Notre Dame Law Review

Volume 60 | Issue 5 Article 6

1-1-1985

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I. Prologue: From *Everson* to *Allen*

The opening words of the Bill of Rights—"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof"[1]—have provided a constitutional framework for this country's unique blending of religious freedom, diversity, and harmony. Although separation of church and state, embodied in the first amendment's establishment clause, is deeply

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1 U.S. CONST. amend. I.

rooted in American history, Supreme Court involvement in this area is of comparatively recent origin, dating from the *Everson v. Board of Education*[2] case in 1947.

A brief review of the major Supreme Court decisions prior to 1969 is in order. Perhaps it is not surprising that all of them arose in the school context: adherents of religious education either sought financial help for children in religious schools, or sought to use the public schools to further religious practices or the teaching of religion.

Everson involved a New Jersey statute that permitted a local board of education to reimburse parents for the costs of bus transportation to Catholic parochial schools. Both the majority and the dissent in *Everson* drew heavily on the events in Virginia in 1784, which had led to James Madison's famous Memorial and Remonstrance Against Religious Assessments, written in 1785 to protest a proposed bill that would have required each taxpayer to pay an amount to a church of the taxpayer's own choosing.[3] There were no public schools in Virginia at the time, and education was a principal function of the churches. Madison condemned the tax as an "establishment," and its defeat in Virginia was followed by enactment of Jefferson's Bill for Religious Liberty.

In light of Justice Rehnquist's recent attacks on the historical underpinnings of the Court's view of the establishment clause,[4] it is useful to review the *Everson* opinion. Both Justice Black's majority opinion, and Justice Rutledge's dissent, relied on the Virginia experience to argue that separation of church and state, and not merely the avoidance of the state religion or the favoring of one religion over another, was the guiding principle of interpretation of the establishment clause. In his oft-quoted dicta, Justice Black wrote:

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

2 330 U.S. 1 (1947).

3 The Remonstrance was included as an appendix to Justice Rutledge's dissent. *See* 330 U.S. at 63 (1947).

4 *See* Wallace v. Jaffree, 105 S. Ct. 2479, 2508 (1985) (Rehnquist, J., dissenting).

> any religious organization or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."[5]

This theme was echoed in Justice Rutledge's dissent: "Not simply an established church, but any law respecting an establishment of religion is forbidden. . . . Madison could not have confused 'church' and 'religion,' or 'an established church' and 'an establishment of religion.' "[6]

Scholars and justices have disagreed over whether the first amendment was intended to embody these principles developed in Virginia a few years earlier, or whether the Madison and Jefferson views of separation were intended to be applicable to the states through the fourteenth amendment, or whether they are applicable to the different factual settings of public schools in the mid-twentieth century.[7] There is little doubt, however, that Madison and Jefferson emphasized the principles of separation of church and state at least prior to 1789, and that the majority of the Supreme Court has consistently adopted that interpretation of the establishment clause, starting with *Everson*.

But agreement on general principles of interpretation did not lead to agreement on the constitutionality of the practices in *Everson* itself. Justice Black's majority opinion upheld the bus reimbursement program on grounds that it was "public welfare legislation" designed not to benefit religion but to help children get to school safely.[8]

Rereading *Everson* following four decades of Court decisions is like rediscovering seedlings that have grown into large trees. Virtually all of the arguments developed by the varying sides of the controversy were articulated in the *Everson* opinions. Justice Black cautioned that "we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do

5 330 U.S. at 15-16 (1947) (citation omitted).

6 *Id.* at 31.

7 *See* I. BRANDT, JAMES MADISON: THE NATIONALIST 343-55 (1948); L. LEVY, NO RE-ESTABLISHMENT OF RELIGION: THE ORIGINAL UNDERSTANDING IN JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 169 (1972); Cahn, *The Establishment of Religion Puzzle*, 36 N.Y.U. L. REV. 1274 (1961); Sky, *The Establishment Clause, the Congress and the Schools: A Historical Perspective*, 52 VA. L. REV. 1395 (1966). *See also* Abington School Dist. v. Schempp, 374 U.S. 203, 238-42 (1963) (Brennan, J., concurring), in which he described as "futile and misdirected" a "too literal quest for the advice of the Founding Fathers" to help decide the specific issue of the validity of the reading of the Bible or the Lord's Prayer at the start of the school day. Justice Rehnquist's dissent in Wallace v. Jaffree, 105 S. Ct. 2479, 2508 (1985), is the product of historical research, as were the opinions of Justices Black and Rutledge in *Everson*. Justice Reed questioned the *Everson* historical analysis in his dissent in McCollum v. Board of Educ., 333 U.S. 203, 238 (1948).

8 330 U.S. at 16-17 (1947).

not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief. . . . State power is no more to be used so as to handicap religions than it is to favor them."[9] Thus, the concepts of benefitting the child, of accommodating to religion, of not depriving children in religious schools of secular benefits—all were developed in *Everson* at the same time as the majority and the dissents articulated a clear separation theory. The Court split over whether the expenditures were, as described in Black's dicta, a tax "levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion,"[10] or whether they were something else, *i.e.*, aid to a child, a welfare benefit, or an accommodation to religion.

In 1948 and 1952, the battleground shifted to "released time," and it is not surprising that in the first of these cases, *McCollum v. Board of Education*,[11] the Court's emphasis on the concept of separation of church and state led to an 8-1 decision invalidating the teaching of religion on school premises. But four years later, a bitterly divided Court in *Zorach v. Clauson*[12] held that releasing children for religious school instruction on nonpublic school premises, while other students remained in school, was a permissible accommodation to religion. Justice Douglas, who was with the majority in *Everson*, wrote his oft-quoted and criticized comment:

> 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 or public events to sectarian needs, 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. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups.[13]

Justice Black , who wrote the majority opinion in *McCollum*, dissented in *Zorach*, arguing that he saw no difference between the two cases.[14] Justice Jackson criticized the majority for leaving the wall between church and state "more warped and twisted than I expected."[15]

In *McCollum* and *Zorach* there emerged a distinction that was to find more detailed expression in the opinions of the Burger Court:

9 *Id.* at 16-18.
10 *Id.* at 15-16.
11 333 U.S. 203 (1948).
12 343 U.S. 306 (1952).
13 *Id.* at 313-14.
14 *Id.* at 315 (Black, J., dissenting).
15 *Id.* at 325 (Jackson, J., dissenting).

teaching religion on public school premises is an impermissible endorsement of religion, but a program of cooperation that enables the public and religious schools to perform their independent functions in their own ways might be permissible. Of course, the compulsory attendance requirement, which enforced a child's attendance at the religious school, could be viewed as something more than reasonable cooperation, and it was precisely on this point that the majority and the dissent in *Zorach* differed most sharply. "Entanglement" was not mentioned in these cases, but concerns over entanglement were undoubtedly present.[16]

In light of the principles that evolved in *Everson*, *McCollum*, and *Zorach*, the 1962 decision in *Engel v. Vitale*,[17] invalidating the New York Regents' prayer, should have come as no surprise, although the controversy it generated created the impression that new constitutional ground had been broken. Surely the *Everson* dicta, which barred a state from passing laws that "aid one religion or prefer one religion or another," precluded a state-prescribed prayer. With only Justice Stewart dissenting, Justice Black's majority opinion concluded that neither the alleged neutrality of the "nondenominational" prayer, nor the "voluntary" participation by students " . . . can free it from the limitation of the Establishment Clause."[18]

One year later *Engel* was extended to a Pennsylvania law requiring Bible reading and the recitation of the Lord's Prayer at the beginning of the school day. In the latter case, *Abington School District v. Schempp*,[19] Justice Clark's majority (8-1) opinion emphasized the importance of neutrality in relations between government and religion, and set forth two parts of what was ultimately to become the three-part test in establishment clause cases: "[T]o withstand the strictures of the Establishment Clause there must be a secular purpose and a primary effect that neither advances nor inhibits religion."[20]

The prayer and Bible reading cases also brought to the fore the close connection between "neutrality" and "separation." Justice Black's opinion appeared to accept the "non-denominational" claim for the Regents' prayer and held it invalid because the gov-

16 *See* McCollum v. Board of Educ., 333 U.S. 203, 228 (1948) (Frankfurter, J., concurring).

17 370 U.S. 421 (1962).

18 *Id.* at 430.

19 374 U.S. 203 (1963).

20 *Id.* at 222. Justice Brennan, in a concurring opinion, suggested an establishment clause test that would forbid "those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice." 374 U.S. at 295.

ernment could not endorse any religious practice. Actually, as Edmond Cahn, a religious man and a perceptive legal philosopher, brilliantly demonstrated, prayers can never be "neutral" among religions.[21] No single prayer can satisfy all religious beliefs, inevitably creating controversy as to the nature of the prescribed prayer and a sense of exclusion and coercion imposed on those whose beliefs or non-beliefs differ from majority religious sentiments.

Despite the near-unanimity, *Engel* and *Schempp* contained hints of future controversy. Justice Brennan, concurring in *Schempp*, raised the issue of the constitutionality of the moment of silence.[22] Justice Douglas' concurrence in *Engel*, and Justice Stewart's dissent, speculated about the many other public manifestations of religion, including legislative chaplains, and Justice Stewart's *Schempp* dissent argued that the establishment clause was violated only if there was evidence of government coercion.[23] Nor did the cases preclude subsequent litigation over whether the challenged practices were religious, as the Regents' prayer and Bible reading clearly were, or whether they were educational, cultural, or otherwise secular, as might be the case with the teaching of religion, or possibly the singing of Christmas carols.[24] Indeed, one year before *Engel* the Court rejected an establishment clause challenge to Sunday closing laws, concluding that whatever may have been the original religious motivation for such laws the "present purpose and effect of most of them is to provide a uniform day of rest for all citizens."[25]

Thus, while these cases held that the establishment clause bars government conduct where the purpose or effect is to advance religions, the forbidden motivation and effect would not always be as easy as in *Engel* and *Schempp*. It was hard to argue that a prayer, or Bible reading, had neither the purpose nor effect of advancing religion.

As the Warren Court era came to an end, disagreements within the Court related primarily to the application of its establishment clause doctrine to particular cases, rather than to the doctrine itself. Disagreement outside the Court, however, stemmed from those with a strong belief that the Court's basic approach displayed a hostility toward religion. These sentiments were to grow more intense with the rise of the so-called Religious Right during the years of the

21 Cahn, *On Government and Prayer*, in CONFRONTING INJUSTICE 189-201 (L. Cahn ed. 1966).

22 374 U.S. at 281 (1963).

23 *Id.* at 308. Justice Stewart later abandoned this limited view of the establishment clause. *See, e.g.*, Meek v. Pittenger, 421 U.S. 349 (1975).

24 *See* Note, *Religious Holiday Observances in the Public Schools*, 48 N.Y.U. L. REV. 1116 (1973). *See also* Florey v. Sioux Falls School Dist., 619 F.2d 1311 (8th Cir. 1980).

25 McGowan v. Maryland, 366 U.S. 420, 445 (1961).

Burger Court. The focus of this criticism, as it had since *Engel*, was on the school prayer cases, which represented the core of the Warren Court's establishment clause interpretation.

The final major decision of the Warren Court interpreting the establishment clause[26] was a prelude to an issue that assumed major importance to the Burger Court—financial aid to parochial schools. In 1968, in *Board of Education v. Allen*,[27] the child-benefit rationale stressed by Justice Black in *Everson* was extended to uphold a New York law requiring school officials to lend books without charge to students attending both public and private schools. Justice White accepted the argument that the financial benefit accrued to the children, and their parents, rather than to the school. The books were selected by the public school authorities, and ownership remained with the state. Justice Black, who had, in his *Everson* opinion, described the New Jersey law as approaching the "verge" of the state's constitutional power, dissented in *Allen*, as did Justices Douglas and Fortas.[28] The *Allen* case demonstrated that, despite the near-unanimity that the Court had reached on such issues as school prayer, the secular educational purpose behind many programs of financial aid to religious schools, and the potential expansion of the child-benefit theory, created the possibility of massive government support for religious schools. Whether the Burger Court could develop a constitutional approach to meet this challenge to the separation of church and state was the principal issue of establishment clause law when Earl Warren left the Court.

II. Enter "Entanglement": *Walz* (1970) and *Lemon* (1971)

The "released time" and school prayer cases had established that religious schools could not expect government money for the teaching of religion. Only by reading the establishment clause as limited to the establishing of a state religion, or to preventing overt discrimination among religions (a position later adopted only by Justice Rehnquist), could government support for the teaching of

26 Epperson v. Arkansas, 393 U.S. 97 (1968) was also decided at this time. The Court found that an Arkansas law that banned the teaching of Darwin's theory of evolution originated from "fundamentalist sectarian conviction." This finding compelled the conclusion that the law was an establishment of religion. In other contexts, however, efforts by religious groups to influence educational policy could not be viewed as establishments. The critical issue is whether the state is adopting religious beliefs, as distinct from moral values. *Epperson* has been relied on by those challenging laws that require the teaching of "scientific creationism." *See* McLean v. Arkansas, 529 F. Supp. 1255 (E.D. Ark. 1982); Aguillard v. Edwards, 765 F.2d 1251 (5th Cir. 1985).

27 392 U.S. 326 (1968).

28 392 U.S. at 250 (Black, J., dissenting); 392 U.S. at 254 (Douglas, J., dissenting); 392 U.S. at 269 (Fortas, J., dissenting).

religion be sustained. But why not government money to teach secular subjects? It could be argued that the purpose was secular (education), and the effect was to benefit the child, encourage parental choice, or relieve public school overcrowding, rather than to promote religion (the next logical progression from bus transportation in *Everson* and lending of textbooks in *Allen*). And if government could "accommodate" religion by using the compulsory attendance laws to make sure that the children attend religious classes after school (*Zorach*), why not "accommodate" by paying for the costs of purely secular subjects like history, mathematics and science? To those who feared that massive government support for religious schools would place the imprimatur of government behind religions (particularly those religions that believed in separate religious schools) and create bitter political divisiveness along religious lines, the cases since *Everson*, while providing a barrier against direct support for the teaching of religion, were far from conclusive on the issue of financial support for church-related schools. At a time when many religious schools were clamoring for public funds, and many parents, increasingly dissatisfied with the public school system, were looking favorably on the alternative of religious schools, what was needed was a constitutional doctrine to reinforce, in the context of financial aid to religious schools, the principles that had evolved in the prayer cases.

