## CHAPTER 5

**Church and State**

*When a religion is good, I conceive that it will support itself; when it cannot support itself, and God does not take care to support it, so that its professors are obliged to call for the help of the civil power, it is a sign, I apprehend, of its being a bad one. . . .*

—Benjamin Franklin, 1780

###### CHAPTER OUTLINE

■ INTRODUCTION

■ BACKGROUND

■ WALL OF SEPARATION

■ COLONIAL ESTABLISHMENTS

*The Three Choices*

■ SEPARATION IMPLEMENTED

■ CHURCH OPPOSITION TO SCHOOLS OF THE REPUBLIC

■ THE PUBLIC SCHOOL AND RELIGION

■ PUBLIC TAXATION TO SUPPORT RELIGIOUS SCHOOLS

■ THE ESTABLISHMENT CLAUSE AND THE *LEMON* TEST

*The* Lemon *Test*

*The Wall Begins to Crumble The Marginalizing of* Lemon

*The New Establishment Clause Jurisprudence*

■ RELIGION AND THE RECONSTRUCTION ERA: GRANT AND BLAINE

■ THE FOUNDERS’ INTENT REGARDING SEPARATION

■ NEW THEORIES OF CHURCH AND STATE

*Separation*

*Nonpreferential Subsidization Subsidization and Collaboration*

■ VOUCHERS

■ INDEPENDENT VITALITY OF STATE CONSTITUTIONS

■ SUPREME COURT’S SECULARIZATION OF PUBLIC SCHOOLS: A BIFURCATED STANDARD

*Released Time for Religious Instruction Volitional Exercises*

*Religious Exercises Silent Meditation*

*Student-Initiated Religious Speech*

*Prayer at Graduation and Extracurricular Activities*

■ EQUAL ACCESS ACT

■ FACILITIES

■ FLAG SALUTE

■ SUMMATION OF CASE LAW

■ RESEARCH AIDS

176

* Introduction

The leading clauses of the First Amendment, so revered by the Founders of the Republic, pro- claims: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .” As we shall see in this chapter, the current Supreme Court in its “new jurisprudence” has effectively abrogated the Es- tablishment Clause now permitting Congress and state legislatures to provide public funds for religious institutions, even “pervasively sectar- ian” ones, by means of devices such as “grants for faith-based initiatives” as well as vouchers and tax credits to support clerical schools. The Court, however, while permitting public monies to flow to church-controlled schools and institu- tions, has been consistently diligent in its pur- suit of the secularization of public institutions, in general, and public schools in particular. The legal precedents rendered by the Supreme Court are discussed throughout this chapter.

* Background

Reports of religious conflicts worldwide are em- blazoned across the front pages and covers of major newspapers and magazines in virtually every edition. Religious and ethnic cleansing, and indeed genocide, are not recent phenomena and have been a tragic part of our world’s his- tory for time immemorial. Witness the atrocities perpetrated against the Christians during the Roman Empire, the Jews and Muslims in the name of religion during the Crusades, the Span- ish Inquisition, the pogroms in Russia and the Holocaust, and against other groups in more recent history, including genocide carried out against Americans, Bosnians, and Kurds. Addi- tionally, religious strife continues to be standard fare in daily news accounts. Northern Ireland, Iraq, Iran, Indonesia, Kashmir, Algeria, Israel, Egypt, and the Christians versus Muslims at “ground zero” in New York City, 2010, are but a few of the trouble spots dealing with religious discord in today’s world.1 *The Economist* has called this increasing religious militancy “a cri- sis of conscience,” affecting peoples throughout the world.2

In his influential book *The Clash of Civilizations,*

Huntington observes that “Religion is a central

*Background* 177

defining characteristic of civilizations,”3 and religious intolerance has created definitive “fault lines” between the Christian west and the Mus- lim east.4 Rising religious division has dramati- cally affected the drafting of a new constitution for the European Union. This problem, coupled with disagreement over the weight of voting power among the European Union countries, has thus far foreclosed the adoption of a new European charter.5 The French are strongly for separation of church and state and desire a secu- lar document, whereas Poland, Italy, Spain, and Ireland require an explicit reference to Christian- ity in the statement of values of any new charter. On the other hand, Turkey, a country of millions of Muslims, which is scheduled to be a new en- trant to the EU, is strongly secular and sees great difficulty in the European Union becoming a “Christian Club.” Moreover, the EU countries, as now constituted, are home to millions of Mus- lim, Hindu, and Jewish citizens.6 Thus, religious discord continues worldwide as one of the most troubling and historically insoluble issues facing world peace.

Nor is this religious strife restricted to for- eign and remote lands. As we have seen, reli- gious fanaticism has bred dire and sorrowful problems in our own country, as witnessed by the debacle at Waco and the destruction of the World Trade Center in New York in Septem- ber 2001. In the United States, there has been a recent and dramatic shift by large and promi- nent religious groups toward the view that “religiously trained professionals should exert spiritual influence over the secular matters of government.”7 Cox, a professor of religion at Harvard, has explained, in an article entitled “The Warring Visions of the Religious Right,” the theological bases for the emergence of this new wave of Christian fundamentalism and its political implications at both the state and the federal levels. This fundamentalism argues that those with “Judeo-Christian” values are best qualified “to rule” and should be given their “rightful place of leadership at the top of the world” before world peace can or should be restored. This dogma has been given increas- ing credence in legislative halls.8 All of this is not new, but with new momentum, religious fundamentalism has recently reached out in an effort to control both state legislatures and the

U.S. Congress, materially affecting the nature and structure of public schools in America. The court cases bearing on efforts by various religious groups to use tax monies to enhance religious schools, coupled with efforts to intro- duce sectarianism into the activities of public schools, reflect the multiplication and magni- fication of this religious discord surrounding public schools.

*[B]ishops may not meddle with the affairs of the commonwealth because they are governors of an- other corporation, which is the church, nor kings with making laws for the church, because they have government not of this corporation, but of another divided from it, the commonwealth, and the walls of separation between the two must forever be upheld.*

*—Richard Hooker, England, 1648*

*For public schools to exist, “[I]t is necessary to erect a wall of separation between education and religion.”*

*—Directory’s Commissioner to the Seine,*

*Paris, France, 1793*

This chapter is about the struggle for liberty of conscience and the requirements on the pub- lic schools in maintaining neutrality in matters of religion.

### Wall of Separation

In 1879, the Supreme Court in *Reynolds v. United States*9 first invoked Jefferson’s famous dictum, calling for the erection of a “wall of separation between church and state.” More than a cen- tury of judicial struggle has resulted in precious little resolution of the church and state conflict. In fact, it appears that the plethora of litigation over the years has merely tended to obscure the boundaries of separation envisaged by Jefferson. Indeed, lately it seems that the vision of sepa- ration, the foundational premise10 of religious freedom, may be becoming so obscure as to have indiscernible contours and boundaries. In 1985, Chief Justice Rehnquist, in his dissent in *Wal- lace v. Jaffree,* started the judicial ball rolling to dismantling the American “wall of separation” by roundly condemning the entire idea, saying that it is “a metaphor based on bad history, a metaphor which has proved useless as a guide to judging,” and that it “should be frankly and explicitly abandoned.”11

WALL OF SEPARATION

*I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building a wall of separa- tion between church and State.*

*—Thomas Jefferson, reply to Danbury Baptist,*

*Connecticut, January 1, 1802*

Thus, the issue of separation and the interre- lationship between religion and government re- tains its characteristic preeminence as a divisive issue in American society. To better understand the problem requires a brief look backward to the antecedents of the church–state issues touch- ing the schools of this country. Centuries of reli- gious strife in Europe left an indelible mark on the minds of the fathers of the American Consti- tution. Controversy over religion has not abated and today causes as much international and do- mestic discord as it did a thousand years ago. The diversity of religious backgrounds among the American colonies was so great, and reli- gious sentiments so deep, that representatives at the Constitutional Convention in Philadelphia in 1787 were loath to address the issue should the convention founder on the shoals of religious dissension. Avoidance was implicitly agreed upon, and everyone more or less adopted the position of John Adams, who assumed that if the issue was not mentioned, both the state and reli- gion would be best served. Adams expressed the hope that “Congress will never meddle with re- ligion further than to say their own prayers, and to fast and to give thanks once a year.”12

Some believed that simple omission was not the appropriate solution to the religious dilemma, and although it was not acted upon by the conven- tion, Pinckney of South Carolina sought to make the absence of congressional power in religion explicit by proposing that the new constitution provide that “the legislature of the United States

*Colonial Establishments* 179

shall pass no law on the subject of religion.”13 Even though no general religious provision was acted upon, there is little doubt that the failure re- sulted from the delegates’ firm belief that such a provision was not necessary to preserve religious liberty. Although no general religious separation provision was thought to be needed, the conven- tion did decide to specifically prohibit states from imposing religious tests for federal office. Madi- son explained it might be implied that “without [an] exception, a power would have been given to impose an oath involving religious test as a qualification for office.”14 Obviously, it was in the interest of the central government to prevent states with different religious ties from requiring religious tests for federal office. With cognizance of this, the convention adopted Pinckney’s mo- tion that “no religious test shall ever be required as a qualification to any office or public trust un- der the United States”; this became the last clause of Article VI in the Constitution.

Thus, when the Constitution was presented to the states, only the “religious test” of office pro- vision was included, and no other reference was made regarding religious toleration. This omis- sion was not taken lightly when the states were called upon to ratify the document. Six states ratified but proposed amendments guarantee- ing religious liberty, and two other states, North Carolina and Rhode Island, refused to ratify until a bill of rights including religious freedom was promulgated.15 Although Madison defended the omission, saying that “the government has no jurisdiction over [religion],”16 it was argued by others that there was no security for the rights of conscience. Jefferson ultimately convinced Madi- son that a religious provision in a bill of rights was necessary. Commenting on the proposed con- stitution in a letter to Madison from Paris, where Jefferson was serving as ambassador, he said:

I will now add what I do not like. First, the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against monopolies, the exter- nal and unremitting force of the *habeas corpus* laws, and trials by juries. . . . [A] bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just gov- ernment should refuse or rest on inference.17

The very uncertainty itself of whether such rights were implied in the Constitution was

evidence enough that a bill of rights protecting religious freedom and ensuring disestablishment was necessary. Madison, with Jefferson’s urging and his own experience in persuading the states to ratify only after promising amendments as spe- cific affirmation of individual rights and freedoms, stated that he now favored amendments to pro- vide for “all essential rights, particularly the rights of Conscience in the fullest latitude, the freedom of the press, trial by jury, etc.”18 In accordance with this position, Madison introduced to the House of Representatives, in 1789, a compilation of proposals for amendments that he maintained would prevent encroachments by the sovereign power into individual rights and liberties. Madi- son’s proposals before the House were to finally become the Bill of Rights, which was approved by the requisite number of states in 1791. Prominent among these rights was the separation of church and state provision, which guaranteed religious freedom and prohibits establishment of religion by government. The First Amendment states:

Congress shall make no law respecting an estab- lishment of religion, or prohibiting the free exer- cise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

* Colonial Establishments The colonies during the seventeenth and eighteenth centuries reflected the precedent

of single-church establishments of Europe. Although the intensity of the force of the pre- ferred church varied among the colonies, there nevertheless existed strong and unquestioned establishments of the Congregational Church in New England—Massachusetts, Connecticut, and New Hampshire—and of the Anglican Church in the South—Virginia, North Carolina, and South Carolina. Another group of colonies—New York, New Jersey, Maryland, and Georgia—evolved through periods of preference for different churches, and tax support for Protestant churches, as the population changed. In New York, for ex- ample, the Dutch Reformed Church was initially established, but as the colony grew, a heteroge- neous group of other believers entered, includ- ing Calvinists, Lutherans, Mennonites, Quakers, Catholics, and Jews. When the English took over

New Netherland and it became New York, the inclinations of the Stuarts toward Catholicism forced more toleration for all religious groups. The ultimate effect was that, by 1693, New York, while Anglican, was reasonably tolerant toward Catholics and generally provided tax support for all Protestant ministries.19 Because the religious preference of New York was largely unclear, a battle raged for years between the royal gover- nors and the Anglican clergy, who demanded the clear and certain establishment of the Church of England. The policy ultimately became one of multiple establishments, whereby a variety of churches were provided funding by the state.

A fourth group of colonies—Pennsylvania, Del- aware, and Rhode Island—had a large measure of religious freedom, which generally prevailed from their origins. Pennsylvania advanced a toler- ation that generally followed William Penn’s phi- losophy as expounded in his *Frame of Government,* promoting freedom of religion.20 Delaware broke off from Pennsylvania in 1702 and continued this policy of religious freedom and the prohibition of use of public funds for church purposes.

But Rhode Island, under Roger Williams, was the prototype of religious tolerance that came ul- timately to prevail. From the time that Williams landed in Massachusetts in 1631, conflict devel- oped with the Puritan establishment. Because of his insistence on separation of civil and ecclesi- astical aspects of society, Williams was banished in 1635. In 1636, he formed a plantation in Rhode Island territory, and in 1643, a patent was obtained from Charles I to form a new colony. Williams’s ideas regarding the separation of church and state were predominant in Rhode Island, evolv- ing from four basic theses: (1) attempts by the state to enforce religious orthodoxy produce per- secution and religious wars and pervert God’s plan for the regeneration of souls; (2) God has not blessed a particular form of government, and governments will vary with the nature of the people governed; (3) political and religious diversity cannot be avoided; and (4) the human conscience must be totally free, through religious

had little carryover on those who formed the new federal Constitution in 1787 and the sub- sequent First Amendment.22

###### THE THREE CHOICES

When the matter of religion was to be consid- ered by the Constitutional Convention at Phila- delphia in 1787, there were essentially three rationalizations for church–state relationships that had arisen out of the Reformation: the *Eras- tian* (named after the German philosopher Eras- tus), the theocratic, and the separatist. *First,* and dominant among these was the *Erastian* view, which assumed state superiority over ecclesiasti- cal affairs and used religion to further the inter- ests of the state. It was during the Elizabethan era in England that the Erastian philosophy was fully implemented. The *second,* the *theocratic,* was founded in the idea that the church is su- preme and the state should be used to further ecclesiastical policy. *Third, complete separation* was advanced as the proper course by minority dissident groups in Europe, but it did not find full expression until 1791 in America.23 It was, however, John Locke on whom both Madison and Jefferson relied for their basic philosophical ideas concerning separation. In his *Letter Con- cerning Toleration,* Locke maintained that “[t]he care of souls cannot belong to the civil magis- trate because his power consists only in outward force, but true and saving religion consists in the inward persuasion of the mind.”24

Locke’s ideas were developed and expanded under fire in the great dispute in Virginia over the established religion that had been carefully protected by statutes promulgated by the An- glican Church until the Revolution. These laws provided for religious services according to the laws and orders of the Church of England: com- pulsory attendance at religious services, regula- tion of nonconformists, glebe lands for support of the clergy, and a system of governmentally sanctioned vestries empowered to levy tithes for upkeep of the church and ministers’ salaries.

freedom and the separation of church and state.21

These ideas were elaborated in Williams’s *Bloudy Tenet of Persecution* in 1644.

Williams’s ideas undoubtedly influenced the American attitude toward disestablishment that became prevalent after the war for inde- pendence, but Williams’s legacy apparently

### Separation Implemented

Jefferson, more than any other person, led in enunciating and implementing the separation principle. In 1776, while he was in Philadelphia writing the Declaration of Independence, he drafted a proposed constitution for Virginia that

*Separation Implemented* 181

stated: “All persons shall have full and free lib- erty of religious opinion; nor shall any be com- pelled to frequent or maintain any religious institution.”25 Although this particular measure was not passed, it nevertheless set the tone for religious freedom for Virginia in the era to come. In spite of Jefferson’s position, however, in 1779 a bill was introduced in the Virginia legislature declaring that “the Christian Religion shall in all times coming be deemed and held to be the es- tablished Religion of the Commonwealth.”26 It required every person to enroll his or her name with the county clerk and designate the society that he or she intended to support, whereupon the clerk would present the roll for the appropri- ate religious group to determine assessment rates; these were then collected by the sheriff, and the proceeds were turned over to the church. Persons failing to enroll in a religious society had their payments spread across all religious groups.27

In 1784, the bill was called up for a vote. Enti- tled “A Bill Establishing a Provision for Teachers of the Christian Religion,” it was sponsored by Patrick Henry. Although the bill was defeated, from the preceding and ensuing debate, two of the most important documents in religious free- dom were written, Jefferson’s Bill for Establish- ing Religious Freedom and Madison’s *Memorial and Remonstrance against Religious Assessments*. Jefferson’s bill was written and introduced in the Virginia General Assembly in 1779 but was not enacted into law until January 1786.

Madison’s *Memorial,* in opposition to Henry’s bill for religious assessments, was of major historical significance. The philosophy stated therein has often been referred to by the U.S. Supreme Court in support of its opinions. The *Memorial* presents several arguments against the religious assessment bill, but more important, it conveys a philosophy of separation that, along with Jefferson’s, provided the logic and rationale for the “wall of separation” provisions of the First Amendment in 1791.

#### An Act for Establishing Religious Freedom, Thomas Jefferson

*Written and introduced in 1779, enacted in 1786.*

. . . That the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being

themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavor- ing to impose them on others, hath established and maintained false religions over the greatest part of the world, and through all time;

That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose power he feels most persua- sive to righteousness, and is withdrawing from the ministry those temporal rewards, which proceed- ing from an approbation of their personal conduct, are an additional incitement to earnest and unre- mitting labors for the instruction of mankind.

That our civil rights have no dependence on our religious opinions, any more than our opin- ions in physics or geometry; that, therefore, the proscribing any citizen as unworthy of the public confidence by laying upon him an incapacity of being called to the offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens he has a natural right;

That it tends also to corrupt the principles of that very religion it is meant to encourage, by bribing, with a monopoly of worldly honors and emolu- ments, those who will externally profess and con- form to it; that though indeed these are criminals who do not withstand such temptation, yet neither are those innocent who lay the bait in their way;

That to suffer the civil magistrate to intrude his powers into the field of opinion and to re- strain the profession or propagation of princi- ples, on the supposition of their ill tendency, is a dangerous fallacy, which at once destroys all re- ligious liberty, because he being of course judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the senti- ments of others only as they shall square with or differ from his own; . . .

And finally, that truth is great and will prevail if left to herself, that she is the proper and suffi- cient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument

and debate, errors ceasing to be dangerous when it is permitted freely to contradict them.

*Be it therefore enacted by the General Assembly*, That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his re- ligious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in nowise diminish, enlarge, or affect their civil capacities.

And though we well know this Assembly, elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding assemblies, constituted with the powers equal to our own, and that therefore to declare this act irrevocable, would be of no effect in law, yet we are free to declare, and do declare, that their rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an in- fringement of natural right.

THREE PENCE TAX FOR RELIGION

*That the same authority that can call for each citi- zen to contribute three pence only of his property for the support of only one establishment, may force him to conform to any one establishment, in all cases whatsoever.*

*—*James Madison, *Memorial and Remonstrance Against Religious Assessments, 1795*

#### Memorial and Remonstrance Against Religious Assessments, James Madison

1785.

