent demonstrated his vehement disagreement with the accommodation afforded religion.

Lee v. Weisman (120 L.Ed.2d 467 [1992])

In 1991, the Supreme Court reaffirmed its thirty year ban on prayer in public schools. *Lee v. Weisman* (120 L.Ed.2d 467 [1992]) dealt not with classroom prayers, but rather prayers offered at public school graduation ceremonies. Principals at public secondary and high schools in Providence, Rhode Island were authorized to invite clergymen to offer prayers as part of formal graduation ceremonies. In 1989, the principal of Nathan Bishop Middle School, Robert E. Lee,

[22]Stevens later reasoned that schools would be helpless to exclude organizations like the Ku Klux Klan unless they eliminated all traditional extracurricular activities. This was a "sweeping intrusion by the Federal Government into the operation of...public schools" (496 U.S. at 290).

invited a Jewish rabbi to pray at the school's graduation. As a precaution, Lee advised the rabbi that his prayers should be nonsectarian.[23]

Prior to the graduation, Daniel Weisman, father of a 1989 middle school graduate and Providence taxpayer, sought a restraining order against the practice. The United States District Court for the District of Rhode Island denied the request for lack of adequate time to consider it. As a result, the rabbi offered both the invocation and benediction at the ceremony. Following the graduation, Weisman sought a permanent injunction prohibiting public schools in Providence from offering prayers as part of graduation exercises, asserting that all such prayers were contradictory to the Establishment Clause.

The United States District Court for the District of Rhode Island found the practice in violation of the Establishment Clause and enjoined public schools in Providence from continuing the practice (728 F.Supp. 68 [1990]). In applying the *Lemon* test, the court determined that the prayers identified government with religion and endorsed religion.[24] On appeal, the United States Court of Appeals for the First Circuit affirmed the lower court's decision (908 F.2d 1090 [1990]). One judge suggested that no prayers *whatsoever*--including those that did not even mention a deity--could be offered at public school graduations. Another judge dissented, expressing the view that so long as the prayers were nonsectarian, no Establishment Clause violation occurred.[25] The Supreme Court granted certiorari.

---

[23]Lee also provide the rabbi with a pamphlet entitled "Guidelines for Civic Occasions." This pamphlet was prepared by the National Conference of Christians and Jews and recommended that public prayers at nonsectarian events be crafted with "inclusiveness and sensitivity" (quoted in *Weisman*, 120 L.Ed.2d at 477).

[24]Because the court found a "primary effect" that advanced religion, it did not even address the "secular purpose" or "excessive entanglement" inquiry of *Lemon*.

[25]This rationale was based on the Court's holding in *Marsh* (1983). In *Marsh*, the Court permitted a state legislature to open its sessions with prayer because of the historical importance that prayer played in our nation's history. *Marsh* was decided with no reference to *Lemon*.

The justices, dividing 5-4, held the practice unconstitutional. Justice Kennedy authored the majority opinion and was joined by Justices Blackmun, Stevens, O'Connor, and Souter. Justices Blackmun and Souter wrote separate opinions. Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Thomas, dissented.

The formal religious observance so conflicted with settled precedent, Kennedy quickly noted, that the Court did not need to reconsider the constitutional framework (*Lemon*) for Establishment Clause adjudication.[26] The state's involvement with religious activity was "pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school" (120 L.Ed.2d at 480). From a constitutional perspective, it was as if the state decreed that the prayer must occur (120 L.Ed.2d at 481). In what would have been an opportunity to reaffirm the Court's allegiance to the *Lemon* doctrine, the majority steered completely clear. While much of the rationale of *Lemon* appeared in the opinion, Kennedy did not apply the three prongs of *Lemon* to the challenged practice. Instead, he applied some historical analysis. The religion clauses of the First Amendment demonstrated that religion was "too precious to be either proscribed or prescribed" by government (120 L.Ed.2d at 482). Simply stated, the religion clauses were designed to protect religion from government *and* government from religion.[27] According to Kennedy, this lesson was as valuable in 1992 as it was when it was written over two hundred years earlier, for if the state sponsored religious exercises, it "disavow[ed] its own duty to guard and respect that sphere of inviolable conscience and belief which [was] the mark of a free people" (120 L.Ed.2d at 484).

---

[26]Lee, and several *amicus*, had petitioned the Court to reconsider its holding in *Lemon*.

[27]Restating from Madison's *Remonstrance*, Kennedy noted: "Experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation" (quoted in *Weisman*, 120 L.Ed.2d at 482). This was particularly troubling in a setting where school official's efforts to monitor prayer would be perceived by students as a fostering of prayer.

The Court also addressed the issue of coercion.[28] It was "an undeniable fact" that the state placed coercive pressures on students to maintain "respectful silence" during the prayers. While this type of pressure might be "silent and indirect," it was "as real as overt compulsion" (120 L.Ed.2d at 484). A dissenter could not have felt free to express his or her disagreement without causing a public scene.[29] Therefore, the state could not place students in the difficult position of having to choose between participation in "one of life's most significant occasions" or protesting against it.[30] Finally, Kennedy rejected the school's efforts at validating the practice. The school argued that graduation attendance was noncompulsory. That argument "lacked all persuasion" (120 L.Ed.2d at 485). It was also irrelevant that: (1) the prayers were brief; (2) there was a good-faith attempt on behalf of the school to make the prayers nonsectarian and acceptable to most persons; and (3) many persons believed a graduation ceremony lacked meaning without some religious activities.

While an application of the *Lemon* doctrine would have probably yielded the same result, the Court announced its findings without reference to the established doctrine. There was no support or disapproval given to *Lemon*. The Court simply relied on long-standing precedent dealing with prayer in public schools, the history of the First Amendment, and Kennedy's "coercion" test.[31] The *Lemon* doctrine was conspicuously absent.

---

[28]Kennedy had proposed a "coercion" test to replace the *Lemon* test in *Allegheny County* (1989).

[29]Kennedy noted that young persons were "susceptible to pressure from their peers towards conformity." This pressure was most strongly manifested "in matters of social convention" (120 L.Ed.2d at 485).

[30]To force a student to decide between these options was "formalism in the extreme" (120 L.Ed.2d at 485).

[31]For the first time since the *Lemon* decision, the Court struck down a marriage between church and state based not on the established doctrine, but on history and "coercion." In *Marsh* (1983), the Court used historical analysis to permit prayer in legislative sessions. The majority opinion distinguished *Weisman* from *Marsh*. *Weisman* involved school-age children. *Marsh* involved adults, free to come and go as they pleased. "The influences and force of a formal exercise in a school graduation [were] far greater than the prayer exercise...condoned in *Marsh*" (120 L.Ed.2d at 487).

Justice Blackmun, joined by Justices Stevens and O'Connor, concurred. There was "no doubt" that the invocation of God's blessings was a religious activity (120 L.Ed.2d at 491).[32] Blackmun wrote separately to disagree with the Court's misguided reliance on coercion. Although proof of government coercion was sufficient to prove an Establishment Clause violation, it was not mandatory. Coercion was an "obvious indication" of religious endorsement. However, a constitutional violation was "not predicated on coercion" (120 L.Ed.2d at 492). The Constitution also forbade government from participating in religious activities. Summarized, the Establishment Clause prohibited government from becoming actively involved in religion, irrespective of whether people were coerced to conform. As in the majority opinion, the *Lemon* doctrine was not present in Blackmun's concurrence.

In another concurrence, Justice Souter, joined by Justices Stevens and O'Connor, agreed that coercion was unnecessary to establish a constitutional violation. But he went further, perhaps to carve his opinion in the already crowded "wall of separation." In his first Establishment Clause case, Souter articulated his understanding of the First Amendment--an understanding that supported Black's "strict separation" over Rehnquist's "nonpreferentialism."[33] After a lengthy historical review of the drafters' views on the Establishment Clause, he concluded, as many justices before him had, that government must remain neutral in matters of religion. That did not mean, however, that government was prohibited from taking religion into account. In certain situations, the state may accommodate religion without endorsing it. But in this case, Rhode Island "crossed

---

[32]Blackmun cited *Engel* (370 U.S. 421, 424 [1962]): "[Prayer] is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer had always been religious."

[33]He noted (120 L.Ed.2d at 497):
[Some] argue that, as originally understood by the Framers, "the Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion" (quoting from *Jaffree*, 472 U.S. 38, 106 [1985] [J. Rehnquist, dissenting])....While a case has been made for this position, it is not so convincing as to warrant reconsideration of our settled law; indeed, I find in the history of the Clause's textual development a more powerful argument supporting the Court's jurisprudence following *Everson*.

the line from permissible accommodation to unconstitutional establishment.... [G]overnment's sponsorship of prayer at the graduation ceremony [was] most reasonably understood as an official endorsement of religion..." (120 L.Ed.2d at 508). Like his colleagues, Souter did not reference *Lemon*.

Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Thomas, dissented. Much of his scathing argument was couched in *Marsh's* "long-standing American tradition of nonsectarian prayer"--a tradition, in effect, that the Court had now destroyed. According to Scalia, the majority's "instrument of destruction, the bulldozer of its social engineering," was a "boundless, and boundlessly manipulable, test of psychological coercion" (120 L.Ed.2d at 509).[34] In applying this test of coercion, he reasoned, the Court had gone "beyond the realm where judges know what they are doing" (120 L.Ed.2d at 513). After criticizing the majority for using coercion as the "very linchpin" of its opinion, Scalia noted: to argue that the state had coerced students was "incoherent" (120 L.Ed.2d at 512-513). Prayers offered at graduations did not involve any psychological coercion of students to participate in religious exercises.[35] Furthermore, even if religious compulsion was present, the Establishment Clause only prohibited coercion that was backed by a threat of penalty. In this case, students were not forced to stand or recite the prayers, and they were not punished for remaining seated and silent.[36] In closing his dissent, Scalia appealed to sentiment. "[I]t is a shame to deprive our public culture of the opportunity, and indeed the encouragement, for people to [pray] voluntarily....To deprive our

---

[34]This was justification, according to Scalia, that the Constitution must not be subjected to the "philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people" (120 L.Ed.2d at 509).

[35]Scalia reasoned that official prayers did not compel religious orthodoxy. Surely, he noted, if students were compelled to stand for prayers, then the state likewise compelled students to stand for the pledge of allegiance.

[36]Referring to this case as a "jurisprudential disaster," Scalia noted that one happy aspect of the case was that it was not a "practical [disaster]." Invocations and benedictions could still be given at public-school graduations. All that was required was some form of an official announcement to the effect that none were compelled to join in the prayer, and that by rising for the prayer, one did not indicate support or approval (120 L.Ed.2d at 518).

society of that important unifying mechanism...is as senseless in policy as it is unsupported in law" (120 L.Ed.2d at 519). Scalia's dissent referenced *Lemon*, but not in a positive light. He noted that Establishment Clause jurisprudence had become "bedeviled (so to speak) by reliance on formulaic abstractions that...positively conflict[ed] with...long-accepted constitutional traditions" (120 L.Ed.2d at 517). Foremost among those abstractions was the *Lemon* test.

To the supporters of the *Lemon* doctrine, *Weisman* was not a favorable decision. For the first time since *Marsh* (1983), the Court did not apply the facts of an establishment case to the three inquiries of *Lemon*. And the only reference to *Lemon*, found at the conclusion of a blistering dissent, advocated its abolishment.

Board of Education of Kiryas Joel v. Grumet (129 L.Ed.2d 546 [1994])

Pursuant to New York law, members of the Satmar Hasidic sect, practitioners of a strict form of Judaism, incorporated the village of Kiryas Joel and intentionally drew the village's boundaries to exclude all persons but Satmars. In 1989, the New York Legislature, acting with the knowledge that all residents of the village were of one religious sect, passed a statute that constituted Kiryas Joel as a separate public school district.[37] This newly formed public school district operated only a special education program for handicapped students.[38] Most of the children in the village opted to remain in private parochial schools, yet relied on the new school district for transportation, remedial education, and health and welfare services.

---

[37]Prior to this legislation, handicapped Satmar students were provided special services by the state at the private schools. When the Supreme Court determined that supplemental educational services at sectarian institutions were unconstitutional in *Aguilar* (1985), parents of handicapped students were forced to send their children outside of the village to public schools in Monroe, New York--the town in which the village had been incorporated. However, most parents withdrew their children from these public schools because of the trauma that accompanied a child being outside of his or her own religious community. In an effort to continue to provide the handicapped children of Kiryas Joel with special services, the state legislature passed this Act. See 1989 NY Laws, Chapter 748 (1989).

[38]If children from the village wanted to attend a public school (that offered more than a special education program), the Kiryas Joel School District would pay tuition to send the student to a nearby public school district.

Officers of the State School Boards Association challenged this policy as being an unconstitutional establishment of religion. The State Supreme Court for Albany County agreed, holding that the statute failed the *Lemon* test. A divided Appellate Division affirmed the lower court's decision, concluding that the statute had the "primary effect" of advancing religion. The U.S. Supreme Court granted certiorari and agreed to rule on *Board of Education of Kiryas Joel v. Grumet* (129 L.Ed.2d 546 [1994]).

The Court, dividing 6-3, affirmed the Appellate Division's decision. Justice Souter authored the majority opinion and was joined by Justices Blackmun, Stevens, Ginsburg, and O'Connor. Kennedy concurred only in the judgment. The three remaining members of the Court--Chief Justice Rehnquist and Justices Scalia and Thomas--dissented. The reasoning of the majority was direct: "Because this unusual Act is tantamount to an allocation of political power on a religious criterion and neither presupposes nor requires governmental impartiality toward religion, we hold that it violates the prohibition against establishment" (129 L.Ed.2d at 552).

The Establishment Clause clearly compelled government to pursue a course of neutrality toward religion. Tersely stated, the New York law failed this requirement because it delegated the state's discretionary authority over public schools to a group solely defined by its religious character (129 L.Ed.2d at 556).[39] This practice fused governmental and religious functions, thus leading to an impermissible entanglement. Furthermore, the justices concluded that the statute had the "primary effect" of advancing religion.

Souter scolded the New York Legislature for, in effect, preferring one religion to another.[40] By passing this "special and unusual" Act, the legislators extended the benefit of a

---

[39]Souter recognized that the law did not *expressly* delegate governmental authority to a religious body. Nonetheless, the Court was persuaded that, in effect, the authority was given to a religious body because it was "undisputed" that the boundary lines of the unusual school district were drawn specifically to divide residents according to religious affiliation and doctrinal adherence, so as to exclude all but Satmars (129 L.Ed.2d at 558).

[40]A long line of Supreme Court decisions supported this proscription. See, for example, *Jaffree* (472 U.S. 38, 52-54 [1985]), *Epperson* (393 U.S. 97, 104 [1968]), and *Schempp* (374 U.S. 203, 216-217 [1963]).

special franchise to an electorate defined by common religious belief and practice. Similar benefits were not extended to other religious (or nonreligious) groups. Thus, New York was exhibiting legislative favoritism along religious lines. This was contrary to the general principle that civil power had to be exercised in a manner that was not only neutral toward religion, but also neutral among religious sects. In this case, "the benefit flow[ed] only to a single sect" (129 L.Ed.2d at 562). The majority acknowledged that the Constitution permitted New York to accommodate religion through the alleviation of special needs.[41] However, "accommodation [was] not a principle without limits" (129 L.Ed.2d at 562). Those limits mandated governmental neutrality. Because the provisions in this case singled out a particular religious sect for special treatment, it failed the test of neutrality, and "crossed the line from permissible accommodation to impermissible establishment" (129 L.Ed.2d at 565).

Justice Blackmun wrote separately to reaffirm his conviction of the general validity of the *Lemon* doctrine. He disagreed with any suggestion that this decision signaled a departure from the principles articulated in *Lemon*. Even though the majority had not directly invoked that doctrine, Blackmun, nonetheless, believed that the court's opinion "explicitly rested" on the *Lemon* criteria (129 L.Ed.2d at 565).

Justice Stevens, joined by Justices Blackmun and Ginsburg, concurred, expressing the view that New York had provided "official support to cement the attachment of young adherents to a particular faith" (129 L.Ed.2d at 566). This support could only be characterized as an endorsement, and not merely an accommodation, of religion.[42]

---

[41]Quoting from *Walz* (397 U.S. 664, 673 [1971]), Souter noted that there was sufficient room under the Establishment Clause for "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."

[42]This type of aid, Stevens noted (129 L.Ed.2d at 566), was "unlike the evenhanded distribution of a public benefit or service, a 'release time' program for public school students,...or a decision to grant an exemption from a burdensome general rule."

Another concurrence was written by Justice O'Connor. She initially recognized that religious needs could be accommodated so long as that accommodation took place as the result of laws that were neutral in regard to religion.[43] But in this case, the challenged statute impermissibly singled out a particular religious group for favorable treatment. The Court's decision did not prohibit the accommodation of the Satmars' religious needs. It merely required that any accommodation be implemented through generally applicable legislation.[44] In regard to the *Lemon* doctrine, O'Connor conceded that the doctrine "may do more harm than good." It was "appealing" for the Court to look for a "Grand Unified Theory" by which to resolve all Establishment Clause cases, but the bottom line was that "the same constitutional principle...operat[ed] differently in different contexts." Because of the "widely disparate situations" addressed by *Lemon*, O'Connor insinuated that the doctrine was "amorphous,...distorted" and perhaps even "useless" (129 L.Ed.2d at 570-571). She concluded, much to the chagrin of those who supported the *Lemon* doctrine: "the Establishment Clause...cannot easily be reduced to a single test." While she did not advocate *Lemon's* abandonment, she suggested that any return to the twenty-three year old unitary approach would be "futile." Instead, the Court would be better suited to handle these difficult challenges by establishing a "narrower,...more precise,...easier to apply,...more carefully tailored,...less distorted" doctrine (129 L.Ed.2d at 571).[45]

---

[43] O'Connor referred to the Court's "emphasis on equal treatment" as being "an eminently sound approach" (129 L.Ed.2d at 568).

[44] According to O'Connor, generally applicable (neutral) legislation should include government's provisions of special educational services for handicapped children, regardless of whether those services were provided on-site at sectarian schools. By providing these basic services, states would not violate the principle of neutrality toward religion. O'Connor encouraged the Court to reconsider *Aguilar* (1985), which struck down general educational services to sectarian schoolchildren. A reconsideration would bring Establishment Clause jurisprudence "back to...the proper track--government impartiality, not animosity, towards religion" (129 L.Ed.2d at 570).