The idea that governmental actions should be judged in terms of avoiding excessive entanglement between government and religion surfaced in the early 1970's as a third prong to the "purpose" and "effect" test set forth in *Schempp*.

The first case to articulate the concept, *Walz v. Tax Commission*,[29] was not a school-assistance case. Ironically, *Walz* upheld the greatest single benefit available to churches—the real estate tax exemption uniformly provided by state and local governments. After concluding that the purpose of the exemption was not to establish religion but to spare "the exercise of religion from the burden of property taxation levied on private profit institutions," Chief Justice Burger turned to the "effect" prong of the *Schempp* test:

> We must also be sure that the end result—the effect—is not an excessive government entanglement with religion. The test is inescapably one of degree. Either course, taxation of churches or exemption, occasions some degree of involvement with religion. Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal

29 397 U.S. 664 (1970). The author, as New York City's First Assistant Corporation Counsel, participated in the *Walz* case.

procedures.[30]

Thus, the Court, with only Justice Douglas dissenting, justified an economic benefit to churches on grounds that the denial of the benefit would have the effect of excessive government involvement with religious institutions. One year later, in 1971, the "entanglement" idea emerged as the third prong of a test which helped close the door on most forms of significant financial assistance to church-related elementary and high schools.

Lemon v. Kurtzman,[31] and its companion cases,[32] were the first in a series of cases in which the Burger Court, during the next decade, grappled with state laws providing grants and support services to religious schools. In all of them the Court applied the oft-quoted test articulated in *Lemon* by Chief Justice Burger:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, [citing] finally the statute must not foster "an excessive government entanglement with religion" [citing *Walz*].[33]

At issue in *Lemon* were Rhode Island and Pennsylvania statutes that provided (in Rhode Island) for payments to supplement the salaries of teachers of secular subjects in private elementary schools, and (in Pennsylvania) the "purchase" of "secular educational services" from private schools. Both statutes required private schools to use books used in public schools and precluded payment for subject matter that involved religious teaching.

The necessity of surveillance of the religious school teachers by the state to insure compliance with the statutory restrictions, wrote the Chief Justice, involved excessive and continuing entanglement between government and religion. In reaching this conclusion the Court ruled that it was not necessary to decide whether the restrictions on the teaching of religion were sufficient to enable the laws to satisfy the "effect" prong. The majority noted the religious mission of the church-related elementary and secondary schools whose teachers were subject to the direction and discipline of the religious organizations. "Unlike a book," wrote the Chief Justice, "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 limi-

30 *Id.* at 674.

31 403 U.S. 602 (1971).

32 Earley v. Di Censo and Robinson v. Di Censo, 403 U.S. 602 (1971).

33 403 U.S. at 612-13.

tations imposed by the First Amendment."[34]

Apart from the problem of checking on teachers, the Rhode Island law also required surveillance of the religious school's records to determine how much money was being spent on secular education, because the salary supplement was tied to a formula requiring a calculation of per-student expenditures for secular education in the private schools. And the Pennsylvania law had the "further defect of providing state financial aid directly to the church-related schools,"[35] which necessitated greater surveillance and control than payments to students and parents.

Thus, the Chief Justice recognized that direct aid to religious schools to teach basic secular subjects involved two unacceptable risks: Either the government funds would be used to support the teaching of religion, or the government would become entangled with the religious authorities in trying to make certain that this result did not occur. Neither alternative was compatible with what the Court held to be the "dictates" of the religion clauses: "Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government."[36] *Lemon* was a recognition that the establishment clause protected all of the people from government endorsement of religion, and also protected religion from the control that inevitably accompanies extensive financial support.

A particularly interesting portion of the *Lemon* opinion struck a chord that had been sounded in Madison's Remonstrance in 1785, the danger of political divisiveness. Describing this phenomenon as a "broader base of entanglement," the Chief Justice wrote:

> Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular education of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith. . . . [P]olitical division along religious lines was one of the principal evils against which the First Amendment was intended to protect. . . . The history of many countries attests to the hazards of religion's intruding into the legitimate and free exercise of

34 *Id.* at 619.

35 *Id.* at 621.

36 *Id.* at 625.

religious belief.[37]

Finally, the Chief Justice seemed to be acutely aware of the need to create a constitutional standard that could counter the tendency of religious organizations to use prior decisions, such as *Everson* and *Allen*, as a springboard for expanded financial aid to religious schools. Perhaps in hope that the "entanglement" test might provide a brake on the threatened flow of financial support for such schools, Chief Justice Burger wrote:

> We have already noted that modern governmental programs have self-perpetuating and self-expanding propensities. These internal pressures are only enhanced when the schemes involve institutions whose legitimate needs are growing and whose interests have substantial political support. Nor can we fail to see that in constitutional adjudication some steps, which when taken were thought to approach "the verge" [see Justice Black's opinion in *Everson*], have become the platform for yet further steps. . . . The dangers are increased by the difficulty of perceiving in advance exactly where the "verge" of the precipice lies. *As well as constituting an independent evil against which Religion Clauses were intended to protect, involvement or entanglement between government and religion serves as a warning signal.*[38]

The Chief Justice's opinion in *Lemon* was an incisive application of constitutional principles, developed in earlier cases, to the different factual setting of direct financial support to church-related schools. While *Lemon* has undergone many interpretations, and been questioned as a firm test by its author, it has been reaffirmed consistently in subsequent decisions, and its pragmatic insights deserve reemphasis in any review of the Burger Court's performance in the church-state area.

Lemon may have effectively blocked direct government support for elementary and secondary schools, but the Court has been far more lenient with regard to aid to church-related colleges. Decided with *Lemon* was *Tilton v. Richardson*,[39] in which the Court, again with Chief Justice Burger writing the plurality opinion, sustained federal construction grants to church-affiliated colleges for facilities devoted exclusively to secular educational purposes.[40] The majority

37 *Id.* at 622-23 (citations omitted).

38 *Id.* at 624-25 (emphasis added).

39 403 U.S. 672 (1971).

40 Chief Justice Burger's opinion was joined by Justices Harlan, Stewart and Blackmun. Justice White concurred in the judgment. The Court's judgment invalidated a portion of the federal statute that imposed a 20-year limitation on the government's right to recover a portion of the grant if the facility was no longer being used for secular purposes. Justices Black, Douglas, and Marshall agreed with the latter conclusion, but would also have held the enitre program invalid. Justice Brennan would have held the program invalid only as to sectarian institutions and would have remanded to determine the sectarian character of the colleges.

noted that religious indoctrination was not a substantial purpose of the colleges and that college students were not so susceptible to religious teachings. Moreover, the very nature of a college curriculum tended to curb sectarian influence and reduce the risk that the primary effect would be to encourage or support religious activities. Entanglement was found not to be excessive because the inspection necessary to determine that the facilities were devoted to secular education would be "minimal."

These cases, decided in 1971, appeared to shut off direct financial aid to church-related elementary and high schools, while opening the way for such support to church-affiliated colleges. They also set the stage for a decade of intensive litigation, as state governments tried to channel money to religious schools, while avoiding the interdictions of *Lemon*. Paying for support services, and providing grants and tax benefits to parents who send children to private schools were the methods employed by supporters of religious education to test anew the contours of establishment clause limitations on aid to religious education. The Court's response to these efforts shaped the law in this area in the years following *Lemon*.

III. *Lemon* and *Tilton* Applied in the 1970's: Fine Lines and a Divided Court

A. *Tax Benefits to Help Pay Tuition*

If *Lemon* struck a blow at direct grants in the form of paying for the cost of secular subjects, *Committee for Public Education and Religious Liberty v. Nyquist*,[41] decided in 1973, appeared to erect a similar barrier against tuition grants and the use of the tax system to provide cash benefits to parents who send children to religious schools. State aid to reduce tuition costs was a natural fallback from the direct assistance plan held invalid in *Lemon*. If parents could receive grants, or a tax break in the form of a tax credit or deduction, resulting from tuition payments to religious schools, then these benefits could be passed along to the religious schools through tuition increases that would be cost-free to the parents. This was behind the New York State plan held invalid in *Nyquist*, the first case involving financial assistance to religious schools to be decided by a Court with the four new Nixon appointees.

Actually, the statute in *Nyquist* created three programs of financial assistance to religious schools, two of which involved tuition assistance. The third provided for grants of $30 to $40 per year per student (depending on the age of the facility) for "maintenance and

41 413 U.S. 756 (1973).

repair of . . . school facilities and equipment to ensure the health, welfare and safety of enrolled pupils" in nonpublic schools serving a high concentration of low income families. The maintenance and repair provision was struck down in a unanimous opinion written by Justice Powell "because their effect, inevitably, is to subsidize and advance the religious mission of sectarian schools."[42]

A second program reimbursed low income parents (below $5,000) for 50% of tuition paid to nonpublic schools up to an amount not exceeding $50 for grade school and $100 for high school. In New York State 85% of the children attending nonpublic schools were in religiously-affiliated schools. This tuition reimbursement program similarly failed the "effect" prong of the *Lemon* test. *Everson* and *Allen* were distinguished as involving welfare and educational measures that benefitted children and did not involve expenditures for religious courses. Although three justices dissented (the Chief Justice and Justices White and Rehnquist), Justice Powell emphasized that

> it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian. By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. . . . [T]he effect of the aid was unmistakably to provide desired financial support for nonpublic, sectarian institutions.[43]

The third statute allowed middle income families (those with incomes between $5000 and $25,000) whose children attended nonpublic schools, to deduct a specified amount from their adjusted gross income. As described in the opinion, the deduction was not related to a parent's actual expenditure but was based on a formula that was "apparently the product of a legislative attempt to assure that each family would receive a carefully estimated net benefit, and that the tax benefit would be comparable to, and compatible with, the tuition grant for lower income families."[44] The majority concluded that "there would appear to be little difference, for purposes of whether such aid has the effect of advancing religion, between the tax benefit allowed here and the tuition grant . . . ."[45]

Justice Powell distinguished *Walz* on grounds that the exemption from property taxes was part of a history of neutrality toward religion while the special tax benefits in the New York program

42 *Id.* at 779-80.
43 *Id.* at 783.
44 *Id.* at 790.
45 *Id.* at 790-91.

have a "purpose and inevitable effect . . . to aid and advance . . . religious institutions."[46] Moreover, the *Walz* exemption was not limited to churches, while the benefits of the New York statute flowed primarily to those sending their children to sectarian schools. "Without intimating whether this factor alone might have controlling significance in another context in some future case," wrote Justice Powell, "it should be apparent that in terms of the potential divisiveness of any legislative measure the narrowness of the benefitted class would be an important factor."[47] Picking up on this "political divisiveness" theme, Justice Powell, in a separate portion of the opinion, emphasized that while it was not necessary to consider the "entanglement" issue, "the importance of the competing societal interests implicated here prompts us to make the further observation that, apart from any specific entanglement of the State in particular religious programs, assistance of the sort here involved carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion."[48]

If, as the Court majority believed,[49] the establishment clause should prevent direct government assistance to religious education, the *Nyquist* result was as necessary as that in *Lemon*. Both programs would have involved the state in massive funding of religious schools. There could be no "neutrality" in such programs. Those religions that support religious schools would benefit at the expense of those that do not. Both programs posed threats to religious diversity, religious harmony, and ultimately to religious freedom.

Perhaps if the Court had simply applied the *Everson* dicta, *Nyquist* (and *Lemon*) might have been easier cases. But the three-part test, which served to focus on the dangers when church and state become joint venturers in the educational process, had the disadvantage of compartmentalizing the issue into discrete "tests," thereby overlooking the broader implications of a particular program. The New York tuition assistance program in *Nyquist* demonstrates the problem. "Purpose" is not easy to define; it is difficult to conclude that there is no secular purpose to a program of aid to parents whose children attend religious schools. Tuition grants, or tax credits, do not involve administrative entanglements. One is left with the rather elusive concepts of "effect" or "political entanglement."

The "effect" test inevitably involves a discussion over whether

46 *Id.* at 793.
47 *Id.* at 794.
48 *Id.*
49 Justice Powell's opinion contains a long footnote adopting the *Everson-McCollum-Engel* view of the historical basis of the establishment clause. 413 U.S. at 770-71 n.28.

the forbidden "effect" must be a "primary" effect. Justice Powell, in a footnote in *Nyquist*, attempted to answer the argument that the "primary effect" was not to subsidize religion but to promote the secular purpose of perpetuating a pluralistic environment and protecting the fiscal integrity of overburdened public schools. Justice Powell wrote: "We do not think such metaphysical judgments are either possible or necessary. Our cases simply do not support the notion that a law found to have a 'primary' effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion."[50]

The political divisiveness argument is open to the criticism that any program that provides some financial benefit to religious schools (including the *Everson* statute) creates a threat of political divisiveness along religious lines. Justice Powell's answer, focusing on annual appropriations for a program confined to a religious constituency, is a persuasive answer to some. Others argue, however, that constitutional issues should not depend on the degree of political controversy engendered by a program or by litigation.[51]

As the three-part test of *Lemon* was applied in *Nyquist*, the New York program failed because a specified sum of money was given to parents of children in parochial schools in the form of grants or tuition benefits and the only beneficiaries were parents of children attending private schools, most of which were religiously oriented. Actually, the New York programs should have been invalidated for a more forthright reason: They involved direct and unrestricted financial grants to religious schools through the devious device of a cash benefit to the parents. By focusing on "effect" and "entanglement" as separate issues, the path was opened for possibly upholding tuition benefit programs that aided public school, as well as private school, parents and that provided a less specific amount of cash benefit per student. If "effect" could be muddied, and the constituency for the benefits broadened beyond the narrow religious constituency, it might be possible to distinguish the *Nyquist* opinion. But such concerns were for a later day. In the meantime the Court, in *Nyquist*, had turned back a rather blatant effort to funnel significant dollars to religious schools.

If *Nyquist* helped shut the door on direct aid to religious elementary and secondary schools, the Burger Court continued to per-

50 *Id.* at 783-84 n.39.