*To the Honorable General Assembly of the Commonwealth of Virginia.*

*A Memorial and Remonstrance (in part).*

We, the subscribers, citizens of the said Com- monwealth, having taken into serious consider- ation, a Bill printed by order of the last Session of

General Assembly, entitled “A Bill establishing a provision for teachers of the Christian Religion,” and conceiving that the same, if finally armed with the sanctions of a law, will be a dangerous abuse of power, are bound as faithful members of a free State, to remonstrate against it, and to declare the reasons by which we are determined. We remonstrate against the said Bill,

Because we hold it for a fundamental and unde- niable truth, “that religion, or the duty which we owe to our Creator, and the manner of discharg- ing it, can be directed only by reason and con- viction, not by force or violence.”28 The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. . . .

Because, it is proper to take alarm at the first experiment on our liberties. We hold this pru- dent jealousy to be the first duty of citizens, and one of [the] noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by ex- ercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We reverse this lesson too much, soon to forget it. Who does not see that the same authority which can establish Christianity, in ex- clusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contrib- ute three pence only of his property for the sup- port of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

. . . What influence in fact have ecclesiastical establishments had on Civil Society? In some in- stances they have been seen to erect a spiritual tyranny on the ruins of Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberties, may have found an established clergy convenient auxiliaries. A just government, instituted to secure and perpetuate it, needs them not. Such a government will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which

*Church Opposition to Schools of the Republic* 183

protects his person and his property; by neither invading the equal rights by any Sect, nor suffer- ing any Sect to invade those of another. . . .

Because, it (the proposed Virginia Bill) will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects. Torrents of blood have been spilt in the old World, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions. Time has at length revealed the true remedy. Every relax- ation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. The American Theatre has exhibited proofs, that equal and complete liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosper- ity of the State. If with the salutary effects of this system under our own eyes, we begin to contract the bonds of Religious freedom, we know no name that will too severely reproach our folly. At least let warning be taken at the first fruit of the threatened innovation. The very appearance of the Bill has transformed that “Christian forbear- ance,29 love and charity,” which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased. What mischiefs may not be dreaded should this enemy to the public quiet be armed with the force of a law? . . .

. . . We, the subscribers, say, that the General Assembly of the Commonwealth have no such authority: And that no effort may be omitted in our part against so dangerous an usurpation, we oppose to it, this remonstrance; earnestly pray- ing, as we are in duty bound, that the Supreme Lawgiver of the Universe, by illuminating those to whom it is addressed, may on the one hand turn their councils from every act which would affront his holy prerogative, or violate the trust committed to them: and on the other, guide them into every measure which may be worthy of his [blessing, may re]dound to their own praise, and may establish more firmly the liberties, the pros- perity, and the Happiness of the Commonwealth.

### Church Opposition to Schools of the Republic

The idea of “schools of the republic,” or public schools, arose in the era of Enlightenment from

about 1740 to 1800 in Germany, France, and America, the time of revolution and the form- ing of new republics. Earlier, universal education was far from the most progressive contempla- tion, and ignorance and prejudice retarded the human condition on both sides of the Atlantic.30 With the breadth of change emanating from the Enlightenment, a new secular and utilitarian spirit found the old system of religious educa- tion to be not only inadequate, but also a primary reason for the vast social ills that restrained the human spirit, manifested inequality, and resulted in a general denial of prospects in life for the poor and ignorant. Ultimately, the American and French revolutionaries of the 1790s, versed in the philosophy of the Enlightenment, moved to fill the educational vacuum that had long existed.31 Universal primary schooling became the ideal of a progressive nation. Essential to that ideal was the assumption that “children belonged to the nation as well as their families.”32 As Danton, the great French revolutionary, declared, “I too am a father, but my son does not belong to me, he be- longs to the Republic.”33 In short, the education of the children was too important to be left to the parents and the Church. The theory of public secular schools that emerged from the Enlighten- ment philosophy was advanced by the founding fathers of the American Constitution: the best education was to be thorough and common to all children in public schools, and schools were to be nonsectarian and religiously neutral. As one commissioner of the Directory in the French Revolution in Paris stated, predating Jefferson’s reference to a wall, “it is necessary to erect a wall of separation between education and religion.”34

For a brief time in the 1790s, it appeared that public nonsectarian schools created during the Revolution might gain a foothold and succeed in France, but there soon emerged a great deterrent that one French historian called the “imperious demands for instruction in religious doctrines.”35 The Catholic Church was convinced that educa- tion not conducted by the Church itself could lead only to a general perversion of morals and the degeneration of the condition of soci- ety.36 In France, intense competition developed between the Catholic Church and the public schools.37 The competition between the newly created public and parochial schools intensified and was manifested in various ways, including

community discord among teachers, parents, and pupils, even deteriorating into physical strife and pitched street fights. Moreover, the so- cial and religious pressures resulted in the public schools drawing a poorer and smaller clientele of students than did the parochial schools. In the end, the new experiment of public schools in France was eclipsed as the government no longer sought to preserve a secular atmosphere in the public schools. The public school class- rooms returned to the use of “religious texts, served as sacristans to the clergy and conformed to the religious ‘prejudices’ of the parents.”38 By 1811, virtually “all primary education had religious coloration;”39 thus, the public secular school ideal, fostered and given philosophical sustenance by the rationale and reasoning of the Enlightenment, never really obtained reality in revolutionary and postrevolutionary France.

Public common schools fared better in America, where religious divisiveness and dis- cord were not indigenous and well entrenched. In the early 1800s, various states set about cre- ating public school systems that would not of- fend the diverse religious beliefs of those who populated the new nation. Commager’s cogent phrase, “How Europe Imagined and America Realized the Enlightenment,” was nowhere more evident than in the creation of American public schools.40 In the new republic, unlike in France and England, secularization and ratio- nalism had made “inroads on the claims of the clergy to preeminence in the public arena,” and in particular with regard to public education.41 The early experience of England and the colo- nies taught that investing authority of the state in a privileged church had produced very little except “resentment and acrimony”42 and that “a broad text of toleration and equality” should be the goal of society and its schools.43 In America, there emerged, after much discord, an under- standing that the separation of church and state would not impair morals or weaken any reli- gion, but rather would strengthen both the state and the church.44

Yet America was not destined to cleanly es- cape the problems of the age-old religious strife of Europe that had prevented the successful establishment of a system of public schools in France and England. Each state in America had its own instances of religious opposition to the

creation of public schools intertwined with at- tempts by various religious groups to encroach on the school curriculum and to obtain public tax funds to support their own sectarian schools. Such conflict was particularly evident in New England and other original colonies, where church and state had not been separated prior to the American Revolution.

As observed in Chapter 2 of this book, much opposition to public schools was manifested by Protestant churches in Massachusetts, develop- ing into what Cubberley would later call “The Battle for Free State Schools.”45 Not only was this battle joined by people who simply did not want to pay taxes for public schools, but also the opposition largely emanated from the ranks of conservative Protestant ministers who ar- gued that public schools would injure religious schools’ attendance, thereby reducing their in- fluence and thus retarding the progress and welfare of the churches. More intense objection came from more extreme Protestant sects, which feared that there was an ulterior motive of the state, “priestcraft,” the purpose of which was to create a state school that would then evolve into a state church.46

In Massachusetts, Horace Mann was roundly castigated as being antireligious and the prin- cipal exponent of “Godless public schools.”47 Cubberley, in writing about New England Puritan opposition to the creation of public schools, observed: “Those who believed in the old system of religious instruction, . . . those who desired to . . . stop the development of the public schools, united their forces in this first big attack (in America) against secular education.”48 Thus, a substantial segment of the Protestants op- posed public schools and vigorously denounced them because they were nonsectarian and did not espouse particular religious beliefs. In 1838, Massachusetts public schools were assailed as being incapable of teaching moral values if they remained nonsectarian. It was said that “[t]he Bible . . . the need of a Redeemer . . . the holy em- ployments of the redeemed in heaven—should be daily and thoroughly taught in the schools.”49 Later, in 1846, a great hue and cry arose in Mas- sachusetts, where Protestant fundamentalist groups charged that the increase in “intemper- ance, crime, and juvenile depravity in the state was due to the ‘Godless schools.’”50

STRUGGLE OF RELIGION AND PUBLIC SCHOOLS

*In predominately Catholic countries, notably France and Italy, and later, almost every country in Latin America, Catholics and anticlerical liber- als engaged in protracted struggles over matters of public education. [I]n the English-speaking Protestant North Atlantic, the German and Irish Catholic diaspora of the 1840s thrust the religious problem into center stage. . . . As one American Catholic writer put it in 1850, the battle over religion and education is ‘the fierce contest in Ireland; the same in France; the same in Belgium; the same in Prussia and the petty states of Germany; the same in Bavaria; the same in Austria; the same in Piedmont . . .’ The education issue became especially volatile in the United States.*

*—John T. McGreevy*

Possibly the greatest early discord occurred in New York City, where Catholic immigrants from Europe, who constituted a large percentage of the total population, launched a determined resistance to the establishment of public schools. This episode was the principal event in the estab- lishment of the parochial schools in America. In New York, Catholic clergy in the late 1830s and 1840s objected to the creation of public schools for the same reasons that were advanced by the Catholic Church in France during and after the French Revolution.

The Catholic argument was basically twofold: first, by excluding sectarianism, positive church dogma was banished from public schools, and, second, if the public schools were to be sectarian, they could only be of the Catholic faith.51 If the public schools were not to teach Catholic doc- trine as the only brand of religion, then the public schools would be promoting infidelity to Christi- anity; therefore, if the public common schools did not convey the Catholic theology, then Catholic children would not be permitted to attend.52 The Catholic Church defined religion as being insepa- rable from specific denominational doctrines and denied that any school could teach moral prin- ciples in the absence of the Catholic catechism.53 This reasoning therefore effectively foreclosed the possibility that the Catholic Church could ever support public common schools.

*The Public School and Religion* 185

The only condition under which an accord could be reached with the Catholic Church to par- ticipate in a system of education was for the state to pay for a “Catholic Public School System.” Any type of public school system that did not incul- cate Catholic doctrine and that was nonsectarian and nondenominational was unacceptable. Thus, the permanent and insoluble problem was set, wherein fundamentalist Protestant groups and the Catholic Church could never agree with the prin- ciples and philosophy that form the foundation of public schools. As in France, the Catholic Church and fundamentalist Protestant groups opposed the creation of secular public schools in America. This struggle remains alive and well today. The

U.S. Supreme Court decisions in *Agostini,*54 *Helms,*55 and *Zelman*56 indicate that this church op- position to the idea of public common schools has now been accepted by the Court and that the re- ligion provisions of the First Amendment will no longer be interpreted to prevent tax funds being appropriated to strengthen church schools.

Thus, the ideal of public schools, envisaged as perhaps the most important aspect of a republic—a system of universal, secular common schools sup- ported by general taxation—an Enlightenment idea that confronted severe opposition at its birth, ap- pears to be waning in its political strength relative to the political power of private and ecclesiastical schools. The opinions of the members of the U.S. Supreme Court today, however, clearly reflect the weight and political prominence of conservative religion’s antipathy toward secular public schools. Bills abound in state legislatures that propose various schemes to utilize public tax revenues to fund private and religious schools. Perhaps this trend in reducing the wall of separation may foretell the slowly engulfing twilight for the public school experiment in America. The fol- lowing pages of this chapter present the issues pertaining to the establishment of religion and the progression of Supreme Court decisions allowing state and federal laws to channel public

tax funds to sectarian schools.

### The Public School and Religion

The public school is founded on three funda- mental assumptions that relate either directly or indirectly to the issue of church and state. *First,*

education is a benefit to the entire society, and the legislature has the power to tax all for sup- port. Essential to this concept is that general taxation is used for support and that taxation is not levied merely on those who use the public schools—the childless and those who send their children to private schools must all pay their fair share. Thaddeus Stevens in 1835, in dramati- cally defeating a legislative proposal to repeal general taxation for education, enunciated the principle of universal responsibility for univer- sal education in Pennsylvania. Opponents of public schools claimed that it was unjust to tax people to educate the children of others; Stevens responded thusly:

It is for their own benefit, inasmuch as it perpe- trates the government and ensures the due admin- istration of the laws under which they live, and by which their lives and property are protected. Why do they not urge the same objection against all other taxes? The industrious, thrifty, rich farmer pays a heavy county tax to support criminal courts, build jails, and pay sheriffs and jail keepers, and yet probably he never has had and probably never will have any direct personal use for them. . . . He cheerfully pays burdensome taxes which are necessarily levied to support and punish convicts, but loudly complains of that which goes to pre- vent his fellow being from becoming a criminal and to obviate the necessity of those humiliating institutions.57

To Stevens, education was a public obliga- tion that must be nurtured to develop the en- tire civic intelligence to better govern through an elective republic. Those who do not directly benefit from public education certainly gain in- directly through association with an enlightened citizenry.

*Second*, education provided by the state must be secular, and individual religious beliefs should not be inhibited. An important element of the secular state envisioned by Jefferson was a system of public schools that could convey all necessary temporal knowledge and yet not im- pede religious freedom. The power of the state could not be used to inculcate religious beliefs, nor could the authority of the state to tax be used to assist religious training.

An extract from an opinion by the Iowa Supreme Court forcefully expresses the idea that public tax funds should not be used for religious

instruction and, further, should not be used by religious groups to proselytize:

If there is any one thing which is well settled in the policies and purposes of the American people as a whole, it is the fixed and unalterable determina- tion that there shall be an absolute and unequivo- cal separation of church and state, and that our public school system, supported by the taxation of the property of all alike—Catholic, Protestant, Jew, Gentile, believer and infidel—shall not be used directly or indirectly for religious instruction, and above all that it shall not be made an instrumen- tality of proselyting influence, in favor of any reli- gious organization, sect, creed, or belief.58

*Third,* the state can compel all parents to provide their children with a minimum secular education. This assumption is essential to the concept of general mass education. Every gov- ernment has as a goal its own continuation and preservation, and in a republic, an educated elec- torate is fundamental. As such, the state must be conceived as *parens patriae* in enforcing mini- mum educational and welfare requirements. The validity of the state’s interest was established years ago in *Prince v. Massachusetts.*59

The primary issue emanates from placing the force and power of the state, whether it be through taxation or other public policy decision, in a position to either enhance or inhibit religion. This was one of the most obstinate problems that Horace Mann was forced to overcome in his great crusade to found free common schools in Massachusetts. Mann vigorously maintained that the only purpose of religious education in the schools was to convey to each child the idea and respect of religious liberty.

American public schools are secular and not merely nonsectarian; this is necessary if separa- tion of church and state is to be complete. The important position of education in the govern- mental process is the key to maintaining religious liberty. Pfeffer observes that to be secular does not mean to be “Godless”; it is merely a guaran- tee that the state will not dictate or encroach on religious beliefs of the individual. He says:

A secular state requires a secular state school; but the secularization of the state does not mean the secularization of society. Only by accepting a totalitarian philosophy, either in religion or politics or both, can [it] be equated with society. We are a religious people even though our government

is secular. Our democratic state must be secular, for it does not purport or seek to pre-empt all of societal life. Similarly the public school need not and should not be the totality of the education process.60

In this regard, the public school ideal in America precludes religious indoctrination in the public schools, and it proscribes the state from preempting all the child’s time, thereby allow- ing substantial opportunity for religious train- ing outside the school by parents and churches.61 Whether the U.S. Supreme Court will continue to disallow the providing of public funds to pa- rochial schools is a continuing saga, the outcome of which is still uncertain.

### Public Taxation to Support Religious Schools

The U.S. Supreme Court, in the case of *Cochran v. Louisiana State Board of Education,* ruled that a state plan to provide textbooks to parochial school students does not violate the Fourteenth Amendment.62 The Court in this case was not asked to determine whether the First Amend- ment was violated. The decision in the *Cochran* case was rendered in 1930, 10 years before the Court decided in the *Cantwell* case that the reli- gious liberties of the First Amendment not only provided protection against actions by the Con- gress, but also, when applied through the Four- teenth Amendment, protected the individual from arbitrary acts of the states.63 However, the Court in this case did identify and adopt the “child benefit” concept, which has subsequently been used in many instances to defend the appropriation of public funds for private and parochial school use.

The Supreme Court in *Everson v. Board of Education,* a 1947 decision, held that the use of public funds for transportation of parochial school children does not violate the First Amend- ment. However, many state constitutions impose stricter regulations concerning separation of church and state than does the U.S. Constitution, and as a result, the highest courts in several states have ruled that their state constitutions would be violated if public funds were used to provide transportation for parochial school pupils.

In the *Everson* case, the legislature of New Jersey enacted a law that allowed boards of education to provide transportation for paro- chial school children at public expense. A school board, acting under this statute, authorized re- imbursement of parents for bus fares spent in sending their children to parochial schools. The plaintiff attacked the statute on the grounds that it violated the First and Fourteenth Amendments of the federal Constitution. The Court, in a 5–4 decision, ruled that the statute did not violate the Constitution. The Court adopted the “child benefit” doctrine and reasoned that the funds were expended for the benefit of the individual child and not for religious purposes. The trans- portation law was a general program that pro- vided assistance in getting children safely to and from school, regardless of their religion.

In 1968, the Supreme Court in *Board of Edu- cation of Central School District v. Allen* applied the reasoning of the *Cochran* and *Everson* cases in upholding as constitutional a New York stat- ute that provided for distribution of textbooks free of charge to students attending parochial schools. The Court stated that there was no in- dication that the books were being used to teach religion and that, since private schools serve a public purpose and perform a secular as well as a sectarian function, such an expenditure of pub- lic funds is not unconstitutional.64

*Establishment Clause Does Not Prohibit Spending Tax Funds to Pay Bus Fares for Parochial School Students*



#### Everson v. Board of Education

*Supreme Court of the United States, 1947.*

*330 U.S. 1, 67 S. Ct. 504.*

Mr. Justice BLACK delivered the opinion of the Court.

A New Jersey statute authorizes its local school districts to make rules and contracts for the transportation of children to and from schools. The appellee, a township board of edu- cation acting pursuant to this statute authorized

reimbursement to parents of money expended by them for the bus transportation of their chil- dren on regular buses operated by the public transportation system. Part of this money was for the payment of transportation of some children in the community to Catholic parochial schools. These church schools give their students, in ad- dition to secular education, regular religious in- struction conforming to the religious tenets and modes of worship of the Catholic Faith. The su- perintendent of these schools is a Catholic priest. The appellant, in his capacity as a district tax- payer, filed suit in a State court challenging the right of the Board to reimburse parents of pa- rochial school students. He contended that the statute and the resolution passed pursuant to it violated both the State and the Federal Consti- tutions. That court held that the legislature was without power to authorize such payment under

the State constitution. . . .

The only contention here is that the State statute and the resolution, in so far as they au- thorized reimbursement to parents of children attending parochial schools, violate the Federal Constitution in these two respects, which to some extent, overlap. First. They authorize the State to take by taxation the private property of some and bestow it upon others, to be used for their own private purposes. This, it is alleged, violates the due process clause of the Fourteenth Amendment. Second. The statute and the resolu- tion forced inhabitants to pay taxes to help sup- port and maintain schools which are dedicated to, and which regularly teach, the Catholic Faith. This is alleged to be a use of State power to sup- port church schools contrary to the prohibition of the First Amendment, which the Fourteenth Amendment made applicable to the states.