[45] In a somewhat conciliatory tone, O'Connor conceded that abandoning the *Lemon* test did not necessarily translate into an abandonment of *Lemon's* insights.

Justice Kennedy also agreed with the judgment, yet wrote separately to express his reservations about the majority's reasoning. According to his interpretation of the majority opinion, the Court had prohibited this special religious school district because of the risk that the legislature would not grant similar accommodations to other religious groups. Instead of relying on this unfounded rationale, the majority should have focused on the "real vice" of the Kiryas Joel school district: religious gerrymandering by the New York Legislature (129 L.Ed.2d at 573). Were it not for this impermissible religious gerrymandering, the state's efforts to accommodate the special needs of handicapped Satmar schoolchildren would have been constitutional.[46] However, the manner in which the New York Legislature went about providing this accommodation was contradictory to constitutional commands because the Establishment Clause prohibited government from drawing political boundaries on the basis of religious faith.

In a complete repudiation of Souter's majority opinion, Justice Scalia dissented, implying that the decision demonstrated intolerance toward religion.[47] Scalia noted that the majority's position "boils down to the 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." This disfavoring of religion was "positively antagonistic to the purposes of the Religion Clauses." (129 L.Ed.2d at 582). The statute should have been rendered valid because no public aid was appropriated for private education, and the statute made no mention of religion.[48] After

---

[46]Kennedy conceded that the Court was perhaps most responsible for the unfortunate position in which the Satmars had been placed. In *Aguilar* (1985), the Court had struck down a program that used public funds to teach educationally deprived children at parochial schools. Because of this ruling, the Monroe-Woodbury School District was forced to cancel its special education programs at the Kiryas Joel religious schools. Were it not for this decision, the Satmars would never have been forced to seek special accommodations from the state. Kennedy suggested that the Court reconsider the *Aguilar* holding, acknowledging that some sort of neutral aid scheme--one that was available to religious and nonreligious alike--was a preferable way to address similar problems (129 L.Ed.2d at 579).

[47]While Scalia referred to the decision as "breathtaking" and "astounding," he was not surprised by the outcome, for the majority had abandoned text and history as its guides. Once that had been done, "nothing prevent[ed] it [the Court] from calling religious toleration the establishment of religion" (129 L.Ed.2d at 579).

[48]Scalia was apparently willing to overlook the fact that the public school district's boundaries were drawn with the specific purpose of excluding persons of differing beliefs.

concluding that the statute was not designed to confer special benefits on a particular religious sect, Scalia noted (129 L.Ed.2d at 586) that even if the statute created a special arrangement for the Satmars solely *because of* their religion, it would be permissible because the Establishment Clause did not prohibit governmental accommodation of religious needs. In fact, the Constitution encouraged accommodation.[49] It was unfortunate, he believed, that the majority was "uncomfortable with this aspect of our constitutional tradition" (129 L.Ed.2d at 587). In a brief remark concerning the *Lemon* doctrine, Scalia expressed his hope that the Court would replace the doctrine with one that applied "fidelity to the longstanding traditions of our people" (129 L.Ed.2d at 591). Concluding this scathing dissent, Scalia lamented that the Establishment Clause had been turned into "a repealer of our National tradition of religious toleration" (129 L.Ed.2d at 592).[50]

This decision aroused much public sentiment.[51] *Kiryas Joel* afforded the Court yet another opportunity to provide greater coherence in its conflicting Establishment Clause jurisprudence and to overrule the highly criticized *Lemon* doctrine. But the justices opted to do neither. *Lemon* was not abandoned and Establishment Clause jurisprudence was no more coherent following *Kiryas Joel*. In fact, as one commentator observed, *Kiryas Joel* was simply the latest in

---

[49]Scalia would later remark (129 L.Ed.2d at 589): "I do not think that the Establishment Clause prohibits formally established 'state' churches and nothing more....I have always believed...that the Establishment Clause prohibits the favoring of one religion over others."

[50]Souter did not take this blatant criticism without returning fire. He called Scalia a "gladiator...who thrusts at lions of his own imagining" (129 L.Ed.2d at 564). Refusing to be intimidated by Scalia, he further remarked (129 L.Ed.2d at 564-565):

> 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.

[51]Barry Lynn, executive director of Americans United for the Separation of Church and State, said of the decision: "The door is now firmly shut to other religious groups that may have been planning to demand their own taxpayer-financed 'public' schools." J. Brent Walker of the Baptist Joint Committee, remarked: "Today's opinion clearly shows that the wall of separation between church and state continues to stand, despite unrelenting attacks." By contrast, Jay Sekulow of the American Center for Law and Justice noted: "This decision is disturbing and dangerous in the fight to guarantee freedom of religion for all people of faith." For greater detail on the public reaction to this decision, see Deibel (1994) and Mauro (1994).

a long line of cases that demonstrated the "doctrinal gridlock" of Establishment Clause adjudication.[52]

Even though the *Lemon* doctrine was not overturned by the *Kiryas Joel* decision, proponents of the doctrine could not have been pleased. Only one member of the Court--Justice Blackmun--suggested a resurrection of the *Lemon* test. Apparently, the others in the majority were content to decide this Establishment Clause case without reference to *Lemon*, even though two of the prongs were implicated by Justice Souter. Furthermore, Justice O'Connor--who had never been completely satisfied with the application of the doctrine, yet nonetheless consistently applied church and state matters to the framework--seemed to concede that cases involving the Establishment Clause presented too great a controversy to be judged in light of an inflexible doctrine. Instead, she advocated replacing that doctrine with nothing, content to let the case law "evolve" into a series of situation specific rules without the constraints imposed by the "rigid" dictates of *Lemon*. Following this decision, five members of the Court--Chief Justice Rehnquist and Justices O'Connor, Kennedy, Scalia, and Thomas--had expressed serious doubts about the desirability and validity of the *Lemon* doctrine.[53]

Rosenberger v. Rector (No. 94-329 [1995])

Because of a university guideline that prohibited financing of religious organizations, the student council at the University of Virginia rejected a Christian student group's request for $5,900

---

[52]James (1994: C5) also noted that the decision raised many questions. For example, did the Court intend to require a different relationship between state legislatures and religiously homogenized local governments? Was the Court requiring all government efforts at accommodating religious practices to be accompanied through an accommodation of all similarly situated groups simultaneously? Was the Court introducing an equal protection component to its Establishment Clause jurisprudence, one that required that all acts of accommodation be balanced by acts that discouraged religious segregation?

[53]Those same five members further suggested that the *Lemon* doctrine had been misapplied in *Aguilar* (1985) to prohibit basic educational programs on sectarian school campuses. Given the opportunity to address this issue again, a majority of justices seem willing to reinterpret *Lemon* in a way that permits this neutral accommodation. Apparently, these justices believe the Court's decision in *Aguilar* exhibited hostility toward religion.

to publish a magazine to discuss biblical Christianity.[54] The group, Wide Awake Productions, claimed that the denial constituted a general discrimination against religion because other publications received subsidies from the university. The university's administration supported the council's decision, whereupon the group claimed that the funding guidelines violated their constitutional rights to free speech and free exercise of religion.

The United States District Court for the Western District of Virginia found no constitutional violation (795 F.Supp. 175 [1992]). The University had properly limited eligibility for Student Activity Fund monies to "appropriate" organizations--those that furthered the institution's educational process. More importantly, the district court concluded that the ineligibility of religious groups was justified because of mandated state neutrality towards religion. Virginia had thus not engaged in viewpoint or content-based discrimination. The court also rejected the group's claim that by refusing to subsidize their publication, the University had restricted their "free exercise of religion."[55] Any burden imposed on the group was merely "incidental" and, therefore, posed no constitutional significance. Wide Awake Productions appealed, contending that the proscriptions against funding for religious activities: (1) violated the Free Speech and Free Press Clauses of the First Amendment by depriving it of government benefits solely on the content of their speech; and (2) violated the Equal Protection Clause of the Fourteenth Amendment because other groups that engaged in religious activities received benefits.

The U.S. Court of Appeals for the Fourth Circuit rejected both of these contentions (18 F.3d 269 [1994]). The judges recognized that the First Amendment's free speech provision

---

[54]Funding for student groups came from a "student activities fund." Its guidelines prohibited the disbursement of funds to fraternities and sororities, political and religious organizations, and groups whose membership was "exclusionary in nature."

[55]Their logic here was somewhat perplexing. Because the school opted not to subsidize its publication, the organization had to devote more time to fundraising and less time to publishing its religious speech. Thus, the organization's "free exercise" rights were denied because its efforts were diverted from its main goal: challenging Christians to live according to their faith.

ordinarily prohibited the University of Virginia from treating publications differently based solely on their content. However, in this case, the state justified its discrimination by offering "a compelling state interest in maintaining strict separation of church and state" (18 F.3d at 281).

The appellate court applied the *Lemon* doctrine. It was "clear" that the funding guidelines were motivated by a legitimate "secular purpose"--the advancement of the University of Virginia's educational mission (18 F.3d at 269). Addressing the more subtle question of "primary effect," the court recognized that the University's policy of allowing members of Wide Awake Productions "open access to campus facilities" afforded the Christian group "ample opportunity" to express their viewpoint (18 F.3d at 285). Moreover, the University community was free to read and consider them. The University simply did not go further and allocate its funds to support a particular religious perspective. The court was thus "unpersuaded" that the "primary effect" of the guidelines was to inhibit religion.[56] The third prong of *Lemon*--"excessive entanglement"--was the criterion most plainly implicated in this case. Referring to direct monetary subsidization of religious organizations as a "beast," the court opined that allotting state funds to Christian organizations would "excessively entangle the University of Virginia with the propagation of the Christian religion" (18 F.3d at 286).[57] For these reasons, the court concluded that Virginia had proved the existence of a "compelling state interest," one so compelling that the state could prohibit the disbursement of University funds to organizations engaged in religious expression.[58]

---

[56] In a stinging blow to the Christian group, the opinion noted: "Using public funds to support a publication so clearly engaged in the propagation of particular religious doctrines would constitute a patent Establishment Clause violation" (18 F.3d at 285).

[57] The court also recognized the possibility of "seriously divisive political consequences" should the University engage in annual appropriations for religious organizations (18 F.3d at 286).

[58] The court also determined that guidelines were sufficiently tailored to achieve the "compelling state interest" and that the Christian group could not claim an equal protection violation because there was no showing of "discriminatory intent" on behalf of the state (18 F.3d at 285-287).

Wide Awake Publications appealed. The group's brief before the Supreme Court alleged that the decision "condoned discrimination against--not neutrality toward--religion."[59] An *amicus* brief filed by the Christian Legal Society remarked that the decision represented a step toward "a relentlessly secular society where religious expression is frowned upon and religious persons are denied the privileges afforded other citizens." Recognizing the importance of this issue, the Supreme Court agreed to rule on this matter in *Rosenberger v. Rector* (No. 94-329 [1995]).

This case presents the Court, once again, with the question of what limits the First Amendment places on taxpayer support for religious organizations. Its importance is further heightened by the fact that several justices have expressed their desire to reevaluate some precedents that barred direct *and* indirect aid to religious institutions. On a broader level, the case provides an opportunity for the justices to reevaluate their approach to Establishment Clause jurisprudence. A majority of the justices have expressed some serious reservations about the *Lemon* doctrine and have urged a reconsideration of the Court's traditional framework for church-state relations. *Rosenberger* may provide the vehicle for change.

4. Religion in the Public Domain

Government's endorsement or inhibition of religion in the public arena was one of the primary evils that the Establishment Clause was designed to prevent. At the very core of that principle was the understanding that government could not favor religion over nonreligion, one particular religious belief over another, or nonreligion over religion. In 1993, the Court addressed the use of public facilities for religious purposes.

---

[59]The brief was written by Professor Michael W. McConnell of the University of Chicago Law School. McConnell has written extensively on the need for government to accommodate religion. See Chapter 4.

Lamb's Chapel v. Center Moriches (124 L.Ed.2d 352 [1993])

Under Section 414 of the New York Education Law, passed in 1988, school districts were authorized to allow various uses of public school property when it was not being used for educational purposes. While various uses were permitted under this statute, the law prohibited the use of school facilities for religious purposes. The Board of Center Moriches Union Free School District, acting pursuant to the statute's empowerment, issued regulations for the use of school property. Those regulations permitted social, civic, political, and recreational uses, but denied use by any group for religious purposes. Lamb's Chapel, an evangelical church in the Center Moriches community, was denied permission to use the school facilities to show a film series on traditional, Christian family values.[60] The church brought suit in the United States District Court for the Eastern District of New York contesting that the denial violated its First Amendment rights to freedom of speech, assembly, and exercise of religion, and its Fourteenth Amendment right to equal protection. The church further alleged that by permitting access to the facilities, the state would not encroach upon the Establishment Clause (736 F.Supp. 1247 [1991]). The district court concluded that the school district's denial was "viewpoint neutral" and did not exhibit hostility toward religion or advancement of nonreligion. Therefore, no constitutional violation occurred. The U.S. Court of Appeals for the Second Circuit affirmed the decision of the lower court (959 F.2d 381 [1992]). Recognizing the importance of the holding, the Supreme Court granted certiorari in *Lamb's Chapel v. Center Moriches* (124 L.Ed.2d 352 [1993]).[61]

In an unanimous decision, the Court reversed. Justice White wrote the cursory majority opinion, and was joined by Chief Justice Rehnquist and Justices Blackmun, Stevens, O'Connor,

---

[60]The film series contained lectures by Dr. James Dobson. According to a public relations brochure, Dobson was a licensed psychologist, former professor of pediatrics at the University of California, best-selling author, and radio commentator.

[61]For purposes of this dissertation, I will primarily focus on the Court's holding with respect to the Establishment Clause.

and Souter. Justices Kennedy and Scalia authored concurring opinions, with Justice Thomas joining the latter's. It was viewpoint discrimination, the majority reasoned, to deny permission solely because the film dealt with a permissible subject from a religious perspective.[62] More importantly, the Court ruled that permitting the use of such facilities for certain religious purposes would not be an Establishment Clause violation.[63] Because the property was open to multiple private organizations, there existed "no realistic danger" that the community would conclude that the school district was "endorsing religion or any particular creed." Additionally, any benefit granted to religion was "no more than incidental" (124 L.Ed.2d at 363).[64] In reaching this conclusion, the Court mechanically restated the *Lemon* test, with no elaboration.[65]

Justice Kennedy authored a brief concurrence to express his view that the majority's citation of the *Lemon* doctrine and its use of the phrase "endorsing religion" was "unsettling and unnecessary" (124 L.Ed.2d at 364). Kennedy did not feel that "endorsement" was sufficient to serve as the prime determinant in matters of Establishment Clause adjudication.

Justice Scalia, joined by Justice Thomas, also wrote a concurring opinion. He disagreed with the majority's use of the "endorsement" test and invocation of the *Lemon* doctrine. In perhaps the most stinging criticism of the *Lemon* doctrine up to this point, Scalia noted: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence....Its most

---

[62]According to the Court, films dealing with family issues were permissible. However, films dealing with family issues from a religious perspective were not acceptable. This constituted viewpoint discrimination.

[63]The Court noted that the film was not shown during school hours, was not sponsored by the school, and was open to the entire public, not just church members.

[64]The Court relied heavily on *Widmar* (1981), which held that a public university policy that permitted use of facilities for religious purposes was not violative of the Establishment Clause.

[65]It was almost as if Justice White felt painfully obligated to reference the *Lemon* test. No standard application of the test was ever offered by the majority opinion. No endorsement, subtle or overt, of the test was ever stated in the majority opinion. Likewise, no campaigning against the doctrine was evidenced by the majority opinion.

recent burial, only last Term, was, to be sure, not fully six feet under" (124 L.Ed.2d at 365).[66] Scalia noted that six of the current justices had "personally driven pencils through the creature's heart" (124 L.Ed.2d at 365).[67] However, the doctrine had survived. The simple reason was this: when the Court wanted to strike down a practice the doctrine forbade, it invoked *Lemon*; conversely, when the Court desired to uphold a practice the doctrine prohibited, it ignored *Lemon*.[68] On other occasions, the justices took a middle ground.[69] After harshly criticizing the doctrine, Scalia sarcastically noted that such a "docile and useful monster [was] worth keeping around, at least in a somnolent state; one never [knew] when one might need him" (124 L.Ed.2d at 366). However, regardless of the end result, Scalia could not apply the *Lemon* test. To do so would contribute to the "strange Establishment Clause geometry of crooked lines and wavering shapes" produced by *Lemon* (124 L.Ed.2d at 366).

In this unanimous decision, in which the majority only briefly alluded to the *Lemon* test and a concurrence vigorously lambasted every application of that test, *Lemon*, once again, survived. The Court, in spite of the fact that no justice expressed outright support for the doctrine, just could not eliminate its twenty-three year bellwether of Establishment Clause adjudication.

---

[66]Scalia was referring to *Weisman* (1992). However, in that case, the Court rejected the opportunity to repudiate the *Lemon* test.

[67]Scalia was referring to Chief Justice Rehnquist, and Justices Kennedy, White, O'Connor, Thomas, and himself.

[68]For example, in *Aguilar* (1985), the Court invoked the *Lemon* doctrine to strike down the administration of remedial educational programs in parochial schools. In *Marsh* (1983), the majority completely ignored the *Lemon* doctrine to uphold the practice of opening legislative sessions with prayer in Nebraska.

[69]For example, in *Hunt* (413 U.S. 734, 741 [1973]), the majority referred to *Lemon's* inquiries as nothing more than "helpful signposts."

5. Summary and Conclusions

Between 1990-1994, the Court heard five cases that involved the Establishment Clause (Table 7.1). In those cases, the *Lemon* doctrine was only clearly invoked in one. It was alluded to in two. In three cases, *Lemon* was completely absent from the majority opinion. Despite this shaky "attendance record," the doctrine was never abandoned. The justices were simply opting not to apply the tripartite doctrine.

In the first case of the decade, *Mergens* (1990), a near unanimous Court applied the *Lemon* framework in concluding that the Equal Access Act, which prohibited public high schools from barring student religious group meetings on school premises, was not violative of the Establishment Clause. While the majority applied *Lemon*, Justice Kennedy referred to the test as "antiquated," and suggested replacing it with a test of "coercion."