51 Later opinions referred to the political divisiveness argument as an "elusive inquiry" and sought to limit its application to cases where "direct financial subsidies are paid to parochial schools or to teachers in parochial schools." Mueller v. Allen, 463 U.S. 388, 403-04 n.11 (1983). *See also* the discussion of this issue in Lynch v. Donnelly, 104 S. Ct. 1355, 1364-65 (1984), and text accompanying notes 106-11 *infra*.

mit expanded aid to church-related colleges. In *Hunt v. McNair*,[52] decided on the same day as *Nyquist*, the Court, relying on *Tilton*, upheld a construction aid program that permitted all colleges, regardless of religious affiliation, to borrow funds at low interest rates through the use of state-issued revenue bonds. The 5-4 majority in *Tilton* increased to 6-3 as Justices Powell and Rehnquist (both with the new majority) replaced Justices Harlan and Black, who had been on opposite sides in *Tilton*. Justices Brennan, Marshall, and Douglas dissented from Justice Powell's majority opinion and argued that the state would have to police college affairs during the life of the bonds to make certain that public funds were not being used for sectarian construction.[53]

Three years later, by a similar 6-3 majority (Justice Stevens replaced Justice Douglas in dissent) the Court in *Roemer v. Maryland*[54] followed *Tilton* and *Hunt*, upholding a program of annual noncategorical grants to private colleges, irrespective of church affiliation, as long as the funds were not used for sectarian purposes. The distinction between aid to colleges and to elementary and secondary schools was firmly established. "Entanglement" and "effect" evoked less concern in a college setting.

B. *Support Services*

Having failed in their effort to obtain massive direct grants (*Lemon*) and indirect grants through tuition assistance (*Nyquist*), the proponents of financial aid to religious schools turned to a more selective approach—reimbursement for the cost of providing auxiliary secular services such as student testing and diagnostic, therapeutic, and remedial services. The cases in which the Court considered these issues in the latter part of the decade appeared to draw very fine, and arguably arbitrary, distinctions. When one considers, however, the evolution of the Court's thinking on these issues, it was inevitable that the results would turn on narrow issues of fact. *Everson* had ruled that some programs of state assistance to children attending religious schools were permissible even though religious schools were the indirect financial beneficiaries. Moreover, the state clearly could provide medical services to children in religious schools, and, indeed, might be precluded by free exercise considerations from denying such benefits. And *Allen* (lending of textbooks) had validated some forms of educational assistance to religious schools. On the other hand, the Court in *Lemon* and *Nyquist* had rejected what would have been open-ended financial aid.

52 413 U.S. 734 (1973).
53 *Id.* at 752.
54 426 U.S. 736 (1976).

By eschewing an all-or-nothing approach, the Court committed itself to a case-by-case evaluation of government aid programs in an effort to limit the quantity of aid, and the nature of the government involvement, so that church and state would not become financial and administrative partners in the process of elementary and secondary education.

In the first of these cases, *Levitt v. Committee for Public Education & Religious Liberty*,[55] decided the same day in 1973 as *Nyquist*, the Court struck down a New York law that reimbursed private schools for the cost of administering state-mandated tests. The tests were both state-prepared and teacher-prepared. Because the latter involved the discretion of teachers supervised by religious institutions, Chief Justice Burger's majority opinion (only Justice White dissented) concluded that there was a substantial risk the tests could be used for religious indoctrination. Moreover, the lump-sum, per-pupil, method of reimbursement was not related to the actual cost of the tests. Later cases permitted reimbursement for the actual cost of having private school personnel administer and grade state-mandated and state-prepared tests.[56]

Meek v. Pittenger,[57] decided in 1975, dealt with Pennsylvania's efforts to overcome the "entanglement" hurdle by providing for a range of auxiliary support services to be furnished in the private schools by public school personnel. The services included counseling, psychological services, speech and hearing therapy, testing and related services for exceptional or educationally disadvantaged students, and educational material and equipment such as maps, charts, films, records, periodicals, projectors, recorders and laboratory paraphernalia. Of the nonpublic schools eligible for the assistance, 75% were church-affiliated. The State sought to distinguish *Lemon* on the basis of the subject matter of the services and the fact that public school personnel would perform the services.

Justice Stewart's plurality opinion[58] rejected both of these distinctions. Relying both on "effect" and "entanglement," the Court concluded that the State must be certain that the subsidized teachers do not teach religion, whether the class be "remedial arithmetic" or "medieval history."[59] Addressing the issue of the use of public school teachers, Justice Stewart pointed out that they were

55 413 U.S. 472 (1973).

56 *See* Wollman v. Walter, 433 U.S. 229, 238-42 (1977).

57 421 U.S. 349 (1975).

58 Justices Blackmun and Powell joined Part V of Justice Stewart's opinion invalidating the "remedial" auxiliary services provision of the Pennsylvania program. Justices Brennan, Douglas and Marshall joined Part V, in an opinion by Justice Brennan, dissenting from the majority's sustaining of textbook loan provisions that were upheld on the basis of Board of Educ. v. Allen, 392 U.S. 236 (1968).

59 421 U.S. at 371.

"performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained."[60] Excessive entanglement would result from the need of the state to engage in surveillance of its own personnel to ensure that they remained religiously neutral. The opinion also mentioned the danger of political divisiveness,[61] a point introduced earlier in *Lemon* and *Nyquist*. The loan of instructional material was similarly invalid.[62]

Significantly, however, the near-unanimity of *Levitt* was absent in *Meek*, as the Chief Justice and Justice Rehnquist now joined Justice White in dissent, arguing that there was no support for the conclusion that the public school teachers would attempt to teach religion or that the programs would produce political divisiveness. The dissents were particularly bitter, with the Chief Justice condemning the majority for penalizing children "because of their parents' choice of religious exercise," and arguing that this denial of remedial assistance constituted a "denial of equal protection, which is, for me, a gross violation of Fourteenth Amendment rights . . . ."[63] *Meek* was the first indication that a growing minority was prepared to accept financial aid in the form of government furnishing of secular support services by public school teachers on the premises of parochial schools.[64]

Wollman v. Walter,[65] decided in 1977, involved an Ohio statutory scheme designed to respond to the majority's objections in *Meek*. Under the Ohio plan, diagnostic services (psychological, hearing and speech) were performed by public school personnel on parochial school premises, presumably because these were analogous to health and welfare services provided by the state to all children. Therapeutic and remedial services, on the other hand, would be performed off the premises of the private school. A divided Court upheld these provisions. Justice Blackmun's majority opinion accepted the arguments that the limited contact between diagnostician and child in the parochial school did not pose the risk of the teaching of religion, and that the performance of the remedial tasks by public school personnel on sites not identified with sectarian schools minimized the dangers of entanglement. Justices Bren-

60 *Id.*

61 *Id.* at 372 n.22.

62 The lineup of the Court on this issue was the same as in Part V. *See* note 58 *supra*.

63 421 U.S. at 386-87.

64 The Chief Justice, and Justices White and Rehnquist would have also upheld the sections of the law providing for the lending of instructional materials.

65 433 U.S. 229 (1977).

nan and Marshall would have invalidated the remedial services provisions, even if conducted off premises.

While accepting the on-premises/off-premises distinction for remedial educational programs, *Wollman* adhered to the precedents of earlier cases by sustaining the provisions that authorized funds for textbooks and striking down reimbursement for instructional materials, equipment, and field trip services.

Thus, the Court, by 1977, had drawn a distinction between remedial services (permissible only if performed by public school employees off the premises of the religious school) and diagnostic services (permissible if performed by public school employees even on religious school premises). As for remedial services, it appeared that four Justices (Powell, Blackmun, Stewart, and Stevens) drew the line at the parochial schoolhouse door. Justices Brennan and Marshall rejected the distinction and would have found a constitutional violation whether the services were performed on or off parochial school premises, while the Chief Justice[66] and Justices White and Rehnquist similarly rejected the distinction but reached the opposite constitutional conclusion. On diagnostic services, only Justice Brennan dissented from *Wollman's* approval of reimbursement for diagnostic services performed by public school employees on religious school premises.

These distinctions, which provoked sharp differences on the Court, bore some relationship to establishment clause concerns even if one were to conclude that the distinctions did not warrant the different conclusions. Teaching of religion is less likely to occur in the course of diagnosing a learning problem. Therefore, surveillance, and the consequent entanglement, is far less necessary. Remedial teaching, on the other hand, may become indistinguishable from "normal" teaching, particularly if it involves "enrichment" courses. To allow public school teachers to engage in remedial teaching in religious schools would open the way for extensive financial support of religious schools and would require constant policing to ensure that these funds were not being diverted for religious purposes. Admittedly, remedial teaching outside religious schools could also trigger substantial government expenditures and some administrative entanglement, but the religious schools are probably not inclined to expand their reliance on such programs because they tend to defeat the very purpose for which

66 The Chief Justice's position after *Wollman* was not completely clear, since he joined in Part VI of the Court's opinion which upheld the provision of therapeutic services off the premises of the religious schools, and which reaffirmed the *Meek* distinction between the religious school premises and a "neutral" site. However, in light of the Chief Justice's strong dissent from that portion of the *Meek* opinion, the Chief Justice in *Wollman* undoubtedly was simply agreeing with the majority's conclusion that the provision was valid.

religious schools are established—the placing of children in a pervasively religious environment for most of the formative educational years. The religious school authorities would be very much inclined, however, to draw public school teachers into the process of religious education if these teachers were permitted to perform "remedial" services in religious schools.

Given a constitutional framework where some programs that provide financial aid are valid (*Everson* and *Allen*), but not all forms of aid to religious schools for providing secular services are permissible (*Lemon*), the entanglement prong of the *Lemon* test, interpreted to require that only public school employees may render educational support services (whether remedial or diagnostic) and actual instruction of students (remedial or otherwise) be performed by such employees away from private religious schools, is a useful tool to keep the two educational systems separate.

IV. The Reagan Election: A New Political Agenda and New Pressures on the Wall of Separation

As the decade of the 1970's drew to a close, one might have concluded that a rather solid Court majority agreed on the broad principles of establishment clause law: Government cannot support religious practices and institutions; government must be neutral in its dealing with religion; and secular programs must be conducted so as to avoid government support for, and excessive entanglement in, religious institutions and activities. There appeared little likelihood of a change of heart on the school prayer issue, and the cases involving support services for religious schools were turning on narrow factual issues, with a majority of six justices (or possibly seven, depending on the Chief Justice) having applied the *Lemon* test effectively to preclude significant direct government assistance to parochial schools. Only Justices Rehnquist and White, and more recently the Chief Justice, seemed to question consistently the underlying premises of *Lemon*, *Nyquist* and *Meek*.

The first significant church-state case of the 1980's certainly gave no indication of any change in direction. In *Stone v. Graham*,[67] a *per curiam* opinion, the Court invalidated a Kentucky statute that required public school officials to post a copy of the Ten Commandments, purchased with private contributions, in every public classroom. Each plaque bore a notation explaining the purpose of the display as demonstrating secular application of the Ten Commandments "in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."[68] The

67 449 U.S. 39 (1980).
68 *Id.* at 41.

Court concluded that the statute served no secular purpose. Because the Ten Commandments is "a sacred text in the Jewish and Christian faiths, no legislative recitation of secular purpose could blind us to that fact." Justice Rehnquist, in dissent, objected to this summary rejection of the secular purpose articulated by the Kentucky legislature. The Chief Justice, and Justices Blackmun and Stewart, objected to the Court's summary reversal, without indicating their views on the merits.

But political events were starting to run counter to the Court's constitutional doctrines. The election of President Reagan in November 1980 brought to the White House a President supported by a religious constituency that had long been critical of the Court's decisions in the school prayer area.[69] A constitutional amendment to overturn *Engel v. Vitale* was high on the "social issues" agenda of the Reagan presidency. As part of his "pro-religion" program, the President also promoted financial aid to religious schools, focusing primarily on a tuition tax credit proposal similar to the New York program found unconstitutional in *Nyquist*.[70] As has happened so often, the Supreme Court's judicial agenda soon reflected the country's political agenda as church-state issues moved to the front burner. By the end of the 1983-1984 Term, a new series of cases heralded increased judicial receptivity to government involvement with religion.

A. Widmar v. Vincent: *"Equal Access" for Religious Speech*

If separation of church and state has been a principal theme in establishment clause law, at least since 1947, one of the countervailing themes has been the concept of "accommodation." Justice Black wrote in *Everson* that the first amendment does not require that the state and religious groups be adversaries.[71] In upholding the New York released time program in *Zorach v. Clauson*, Justice Douglas wrote that when the state encourages religious instruction it "respects the religious nature of our people and accommodates the public service to their spiritual needs."[72] And in *Walz v. Tax Commission of New York*, Chief Justice Burger, in upholding the real property tax exemption for churches, wrote that the principle of

69 *See generally Proposed Constitutional Amendment to Permit Voluntary Prayer: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982). For the 1984 voluntary school prayer amendment debate, see 130 CONG. REC. S2879 (daily ed. March 20, 1984). A silent prayer amendment was tabled prior to the above debate. *See* 130 CONG. REC. S2850 (daily ed. March 19, 1984).

70 S. 528, 98th Cong., 1st Sess., 129 CONG. REC. S1335-38 (daily ed. February 17, 1983). In November of 1983, the Senate rejected the president's proposed tuition tax credit program; *see* New York Times, Nov. 17, 1983, at A1, col. 1.

71 330 U.S. at 18.

72 343 U.S. at 314.

government neutrality toward religion "derives from an accommodation of the Establishment and Free Exercise Clauses" that prevents "governmental control of churches or governmental restraint on religious practice."[73]

Of course, some "accommodation" with religion is necessary in order to recognize an individual's rights under the free exercise clause. *Sherbert v. Verner*,[74] decided in 1963, held that a state could not deny unemployment benefits to a woman whose religious belief prevented her from working on Saturday. To regard this exception to an otherwise valid secular law as an "establishment" would place the two great religion clauses in irreconcilable conflict. The Court has, quite properly, also recognized that the state may alleviate burdens on free exercise, even if the burdens do not rise to the level of a constitutional violation. In one of the Sunday closing law cases,[75] for example, the Court, while holding that a New York Sunday closing law did not violate the free exercise rights of an Orthodox Jew, suggested that the state could provide an exemption for those whose religious beliefs required that their businesses remained closed on Sundays.[76] And in *Walz*, Chief Justice Burger wrote: "The limits of permissive state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause."[77]

The aggressive posture of the evangelical religious groups has led to the claim that students in public schools had a "right" to engage in group prayer at the start of the day, and that children attending parochial schools were the victims of discrimination because of their religion if they were denied educational programs available to others. It was but a small step to argue that state support for public religious observances, or government financial support for religious schools, was an "accommodation" to religious belief which, even if not required by the free exercise clause, was the type of cooperation that the establishment clause permitted.

Widmar v. Vincent,[78] decided in 1981, lent some support for this argument. The University of Missouri at Kansas City had adopted a regulation prohibiting the use of university buildings or grounds "for purposes of religious worship or religious teaching." The regulation was challenged by an evangelical Christian students organization on first amendment and equal protection clause grounds.