***First.*** The due process argument that the State law taxes some people to help others carry out their private purposes is framed in two phases. The first phase is that a state cannot tax A to re- imburse B for the cost of transporting his chil- dren to church schools. This is said to violate the due process clause because the children are sent to these church schools to satisfy the personal desires of their parents, rather than the public’s interest in the general education of all children. This argument, if valid, would apply equally to prohibit state payment for the transportation of children to any nonpublic school, whether

operated by a church, or any other nongovern- ment individual or group. But, the New Jersey legislature has decided that a public purpose will be served by using tax-raised funds to pay the bus fares of all school children, including those who attend parochial schools. The New Jersey Court of Errors and Appeals has reached the same con- clusion. The fact that a state law, passed to satisfy a public need, coincides with the personal de- sires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the pub- lic need. . . .

It is much too late to argue that legislation in- tended to facilitate the opportunity of children to get a secular education serves no public purpose. *Cochran v. Louisiana State Board of Education*, 281

U.S. 370, 50 S. Ct. 335 (1930). . . . The same thing is no less true of legislation to reimburse needy parents, or all parents, for payment of the fares of their children so that they can ride in public buses to and from schools rather than run the risk of traffic and other hazards incident to walking or “hitchhiking.” . . . Nor does it follow that a law has a private rather than a public purpose because it provides that tax-raised funds will be paid to reimburse individuals on account of money spent by them in a way which furthers a public pro- gram. . . . Subsidies and loans to individuals such as farmers and home owners, and to privately owned transportation systems, as well as many other kinds of businesses, have been common- place practices in our state and national history.

Insofar as the second phase of the due pro- cess argument may differ from the first, it is by suggesting that taxation for transportation of children to church schools constitutes support of a religion by the State. But if the law is invalid for this reason, it is because it violates the First Amendment’s prohibition against the establish- ment of religion by law. This is the exact ques- tion raised by appellant’s second contention, to consideration of which we now turn.

***Second.*** The New Jersey statute is challenged as a “law respecting an establishment of religion.” The First Amendment, as made applicable to the states by the Fourteenth, . . . commands that a state “shall make no law respecting an establish- ment of religion, or prohibiting the free exercise thereof.” These words of the First Amendment reflected in the minds of early Americans a vivid

mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their pos- terity. Doubtless their goal has not been entirely reached; but so far has the Nation moved toward it that the expression “law respecting an estab- lishment of religion” probably does not so viv- idly remind present-day Americans of the evils, fears, and political problems that caused that ex- pression to be written into our Bill of Rights. . . .

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or 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 reli- gious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organi- zations 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.” *Reynolds v. United States,* 98 U.S. at page 164.

We must consider the New Jersey statute in accordance with the foregoing limitations im- posed by the First Amendment. But we must not strike that state statute down if it is within the state’s constitutional power even though it ap- proaches the verge of that power. . . . New Jersey cannot consistently with the “establishment of religion” clause of the First Amendment contrib- ute tax-raised funds to the support of an institu- tion which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammed- ans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from

receiving the benefits of public welfare legisla- tion. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious belief.

Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibil- ity that some of the children might not be sent to the church schools if the parents were compelled to pay their children’s bus fares out of their own pockets when transportation to a public school would have been paid for by the State. The same possibility exists where the state requires a local transit company to provide reduced fares to school children including those attending pa- rochial schools, or where a municipally owned transportation system undertakes to carry all school children free of charge. Moreover, state- paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guaran- tee free transportation of a kind which the state deems to be best for the school children’s welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policemen. Simi- larly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and side- walks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to op- erate. But such is obviously not the purpose of the First Amendment. That Amendment requires

the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them. . . .

The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.

Affirmed.

###### CASE NOTES

1. A Pennsylvania statute that allowed the trans- portation of private schoolchildren beyond school district boundary lines was ruled consti- tutional. *School District of Pittsburgh v. Common- wealth Department of Education,* 33 Pa. Commw. 535, 382 A.2d 772 (1978), *appeal dismissed,* 443

U.S. 901, 99 S. Ct. 3091 (1979). *See also Springfield School District v. Department of Education,* 483 Pa. 539, 397 A.2d 1154 (1979), *appeal dismissed,* 443 U.S. 901, 99 S. Ct. 3091 (1979).

1. Statutes that authorize public transportation for parochial school children to travel to and from the private schools do not constitute mandatory authority for the public schools to also transport such children for educational field trips. *Cook v. Griffin,* 47 A.D.2d 23, 364 N.Y.S.2d 632 (1975). *See also Wolman v. Walter,* 433 U.S. 229, 97 S. Ct. 2593 (1977).

*Loan of Textbooks to Parochial School Students Does Not Violate Establishment Clause*



#### Board of Education of Central School District No. 1 v. Allen

*Supreme Court of the United States, 1968.*

*392 U.S. 236, 88 S. Ct. 1923.*

Mr. Justice WHITE delivered the opinion of the Court.

A law of the State of New York requires local public school authorities to lend textbooks free of charge to all students in grades seven through

twelve; students attending private schools are in- cluded. This case presents the question whether this statute is a “law respecting an establish- ment of religion, or prohibiting the free exercise thereof,” and so in conflict with the First and Fourteenth Amendments to the Constitution, be- cause it authorizes the loan of textbooks to stu- dents attending parochial schools. We hold that the law is not in violation of the Constitution. . . . Beginning with the 1966–1967 school year, local school boards were required to purchase textbooks and lend them without charge “to all children residing in such district who are en- rolled in grades seven to twelve of a public or private school which complies with the compul- sory education law.” *New York Education Law*,

§ 701 (Supp. 1967).

Appellant Board of Education of Central School District No. 1 in Rensselaer and Colum- bia counties brought suit in the New York courts against appellee James Allen. The complaint alleged that § 701 violated both the State and Federal Constitutions; that if appellants, in reli- ance on their interpretation of the Constitution, failed to lend books to parochial school students within their counties, appellee Allen would re- move appellants from office; and that to prevent this, appellants were complying with the law and submitting to their constituents a school budget including funds for books to be lent to parochial school pupils. Appellants therefore sought a dec- laration that § 701 was invalid, an order barring appellee Allen from removing appellants from office for failing to comply with it, and another order restraining him from apportioning state funds to school districts for the purchase of text- books to be lent to parochial students. . . .

*Everson* and later cases have shown that the line between state neutrality to religion and state support of religion is not easy to locate. “The con- stitutional standard is the separation of Church and State. The problem, like many problems in constitutional law, is one of degree.” *. . .*

The test may be stated as follows: what is the pur- pose and the primary effect of the enactment? If either is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Estab- lishment Clause there must be a secular legislative purpose and a primary effect that neither advances

nor inhibits religion. *Everson v. Board of Education*. . . . 374 U.S. at 222, 83 S. Ct. at 1571.

This test is not easy to apply. . . . The statute upheld in *Everson* would be considered a law having “a secular legislative purpose and a pri- mary effect that neither advances nor inhibits re- ligion.” We reach the same result with respect to the New York law requiring school books to be loaned free of charge to all students in specified grades. The express purpose of § 701 was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. . . . The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are fur- nished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools. Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution. . . .

The major reason offered by appellants for distinguishing free textbooks from free bus fares is that books, but not buses, are critical to the teaching process, and in a sectarian school that process is employed to teach religion. However, this Court has long recognized that religious schools pursue two goals, religious instruction and secular education. In the leading case of *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S. Ct. 571 (1925), the Court held that although it would not question Oregon’s power to compel school attendance or require that the attendance be at an institution meeting state-imposed require- ments as to quality and nature of curriculum, Oregon had not shown that its interest in secular education required that all children attend pub- licly operated schools. A premise of this holding was the view that the State’s interest in educa- tion would be served sufficiently by reliance on the secular teaching that accompanied religious training in the schools maintained by the Soci- ety of Sisters. Since *Pierce,* a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be

at institutions which provide minimum hours of instruction, employ teachers of specified train- ing, and cover prescribed subjects of instruction. Indeed, the State’s interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruc- tion at home as compliance with compulsory education statutes. These cases were a sensible corollary of *Pierce v. Society of Sisters:* if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational func- tion. Another corollary was *Cochran v. Louisiana State Board of Education,* 281 U.S. 370, 50 S. Ct. 335 (1930), where appellants said that a statute requiring school books to be furnished with- out charge to all students, whether they attend public or private schools, did not serve a “pub- lic purpose,” and so offended the Fourteenth Amendment. Speaking through Chief Justice Hughes, the Court summarized as follows its conclusion that Louisiana’s interest in the secu- lar education being provided by private schools made provision of textbooks to students in those schools a properly public concern: “[The State’s] interest is education, broadly; its method, com- prehensive. Individual interests are aided only as the common interest is safeguarded.” 281 U.S. at 375, 50 S. Ct. at 336.

Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experi- ence. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial sys- tems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sec- tarian function, the task of secular education.

Against this background of judgment and experience, unchallenged in the meager record before us in this case, we cannot agree with appellants either that all teaching in a sectar- ian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teach- ing of religion. . . . Nothing in this record sup- ports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial schools to teach religion. No evidence has been offered about particular schools, par- ticular courses, particular teachers, or particular books. We are unable to hold, based solely on judicial notice, that this statute results in un- constitutional involvement of the State with religious instruction or that § 701, for this or the other reasons urged, is a law respecting the establishment of religion within the meaning of the First Amendment. . . .

###### CASE NOTES

1. Justice Black wrote the majority opinion in *Everson* and dissented in *Allen*. This is particu- larly interesting, since the majority opinion by Justice White relied heavily on the interpreta- tion and meaning of the majority in *Everson.*
2. The *Cochran* case in Louisiana was preceded by *Borden v. Louisiana State Board of Education,* 168 La. 1005, 123 So. 655 (1929), which held that the Acts of 1928, Nos. 100 and 143, the same Acts contested in *Cochran,* were not vio- lative of constitutional provisions prohibiting public funds for private or benevolent pur- poses and were not adverse to due process requirements.
3. Appellants in *Allen* argued that transportation of parochial pupils may be constitutional, whereas providing textbooks is not. How does the Court react to this argument? Compare the Court’s opinion to the dissenting opinion of Justice Jackson in the *Everson* case. In *Everson,* Justice Jackson said:

I find myself, contrary to first impressions, unable to join in this decision. I have a sympathy, though it is not ideological, with Catholic citizens who are com- pelled by law to pay taxes for public schools, and also feel constrained by conscience and discipline to support other schools for their own children. Such

relief to them as this case involves is not in itself a serious burden to taxpayers and I had assumed it to be as little serious in principle. Study of this case convinces me otherwise. The Court’s opinion mar- shals every argument in favor of state aid and puts the case in its most favorable light, but much of its reasoning confirms my conclusions that there are no good grounds upon which to support the present legislation. In fact, the undertones of the opinion, ad- vocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters. The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron’s reports, “whis- pering ‘I will ne’er consent,’—consented.”

1. What is the implication of Justice White’s statement that “parochial schools are per- forming, in addition to their sectarian func- tion, the task of secular education”?
2. How does Justice Black, in dissent in *Allen*, distinguish textbooks from transportation in *Everson*, in which he wrote the majority opinion?

### The Establishment Clause and the *Lemon* Test

The decision by the Supreme Court in the *Allen* case65 created many questions on the part of both public and parochial school leaders throughout the country. The language of Justice White, speak- ing for the majority, was unclear, failing to delin- eate First Amendment restrictions in providing state aid to parochial schools. White applied the public purpose theory and reasoned that the state could give assistance to religious schools so long as the aid was provided for only secular services in the operation of parochial schools. He said that

a wide segment of informed opinion, legislative and otherwise, has found that [parochial] schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular edu- cation.66 [emphasis added]

This statement was taken by many parochial school advocates to mean that a state could per- missibly provide funds to parochial schools for such things as teachers’ salaries, operations,

buildings, and so on, so long as the funds were used by the parochial schools only for “public secular purposes.” State legislatures were sud- denly flooded with hundreds of bills to provide state support to parochial schools; some were passed and others, for various reasons, failed.67

THE *LEMON* TEST

It was into this fertile area of conjecture that the

U.S. Supreme Court walked in 1971, when it was asked to rule on the constitutionality of two such state acts from Pennsylvania and Rhode Island. This was the now famous *Lemon v. Kurtzman* case, which first enunciated the three-part test of con- stitutionality of state acts pertaining to the estab- lishment of religion. Both states, capitalizing on the vagueness of *Allen,* were attempting to give public funds to parochial schools. The Supreme Court struck down the statutes of both states. The Court found the “secular purpose” standard alone to be inadequate and then added another standard, that of “excessive entanglement.” This standard seeks to prevent the state from infring- ing on the separate rights of religion by becom- ing too intermingled with the process of religion. The Supreme Court enunciated a three-part test for determining whether a state statute is con- stitutional under the Establishment Clause of the First Amendment: (1) the statute must have a secular legislative purpose, (2) its principal or primary effect must be one that neither advances nor inhibits religion, and (3) it must not foster ex- cessive government entanglement with religion.

*State Aid to Parochial Schools Through Salary Supplements and Purchase of Services Constitutes Impermissible Entanglement Between Church and State*



#### Lemon v. Kurtzman

*Supreme Court of the United States, 1971.*

*403 U.S. 602, 91 S. Ct. 2105.*

Mr. Chief Justice BURGER delivered the opinion of the Court.

These two appeals raise questions as to Penn- sylvania and Rhode Island statutes providing state aid to church-related elementary and sec- ondary schools. Both statutes are challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment and the Due Process Clause of the Fourteenth Amendment.

Pennsylvania has adopted a statutory pro- gram that provides financial support to non- public elementary and secondary schools by way of reimbursement for the cost of teachers’ salaries, textbooks, and instructional materials in specified secular subjects. Rhode Island has adopted a statute under which the State pays directly to teachers in nonpublic elementary schools a supplement of 15% of their annual sal- ary. Under each statute state aid has been given to church-related educational institutions. We hold that both statutes are unconstitutional.

The Rhode Island Salary Supplement Act, R.I. Gen. Laws § 16-51-1 et seq., was enacted in 1969. It rests on the legislative finding that the qual- ity of education available in nonpublic elemen- tary schools has been jeopardized by the rapidly rising salaries needed to attract competent and dedicated teachers. The Act authorizes state of- ficials to supplement the salaries of teachers of secular subjects in nonpublic elementary schools by paying directly to a teacher an amount not in excess of 15% of his current annual salary. . . .

In order to be eligible for the Rhode Island salary supplement, the recipient must teach in a nonpublic school at which the average per-pupil expenditure on secular education is less than the average in the State’s public schools during a specified period. Appellant State Commissioner of Education also requires eligible schools to sub- mit financial data. If this information indicates a per-pupil expenditure in excess of the statutory limitation, the records of the school in question must be examined in order to assess how much of the expenditure is attributable to secular edu- cation and how much to religious activity.

The Act also requires that teachers eligible for salary supplements must teach only those sub- jects that are offered in the State’s public school. They must use “only teaching materials which are used in the public schools.” Finally, any teacher applying for a salary supplement must first agree in writing “not to teach a course in religion for so long as or during such time as he

or she receives any salary supplements” under the Act.

Appellees are citizens and taxpayers of Rhode Island. . . . Appellants are state officials charged with administration of the Act, teachers eligible for salary supplements under the Act, and par- ents of children in church-related elementary schools whose teachers would receive state sal- ary assistance.

A three-judge federal court was convened. . . . It found that Rhode Island’s nonpublic elemen- tary schools accommodated approximately 25% of the State’s pupils. About 95% of these pu- pils attended schools affiliated with the Roman Catholic Church. To date some 250 teachers have applied for benefits under the Act. All of them are employed by Roman Catholic schools.

The court held a hearing at which extensive evidence was introduced concerning the nature of the secular instruction offered in the Roman Catholic schools whose teachers would be eligi- ble for salary assistance under the Act. Although the Court found that concern for religious values does not necessarily affect the content of secular subjects, it also found that the parochial school system was “an integral part of the religious mission of the Catholic Church.”

The District Court concluded that the Act violated the Establishment Clause, holding that it fostered “excessive entanglement” between government and religion. In addition two judges thought that the Act had the impermissible effect of giving “significant aid to a religious enterprise.” . . . We affirm.

Pennsylvania has adopted a program that has some but not all of the features of the Rhode Island program. The Pennsylvania Nonpublic Elementary and Secondary Education Act, 24 Pa. Stat. §§ 5601-9, was passed in 1968 in response to a crisis that the Pennsylvania Legislature found existed in the State’s nonpublic schools due to rapidly rising costs. The statute affirmatively reflects the legislative conclusion that the State’s educational goals could appropriately be ful- filled by government support of “those purely secular educational objectives achieved through nonpublic education. . . .”

The statute authorizes appellee state Super- intendent of Public Instruction to “purchase” specified “secular educational services” from nonpublic schools. Under the “contracts”

authorized by the statute, the State directly reim- burses nonpublic schools solely for their actual expenditures for teachers’ salaries, textbooks, and instructional materials. A school seeking re- imbursement must maintain prescribed account- ing procedures that identify the “separate” cost of the “secular educational service.” These ac- counts are subject to state audit. . . .

There are several significant statutory re- strictions on state aid. Reimbursement is lim- ited to courses “presented in the curricula of the public schools.” It is further limited “solely” to courses in the following “secular” subjects: mathematics, modern foreign languages (Latin, Hebrew, and classical Greek excluded), physical science, and physical education. Textbooks and instructional materials included in the program must be approved by the state Superintendent of Public Instruction. Finally, the statute pro- hibits reimbursement for any course that con- tains “any subject matter expressing religious teaching, or the morals or forms of worship of any sect.”

The Act went into effect on July 1, 1968. . . . The State has now entered into contracts with some 1,181 nonpublic elementary and second- ary schools with a student population of some 535,215 pupils—more than 20% of the total num- ber of students in the State. More than 96% of these pupils attend church-related schools, and most of these schools are affiliated with the Ro- man Catholic Church.

Appellants brought this action in the Dis- trict Court to challenge the constitutionality of the Pennsylvania statute. . . . The District Court held that the individual plaintiffs-appellants had standing to challenge the Act. . . .

The court granted appellees’ motion to dis- miss the complaint for failure to state a claim for relief. . . . It held that the Act violated neither the Establishment nor the Free Exercise Clause. . . . We reverse. . . .

The language of the Religion Clauses of the First Amendment is at best opaque, particu- larly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state re- ligion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be “no law *respecting* an establishment of religion.”

A law may be one “respecting” the forbidden objective while falling short of its total realiza- tion. A law “respecting” the proscribed result, that is, the establishment of religion, is not al- ways easily identifiable as one violative of the Clause. A given law might not *establish* a state re- ligion but nevertheless be one “respecting” that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.

In the absence of precisely stated constitu- tional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: “sponsorship, financial support, and active involvement of the sovereign in religious activity.” *Walz v. Tax Commission,* 397 U.S. 664, 668, 90 S.Ct. 1409, (1970).

Every analysis in this area must begin with consideration of the cumulative criteria devel- oped 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,* (1968); finally, the stat- ute must not foster “an excessive government entanglement with religion.” *Walz,* supra.

Inquiry into the legislative purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative in- tent was to advance religion. On the contrary, the statutes themselves clearly state that they are intended to enhance the quality of the secu- lar education in all schools covered by the com- pulsory attendance laws. There is no reason to believe the legislatures meant anything else. A State always has a legitimate concern for main- taining minimum standards in all schools it al- lows to operate. As in *Allen,* we find nothing here that undermines the stated legislative in- tent; it must therefore be accorded appropriate deference. . . .