Two years later, in *Weisman* (1992), the Court, dividing 5-4, ruled that the inclusion of prayer at a public school graduation was forbidden by the Establishment Clause. Yet the Court steered altogether clear of *Lemon*. Instead, the Court relied on precedent (*Engel* [1962] and *Schempp* [1963]), the history of the First Amendment, and the presence of governmental coercion to strike down the practice. Justice Scalia, joined by three other Court members, referred to the *Lemon* doctrine as being "too formalistic." He favored complete abandonment of the doctrine.

In the following term, the Court unanimously ruled in *Lamb's Chapel* (1993) that it would not violate the Establishment Clause if a public school permitted a church to use school facilities, outside school hours, to show a film discussing family values. The Court determined that to deny the church's request constituted "content discrimination." But the justices ruled so with only a cursory reference to *Lemon*. The lip service offered *Lemon* clearly demonstrated the Court's difficulty in applying the embattled doctrine. Justice Scalia referred to the test as a "ghoul" that just would not go away. Even certain death could not stop *Lemon*.

Table 7.1 Supreme Court Establishment Clause Jurisprudence, 1990-1995

Year	Case	Vote	Holding
1990	*Westside v. Mergens*	8-1	Federal Equal Access Act, which prohibited public schools from barring student religious groups from meeting on school premises, held not violative of the Establishment Clause because it did not advance or inhibit religion. *Lemon* doctrine applied.
1992	*Lee v. Weisman*	5-4	Prayers as part of the formal graduation exercises at public secondary schools forbidden by the Establishment Clause because of coercive possibilities. *Lemon* doctrine never mentioned.
1993	*Lamb's Chapel v. Moriches*	9-0	School board policy that denied access to school premises, outside school hours, to church seeking to show film on family issues violated the Free Speech Clause. Permitting the church to meet would not violate the Establishment Clause because it would not confer state approval. Cursory reference to *Lemon*.
1993	*Zobrest v. Catalina Foothills*	7-2	Establishment Clause did not bar public school district from providing sign-language interpreter to accompany deaf student to classes at sectarian high school. Practice was neutral and impartial. No reference to *Lemon*.
1994	*Kiryas Joel v. Grumet*	6-3	New York statute creating public school district for Hasidic Jewish village held to violate the Establishment Clause. State could not delegate a governmental power to an electorate defined by a common religious belief or practice. *Lemon* doctrine never mentioned, yet two prongs implicated.
1995	*Rosenberger v. Rector*	???	Issue: Whether the University of Virginia can deny funding to a student group for a religious publication simply on the basis of the religious content of the publication?

In *Zobrest* (1993), the Court, dividing 7-2, held that the Establishment Clause did not prevent a public school district from providing a sign-language interpreter to accompany a deaf student enrolled in classes at a sectarian high school. Once again, the majority ignored *Lemon*. The justices permitted this governmental involvement because of its neutrality and impartiality.

In *Kiryas Joel* (1994), the Court, in a 6-3 decision, ruled that a New York statute creating a public school district for a Hasidic Jewish Village violated the Establishment Clause. But, in reality, the Court characterized *Kiryas Joel* as a delegation-of-power case. The state could not delegate its civic authority to a religious group. The authority over public schools belonged to the state, and not to a body chosen with regard only to certain religious beliefs. Justice O'Connor suggested *Lemon* be replaced, but replaced with a nondoctrine: cases were to be judged one by one, with no search for doctrinal coherence. Justice Scalia voted to replace *Lemon* with "something" that respected religious traditions. Only Justice Blackmun wanted to keep the *Lemon* doctrine. *Kiryas Joel* clearly demonstrated the vehemence of the disagreement among the justices in matters of church and state, as the opinions could easily be read as personal insults on justices of differing persuasions. Following *Kiryas Joel*, there was no greater coherence in Establishment Clause adjudication. But the *Lemon* doctrine was not abandoned. It just limped on, and Establishment Clause jurisprudence remained in, or perhaps went further into, disarray.

The justices will have another opportunity to provide some Establishment Clause coherence during the 1994-1995 term. If recent history serves as a prognosticator, there is little reason to believe that the Court will achieve doctrinal consistency or officially reject the *Lemon* doctrine.

The first half of the 1990s proved difficult for the *Lemon* doctrine. Five of the court members--Chief Justice Rehnquist, and Justices O'Connor, Scalia, Kennedy,and Thomas--expressed, at one time or another, serious reservations about the doctrine. Chief Justice Rehnquist and Justices Scalia and Thomas favored a complete abandonment of the *Lemon* doctrine because it

was inconsistent with historical First Amendment analysis and exhibited hostility toward religion. Justice O'Connor believed the doctrine to be so vague that it was useless. Furthermore, matters concerning the establishment of religion did not neatly lend themselves to constitutional doctrine. Justice Kennedy desired that the *Lemon* framework be replaced with a test of "coercion." The bottom line, for him, was that government should be prevented from religious coercion.

In the Court's most recent Establishment Clause case, *Kiryas Joel*, only one member of the Court--Justice Blackmun--expressed a desire to retain the *Lemon* framework. And he has since retired.[70] With Blackmun's retirement, the *Lemon* doctrine outlasted every justice who was on the Court when it was officially adopted in 1971. But the *Lemon* doctrine has survived, at least for now. "It just keeps going...and going...and going."

[70]Blackmun was replaced by Stephen Breyer, who had served on the U.S. Court of Appeals for the First Circuit since 1980. In the following chapter, I will analyze Breyer's opinions on church-state relations.

CHAPTER 8

CONCLUSION: OF MYTH AND REALITY

1. Introduction

The Supreme Court's decisions indicate that Establishment Clause adjudication is in a state of confusion. Multiple cases decided under the *Lemon* doctrine have resulted in discordant holdings. The Court has permitted certain forms of governmental aid, while holding other forms unconstitutional. For example, in *Allen* (1968), the Court upheld a state provision of secular textbooks to nonpublic schools. But in *Meek* (1975), the justices invalidated a state statute that provided instructional materials and equipment to nonpublic schools. In *Lemon* (1971), the Court struck down a state program that reimbursed nonpublic schools for textbooks, instructional materials, and teacher salaries. Yet nine years later in *Regan* (1980), the justices validated a reimbursement scheme to nonpublic schools for costs incurred in the administration and maintenance of state-required tests and records.

Since *Lemon's* inception, the justices have also continually rejected a rigid application of the doctrine. In *Tilton* (1971), Chief Justice Burger noted that Establishment Clause adjudication could not be reduced to any "single constitutional caliper" and that the doctrine's criteria should only be "viewed as guidelines" (403 U.S. 672, 677-678 [1971]). Two years later, the Court in *Hunt* (413 U.S. 734, 741 [1973]) referred to *Lemon's* prongs as nothing more than "helpful signposts." In *Meek* (421 U.S. 349, 358 [1975]), the justices conceded that the *Lemon* test was "not easily applied."

In 1980, Justice White noted in *Regan* (444 U.S. 646, 662) that under the *Lemon* test the Court had "sacrifice[d] clarity and predictability for flexibility." In *Marsh* (1983), the justices

declined to apply the test. The following year in *Lynch* (1984), the Court reiterated that the *Lemon* test had never been binding when Chief Justice Burger remarked (465 U.S. 668, 679): "We have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area."

In 1992 in *Weisman* (120 L.Ed.2d 467, 480), the Court expressly rejected the invitation to reconsider *Lemon*. In 1993, the majority held in *Lamb's Chapel* (124 L.Ed.2d 352, 363, n.7 [1993]) that the *Lemon* doctrine, albeit "frightening" to some, still controlled Establishment Clause adjudication. Yet only eleven days later in *Zobrest* (1993), the Court decided another Establishment Clause case with no reference whatsoever to *Lemon*. These inconsistent applications of the doctrine clearly demonstrate the befuddled state of Supreme Court adjudication with regard to the Establishment Clause.

During the 1994-1995 term, the Supreme Court will have another opportunity to reconsider the *Lemon* doctrine. At present, five of the justices have expressed some disfavor with the *Lemon* doctrine, namely Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas. *Rosenberger* (No. 94-329 [1995]) will provide the justices with an occasion to reevaluate the constitutional framework for decisions arising under the Establishment Clause and the means by which to clarify this confused state of jurisprudence.

2. Analysis of the Three Lemon Criteria

In spite of these inconsistencies, the justices have consistently refused to abandon *Lemon's* primary framework. At present, it remains the only Establishment Clause doctrine ever agreed upon by a majority of the justices. However, since its promulgation, the doctrine has been substantially modified. The "secular purpose," "primary effect," and "excessive entanglement" prongs of the test have been considerably altered.

"Secular Purpose"

According to the first requirement of *Lemon*, a challenged statute must have a "secular legislative purpose." Strictly interpreted, this provision mandates secular motivation for *all* legislation. Yet the justices seem to have lowered this threshold. In *Lynch* (465 U.S. 668, 680 [1984]), the Court, per Justice Burger, remarked that legislation would be invalidated only when the statute was "motivated wholly by religious concerns."[1] The Court further clarified its position in *Jaffree* (472 U.S. 38, 56 [1985]) when Justice Stevens noted that a statute motivated "in part by a religious purpose" did not violate *Lemon*, but a statute "entirely motivated by a purpose to advance religion" deserved invalidation. Thus, as redefined by the Court, the dispositive question in regard to "secular purpose" is whether the *sole* purpose of the challenged statute is the advancement of religion. A statute is not violative of the first inquiry of *Lemon* if its purpose is *secular,* or both *secular* and *religious*. A statute is unconstitutional only if its primary purpose is *wholly religious*. Thus, the government is permitted to act for religious and secular reasons, so long as the religious purposes are not preeminent.

According to Esbeck (1990: 516), the are several reasons for the Court's softening of the rigor of the "secular purpose" prong. First, it is difficult to determine with any degree of reliability the motivations behind an enactment that is the product of a complex legislative process. As Chief Justice Warren had warned in *U.S. v. O'Brien* (391 U.S. 367, 383 [1968]): "Inquiries into Congressional motives or purpose are a hazardous matter." To which Justice Scalia added in *Aguillard* (482 U.S. 578, 636, 638 [1987]): determining the subjective intent of legislators is "almost always an impossible task" and "a perilous enterprise."

Second, it is somewhat inappropriate for the Court to delve too deeply into the workings of a democratically-elected legislature. Because of the difficulty in determining motivation and the

[1]Three years later in *Aguillard* (482 U.S. 578, 590 [1987]), the majority opinion, per Justice Brennan, further softened this requirement by permitting legislation unless its purpose was "pre-eminent[ly] religious."

dangers in appearing as a "Superlegislature," the justices have shown great deference to legislative bodies. In a concurrence in *Jaffree* (472 U.S. 38, 74 [1985]), Justice O'Connor noted that the Court's inquiries into impermissible purposes should be "deferential and limited" because the judicial branch did not have a "license to psychoanalyze the legislators."[2] Striking down a law approved by a democratically-elected legislature was, according to Scalia in *Aguillard* (482 U.S. 578, 626), "no minor matter." Eshbeck also noted the "disutility" of invalidating a law that would have been constitutional except for impermissible motives and the "futility" of striking down a law because of an impermissible motive, when the law was likely to resurface cleansed of all improper motives.[3]

As a result of these and other infirmities, the value of the "secular purpose" prong of *Lemon* has been greatly diluted. Indeed, since *Lemon's* inception, the Court has used the "secular purpose" inquiry as the decisive factor in only three cases.[4] In *Stone v. Graham* (449 U.S. 39 [1980]), the Court invalidated a Kentucky law that required all public schools to post a copy of the Ten Commandments in classrooms, finding that the purpose of this statute was "plainly religious" (449 U.S. at 41).[5] In *Jaffree* (1985), the Court used the "secular purpose" inquiry to strike down an Alabama moment of silence statute.[6] And in *Aguillard* (1987), the Court applied *Lemon's* first

---

[2]O'Connor conceded that she would sustain a moment-of-silence statute to begin each public school day, so long as the legislative purpose was not pre-eminently religious. In this case, however, the Alabama Legislature admitted that its purpose was to re-introduce prayer in public schools.

[3]Esbeck remarked (1990: 520) that deference would "spawn disingenuous actions by lawmakers to hide their true motives by 'sanitizing' the official record."

[4]Prior to *Lemon*, the Court used "secular purpose" as the primary factor in striking down an Arkansas law that prohibited the teaching of evolution in all public schools. See *Epperson* (1969).

[5]The Court suggested that a "secular purpose" might be present if the Ten Commandments were "integrated into the school curriculum," as opposed to merely being posted on the classroom walls (449 U.S. at 42).

[6]The Alabama statute's primary sponsor candidly acknowledged that the only purpose for the bill was religious--to reintroduce prayer in public schools.

criterion to invalidate a Louisiana law that attempted to balance the teaching of evolution and creation science in public schools.

Because this inquiry has only rarely been used as the dispositive factor, its definition and application remain sketchy. Justice Rehnquist noted in his dissent in *Jaffree* (472 U.S. 38, 108 [1985]) that the "secular purpose" prong had "proven mercurial in application" because the Court had never fully defined the inquiry or stated how it was to operate. When the justices used the criterion to strike down statutes, their analysis was minimal. *Epperson*, *Stone*, *Jaffree*, and *Aguillard* all dealt with inherently religious practices and statutes. As a result of this prong's murky parameters and the Court's unwillingness to offer sound guidelines for application, two of the justices, Chief Justice Rehnquist and Justice Scalia, have called for its outright abandonment.[7]

One justice has exerted much effort in attempting to resolve the dilemmas created by this prong. Justice O'Connor provided the most pragmatic formulation to date for this inquiry in her concurrence in *Jaffree* (472 U.S. 38, 76 [1985]): "The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as state endorsement." Under this modification, the "secular purpose" prong is seemingly combined with the "primary effect" prong, thus permitting the Court to consider a statute's non-secular effects and its non-secular purposes. This approach, according to O'Connor, also greatly reduces the potential for judicial miscalculation with regard to legislative motivation without eliminating legislative purpose as an important factor.

The "secular purpose" prong of *Lemon*, in spite of its diminutive use as a deciding factor, has received much scholarly criticism.[8] As a result, the Court has somewhat retreated from

---

[7]Chief Justice Rehnquist indicated in *Jaffree* (472 U.S. 38, 112 [1985]) that he had "little use" for the entirety of the *Lemon* doctrine. Justice Scalia remarked in *Aguillard* (482 U.S. 578, 636 [1987]) that the "secular purpose" prong yielded "unprincipled results" and had made a "maze" of the Establishment Clause.

[8]*The Williamsburg Charter* (1988), a national effort to reaffirm the value of the religion clauses, stated: "Words such as public, secular, and religious should be free from discriminatory bias. 'Secular purpose,' for example, should not mean 'non-religious purpose' but 'general public purpose.' Otherwise the impression is gained that 'public

mandating a wholly "secular purpose." Nonetheless, to pass constitutional muster, a challenged statute must have some "secular purpose." A law's purpose need not be totally unrelated to religion. That would demonstrate certain hostility toward religion. Religion simply cannot be the overriding purpose or motivation of legislation.

"Primary Effect"

According to the second requirement of *Lemon*, a challenged statute must not have the "primary effect" of advancing or inhibiting religion.[9] By definition, therefore, statutes that only *incidentally* advance or inhibit religion are not necessarily Establishment Clause violations. Only policies that have the essential effect of influencing religion, either positively or negatively, require invalidation. Accordingly, the Supreme Court has permitted multiple practices that have various indirect effects on religion.[10] As stated by Justice Black in *Everson* (330 U.S. 1, 18 [1947]):

---

is equivalent to secular; religion is equivalent to private.' Such equations are neither accurate not just." For greater detail, see Morokuma, Nelson, and Newton (1993).

[9]The Court has been somewhat evasive in defining exactly what constitutes an advancement of religion. Even murkier is what constitutes an inhibition of religion. The Court has never taken this inquiry very seriously.

[10]For example, in *Everson* (1947), the Court permitted reimbursement to parents of parochial school children for transportation expenses. The *Zorach* Court (1952) sustained a release-time program so public schoolchildren could attend parochial training off school premises during school hours. In *Allen* (1968), the justices upheld a New York provision for textbooks for use in parochial schools. The Court allowed a New York property tax exemption for churches and religious organizations in *Walz* (1970). The *Tilton* Court (1971) sustained federal aid in the form of construction grants to church-related colleges and the *Hunt* Court (1973) permitted a similar state bond scheme. In *Widmar* (1981), the justices ruled that an equal access policy to university facilities did not violate the Establishment Clause even when privileges were extended to religious organizations. The Court in *Mueller* (1983) condoned a Minnesota policy that provided tax deductions for parochial school tuition. In *Marsh* (1983), the Court permitted a state legislative chaplain. In *Lynch* (1984), the Court allowed a nativity scene to remain on public property. In *Witters* (1986), the Court ruled that rehabilitation funding for a blind person attending a Bible college was not unconstitutional. The *Mergens* Court (1990) held that the Equal Access Act was not violated when benefits were extended to religious organizations. In *Lamb's Chapel* (1993), the Court determined that a public school could not deny access to its premises solely on account of religion. And finally in *Zobrest* (1993), the Court held that a public school district could not refuse a sign-language interpreter to a deaf student simply because that student was enrolled in a parochial school. In each of these cases, the Court recognized the *effect* of the provisions, with regard to religion, to be nothing more than "incidental." Thus, they were not violative of the "primary effect" inquiry of *Lemon*.

Moreover, striking down a government policy simply because it indirectly affects religion demonstrates hostility toward religion. For instance, police departments protect church buildings from robbery and priests from abductions. Fire departments respond to church fires. While there might be an advantage given here to a religious body, it is only *de minimus* and not unconstitutional. One constitutional scholar (Giannella, 1968: 521) summarized

"State power is no more to be used so as to handicap religions than it is to favor them." However, the Court has not always required that an advancement or inhibition of religion be present to strike down a policy. In certain cases, the Court has *assumed* that a practice would primarily effect religion and has proceeded to invalidate that legislation.[11]

Of the thirty cases examined in this dissertation, practices in fourteen have been invalidated.[12] Of the twenty-one post-*Lemon* cases analyzed, only nine have been deemed unconstitutional, of which three were partly constitutional and partly unconstitutional.[13] Of those nine post-*Lemon* cases in which a constitutional violation was found, the dispositive factor in striking down the practice was its "primary effect" in five.[14] In each of these cases, the Court determined that the challenged statutes primarily benefited religion. In order to decipher a statute's "primary effect," the Court has taken into consideration three variables--the specific type of aid (whether it advances the secular or sectarian), the form in which the aid was delivered (whether it is a personal or state decision), and the challenged legislation's breadth of class benefited (whether many or few benefit).