73 397 U.S. at 669-70.

74 374 U.S. 398 (1963).

75 Braunfeld v. Brown, 366 U.S. 599 (1961).

76 Such an exemption was upheld in Arlan's Dep't Store of Louisville, Inc. v. Kentucky, 357 S.W.2d 708 (Ky. 1962), *appeal dismissed*, 371 U.S. 218 (1962).

77 397 U.S. at 673.

78 454 U.S. 263 (1981).

Justice Powell's majority (8-1) opinion concluded that once the University created a forum generally open to student groups, it could not impose a content-based exclusionary rule against religious speech. As a free speech case, *Widmar* was unexceptional: An urban public university, unlike a primary or secondary school, possesses many of the characteristics of a public forum, and the University's own regulations created a forum for student groups.

The case had establishment clause ramifications, however, because the state sought to justify its exclusion of student religious groups on grounds that religious teaching and worship on the premises of a public university was an establishment of religion. Although Justice Powell's opinion emphasized that the case was decided on the "bases of speech and association rights,"[79] and that there was no conflict with the establishment clause, the Court appeared to be mandating a practice—religious activity (even prayer)—on the premises of a public educational institution. Justice Powell was careful to note that "an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices,"[80] but it was not long before proponents of school prayer argued that student religious clubs had a right, despite the establishment clause, to conduct meetings and prayers in elementary and high schools.

The regulation in *Widmar* was held to be a free speech violation. The result in *Widmar* posed a threat to establishment concerns only if it could be argued that the student activity in *Widmar* should be allowed as an "accommodation" to free speech rights even in those cases where there was no free speech violation. This was essentially the claim raised by religious groups seeking to use *Widmar* as a basis for bringing organized religious activity into public elementary and high schools. "Equal access" became the key to open the schoolhouse door.[81]

B. Mueller v. Allen: *A Shift Away From* Nyquist

It will be recalled that in *Committee for Public Education v. Nyquist*,[82] decided in 1973, the Court appeared to have concluded that the state could not use the tax system to reimburse a taxpayer for a

79 *Id.* at 273 n.13.

80 *Id.* at 274.

81 *See* Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984), *cert. granted*, 105 S. Ct. 1167 (1985); Nartowicz v. Clayton County School Dist., 736 F.2d 646 (11th Cir. 1984); Brandon v. Board of Educ. of Guilderland Central School Dist., 635 F.2d 971 (2d Cir. 1980); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982); Bell v. Little Axe Indep. School Dist. No. 70, 766 F.2d 1391 (10th Cir. 1985). Congress provided for limited "equal access" to religious groups in public schools through the Equal Access Act, Pub. L. No. 98-377, 98 Stat. 1302 *et. seq.* (1984).

82 413 U.S. 756 (1973).

fixed amount of money where the tax benefit is earned primarily by those paying tuition to religious schools. Justice Powell's opinion, for a 6-3 majority, was based on the "effect" prong of the *Lemon* test, and also emphasized the dangers of political divisiveness inherent in the New York tuition tax benefit law.

Nyquist, and its companion case,[83] involved benefits only for those parents whose children attended private schools in states where the effect of the program was to provide benefits almost entirely to those attending religious schools. Moreover, since they involved specified cash benefits to individual taxpayers, the tax savings could easily be calculated and passed along to the private religious school in the form of higher tuition. The possibility existed, therefore, that a benefit in the form of a deduction from taxable income (rather than a specified dollar amount), extended to parents of children in public schools, might survive constitutional challenge.

Minnesota exploited these possibilities by enacting a law that provided for a deduction from taxable income of up to $500 in some grades and $700 in others. The deductions were available not only to parents of children attending private schools, but also to parents of public school students. Expenses could be deducted for such items as tuition paid by public school children to attend school outside their home district, summer school tuition, tuition for instruction provided for the physically handicapped, and costs of transportation and textbooks.

On the basis of these differences, a 5-4 majority in *Mueller v. Allen*,[84] decided in 1983, upheld the Minnesota statute even though it was estimated that approximately 96% of the children in private schools attended religious schools. Justice Rehnquist, one of the *Nyquist* dissenters, wrote the majority opinion, which was joined by the two other *Nyquist* dissenters, the Chief Justice and Justice White, and by the newest member of the Court, Justice O'Connor. The decisive switch was that of Justice Powell, who wrote the *Nyquist* opinion but who joined the new majority in *Mueller*. Justice Stevens, who was not on the Court in 1973, now seemed firmly aligned with Justices Brennan, Marshall, and Blackmun in opposition to programs of financial support for religious schools.

In deciding that the Minnesota law did not have the "effect" of advancing the sectarian aims of the nonpublic schools, Justice Rehnquist placed principal emphasis on the availability of the deduction to all parents. Also, this was one of many deductions permitted under the Minnesota tax system. Even though *Widmar* was

83 Levitt v. Committee for Pub. Educ. & Religious Liberty, 423 U.S. 472 (1973).
84 463 U.S. 388 (1983).

explicitly based, as noted above, on the free speech rights of the student religious groups, Justice Rehnquist cited *Widmar* as authority for the proposition that when benefits are extended to a broad spectrum of groups, it is an "important index of secular effect."[85]

Nor could a secular purpose be discerned from the fact that the overwhelming portion of the tax benefits flowed to parents of religious school children. Although the class of beneficiaries was clearly a factor in *Nyquist*, Justice Rehnquist concluded: "We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."[86]

One could easily argue, as did Justice Marshall in his strong dissent, that the difference between the New York law in *Nyquist* and the Minnesota law did not warrant different results under the "effect" prong. Fewer than 100 of the 90,000 children who attend public schools pay a "general tuition. . . . Parents who send their children to free public schools are simply ineligible to obtain the full benefit of the deduction except in the unlikely event that they buy $700 worth of pencils, notebooks, and bus rides for their school-age children."[87] Moreover, there was no doubt that the entire scheme was designed to provide a tax break that could be passed along to the religious schools in the form of higher tuition. While the amount of the benefit resulting from a deduction varied in accordance with the parents' taxable income, virtually all taxpayers benefitted to some extent, and private schools would have little difficulty in becoming the indirect beneficiaries of the state's generosity. "For the first time," wrote Justice Marshall, "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 function of those schools and will not be used to support religious instruction."[88]

As with most of the establishment clause cases decided during the period 1981-1984, *Mueller v. Allen* could be viewed either as a major departure from precedent and the forerunner of extensive government support for religious schools, or rather as a case involving facts sufficiently different from prior cases so that the statute could be sustained without undermining the earlier cases. On the one hand, *Nyquist* was reaffirmed and the *Lemon* three-part test applied; the Minnesota and New York laws did differ, and the issue of a tax deduction had been specifically reserved in *Nyquist*.[89] On

85 *Id.* at 397.
86 *Id.* at 401.
87 *Id.* at 409 (Marshall, J., dissenting).
88 *Id.* at 416-17.
89 413 U.S. at 790 n.49.

the other hand, Justice Rehnquist's opinion opened the way for the possible infusion of considerable government support for religious schools with no attempt to tie such aid to the secular functions of the schools.

Justice Rehnquist, moreover, sounded a note that was to be heard again in later cases when he observed that the "attenuated financial benefit . . . that eventually flows to parochial schools"[90] does not pose the danger that led to the inclusion of the establishment clause in the Bill of Rights. This reflects a "let's look at the big historical picture" attitude that seeks to overlook "minor" benefits or "accommodations" to religious institutions.[91] Actually James Madison, in his Remonstrance, warned: "That the same authority which can force a citizen to contribute three pence only of his property for the support of one establishment, may force him to conform to any other establishment in all cases whatsoever."[92] But Justice Rehnquist, in *Mueller* and in later cases, suggested that the "historic purpose" of the establishment clause involved something more significant than the seemingly petty distinctions that occupied the attention of the Court during the 1970's. The effect of this approach is to denigrate the body of precedent that had evolved since *Everson*. If one can then define the "historic purpose" as only to prevent a state church, or discrimination among religious sects, Madison's warning could become a reality.

Crucial to the ultimate significance of *Mueller* was the question of whether it could be a precedent for upholding the constitutionality of the federal tuition tax proposal being pushed in Congress by the Reagan Administration. This would determine whether *Mueller* was, indeed, the forerunner of massive government support for parochial education. Congressional proposals for a nationwide program of tuition tax credits differ in several important respects from the program upheld in *Mueller*. The essence of the Reagan proposal is a credit against tax liability of an amount equal to statutory maximums ($300 in the bill proposed by the Administration in 1983).[93] To meet the constitutional standard set by the majority in *Mueller*, a tuition tax credit proposal would, at a minimum, have to be available to children in public as well as private schools. This

90 463 U.S. at 400.

91 *See* Aguilar v. Felton, 105 S. Ct. 3232, 3243 (1985) (Rehnquist, J., dissenting):

> The Court . . . strikes down nondiscriminatory nonsectarian aid to educationally deprived children from low income families. The Establishment Clause does not prohibit such sorely needed assistance; we have indeed travelled far afield from the concerns which prompted the adoption of the First Amendment when we rely on gossamer abstractions to invalidate a law which obviously meets an entirely secular need.

92 Reproduced in Everson v. Board of Educ., 330 U.S. at 63, 65-66.

93 *See* note 70 *supra*.

would sharply escalate the cost by allowing deductions for tuition and other expenses that some states, like Minnesota, may presently charge public school parents. It would also tempt states to charge for some public school expenses that are now free, because a significant part of the cost would be borne by the federal government in the form of the income tax deduction. Since states have varying practices with regard to charging expenses to public school children, a program of federal tax deductions for such expenses would benefit parents unevenly, depending on the laws of their particular state.

Apart from these political problems, the proposals in Congress clearly do not conform to the feature that the majority found critical in *Mueller*—that the benefit was in the form of a deduction and not a specified credit. The sharply progressive federal tax system highlights the unequal impact of a tax deduction on taxpayers. Thus, while the Court may have opened the door to the flow of public money to religious schools through tax benefits to parents of parochial school children, the constitutional standard established in *Mueller* may be quite costly, particularly if it encourages states to start charging for expenses to public school children. It may also create political and administrative problems that may make the whole idea far less attractive than a simple tuition tax credit of the type held invalid in *Nyquist*. Of course, three justices dissented in *Nyquist* itself,[94] and with the addition of Justice O'Connor, and with a program that is less blatant in providing benefits exclusively to a religious constituency, *Mueller v. Allen* could be the authority for upholding significant federal support for religious schools.

Political divisiveness, which was emphasized in *Lemon*, *Nyquist*, and *Meek*, was casually disposed of in a footnote in *Mueller v. Allen*. Justice Rehnquist simply ignored the *Nyquist* precedent and concluded that the language in *Lemon* respecting political divisiveness "must be regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools."[95] Thus, *Mueller* provided the opportunity for a very limiting interpretation of an important component of the "entanglement" prong of the *Lemon* test. This, too, would be significant in later cases.

C. *Legislative Chaplains: Historical Exception or Still More Accommodation*

Shortly after *Mueller v. Allen*, at the close of the 1982-1983

94 Chief Justice Burger and Justices White and Rehnquist.
95 463 U.S. at 403-04 n.11.

Term, the court, in *Marsh v. Chambers*,[96] held that paid legislative chaplains and opening prayers at the start of each session of the Nebraska legislature were not establishment clause violations. Chief Justice Burger's majority opinion (6-3) was based almost entirely on historical analysis, emphasizing that the practices challenged were identical to those adopted by the very Congress that approved the first amendment in 1789. Moreover, the issue of legislative chaplains was actually considered by the Framers of the first amendment and apparently not viewed as the type of evil that the establishment clause was designed to prevent. Chief Justice Burger also rejected the argument that the clause should be given a more expansive reading when applied to the states through the fourteenth amendment. Supporting a narrow view of the case was the reference to the fact that the complaining party was an adult, an obvious gesture of deference to the school prayer cases.

Justice Brennan's dissent, joined by Justice Marshall, may have been accurate in describing the majority opinion as "narrow and, on the whole, careful . . . and its limited rationale should pose little threat to the overall fate of the Establishment Clause."[97] But the Chief Justice's opinion did more than characterize the Nebraska practice as an historical exception to the establishment clause. In words that might be applied to school prayer, or other manifestations of government-supported religious practices in public life, the Chief Justice compared the hiring of a legislative chaplain (in this case the same one for sixteen years) to the "conduct" approved in the Sunday closing law cases, and described the practice as "simply a tolerable acknowledgement of beliefs widely held among people of this country."[98]

Justice Brennan's dissent questioned the emphasis on the intent of the members of the First Congress, arguing that the Constitution is not a "static document" and that "practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike."[99] He concluded that the Nebraska practices were not *de minimis* or nonsectarian but "will inevitably and continuously involve the State in one or another religious debate."[100] Justice Stevens's dissent was based on the sixteen-year tenure of a chaplain of one religious faith.

The difference over the role of history that emerged in the opinions of the Chief Justice and Justice Brennan was a significant

96 463 U.S. 783 (1983).
97 *Id.* at 795 (Brennan, J., dissenting).
98 *Id.* at 792.
99 *Id.* at 816-17 (Brennan, J., dissenting).
100 *Id.* at 819.

shift in what had been the earlier pattern in establishment clause cases. Starting with the *Everson* case the separationists on the Court had virtually monopolized the historical turf, relying on the Virginia experience in 1784 and 1785 to justify reading into the establishment clause the views of Madison and Jefferson that were articulated so forcefully at that time. The debates in the First Congress were far less clear and one's conclusion about them depended in large part on trying to fathom the extent to which Madison was trying to infuse his own views on limitations of state power into an amendment that limited the federal government.

The Chief Justice had relied on history to justify the tax benefit in *Walz*, as did Justice Rehnquist in *Mueller v. Allen*. *Marsh v. Chambers* was further indication that history was rapidly becoming a weapon for all sides to use.

D. *The Crèche Case: Accommodation Triumphant*

The construction of a nativity scene—a crèche—at public expense on a private park in front of City Hall in Pawtucket, Rhode Island would appear to be a classic example of conduct that violates the establishment clause. The use of public funds to construct an avowedly religious symbol implicates virtually all of the values that the Court had infused into the establishment clause since 1947. Justice Black's *Everson* dicta, and Chief Justice Burger's three-part *Lemon* test were designed to guarantee neutrality and maximum noninvolvement by government in matters of religion. Here was the absence of neutrality and the essence of involvement—government financial support for the depiction of an event that was of profound religious significance to one religion and that was, as a matter of religious belief, rejected by most others.