The two legislatures, however, have also recognized that church-related elementary and secondary schools have a significant religious mission and that a substantial portion of their activities is religiously oriented. They have therefore sought to create statutory restrictions designed to guarantee the separation between secular and religious educational functions

and to ensure that State financial aid supports only the former. All these provisions are pre- cautions taken in candid recognition that these programs approached, even if they did not intrude upon, the forbidden areas under the Religion Clauses. We need not decide whether these legislative precautions restrict the prin- cipal or primary effect of the programs to the point where they do not offend the Religion Clauses, for we conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves *excessive en- tanglement* between government and religion (emphasis added). . . .

*Rhode Island Program.* The District Court made extensive findings on the grave potential for excessive entanglement that inheres in the reli- gious character and purpose of the Roman Cath- olic elementary schools of Rhode Island, to date the sole beneficiaries of the Rhode Island Salary Supplement Act.

The church schools involved in the program are located close to parish churches. . . . The school buildings contain identifying religious symbols such as crosses on the exterior and cru- cifixes, and religious paintings and statues either in the classrooms or hallways. Although only ap- proximately thirty minutes a day are devoted to direct religious instruction, there are religiously oriented extracurricular activities. Approxi- mately two-thirds of the teachers in these schools are nuns of various religious orders. Their dedi- cated efforts provide an atmosphere in which religious instruction and religious vocations are natural and proper parts of life in such schools. Indeed, as the District Court found, the role of teaching nuns in enhancing the religious atmo- sphere has led the parochial school authorities to attempt to maintain a one-to-one ratio between nuns and lay teachers in all schools rather than to permit some to be staffed almost entirely by lay teachers.

On the basis of these findings the District Court concluded that the parochial schools con- stituted “an integral part of the religious mission of the Catholic Church.” The various characteris- tics of the schools make them “a powerful vehi- cle for transmitting the Catholic faith to the next generation.” This process of inculcating religious doctrine is, of course, enhanced by the impres- sionable age of the pupils, in primary schools

particularly. In short, parochial schools involve substantial religious activity and purpose.

The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid. Although the District Court found that concern for religious values did not inevitably or necessarily intrude into the content of secular subjects, the consider- able religious activities of these schools led the legislature to provide for careful governmental controls and surveillance by state authorities in order to ensure that state aid supports only secu- lar education. . . .

The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under re- ligious discipline can avoid conflicts. The State must be certain, given the Religion Clauses that subsidized teachers do not inculcate religion— indeed the State here has undertaken to do so. To ensure that no trespass occurs, the State has therefore carefully conditioned its aid with per- vasive restrictions. An eligible recipient must teach only those courses that are offered in the public schools and use only those texts and materials that are found in the public schools. In addition, the teacher must not engage in teaching any course in religion.

A comprehensive, discriminating, and con- tinuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjec- tive acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entangle- ment between state and church.

There is another area of entanglement in the Rhode Island program that gives concern. The statute excludes teachers employed by nonpub- lic schools whose average per-pupil expendi- tures on secular education equal or exceed the comparable figures for public schools. In the event that the total expenditures of an otherwise eligible school exceed this norm, the program requires the government to examine the school’s records in order to determine how much of the total expenditures is attributable to secular

education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organiza- tion is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive govern- ment direction of church schools and hence of churches. . . .

*Pennsylvania Program.* The Pennsylvania stat- ute also provides state aid to church-related schools for teachers’ salaries. The complaint describes an educational system that is very similar to the one existing in Rhode Island. Ac- cording to the allegations, the church-related elementary and secondary schools are controlled by religious organizations, have the purpose of propagating and promoting a particular religious faith, and conduct their operations to fulfill that purpose. Since this complaint was dismissed for failure to state a claim for relief, we must accept these allegations as true for purposes of our review.

As we noted earlier, the very restrictions and surveillance necessary to ensure that teachers play a strictly non-ideological role give rise to entanglements between church and state. The Pennsylvania statute, like that of Rhode Island, fosters this kind of relationship. Reimburse- ment is not only limited to courses offered in the public schools and materials approved by state officials, but the statute excludes “any subject matter expressing religious teaching, or the mor- als or forms of worship of any sect.” In addition, schools seeking reimbursement must maintain accounting procedures that require the State to establish the cost of the secular as distinguished from the religious instruction.

The Pennsylvania statute, moreover, has the further defect of providing state financial aid di- rectly to the church-related schools. This factor distinguishes both *Everson* and *Allen,* for in both those cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school. . . . In *Walz v. Tax Commission, . . .* the Court warned of the dangers of direct payments to religious organizations:

Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative

relationships for enforcement of statutory or ad- ministrative standards. . . .

The history of government grants of a continu- ing cash subsidy indicates that such programs have almost always been accompanied by vary- ing measures of control and surveillance. The government cash grants before us now provide no basis for predicting that comprehensive mea- sures of surveillance and controls will not follow. In particular the government’s post audit power to inspect and evaluate a church-related school’s financial records and to determine which expen- ditures are religious and which are secular creates an intimate and continuing relationship between church and state.

A broader base of entanglement of yet a dif- ferent character is presented by the divisive political potential of these state programs. In a community where such a large number of pu- pils are served by church-related schools, it can be assumed that state assistance will entail con- siderable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the reli- gious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for consti- tutional, religious, or fiscal reasons, will inevita- bly 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.

Ordinarily, political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. . . . The potential divisive- ness of such conflict is a threat to the normal political process. . . .

The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likeli- hood of larger and larger demands as costs and populations grow. . . .

In *Walz* it was argued that a tax exemption for places of religious worship would prove to be the first step in an inevitable progression leading to the establishment of state churches and state reli- gion. That claim could not stand up against more than 200 years of virtually universal practice embedded in our colonial experience and con- tinuing into the present.

The progression argument, however, is more persuasive here. We have no long history of state aid to church-related educational insti- tutions comparable to 200 years of tax exemp- tion for churches. Indeed, the state programs before us today represent something of an innovation. 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,” have become the platform for yet fur- ther steps. A certain momentum develops in constitutional theory and it can be a “downhill thrust” easily set in motion but difficult to retard or stop. Development by momentum is not in- variably bad; indeed, it is the way the common law has grown, but it is a force to be recognized and reckoned with. The dangers are increased by the difficulty of perceiving in advance ex- actly where the “verge” of the precipice lies. As well as constituting an independent evil against which the Religion Clauses were intended to protect, involvement or entanglement between government and religion serves as a warning signal. . . .

The judgment of the Rhode Island District Court in No. 569 and No. 570 is affirmed. The judgment of the Pennsylvania District Court in No. 89 is reversed, and the case is remanded for further proceedings consistent with this opinion. . . .

###### THE WALL BEGINS TO CRUMBLE

The issue of aid to nonpublic schools in the form of tax credits or tax deductions is not a new idea. In 1972, a lower federal district court invalidated Ohio’s Parental Reimburse- ment Grant, which provided a tax credit68 to

nonpublic school parents, a decision that was summarily affirmed by the U.S. Supreme Court in 1973.69 The Supreme Court addressed the tax benefit in *Committee for Public Education and Religious Liberty v. Nyquist* in 1973 and found a New York statute for nonpublic school parents was unconstitutional.70 Again, in 1979, the Supreme Court confronted the tax benefit issue, at which time it summarily affirmed the deci- sion71 of the Third Circuit Court of Appeals invalidating a tax benefit program for nonpublic school parents in New Jersey.

The watershed case on the subject of tax credits, *Mueller v. Allen*72 resulted from a Min- nesota statute that allowed all parent taxpayers to deduct from their income taxes a legislatively specified amount. In approving this scheme of aid to private schools, the U.S. Supreme Court appeared to chart a new direction of even greater leniency in the provision of public monies for parochial schools. In upholding the Minnesota plan, the Court distinguished its rejection of the earlier tax deduction or credit plans by noting that each of those limited tax benefits was avail- able only to parents of private school children, whereas the Minnesota deduction was available to parents of all children in both private and public schools. The Court did not seem to be concerned that tax deduction benefits to public school parents would be minimal because pub- lic schools do not charge tuition or transporta- tion fees and textbooks are, by and large, free. The primary benefits would then, of course, accrue largely to the advantage of parochial school parents. Justice Rehnquist, in applying the three-part test for the 5–4 majority, found that the statute had a secular purpose, that it did not advance or promote religion, and that gov- ernmental entanglement with the church was minimal and unimportant.

Importantly, Rehnquist, in justifying the deci- sion, expressed a view of the Court to the effect that parochial schools are a viable and important alternative to public schools, fostering “whole- some competition,” and that states are justified in giving them tax support.73 This same view is a slightly different version of that expressed by Justice White in 1968 in *Board of Education of Central School District v. Allen*.74 In *School Dis- trict of the City of Grand Rapids v. Ball*,75 in 1985,

the Supreme Court, under the hand of Justice Brennan, momentarily returned to a stricter ad- herence to separation. In this case, a Grand Rap- ids plan offered benefits to parochial schools through shared time and community education programs financed by the public school system. Justice Brennan, writing for the majority, found that the plan had the primary effect of advanc- ing religion.

Justice Brennan again prevailed in the 1985 *Aguilar v. Felton* decision,76 in which he formed a majority coalition of justices, enabling the Court to strike down a New York City plan that pro- vided funds under Title I of the federal Elemen- tary and Secondary Education Act of 1965 to pay for the education of eligible parochial school stu- dents on parochial school premises. The Supreme Court found that such a benefit to the parochial schools offended the Establishment Clause. Jus- tice Brennan went to great length to explain why this particular plan, which involved the use of public school teachers in parochial schools as well as an elaborate monitoring system, violated the excessive entanglement test.

The erosion of the wall as far as aid to paro- chial schools is concerned is premised on the philosophical rationale enunciated by Chief Jus- tice Rehnquist in his dissent in *Wallace v. Jaffree* in 1985,77 where he maintained that the true intent of the Establishment Clause is merely to prohibit a “national religion” or the “official designation of any church as a national one,” as well as to discourage the preference of any particular re- ligious sect over another. It did not intend, ac- cording to Rehnquist, to create “government neutrality between religion and irreligion, nor did it prohibit the federal government from providing non-discriminating aid to religion.”78 This neutrality or nonpreferential philosophy allows state and federal tax funds to go to reli- gious schools so long as one or a few religious sects are not preferred over others. According to Levy, the fact that the Catholic Church may control 80 percent of America’s private schools would apparently make no difference in the ap- plication of this nonpreferential philosophy.79 This position is, of course, diametrically opposed to the intent enunciated in Madison’s *Memorial and Remonstrance,* which declared that govern- ment should not aid one religion or all religions.

*Mueller v. Allen* is the Supreme Court’s first obvi- ous and definitive step away from the doctrine of separation.

*Tax Deductions Benefiting Parents of Parochial School Children Do Not Violate the Establishment Clause*



#### Mueller v. Allen

*Supreme Court of the United States, 1983.*

*463 U.S. 388, 103 S. Ct. 3062.*

Justice REHNQUIST delivered the opinion of the Court.

Minnesota allows taxpayers, in computing their state income tax, to deduct certain expenses incurred in providing for education of their children. . . .

Minnesota, like every other state, provides its citizens with free elementary and second- ary schooling. It seems to be agreed that about 820,000 students attended this school system in the most recent school year. During the same year, approximately 91,000 elementary and sec- ondary students attended some 500 privately supported schools located in Minnesota, and about 95% of these students attended schools considering themselves to be sectarian.

Minnesota, by a law originally enacted in 1955 and revised in 1976 and again in 1978, permits state taxpayers to claim a deduction from gross income for certain expenses incurred in educating their children. The deduction is limited to actual expenses incurred for the “tuition, textbooks and transportation” of dependents attending elemen- tary or secondary schools. A deduction may not exceed $500 per dependent in grades K through six and $700 per dependent in grades seven through twelve. . . .

Today’s case is no exception to our oft-repeated statement that the Establishment Clause presents especially difficult questions of interpretation and application. It is easy enough to quote the few words comprising that clause—“Congress shall make no law respecting an establishment

of religion.” It is not at all easy, however, to apply this Court’s various decisions construing the Clause to governmental programs of finan- cial assistance to sectarian schools and the par- ents of children attending those schools. Indeed, in many of these decisions “we have expressly or implicitly acknowledged that ‘we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.’” *Lemon v. Kurtzman,* 403 U.S. 602, 609, 612,

91 S. Ct. 2105, 2109, 2111 (1971) . . .

One fixed principle in this field is our consis- tent rejection of the argument that “any program which in some manner aids an institution with a religious affiliation” violates the Establishment Clause. . . .

The general nature of our inquiry in this area has been guided, since the decision in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S. Ct. 2105(1971), by

the “three-part” test laid down in that case:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster “an excessive government entanglement with religion.” Ibid., at 612–613, 91 S. Ct., at 2111.

While this principle is well settled, our cases have also emphasized that it provides “no more than [a] helpful signpost” in dealing with Establishment Clause challenges. With this caveat in mind, we turn to the specific challenges raised against § 290.09(22) under the *Lemon* framework.

Little time need be spent on the question of whether the Minnesota tax deduction has a secu- lar purpose. Under our prior decisions, govern- mental assistance programs have consistently survived this inquiry even when they have run afoul of other aspects of the *Lemon* framework. This reflects, at least in part, our reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state’s program may be discerned from the face of the statute.

A state’s decision to defray the cost of educa- tional expenses incurred by parents—regardless of the type of schools their children attend— evidences a purpose that is both secular and understandable. . . .

We turn therefore to the more difficult but related question whether the Minnesota statute has “the primary effect of advancing the sectar- ian aims of the nonpublic schools.” In concluding that it does not, we find several features of the Minnesota tax deduction particularly significant. First, an essential feature of Minnesota’s arrange- ment is the fact that § 290.09(22) is only one among many deductions—such as those for medical ex- penses, Minn. Stat. § 290.09(10), and charitable contributions, Minn. Stat. § 290.21—available un- der the Minnesota tax laws. . . . Under our prior decisions, the Minnesota legislature’s judgment that a deduction for educational expenses fairly equalizes the tax burden of its citizens and en- courages desirable expenditures for educational purposes is entitled to substantial deference.

Other characteristics of § 290.09(22) argue equally strongly for the provision’s constitutional- ity. Most importantly, the deduction is available for educational expenses incurred by *all* parents, in- cluding those whose children attend public schools and those whose children attend nonsectarian pri- vate schools or sectarian private schools*. . . .*

We . . . agree with the Court of Appeals that, by channeling whatever assistance it may pro- vide to parochial schools through individual parents, Minnesota has reduced the Establish- ment Clause objections to which its action is sub- ject. It is true, of course, that financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children. It is also true, however, that under Minnesota’s arrange- ment public funds become available only as a result of numerous, private choices of individual parents of school-age children. For these rea- sons, we recognized in *Nyquist* that the means by which state assistance flows to private schools is of some importance: we said that “the fact that aid is disbursed to parents rather than to . . . schools” is a material consideration in Establish- ment Clause analysis, albeit “only one among many to be considered.” . . .

We find it useful, in the light of the foregoing characteristics of § 290.09(22), to compare the attenuated financial benefits flowing to paro- chial schools from the section to the evils against which the Establishment Clause was designed to protect. These dangers are well-described by our statement that “what is at stake as a matter of

policy [in Establishment Clause cases] is prevent- ing that kind and degree of government involve- ment in religious life that, as history teaches us, is apt to lead to strife and frequently strain a politi- cal system to the breaking point.” It is important, however, to “keep these issues in perspective.”

At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote, and when viewed against the positive contributions of sectarian schools, such risk seems entirely tolerable in light of the continuing oversight of this Court. *Wolman,* 433 U.S., at 263, 97 S. Ct., at 2613.

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

Petitioners argue that, notwithstanding the facial neutrality of § 290.09(22), in application the statute primarily benefits religious institutions. Petitioners rely, as they did below, on a statistical analysis of the type of persons claiming the tax deduction. They contend that most parents of public school children incur no tuition expenses, and that other expenses deductible under

§ 290.09(22) are negligible in value; moreover, they claim that 96% of the children in private schools in 1978–1979 attended religiously affili- ated institutions. Because of all this, they reason, the bulk of deductions taken under § 290.09(22) will be claimed by parents of children in sectar- ian schools. Respondents reply that petitioners have failed to consider the impact of deductions for items such as transportation, summer school tuition, tuition paid by parents whose children attended schools outside the school districts in which they resided, rental or purchase costs for a variety of equipment, and tuition for certain types of instruction not ordinarily provided in public schools.

We need not consider these contentions in de- tail. We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which vari- ous classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled stan- dards by which such statistical evidence might be evaluated. Moreover, the fact that private per- sons fail in a particular year to claim the tax re- lief to which they are entitled—under a facially neutral statute—should be of little importance in determining the constitutionality of the statute permitting such relief. . . .

Thus, we hold that the Minnesota tax deduc- tion for educational expenses satisfies the primary effect inquiry of our Establishment Clause cases.

Turning to the third part of the *Lemon* inquiry, we have no difficulty in concluding that the Min- nesota statute does not “excessively entangle” the state in religion. The only plausible source of the “comprehensive, discriminating and continuing state surveillance” necessary to run afoul of this standard would lie in the fact that state officials must determine whether particular textbooks qualify for a deduction. In making this decision, state officials must disallow deductions taken from “instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship.” Making de- cisions such as this does not differ substantially from making the types of decisions approved in earlier opinions of this Court. In *Board of Educa- tion v. Allen,* for example, the Court upheld the loan of secular textbooks to parents or children attending nonpublic schools; though state offi- cials were required to determine whether partic- ular books were or were not secular, the system was held not to violate the Establishment Clause. See also *Wolman v. Walter; Meek v. Pittenger.* The same result follows in this case.

For the foregoing reasons, the judgment of the Court of Appeals is Affirmed.

###### CASE NOTES

1. Relying on *Mueller v. Allen,* in 1992, a federal district court in Iowa held that Iowa’s income tax laws that allowed a taxpayer to claim an income tax deduction or credit for payment of

elementary or secondary school tuition or for textbooks did not violate the Establishment or Free Exercise Clauses of the First Amend- ment. *Luthens v. Bair,* 788 F. Supp. 1032, (S.D. Iowa 1992).

1. *Tax Credits.* The Supreme Court of Arizona followed the rationale of *Mueller v. Allen* and upheld a state statute that allowed for a state tax credit of up to $500 for donations to school tuition organizations (STO). An STO is a char- itable organization that is tax exempt under

§ 501(c)(3) of the Internal Revenue Code of the United States. An STO is required to allocate at least 90 percent of its annual revenue for educational scholarships or tuition grants to children to attend any qualified school of the parents’ choice. Plaintiffs brought suit claim- ing the tax credit violated the Establishment Clause of the First Amendment and the Arizona Constitution. The Arizona court upheld the statute, and in so doing, followed the rationale of *Mueller*. The Arizona Consti- tution, Article II, § 12, stated that “No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or to the support of any religious establishment.”

1. A second section of the constitution, Article IX,

§ 10 says, “No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public ser- vice corporation.” In spite of this strong and specific prohibition, the court said that the framers of the Arizona Constitution “did not show an undisputable desire to exceed the federal requirement of the Establishment Clause.” Thus, regardless of the language, the Arizona court reads the Arizona Constitu- tion to be no more restrictive as to an estab- lishment of religion. Accordingly, the Arizona Constitution has no “independent vitality” in such matters and thereby must follow the

U.S. Supreme Court interpretation in *Mueller*. *Kotterman v. Killian,* 193 Ariz. 273, 972 P.2d 606 (1999).