---

this contention: government may not deprive religious groups of benefits that are "generally available as a by-product of organized society."

[11]For example, in *Meek* (421 U.S. 349, 372 [1975]), the Court invalidated a state policy because "[t]he potential for impermissible fostering of religion...[was] present." Similarly, the Court remarked in *Wolman* (433 U.S. 229, 254 [1977]) that a state policy ran the "unacceptable risk of fostering religion." In *Grand Rapids* (473 U.S. 373, 375 [1985]), the Court rejected a state proposal because "the program may have the effect of directly promoting religion."

[12]Prior to *Lemon*, the Court used the logic behind the "primary effect" prong to prohibit voluntary religious exercises in public schools--released time programs (*McCollum* [1952]), government-composed prayers (*Engel* [1962]), and Bible readings (*Schempp* [1963]). In these instances, the Court held that government could not sponsor indisputably religious activities.

[13]The Court allowed certain portions of challenged statutes and disallowed other portions in three cases--*Meek* (1975), *Wolman* (1977) and *Allegheny County* (1989).

[14]See *Nyquist* (1973), *Wolman* (1977), *Allegheny County* (1989), *Weisman* (1989), and *Kiryas Joel* (1994).

In looking at parochial school aid cases, the Court has attempted to determine whether the secular effect of the regulation was separable from any religious effect.[15] If the secular activities were separable from the sectarian, they could be funded. The Court has also consistently rejected the argument that all aid to religious organizations necessarily advances sectarian interests because "aid to one aspect of an institution frees it to spend its other resources on religious ends."[16] Thus, the justices have, in effect, determined that government assistance to religious schools does not necessarily translate into government assistance to religion.[17]

The Court has also demonstrated a willingness to consider the form in which the assistance is delivered. A critical question is whether the aid to religion results from the private choices of individuals or from government action. If the assistance to religion is the result of an individual's "private choice," then, so long as the state is neutral, there is no impermissible advancement of religion.[18] For example, if a state reduces the income tax for its residents, some of whom elect to donate all of the money saved to a religious organization, any advancement of religion would be the result of individual decisions and not state action. Simply stated, the Court has generally held that

---

[15] In *Roemer* (426 U.S. 726, 755 [1976]), the Court suggested that the "primary effect" prong was the substantive question with regard to which private institutions could be supported by state funds. According to *Roemer*, no state aid could go to institutions that were so "pervasively sectarian" that secular activities could not be separated from secular ones.

[16] See *Regan* (444 U.S. 646, 658 [1980])

[17] It is interesting to note that no colleges or universities, regardless of their religious affiliation, have ever been deemed "pervasively sectarian" by the Court. Only parochial elementary and secondary schools have been found to be "pervasively sectarian."

[18] Three cases from the 1980s clearly illustrate this variant of the "primary effect" inquiry. In *Widmar* (1981), the Court held that just because university students used a public institution's "open forum" to advance personal religious beliefs, it did not follow that the university was advancing religion. In *Mueller* (463 U.S. 388, 399 [1983]), Justice Rehnquist, remarked: "Where...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." And in *Witters* (474 U.S. 481, 487 [1986]), the Court opined: "Any aid...that ultimately flows to religious institutions does so only as a result of the genuinely independent choices of aid recipients." It could easily be argued that *Everson* (1947) also supported this approach. Any advantage to parochial education was the result of private choices. The government's provision of transportation was facially neutral.

laws do not have the "primary effect" of fostering religion merely because they permit individuals or churches to advance religion.[19]

The Court has also examined the scope of the class of beneficiaries. When religion is advanced simply as a by-product of legislation that benefits other persons or groups, no constitutional violation occurs. In *Widmar* (454 U.S. 263, 274 [1981]), the Court acknowledged: "The provision of benefits to [a] broad...spectrum of [persons]...is an important index of secular effect."[20] The greater the class of beneficiaries the greater the likelihood that the practice will not be considered as advancing religion.[21]

To pass constitutional muster, a challenged policy must have a "primary secular effect." But to ensure that policies do not foster or inhibit religion often requires entanglement. If a statute does not provide adequate safeguards to ensure a "primary secular effect," the Court will generally invalidate the statute.[22] Yet when adequate controls are erected to guarantee that no state funds be used to advance or inhibit religion, the justices will often invalidate on "excessive entanglement" grounds.[23] Law professor Michael Paulsen (1993: 809) referred to the government's dilemma as "damned if you do, damned if you don't." Justice O'Connor clearly recognized the paradox created

---

[19] *Widmar*, *Mueller*, and *Witters* demonstrate the Court's shift from a policy of "no advancement" to "neutrality" in the 1980s.

[20] For example, in *Everson* (1947) and *Allen* (1968), the benefits were school transportation and secular textbooks and the beneficiaries were *all* schoolchildren. In *Widmar* (1981), the beneficiaries were *all* enrolled students at the University of Missouri. In *Mueller* (1983), the recipients of aid were the parents of *all* schoolchildren. In *Witters* (1986), the beneficiaries were *all* visually handicapped persons. In *Mergens* (1990), the receivers were *all* student groups. And in *Lamb's Chapel* (1993) the grantees of aid were *all* community organizations.

Conversely, the beneficiaries in *Nyquist* (1973) were 80% parochial schoolchildren. The *sole* recipients of government aid in *Meek* (1975) were nonpublic school students. And in *Kiryas Joel* (1994), the receivers of assistance were only members of *one* religious sect. As expected, these provisions were struck down.

[21] This principle has also held true outside of education. In *Walz* (1970), the Court upheld state tax exemptions for church property because the state had provided similar benefits to a wide variety of non-profit organizations--libraries, hospitals, playgrounds, etc.

[22] See *Meek* (1975), *Wolman* (1976), and *Grand Rapids* (1985).

[23] See *Lemon* (1971), *Meek* (1975), and *New York v. Cathedral Academy* (434 U.S. 125 [1977]).

by these two prongs working together to invalidate legislation in *Aguilar* (473 U.S. 402, 430 [1985]). To resolve this tension, she recommended that "state efforts to ensure that public resources are used for nonsectarian ends should not in themselves serve to invalidate an otherwise valid statute."

Because of the apparent difficulty in determining a statute's "primary effect," O'Connor suggested in her concurrence in *Lynch* (1984) that the Court clarify its Establishment Clause doctrine by focusing not on "secular purpose" and "primary effect," but rather on whether government had endorsed (or disapproved of) religion. According to her, endorsement (or disapproval) and not advancement (or inhibition) of religion was the proper inquiry.[24] To support her argument, she wrote (465 U.S. 668, 688): "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." In response to the justices marginally accepting this inquiry, constitutional scholar Laurence Tribe (1988: 1215) noted that the Court had transformed the second prong of *Lemon* into a "*requirement that any non-secular effect be remote, indirect, or incidental.*"

"Excessive Entanglement"

Roger Williams, the foremost separatist in early America, feared that unrestrained civil authorities would interfere with individual religious pursuits. To prevent worldly corruptions from consuming the church, he advocated the erection of "sturdy fences against the wilderness [government]" (Howe: 1965: 6). James Madison believed that religion and government could best achieve their respective objectives if they did not trespass into the other's arena. The third requirement of *Lemon* reflected these fears. To pass constitutional muster, a statute cannot foster

[24]The Court has viewed this approach with some favor. See *Grand Rapids v. Ball* (473 U.S. 373, 389 [1985]), *Witters* (1986), and *Allegheny County* (1989). Justice Kennedy accused the Court of officially adopting this "endorsement" test in *Allegheny County* (1989).

"excessive government entanglement" with religion.[25] By preventing entanglement, government would be precluded from intruding into the precincts of religion, and vice versa.

Of the twenty-two post-*Walz* (1970) cases analyzed in this dissertation, the Court has only found an impermissible entanglement as the primary infirmity in five.[26] But what exactly constitutes "excessive entanglement" is somewhat elusive and the justices seemingly possess boundless discretion in determining what is "excessive." In its "excessive entanglement" analysis, the Court has taken into consideration doctrinal entanglement, administrative entanglement, political divisiveness, and the delegation of governmental power.

With strong convictions, the Court has continually prohibited doctrinal entanglement.[27] Government has shunned its role as a determiner of religious truth.[28] Thus, statutes that proscribe "religious orthodoxy" are patent violations of the Establishment Clause. The justices have prohibited administrative entanglement between church and state.[29] The Court has disallowed government surveillance of religious institutions, even when that surveillance is designed to ensure that public funds are not expended for sectarian purposes.[30] The justices have rejected

---

[25]In *Walz* (397 U.S. 664, 674 [1970]), Chief Justice Burger cautioned: "We must...be sure that the end result--the effect--is not an excessive government entanglement with religion."

[26]See *Lemon* (1971), *Meek* (1975), *Wolman* (1977), *Aguilar* (1985), and *Kiryas Joel* (1994).

[27]Justice Brennan remarked in his concurrence in *Schempp* (374 U.S. 203, 243 [1963]) that all organs of government were required to take a course of "strict neutrality toward theological questions."

[28]Justice Robert Jackson remarked in *West Virginia v. Barnette* (319 U.S. 624, 642 [1943]): "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, *religion*, or other matters of opinion or force citizens to confess by word or act their faith therein" (emphasis added).

[29]In several cases, the Court has taken an entanglement-avoidance approach. That is, certain organizations have argued that government restrictions increase the amount of entanglement required between church and state. For example, in *Walz* (397 U.S. 664, 674 [1970]), the Court rejected a claim that tax-exemption created "excessive entanglement" because if the state were to tax the church, the entanglement would be even greater. Thus, tax exempt status for religious organizations was a form a entanglement-avoidance. In *Widmar* (454 U.S. 263, 272 n.11 [1981]), the University of Missouri argued that by allowing religious groups to meet on campus, "excessive entanglement" would be created. The Court rejected this because greater entanglement would have occurred if the institution had been required to enforce its exclusion of religious worship and speech.

[30]For example, in *Lemon* (403 U.S. 602, 618-619 [1971]), the Court struck down a teacher reimbursement scheme because "a comprehensive, discriminating, and continuing state surveillance" was required to ensure that the

administrative entanglement with respect to *continuing* fiscal relationships.[31] Conversely, practices that require "continuing financial relationships" create "excessive entanglement."[32] The Court has also singled out the nature of the recipient institutions in attempting to determine administrative entanglement.[33] Aid to "pervasively sectarian" institutions increases the dangers of administrative entanglement. The form of the aid has also been considered in determining administrative entanglement.[34]

This cursory analysis of permissible and impermissible forms of aid under the entanglement inquiry of *Lemon* demonstrates the importance of the type of aid provided in analyzing constitutionality. Apparently, the dispositive factor in regard to the form of the assistance is whether the aid can be easily diverted to inculcate religious values. If that is possible,

---

teachers played a nonideological role. The *Meek* Court (421 U.S. 349, 370 [1975]) invalidated an assistance practice because the state had to be "certain" that school personnel did not advance religion. In *Aguilar* (473 U.S. 402, 412 [1985]), the Court struck down "auxiliary services" provided by public teachers because "ongoing inspection" was required to ensure the absence of a religious message.

[31]For example, the *Tilton* Court (1971) found no "excessive entanglement" because there was "no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities." Furthermore, the assistance was in the form of a one-time grant. The *Tilton* Court left open the possibility that entanglement was less "excessive" if the assistance was provided in the form of a one-time offering. Apparently, the timing and frequency of assistance could feasibly make an unconstitutional practice constitutional.

[32]See *Grand Rapids* (473 U.S. 373 [1985]) and *Aguilar* (1985).

[33]In *Roemer* (426 U.S. 736, 758-759 [1976]), a plurality opinion upheld assistance to church-related institutions because the institutions were not "pervasively sectarian," and thus did not require supervision to ensure that religion was not advanced by state funds.

[34]Assistance in the form of payments to parochial school educators who teach secular subjects creates "excessive entanglement" because close supervision is necessary to ensure the teachers play a nonideological role (*Lemon* [1971] and *Meek* [1975]). Assistance in the form of public school employees who teach secular subjects is likewise impermissibly entangling (*Aguilar* [1985]). Aid in the form of maintenance and repair provisions (*Nyquist* 1973]), guidance counseling and speech and hearing services (*Meek* [1975]), and instructional material, instructional equipment, and field trip transportation (*Wolman* [1977]) for nonpublic school children leads to "excessive entanglement." Yet assistance in the form of secular textbooks to parochial schools (*Allen* [1968] and *Meek* [1975]), tax exemptions for religious organizations (*Walz* [1970]), construction grants to erect buildings for secular education at church-related institutions (*Tilton* [1971] and *Hunt* [1973]), standardized testing services, public health services, and remedial educational services (*Wolman* [1977]), reimbursement for state-mandated testing (*Regan* [1980]), tax deductions for public and private education (*Mueller* [1983]), state rehabilitation payments for parochial education (*Witters* [1986]), and a provision for a state sign-language interpreter to accompany a deaf student to classes at a sectarian high school (*Zobrest* [1993]) do not create "excessive entanglement."

then close supervision is necessary to ensure no fostering of religion. Close supervision, however, leads to "excessive entanglement." Justice Rehnquist recognized this "Catch-22" situation and recommended abolishing the "excessive entanglement" prong altogether.[35] Justice O'Connor suggested in *Aguilar* (473 U.S. 402, 430 [1985]) that a statute that passes the first two prongs of *Lemon* should not be invalidated on "excessive entanglement" grounds. Also considered in this analysis is whether the assistance to religion, if any, is the result of state action or private decisions.[36]

Another inquiry into this prong is whether government action results in "political divisiveness."[37] In *Lemon* (403 U.S. 602, 622 [1971]), Chief Justice Burger cautioned against a "broader base" of entanglement--political division along religious lines, which was "one of the principle evils against which the First Amendment was intended to protect." However, the majority of justices have not viewed this inquiry of *Lemon* as being tantamount to Establishment Clause analysis, or at least not on par with the other three inquiries of *Lemon*.[38] The Court has never invalidated a challenged law solely because its application would be politically divisive.[39] In fact,

---

[35]See Justice Rehnquist's dissenting opinion in *Jaffree* (472 U.S. 38, 110 [1985]).

[36]Those cases in which the "private decision" factor weighed heavily included *Mueller* (1983), *Witters* (1986), and *Zobrest* (1993).

[37]This inquiry reflected Jefferson's fears that religion might adulterate politics.

[38]Gaffney (1980) sharply criticized the Court's divisiveness inquiry. He noted some of the First Amendment contradictions of a judicial policy that considered "political divisiveness along religious lines." The premise of such a policy was that religion should be excluded from the public forum, which, in effect, amounted to religious censorship, prohibited by the Freedom of Speech Clause. Furthermore, the "political divisiveness" inquiry discouraged religious involvement in politics, which raised free exercise concerns. Gaffney did not believe that the Court should impose such a chill on religious freedom of speech.

[39]In fact, in *Tilton* (1971), the Court refused to even recognize the potential for "political divisiveness" in a case where state agencies helped coordinate the operations of parochial institutions. In *Nyquist* (413 U.S. 756, 794 [1973]), Justice Powell noted that while "political divisiveness" may not alone warrant the invalidation of a statute, it was "certainly a 'warning signal' not to be ignored." He also referred to "political divisiveness" as carrying "grave potential for entanglement." In a separate opinion in *Meek* (421 U.S. 349, 374 [1975]), Justice Brennan claimed that "political divisiveness" was a "significant fourth factor to the [*Lemon*] test." Brennan reiterated this in his concurrence in *Wolman* (433 U.S. 229, 256 [1977]), where he noted that the potential for "political divisiveness" sufficed "without more" to invalidate a statute. Justice Marshall, also in a concurrence in *Wolman* (433 U.S. at 259), chastised the Court for its failure to consider this inquiry and suggested that a challenged textbook provision should

the Court has expressly repudiated "political divisiveness" as a fourth factor of the *Lemon* doctrine.[40] Even though "political divisiveness" cannot "stand alone" as an invalidator of challenged statutes, the Court has considered it as a factor in striking down legislation in a limited area of adjudication--parochial school cases.[41] In sum, the "political divisiveness" factor in Establishment Clause jurisprudence has never been used as the sole factor in striking down a practice, and has been used sparingly as a substantive factor in case analysis (and then only in cases involving parochial aid). Because the Court has never specifically defined "political divisiveness," its application remains murky.

A final element that the Court has analyzed in its "excessive entanglement" inquiry is whether government has transferred its traditional powers to religious bodies.[42] Generally

---

be invalidated because of the dangers of "political divisiveness on religious lines." However, the Court as a whole has failed to embrace "political divisiveness."

[40]In *Lynch* (465 U.S. 668, 684 [1984]), Chief Justice Burger noted that the Supreme Court had never held that "political divisiveness" alone was sufficient to invalidate government conduct. He (465 U.S. at 684-685) also noted how easy it was to "create the appearance of divisiveness and then to exploit it as evidence of entanglement." Justice O'Connor has even advocated the abandonment of the "political divisiveness" inquiry. See *Aguilar* (473 U.S. 402, 429 [1985]).

[41]In *Lemon* (403 U.S. 602, 623 [1971]), the Court held that the need for increasing annual appropriations to parochial schools created "potential divisiveness." In *Mueller* (463 U.S. 388, 403-404 n.11,12 [1983]), Justice Rehnquist, referring to "political divisiveness" as an "elusive...inquiry subsumed under the third part of the *Lemon* test," confined its inquiry to cases where financial subsidies were paid directly to parochial schools or to teachers in parochial schools. In *Meek* (421 U.S. 349, 372 [1975]), the justices similarly held that need for annual appropriations for "auxiliary services" created a serious potential for divisiveness along religious lines." The Court in *Nyquist* (413 U.S. 756, 794-798 [1973]) held the various monetary provisions for parochial education carried "grave potential for entanglement in the broader sense of political strife." In *Aguilar* (473 U.S. 402, 416-417 [1985]), Justice Powell expanded this argument, asserting that all direct governmental aid to parochial schools was "likely to spark political disagreement."