Nor did the case raise significant countervailing establishment clause themes. Since citizens did not have a first amendment free speech right to a government-funded crèche, the "accommodation" argument in *Widmar* did not exist. Nor could the state be viewed as burdening religion by refusing to pay for a crèche, as it might by the imposition of property taxes,[101] or the drafting of conscientious objectors.[102] In the latter situations, an accommodation, in the form of tax and draft exemptions, would not be considered an establishment. The crèche could not be equated with a textbook; it provided no secular benefit to individuals to warrant even an analogous argument to the child-benefit theory. The depiction of the birth of Christ represents to Christians the arrival of God on earth, and devout Christians would object to characterizing the

101 *See* Walz v. Tax Commission, 397 U.S. 664 (1970).
102 *See* Gillette v. United States, 401 U.S. 437 (1971).

event as simply an historical occurrence in Bethlehem nearly 2000 years ago. And there was no long historical exemption that could be traced back to the First Congress. Indeed, there was persuasive historical evidence that the secular observance of Christmas was not a common practice at the end of the eighteenth century.[103]

Both the district and circuit courts had ruled that the Pawtucket crèche was unconstitutional. As an indication of the political-religious agenda of the Reagan Administration, the Justice Department in an *amicus* brief urged reversal. Chief Justice Burger's majority (5-4) opinion in *Lynch v. Donnelly*[104] was based on an expanded notion of "accommodation" to religion and on what the Court perceived to be the essentially secular nature of the Christmas display and celebration, of which the crèche was one component. The Chief Justice found that the Constitution "affirmatively mandates" accommodation.[105] *Marsh v. Chambers*, which might have been viewed as an historical exception to establishment clause values, was portrayed by the Chief Justice as an example of the "contemporaneous understanding" of the establishment clause by the First Congress in 1789 and a "striking example of the accommodation of religious beliefs intended by the Framers."[106] Also cited as "accommodations" to religion were *Zorach v. Clauson*, "In God We Trust" on coins, "One Nation under God" in the Pledge of Allegiance, and paintings with a religious message exhibited in the National Gallery in Washington. Whatever one's view of *Zorach*, which upheld adjusting the school schedule so that some children could attend religious classes on off-school premises while others remained in the public school, it is hardly a firm precedent for the construction of an avowedly religious symbol, recognized as such by the Court.

By viewing the crèche "in the context of the Christmas season,"[107] the Chief Justice was able to apply the three-part *Lemon* test to find a "secular purpose" (it "depicts the historical origins of this traditional event long recognized as a National Holiday"),[108] and a "primary effect" that does not benefit religion or Christianity ("We can assume, *arguendo*, that the display advances religion in a sense . . . ; display of the crèche is 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 of religious paintings in governmentally

103 *See* Lynch v. Donnelly, 104 S. Ct. 1355, 1382-84 (1984) (Brennan, J., dissenting).

104 104 S. Ct. 1355 (1984).

105 *Id.* at 1359.

106 *Id.* at 1359-60.

107 *Id.* at 1362.

108 *Id.* at 1363.

supported museums.").[109]

As for the "entanglement" prong, the Court found no evidence of "administrative entanglement" and following the approach of *Mueller*, concluded that in the absence of a direct subsidy to a religious institution, "no inquiry into potential political divisiveness is called for."[110]

Justice O'Connor concurred in the majority opinion, but wrote "separately to suggest a clarification of our Establishment Clause doctrine." It is understandable that the newest member of the Court should attempt to clarify a confusing and controversial area of constitutional law, but it is doubtful that her suggested approach will be any more helpful than the existing three-part *Lemon* test in deciding cases. "The Establishment Clause," wrote Justice O'Conner, "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." The government violates the clause through "excessive entanglement," which Justice O'Connor defined as "institutional entanglement" rather than "political divisiveness." The latter may be evidence of the former, or of improper endorsement of religion, but should not be an "independent ground for holding a government practice unconstitutional."[111]

Justice O'Connor would have the "purpose" and "effect" prongs of *Lemon* relate to the endorsement of religion: "The purpose prong . . . asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."[112] Generally, by defining "effect" in terms of whether the government action has "the effect of communicating a message" of endorsement or disapproval of religion, Justice O'Connor's approach could validate many forms of financial aid to religious schools that are of considerable financial benefit (*e.g.*, the *Nyquist* or *Lemon* programs) but that might not be viewed as "communicating a message of endorsement." It is hard to fathom why "communicating a message of endorsement or disapproval" significantly clarified "primary effect . . . that neither advances nor inhibits religion."

On the other hand, Chief Justice Burger so emasculated the "purpose" prong in his majority opinion in *Lynch v. Donnelly* that Justice O'Connor's formulation, while it did not lead to a different result with regard to the crèche, offered the possibility of a more

109 *Id.* at 1364.

110 *Id.* at 1365.

111 *Id.* at 1366-37 (O'Connor, J., concurring). No Supreme Court decision has relied on political divisiveness as an "independent ground."

112 *Id.* at 1368.

searching evaluation of governmental intent. Chief Justice Burger seemed satisfied with any secular purpose, while Justice O'Connor specifically rejected so lenient a stance: "That requirement is not satisfied, however, by the mere presence of some secular purpose, however dominated by religious purposes."[113]

Applying her version of the *Lemon* test to the facts of the crèche case, Justice O'Connor basically reached the same result as Chief Justice Burger and for the same reason—the crèche was part of the holiday setting of the celebration of Christmas. The purpose was not to endorse religion, but to celebrate a holiday. And government celebration of the holiday is "not understood to endorse the religious content of the holiday, just as government celebration of Thanksgiving is not so understood."[114] Thus, by narrowing the meaning of "effect" to encompass only endorsement or disapproval, it was easier for Justice O'Connor to conclude that cloaking a religious symbol in the trappings of a national holiday did not have a "primary effect" of advancing religion.

In the final analysis the difference between the majority and Justice Brennan's dissent did not derive from "tests" or the meaning of "purpose" and "effect" or even from the different historical analyses of the celebration of Christmas in the Burger and Brennan opinions. The essential difference was one of sensitivity to the meaning of the nativity scene (whether standing alone or as part of the broader Christmas celebration) to Christians and non-Christians, particularly Jews, for whom the depiction of the birth of Christ as God represents a fundamental point of departure of Christianity from Judaism. The following excerpts from the two opinions speak eloquently of these different approaches to deeply-felt religious beliefs:

Chief Justice Burger:

> The crèche, like a painting, is passive; admittedly it is a reminder of the origins of Christmas. Even the traditional, purely secular displays extant at Christmas, with or without a crèche, would inevitably recall the religious nature of the Holiday. . . . It would be ironic, however, if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western world for 20 centuries . . . would so "taint" the City's exhibit as to render it violative of the Establishment Clause.[115]

Justice Brennan:

> Unlike such secular figures as Santa Claus, reindeer and carolers, a nativity scene represents far more than a mere "tradi-

113 *Id.*
114 *Id.* at 1369.
115 *Id.* at 1365.

> tional" symbol of Christmas. The essence of the crèche's symbolic purpose and effect is to prompt the observer to experience a sense of simple awe and wonder appropriate to the contemplation of one of the central elements of Christian dogma—that God sent His son into the world to be a Messiah. Contrary to the Court's suggestion, the crèche is far from a mere representation of a "particular historic religious event." It is, instead, best understood as a mystical re-creation of an event that lies at the heart of Christian faith. To suggest, as the Court does, that such a symbol is merely "traditional" and therefore no different from Santa's house or reindeer is not only offensive to those for whom the crèche has profound significance, but insulting to those who insist for religious or personal reasons that the story of Christ is in no sense a part of "history" nor an unavoidable element of our national "heritage."[116]

The Court's interpretation of the establishment clause has, as we have seen, not been a model of consistency. Yet, through a myriad of cases, the Court seems to have sounded a theme that all religious faiths are constitutionally equal, and that believers and nonbelievers alike can enjoy the uniquely American experience of being neither included, excluded, or insulted by government because of one's religion. To those who felt excluded because to them a government-funded nativity scene was either offensive or insulting, *Lynch v. Donnelly* conveyed a sad and disappointing message.[117]

E. *The End of the 1983-1984 Term: A Look Back and Then Ahead*

As the 1984 Term drew to a close, only one case during the preceding two years, *Larkin v. Grendel's Den*,[118] evinced a strong in-

116 *Id.* at 1378-79 (Brennan, J., dissenting).

117 *See* Redlich, *Nativity Ruling Insults Jews*, New York Times, Mar. 26, 1984, at A19, col. 2; Van Alystyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Commentary on* Lynch v. Donnelly, 1984 DUKE L.J. 301.

118 459 U.S. 116 (1982). Larson v. Valente, 456 U.S. 228 (1982), might possibly be considered another example of a strong reaffirmation of establishment clause principles. The case involved a Minnesota law which imposed registration and reporting requirements on charitable organizations, but which exempted from regulation those religions that received less than half of their contributions from nonmembers. The Court accepted the argument of the Unification Church that the law established a governmental preference in favor of those religions that did not rely on nonmembers for principal financial support. Given this interpretation, the result was clear. As Justice Brennan's majority opinion stated: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." 456 U.S. at 244. The majority applied a "compelling governmental interest" test and rejected the asserted justifications proffered by the state. In addition, the entanglement prong of the *Lemon* three-part test was applied and the distinctions drawn by the statute were held to engender a risk of politicizing religion. Justices White and Rehnquist argued that the record was not adequate to support the finding of religious preference, or to reject the state's justifications. Four justices (the Chief Justice and Justices White, Rehnquist and O'Connor) dissented in the tangential issue of standing that was present in the case.

terpretation of the establishment clause. Writing for a near-unanimous Court (only Justice Rehnquist dissented), Chief Justice Burger held that a Massachusetts statute that gave churches and schools the power to veto applications for liquor licenses within 500 feet of the church provides an actual and symbolic benefit to churches, thereby constituting a "primary effect" of advancing religion. The law also "enmeshes churches in the processes of government" and creates the danger of "divisiveness along religious lines," in violation of the entanglement prong of *Lemon*. There is little doubt that the state could enact a law simply preventing bars from operating within 500 feet of a church or a school. Perhaps the readily available alternative method of keeping liquor and religion separate made it easier for the Court to strike down the method chosen by Massachusetts.

Compared to the other cases decided during the 1982-1983 and the 1983-1984 Terms, however, the issue of whether a state could allow a church to veto the location of a saloon did not appear significant. These cases—*Marsh v. Chambers*, *Mueller v. Allen*, and *Lynch v. Donnelly*—suggested that the shift of Justice Powell from his *Nyquist* position, combined with the addition to the Court of Justice O'Connor, could create a majority that would be prepared to reconsider some of the basic establishment clause cases of the past thirty-seven years. Scheduled to be decided during 1984-1985 were a group of cases that could be the vehicle for such a historic shift in position.

V. The 1984-1985 Term: Separation to the Fore

Both sides in the controversy over the meaning of the establishment clause worried, and hoped, as the months of the 1984-1985 Term dragged on. When the Court adjourned on July 2, 1985, those who were fearful a year earlier breathed a collective sigh of relief. For those who had hoped for a definitively changed direction there was bitter disappointment. The big news was, essentially, no news. The three major decisions of the Court followed the pattern of prior precedent.

A. *Silent Prayer: A Matter of Purpose*

In 1978 Alabama enacted a law that required teachers, in grades one through six, to announce a period of silence at the start of each day's first class "for meditation." A second law was enacted in 1981 providing that the teacher "may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer . . . ." In 1982 the Alabama Legislature authorized any teacher or professor "in any public educa-

tional institution within the state of Alabama" to lead "willing students" in a prescribed prayer that recognized "Almighty God" as the "Creator and Supreme Judge of the World."[119]

Originally all three statutes were challenged, but only the 1981 "meditation or voluntary prayer" statute was at issue in *Wallace v. Jaffree*,[120] decided on June 4, 1985. *Jaffree* did not challenge the ruling of the lower federal courts upholding the 1978 "period of silence . . . for meditation" statute. The 1982 statute, with its prescribed prayer, was found by the district court to have been enacted "to encourage a religious activity." Nevertheless, after a trial on the merits, the 1982 law was upheld because the district court concluded that the Supreme Court had misconstrued the establishment clause in its prior opinions and that Alabama could establish a state-supported religion. The Eleventh Circuit Court of Appeals reversed the district court, and, acting on Alabama's appeal, the Supreme Court, in 1984, summarily and unanimously affirmed the Circuit Court's ruling. *Engel v. Vitale* was alive and well.

The district court had also upheld the 1981 law despite a finding that it, too, had been enacted for religious purposes. The Eleventh Circuit, agreeing with the finding, reversed the district court, leading to Alabama's appeal.[121]

The legislative and judicial history of *Wallace v. Jaffree* is significant because a so-called "pure moment of silence" law already existed, and "voluntary prayer" was the only meaningful change accomplished in the 1981 law. The new law could have only been intended to encourage religious activity, as the district and circuit courts found. Thus, a "secular purpose" was difficult, if not impossible, to discern. If the first prong of the *Lemon* test still had life after *Lynch v. Donnelly*, the 1981 Alabama law would be difficult to sustain. By a 6-3 vote, the Supreme Court agreed. Justices Powell and O'Connor provided the decisive "switch" votes from *Lynch v. Donnelly*.

In one sense Justice Stevens's majority opinion simply applied precedent to the peculiar facts of the Alabama statute and concluded that the statute had "no secular purpose." The opinion continued:

> The rebutted evidence of legislative intent contained in the legislative record and in the testimony of the sponsor . . . is confirmed by a consideration of the relationship between this statute and the two other measures that were considered in this case. . . . The Legislature enacted [the 1981 statute] despite

119 These provisons are set forth in Wallace v. Jaffree, 105 S. Ct. 2479, 2481-82 (1985).
120 105 S. Ct. 2479 (1985).
121 The history of the litigation under the three statutes is set forth at 105 S. Ct. at 2482-86.

> the existence of [the 1978 statute] for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each school day. The addition of "or voluntary prayer" indicates that the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the Government must pursue a course of complete neutrality toward religion.[122]

Moreover, the law's sponsor stated, in the legislative record and in testimony, that the bill was intended "to return voluntary prayer" to public schools.[123]

In a broader sense, however, *Wallace v. Jaffree* was the forum for a reconsideration of the basic principles that had guided the Supreme Court in its interpretation of the establishment clause since 1947. Important indications of the Court's thinking emerged.