###### THE MARGINALIZING OF *LEMON*

The *Lemon* test was used in all Supreme Court school religion cases in the 1980s and for all but two non-school cases: *Marsh v. Chambers*80 (here the so-called historical analysis was used) and

*Larson v. Valente*.81 In a number of the decisions, the Supreme Court downgraded the importance of the *Lemon* test. The test was described as only a “guideline” in *Committee for Public Education and Religious Liberty v. Nyquist*82 and then as “no more than [a] useful ‘guideline’” in *Mueller v. Allen*.83 Later, in *Lynch v. Donnelly,*84 the Court stated that the *Lemon* test has never been bind- ing on the Court. There was speculation that the Supreme Court would overturn *Lemon* or estab- lish a new test when *Lee v. Weisman*85 was argued before the Court in 1992. But Justice Kennedy, writing for the majority, averted the issue, stat- ing that “the court will not reconsider its deci- sion in *Lemon*.”86 The Court thereby did not use the tripartite *Lemon* test in *Weisman,* but, rather, it applied a new standard—the coercion test. The Court stated: “The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitation imposed by the Establishment Clause, which guarantees at a minimum that a government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or reli- gious faith, or tends to do so.’”87

The member of the Supreme Court most critical of *Lemon* has been Justice Scalia. Scalia, a strong proponent of parochial schools, in his dissent in *Lamb’s Chapel,*88 attacked the *Lemon* test, stating:

As to the Court’s invocation of the *Lemon* Test: Like some ghoul in a late-night horror movie that re- peatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children. 89

Justice Scalia’s efforts to overturn the *Lemon* test and demolish the wall of separation have now largely come to fruition.

The Court did not use the *Lemon* test in decid- ing *Board of Education of Kiryas Joel Village School District v. Grumet;*90 rather, it applied a “neutral- ity” standard, saying, “A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of ‘neutral- ity’ toward religion.”91 In this case, the state legis- lature created a separate special education school district for a religious educational enclave:

The New York Village of Kiryas Joel is a religious enclave of Satmar Hasidim, practitioners of a strict

form of Judaism. Its local incorporation intention- ally drew its boundaries under the state’s gen- eral village incorporation law to exclude all but Satmars.92

This state statute specifically carved out the special school district exclusively for the Satmar Hasidic sect. In declaring the Act unconstitu- tional, the Supreme Court stated: “Because this unusual act is tantamount to an allocation of po- litical power on a religious criterion and neither presupposes nor requires governmental impar- tiality toward religion, we hold that it violates the prohibition against establishment.”93

###### THE NEW ESTABLISHMENT CLAUSE JURISPRUDENCE

Earlier Supreme Court precedents confirming the Establishment Clause as a strong deterrent against state aid to parochial or clerical schools have now been largely repudiated by later rulings. With Justices Rehnquist, O’Connor, Kennedy, Scalia, and Thomas forming the ma- jority, historic separation preventing the flow of public tax funds to parochial schools was nulli- fied in the 1997 case of *Agostini v. Felton*.94 Justice O’Connor, writing for a 5–4 majority, announced the new and “significant change in Establish- ment Clause law.” In this decision, the Court re- peatedly referred to its “current understanding of the Establishment Clause.” This “current un- derstanding” is based on this Supreme Court’s precedents in *Witters v. Washington Department of Services for the Blind*,95 *Zobrest v. Catalina Foot- hills School District,*96 *Rosenberger v. Rector and Visitors of the University of Virginia,*97 and *Board of Education of Kiryas Joel Village School District v. Grumet*.98 In these cases, the Court established a carefully calculated chain of precedents leading to what amounts to a negation of the effects of the Establishment Clause as it had before ap- plied to public funding of parochial schools. The Court’s reasoning was synthesized and enun- ciated as new precedent in *Agostini v. Felton,* in which it overruled the earlier precedents of *Aguilar v. Felton*99 and *School District of the City of Grand Rapids v. Ball.*100 As pointed out earlier in this chapter, the original *Aguilar* case, with for- mer Justice Brennan writing for the majority, had held that the use of federal Title I funds to pay for educational services in parochial schools was unconstitutional. The same Court in the *Grand*

*Rapids* case reinforced the Establishment Clause principle of separation of church and state by in- validating a state plan to provide public funds for shared time and community education programs in parochial schools. Subsequently, however, after Justices Brennan and Marshall retired, the philosophy of the Court shifted dramatically. The new appointees to the Court formed a majority that, in *Agostini,* annulled the strong separation decisions of *Aguilar* and *Grand Rapids.* The Supreme Court, although not directly overruling *Lemon* and its three-prong test, did nevertheless reinterpret *Lemon* in such a way as to greatly reduce its strength in prevent- ing public aid to parochial schools.

In addressing the *Lemon* standards, the Court observed that its new ruling in *Agostini* had not materially changed the first prong of *Lemon,* the purpose test. The fact that the Court let this part stand without reinterpretation did not, however, change current jurisprudence. For some time now, the Court’s precedents have indicated that the purpose test did not prevent government from providing tax funds to parochial schools.101 The real and pervasive shift in the new Estab- lishment Clause judicial philosophy emanated from this Court’s virtual obliteration of the sec- ond prong, the effect test, and the third prong, the excessive entanglement test. The majority in *Agostini* pointed out that the Court’s ruling in *Zobrest* was controlling in the application of the effect test; in *Zobrest,* the Court held that the use of public funds to pay for a special education em- ployee in a Roman Catholic high school did not have the impermissible effect of advancing reli- gion. The Court’s ruling in *Agostini* cited its own decision in *Witters* as precedent and pointed out that its new Establishment Clause jurisprudence did not prevent direct grants to students in reli- gious schools even though the money would be used to obtain a religious education. *Zobrest* and *Witters* directly repudiate the previously held assumptions in *Aguilar* and *Grand Rapids* that a publicly funded employee in a religious school creates the unacceptable effect of advancing reli- gion. Thus, *Zobrest, Witters,* and *Agostini,* in con- cert, apparently largely nullify the effect test as a deterrent to government funding for parochial schools.

The Court in *Agostini* most clearly indicated its overruling of the separation precedents of

earlier Supreme Court decisions when it exam- ined the federal Title I program in light of the third prong of *Lemon,* excessive entanglement. The Court explained that monitoring by public officials of parochial school programs, adminis- trative interaction between public school boards and the parochial schools, and possible “political divisiveness” created by aid to parochial schools cannot be construed to be excessive entangle- ment. Thus, in view of this Court’s treatment of the excessive entanglement standard, it is diffi- cult to conjure a scenario where excessive entan- glement could be adjudged so intrusive as to be violative of this third *Lemon* test. A careful read- ing of *Agostini* makes it clear that the entangle- ment test is to be considered of little importance in future Supreme Court decisions.

In June 2000, the U.S. Supreme Court handed down *Mitchell v. Helms,*102 a fractionated deci- sion that appeared to nullify the remaining Establishment Clause deterrence to public fund- ing of sectarian schools. The opinion, rendered by a plurality, meaning four justices, with Thomas writing, consolidated and reinforced the Court’s position encapsulated in *Agostini,*103 flatly break- ing from previous Supreme Court decisions that had prohibited providing sectarian schools with public funds. The Supreme Court observed in *Agostini* that “*stare decisis* is not an inexorable command”; therefore, earlier precedents did not bind this Court to the earlier Supreme Court rul- ings that held that the Establishment Clause pro- hibited public funding of ecclesiastical schools. *Agostini* and *Helms* gave birth to a so-called new Establishment Clause jurisprudence because of its departure from the historical American sepa- ration of church and state philosophy. Justice Clarence Thomas explained that the new Estab- lishment Clause jurisprudence hinges primarily on an “effect” test that considers the neutrality of the governmental funding and whether the aid subsidizes a particular religious group. Accord- ing to Justice Thomas, if the government funds have no strings attached and do not require that the sectarian schools teach a particular brand of religion, then use of public funds by the church schools is permissible. If in the use of the public funds, the sectarian school chooses to inculcate its own religious doctrine, and such cannot be attributed directly to governmental action, then there is no violation of the Establishment Clause.

Therefore, according to the Court, public funds can be used for religious indoctrination so long as it is the choice made by the particular religious sect that conducts the school and does not consti- tute a religious doctrine prescribed by the govern- ment as a condition for receiving the funds. This reasoning the Court calls the neutrality principle. In short, what the Court is apparently saying is that if the public funds are not used to impose a “state religion” upon the sectarian schools or are not given to only one particular type of religious school, then the governmental funding comports with the Establishment Clause.

Even though the Court in *Helms* was not re- quired by the appeal to address the “purpose test” or the “excessive entanglement test” of *Lemon,* the implication is clear that neither test will in the future be effective deterrents to the channeling of public dollars to religious schools. The new criteria of Justice Thomas’s effect test appear to subsume the original “purpose” test of *Lemon,* indicating that there is no constitutional violation if the state aid is allocated on a neutral and secular basis, neither favoring nor disfavor- ing any particular religious sect.

Further, regardless of the fact that the ex- cessive entanglement test was not directly ad- dressed in *Helms,* the Court indicated that it would probably give this test rather short shrift in the future due to its “pared down” judicial concern for potential divisiveness that might ac- crue from financial aid to religion. Too, the Court suggested foreclosure of entanglement consider- ations in an elongated dismissal of the issue of diversion of funds. The plaintiffs in *Helms* had complained that governmental funds provided to sectarian schools could be easily diverted for religious indoctrination, regardless of their origi- nal secular purpose. *Lemon* had held that the act of monitoring the use of public funds by gov- ernment to prevent their diversion within the sectarian school to religious purposes created excessive entanglements. The Court in *Helms* responded that all this is obviated if the diver- sion comes about as a result of the choices made by the clergy controlling the schools or the par- ents of children attending the religious schools. Church and family choices justify such diverting of funds. Moreover, the Court indicated it would simply disregard any concern of political divi- siveness as an entanglement issue.

Therefore, the *Helms* case constitutes a de- finitive step in the Supreme Court’s disas- sembling of the judicial precedents that had earlier in American history forbidden tax support for the benefit of sectarian schools. The new jurisprudence of the Establishment Clause, appropriated by the current Supreme Court, has now dismantled the principal constitutional barriers that prevented general taxation for the support of religious institutions.

*Payment of Title I Teachers in Parochial Schools Does Not Violate the Establishment Clause*



#### Agostini v. Felton

*Supreme Court of the United States, 1997.*

*521 U.S. 203, 117 S. Ct. 1997.*

Justice O’CONNOR delivered the opinion of the Court.

In *Aguilar v. Felton,* 473 U.S. 402, 105 S. Ct. 3232 (1985), this Court held that the Establishment Clause of the First Amendment barred the city of New York from sending public school teachers into parochial schools to provide remedial educa- tion to disadvantaged children pursuant to a con- gressionally mandated program. On remand, the District Court for the Eastern District of New York entered a permanent injunction reflecting our rul- ing. Twelve years later, petitioners—the parties bound by that injunction—seek relief from its op- eration. Petitioners maintain that *Aguilar* cannot be squared with our intervening Establishment Clause jurisprudence and ask that we explicitly recognize what our more recent cases already dictate: *Aguilar* is no longer good law. . . .

In 1965, Congress enacted Title I of the Elementary and Secondary Education Act of 1965, 79 Stat. 27, as modified, 20 U.S.C. § 6301 et seq., to “provid[e] full educational opportu- nity to every child regardless of economic back- ground.” . . . Toward that end, Title I channels federal funds, through the States, to “local edu- cational agencies.” . . . The LEA’s spend these funds to provide remedial education, guidance,

and job counseling to eligible students. . . . Title I funds must be made available to all eligible chil- dren, regardless of whether they attend public schools. . . .

An LEA providing services to children en- rolled in private schools is subject to a number of constraints that are not imposed when it provides aid to public schools. Title I services may be provided only to those private school students eligible for aid, and cannot be used to provide services on a “school-wide” basis. . . . In addition, the LEA must retain complete con- trol over Title I funds; retain title to all materi- als used to provide Title I services; and provide those services through public employees or other persons independent of the private school and any religious institution. . . . The Title I ser- vices themselves must be “secular, neutral, and non-ideological,” . . . and must “supplement, and in no case supplant, the level of services” already provided by the private school. . . .

In 1978, in *Aguilar,* six federal taxpayers— respondents here—sued the Board in the District Court for the Eastern District of New York. . . . In a 5–4 decision, this Court affirmed on the ground that the Board’s Title I program necessitated an “excessive entanglement of church and state in the administration of [Title I] benefits.” 473 U.S. at 414, 105 S. Ct. at 3239. . . .

The Board, like other LEA’s across the United States, modified its Title I program so it could continue serving those students who attended private religious schools. Rather than offer Title I instruction to parochial school students at their schools, the Board reverted to its prior practice of providing instruction at public school sites, at leased sites, and in mobile instructional units (es- sentially vans converted into classrooms) parked near the sectarian school. The Board also offered computer-aided instruction, which could be pro- vided “on premises” because it did not require public employees to be physically present on the premises of a religious school.

It is not disputed that the additional costs of complying with *Aguilar*’s mandate are significant. . . .

In order to evaluate whether *Aguilar* has been eroded by our subsequent Establishment Clause cases, it is necessary to understand the rationale upon which *Aguilar,* as well as its companion case, *School Dist. of Grand Rapids v. Ball,* rested.

In *Ball,* the Court evaluated two programs implemented by the School District of Grand Rapids, Michigan. The district’s Shared Time program, the one most analogous to Title I, pro- vided remedial and “enrichment” classes, at public expense, to students attending nonpublic schools. The classes were taught during regular school hours by publicly employed teachers, using materials purchased with public funds, on the premises of nonpublic schools. . . . Accord- ingly, a majority found a “substantial risk” that teachers—even those who were not employed by the private schools—might “subtly (or overtly) conform their instruction to the [pervasively sectarian] environment in which they [taught].”

Distilled to essentials, the Court’s conclu- sion that the Shared Time program in *Ball* had the impermissible effect of advancing religion rested on three assumptions: (i) any public em- ployee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and (iii) any and all public aid that directly aids the educational func- tion of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private deci- sionmaking. Additionally, in *Aguilar* there was a fourth assumption: that New York City’s Title I program necessitated an excessive government entanglement with religion because public em- ployees who teach on the premises of religious schools must be closely monitored to ensure that they do not inculcate religion.

Our more recent cases have undermined the assumptions upon which *Ball* and *Aguilar* re- lied. To be sure, the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed since *Aguilar* was decided. For example, we continue to ask whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged. . . .

As we have repeatedly recognized, govern- ment inculcation of religious beliefs has the im- permissible effect of advancing religion. Our cases subsequent to *Aguilar* have, however, modified in two significant respects the approach we use to assess indoctrination. First, we have

abandoned the presumption erected in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctri- nation or constitutes a symbolic union between government and religion. . . .

Second, we have departed from the rule re- lied on in *Ball* that all government aid that di- rectly aids the educational function of religious schools is invalid. In *Witters v. Washington Dept. of Servs. for the Blind,* we held that the Establish- ment Clause did not bar a State from issuing a vocational tuition grant to a blind person who wished to use the grant to attend a Christian col- lege and become a pastor, missionary, or youth director. Even though the grant recipient clearly would use the money to obtain religious educa- tion, we observed that the tuition grants were “made available generally without regard to the sectarian-nonsectarian, or public/nonpublic na- ture of the institution benefited.” . . . The grants were disbursed directly to students, who then used the money to pay for tuition at the educa- tional institution of their choice. . . .

*Zobrest* and *Witters* make clear that, under current law, the Shared Time program in *Ball* and New York City’s Title I program in *Aguilar* will not, as a matter of law, be deemed to have the effect of advancing religion through indoctri- nation. Indeed, each of the premises upon which we relied in *Ball* to reach a contrary conclusion is no longer valid. . . .

. . . [I]t is clear that Title I services are allocated on the basis of criteria that neither favor nor disfa- vor religion. The services are available to all chil- dren who meet the Act’s eligibility requirements, no matter what their religious beliefs or where they go to school, 20 U.S.C. § 6312(c)(1)(F). The Board’s program does not, therefore, give aid recipients any incentive to modify their religious beliefs or practices in order to obtain those services.

We turn now to *Aguilar*’s conclusion that New York City’s Title I program resulted in an exces- sive entanglement between church and state. Whether a government aid program results in such an entanglement has consistently been an aspect of our Establishment Clause analysis. We have considered entanglement both in the course of assessing whether an aid program has an im- permissible effect of advancing religion, . . . and as a factor separate and apart from “effect,” *Lemon v. Kurtzman,* 403 U.S. at 612–613, 91 S. Ct. at 2111. . . .

Not all entanglements, of course, have the ef- fect of advancing or inhibiting religion. Interac- tion between church and state is inevitable, and we have always tolerated some level of involve- ment between the two. Entanglement must be “excessive” before it runs afoul of the Establish- ment Clause. . . .

The pre-*Aguilar* Title I program does not result in an “excessive” entanglement that advances or inhibits religion. As discussed previously, the Court’s finding of “excessive” entanglement in *Aguilar* rested on three grounds: (i) the program would require “pervasive monitoring by public authorities” to ensure that Title I employees did not inculcate religion; (ii) the program required “administrative cooperation” between the Board and parochial schools; and (iii) the program might increase the dangers of “political divisive- ness.” . . . Under our current understanding of the Establishment Clause, the last two considerations are insufficient by themselves to create an “exces- sive” entanglement. They are present no matter where Title I services are offered, and no court has held that Title I services cannot be offered off- campus. . . . Further, the assumption underlying the first consideration has been undermined. In *Aguilar,* the Court presumed that full-time public employees on parochial school grounds would be tempted to inculcate religion, despite the ethi- cal standards they were required to uphold. Be- cause of this risk pervasive monitoring would be required. But after *Zobrest* we no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment. Since we have abandoned the as- sumption that properly instructed public employ- ees will fail to discharge their duties faithfully, we must also discard the assumption that pervasive monitoring of Title I teachers is required. . . .

To summarize, New York City’s Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement. We therefore hold that a federally funded program providing supple- mental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program

containing safeguards such as those present here. The same considerations that justify this hold- ing require us to conclude that this carefully constrained program also cannot reasonably be viewed as an endorsement of religion. . . . Accord- ingly, we must acknowledge that *Aguilar,* as well as the portion of *Ball* addressing *Grand Rapids’* Shared Time program, are no longer good law.

The doctrine of *stare decisis* does not preclude us from recognizing the change in our law and overruling *Aguilar* and those portions of *Ball* inconsistent with our more recent decisions. As we have often noted, “*[s]tare decisis* is not an in- exorable command,” but instead reflects a policy judgment that “in most matters it is more im- portant that the applicable rule of law be settled than that it be settled right.” . . . As discussed above, our Establishment Clause jurisprudence has changed significantly since we decided *Ball* and *Aguilar,* so our decision to overturn those cases rests on far more than “a present doctri- nal disposition to come out differently from the Court of [1985].” . . . We therefore overrule *Ball* and *Aguilar* to the extent those decisions are in- consistent with our current understanding of the Establishment Clause. . . .

We therefore conclude that our Establishment Clause law has “significant[ly] change[d]” since we decided *Aguilar*. . . .

For these reasons, we reverse the judgment of the Court of Appeals and remand to the District Court with instructions to vacate its September 26, 1985, order.