[42]For example, in *Larkin v. Grendel's Den* (459 U.S. 116 [1982]), the Court struck down a Massachusetts law that barred liquor licenses to establishments within 500 feet of a church on the grounds of "excessive entanglement." According to Chief Justice Burger (459 U.S. at 127), the action "enmeshe[d] churches in the exercise of substantial governmental powers." In effect, the state had unconstitutionally delegated its discretionary powers (in this case, zoning and liquor licenses) to religious institutions (churches). This was also the dispositive factor in *Kiryas Joel* (129 L.Ed.2d 546, 552 [1994]), where the Court concluded that New York's actions were "tantamount to an allocation of political power on a religious criterion." The state had unconstitutionally delegated its civic authority (in this case, education) to an electorate defined solely by common religious belief and practice (the Satmar Hasidic Jewish sect). In effect, New York was exhibiting favoritism along religious lines, contrary to the general principle that civil power had to be exercised neutrally toward religion and among religious sects. Souter (129 L.Ed.2d at 565) quoted approvingly from *Wisconsin v. Yoder* (406 U.S. 205, 213 [1972]) when he noted that education "rank[ed] at the very apex of the function of a State."

speaking, the Court has found statutes offensive to the Establishment Clause when they transfer government authority to any type of religious institution. Constitutional scholar Laurence Tribe (1988: 1229) noted that vesting authority in this manner seemed to be an "independent test of constitutionality."

Since their inception in 1971, the inquiries of *Lemon* have been substantially developed, refined, and in some cases, rejected by certain justices. The Court's application of these prongs has been an enormously complex task. Providing coherence to matters of religion does not come easily in such a diverse society as the United States.

3. Alignment of the Justices with Regard to the Lemon Doctrine

The term "wall of separation" between church and state surfaced in 1802 when Thomas Jefferson used the words in his letter to the Danbury Baptist Convention. The *Lemon* doctrine was officially adopted by the Court many years later in 1971. Yet neither the notion of separation nor the tripartite examination has enjoyed universal acceptance by the justices. In fact, many of them have expressed tremendous dissatisfaction with the Court's doctrine and the faulty historical premise which serves as its foundation.

While the *Lemon* doctrine has been the recipient of sharp criticism from the academic and legal communities, perhaps the most scathing remarks have come from the justices themselves. In *Roemer* (426 U.S. 736, 768 [1976]), Justice White called the tripartite doctrine an "unnecessary...and superfluous test for establishing when the state's involvement with religion passes the peril point." Justice Rehnquist remarked in dissent in *Jaffree* (472 U.S. 38, 110 [1985]) that the three-part doctrine had "simply not provided adequate standards for deciding Establishment Clause cases." In *Aguilar* (473 U.S. 402, 430 [1985]), Justice O'Connor's concurrence referred to Establishment Clause adjudication as having produced "anomalous results"

and Justice Scalia (473 U.S. at 639) called the Court's efforts "embarrassing." Justice Kennedy, in a concurrence in *Allegheny County* (492 U.S. 573, 655 [1989]), noted that application of the *Lemon* doctrine resulted in "an unjustified hostility toward religion." Without question, the justices have struggled in attempting to apply the much maligned *Lemon* doctrine. Before predictions can be made about the viability of the *Lemon* doctrine, it is necessary to examine the positions of the individual justices with regard to its importance.[43] Some justices have trumpeted calls for abandonment. Others have supported marginal alterations. Even others have expressed their allegiance to the embattled doctrine.

Chief Justice William Rehnquist, the longest serving member of the current Court, has been the most ardent supporter of governmental "accommodation." In fact, in the twenty cases analyzed in this dissertation in which he participated, Rehnquist *never* found a statute completely unconstitutional. In nineteen cases, he found none of the challenged policies violative of the Establishment Clause. In the remaining case, Rehnquist found only part of the statute unconstitutional.[44] Thus, it remains relatively unknown just what constitutes an Establishment Clause violation according to Rehnquist. Generally stated, Rehnquist is uninterested in maintaining *Everson's* separation and unconcerned about government support of religion. He has repeatedly encouraged his colleagues to rethink their interpretation of the Establishment Clause.

He has also been one of the most outspoken critics of the *Lemon* test. As early as 1976 Rehnquist aligned himself against the doctrine when he agreed with Justice White that the "excessive entanglement" prong was "unnecessary."[45] His most stinging criticism of *Lemon* came

---

[43]The positions of the justices will be systematically examined in order of seniority. It is worth noting that none of the present justices were Court members during the 1970-1971 term when the *Lemon* doctrine was adopted.

[44]In *Nyquist* (1973), he found only a "maintenance and repair" provision unconstitutional, while upholding "tuition reimbursement" and "tax relief" policies.

[45]Rehnquist also agreed with White that this inquiry had no constitutional foundation and was "insolubly paradoxical" (426 U.S. at 768-769).

in his dissent in *Jaffree* (472 U.S. 38 [1985]), where he advocated abolishing the doctrine altogether.[46] He remarked (472 U.S. at 112): "If a constitutional theory has no basis in the history of the amendment it seeks to interpret, it is difficult to apply and yields unprincipled results." To be consistent with the framers, Rehnquist believed, the Establishment Clause had to be interpreted in a manner that permitted governmental promotion of religion, so long as that promotion was without denominational preference. *Lemon* did not yield this proper interpretation; ergo, it was "useless" and not binding on the Court.

Since 1985, Rehnquist has opposed application of the doctrine. In *Allegheny County* (492 U.S. 593, 656 [1989]), he expressed his support for Justice Kennedy's "flexible accommodation," which called for application of Establishment Clause doctrine with "proper sensitivity to...tradition." In 1992 in *Weisman* (120 L.Ed.2d 467, 509-519), he positioned himself with Justice Scalia in demanding "psychological coercion" on behalf of the state as a prerequisite to finding a constitutional violation. It can be assumed, with a fair amount of certainty, that if presented (once again) with the chance to overturn the *Lemon* doctrine, Rehnquist would leap at the opportunity. Furthermore, he would support a new Establishment Clause canon based on his understanding of the purpose and meaning of the First Amendment.

Justice John Paul Stevens, the oldest member of the Court, has been its most ardent separationist.[47] Of the seventeen cases in which he has participated, Stevens has uncovered a constitutional violation in thirteen.[48] In only three cases has he determined that the challenged

---

[46]He remarked (472 U.S. at 92) that the Court had developed the constitutional doctrine on a "mistaken understanding of constitutional history." The first two prongs of *Lemon* were "in no way based on either the language or intent of the drafters" and the third prong created an "insoluble paradox" (472 U.S. at 108-109).

[47]Stevens and Rehnquist have disagreed on Establishment Clause cases at the striking rate of 82%.

[48]Stevens has found unconstitutional public grants to "nonpervasively sectarian" institutions (*Roemer* [1976]), state provisions of secular textbooks and standardized testing services (*Wolman* [1978]), reimbursements from public funds for state-mandated testing and reporting (*Regan* [1980]), state tax deductions for public and private school expenses (*Mueller* [1983]), opening legislative sessions with prayer (*Marsh* [1983]), a municipality's inclusion of a nativity scene in its Christmas display (*Lynch* [1984]), a moment of silence for "meditation and voluntary prayer" (*Jaffree* [1985]), a state statute requiring that the teaching of evolution be accompanied by creation science in public schools (*Aguillard* [1987]), a display of a crèche in a county courthouse and a menorah outside a government office

statutes were permissible.[49] Juxtaposed to Rehnquist, most interaction between church and state constitutes a violation in Steven's mind.

Throughout his tenure, Stevens has consistently applied the *Lemon* doctrine as his framework for analysis.[50] Unlike Rehnquist, he does not feel that the doctrine is contrary to the drafter's intentions. Jefferson's "wall" is the appropriate principle and separation between church and state is the desired result. In *Allegheny County* (492 U.S. 573, 627 [1989]), Stevens aligned himself with Justice O'Connor in concluding that an appropriate inquiry in establishment of religion cases was her "endorsement" test. He also has firmly rejected the notion that a showing of coercion was necessary to a successful Establishment Clause claim.[51] The most ardent separationist on the Court has used the *Lemon* doctrine to keep religion and politics in their respective, separate arenas, and there is no evidence that his resolve is weakening.

Justice Sandra Day O'Connor, appointed to the Court in 1981 by conservative President Ronald Reagan, has taken a more centrist approach than those taken by her two senior colleagues. Of the fourteen decisions analyzed in which she participated, O'Connor found a constitutional violation in five, no violation in eight, and remanded one case to the lower court for a clarification. She has also written quite extensively on the matter, penning eight opinions.[52] Her entry into the Establishment Clause fray came in *Lynch* (1984). Bucking the conservative trend, O'Connor did

---

building (*Allegheny County* [1989]), religious groups having "equal access" to public high school facilities (*Mergens* [1990]), graduation prayers (*Weisman* [1992]) and a religion-based public school district (*Kiryas Joel* [1994]).

[49]In fact, the only commingling of church and state supported by Stevens during his tenure has been with respect to equal access for religious groups at public universities (*Widmar* [1981]), educational provisions for the handicapped (*Witters* [1986]), and general access to public facilities for churches (*Lamb's Chapel* [1993])–all non-controversial cases. In one case, *Zobrest* (1993), Stevens voted to remand the case for clarification.

[50]Stevens has only written one majority opinion–*Jaffree* (1985). In that case, and in his other separate opinions, the *Lemon* doctrine was the starting point.

[51]See *Allegheny County* (492 U.S. 593, 627-628 [1989]) and *Weisman* (120 L.Ed.2d 467, 495 [1992]).

[52]She has written one majority opinion (*Mergens* [1990]), five concurrences (*Lynch* [1984], *Jaffree* [1985], *Witters* [1986], *Allegheny County* [1989], and *Kiryas Joel* [1994])), and two dissents (*Aguilar* [1985] and *Zobrest* [1993]). In *Zobrest*, she voted to remand the case to the lower court for some clarification.

not call for the abandonment of the *Lemon* doctrine. Instead, she suggested (465 U.S. 668, 688) a clarification of the doctrine: the proper inquiry was whether the intentions of government were to convey a message of endorsement or disapproval of religion. Intentions were more important than results.[53] The following year in *Aguilar* (473 U.S. 402, 428-429 [1985]), she proposed a modification to the "excessive entanglement" prong.[54] Recognizing the "insoluble paradox" created by the third inquiry, she advocated a nonapplication of the third prong if the first two prongs of *Lemon* were satisfied.

For her first dozen years on the High Court, O'Connor applied her amended *Lemon* doctrine. During none of the cases in the 1980s did she advocate overturning the doctrine. She merely focused on "endorsement." But in *Kiryas Joel* (129 L.Ed.2d 546, 570-571 [1994]), she conceded the Court's doctrinal failures and expressed serious doubts about her allegiance to the *Lemon* test. She concluded that the Establishment Clause could not "easily be reduced to a single test." Instead of continually applying the "amorphous,...distorted,...[and perhaps] useless" test, the justices would be better suited to handle difficult challenges by establishing a "narrower,...more precise,...easier to apply,...more carefully tailored,...less distorted" doctrine. Yet she offered no pragmatic alternatives, concluding that perhaps the solution was to judge each predicament on a case-by-case basis, with no search for a "Grand Unified Theory;" in essence, a nondoctrine.

Justice Antonin Scalia, appointed in 1986, has taken a conservative approach similar to that of Chief Justice Rehnquist.[55] He does not agree with the Jefferson-Madison approach that advocates a "wall of separation." Accordingly, he has expressed his dissatisfaction with the

---

[53]O'Connor reaffirmed this "endorsement" position in *Jaffree* (1985), *Allegheny County* (1989), and *Mergens* (1990). According to Justice Kennedy, the Court officially adopted this revision in *Allegheny County* (492 U.S. 573, 668 [1989]).

[54]Quoting approvingly from constitutional scholar Jesse Choper (1980: 681), she noted (473 U.S. at 430) that the "anomalous results in...Establishment Clause cases [were] 'attributable to [the] entanglement prong'."

[55]In fact, the two have never voted separately on Establishment Clause matters.

Court's adoption of a separationist position. Of the seven cases decided since his appointment to the Court, Scalia has yet to uncover an Establishment Clause encroachment. He has not written a majority opinion, but has authored three dissents and one concurrence. In his first opinion, a thirty-one page dissent in *Aguillard* (482 U.S. 578, 640 [1987]), he propounded the abandonment of the "secular purpose" test because it had "no basis in the language or history of the Amendment."[56] Furthermore, it was impossible to determine with any degree of certainty the subjective motivation of those enacting the statute. As such, the justices could only "guess at its meaning" (482 U.S. at 611).[57] Two years later in *Allegheny County* (492 U.S. 593, 656-657 [1989]), Scalia expressed his support for Justice Kennedy's "flexible accommodation," that is, permitting government to recognize the important position that religion occupies in society, so long as government's acknowledgment is passive and noncoercive. Scalia qualified this opinion in *Weisman* (120 L.Ed.2d 467, 515-516) when he noted that the only type of religious coercion forbidden by the Establishment Clause was legal coercion backed by a "threat of penalty." Thus, Scalia rejected Kennedy's "psychological coercion" test in favor of his "legal coercion."

As for the "bedeviled" *Lemon* doctrine, Scalia found it positively inconsistent with long-standing traditions of the American people (120 L.Ed.2d at 517). In *Lamb's Chapel* (124 L.Ed.2d 352, 366), he dogmatically refused to apply the doctrine because it contributed to a "strange Establishment Clause geometry of crooked lines and wavering shapes."[58] In *Kiryas Joel* (129 L.Ed.2d 546, 592 [1994]), he scathingly referred to the *Lemon* test as "a repealer of our National

---

[56]He noted (482 U.S. at 636) that it had made a "maze of the Establishment Clause."

[57]Another infirmity of the "secular purpose" test was the appearance of judicial activism. Scalia remarked: "Striking down a law approved by the democratically elected representatives of the people is no minor matter" (482 U.S. at 626).

[58]However, he did note (124 L.Ed.2d at 366) that a docile *Lemon* doctrine might be worth keeping around because "one never [knew] when one might need him." Apparently, Justice Scalia recognized that the doctrine's "flexibility," which allowed for varying interpretations, might be used to justify even his position at times.

tradition of religious toleration." Accordingly, he favors abolishing the doctrine and replacing it with one more accommodating of the important role that religion plays in society.

Justice Anthony Kennedy, a member of the Court since 1987, has proven to be a swing vote on matters of church and state. Of the six Establishment Clause cases that the Court has heard during his tenure, Kennedy has authored opinions in five.[59] In his initial encounter, *Allegheny County* (492 U.S. 573, 655 [1989]), Kennedy allied himself with Chief Justice Rehnquist and Justice Scalia in finding that the *Lemon* doctrine reflected an "unjustified hostility toward religion." Kennedy noted that he was content with the framework of the *Lemon* doctrine, but did not want to be perceived as advocating or adopting the *Lemon* test as the Court's primary guide. Instead of a rigorous application of the maligned doctrine, Kennedy advocated applying *Lemon* with "proper sensitivity" toward national traditions and permitting government "some latitude in recognizing and accommodating the central role religion plays in...society" (492 U.S. 573, 656-657). As such, the dispositive factors were whether government "coerces anyone to support or participate in any religion or its exercise" or provides "direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so'" (492 U.S. at 659).[60]

Yet, unfortunately for his conservative brethren, Kennedy has lowered the volume on his "accommodationist" and "coercion" rhetoric. In fact, Kennedy now seems very reluctant to overturn *Lemon*, as demonstrated by his majority opinion in *Weisman* (1992). In *Weisman*, he went against the conservative bloc of the Court (Rehnquist, Scalia, Thomas, and White), voting to

---

[59]Kennedy wrote the majority opinion in *Weisman* (1992), concurring opinions in *Mergens* (1990), *Lamb's Chapel* (1993) and *Kiryas Joel* (1994) and a separate opinion in *Allegheny County* (1989), in which he concurred and dissented in part.

[60]Kennedy was quoting from *Lynch* (465 U.S. 668, 678 [1984]). In his analysis, Kennedy also rebuffed the Court for its adherence to O'Connor's bogus "endorsement" test, claiming that nonendorsement was hostility toward religion.

strike down graduation prayer exercises at public schools.[61] Kennedy's opinion demonstrated his opposition to coercive governmental practices (of which he believed prayer was one), yet focused primarily on the perils of government's involvement in religious matters--hardly an "accommodationist" concern. To the dismay of his colleagues, his analysis indirectly incorporated the "secular purpose" and "excessive entanglement" prongs of *Lemon*, as well as the activity's potential for "political divisiveness"--an important fourth concern of *Lemon* that the Court seemed to have forgotten. So, while he did not formally implicate the doctrine's prongs, Kennedy adhered to the sentiment of *Lemon*--noninvolvement and neutrality. In effect, Kennedy delivered a message to his colleagues that "coercion" was still a concern, but that his primary concern was with a state "establish[ing] a religion or religious faith or tend[ing] to do so."[62] Following the decision in *Weisman* (1992), Kennedy's alignment with those oppose to the *Lemon* doctrine is no longer assured. He appears to have positioned himself as a centrist on the Court in this matter.

Named to the Court in 1990 by President George Bush, Justice David Souter has likewise carved out his beliefs on separation of church and state. With respect to the turbulent state of Establishment Clause jurisprudence, Souter was asked numerous questions about the *Lemon* doctrine at his confirmation hearings before the Senate Judiciary Committee (United States Senate, Executive Report 101-32 [1990]). With specific regard to the *Lemon* doctrine, he remarked:

> The concerns that have been raised about [*Lemon*] naturally provoke a search, not only perhaps for a different test of the [Establishment Clause] standard which we think we are applying today, but a deeper re-examination about the very concept behind the [E]stablishment [C]lause. But if I were to go to the Court, I would not go with a personal agenda to foster that; neither would I go in ignorance of the difficulty which has arisen in the administration of *Kurtzman* (Greenhouse, 1991: A13).