First, Justice Stevens's majority opinion reaffirmed the *Lemon v. Kurtzman* three-part test, although only the first prong was actually discussed. Justice Powell's opinion, concurring both in the judgment and with Justice Stevens's opinion, was written "to express additional views and to respond to criticism of the three-pronged *Lemon* test."[124] In a footnote, Justice Powell referred to Justice O'Connor's statement in her concurring opinion that the *Lemon* standards "should be reexamined and refined" and to Justice Rehnquist's conclusion that the test be abandoned.[125] Justice Powell's defense of *Lemon* was most clearly directed at the Chief Justice's *Jaffree* dissent, in which he referred to the Court's treatment of *Lemon* as "a naive preoccupation with an easy bright-line approach for addressing constitutional issues" and the application of "tidy formulas by rote."[126] Justice Powell reminded the Court that only *Marsh v. Chambers* had been decided without reference to *Lemon*, and that *Lemon* had not been modified or overruled. He expressed concern that "continued criticism of [*Lemon*] could encourage other courts to feel free to decide Establishment Clause cases on an *ad hoc* basis."[127]

Justice Powell, as he has in other contexts,[128] was reminding his colleagues of their stake in the integrity of the judicial process, and the self-restraining influence of a body of precedent that develops around judicially-created doctrines and standards.

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122 *Id.* at 2491.
123 *Id.* at 2490.
124 *Id.* at 2493 (Powell, J., concurring).
125 *Id.* at 2493-94 n.3.
126 *Id.* at 2507 (1985) (Burger, C.J., dissenting).
127 *Id.* at 2494 (Powell, J., concurring).
128 *See* his opinion in Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983), and Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005, 1021 (1985), (dissenting from the overruling of National League of Cities v. Usery, 426 U.S. 833 (1976)).

Second, although the *Lemon* standard was reaffirmed, the Court may have redefined the "purpose" prong, despite Justice Powell's admonition that *Lemon* should be left alone. *Lemon*, it will be recalled, required that the government action "must have a secular legislative purpose." One can read the majority opinion in *Jaffree* as being based on the conclusion that the Alabama law had no secular purpose; this was Justice Powell's interpretation.[129] But the majority opinion itself, with which Justice Powell concurred, specifically quoted Justice O'Connor's restatement of the "purpose" prong in her concurring opinion in *Lynch v. Donnelly*. Justice Stevens wrote, "in applying the purpose test, it is appropriate to ask 'whether the government's actual purpose is to endorse or disapprove of religion.' "[130] Justice O'Connor specifically stated in her *Lynch* concurrence that the existence of some secular purpose would not suffice if the action was dominated by a religious purpose.[131] Her concurrence in *Jaffree* was based on her conclusion that Alabama intentionally endorsed the particular practice of prayer. It was not based on the lack on any secular purpose. Justice Stevens's formulation (adopting Justice O'Connor's) could be significant in future cases if there is a secular purpose that is insignificant compared to the dominant religious purpose.

Third, the majority stated clearly that it intends to apply strict constitutional standards "whenever the State itself speaks on a religious subject,"[132] thus apparently rejecting the approach, suggested with increasing frequency by the Chief Justice, that the Court should concern itself only with state practices that are "a step toward creating an established church,"[133] or that are dictated by the "Archbishop of Canterbury, the Vicar of Rome, or some other powerful religious leaders."[134] His dissent in *Jaffree* ended with the disparaging comment, "[t]he mountains have labored and brought forth a mouse."[135] Justice Rehnquist had sounded a similar "let's-look-at-the-big-picture" theme in *Mueller v. Allen*, and he expanded it in his *Jaffree* dissent. The majority, however, referred to "the myriad subtle ways in which Establishment Clause values can be eroded."[136] Six justices continue to view these cases as raising important issues of religious freedom.

Fourth, the majority's holding was a rejection of the "accom-

129 105 S. Ct. at 2494-95 (Powell, J., concurring).
130 *Id.* at 2490.
131 104 S. Ct. at 1368 (O'Connor, J., concurring).
132 105 S. Ct. at 2492.
133 *Id.* at 2507 (Burger, C.J., dissenting).
134 Lynch v. Donnelly, 104 S. Ct. at 1365.
135 105 S. Ct. at 2508 (Burger, C.J., dissenting).
136 *Id.* at 2493.

modation to religion" approach forcefully advanced by the Chief Justice in *Lynch* and restated in his *Jaffree* dissent. He described the Alabama law as one that "affirmatively furthers the values of religious freedom and tolerance that the Establishment Clause was designed to protect. . . . It accommodates the purely private, voluntary religious choices of the individual pupils who wish to pray while at the same time creating a time for nonreligious reflection for those who do not choose to pray."[137] The United States, in its *amicus* brief, similarly asked the Court to regard the Alabama law as an accommodation that is contemplated by the first amendment's guarantee of free exercise of religion.[138]

Justice O'Connor's concurring opinion,[139] which elaborated on a footnote in the majority opinion, provided a useful analysis for limiting this potentially open-ended "accommodation" approach to establishment clause issues. She observed that "complete neutrality" is not the answer to the conflict between the religion clauses. Strict adherence to *Lemon* would prevent exemption from such government regulations as the Sunday closing laws. Such exemptions are hardly neutral toward religion. "On the other hand," she wrote, "judicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause."[140] Thus, to protect the establishment clause, it was necessary, in *Lemon* itself, to adopt the nonneutral position of denying financial benefits to those who send their children to religious schools.

Justice O'Connor resolved the tension by drawing on the free exercise derivation of the "accommodation" concept. If the government "lifts a government-imposed burden on the free exercise of religion . . . then the standard Establishment Clause test should be modified accordingly. It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden."[141]

This analysis, Justice O'Connor concluded, would not save the Alabama law because the state had imposed no burden on a child's ability to pray silently in public schools. The only burden lifted by the statute is the limitation on group silent prayer under state sponsorship. "Phrased in these terms, the burden lifted by the statute is not one imposed by the State of Alabama but by the Establishment Clause as interpreted in *Engel* and *Abington*. In my view, it is beyond

137 *Id.* at 2507-08.
138 *See* 105 S. Ct. at 2502 (O'Connor, J., dissenting).
139 *Id.* at 2491 n.45.
140 *Id.* at 2504.
141 *Id.*

the authority of the State of Alabama to remove burdens imposed by the Constitution itself."[142]

While Justice O'Connor's analysis is helpful in ruling out the "accommodation" argument raised in *Jaffree*, there will be other instances in which it will not be clear whether the state is alleviating a state-imposed burden on free exercise (*e.g.*, allowing chapels on military bases), or whether it is engaging in conduct that is otherwise barred by establishment clause concerns (*e.g.*, vocal prayer). *Widmar v. Vincent*[143] arguably fell into this uncertain category, although the Court's recognition of a state university's urban campus as a public forum for student groups required lifting the burden of the state-imposed exclusion of religious groups. Whether this result can be applied to public high schools, where the requirements of the establishment clause itself might require the exclusion of religious clubs, is an issue that the Court will be facing in the coming months.[144]

Finally, and most importantly, the majority rejected two fundamental challenges to constitutional jurisprudence in the church-state area. A section of Justice Stevens's opinion was devoted to answering what was described as the "remarkable conclusion" of the district court that the "Federal Constitution imposes no obstacle to Alabama's establishment of a state religion." Because no member of the Court was urging the Court to read the religion clauses out of the fourteenth amendment's due process clause, one suspects that the real purpose of the discussion was to answer the long and scholarly opinion of Justice Rehnquist, in which he directly challenged the historical argument, first advanced in *Everson*, that the establishment clause was intended to embody the Jefferson-Madison views of separation of church and state. As the following conclusionary paragraph indicates, Justice Rehnquist's historical analysis, based on the debates of the First Congress, led him to challenge virtually all of the Court's establishment clause decisions:

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

142 *Id.* at 2505.

143 454 U.S. 263 (1981).

144 *See* Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984), *cert. granted*, 105 S. Ct. 1167 (1985).

> however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means.[145]

It is not fair to Justice Rehnquist to summarize briefly his long and thoughtful opinion. But its historical underpinning is to reject the argument that Madison carried into the House of Representatives in 1789 the views, shared with Thomas Jefferson, that were embodied in the Memorial and Remonstrance Against Religious Assessments (1785) and the Virginia Statute of Religous Liberty in 1786. Justice Rehnquist argued that Madison originally had little interest in a Bill of Rights, and that his main concern during the First Congress, as reflected in the debates, was to prevent the establishment of a national religion.

Others, of course, disagree. Justices Black and Rutledge, on opposite sides in *Everson*, agreed on the importance of the Virginia experience in the formulation of the first amendment. Irving Brandt, in his multi-volume biography of James Madison, traced the changes in language as the establishment clause evolved during the First Congress, and concluded that the words "respecting an establishment of religion" were inserted so that the Amendment would not be limited to a prohibition on the establishment of a national religion.[146] Madison's repeated use of the word "establishment" in his Remonstrance was cited as evidence that he understood the difference between "established church" and "establishment" and that he intended to make certain that the new government could not "intermeddle with religion."[147]

Neither side in this historical debate could legitimately claim that the intent of the Framers could provide an answer to the issue of prayer in public schools. The separationists looked to the Virginia history, and the views of Madison and Jefferson, to advance the proposition that the establishment clause was intended to do more than prevent an established church or discrimination among religions. Jefferson's wall became the symbolic metaphor, and while there have been sharp disagreements with regard to particular cases, the Court has derived its constitutional principles from the Jefferson-Madison philosophy. By challenging the historical roots from which this philosophy is derived, Justice Rehnquist has

145 105 S. Ct. at 2520. Justice Rehnquist relied heavily on the historical analysis in R. CORD, SEPARATION OF CHURCH AND STATE (1982). *See also* M. HOWE, THE GARDEN AND THE WILDERNESS (1965).

146 *See* I. BRANDT, *supra* note 7, at 353.

147 *See* Everson v. Board of Educ., 330 U.S. 1, 38 (1947) (Rutledge, J., dissenting) (quoting the Remonstrance).

challenged virtually the entire body of precedent developed by the Court for thirty-seven years. The proper role of history in constitutional ajudication is a subject of considerable scholarly debate,[148] and neither conservatives nor liberals have been consistent in their uses of history. Justice Rehnquist is clearly trying to shift the direction of establishment clause law, but thus far he appears to have few allies.

The majority opinion's citations to Justice Black's *Everson* dicta and to Madison's Remonstrance demonstrates continued support for the Court's traditional historical analysis.[149] Justice Stevens acknowledged, however, that religious freedom may have been understood "at one time" to prohibit only "the preference of one Christian sect over another . . . . But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all."[150] At this point in the opinion, Justice Stevens quoted Justice Black's *Everson* dicta that the first amendment bars "laws which aid one religion, aid all religions, or prefer one religion over another."[151]

Only Justice White expressed support (short of full endorsement) for Justice Rehnquist's position. "I appreciate Justice Rehnquist's explication of the history of the religion clauses. . . . Against that history it would be quite understandable if we undertook to reassess our cases dealing with these clauses."[152] While Chief Justice Burger's emphasis on the dangers of an established church might lend support to Justice Rehnquist's position, he continued to apply the *Lemon* test (which Justice Rehnquist's position would render irrelevant) and, in other contexts, to find establishment clause violations in government conduct that Justice Rehnquist's analysis would sustain.

What does *Wallace v. Jaffree* predict as to future "moment of silence" laws? A statute that sets aside a moment of silence, without mentioning prayer, would be sustained unless it can be shown that its legislative history demonstrated "no secular purpose" or that it was, in Justice O'Connor's words, "intended to convey a message of state encouragement of religion." Despite the reality that religion has probably been involved in "moment of silence" legislation, at least since *Engel v. Vitale*, the "secular purpose" prong

148 *See* Powell, *The Original Understanding of Origianl Intent*, 98 HARV. L. REV. 885 (1985); Richards, *Interpretation and Historiography*, 58 S. CAL. L. REV. 489 (1985).

149 Wallace v. Jaffree, 105 S. Ct. 2479, 2488-89 nn.37, 38 (1985).

150 105 S. Ct. at 2488.

151 *Id.* at 2488 n.37.

152 *Id.* at 2508 (White, J., dissenting).

may not be difficult to satisfy, even if the legislature has manifested a sectarian interest. Justice Powell, in his concurrence, stated his agreement with Justice O'Connor that "*some* moment-of-silence statutes *may* be constitutional."[153]

If the "secular purpose" requirement is met, it is unlikely that a "moment of silence" law will fail the "effect" test either. Justice Powell specifically stated that a "moment of silence" law is unlikely to have the effect of advancing religion.[154] Unless it is implemented in a sectarian manner, it would be difficult to demonstrate that a law providing for a moment of silence, enacted with a secular purpose, had the effect of advancing religion.

More difficult to predict is the fate of a law providing, as did Alabama's, for a moment of silence for meditation "or silent prayer." Justice O'Connor would approve a moment of silence law "drafted and implemented so as to permit prayer, meditation and reflection . . . without endorsing one alternative over the others . . . ."[155] Justice Powell would have upheld the Alabama statute itself if it had a clear secular purpose.[156] He, like Justice O'Connor, would probably be satisfied if the legislative history was not as blatant as in Alabama. The majority opinion, moreover, stated that the intent of the Alabama law was different from "merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day."[157] Perhaps different language and history would persuade members of the majority that there was a secular purpose and no proscribed religious effect in some "meditation or prayer" statutes.

Thus, one can conclude that a "pure" moment of silence law is probably valid unless the legislative history dilutes the purity.[158] In today's political environment, with religious leaders actively involved in politics, those who see religious motives in all moments of silence laws will find *Jaffree* of some help. *Jaffree* will be more helpful in overturning laws that provide for a moment of silence for meditation "or prayer."[159] *Jaffree* does not invalidate all such statutes, but makes their defense more difficult.

Overlooked in the several *Jaffree* opinions is an important reli-

153 *Id.* at 2493 (emphasis added); *see* Justice O'Connor's comment in her concurring opinon: "It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful school children." *Id.* at 2499.

154 *Id.* at 2495 (Powell, J., concurring).

155 *Id.* at 2501 (O'Connor, J., concurring).

156 *Id.* at 2495 (Powell, J., concurring).

157 *Id.* at 2491.

158 *See* May v. Cooperman, 572 F. Supp. 1561 (D. N.J. 1983) ("one-minute period of silence" held invalid); *contra* Gaines v. Anderson, 421 F. Supp. 337 (D. Mass. 1976).