It is so ordered.

*Federal Funds to Sectarian Schools for Acquisition of Instructional and Educational Materials Does Not Violate the Establishment Clause*



#### Mitchell v. Helms

*Supreme Court of the United States, 2000.*

*530 U.S. 793, 120 S. Ct. 2530.*

Justice Thomas announced the judgment of the Court and delivered an opinion, in which the Chief Justice, Justice Scalia, and Justice Kennedy join.

As part of a longstanding school aid program known as Chapter 2, the Federal Government distributes funds to state and local governmental agencies, which in turn lend educational materi- als and equipment to public and private schools, with the enrollment of each participating school determining the amount of aid that it receives. The question is whether Chapter 2, as applied in Jefferson Parish, Louisiana, is a law respect- ing an establishment of religion, because many of the private schools receiving Chapter 2 aid in that parish are religiously affiliated. We hold that Chapter 2 is not such a law. . . .

Chapter 2 of the Education Consolidation and Improvement Act of 1981, Pub. L. 97–35, 95

Stat. 469, as amended, 20 U.S.C. §§ 7301–7373, has its origins in the Elementary and Second- ary Education Act of 1965 (ESEA), and is a close cousin of the provision of the ESEA that we re- cently considered in *Agostini v. Felton,* 521 U.S. 203 (1997). Like the provision at issue in *Agostini,* Chapter 2 channels federal funds to local educa- tional agencies (LEA’s), which are usually public school districts, via state educational agencies (SEA’s), to implement programs to assist chil- dren in elementary and secondary schools. Among other things, Chapter 2 provides aid “for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), as- sessments, reference materials, computer soft- ware and hardware for instructional use, and other curricular materials.” . . . LEA’s and SEA’s must offer assistance to both public and pri- vate schools (although any private school must be nonprofit). Participating private schools receive Chapter 2 aid based on the number of children enrolled in each school, and alloca- tions of Chapter 2 funds for those schools must generally be “equal (consistent with the num- ber of children to be served) to expenditures for programs . . . for children enrolled in the pub- lic schools of the [LEA].” LEA’s just in all cases “assure equitable participation” of the children of private schools “in the purposes and ben- efits” of Chapter 2. Further, Chapter 2 funds may only “supplement and, to the extent prac- tical, increase the level of funds that would . . . be made available from non-Federal sources.” LEA’s and SEA’s may not operate their programs “so as to supplant funds from non- Federal sources.” . . .

The Establishment Clause of the First Amend- ment dictates that “Congress shall make no law respecting an establishment of religion.” In the over 50 years since *Everson,* we have consistently struggled to apply these simple words in the con- text of governmental aid to religious schools. . . .

In *Agostini,* however, we brought some clar- ity to our case law, by overruling two anomalous precedents (*Meek* and *Wolman,* one in whole, the other in part) and by consolidating some of our previously disparate considerations under a revised test. Whereas in *Lemon* we had consid- ered whether a statute (1) has a secular purpose,

(2) has a primary effect of advancing or inhibiting religion, or (3) creates an excessive entanglement between government and religion, . . . in *Agostini* we modified *Lemon* for purposes of evaluating aid to schools and examined only the first and second factors. . . . We acknowledged that our cases discussing excessive entanglement had ap- plied many of the same considerations as had our cases discussing primary effect, and we therefore recast *Lemon*’s entanglement inquiry as simply one criterion relevant to determining a statute’s effect. . . . We also acknowledged that our cases had pared somewhat the factors that could jus- tify a finding of excessive entanglement. . . . We then set out revised criteria for determining the effect of a statute:

To summarize, New York City’s Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: It does not result in governmental indoctrination; define its re- cipients by reference to religion; or create an exces- sive entanglement. . . .

In this case, our inquiry under *Agostini*’s pur- pose and effect test is a narrow one. Because re- spondents do not challenge the District Court’s holding that Chapter 2 has a secular purpose, and because the Fifth Circuit also did not ques- tion that holding, . . . we will consider only the first two *Agostini* criteria, since neither respon- dents nor the Fifth Circuit has questioned the District Court’s holding, . . . that Chapter 2 does not create an excessive entanglement. Consider- ing Chapter 2 in light of our more recent case law, we conclude that it neither results in religious in- doctrination by the government nor defines its recipients by reference to religion. We therefore

hold that Chapter 2 is not a “law respecting an establishment of religion.” In so holding, we ac- knowledge . . . *Meek* and *Wolman* are anomalies in our case law. We therefore conclude that they are no longer good law. . . .

As we indicated in *Agostini,* and have in- dicated elsewhere, the question whether gov- ernmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action. . . . We have also indicated that the answer to the question of indoctrination will resolve the question whether a program of educational aid “subsidizes” reli- gion, as our religion cases use that term. . . .

In distinguishing between indoctrination that is attributable to the State and indoctrina- tion that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recip- ient conducts has been done at the behest of the government. For attribution of indoctrination is a relative question. If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination. To put the point differently, if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, . . . then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose. The government, in crafting such an aid program, has had to conclude that a given level of aid is necessary to further that purpose among secular recipients and has provided no more than the same level to religious recipients.

As a way of assuring neutrality, we have re- peatedly considered whether any governmen- tal aid that goes to a religious institution does so “only as a result of the genuinely indepen- dent and private choices of individuals.” . . . We have viewed as significant whether the “pri- vate choices of individual parents,” as opposed to the “unmediated” will of government, . . .

determine what schools ultimately benefit from the governmental aid, and how much. For if nu- merous private choices, rather than the single choice of a government, determine the distribu- tion of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot eas- ily, grant special favors that might lead to a re- ligious establishment. Private choice also helps guarantee neutrality by mitigating the prefer- ence for pre-existing recipients that is arguably inherent in any governmental aid program . . . and that could lead to a program inadvertently favoring one religion or favoring religious pri- vate schools in general over nonreligious ones.

The principles of neutrality and private choice, and their relationship to each other, were prominent not only in *Agostini, . . .* but also in *Zobrest, Witters,* and *Mueller. . . .*

[P]rivate choices helped to ensure neutral- ity, and neutrality and private choices together eliminated any possible attribution to the gov- ernment even when the interpreter translated classes on Catholic doctrine. . . .

The tax deduction for educational expenses that we upheld in *Mueller* was, in these respects, the same as the tuition grant in *Witters*. We upheld it chiefly because it “neutrally provides state as- sistance to a broad spectrum of citizens,” . . . and because “numerous, private choices of individ- ual parents of school-age children,” determined which schools would benefit from the deduc- tions. We explained that “[w]here, as here, aid to parochial schools is available only as a result of decisions of individual parents no ‘*imprimatur* of state approval’ can be deemed to have been con- ferred on any particular religion, or on religion generally.” . . .

If aid to schools, even “direct aid,” is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any “support of religion,” . . . Although the presence of private choice is easier to see when aid literally passes through the hands of individuals—which is why we have mentioned directness in the same breath with private choice, . . . there is no reason why the Establishment Clause requires such a form. . . .

Respondents also contend that the Establish- ment Clause requires that aid to religious schools

not be impermissibly religious in nature or be di- vertible to religious use. We agree with the first part of this argument but not the second. Re- spondent’s “no divertibility” rule is inconsistent with our more recent case law and is unwork- able. So long as the governmental aid is not itself “unsuitable for use in the public schools because of religious content,” . . . and eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate can- not be attributed to the government and is thus not of constitutional concern. And, of course, the use to which the aid is put does not affect the criteria governing the aid’s allocation and thus does not create any impermissible incentive un- der *Agostini*’s second criterion. . . .

A concern for divertibility, as opposed to im- proper content, is misplaced not only because it fails to explain why the sort of aid that we have allowed is permissible, but also because it is boundless—enveloping all aid, no matter how trivial—and thus has only the most attenuated (if any) link to any realistic concern for preventing an “establishment of religion.” Presumably, for example, government-provided lecterns, chalk, crayons, pens, paper, and paintbrushes would have to be excluded from religious schools under respondents’ proposed rule. But we fail to see how indoctrination by means of (i.e., diver- sion of) such aid could be attributed to the gov- ernment. In fact, the risk of improper attribution is less when the aid lacks content, for there is no risk (as there is with books), of the government inadvertently providing improper content. . . .

Finally, any aid, with or without content, is “divertible” in the sense that it allows schools to “divert” resources. Yet we have “not accepted the recurrent argument that all aid is forbidden be- cause aid to one aspect of an institution frees it to spend its other resources on religious ends.” . . .

One of the dissent’s factors deserves special mention: whether a school that receives aid (or whose students receive aid) is pervasively sec- tarian. The dissent is correct that there was a period when this factor mattered, particularly if the pervasively sectarian school was a primary or secondary school. . . . But that period is one that the Court should regret, and it is thankfully long past. . . .

[T]he inquiry into the recipient’s religious views required by a focus on whether a school

is pervasively sectarian is not only unnecessary but also offensive. It is well established, in nu- merous other contexts, that courts should refrain from trolling through a person’s or institution’s religious beliefs. . . . Yet that is just what this fac- tor requires, as was evident before the District Court, . . . In addition, and related, the applica- tion of the “pervasively sectarian” factor collides with our decisions that have prohibited govern- ments from discriminating in the distribution of public benefits based upon religious status or sincerity.

Finally, hostility to aid to pervasively sectar- ian schools has a shameful pedigree that we do not hesitate to disavow. . . . Although the dis- sent professes concern for “the implied exclu- sion of the less favored.” . . . [T]he exclusion of pervasively sectarian schools from government- aid programs is just that, particularly given the history of such exclusion. Opposition to aid to “sectarian” schools acquired prominence in the 1870’s with Congress’s consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in gen- eral, and it was an open secret that “sectarian” was code for “Catholic.” . . . In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now.

. . . . We therefore have no difficulty con- cluding that Chapter 2 is neutral with regard to religion. . . . Chapter 2 aid also, like the aid in *Agostini, Zobrest,* and *Witters,* reaches participat- ing schools only “as a consequence of private decisionmaking.” . . . It is the students and their parents—not the government—who, through their choice of school, determine who receives Chapter 2 funds. The aid follows the child.

and, perhaps, of computers and computer soft- ware), and students themselves do not need to apply for Chapter 2 aid in order for their schools to receive it, but, as we explained in *Agostini,* these traits are not constitutionally significant or meaningful. . . . Nor, for reasons we have already explained, is it of constitutional significance that the schools themselves, rather than the students, are the bailees of the Chapter 2 aid. The ultimate beneficiaries of Chapter 2 aid are the students who attend the schools that receive that aid, and this is so regardless of whether individual stu- dents lug computers to school each day or, as Jefferson Parish has more sensibly provided, the schools receive the computers. . . .

Finally, Chapter 2 satisfies the first *Agostini* criterion because it does not provide to religious schools aid that has an impermissible content. The statute explicitly bars anything of the sort, providing that all Chapter 2 aid for the benefit of children in private schools shall be “secular, neu- tral, and nonideological,” . . . and the record in- dicates that the Louisiana SEA and the Jefferson Parish LEA have faithfully enforced this require- ment insofar as relevant to this case. The chief aid at issue is computers, computer software, and library books. The computers presumably have no pre-existing content, or at least none that would be impermissible for use in public schools. . . .

In short, Chapter 2 satisfies both the first and second primary criteria of *Agostini*. It therefore does not have the effect of advancing religion. For the same reason, Chapter 2 also “cannot reasonably be viewed as an endorsement of re- ligion.” . . . Accordingly, we hold that Chapter 2 is not a law respecting an establishment of reli- gion. Jefferson Parish need not exclude religious schools from its Chapter 2 program. To the extent that *Meek* and *Wolman* conflict with this holding, we overrule them.

The judgment of the Fifth Circuit is reversed.

It is so ordered.

Because Chapter 2 aid is provided pursuant

to private choices, it is not problematic that one could fairly describe Chapter 2 as providing “di- rect” aid. The materials and equipment provided under Chapter 2 are presumably used from time to time by entire classes rather than by indi- vidual students (although individual students are likely the chief consumers of library books

###### CASE NOTE

In 2010, during the period of speculation re- garding President Obama’s deliberations in choosing a replacement for Justice John Paul Stevens on the Supreme Court, considerable attention was given to the religious beliefs of the sitting members of the Supreme Court. Earlier,

Geoffrey R. Stone, Edward H. Levi Distin- guished Service Professor of Law and former Dean of the Law School, University of Chicago, had raised the issue of religion and politics in the *Chicago Tribune* where he observed that the five justices who voted to uphold the federal ban on the so-called partial birth abortions in *Gonza- les v. Carhart,* 548 U.S. 938, 127 S. Ct. 30 (2006),

were Roman Catholics; Chief Justice Roberts and Associate Justices Alito, Kennedy, Thomas, and Scalia. Professor Stone had specifically written in the *Tribune* in 2007 that: “Here is a painfully awkward observation. All five justices in *Gonza- les* are Catholic. The four justices who are either Protestant or Jewish all voted in accord with the settled precedent.”

Stone continued, “Given the nature of the is- sue, the strength of the relevant precedent, and the inadequacy of the court’s reasoning, the question of religion is too obvious to ignore.” The *New York Times* reported that following the *Tribune* article, Professor Stone “was surprised by the vehement criticism that followed. Catho- lics in particular.” The *Times* noted that “One Catholic, Justice Antonin Scalia, was especially furious about the questions raised by Professor Stone’s article.” Scalia said that Stone’s article was “a damn lie” and added that “it got me so mad that I will not appear at the University of Chicago until he (Stone) is no longer on the fac- ulty.” The *New York Times*, “Week in Review,” Sunday, April 11, 2010, Opinion pp. 1, 4.

Thus, whether religious beliefs of the Supreme Court justices bear on their views regarding the First Amendment and the meaning of the idea of “separation of church and state” will undoubt- edly be a matter of ongoing disagreement.

### Religion and the Reconstruction Era: Grant and Blaine

One of Justice Clarence Thomas’ sweeping gen- eralizations in *Mitchell v. Helms*104 asserted that not only can states constitutionally provide pub- lic funding to pervasively sectarian schools, but that not to do so manifests a hostility toward re- ligion, and in particular the Roman Catholic reli- gion. To Thomas, strong separation language in state constitutions written after 1870 were sim- ply subtle devices to deprive Catholic schools of

public funding, and are, therefore, violative of the federal Constitution. At the heart of Thomas’ reasoning is his belief that state constitutional provisions that prohibit government aid to reli- gion were enacted as Protestant manifestations of anti-Catholic bigotry of the Reconstruction Era. Thomas’ “bigotry thesis” is grounded in his assumption that the strict separation provisions in post-reconstruction state constitutions had emanated from the U.S. Congress in the 1870s, led by Speaker of the House James G. Blaine and by President Grant, both of whom Justice Thomas believes to have had strong and preju- diced anti-Catholic biases.

Later in *Locke v. Davey,*105 2004, a State of Wash- ington case, Justice Rehnquist, although lending credence to Thomas’ “bigotry thesis,” concluded that the facts in *Davey* were not sufficient to document bigoted intent in that particular case. Rehnquist concluded saying that: “neither *Davey* nor *amici* have established a credible connection between the Blaine Amendment and Articles I and II of the Washington Constitution. Accord- ingly, the Blaine Amendment’s history is simply not before us.”106

Most states have church-state provisions that are explicitly stronger than the Establishment Clause of the First Amendment in prohibiting the use of public funds for churches, church schools, or other religious enterprises.107 The effect of Justice Thomas’ “bigotry thesis” is that any state prohibition against public funding of religious schools is suspect as constituting “hostility” to religion,108 generally, and to the Catholic religion specifically.

The so-called Blaine Amendment that Jus- tice Thomas cites in *Helms,* was proposed by James G. Blaine, representative from Maine and speaker of the House, on December 14, 1875, and was passed by an overwhelming majority of the House (180 votes in favor and 7 votes opposed) on August 4, 1876. It, however, failed to gain the two-thirds required vote in the U.S. Senate (28 votes in favor and 16 votes opposed). The failure of the Amendment in the Senate was directly attributable to the negative votes of the newly reinstated segregationist Democrats from the Confederate states.109

Justices Rehnquist, Thomas, and Scalia as- serted in *Helms* and *Davey* that further historical scrutiny is desirable to specifically document the

bigotry of that era and its connection as the moti- vating factor in the adoption of state constitutions that prohibit public funding of Catholic schools. If any such evidence is found, then it must be presumed that the present Supreme Court will entertain the opportunity to overthrow separa- tion provisions in state constitutions.

Who was Blaine? Blaine was an Abraham Lincoln110 liberal Republican from the State of Maine. Blaine’s allegiance to Lincoln rested on the shared belief in a nation founded on a post- Civil War “new birth of freedom,” and, as a con- gressman in the 38th Congress, Blaine advanced the vision of “national survival and glory.”111 Essential to Lincoln and Blaine’s philosophy of nationhood was “oneness,” “unity,” and “one country, one Constitution, one destiny.”112 With the idea of national oneness, Blaine called for all measures that would “bind us more indissolubly together,” in order that “we cannot fly apart.”113

After Lincoln’s death, Blaine opposed pro- Southern segregationist policies and, in particu- lar, he strongly questioned the reconstruction policies of President Andrew Johnson and John- son’s stifling of the Civil Rights Act of 1866; and other civil rights measures caused Blaine to vote for Johnson’s impeachment in February of 1868.114 The last straw had been Johnson’s op- position to the Fourteenth Amendment.115 The language and passage of the Fourteenth Amend- ment in 1868116 owed much to Blaine’s leader- ship in Congress and his constancy in support of the southern blacks who had been disenfran- chised by southern white Democrats shortly after the War.117

Robert Kagan, in his 2006 bestseller *Dangerous Nation,*118 speaks of Blaine’s advocacy of national progress and his instrumental role in mending a nation that had been broken by the Civil War and later rent by Jim Crow laws. Kagan observes that Blaine was “by far the most popular and dominant political figure from the 1870s to the early 1890s” in America, and by virtue of leader- ship he not only sought to eradicate the vestiges of slavery, but he represented the “Republican vision of a more active and moralistic American foreign policy.”119

Morton Keller, in his seminal history of the late nineteenth-century America, placed Blaine in the vanguard of the northern Republican in- tellectuals, who defied southern racism and

subscribed “to the ideal of a powerful, unified, purposeful nation.”120 Kagan observed that Blaine, Seward, and other Republicans sought a foreign policy that would eventually “place the United States at the center of global influence”121 and a domestic policy of cohesion, unity of pur- pose, and a revival of morality that had been so badly damaged by the rationalization of racial discrimination.