---

[61] Had Kennedy voted with the four members of the conservative bloc, it is feasible to conclude that the *Lemon* doctrine would have been overturned.

[62] Kennedy also voted against the conservative bloc in *Kiryas Joel* (129 L.Ed.2d. 546, 572-579 [1994]), yet couched his argument in terms of religious gerrymandering.

Yet, to the disappointment of fellow conservative justices, Souter has not chosen to re-examine the very concept behind the Establishment Clause. If anything, Souter has served to help fortify the "wall of separation." In three of the four cases he has heard while on Court, Souter has found a constitutional violation.[63] He surprised conservatives in *Weisman* (120 L.Ed.2d 467 [1993]) when he joined Justices Blackmun, Stevens, and O'Connor in striking down graduation prayers in public schools. In his first opinion, he sharply dismissed "nonpreferentialist" and "accommodationist" views when he reaffirmed one of the basic principles of *Everson*: the Establishment Clause not only forbade government support for one religious denomination but also for religion in general; thus, government could not favor one religion over another, or religion over nonreligion. He justified this position by referring to historical analysis--for so long the trump card of the "accommodationist"--in which he demonstrated that the framers severely lacked a common understanding about the Establishment Clause. Souter has also alluded favorably to O'Connor's "endorsement" test and has rejected Scalia's "coercion" prerequisite.[64]

His majority opinion striking down the creation of a public religious school district in *Kiryas Joel* (1994) further disappointed religious and political conservatives. He remarked (129 L.Ed.2d 546, 562): "accommodation is not a principle without limits." Souter was unwilling to back down from the Court's conservative intelligentsia and repeatedly traded barbs with Justice Scalia, the conservative leader on the Court. At one point, Souter described Scalia as a "gladiator...[who] thrusts at lions of his own imagining" (129 L.Ed.2d at 564). Souter's entrance into the Establishment Clause debate with his concurrence in *Weisman* (1992) and majority opinion in *Kiryas Joel* (1994) aligns him as a general subscriber to the strict separationist standard advocated in *Everson*. Accordingly, he appears to support the principles of *Lemon*. His

---

[63]The only case in which he did not find a violation of the Establishment Clause was the non-controversial *Lamb's Chapel* (1993).

[64]He specifically remarked (120 L.Ed.2d at 501-502) that the Court's precedents "simply...cannot support the position that a showing of coercion is necessary to a successful Establishment Clause claim."

willingness to attack conservative ideologue Scalia may propel his emergence as the leader of the moderate voice on the Court (at least in matters of church and state).

Justice Clarence Thomas was named to the Court by President George Bush in 1991. At his confirmation hearings, he indicated that he had no disagreement with the *Lemon* test and thought that the "wall of separation" between church and state was "an appropriate metaphor." Referring to Establishment Clause adjudication as a "vibrant debate," Thomas noted that he had an open mind with regard to the *Lemon* doctrine, although he recognized the difficulties in its administration. Thomas further remarked that he would remain "sensitive" to those who preferred to keep government and religion separate (United States Senate, Executive Report 102-15 [1991]).

Yet "separationists" would hardly consider Justice Thomas "sensitive" to their plight. Because Thomas has only voted on four Establishment Clause cases, his judicial principles are not fully developed. This much is known: he has yet to write an opinion, yet to find a statute that encroached upon the Establishment Clause, and, in every instance, sided with "accommodationist" Justice Scalia.[65] By implication of his joining Scalia's dissent in *Weisman* (120 L.Ed.2d 467, 509-519 [1992]), Thomas demonstrated his unwillingness to adhere to any policy that invalidated long-standing American traditions. Apparently, as does Scalia, Thomas views the *Lemon* doctrine as inconsistent with the purpose and meaning of the Establishment Clause. He appears poised to overturn the doctrine if the situation arises.

The two most recent Court appointees were selected by President Bill Clinton. Justice Ruth Bader Ginsburg was appointed in 1993 and Justice Stephen Breyer was named to the Court in 1994. Justice Ginsburg came to the Court from the United States Court of Appeals for the District of Columbia. Because she had written no prior opinions on the Establishment Clause, her remarks to the Judiciary Committee on this matter were somewhat elliptic. Ginsburg indicated,

---

[65]He found nothing impermissible with graduation prayers at public schools (*Weisman* [1992]) or public school districts created along religious lines (*Kiryas Joel* [1994]).

however, that she would not clamor for the overturning of *Lemon*. She noted that notwithstanding the attacks on the three-part test, *Lemon* remained good law, "and my approach is the law stays the law unless and until there is a reason to displace it." In response to the criticism surrounding the doctrine, she remarked: "What is the alternative? It is very easy to tear down, to say that--to deconstruct. It is not so easy to construct" (United States Senate, Executive Report 103-6 [1993]). In her only Establishment Clause decision, she positioned herself with the centrist bloc of the Court, voting to strike down a public school district composed along religious lines (*Kiryas Joel* [1994]). However, that case, while "anti-accommodationist" in tone, said very little about the viability of the *Lemon* doctrine. Perhaps her confirmation hearing remarks represent the best presage of her judicial alignment on this matter.

Justice Stephen Breyer came to the Supreme Court from the U.S. Court of Appeals for the First Circuit. While serving as Chief Judge on that Court, Breyer interpreted the Establishment Clause only once.[66] In that instance, he applied the *Lemon* doctrine. At his confirmation hearings (United States Senate, Executive Report 103-31 [1994]), Breyer made incontestable his belief that the Establishment Clause erected a "wall of separation" between church and state:

> [When] I think of the Establishment Clause, I think of Jefferson, and I think of a wall. And the reason that there was that wall...which has become so much more important perhaps even now than it was then, is that we are a country of so many different people, of so many different religions, and it is so terribly important to members of each religion to be able to practice that religion freely, to be able to pass that religion on to their children. And each religion in a country of many, many different religions would not want the State to side with some other religion, so each must be concerned that the state remain neutral.

When asked if the state could aid religion, he responded: "Certainly, sometimes" and then proceeded to demonstrate this understanding using a burning church and a public fire department as his example--hardly an "accommodationist" perspective. In matters of religion, Breyer acknowledged that a judge should "start with the basic idea that the State is neutral...not favoring

---

[66]See *Jamestown School Committee v. Schmidt* (699 F.2d 1 [1983]). The Supreme Court denied certiorari (464 U.S. 851 [1983]).

one religion over another, not favoring religion over nonreligion." These remarks seem to indicate that Breyer will position himself with the moderate bloc of justices on this matter. His first Establishment Clause case on the Court will be *Rosenberger v. Rector* (No. 94-329 [1995]).

As evidenced above, while the doctrine does not enjoy universal acceptance, it does not suffer from chronic disapproval either. At present, only three justices clearly oppose the doctrine, namely Chief Justice Rehnquist and Justices Scalia and Thomas. Three justices--Stevens, Souter, and Breyer--can be fairly characterized as separationists, supporting the spirit of the *Lemon* doctrine. The remaining three are not necessarily opposed to *Lemon* and have been hesitant to overturn the Court's canon in these matters. Justice Kennedy expressly rejected the opportunity to overturn the doctrine in *Weisman* (1992). Justice O'Connor faintly suggested a nondoctrinal, case-by-case approach in *Kiryas Joel* (1994). Justice Ginsburg has not offered overwhelming support or opposition to *Lemon*, yet appears reluctant to overturn an established doctrine in the absence of "a better one."

Apparently, the justices cannot agree on any "better" framework for Establishment Clause analysis than the *Lemon* doctrine. Perhaps that will one of the factors contributing to the doctrine's salvation. Barring any monumental ideological shifts among the present justices, the Court does not appear poised to reject its tripartite mode of analysis.

4. Factors Contributing to Changes in Establishment Clause Jurisprudence

Since the Supreme Court embarked upon its separation of church and state journey almost fifty years ago with its decision in *Everson* (1947), a number of significant changes have taken place in this area of constitutional law. Most important of those changes has been the development of a "purpose-effect-entanglement" yardstick. But any sound analysis of the relationship between church and state must look deeper than merely the Court's pronouncements to discover some of the

salient factors behind the Court's sojourn. Changes in Establishment Clause jurisprudence are also reflective of changes in American religious life and transformations in American politics.

Changes in American Religious Life

Since World War II, a number of significant developments in American religious life have made religion a deeply contested issue. The most notable change has been the pluralization of religion. For the first 150 years of United States history, mainstream religion was defined solely as Protestantism. Religions on the outside--Roman Catholic, Jewish, Amish, Quaker, Jehovah's Witnesses, Seventh Day Adventist, Christian Scientist, Mormon, Eastern Orthodox, and others--were forced to contend with the dominant Protestantism. America's culture, economy, *and* politics all reflected this Protestant hegemony. Indeed, Protestants viewed their American heritage in terms of religion, evidenced by the belief of many early Protestants (and some still today) that America was a profoundly Christian nation with a special destiny. This powerful Protestant religious and cultural establishment was firmly entrenched as a dominant social and political force.[67]

Yet at present, the preponderant influence of Protestantism is diminished and American religion is highly pluralized. The concept of mainstream religion is almost "oxymoronic." Religion and religious groups in the latter half of the twentieth century have "fractionated" (Demerath and Williams, 1987: 81-82). In the past fifty years, Jews, Catholics, and others have assimilated themselves as important components of the religious "melting pot" of American culture.[68] In the 1980s, many privatized religions entered the public square.

As a result of this pluralization, government has been forced to ensure religious liberty through practices of noninvolvement and neutrality. At present, religious pluralism is so broad that almost every government action can be construed as either endorsing or repudiating a religious

---

[67]For a detailed discussion of the changes in American religious life, see Marsden (1990).

[68]The Catholics journey into the "mainstream" is demonstrated by the election of John F. Kennedy as President in 1960.

denomination or religion in general. When religious beliefs are approved, government's message is one of respect. But when religious beliefs do not receive government's "stamp of approval," the message sent is one of disrespect and alienation. Thus, there is an ever-increasing need for legislatures and courts to establish firm boundaries between church and state to promote religious autonomy and prevent denominational preeminence.

Another important factor contributing to change has been the politicization of religion. With the post World War II renewal of spirituality came an increase in the political activity of religious groups from both ideological perspectives. Professor George Marsden (1990: 238-239) noted that liberal religious groups tend to lobby for "love, relationships, peace, justice, inclusiveness, tolerance of minorities, and acceptance of varieties of lifestyles and expressions of sexuality." Various groups of this persuasion have spoken with respect to Vietnam, the War on Poverty, women's rights, civil rights, and the gay and lesbian movement. Conservative religious groups, on the other hand, champion "long-standing Christian...teachings concerning family, sexuality, discipline, and the importance of moral law" (1990: 239). Many of these organizations, especially "mainstream" evangelical Protestant ones (i.e. Moral Majority, Christian Coalition), have "wrapped the flag around the cross" in an effort to advance their theological beliefs through the political process.

Arguably more than at any other time in American history, religious interests have become politicized and religious groups politically active. Religious bodies nominate candidates, campaign, and often determine state and local elections. Religious groups testify before Congress. Religious organizations file *amicus curiae* briefs before the Supreme Court. Religious interests lobby the president. And that is acceptable. The political process must be open to all willing participants and not reserved for only nonreligious ones. Graham Wootton (1985: 22) defined "interest group" as a private, nongovernmental "organization that engages in activity relative to governmental decisions." By that definition, America has multiple religious "interest groups,"

some of which lobby for a relaxation of anti-establishment requirements. But just because these religious organizations have properly exercised their First Amendment rights through a wielding of political sabers, it does not follow that governmental "accommodation" of those concerns is justified. Nonetheless, this changing "socio-political-religious" climate has affected (and will continue to affect) Establishment Clause adjudication.[69]

Changes in American Politics

Changes in American politics have also influenced Establishment Clause adjudication. As a natural part of government's exponential expansion over the last sixty years, more public resources are being doled out to private organizations. Religion wants its share of the "public treasury." Another factor to be considered is the composition of the Court. Conservative justices generally agree that the "wall of separation" is the antithesis of the Establishment Clause and that the *Lemon* doctrine has been unduly hostile to religion. Conversely, liberal justices find the "wall of separation" as the imperative component of the Establishment Clause, and the *Lemon* doctrine as the "guardian" of that "wall." At present, two of the Court members--Chief Justice Rehnquist and Justice Stevens--are over seventy years of age. Rehnquist and Justice O'Connor are also experiencing serious health problems. If the makeup of the Court were to be altered, perhaps so might *Lemon's* standing. However, if those compositional changes are made during Clinton's administration, it would be unlikely that the President would appoint anyone directly opposed to the embattled doctrine.[70]

---

[69]For example, in November of 1994, a large number of "religious interest" candidates were elected to Congress. Almost immediately, a proposal was advanced to reintroduce "voluntary prayer" in public schools, for that was "what the people wanted." This changing "socio-political-religious" climate might force the Court to, once again, address this controversial issue.

[70]On numerous occasions, Clinton, as Governor of Arkansas and President of the United States, has expressed his spirited defense of a strict separation between church and state. Justices Ginsburg and Breyer are, most likely, harbingers of future Clinton appointees.

The influence of the president on Establishment Clause adjudication needs to be mentioned, since appointees to the bench tend to reflect their nominator's judicial predisposition. Reagan, who served as president from 1981-1989, criticized the Court for contributing to the secularization of society and removing religion from public life. He vowed at his presidency's inception that he would appoint only individuals to the bench who favored "accommodation." Unfortunately for Reagan, of his three appointees--Justices O'Connor, Scalia, and Kennedy--only one has followed a truly "accommodationist" course. Bush, upon accepting the Republican presidential nomination in 1988, stressed his respect for "old fashioned common sense," which included that school children be allowed to recite voluntary prayer in public schools (Congressional Quarterly Almanac, 42-43A [1988]). He further expressed his opposition to the Court's decisions in *Engel* (1962) and *Schempp* (1963). With respect to graduation prayers (*Weisman* [1992]), Bush remarked: "I simply do not agree that religion has no place in something like a graduation" (Lawton, 1991: 38).[71] Of his two appointees--Justices Souter and Thomas--only one has taken a perspective similar to his. President Clinton has generally supported the "wall of separation," rejecting his predecessor's proclivities to lower the wall through "accommodation." It can be surmised that any further Court appointee during his administration will have some respect for the "wall." While presidents do not always get what they desire or expect ideologically, their influence on the adjudicatory process is important.

5. The Future of Establishment Clause Jurisprudence

Since the post-World War II surge in religious pluralization and politicization, religion has become firmly entrenched as a matter of political debate. For those fifty years, the Court has

[71] Bush instructed his Solicitor General to intervene as *amicus curiae* and petition the Court to replace the *Lemon* test with something more compatible with his views.

enforced principles of noninvolvement and neutrality, beginning with *Everson* (1947) and evolving into the tripartite examination of *Lemon* (1971). In keeping with Jefferson's "wall of separation," *Lemon* was designed to confront "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'."[72]

Yet the Court has not always been clear or consistent in its interpretation of *Lemon*. *Lemon* has proven to be a "hobgoblin of consistency" (Demerath and Williams, 1987: 86). Not even the most informed of scholars can predict with a high degree of certainty when state action crosses the peril point in regard to relations with religion. Arguably no other constitutional doctrine is as bedeviled as *Lemon*. The Court's Establishment Clause criteria has been, in the eyes of many, a prolific source of trouble. Thus, many feel that the doctrine is destined for revocation.

Their position is not without justification. Recent decisions have not garnered a majority of justices supporting a rigid application of the three criteria. In *Allegheny County* (1989), the Court did not affirm *Lemon*; it merely recognized the doctrine's regular application. Furthermore, the *Allegheny County* majority seemed to refine *Lemon* to a single, basic test of "endorsement." In *Weisman* (1992), the *Lemon* test was not found to be the operative factor. In *Kiryas Joel* (1994), the Court chose to overlook a potential *Lemon* violation, instead couching its rationale in terms of an unconstitutional delegation of power. Indeed, in *Kiryas Joel* (1994), only one member of the Court, Justice Blackmun, advocated a rigorous return to *Lemon*, and he has since retired. In the last five cases that the Court has heard on this matter, *Lemon's* tripartite analysis has only been systematically invoked in two, *Mergens* (1990)--where it did not even command a majority--and *Zobrest* (1993)--where it was loosely applied to permit a peripheral commingling. Those who clamor for *Lemon's* overturning and anxiously await its demise point to the fact that the doctrine

[72]See *Walz* (397 U.S. 664, 668 [1970]). Chief Justice Warren Burger offered these comments as a sort of synthesis of the state of Establishment Clause analysis in 1970. He was incorporating the principles adopted in *Schempp* (1963) with the "entanglement prong."

has few outright supporters on the Court. But this rationale fails to consider other important factors--the regular application of its principles and the notion that the justices can adhere to the "spirit of the *Lemon* doctrine" without being bound to a mechanical application of the test.

Since 1971, the Court has consistently relied on *Lemon's* principles to resolve establishment disputes. In fact, the Court has decided thirty-five Establishment Clause cases since 1947. In only one instance, *Marsh* (1983), has the Court not rested its decisions on the basic principles articulated in *Lemon*. In no cases involving religious activities in public schools has the Court failed to apply the doctrine. In spite of the legal community's vociferous clamoring for *Lemon's* death, the Court has *with great regularity* judged challenged statutes with allegiance to the purpose-effect-entanglement criteria.

Lemon has undergone significant modifications over the past quarter of a century. It has been refined and reformulated by some, rejected by others, but *never* abandoned as a constitutional doctrine. Its refinement is not indicative of its impending doom. *Lemon* was never meant to be a "talismanic rule of law" (Conckle, 1993: 867). As Chief Justice Burger remarked in *Lemon* (403 U.S. 602, 614 [1971]), the line of separation was intentionally designed to be a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." The doctrine was only meant to serve as a guide to adjudication, not as a dictator of results. And *Lemon* does that well. It clearly recognizes Establishment Clause jurisprudence as a matter of degree--an exercise in judgment--while at the same time providing a foundation for analysis. The Court remains free to stiffen or relax the dictates of *Lemon* depending upon specific contexts, thus giving the justices the necessary discretion in their decision-making.