159 *See* Duffy v. Las Cruces Pub. Schools, 557 F. Supp. 1013 (D. N.M. 1983) ("or prayer" statute held unconstitutional).

gious consideration that should influence the constitutional result. "Silent prayer," like vocal prayer, can never be nondenominational. Thus, if one of the objections to vocal prayer was its tendency to divide children along religious lines and to place the endorsement of the state behind one form of religious worship, state-supported silent prayer raises the same problems. When the state encourages silent prayer, it endorses a practice that is unacceptable to those whose faith requires that they pray only in a place of worship, or before some religious symbol. Some faiths may forbid praying with members of another faith, or with the opposite sex; some require believers to stand, or face a certain direction, or sit down, or wear certain apparel, or be led by ordained spiritual leaders—the variables reflect the infinite capacity of the human spirit to worship God in different ways. Any state expression of preference for prayer, whether vocal or silent, destroys the neutral position of the state, divides us along religious lines, and singles out those who choose not to pray in public either because of belief or nonbelief. The Constitution should reflect these differences among our people and not magnify them. Silent prayer must be an expression of individual choice by the student. All prescribed moments of silence are highly suspect.

B. *A Day Off for Sabbath: Accommodation Contained*

In 1963, in *Sherbert v. Verner*,[160] the Court held that South Carolina violated the free exercise rights of a Seventh Day Adventist who was denied unemployment insurance benefits because she was unable to accept a job that required her to work on Saturdays in violation of her religious scruples. In 1981 *Sherbert* was followed by *Thomas v. Indiana Employment Security Division Review Board*,[161] which involved a factory worker who was denied unemployment compensation after he had left a job with a weapons manufacturer because of his religious conviction. *Sherbert* and *Thomas* are frequently cited as examples of permissible accommodations to religion because a state, if it enacted the exception required by the Court's decisions, would be alleviating a state-imposed burden on free exercise.

Different considerations are posed when the state compels private employers to lift the burdens that their conditions of employment impose on the religious beliefs and practices of employees. Title VII, which forbids religious discrimination in employment, requires employers to make "reasonable accommodations" to an employee's religious practices. In *TWA v. Hardison*,[162] decided in 1971,

160 374 U.S. 398 (1963).
161 450 U.S. 707 (1981).
162 432 U.S. 63 (1977).

the Court, possibly to avoid establishment clause problems, interpreted Title VII as requiring employers to incur only *de minimis* burdens.

Statutes that require employers to accommodate to the religious practices of employees can raise establishment clause problems. Religious belief can dictate a wide range of employee practices, and state laws requiring accommodation by employers could, at some point, confer such broad benefits on religious observers as to be considered establishments of religion.

Lynch v. Donnelly, in which the Chief Justice stated that the Constitution "affirmatively mandates" accommodation, did not involve the alleviation of any burdens on a person's exercise of religion, either by the state or a private person. If the Court could uphold a crèche as a permissible accommodation to religion, there was good reason to believe that the Court might be receptive to state laws that required broad accommodations by private employers to the religious practices of employees.

The Connecticut statute involved in *Thornton v. Caldor, Inc.*[163] was enacted in 1977 after the state revised its Sunday closing laws to permit certain classes of businesses to remain open. It provides:

> No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal.[164]

Thornton held a management position in one of the stores of a retail chain. He refused to work on Sunday because it was his Sabbath. He also refused an offer of transfer to a management position in a store in Massachusetts that closed on Sunday, or to a nonsupervisory position within the state at a lower salary. After being transferred to the latter position, he resigned, and a state administrative agency found that he had been discharged in violation of the statute. The Connecticut Supreme Court found the law unconstitutional, failing all three aspects of the *Lemon* test.

In a rare display of unanimity, the Supreme Court, with only Justice Rehnquist dissenting, found the Connecticut statute had a "primary effect that impermissibly advances a particular religion's practice."[165] Chief Justice Burger's majority opinion accepted what it believed to be the Connecticut Supreme Court's interpretation that the statute "imposes on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee by enforcing observance of the Sabbath

163 105 S. Ct. 2914 (1985).
164 CONN. GEN. STAT. § 53-303e(b) (Supp. 1962-1984), reproduced at 105 S. Ct. at 2916.
165 105 S. Ct. at 2918.

the employee unilaterally designates."[166] Actually, the State had argued that the statute, like Title VII, required "reasonable accommodation" and not accommodation at all costs.

Justice O'Connor, applying her version of the "effect" prong of the *Lemon* test, agreed with the majority because the statute "conveys a message of endorsement of the Sabbath observance."[167] Her opinion, joined by Justice Marshall, stressed that the law singled out Sabbath observers for special protection. Referring back to her attempt, in *Wallace v. Jaffree*, to limit the concept of permissible "accommodation" to religion, Justice O'Connor emphasized that the Connecticut law, like Title VII, "lifts a burden on religious practice that is imposed by *private* employers, and hence is not the sort of accommodation statute specifically contemplated by the Free Exercise Clause."[168] It would, therefore, have to meet the *Lemon* three-part test. Title VII meets the test because it provides for "reasonable accommodation" to religious observances and extends its benefits to all religious beliefs and practices. Thus, "an objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion or a particular religious practice."[169]

Thornton is significant because it declined to apply the "accommodation" approach to a government action that, in many ways, represented more of an accommodation than Pawtucket's construction of the crèche or New York's "released time" program in *Zorach*. Although the Connecticut statute relieved only a private burden, the government action in the latter cases relieved no burdens. The Chief Justice has been a proponent of "accommodation," and the Connecticut law presented him with an opportunity to extend the concept in a situation that would have been seen as benefiting freedom of worship. Indeed, Thornton's case was supported by some groups that have been most vigorous in arguing for separation of church and state,[170] probably in the mistaken belief that the Connecticut law, even if it compelled an accommodation that went beyond Title VII, would not be used as an argument for further accommodation because it was intended to protect free religious exercise. Actually, Justice O'Connor's formulation of the proper limits of "accommodation" is too narrow, because the Court has stated, in *Walz* and the Sunday closing law cases, that the state's ability to accommodate to state-imposed burdens on reli-

166 *Id.*

167 *Id.* at 2919 (O'Connor, J., concurring).

168 *Id.* (emphasis in original).

169 *Id.*

170 The American Jewish Congress and the Anti-Defamation League supported Thornton's position.

gious worship is not limited to those burdens that constitute free exercise violations. Nevertheless, if the Court adheres to Justice O'Connor's formulation, even with the *Walz* modification, as it did in *Thornton* and *Wallace v. Jaffree*, the concept of "accommodation" may be contained.

Justice Rehnquist's dissent, without opinion, suggests that his *Jaffree* dissent may leave him with very little to say in establishment clause cases. Actually, he could have joined the majority on grounds that the Connecticut law discriminated among religious sects by benefiting only those faiths that observe a Sabbath. If Justice Rehnquist, in order to find an establishment clause violation, requires a more discriminatory law, or one that actually established a state or national religion, he may find his workload in this area substantially reduced.

C. *Public School Teachers in Religious Schools:* Meek v. Pittenger *Revisited*

Probably the most important church-state decisions of the term were announced on the next-to-last day—*Grand Rapids v. Ball*[171] and *Aguilar v. Felton*.[172] Both involved the same principle that had narrowly divided the Court in *Meek v. Pittenger*—whether "remedial" courses could be taught by public school teachers in private schools. While both involved the same principle, the Grand Rapids program represented a far more extensive effort by public and religious school authorities to use public financial resources in the cooperative administration of the public and sectarian school systems. Both programs were held unconstitutional by narrow (5-4) majorities: Grand Rapids' because its effect was to advance religion, and the New York program in *Aguilar* because of excessive entanglements. One aspect of the Grand Rapids program was struck down by a 7-2 majority.[173]

The Grand Rapids, Michigan School District developed a two-part program—Shared Time and Community Education. Justice Brennan, in his majority opinion, concisely described them, and the facts are highly significant:

> The Shared Time program offers classes during the regular school day that are intended to be supplementary to the "core curriculum" courses that the State of Michigan requires as a part of an accredited school program. Among the subjects offered are "remedial" and "enrichment" mathematics, "remedial" and "enrichment" reading, art, music, and physical

171 105 S. Ct. 3216 (1985).
172 105 S. Ct. 3232 (1985).
173 Only Justices White and Rehnquist voted to uphold the Community Educaton Program, discussed *infra*.

education. A typical nonpublic school student attends these classes for one or two class periods per week; approximately "ten percent of any given nonpublic school student's time during the academic year would consist of Shared Time instruction." Although Shared Time itself is a program offered only in the nonpublic schools, there was testimony that the courses included in that program are offered, albeit perhaps in a somewhat different form, in the public schools as well. All of the classes that are the subject of this case are taught in elementary schools, with the exception of Math Topics, a remedial math course taught in the secondary schools.

The Shared Time teachers are full-time employees of the public schools, who often move from classroom to classroom during the course of the school day. A "significant portion" of the teachers (approximately 10%) "previously taught in nonpublic schools, and many of those had been assigned to the same nonpublic school where they were previously employed." The School District of Grand Rapids hires Shared Time teachers in accordance with its ordinary hiring procedures. The public school system apparently provides all of the supplies, materials, and equipment used in connection with Shared Time instruction.

The Community Education Program is offered throughout the Grand Rapids community in schools and on other sites, for children as well as adults. The classes at issue here are taught in the nonpublic elementary schools and commence at the conclusion of the regular school day. Among the courses offered are Arts and Crafts, Home Economics, Spanish, Gymnastics, Yearbook Production, Christmas Arts and Crafts, Drama, Newspaper, Humanities, Chess, Model Building, and Nature Appreciation. The District Court found that "[a]lthough certain Community Education courses offered at nonpublic school sites are not offered at the public schools on a Community Education basis, all Community Education programs are otherwise available at the public schools, usually as a part of their more extensive regular curriculum."

Community Education teachers are part-time public school employees. Community Education courses are completely voluntary and are offered only if 12 or more students enroll. Because a well-known teacher is necessary to attract the requisite number of students, the School District accords a preference in hiring to instructors already teaching within the school. Thus, "virtually every Community Education course conducted on facilities leased from nonpublic schools has an instructor otherwise employed full time by the same nonpublic school."[174]

Although the Court relied on *Meek v. Pittenger*,[175] and other school aid cases, it was clear that Justice Brennan was using this opportunity to address the issue of aid to religious schools in a broader context than had earlier discussions. Perhaps because the

174 105 S. Ct. at 3218-19 (citations to district court opinion omitted).
175 421 U.S. 349 (1975).

Grand Rapids program, if upheld, would have virtually wiped away any significant constitutional barriers to government funding of religious schools, Justice Brennan addressed the core issue: whether the Grand Rapids program had the "effect" of advancing religion. For three reasons the majority concluded that it did.

First, there was a substantial risk of state-sponsored indoctrination of religion. Forty of the forty-one private schools where the "part-time public schools" were located were "identifiably religious."[176] Shared Time and Community Education teachers were performing important educational functions as an integral part of schools whose essential mission was sectarian. The courses were part of the schools' educational program, unlike diagnostic services or state-prepared standardized tests. The Community Education program suffered from the additional defect that virtually all of the courses were taught by teachers otherwise employed full-time by the same religious school at which the program was already located. No effort was made in either program to monitor the course for religious content. Instead of relying on the "entanglement" prong, as the Court had done in *Lemon* and *Meek*, the majority in *Grand Rapids* concluded that "in the pervasively sectarian environment of a religious school, a teacher may knowingly or unwillingly tailor the content of the course to fit the school's announced goals."[177] Thus, in this context, the danger was not only from the administrative entanglement that would be necessary to prevent state-sponsored teaching of religion, but rather the substantial risk that no program of state supervision would succeed.

Second, the Grand Rapids program created a "symbolic union of government and religion on one sectarian enterprise."[178] Here was a factor not sufficiently emphasized in earlier parochial school-aid cases but which properly focuses on what the "effects" and "entanglement" tests were trying to accomplish—avoiding the promotion of religion through "a close identification of the powers and responsibilities [of government] with those of any—or all—religious denominations . . . ."[179] Echoing a theme developed by Justice O'Connor in her *Lynch v. Donnelly* concurrence, the majority concluded that school children would not easily perceive the difference between public school and religious school classes, and that the program would be viewed as a government endorsement of some faiths and rejection of others. The Court quoted the following excerpt from Judge Henry Friendly's extensive and masterful

176 105 S. Ct. at 3223. Elsewhere in the opinion the schools are described as "pervasively sectarian." *Id.* at 3223.

177 *Id.* at 3225-26.

178 *Id.* at 3227.

179 *Id.* at 3226.

Second Circuit opinion in the companion *Aguilar* case (involving a far less ambitious program):

> Under the City's plan public school teachers are, so far as appearance is concerned, a regular adjunct of the religious school. They pace the same halls, use classrooms in the same building, teach the same students, and confer with the teachers hired by the religious schools, many of them members of religious orders. The religious school appears to the public as a joint enterprise staffed with some teachers paid by its religious sponsors and others by the public.[180]

The third "effect" was that providing teachers themselves, as distinguished from previously approved textbooks, for instructional (not diagnostic) purposes is the "kind of direct aid to the educational function of the religious school [that] is indistinguishable from the provision of a direct subsidy to the religious school that is most clearly prohibited under the Establishment Clause."[181] The majority rejected the argument that the courses were "supplemental." The line between regular and supplemental courses is very thin and could lead to public schools gradually taking over the entire secular curriculum of religious schools:

> But there is no principled basis on which this Court can impose a limit on the percentage of the religious school day that can be subsidized by the public school. To let the genie out of the bottle in this case would be to permit ever larger segments of the religious school curriculum to be turned over to the public school system, thus violating the cardinal principle that the State may not in effect become the prime supporter of the religious school system.[182]

The companion case, *Aguilar v. Felton*,[183] involved a federally funded program that posed less of a threat of "symbolic union" of church and state or of government funding of major aspects of the parochial school system. Unlike the Grand Rapids program, which went beyond *Meek* in providing educational services through government employed personnel, the New York program in *Aguilar* was limited to a narrow range of remedial programs funded by a federal statute enacted in 1965 to assist lower income children in public and private schools. This "aid-the-poor-child" approach was the basis for the federal law, enacted during President Johnson's ad-

180 *Id.* at 3227, *quoting* Felton v. Secretary of United States Dept. of Educ., 739 F.2d 48, 67-68 (2d Cir. 1984).