Grant and Blaine believed that religion, as well as race, could indelibly mark and separate the nation.122 As described by the eminent histo- rian Jean Edward Smith in his biography *Grant,* “The issue had two dimensions: public funding for sectarian education and religious exercises in public schools.”123 Division and discord between Catholics and Protestants were highly visible political issues as Catholics became the majority political force in northern cities, voted their reli- gion, and petitioned state legislatures for public funding of Catholic schools.124 Protestants coun- tered in efforts to have state legislatures to pro- hibit state funding for Catholic schools.125 The conflict escalated as Catholics challenged hymn singing, Bible reading, and praying in the pub- lic schools as Protestant rituals.126 Such religious exercises were in fact generally Protestant- oriented, using, for example, a Protestant version of the Bible rather than the Catholic Douay Bible. School boards in Cincinnati, Chicago, New York, Buffalo, Rochester, and several other major cities under concerted core city Catholic political pres- sure were able to purge most of the Protestant religious exercises from public schools.127

In 1875, President Grant, in a speech to the veterans of the army of Tennessee, appealed for a unified nation, calling for equality of treatment and privilege between North and South, and an end to divisiveness. With cognizance of the religious political strife that was being waged between Protestants and Catholics, Grant asked the veterans to defend “free thought, free speech, a free press, pure morals unfettered by religious sentiments, and of equal rights and privileges of all men, irrespective of nationality, color, or religion.”128

Directly addressing the issue of unity, Grant maintained that the greatest danger of divid- ing the nation was to be found in strife and in- tolerance among religious sects and he warned: “I predict that the dividing line will not be Mason

and Dixon’s, but between patriotism and intel- ligence on the one side, and superstition, ambi- tion, and ignorance on the other.”129 Then Grant concluded, enunciating the rationale for a unified country. To him, the key to unity was a “common school education” that advanced the knowledge of the people as the basis for a democracy that was Jeffersonian in thought and concept.

Smith affirms that the foundation for Grant’s idea of a democratic nation was “free public education.”130 Grant’s resolution of the Catholic versus Protestant conflict, as explained by Smith, was “evenhanded” and denied both of their zealous self-interested positions; “he belted Prot- estants and Catholics alike.”131 For the Catholics, he would provide no public funding for their parochial schools; for the Protestants, he would deny them religious services in the public school classroom and provide them with no public funding of their religious schools. He said to the veterans: “Resolve that neither the State nor the nation shall support institutions of learning other than those sufficient to afford to every child the opportunity of a good common school educa- tion, unmixed with sectarian, pagan, or atheistic dogmas. Leave the matter of religion to the fam- ily altar, the church, and the private school sup- ported entirely by private contributions. Keep the church and state forever separate.”132

On December 7, 1875, in his annual message to Congress, President Grant proposed a consti- tutional amendment that would require states to make schools entirely secular, banning religious exercises and the teaching of religion, and fur- ther, the amendment would prohibit states from providing aid to religious schools and institu- tions. He further proposed that church property should be taxed, a measure that neither Catho- lics nor Protestants appreciated.133 Yet, much favorable press, both Catholic and Protestant, followed President Grant’s speech, and a week later, Speaker Blaine introduced a constitutional amendment into Congress that if passed and ratified would bring President Grant’s wishes to fruition.134

The Grant/Blaine proposed amendment in 1875 was designed to accomplish five ob- jectives.135 *First,* it would effectively apply the Establishment and Free Exercise Clauses of the First Amendment to the states. As written and ratified in 1791, the First Amendment only

applied to Congress. *Second,* it would reassert and define the meaning of “establishment” to comport more clearly with the intent that Madi- son and Jefferson had envisaged for the First Amendment. *Third,* it would restate the Free Exercise Clause and apply it to prevent majori- ties in states from using the public schools to advance their own particular brand of religious belief. The proposed amendment would directly prohibit any state from denying free exercise of religion. Per President Grant’s ideal, the provi- sion was to ensure that public schools would be completely secular, entirely removed from the inculcation of any religious tenet or belief. The efficiency of the language in this provision has been borne out by Supreme Court precedents that have since completely secularized the pub- lic schools.136 *Fourth,* because the Catholic ver- sus Protestant conflict was rooted in education and the struggle to see which sect could obtain the advantage in inculcation of religious beliefs in the children’s minds of the next generation, the Grant and Blaine amendment was directed toward education specifically. The more general- ized prohibitions of the First Amendment were to be made more pointed to ensure seculariza- tion of public schools and to prohibit the use of taxation to support schools of “any religious sect or denomination.” The prohibition applied to all sects in keeping with the wording of the First Amendment as defined by Jefferson and Madi- son. *Fifth,* the proposed Amendment would pro- hibit public monies flowing to church schools and it would also prohibit the use of funds from the sale or rent of land grants from the national domain, reserved for education, to be used for religious purposes or institutions.

Importantly too, the amendment sought to reverse the rejuvenated southern “states’ rights” arguments that had survived the Civil War and still deprived individual rights and freedoms. According to Notre Dame’s eminent historian John I. McGreevy, both Catholics and southern- ers looked with a jaundiced eye upon any mea- sure that strengthened the federal government to the detriment of states’ rights.137 McGreevy says the “Catholics and southerners alike con- stantly warned of an expanding federal state.”138 Throughout the period in which Justice Thomas founds his “bigotry thesis,” white southern Prot- estants and northern white Catholics combined

forces in opposition to federal initiatives toward unity, centralization, and nationalism. Professor McGreevy explains that: “the sources of Catholic and white southern hostility to liberal national- ism differed,” but, “the extent to which Catholic commentators on Reconstruction and Republican reform echoed their white counterparts is strik- ing. Catholic editors . . . joined white southerners in opposing Reconstruction programs. . . .”139

In this regard, the proposed Grant/Blaine amendment was Hamiltonian in concept, invok- ing more central federal authority to correct in- justices fostered by state action. Too, as had been vividly demonstrated, confederated states could not be relied upon to protect religious freedom or individual rights or preserve the unity of the nation. Grant and Blaine had learned that even when the Constitution explicitly prohibited cer- tain state offenses against the individual, the conservative U.S. Supreme Court could and did neuter the applicable constitutional provision. This, of course, did happen to the Fourteenth Amendment in the *Slaughter House Cases,*140 in 1873, wherein the Supreme Court held that the basic rights of liberty and equality of the Four- teenth Amendment should remain under the control of state legislatures. Moreover, the Court very narrowly defined privileges and immuni- ties to restrict the Fourteenth Amendment’s ef- fect on civil rights. Grant and Blaine had watched helplessly as the flagship of reconstruction, the Fourteenth Amendment, had been drastically curtailed and deprived of essential application “against state violations of fundamental guaran- tees of liberty.”141 Thus, in view of the Supreme Court’s early emasculation of the Fourteenth Amendment, Grant and Blaine sought in their proposed amendment to prevent similar nega- tion or nonenforcement of the Establishment and Free Exercise Clauses of the First Amendment. Further, both Grant and Blaine meant to clarify the definition of “establishment of religion” by explicit language that would clearly prohibit states from giving financial support to any and all religions.

In short, the amendment that Grant proposed and that Blaine shepherded through the U.S. House was designed to deter religious intoler- ance and separation that threatened the unity of the nation. Just as the Fourteenth Amendment was designed to effectuate unity and equality

by preventing states from using state power and money to continue segregation of the races, the Grant/Blaine amendment was designed to pre- vent states from feeding religious discord by providing public financing of any and all reli- gious schools and institutions.

Bigotry obviously existed during the nine- teenth century, as it has in all ages at least since Constantine and the rise of monotheism, but what was new in the Blaine era was the spirit of nationalism, and the belief that the state could provide a moral foundation, address, and rectify social and economic inequalities while ensuring new liberties.

The pervasiveness and complexity of interna- tional religious conflict with emerging national governments and the many instances of extreme measures taken by both Catholics and Protes- tants that created divisiveness and discord in the late nineteenth century, suggest that “bigotry thesis” of Justice Thomas would require more substantial historical research than that indi- cated by Justice Thomas’ understandings and presumptions.

### The Founders’ Intent Regarding Separation

The critical question regarding government pro- viding public money to clerical schools (Bap- tist, Catholic, Muslim, et al.) is the intent of the Founders of the American Republic. When they wrote in the first sentence of the Bill of Rights, “Congress shall make no law respecting the es- tablishment of religion . . . ,” did they mean that government could *not fund any and all religions,* or did they mean simply that government could *not aid one preferred religion and could thereby give public money to all religions?*

As discussed previously, the current Supreme Court has departed from the earlier separation precedents of *Everson* (1947) and *Lemon* (1971), and now advances a new and different consti- tutional philosophy in *Agostini* (1997), *Helms* (2000), *Zelman* (2002), and *Davey* (2004) that per- mits Congress and state legislatures to provide public moneys for “faith-based initiatives,” etc., to all religious institutions and schools, even those that are “pervasively sectarian,” including those whose purpose it is to educate the clergy.

*The Founders’ Intent Regarding Separation* 215

Whether we should look to history to inter- pret the Constitution, and not simply rely on legal precedents, is a subject of considerable de- bate among judges and historians. As is amply demonstrated by the Thomas decision in *Helms,* judges may have only a surface view of history.

According to Frank Lambert, the Purdue University scholar of American history, religion was viewed as a divisive force, (a progenitor of factions), threatening “a more perfect union,”142 and to avoid the inherent discord that religion generated, the Founders sought to completely separate church and state.143 In pursuit of sepa- ration, Madison opposed using public tax money to support one and all ministers of religion.144 Lambert concluded that history teaches that the Founder’s intent was not nonpreferential toward religious sects, but rather that the government should remove religion from its cognizance. Thus, according to Lambert, “The Founders’ solution to the problem of how to keep religion from undermining union was to ignore it.”145

This position of the majority of the Supreme Court today, that the Establishment Clause re- quires that government be merely nonprefer- ential toward religion, is clearly contrary to the conclusions of Leonard Levy, the constitutional historian, who points out that the Establishment Clause when ratified in 1791 was meant to pre- vent not just state preference for one religion over others, but it also was intended to forbid nonpreferential support for any or all religious groups.146 Levy’s reading of Madison leads to the conclusion that disestablishment meant that government had no power to legislate concern- ing religion, period, “to aid one sect exclusively or to aid all equally.”147 Madison famously ob- served in his *Memorial and Remonstrance*, “That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.” For this danger not to exist was to have a constitution that would prevent legislatures from enacting any laws at all that touched religion. Madison sought to have no adjoining or abutting of government with reli- gion in any form or context, requiring complete separation, and as is observed earlier in this text, Jefferson made his position quite clear in his *Act for Establishing Religious Freedom,* passed by the

Virginian legislature in 1786: “That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical.”

That government should have nothing to do with religion and vice versa was intended by those who designed and rationalized the Bill of Rights in 1789 is best discerned in the actual wording of the Establishment Clause. The words were well-considered and precise in their mean- ing. The Clause states: “Congress shall make no law respecting an establishment of religion. . . .” As Levy concludes, the mandate is quite clear. It states concisely that Congress is to “make no law,” no law regarding religion, whatsoever. Further, the founders used the word “respect- ing” which is a synonym for “concerning” or “considering,” thus Congress cannot consider an establishment of religion. Moreover, the Clause does not say “one” establishment, rather it uses the article “an.” “An establishment,” according to Levy, referred to all religions as a group.

Thus, the question is, does the word *establish- ment* mean one religion or all religions? Madison in his *Memorial and Remonstrance* opposed a gen- eral tax assessment in Virginia that had been pro- posed to support teachers of all religious sects, not just one sect. In objecting to such a tax for all religions, Madison repeatedly referred to an “es- tablishment of religion.”148 Madison considered the tax for all religions as “the establishment proposed by the bill.” And he further referred to the tax law for all religions as the “proposed establishment.” The intent of the words *an es- tablishment* was in reference to any one or more religions and did not imply that government should only be neutral or nonpreferential among religions.

In 1785, a strong push was launched in the Continental Congress to set aside a section of land under the Northwest Ordinance for religion in western territories. Madison opposed and helped defeat the plan not because it was reli- giously neutral and nonpreferential, but because it was in “consideration” of religion.149

Thus, to Madison, “an establishment” per- tained to all religions without regard to neutral- ity or preference. This is Levy’s interpretation of the Establishment Clause, which is essentially confirmed by the debates of the House and Senate in 1789 as the delegates considered the

appropriate wording of the religion provision in the First Amendment. The House Committee of the Whole of the U.S. House of Representatives proposed that “no religion shall be established by law.” Another proposal was that “Congress shall make no laws touching religion. . . .” In the Senate, the preference question arose more directly when it was proposed and rejected that the amendment have inserted a clause that prohibited Congress from making a law favoring “One Religious sect or Society in *preference* to others” (emphasis added). Another Senate proposal was also rejected that stated that “Congress shall make no law estab- lishing any particular denomination of religion in *preference* to another. . . .” (emphasis added). Yet another Senate proposal was agreed on that read, “Congress shall make no law establishing articles of faith or a mode of worship. . . .”150 According to Levy, the Senate’s version rejecting the prefer- ence language compelled the House Committee to decide the issue. Madison was Chair of the House Conferees. Finally, rejecting all language regarding “preference,” or neutrality of one religious sect over another, the final agreed wording was reached that became the final ver- sion of the “Establishment Clause” of the First Amendment. The House Conferees, “not satis- fied with merely a ban or preference of one sect or religion over others,”151 stated, “Congress shall make no law respecting an establishment of religion. . . .”152

Thus, according to Levy’s interpretation of the intent of the conferees, the Establishment Clause did not speak of neutrality among reli- gious sects, nor did it enunciate a requirement of nonpreference, instead it simply forbade “an establishment of religion,” prohibiting Congress to make any law at all that considers religion.

Rakove, in his Pulitzer Prize–winning trea- tise on the Constitution, titled *Original Meanings: Politics and Ideas in the Making of the Constitution,* confirms Levy’s interpretations that Madison’s and Jefferson’s intent with regard to religion was “a flat constitutional denial of legislative jurisdiction . . . a specific refusal to permit gov- ernment to act over an entire area of behavior” (religion).153 According to Rakove, religion was different and more basic than other rights. He observes that in the “realm of religion,” Madison and Jefferson denied that the State had any constitutional capacity to act at all.154

Thus, the three prominent historians, Lam- bert, Levy, and Rakove, agree that what was new about the American idea of separation of church and state was that the Establishment Clause and the Free Exercise Clause of the First Amendment meant that laws of the State could not touch religion, they could not provide public appropriation of tax funds to aid one religion or all religions, nor could the State promulgate any legislation at all in the realm of religion. Such conclusions regarding constitutional intent of the Founding Fathers by eminent historians call into dispute the interpretations laid down by the Supreme Court in recent years as expressed in *Agostini, Helms, Zelman,* and *Davey*.

### New Theories of Church and State

With the dramatic change in the philosophy of the U.S. Supreme Court toward church and state in the past few years, three rationalizations of competing interpretations of the Establishment Clause and Free Exercise Clause of the First Amendment have emerged.155 The *first* is the traditional American *strict separation* philosophy of Locke, Jefferson, and Madison. The *second* is what is called the *nonpreference* theory, advanced by Justices O’Connor, Thomas, Scalia, et al., who interpret the religion clauses to simply say that government can aid religion but must be impar- tial; that it cannot favor one religion over an- other, or secularism over religion. The *third* is the *noncoercive theory;* under this reasoning, the gov- ernment can aid religion and does not violate the Establishment Clause unless it effectively estab- lishes a state religion.

###### SEPARATION

The separation theory, as explained earlier, is based on the philosophy that government and religion should operate in two entirely separate spheres, as Madison reasoned in his *Memorial and Remonstrance*. Government should be secular, not ecclesiastical, and should not have anything to do with the spiritual world and the hereafter. Rather, government should relate only to temporal affairs of men of the present world. The church, on the other hand, should be purely private and concerned with personal beliefs and individual theology, not attached to or dependent upon

*New Theories of Church and State* 217

government in any way. “Separation” means the temporal and the spiritual should not “touch.” As observed above, the separation theory was most clearly enunciated in *Everson v. Board of Education,* where Justice Black, writing for the majority of the Supreme Court said: “The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable.”156 In *Reynolds v. United States,* the Court interpreted the Establishment Clause intended to “erect a wall of separation between church and state.”157 Specifically to the point, in *Everson,* Justice Black captured the essence of the theory of separation when he said, “Neither a state nor the federal government . . . can pass laws which aid one reli- gion, aid all religions, or prefer one religion over another,”158 and “no tax in any amount large or small, can be levied to support any religious ac- tivities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.”159 This passage in *Everson* best captures the essential difference between *sep- aration* and the other two theories regarding the relationship between church and state.

Justice Brennan, in his dissent in *Marsh v. Chambers,*160 explained that the intent of the Es- tablishment Clause is to guarantee “the individ- ual right of conscience . . . to keep the state from interfering in the essential autonomy of religious life, . . . to prevent the trivialization and degrada- tion of religion by too close an attachment to the organs of government,” and to “help assure that essentially religious issues . . . not become the oc- casion for battle in the political arena.”161

As the Supreme Court observed in *Everson,* separation does not call for the denial of essen- tial public service, such as public transportation for children who attend parochial schools, nor does it require the denial of civil services such as fire and police protection to benefit churches, but separation does mean that churches are not en- titled to be strengthened by having public funds to set up their own transportation systems, pri- vate fire departments, religious police forces, or to pay costs of attending clerical schools.

###### NONPREFERENTIAL SUBSIDIZATION

A second theory says that the dictates of the Establishment and Free Exercise Clauses are not offended if government provides funds and supports religion so long as it is neutral, neither

preferring nor favoring one religion over an- other. In *Mueller v. Allen,*162 with Chief Justice Rehnquist writing for the majority, the Supreme Court upheld tax deductions from state income taxes for parents’ expenses for children at- tending parochial schools. He maintained that because the deductions were available to all par- ents, regardless of the type of private or religious school attended, the benefits were neutral. Kurland, a proponent of this theory, has written that “the clauses should be read as stating a simple precept: that government cannot utilize religion as a standard for action or inaction because the clauses, read together as they should be, prohibit classification in terms of religion, either to confer a benefit or to impose a burden.”163

The nonpreference theory is also at times called the “neutrality” theory. Justice Rehnquist, in his dissent in *Wallace v. Jaffree,* interpreted the Establishment Clause to forbid “preference among religious sects or denominations.”164 He argued that the Establishment Clause did not prohibit the federal government from providing nondiscrimi- natory funding for religious schools.”165

Justice O’Connor, an advocate of the nonpref- erence theory, has explained the issue in terms of an “endorsement test.” According to this ex- planation, government violates the Establish- ment Clause if it endorses or “symbolically” endorses either religion or secularism. O’Connor wrote that “[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disap- proval of religion.”166

Commenting on the confusion implicit in the endorsement test, Chemerinsky writes, “People may perceive symbols in widely varying ways. The Court is left to make a subjective choice as to how people perceive a particular symbol.”167 Thus, the task of the courts in deciding whether government endorses or prefers a religion may become very difficult to ascertain.

Moreover, Levy, quoted above in this chapter, points out that government neutrality was never the objective of the Establishment Clause of the First Amendment.168 Levy documents that before approving the wording of the religion clauses as ratified in 1791, the U.S. Senate rejected three motions containing language that would have prohibited government preference of one reli- gious sect over another.169 He concludes that the

Establishment Clause means that not only does the clause require neutrality and enjoin prefer- ence of one religion over others, but also clearly prohibits “governmental support, primarily financial,”170 for one religion or all religions.

The present majority of Supreme Court Justices, however, do not accept such documentation of the Founders’ original intent. Rather, the Supreme Court’s majority, although undecided about neu- trality versus endorsement, has clearly abrogated the separation interpretation and now appears more inclined toward the accommodation theory which posits that government should be free to subsidize churches and clerical institutions.