Whether the Court mechanically recites the *Lemon* test in its analysis is irrelevant to the viability of the doctrine. The important aspect is whether the justices adhere to the principles of the doctrine. Indeed, while the justices have not systematically applied the three distinct formulas of *Lemon* in their recent cases, they have scrupulously examined the purpose, effect (endorsement),

and resulting relationship of challenged statutes. They simply have chosen not to do so through a rigid application of a tidy formula. In spite of superficial signs that *Lemon* is not being followed precisely, its spirit remains. Simply stated, the *Lemon* doctrine (and perhaps even Establishment Clause adjudication) does not lend itself to "mechanical jurisprudence," but serves its intended function: prohibiting government from favoring one religion over another or religion over nonreligion (the animating purpose and meaning of the First Amendment).

The *Lemon* doctrine has lead to disparate results. It has been applied somewhat inconsistently. It is somewhat unpopular with the justices. Yet no new standard has proved so compelling as to merit the support of a majority of justices. The Court has dismissed a doctrine based on "nonpreferentialism," that is, government can promote religion so long as it does so neutrally.[73] An "endorsement" test advocated amending the salient inquiry to "whether government's actual purpose is to endorse or disapprove of religion." This test has received favorable remarks from a number of justices, yet, as noted by one constitutional scholar (Massey, 1993: 111), is merely an "opposite rhetorical translation[]" of the effects test. An "accommodationist" perspective has suggested reinterpreting the Establishment Clause to permit a general acknowledgment of the role of religion. A majority of the justices have soundly rejected this alternative. Justice Kennedy proposed a "flexible accommodation" that permitted endorsement of religion while prohibiting only those actions that furthered religious interests through "coercive powers" of government. Not only has the Court rejected this as an option, but its author has somewhat retreated from this stance. A test based on "traditionally accepted practices" supported by Justice Scalia has also been rebuffed by the Court.

In spite of the fact that many of the justices are on record as supporting greater "accommodation," *Lemon* has not been interred (Mykkeltvedt, 1993: 908). Furthermore, it seems

---

[73]For a rejection of this philosophy, see *Everson* (330 U.S. 1, 15 [1947]), *McCollum* (330 U.S. 203, 211 [1948]), and *Schempp* (374 U.S. 203, 216-217 [1963]).

unlikely that *Lemon* will be interred, for there is little if any general agreement on a new standard or principle. In future cases, the Court may continue to refine the doctrine, but chances of a dismissal appear remote. The Court will continue to look at "secular purpose." Legislators must continue to pursue a course of neutrality. The justices will continue to look at "effects," whether it be in the form of "advancement," "entanglement," "coercion," or, more likely, a combination of the three. Finally, efforts that commingle the two separate and important institutions will continue to present constitutional problems for the Court.

Decisions under the Establishment Clause will contradict some religious beliefs and affirm others. The *Lemon* doctrine cannot resolve that dilemma. Perhaps nothing can, for matters of religious conscience are at the core of man's conscience. The underlying themes of *Lemon* appear to have survived the conservative sledgehammer of the 1980s and retained their vigor and vitality. *Lemon* has been carefully developed, refined, rebutted and rejected by some, yet presses on....from case to case. Best summarized by Esbeck (1990: 548), the Court has demonstrated its reluctance to abandon *Lemon* because it is "better to live with the devil we do know, than the devil we don't."

But what about the future of decision-making with regard to the Establishment Clause? Our case analysis offers some looming trends, the first of which has been previously addressed--*Lemon* will retain its vitality, even if in an altered form. Second, a majority of justices appear to be steering in the direction of governmental neutrality towards religion.[74] As Choper (1993: 363) indicated, the Court is pursuing a "nonpartisan course between religious and nonreligious institutions and between religious and nonreligious individuals." Finally, with regard to government's acknowledgment of religion as a social phenomenon, the justices appear headed toward a course of "marginal accommodation."[75] The members have somewhat backed away from

[74]Examples of this "neutrality" include *Witters* (1986), *Mergens* (1990), *Lamb's Chapel* (1993), and *Zobrest* (1993). In each of these cases, the Court's rationale focused on the "neutrality" of the challenged statutes.

[75]Examples of this "marginal accommodation" include *Marsh* (1983), *Lynch* (1984), and *Allegheny County* (1989). In each of these cases, the Court upheld traditional practices that did not violate the Establishment Clause.

the strict separationist position. That is, they have acquiesced to the principle that strict separation between religion and politics is not required by the Establishment Clause.

Some general principles with regard to the relationship between church and state have developed over the last twenty-five years. With regard to government aid to religious schools, assistance is permissible if given directly to children or parents who make private, individual choices to send their children to parochial schools.[76] The assistance is unconstitutional if given directly to the private school, or any government benefits are extended under the "imprimatur of state approval."[77] As for religion in public schools, the Court's approach has been one of neutral "accommodation" of religion. So long as a challenged statute does not provide religion with any special privileges, government will "accommodate" religious needs.[78] Practices that provide special advantages to religion or a fostering to religion are impermissible.[79] With respect to religion in the public domain, the Court has taken the approach of permitting peripheral acknowledgments of religion.[80]

The *Lemon* doctrine has withstood efforts aimed at its destruction. As noted by Justice Scalia in *Lamb's Chapel* (124 L.Ed.2d 352, 365 [1992]): "Like some ghoul in a late night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause Jurisprudence." But Scalia offers two simple yet profound reasons for *Lemon's* immortality. One is judicial discretion. When the justices want to strike down a practice that the doctrine forbids, they invoke the doctrine. Conversely, when the Court desires

---

[76]See *Witters* (1986) and *Zobrest* (1993).

[77]See *Nyquist* (1973), *Meek* (1975), *Wolman* (1977), *Grand Rapids* (1985), and *Aguilar* (1985).

[78]See *Widmar* (1981) and *Mergens* (1990).

[79]See *Weisman* (1992) and *Kiryas Joel* (1994).

[80]See *Lynch* (1984), *Allegheny County* (1989) and *Lamb's Chapel* (1992). *Marsh* (1984) is also an example, though it cannot be considered a "peripheral" acknowledgment of religion.

to uphold a practice that the doctrine prohibits, it ignores it. The second reason for *Lemon's* multiple lives is the justices' inabilities to come to any agreement on an acceptable standard to guide adjudication in this sensitive area.

The *Lemon* doctrine is too vague to promote consistency or provide stability--the traditionally-viewed responsibilities of a "doctrine." But these shortcomings were acknowledged as far back as the origin of the doctrine. In *Lemon* (403 U.S. 602, 612 [1971]) the Court recognized that no "bright line" guidance would be afforded by this test. Rather, the justices had only generally agreed on the applicable principles and the framework for analysis, recognizing its inability to perceive with invariable clarity the "lines of demarcation in this extraordinarily sensitive area of constitutional law." In this area, doctrinal elegance may constitute a pipe dream. Former Justice Byron White aptly summarized *Lemon's* contribution to Establishment Clause jurisprudence in *Regan* (444 U.S. 646, 662 [1980]) when he remarked that the doctrine "sacrifice[d] clarity for flexibility." Perhaps that is why the doctrine has lasted so long. Perhaps that is why the doctrine survives.

6. Conclusions

Justice Benjamin Cardozo once remarked: "[P]recedents have so covered the ground that they fix the point of departure from which the labor of the judge begins" (1921: 20). Presumably, precedent promotes consistency and predictability. If a consistent body of law is maintained, individuals can predict, with some degree of certainty, those actions that fall within the law's boundaries as well as those actions that violate the law. Precedent also provides stability.[81] Similar cases should be decided alike. The accumulation of precedents often leads to the

[81]Ostensibly, precedent also promotes judicial efficiency and limits the impact that a single judge or justice can have on the decision-making process.

formulation of a doctrine. Thus, instead of drawing their rationale from a specific case, the justices can rely on some basic postulates derived from a series of cases.[82] Throughout American constitutional history, the Court has often articulated doctrines by which to guide future cases and controversies.

These constitutional doctrines are important. But they do not solve all judicial dilemmas. They cannot always accomplish the stated objectives of certainty, clarity and stability; indeed, these may be unrealistic expectations. As Justice Oliver Wendell Holmes remarked: "The truth is, that the law is always approaching, and never reaching, consistency" (1881: 32).

Constitutional doctrines are important. But they must be flexible. Doctrine should guide jurisprudence, not necessarily restrict its development. Rigid doctrines provide strict directives, but leave the justices with little if any room to maneuver. When such occurs, the doctrine alone becomes the driving force in the adjudicatory process. Conversely, judicial chaos ensues when the justices operate unrestrained by past decisions and general principles. There must be a balance between the simple mechanical application of doctrine and the absence of doctrine.

Constitutional doctrines are important. But in spite of appearances, they do not dictate judicial results. Doctrine is but one of many factors taken into consideration by the justices; it is not a mechanical formula of adherence to an agreed-upon principle. Justices must also consider and allot appropriate weight to their interpretation of the Constitution, social and institutional factors, judicial independence, deference to legislatures, and other democratic ideals. The drafters of the First Amendment were intelligent enough to write in generalities, so that the Court would be free to interpret its language in light of constantly changing perceptions and conditions. The law cannot be reduced to a tidy formula or neatly packaged set of criteria. That criteria can only be a starting point--a foundation for sound analysis--and not a concluding one. Indeed, the Constitution

[82]Such was the case with the *Lemon* doctrine. The *Lemon* Court incorporated two basic principles developed in *Schempp* (1963) with one from *Walz* (1971). The result was a three-pronged doctrine.

may be *timeless*, but politics and judicial interpretation are extremely *time sensitive*. As Justice Holmes remarked in *The Common Law* (1881: 1): "The life of the law has not been logic: it has been experience."

Constitutional doctrines are doctrines only in name. "Guidelines" may be a more accurate description of what "doctrines" provide.

BIBLIOGRAPHY

BIBLIOGRAPHY

Abraham, Henry J. 1988. *Freedom and the Court: Civil Rights and Liberties in the United States*, 5th ed. New York: Oxford University Press.

Abraham, Henry J. 1986. *The Judicial Process*, 5th ed. New York: Oxford University Press.

Abraham, Henry J. 1987. *The Judiciary: The Supreme Court in the Governmental Process*, 7th ed. Boston: Allyn and Bacon.

Adams, John. 1853. *The Life and Works of John Adams*, Vol. IX. Boston: Little, Brown, and Co.

Alley, Robert S. 1988. *The Supreme Court and Church and State*. New York: Oxford University Press.

Allport, Gordon, W. 1962. *The Individual and His Religion*, 2d ed. New York: Macmillan.

Bainton, Roland H. 1958. *The Travail of Religious Liberty*. New York: Harper Torchbook.

Barnum, David G. 1993. *The Supreme Court and American Democracy*. New York: St. Martin's Press.

Beard, Charles A. 1944. *Basic History of the United States*. New York: Garden City Books.

Beard, Charles A. and Mary R. Beard. 1933. *The Rise of American Civilization*. New York: Macmillan Co.

Berns, Walter. 1976. *The First Amendment and the Future of American Democracy*. New York: Basic Books.

Besse, Joseph, ed. 1974. *A Collection of the Works of William Penn*. New York: AMS Press.

Bickel, Alexander. 1962 *The Least Dangerous Branch: The Supreme Court and the Bar of Politics*. Indianapolis: Bobbs-Merrill.

Bickel, Alexander. 1975. *The Morality of Consent*. New Haven: Yale University Press.

Bickel, Alexander M. 1955. "The Original Understanding and the Segregation Decision," *Harvard Law Review*, 69: 1-65.

Bickel, Alexander. 1970. *The Supreme Court and the Idea of Progress*, 1st ed. New York: Harper & Row.

Black, Charles L., Jr. 1960. "The Lawfulness of the Segregation Decision," *Yale Law Journal*, 69: 421-430.

Bollinger, Lee. 1986. *The Tolerant Society: Freedom of Speech and Extremist Speech in America*. New York: Oxford University Press.

Bork, Robert H. 1990. *The Tempting of America*. New York: The Free Press.

Brown, Robert Clarke. 1976. "State Action Analysis of Tax Expenditures," *Harvard Civil Rights-Civil Liberties Law Review*, 11: 97-127.

Burke, Carroll. 1965. *Religion Under the State Constitutions*. Brooklyn, NY: Central Book Co.

Burke, William M. and David J. Reber. 1973. "State Action, Congressional Power and Creditor's Rights: An Essay on the Fourteenth Amendment," *Southern California Law Review*, 46: 1003-1114.

Burnham, Alexander. 1962 "Court's Decision Stirs Controversy," *New York Times*, June 27, 1962, at A1, 20.

Butts, R. Freeman. 1974. *The American Tradition in Religion and Education*. Boston: Beacon Press.

Calabrese, Frank. 1990. "Equal Access Upheld as the Lemon Test Sours," *Depaul Law Review*, 39: 1281-1318.

Cardozo, Benjamin N. 1921. *The Nature of the Judicial Process*. New Haven: Yale University Press.

Carter, Lief H. 1985. *Contemporary Constitutional Lawmaking: The Supreme Court and the Art of Politics*. New York: Pergamon Press.

Carter, Steven. 1993. *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*. New York: Basic Books.

Chafee, Zechariah, Jr. 1941. *Free Speech in the United States*. Cambridge: Harvard University Press.

Choper, Jesse H. 1980. "The Religion Clauses of the First Amendment: Reconciling the Conflict," *University of Pittsburgh Law Review*, 41: 673-701.

Choper, Jesse H. 1963. "Religion in Public Schools: A Proposed Constitutional Standard," *Minnesota Law Review*, 47: 329-416.

Choper, Jesse H. 1993. "Separation of Church and State: 'New' Directions by the 'New' Supreme Court," *Journal of Church and State*, 34: 363-375.

Choper, Jesse H. 1979. "Thoughts on State Action: The "Government Function" and "Power Theory" Approaches, *Washington University Law Quarterly*, 1979: 757-782.

Clinchy, Everett R. 1934. *All in the Name of God*. New York: John Day & Co.

Cobb, Sanford H. 1968. *The Rise of Religious Liberty in America*. New York: Macmillan.

Cochran, Clarke E. 1990. *Religion in Public Life*. New York: Rutledge.

Commager, Henry S. 1951. *Living Ideas in America*. New York: Harper and Brothers.

Conckle, Daniel O. 1993. "Lemon Lives," *Case Western Reserve Law Review*, 43: 865-882.

Congressional Quarterly Almanac. 1988. Washington D.C.: Congressional Quarterly Inquiry.

Cord, Robert L. 1982. *Separation of Church and State: Historical Fact and Current Fiction*. New York: Lambeth Press.

Cover, Robert M. 1982. "The Origins of Judicial Activism in the Protection of Minorities," *Yale Law Journal*, 91: 1287-1316.

Cox, Archibald. 1976. *The Role of Supreme Court in American Government*. New York: Oxford University Press.

Cox, Kenneth Mitchell. 1984. "The Lemon Test Soured: The Supreme Court's New Establishment Clause Analysis," *Vanderbilt Law Review*, 37: 1175-1203.

Curry, Thomas J. 1986. *The First Freedoms: Church and State in America to the Passage of the First Amendment*. New York: Macmillan.

Cushman, Robert F. 1976. *Cases in Civil Liberties*, 2d ed. Englewood Cliffs, NJ: Prentice-Hall, Inc.

Deibel, Mary. 1994. "Special religious school district ruled unconstitutional by Supreme Court," *Knoxville News-Sentinel*, June 29, 1994, A7.

Demerath III, N.J., and Rhys H. Williams. 1987. "A Mythical Past and Uncertain Future," *Church-State Relations: Tensions and Transitions*. Eds. Thomas Robbins and Roland Robertson. New Brunswick: Transaction Books.

Dugan, George. 1963. "Churches Divide with Most in Favor," *New York Times*, June 18, 1963, at A1, 29.

Duval, Benjamin S., Jr. 1970. "The Constitutionality of State Aid to Nonpublic Elementary and Secondary Schools," *University of Illinois Law Forum*, 1970: 342-378.

Dworkin, R. M. 1986. *Law's Empire*. Cambridge: Belknap Press.

Eckenrode, Hamilton James. 1910. *Separation of Church and State in Virginia*. Richmond: Department of Archives and History, Virginia State Library.

Ely, John H. 1980. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge: Harvard University Press.

Ely, John Hart. 1975. "Flag Desecration," *Harvard Law Review*, 88: 1482-1508.

Emerson, Thomas I. 1970. *The System of Freedom of Expression*. New York: Random House.

Esbeck, Carl H. 1990. "The Lemon Test: Should it be Retained, Reformulated, or Rejected?," *Notre Dame Journal of Law*, 4: 513-548.

Fallon, Richard H., Jr. 1984. "Of Justiciability, Remedies and Public Law Litigation: Notes on the Jurispurdence of Lyons," *New York University Law Review*, 59: 1-75.

Fairman, Charles. 1971. *Reconstruction and Reunion*. New York: Macmillan.

Farber, Daniel A. 1980. "Civilizing Public Discourse," *Duke Law Journal*, 1980: 283-303.

Fellman, David. 1965. *Religion in American Public Law*. Boston: Boston University Press.

Ferguson, E. James. 1975. *Confederation, Constitution, and the Early National Period, 1781-1815*. Northbrook, IL: AHM Publishers.

Fichter, Joseph. 1958. *Parochial School: A Sociological Study*. Garden City, NY: Anchor Books

Fischer, David Hackett. 1970. *Historian's Fallacies: Toward a Logic of Historical Thought*. New York: Harper & Row.

Floyd, C. Douglas. 1985. "The Justiciability Decisions of the Burger Court," *Notre Dame Law Review*, 60: 862-946.

Ford, Phil F. 1904. *The Works of Thomas Jefferson*, Vol. II. New York: G.P. Putnam's Sons.

Franklin, John Hope. 1980. *From Slavery to Freedom: A History of Negro Americans*. New York: Knopf.

Frazier, Edward Franklin. 1949. *The Negro in the United States*. New York: Macmillan Co.

Freund, Paul A. 1949. *On Understanding the Supreme Court*. Boston: Little, Brown, and Co.

Gaffney, Edward M. 1980. "Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy," *St. Louis University Law Journal*, 24: 205-236.

Gales, Joseph, ed. 1834. *Annals of Congress*. Washington, DC: Gales and Seaton.