181 105 S. Ct. at 3229.

182 *Id.* at 3230. The importance of keeping the "genie" in the bottle was emphasized by Judge Friendly. *See* Felton v. Secretary of United States Dept. of Educ., 739 F.2d 48, 67 (2d Cir. 1984). *See also* Americans United for Separation of Church and State v. School Dist. of Grand Rapids, 718 F.2d 1389 (6th Cir. 1983).

183 105 S. Ct. 3232 (1985).

ministration.[184] By providing assistance to lower income children in both public and private schools, Title I, as it became known, opened the prospect of federal funds to religious schools, an essential ingredient of the legislative compromise that overcame congressional objections to federal funding of public schools.

As in *Grand Rapids*, Justice Brennan's description of the New York program is instructive:

> Since 1966, the City of New York has provided instructional services funded by Title I to parochial school students on the premises of parochial schools. Of those students eligible to receive funds in 1981-1982, 13.2% were enrolled in private schools. Of that group, 84% were enrolled in schools affiliated with the Roman Catholic Archdiocese of New York and the diocese of Brooklyn and 8% were enrolled in Hebrew day schools. With respect to the religious atmosphere of these schools, the Court of Appeals concluded that "the picture that emerges is of a system in which religious considerations play a key role in the selection of students and teachers, and which has as its substantial purpose the inculcation of religious values."
>
> The programs conducted at these schools include remedial reading, reading skills, remedial mathematics, English as a second language, and guidance services. These programs are carried out by regular employees of the public schools (teachers, guidance counselors, psychologists, psychiatrists and social workers) who have volunteered to teach in the parochial schools. The amount of time that each professional spends in the parochial school is determined by the number of students in the particular program and the needs of these students.
>
> The City's Bureau of Nonpublic School Reimbursement makes teacher assignments, and the instructors are supervised by field personnel, who attempt to pay at least one unannounced visit per month. The field supervisors, in turn, report to program coordinators, who also pay occasional unannounced supervisory visits to monitor Title I classes in the parochial schools. The professionals involved in the program are directed to avoid involvement with religious activities that are conducted within the private schools and to bar religious material in their classrooms. All material and equipment used in the programs funded under Title I are supplied by the Government and are used only in those programs. The professional personnel are solely responsible for the selection of the students. Additionally, the professionals are informed that contact with private school personnel should be kept to a minimum. Finally, the administrators of the parochial schools are required to clear the classrooms used by the public school personnel of all religious symbols.[185]

184 Title I of the Elementary and Secondary Education Act of 1965, 92 Stat. 2153, 20 U.S.C. § 2701 *et. seq.* (1982).

185 105 S. Ct. at 3235.

The Court of Appeals for the Second Circuit, in striking down the program, had described it as having "done so much good and little, if any, harm."[186] Its specific holding was based on the Supreme Court's opinion in *Meek v. Pittenger* invalidating, as an "entanglement," the use of public school personnel to teach remedial courses in religious schools. Judge Friendly's opinion, however, also discussed the significance of "the regular appearance of public school teachers in religious schools,"[187] the serious risks that the religious school atmosphere would "penetrate into the remedial instruction,"[188] and the impossibility of imposing either financial or subject-matter limitations if the *Meek* distinction were abandoned.[189] In a significant footnote, Judge Friendly pointed to the lower court opinion in the *Grand Rapids* case as an example of the type of program that could be justified if the New York program were upheld.[190] Thus, the Second Circuit opinion had paved the way for an affirmance based on the "effect" prong.

Justice Brennan used many of Judge Friendly's arguments in the *Grand Rapids* majority opinion, but relied exclusively on "entanglement" reasoning in affirming the Second Circuit's opinion in *Aguilar*. New York, unlike Grand Rapids, had adopted a system for monitoring the religious content of government funded classes. It was this supervision, however, that was found by the majority to create a danger of excessive entanglement between church and state. As in *Meek*, the fact that the instruction was provided by teachers (not books) on the premises of a pervasively sectarian school would give rise to constant visits and inspections over the continuous life of the program. The religious school would have to "endure the ongoing presence of state personnel whose primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought."[191] These day-to-day contacts are also likely to create "political divisiveness along religious lines . . . ."[192] Justice Brennan resurrected the spectre, originally propounded by the Chief Justice in *Lemon*, of "state inspectors prowling the halls of parochial schools and auditing

186 Felton v. Secretary of United States Dept. of Educ., 739 F.2d 48, 71-72 (2d Cir. 1984).

187 *Id.* at 67.

188 *Id.* at 66.

189 "We see no principal basis for limiting the position urged by appellees to remedial instruction or clinical and guidance services." *Id.* at 66.

190 *Id.* at 67 n.21. The footnote, which cited the Sixth Circuit opinion in *Grand Rapids*, was inserted after Judge Friendly wrote: "To relax *Meeks*' ban on sending public school teachers and counselors into religious schoools . . . would let the genie out of the bottle."

191 Aguilar v. Felton, 105 S. Ct. at 3239.

192 *Id.*

classroom instruction . . . ."[193]

The two programs, and the two opinions of the Court, demonstrated anew the importance of the distinction developed by the Court in the 1970's between programs conducted on and off the premises of the religious schools. An extensive program such as Grand Rapids' involves the government, as Justice Brennan argued, in a joint educational venture, financially and administratively. Although the overall impact of a narrower program, such as the one in *Aguilar*, may have a less "symbolic" and fiscal effect of aiding religion, it still runs the risks of uniting church and state in the operation of the critical government function of education. The dangers of government-sponsored teaching of religion, of a union of government and religion in the operation of the school system, of excessive day-to-day entanglement, and of government subsidy of a major portion of the religious schools' curriculum, are far greater if programs are conducted on religious school premises.

The "entanglement" prong always served the purpose of keeping these two systems apart. *Grand Rapids* could have been based on entanglement alone, but the Court was right in recognizing that when the state program actually moves close to the point of achieving the very evil that the prophylactic "entanglement" rule was designed to prevent, then the "effect" is, as the Court said, one that impermissibly advances the cause of religion. This was the approach of Justice Powell in *Nyquist*; it could have been used in *Lemon*, although in the latter case the Court chose to speak only of entanglement.

Just as *Lemon* recognized the difficulty of limiting a program of state support of secular teachers in religious schools, *Grand Rapids* and *Aguilar* recognized the similar problem in trying to contain a program using public school teachers in religious schools to teach "supplemental courses." Inevitably the public school teacher in the parochial schoolhouse, no less than the public school dollar, will lead to a massive direct subsidy and to the "symbolic union" of the government and religious institutions.

It is possible that in some areas of the country, religious and government authorities might try to work together to relieve religious schools of secular education, with the children of parochial schools attending public schools for secular subjects—the reverse of "released time." The validity of such programs may be one of the issues lurking on the horizon. But religious schools may find this alternative unattractive in view of the reason for creating religious schools—to place children in a pervasive religious atmosphere. Moreover, such a program would involve extensive

193 *Id.*

cooperation of public schools with a variety of religious school systems with regard to scheduling, transportation, and teaching materials. Even if religious schools, in order to save money, are willing to sacrifice a significant aspect of their educational mission by sending children into public schools for a wide range of secular subjects, the resulting entanglement, both political and administrative, and the message of endorsement that such cooperation would involve, might result in the same impermissible "effect" or "entanglement" that proved fatal to the programs in Grand Rapids and New York.

While Justice Brennan's opinions in *Grand Rapids* and *Aguilar* were major contributions to the development of establishment clause law, only four other Justices (Marshall, Blackmun, Powell, and Stevens) agreed with them. Justice Powell, while concurring in the majority opinion, filed a separate opinion stressing the "risk of political divisiveness" as an "additional reason" for holding that the two programs were invalid on entanglement grounds. Justice Powell thus continues to adhere to his *Nyquist* opinion that proposals to extend direct financial aid to parochial schools will trigger political strife between public school and religious school advocates, and between religious groups that sponsor religious schools and those that do not. Justice Powell's opinion in these cases and in *Jaffree*, suggest that *Mueller v. Allen* and *Lynch v. Donnelly* did not represent a shift in position but rather were "close calls" on cases that presented factual differences warranting, in his view, departures from earlier cases whose principles he still intends to follow.[194]

The Chief Justice dissented in *Aguilar* and in that portion of *Grand Rapids* invalidating the Shared Time program. He found the Community Education program invalid under the principles of *Lemon*, chiefly because of the payments to instructors who were full-time teachers in the religious schools.[195] He criticized the "obsession" with *Lemon* criteria and saw no threat to the values underlying the establishment clause in either the New York or Grand Rapids programs.[196]

Justice O'Connor's concurring opinions in *Grand Rapids* and *Aguilar* indicate that while her thoughtful efforts to clarify the law may have stimulated the debate, her "clarification" of the *Lemon* principles does not offer any clearer guide to the results of particular cases than did the original formulation. Perhaps this is why Justice O'Connor's *Lynch v. Donnelly* concurrence is so freely quoted by

194 Interestingly, Justice Powell, in his *Jaffree* opinion, stated that *Lynch v. Donnelly* ". . . was based primarily on the long historical practice of including religious symbols in the celebration of Christmas." 105 S. Ct. at 2494 n.5.

195 105 S. Ct. at 3231 (Burger, C.J., concurring in part, dissenting in part).

196 *Aguilar*, 105 S. Ct. at 3242 (Burger, C.J., dissenting).

her colleagues to justify opposite conclusions in the recent group of cases. Justice Brennan, for example, argued that the "symbolic union of church and state" in the Grand Rapids program conveyed a message of endorsement of religion.[197]

Justice O'Connor, in her *Grand Rapids* dissent, wrote simply that she disagreed that the program impermissibly advances religion "for the reasons stated in my dissenting opinion in *Aguilar v. Felton*."[198] But Justice O'Connor's *Aguilar* dissent examined only the New York Title I program and concluded that it was not tainted by any of the impermissible effects considered important by the majority in *Grand Rapids*. The majority opinion in *Aguilar*, however, was not based on "effect" but on "entanglement." Thus, the *Grand Rapids* majority opinion was not really answered in Justice O'Connor's dissent. She did discuss the "entanglement" issue in *Aguilar* and expressed disagreement with *Meek* and *Wollman* concerning the use of public school teachers on parochial school premises.

In addition, Justice O'Connor objected, as she did in *Lynch v. Donnelly*, to reliance on political divisiveness, but expanded her earlier objection to the "entanglement" prong by expressing "reservations" about the use of the entanglement test as an independent ground for decision, even in an institutional setting. Justice Rehnquist concurred in Justice O'Connor's opinions, while writing brief dissents of his own in both cases, echoing some of the themes in his *Jaffree* dissent.

The two cases that raised probably the most difficult questions concerning whether the state was conveying a "message of endorsement for or disapproval of religion," to use Justice O'Connor's phrase, were *Lynch v. Donnelly* and *Grand Rapids v. Ball*. Justice O'Connor found no such "message" in the former case, because the crèche was part of the Christmas celebration, and she did not really discuss the issue in *Grand Rapids*, even though it was a principal basis for the majority opinion. Justice Brennan's specific arguments concerning the effect of the Grand Rapids program should have been addressed by the dissenting Justice who, as the newest member of the Court, has challenged her colleagues to approach these cases with new insights.

VI. Conclusion

The continued pressure to enlist government support for reli-

197 Grand Rapids School Dist. v. Ball, 105 S. Ct. at 3226. *See also* Justice Stevens's majority opinion in Wallace v. Jaffree, 105 S. Ct. 2479, 2490 n.42 (1985); *see also* Chief Justice Burger's dissent in the same case, *id.* at 2505, arguing that he saw no endorsement of religion in the silent prayer statute.

198 105 S. Ct. at 3216.

gion guarantees a steady flow of establishment clause cases in the years ahead, although the pace may not be quite so hectic as in the past few years. On the horizon is the question of whether the *Widmar* principle of "equal access" for religious clubs in public universities should be extended to public high schools, and whether Congress' recent action bestowing such access was constitutional.[199] There will be more silent prayer cases,[200] challenges to religious symbols in public places,[201] and to the crèche standing alone without Christmas decorations. If the past is prologue, *Grand Rapids* and *Aguilar* will not resolve the issue of financial aid but will instead trigger new forms of government funding for religious schools. Laws such as that upheld in *Mueller v. Allen* may be enacted at the state or national level, and sectarian schools may try to work out extensive arrangements with public school authorities for children in such schools to spend a major portion of their school day taking secular courses in public schools.

The view that the establishment clause should be interpreted to emphasize the separation of church and state still commands a majority of the Court. Five justices restated that view most forcefully in key cases during the past term, and a sixth, Justice O'Connor, joined that group in *Jaffree*. Her view of the policies behind the establishment clause may be less demanding in practice than that of some of her colleagues, but Justice O'Connor is clearly not abandoning the effort to define the proper role for government and religion within the separationist model. Justice Rehnquist, on the other hand, is prepared to abandon the Madison-Jefferson vision, and Justice White appears ready to join him. The Chief Justice has not accepted this position, although in several important cases his concept of "mandated accommodation" may leave little effective room for the principle of separation. Nevertheless, it should not be forgotten that he wrote the majority opinion in *Lemon*, *Larkin v. Grendel's Den*, and, recently, in *Thornton v. Caldor*. He may have charted a path that veers from the views expressed by Justice Black in *Everson*, and his own in *Lemon*, but he has not abandoned them.

When the Chief Justice assumed his present office in 1969, a handful of decisions had attempted to define the broad contours of establishment clause law. During the past sixteen years the Burger Court has reshaped Jefferson's metaphorical wall. The Court has responded to the intense pressures for government financial sup-

199 *See* note 81 *supra*.

200 *See* note 158 *supra*.

201 *See* McCreary v. Village of Scarsdale, 739 F.2d 716 (2d Cir. 1984) (city could not exclude creche from a public park when other free-standing displays were permitted), *aff'd by equally divided Court*, Scarsdale v. McCreary, 105 S. Ct. 1859 (1985).

port for religious schools, and to the growing political power of the religious right, particularly during the Reagan years. While the path has been irregular, and the results far from coherent, by the end of the 1984-1985 Term a slender majority still appeared to cling to the constitutional principles that were first articulated by the Court nearly four decades ago. For those who believe that the Court's overall interpretation of the establishment clause has served well the interests of both government and religion, this is an encouraging sign. But the close division on the Court, the results in some recent cases, notably *Lynch v. Donnelly*, and the uncertain vagaries of presidential politics remind us that the establishment clause, like Jefferson's wall, is not made of stone.