Gausted, Edwin Scott, ed. 1968. *Religious Issues in American History*. New York: Harper Forum Books.

Gey, Peter. 1966. *The Enlightment: An Interpretation*. New York: Knopf.

Gianella, Donald A. 1968. "Religious Liberty, Non-Establishment and Doctrinal Development: Part II, the Non-Establishment Principle, " *Harvard Law Review*, 81: 513-590.

Greene, Evarts B. 1947. *Church and State*. Indianapolis: National Foundation Press.

Greenhouse, Linda. 1991. "Supreme Court to Take Fresh Look at Disputed Church-State Boundary," *New York Times*, March 19, 1991, at A13.

Guliuzza, Frank, III. 1990. "Beyond Incoherence: Making Sense of the Church-State Debate." *Dissertation*. University of Notre Dame.

Gunn, Thomas Jeremy. 1992. "A Standard for Repair: The Establishment of Religion Clause of the United States Constitution." *Dissertation*. Harvard University.

Gunther, Gerald. 1975. "Learned Hand and the Origins of Modern First Amendment Doctrine," *Stanford Law Review*, 27: 719-773.

Gunther, Gerald. 1964. "The Subtle Vices of the 'Passive Virtues': A Comment on Principle and Expediency in Judicial Review," *Columbia Law Review*, 64: 1-25.

Gunther, Gerald. 1972. "The Supreme Court: 1971 Term; In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," *Harvard Law Review*, 86: 1-48.

Hall, Margaret E., ed. 1947. *Selected Writings of Benjamin Nathan Cardozo*. New York: Fallon.

Hand, Learned. 1953. *The Spirit of Liberty: Papers and Addresses*. New York: Knopf.

Harris, Robert J. 1960. *The Quest for Equality: The Constitution, Congress and the Supreme Court*. Baton Rouge: Louisiana State University Press.

Hart, H. L. A. 1961. *The Concept of Law*. New York: Oxford University Press.

Healy, Robert M. 1962. *Jefferson on Religion in Public Education*. New Haven: Yale University Press.

Hechinger, Fred M. 1963. "Decision will Require Change in Majority of State Systems," *New York Times*, June 18, 1963, at A1, 27.

Hersman, Nancy. 1985. "Has the Lemon Test Soured?," *Loyola of Los Angeles Law Review*, 19: 133-177.

Holmes, Oliver Wendell, Jr. 1881. *The Common Law*. Boston: Little, Brown, and Co.

Howe, Mark DeWolf. 1965. *The Garden and the Wilderness: Religion and Government in American Cnstitutional History*. Chicago: University of Chicago Press.

Howe, Mark DeWolf. 1967. *The Garden and the Wilderness: Religion and Government in American Constitutional History*. Chicago: University of Chicago Press.

Hughes, Charles Evans. 1928. *The Supreme Court of the United States*. New York: Columbia University Press.

Humphrey, Edward Frank. 1924. *Nationalism and Religion in America, 1774-1789*. Boston: Chipman Law.

Ignagni, Joseph. 1990. "Explaining and Predicting Supreme Court Decision-Making: The Establishment Clause Cases, 1970-1986." *Dissertation*. Michigan State University.

James, Bernard. 1994. "High Court Takes a Confusing Path," *The National Law Journal*, August 15,1994, C4-C5.

Janocski, Richard. 1989. "Beyond the Plastic Reindeer Rule: The Curious Case of County of Allegheny v. ACLU," *Duquesne Law Review*, 28: 445-487.

Jensen, Merrill. 1964. *The Making of the American Constitution*. Princeton, NJ: Van Nostrand.

Kalvin, Harry, Jr. 1988. *A Worthy Tradition: Freedom of Speech in America*. New York: Harper and Row.

Katz, Wilbur G. 1964. *Religion and the American Constitution*. Evanston, IL: Northwestern University Press.

Kauper, Paul G. 1964. *Religion and the Constitution*. Baton Rouge: Louisiana State University Press.

Kendall, Willmore and George W. Carey. 1970. *The Basic Symbols of the American Political Tradition*. Baton Rouge: Louisiana State University Press.

Kluger, Richard. 1975. *Simple Justice*. New York: Vintage Books.

Koch, Adrienne. 1943. *The Philosophy of Thomas Jefferson*. Gloucester, MA: Columbia University Press.

Konvitz, Milton R. 1957. *Fundamental Liberties of a Free People*. Ithaca, NY: Cornell University Press.

Kurland, Phillip B. 1962. *Religion and the Law*. Chicago: Aldine.

Lawson, Kim A. "Bush Affirms Role in Religion in Public Life," *Christianity Today*, April 29, 1991, at 38.

Laycock, Douglas. 1990. "Formal, Substantive, and Disaggregated Neutrality Toward Religion," *Depaul Law Review*, 39: 993-1018.

Lee, Francis Graham. 1986. *Wall of Controversy: Church-State Conflict in America*. Malabar, FL: Robert Kreiger Publishing Co.

Levi, Edward H. 1948. *An Introduction to Legal Reasoning*. Chicago: University of Chicago Press.

Levy, Leonard. 1986. *The Establishment Clause: Religion and the First Amendment*. New York: Macmillan.

Lewis, Anthony M. 1962. "Both Houses Get Bill to Lift Ban on School Prayer," *New York Times*, June 27, 1962, at A1, 20.

Lewis, Thomas P. 1961. "Burton v. Wilmington Parking Authority - A Case Without Precedent," *Columbia Law Review*, 61: 1458-1467.

Locke, John. 1955. *A Letter Concerning Toleration*. New York: Liberal Arts Press.

Lockhart, William B., Yale Kamisar, Jesse R. Choper, and Steven H. Shiffrin. 1986. *The American Constitution*, 6th ed. St. Paul: West Publishing Co.

Lofgren, Charles A. 1987. *The Plessy Case: A Legal-Historical Approach*. New York: Oxford University Press.

McConnell, Michael. 1985. "Accommodation of Religion," *Supreme Court Review*, 1985: 1-59.

Maddox, Robert L. 1987. *Separation of Church and State: Guarantor of Religious Freedom*. New York: Crossroads.

Madison, James. 1937. "The Federalist #51," *The Federalist Papers*. Chicago: Great Books Foundation.

Main, Jackson Turner. 1961. *The Anti-Federalists: Critics of the Constitution, 1781-1788.* Williamsburg, VA: University of North Carolina Press.

Malbin, Michael J. 1981. *Religion and Politics: The Intentions of the Authors of the First Amendment.* Washington, DC: American Enterprise Institute for Public Policy Research.

Maltz, Earl M. 1980. "Some Thoughts on the Death of Stare Decisis in Constitutional Law," *Wisconsin Law Review*, 1980: 467-496.

Mandel, William Steven. 1990. "Serpentine Walls: Courts, Congress, and Church-State Policy Making." *Dissertation.* University of Virginia.

Marsden, George M. 1990. R*eligion and American Culture.* San Diego: Harcourt Brace Jovanovich.

Massey, Robert Ross. 1993. "The Lemon Test: Reverence or Reality?," *San Diego Justice Journal*, 1: 105-122.

Mauro, Tony. 1994. "Court rules against Jewish school district," *USA Today*, June 29, 1994, at A1.

Mecklin Joseph. 1934. *The Story of American Dissent.* New York: Harcourt, Brace, & Co.

Meyer, Alfred W. 1951. "The Blaine Amendment and the Bill of Rights, " *Harvard Law Review*, 64: 939-945.

Meyer, Jacob C. 1930. *Church and State in Massachusetts from 1740 to 1833.* Cleveland: Western Reserve University.

Miller, Charles Allen. 1969. *The Supreme Court and the Uses of History.* Cambridge: Harvard University Press.

Miller, Glenn. 1988. "Church and State," *The Encyclopedia of the American Religious Experience.* New York: Charles Scribner's Sons, 1369-1391.

Monaghan, Henry Paul. 1988. "Stare Decisis and Constitutional Adjudication," *Columbia Law Review*, 88: 723-773.

Mooney, Christopher F. 1990. *Boundaries Dimly Perceived.* Notre Dame, IN: University of Notre Dame Press.

Morgan, Edmund S. 1967. *Roger Williams: The Church and State.* New York: Harcourt, Brace, and World.

Morgan, Richard E. 1967. "Backs to the Wall: A Study in the Contemporary Politics of Church and State." *Dissertation.* Columbia University.

Morgan, Richard E. 1968. *The Politics of Religious Conflict*. New York: Pegasus.

Morgan, Richard E. 1972. *The Supreme Court and Religion*. New York: The Free Press.

Morokuma, Shinji, Ellen Nelson, and Eric Newton. 1993. *Religious Liberty in America: Crossroads or Crisis?* Arlington, VA: The Freedom Forum.

Murphy, Walter F. 1964. *Elements of Judicial Strategy*. Chicago: University of Chicago Press.

Murphy, Walter F. and C. Herman Pritchett. 1986. *Courts, Judges, and Politics: An Introduction to the Judicial Process*., 4th ed. New York: Random House.

Mykkeltvedt, Roald Y. 1993. "Souring on Lemon: The Supreme Court's Establishment Clause Doctrine in Transistion," *Mercer Law Review*, 44: 881-910.

Myrdal, Gunnar. 1944. *An American Dilemma: The Negro Problem in Modern Democracy*, 9th ed. New York: Harper.

Nerken, Ira. 1977. "A New Deal for Fourteenth Amendment Rights Protection: Challenging the Doctrinal Basis of the Civil Rights Cases and State Action Theory," *Harvard Civil Rights-Civil Liberties Law Review*, 12: 297-366.

Nozick, Robert. 1974. *Anarchy, State and Utopia*. New York: Basic Books.

Oaks, Dalllin H., ed. 1963. *The Wall Between Church and State*. Chicago: University of Chicago Press.

Olshan, David. 1989. "ACLU v. Allegheny County: No Room at the Inn, Courthouse, or City Hall," *Journal of Contemporary Law*, 15: 590-612.

Padover, Saul K. 1965. *Thomas Jefferson and the Foundations of American Freedom*. New York: Van Nostrand.

Paine, Thomas. 1992. *Common Sense*. New York: Classics of Liberty.

Paulsen, Michael Stokes. 1993. "Lemon is Dead," *Case Western Reserve Law Review*, 43: 795-863.

Pfeffer, Leo. 1953. *Church, State, and Freedom*. Boston: Beacon Press.

Pfeffer, Leo. 1956. *The Liberties of America*. Boston: Beacon Press.

Phillips, Jewell Cass, Henry J. Abraham, and Cortez A. M. Ewing. 1971. *Essentials of American National Government*, 3rd ed. New York: American Book Co.

Polenberg, Richard. 1987. *Fighting Faiths: The Abrams Case, the Supreme Court and Free Speech*. New York: Viking Press.

Post, C. Gordon. 1936. *The Supreme Court and Political Questions*. Baltimore: Johns Hopkins University Press.

Pound, Roscoe. 1954. *An Introduction to the Philosophy of Law*. New Haven: Yale University Press.

Pound, Roscoe. 1959. *Jurisprudence*, 5 Vols. St. Paul: West Publishing Co.

Pound, Roscoe. 1908. "Mechanical Jurisprudence," *Columbia Law Review*, 8: 605-623.

Pound, Roscoe. 1907. "The Need of a Sociological Jurisprudence," *Green Bag*, 19: 607-615.

Pritchett, C. Herman. 1971. *The American Constitutional System.*, 3d ed. New York: McGraw-Hill Book Company.

Pritchett, C. Herman. 1984. *Constitutional Civil Liberties*. Englewood Cliffs, NJ: Prentice-Hall Inc.

Pritchett, C. Herman. 1948. *The Roosevelt Years*. New York: Macmillan.

Radcliffe, James E. 1978. *The Case-or-Controversy Provision*. University Park, PA: University of Pennsylvania Press.

Redish, Martin H. 1982. "The Value of Free Speech," *University of Pennsylvania Law Review*, 130: 591-645.

Roche, John P. 1964. *Shadow and Substance*. New York: Macmillan.

Ruffini, Francesco. 1912. *Religious Liberty*. London: Williams and Norgate.

Rutzick, Mark C. 1974. "Offensive Language and the Evolution of First Amendment Protection," *Harvard Civil Rights-Civil Liberties Law Review*, 9: 1-28.

Schubert, Glendon. 1965. *The Judicial Mind*. Evanston, IL: Northwestern University Press.

Semple, Robert Baylor. 1810. *History of the Rise and Progress of the Baptists in Virginia*. Published by the author.

Shapiro, David L. 1985. "Jurisdiction and Discretion," *New York University Law Review*, 60: 543-589.

Shiffrin, Steven. 1990. *The First Amendment: Democracy and Romance*. Cambridge: Harvard University Press.

Simson, Gary J. 1987. "The Establishment Clause in the Supreme Court: Rethinking the Court's Approach," *Cornell Law Review*, 72: 905-935.

Smith, Christopher E. 1993. *Courts, Politics, and the Judicial Process*. Chicago: Nelson-Hall.

Smith, Elywn A. 1972. *Religious Liberty in the United States*. Philadelphia: Fortress Press.

Smith, James M. 1956. *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties*. Ithaca, NY: Cornell University Press.

Sorauf, Frank J. 1976. *The Wall of Separation: The Constitutional Politics of Church and State*. Princeton: Princton University Press.

Spann, Girardeau. 1983. "Expository Justice," *University of Pennsylvania Law Review*, 131: 585-661.

Sprecher, Robert A. 1945. "The Development of the Doctrine of Stare Decisis and the Extent to Which it Should be Applied," *American Bar Association Journal*, 31: 174-196.

Stedman, Murray S. 1964. *Religion and Politics in America*. New York: Harcourt, Brace & World.

Stephens, Otis H., Jr. and Terry Bowen. 1991. "State Action and the Rehnquist Court," Presented at the American Political Science Association, Washington D.C., August 31, 1991.

Stephens, Otis H., Jr. and John M. Scheb II. 1993. *American Constitutional Law*. Minneapolis/St. Paul: West Publishing Co.

Stokes, Anson Phelps. 1950. *Church and State in the United States*. New York: Harper & Brothers.

Stokes, Anson Phelps and Leo Pfeffer. 1964. *Church and State in the United States*. New York: Harper and Row.

Strong, Frank R. 1969. "Fifty Years of Clear and Present Danger: From Schenck to Brandenburg --And Beyond," *Supreme Court Review*, 1969: 41-80.

Strum, Philippa. 1974. *The Supreme Court and "Political Questions."* Tuscaloosa: University of Alabama Press.

Stumpf, Harry P. 1988. *American Judicial Politics*. San Diego: Harcourt Brace Jovanovich.

Sutherland, Arthur E. 1965. *The Church Shall be Free*. Charlottesville: University Press of Virginia.

Swancara, Frank. 1950. *The Separation of Religion and Government: The First Amendment, Madison's Intent, and the McCollum Decision*. New York: Truth Seeker Company.

Thorpe, Francis Newton. 1909. *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws*. Washington, DC: Government Printing Office.

Toqueville, Alexis de. 1945. *Democracy in America*, Vols. 1 & 2. New York: Random House.

Torpey, William George. 1948. *Judicial Doctrines of Religious Rights in America*. Chapel Hill: University of North Carolina Press.

Tribe, Laurence H. 1988. *American Constitutional Law*, 2d ed. Mineola, NY: The Foundation Press.

Tribe, Laurence H. and Michael C. Dorf. 1991. *On Reading the Constitution*. Cambridge: Harvard University Press.

Tussman, Joseph. 1962. *The Supreme Court on Church and State*. New York: Oxford University Press.

Ungs, Thomas D. 1993. "Pluralism and Religion in Contemporary America: Strains in a Traditional Partnership," *Southeastern Political Review*, 21: 445-470.

United States Senate, 101st Congress, 2d Session, Nomination of David H. Souter to be an Associate Justice of the U.S. Supreme Court (Executive Report 101-32), Washington: Government Printing Office, 1990.

United States Senate, 102d Congress, 1st Session, Nomination of Clarence Thomas to be an Associate Justice of the U.S. Supreme Court (Executive Report 102-15), Washington: Government Printing Office, 1991.

United States Senate, 103d Congress, 1st Session, Nomination of Ruth Bader Ginsburg to be an Associate Justice of the U.S. Supreme Court (Executive Report 103-6), Washington: Government Printing Office, 1993.

United States Senate, 103d Congress, 2d Session, Nomination of Stephen G. Breyer to be an Associate Justice of the U.S. Supreme Court (Executive Report 103-31), Washington: Government Printing Office, 1994.

Van Alstyne, William W. 1965. "Mr. Justice Black, Constitutional Review, and the Talisman of State Action," *Duke Law Journal*, 1965: 219-247.

Wade, John W. 1950. "Tort Liability for Abusive and Insulting Language," *Vanderbilt Law Review*, 4: 63-115.

Wechsler, Herbert. 1959. Toward Neutral Principles of Constitutional Law," *Harvard Law Review*, 73: 1-35.

Wilkinson III, J. Harvie. 1975. "The Supreme Court, the Equal Protection Clause and the Three Faces of Constitutional Equality," *Virginia Law Review*, 61: 945-1018.

Williams, Jerre S. 1963. "The Twilight of State Action," *Texas Law Review*, 41: 347-390.

Woodward, C. Vann. 1968. *The Strange Career of Jim Crow*. New York: Oxford University Press.

Wootton, Graham. 1985. *Interest Groups: Policy and Politics in America*. Englewood Cliffs, N.J.: Prentice Hall.

VITA

Richard A. Glenn was born in Burlingame, California on December 23, 1968. He is the son of Reverend C. Kenneth and Beth Glenn. He has one sister, Stephanie, and one brother, Andy. His parents were foreign missionaries with the Southern Baptist Convention. He attended elementary and secondary schools in West Germany, Liberia, Iran, Norway, and the United States. Richard graduated from Arapahoe High School in Littleton, Colorado in June, 1986. The following August he entered Carson-Newman College in Jefferson City, Tennessee and in May, 1990 received the degree of Bachelor of Arts in English, with an emphasis in Literature. Richard entered the University of Tennessee in August, 1990 and obtained the Master of Arts degree in Political Science in December, 1991. In May, 1995, he earned the Doctor of Philosophy degree in Political Science from the University of Tennessee.

He is married to the former Lorena Stitts of Harrison, Tennessee.