###### SUBSIDIZATION AND COLLABORATION

A third theory of the intent of the religion clauses is that of subsidization and collaboration, some- times called accommodation, where the state effectively embraces, funds, and obliges reli- gion’s presence in government.171 This approach reads the Establishment Clause to mean that the government can fund religion and religious ac- tivity and is only prohibited from creating a state church or passing laws that coerce religions that are not in government favor. The underlying “theory of accommodation” has long been ad- vocated by the priestcraft and parochial school proponents, but has only gained recent judicial support under the present Supreme Court. Jus- tice Kennedy, in advancing this theory, has said that government can aid religion, and the only Establishment Clause restraint is that “govern- ment may not coerce anyone to support or par- ticipate in religion or its exercise, or otherwise act in a way which establishes a [state] religion or religious faith, or tends to do so.”172

The word *coerce,* as used by Justice Kennedy, is a central aspect of this theory. Government cannot use its power to establish state orthodoxy in religion. If, for example, government aid is denied for certain religious groups in an effort to gain adherence to a particular religious view- point, it would violate the Establishment Clause. The coercion test appears to be most readily ap- plicable to prevent religious exercises in public schools; however, it would presumably do little to prevent government aid to religious schools. On the contrary, it appears that “accommoda- tion” clearly permits an unremitting flow of public funds to religious schools.

In *Lee v. Wisconsin,* clergy-delivered prayers at public school graduations were declared un- constitutional, and “coercion” was the rationale for invalidation of the practice. Justice Kennedy, writing for the majority, said that such prayers are inherently coercive because there is an im- plicit pressure to attend the graduation ceremo- nies and be subjected to listen, or to leave the ceremonies during the prayer.173 The dissenting opinion in *Lee,* written by Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Thomas, strongly supported a broader collaboration approach, maintaining that the Establishment Clause could only be violated if the law required religious practices and pun- ished those who failed to engage. Accordingly then, at least four of the Supreme Court Justices in *Lee* supported an interpretation of the Estab- lishment Clause that would permit accommo- dation of religion in government, which would be prohibited only if government directly and overtly coerced dissenters.

Under this theory, government is now permit- ted to support “pervasively sectarian” religious institutions as confirmed in 2004 by the Supreme Court’s ruling in *Locke v. Davey.*174 Therefore, the “accommodation” or “noncoercive theory” as well as the nonpreference theory permit state and federal governments to support churches and religious institutions with the only caveat being that governments cannot overtly favor one religion or establish a state religion.

PUBLIC MONEY FOR RELIGION: THE NEW JURISPRUDENCE

*. . . there is no doubt that the State could, consis- tent with the Federal Constitution, permit [a public voucher program for students] to pursue a degree in devotional theology. . . . [a State can provide public funds for] students to attend pervasively religious schools so long as they are accredited.*

*—*Chief Justice Rehnquist, *Locke v. Davey*

### Vouchers

The subject of vouchers has become a highly controversial issue in politics and religion in America. Vouchers are considered the preferred

alternative funding mechanism for conveying public tax money to religious schools. A voucher is a coupon worth a predetermined amount of money that is presented at a private or parochial school by the parent, whereupon the school and parent endorse the voucher and the school re- deems the money from the state or local school district. In keeping with the Supreme Court’s decision in *Zelman v. Simmons-Harris,* vouchers that provide public funds for Catholic or other clerical schools do not violate the Establishment Clause of the First Amendment.

Vouchers or similar devices are not new; they have been used as a conduit to move public funds to the private sector, not only for educa- tion, but for various health, welfare, and other functions of government as well. Yet, vouchers are most closely understood in the public’s mind as devices to funnel money from general taxa- tion to church schools. The voucher’s connection with the struggle between religious schools and public schools goes back at least to the French Revolution, where in 1793, the Catholic Church thwarted the French government’s efforts to cre- ate a system of public schools, and in its place, initiated a system whereby parents were given vouchers for cash to employ teachers and form schools that best suited them. The voucher com- mitted the state to pay the tuition *(rétribution scolaire)* of each student at a standard rate.175 Al- though this early system soon collapsed, it was not dissimilar from the voucher systems now in use in a few states and the federal government in the United States.

In the modern era, the use of tuition vouchers for private schools did not arise in any significant degree until the public schools were racially de- segregated and tuition vouchers were used in the south to circumvent the Equal Protection Clause of the Fourteenth Amendment. Most notably, in an attempt to nullify the effects of *Brown v. Board of Education,*176 the Virginia legislature enacted a tuition voucher law in 1956, and an amended one in 1959, that permitted the closing of public schools and the opening of private, segregated academies.177 Per the Virginia legislation, a pri- vate group formed a charter school for white chil- dren only, and the Board of Supervisors of Prince Edward County awarded the parents tuition vouchers and tax credits. In the case of *County School Board of Prince Edward County v. Griffin,*178

the Virginia Supreme Court upheld the validity of the law. On appeal of the question to the U.S. Supreme Court, the public school closing and the tuition voucher and tax credit scheme was held to be in violation of the Equal Protection Clause of the Fourteenth Amendment.179 Thus, the tu- ition voucher as a means for conveying public funding to private schools in circumvention of constitutional protections established a lamen- table legal precedent in race relations.

The record of tuition vouchers as a device to skirt constitutional restraints has provided in- centive for many church-related elementary and secondary schools to pursue the same. Vouch- ers have become a more volatile political issue throughout the last three decades of the twenti- eth century as fundamentalist religious groups have opened new schools in the South, and as white parents have moved their children out of desegregated public schools. In the northern cen- tral cities, pressure has also increased for states to fund vouchers, as Catholic schools have faced shortages of teachers and resources.180

Moreover, the ideals of capitalism and the virtues of competition have coupled with de- nominational school interests to advance the lib- ertarian virtues of consumer and parental choice. The strength of the privatization movement has permeated not only the federal government’s domestic policy, but its foreign policy as well, in- fluencing the World Bank and the International Monetary Fund to require tuition voucher sys- tems in developing countries.181 Domestically, economic and social forces have combined to establish a national political agenda that aggres- sively advances privatization of education. In response, President George W. Bush announced a voucher plan for the fiscal 2004 budget for the District of Columbia, the only school system op- erated directly by the federal government.182 In July 2002, a presidential commission under the Bush Administration recommended empow- ering parents to exercise choice for students served by the Individuals with Disabilities Education Act (IDEA).183 Also, No Child Left Behind (NCLB), in its original form, was de- signed to permit students to opt out of failing schools with vouchers to attend church-related and private schools. Before NCLB was amended in the U.S. Senate, it would have followed the Florida voucher plan (see Chapter 2) that

initially encouraged students in public schools that have failed to achieve statewide assess- ment benchmarks to obtain vouchers for enroll- ment in other public schools or private religious schools.

The tuition voucher program in Milwaukee, Wisconsin, established in 1990 and expanded in 1995, involves more than 10,000 students and is designed to provide vouchers to students from low-income families to attend private or religious schools. On review of the Milwaukee voucher plan, the Wisconsin Supreme Court held that it did not offend any of the three prongs of the *Lemon* test under the First Amendment, nor did it violate Article I, Section 8, which prohib- its money to “be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.”184 The Wisconsin court disagreed with the plaintiff’s contention that the voucher aid benefited the church school. The court concluded that the “primary effect” of such funds was not to the benefit of the religious school if the state funds were washed through a third party. The court said, “Public funds may be placed at the disposal of third parties so long as the program on its face is neutral between sectarian and nonsectarian alternatives and the transmission of funds is guided by the indepen- dent decision of third parties.”185 The legal con- test over this voucher plan ended when the U.S. Supreme Court denied *certiorari,*186 and the Wisconsin court’s ruling prevailed.

In 1995, the Ohio legislature enacted the Cleveland voucher program, which provided funds for tuition at private and parochial schools. In upholding the Cleveland voucher program in *Zelman v. Simmons-Harris,*187 the U.S. Supreme Court established the long sought-after prece- dent that expounded a constitutional justification for voucher aid to church-related schools. Chief Justice Rehnquist, writing for the majority, relied on a neutrality or nonpreference rationale, say- ing that the “program permits the participation of *all* schools within the district, religious or non- religious. . . . Program benefits are available to participating families on neutral terms, with no preference to religion.”188 According to the Court, the fact that “46 of the 56 private schools . . . participating in the program are religious schools does not condemn it as a violation of the Estab- lishment Clause.”189

*Zelman* is the definitive word on vouchers, the Establishment Clause, and church–state relation- ships. Under this decision, it would be difficult to envisage any type of government aid pro- gram, vouchers or otherwise, to church schools that would be so blatantly religious that this Supreme Court would strike it as violative of the Establishment Clause of the First Amendment.

*Ohio Voucher Program Does Not Violate the Establishment Clause of the First Amendment*



**Zelman v. Simmons-Harris**

*Supreme Court of the United States, 2002.*

*536 U.S. 639, 122 S. Ct. 2460.*

Chief Justice REHNQUIST delivered the opinion of the Court.

The State of Ohio has established a pilot pro- gram designed to provide educational choices to families with children who reside in the Cleve- land City School District. The question presented is whether this program offends the Establish- ment Clause of the United States Constitution. We hold that it does not. . . .

The program provides two basic kinds of as- sistance to parents of children in a covered dis- trict. First, the program provides tuition aid for students in kindergarten through third grade, expanding each year through eighth grade, to at- tend a participating public or private school of their parent’s choosing. . . . Second, the program provides tutorial aid for students who choose to remain enrolled in public school. . . .

The tuition aid portion of the program is de- signed to provide educational choices to parents who reside in a covered district. Any private school, whether religious or nonreligious, may participate in the program and accept program students so long as the school is located within the boundaries of a covered district and meets statewide educational standards. . . . Partici- pating private schools must agree not to dis- criminate on the basis of race, religion, or ethnic background, or to “advocate or foster unlawful

behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion.” . . . Any public school located in a school district adjacent to the covered district may also participate in the program. . . . All par- ticipating schools, whether public or private, are required to accept students in accordance with rules and procedures established by the state superintendent. . . .

Tuition aid is distributed to parents according to financial need. . . .

The tutorial aid portion of the program pro- vides tutorial assistance through grants to any student in a covered district who chooses to remain in public school. Parents arrange for registered tutors to provide assistance to their children and then submit bills for those ser- vices to the State for payment. . . . Students from low income families receive 90% of the amount charged for such assistance up to $360. All other students receive 75% of that amount. . . . The number of tutorial assistance grants offered to students in a covered district must equal the number of tuition aid scholarships provided to students enrolled at participating private or ad- jacent public schools. . . .

The program has been in operation within the Cleveland City School District since the 1996–1997 school year. In the 1999–2000 school year, 56 pri- vate schools participated in the program, 46 (or 82%) of which had a religious affiliation. None of the public schools in districts adjacent to Cleve- land have elected to participate. More than 3,700 students participated in the scholarship program, most of whom (96%) enrolled in religiously af- filiated schools. Sixty percent of these students were from families at or below the poverty line. In the 1998–1999 school year, approximately 1,400 Cleveland public school students received tutorial aid. . . .

. . . In December 2000, a divided panel of the Court of Appeals affirmed the judgment of the District Court, finding that the program had the “primary effect” of advancing religion in violation of the Establishment Clause. . . . We granted *certiorari,* . . . and now reverse the Court of Appeals.

The Establishment Clause of the First Amend- ment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the “purpose” or “effect” of advancing

or inhibiting religion. *Agostini v. Felton*, . . . (1997) (“[W]e continue to ask whether the government acted with the purpose of advancing or inhibiting religion [and] whether the aid has the ‘effect’ of advancing or inhibiting religion” . . .). There is no dispute that the program challenged here was en- acted for the valid secular purpose of providing educational assistance to poor children. . . . Thus, the question presented is whether the Ohio pro- gram nonetheless has the forbidden “effect” of advancing or inhibiting religion.

. . . Three times we have confronted Establish- ment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.

In *Mueller*, we rejected an Establishment Clause challenge to a Minnesota program au- thorizing tax deductions for various educational expenses, including private school tuition costs, even though the great majority of the program’s beneficiaries (96%) were parents of children in religious schools. . . .

That the program was one of true private choice, with no evidence that the State deliber- ately skewed incentives toward religious schools, was sufficient for the program to survive scru- tiny under the Establishment Clause.

In *Witters*, we used identical reasoning to re- ject an Establishment Clause challenge to a voca- tional scholarship program that provided tuition aid to a student studying at a religious institu- tion to become a pastor. . . .

Five Members of the Court, in separate opin- ions, emphasized the general rule from *Mueller* that the amount of government aid channeled to religious institutions by individual aid recipients was not relevant to the constitutional inquiry. . . . Our holding thus rested not on whether few or many recipients chose to expend government aid at a religious school but, rather, on whether recipients generally were empowered to direct the aid to schools or institutions of their own choosing.

Finally, in *Zobrest*, we applied *Mueller* and *Witters* to reject an Establishment Clause chal- lenge to a federal program that permitted sign language interpreters to assist deaf children enrolled in religious schools. . . . Its “primary

beneficiaries,” we said, were “disabled children, not sectarian schools.” . . .

We further observed that “[b]y according par- ents freedom to select a school of their choice, the statute ensures that a government paid inter- preter will be present in a sectarian school only as a result of the private decision of individual parents.” . . . Our focus again was on neutrality and the principle of private choice, not on the number of program beneficiaries attending reli- gious schools. . . . Because the program ensured that parents were the ones to select a religious school as the best learning environment for their handicapped child, the circuit between govern- ment and religion was broken, and the Establish- ment Clause was not implicated.

*Mueller, Witters,* and *Zobrest* thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits gov- ernment aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advance- ment of a religious mission, or the perceived endorsement of a religious message, is reason- ably attributable to the individual recipient, not to the government, whose role ends with the dis- bursement of benefits. . . .

We believe that the program challenged here is a program of true private choice, consistent with *Mueller, Witters,* and *Zobrest,* and thus constitutional. As was true in those cases, the Ohio program is neutral in all respects toward religion. . . . It confers educational assistance directly to a broad class of individuals defined without reference to religion, i.e., any parent of a school-age child who resides in the Cleveland City School District. The program permits the participation of *all* schools within the district, re- ligious or nonreligious. Adjacent public schools also may participate and have a financial incen- tive to do so. Program benefits are available to participating families on neutral terms, with no reference to religion. The only preference stated anywhere in the program is a preference for low-income families, who receive greater

assistance and are given priority for admission at participating schools.

There are no “financial incentive[s]” that “ske[w]” the program toward religious schools. . . . Such incentives “[are] not present . . . where the aid is allocated on the basis of neutral, secular cri- teria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.” . . .

Respondents suggest that even without a fi- nancial incentive for parents to choose a religious school, the program creates a “public perception that the State is endorsing religious practices and beliefs.” . . . But we have repeatedly recog- nized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of gov- ernment endorsement. . . .

Respondents and Justice SOUTER claim that even if we do not focus on the number of par- ticipating schools that are religious schools, we should attach constitutional significance to the fact that 96% of scholarship recipients have en- rolled in religious schools. They claim that this alone proves parents lack genuine choice, even if no parent has ever said so. We need not consider this argument in detail, since it was flatly rejected in *Mueller,* where we found it irrelevant that 96% of parents taking deductions for tuition expenses paid tuition at religious schools. Indeed, we have recently found it irrelevant even to the consti- tutionality of a direct aid program that a vast majority of program benefits went to religious schools. . . . The constitutionality of a neutral ed- ucational aid program simply does not turn on whether and why, in a particular area, at a particu- lar time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school. As we said in *Mueller*, “[s]uch an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated.” . . .

In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits di- rectly to a wide spectrum of individuals, defined only by financial need and residence in a partic- ular school district. It permits such individuals to exercise genuine choice among options public

and private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of decisions re- jecting challenges to similar programs, we hold that the program does not offend the Establish- ment Clause.

The judgment of the Court of Appeals is reversed.

It is so ordered.

### Independent Vitality of State Constitutions

State constitutions may be more protective of individual rights and freedoms than the federal Constitution. With regard to protecting religious freedoms, state constitutions may be stronger in preventing legislatures from taking tax mon- ies from individual citizens and giving it to churches and ecclesiastical schools and colleges. State constitutions that have such higher stan- dards of anti-establishment protections are said to have “independent vitality.” The terminology *independent vitality* emanates from a *Harvard Law Review* article by Justice William J. Brennan, Jr., in 1977, where he espoused the need to invoke state constitutional protections of individuals over and beyond the rights and interests guaran- teed in the Federal Constitution.190 As described by Clint Bolick in the *Texas Review of Law and Politics,* Justice Brennan “pointed out that state constitutions provide an additional layer of con- stitutional rights, and in many cases more ex- pansive protection for those rights.”191

Justice Brennan, known for his views of ex- pansive protections of the U.S. Constitution, had become concerned with inelastic conceptions of federal protections and as a result encouraged state courts to exercise the “independent vital- ity” of their own state constitutions. Brennan was particularly concerned about the “substan- tial irony” of the overreader of federal courts in taking action to “upset state court decisions protecting individual rights.”192 A vivid example of which, in the church–state context, is Justice Thomas’ explicit threat in *Helms* to apply his “bigotry thesis” to invalidate state constitutional provisions that prohibit state legislation from funding parochial schools.

The ideals of freedom of conscience are re- flected in the state constitutions as well as in

the First Amendment of the U.S. Constitution. A state law that is constitutional under the First Amendment of the U.S. Constitution may not be constitutional under the state constitution. Some of the state provisions establish strong and effective barriers preventing the mixing of affairs of state with those of religion. The his- tory, tradition, and religious influence of both Protestant and Catholic churches in the various states, though, have led to judicial interpreta- tions that have, in many instances, weakened the separation of church and state. As political pressure for use of tax funds for support of reli- gious schools has intensified, primarily in states with greater numbers of parochial schools, the establishment principles of those state constitu- tions have been interpreted by state courts to be less restrictive. For example, even though the states of Rhode Island, New York, Pennsyl- vania, Ohio, and Illinois have strongly worded constitutional prohibitions against establish- ment of religion, lenient judicial interpretations have given the legislatures substantial latitude in aiding parochial schools. In these states, the courts have generally ruled that the state con- stitutional restraints are no more, and probably less, restrictive than the First Amendment of the U.S. Constitution.

As an example, the various pressures for aid to parochial schools in Rhode Island, ironically the state of Roger Williams, have caused the courts to negate the meaning of the strong dis- establishment language of the Rhode Island Con- stitution, which says, “[W]e, therefore, declare that no man shall be compelled to frequent or to *support* any religious worship, place, or ministry whatever” (emphasis added).193 The Supreme Court of Rhode Island, in considering the consti- tutionality of textbook aid to parochial schools, noted that the allegedly offending statute was less vulnerable to attack under the Rhode Island Constitution than under the First Amendment. This court held that the Rhode Island Constitu- tion erected a lower wall of separation than did the First Amendment:

Nor can we agree with appellees that the language of the constitution of this state prohibiting estab- lishment of religion or the interference with the free exercise thereof is more restrictive than the lan- guage of the federal constitution as interpreted in *Allen* 194

Similarly, an apparently strong and definitive prohibition in the Illinois Constitution, forbid- ding state aid to church schools by stating that neither the state nor any school district or public corporation “shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school . . . con- trolled by any church or sectarian denomination whatever,”195 has been substantially weakened by state court interpretation. The Illinois Supreme Court has held that the Illinois Constitution is no more restrictive than the First Amendment.196 This view of the Illinois court appears to reflect a prevailing pattern of precedents of state courts in interpreting their own constitutions, closely adhering to the constitutional philosophy of the

U.S. Supreme Court.197

The Connecticut Supreme Court followed the *Everson* precedent and upheld a state statute that provided public funds for transportation of pa- rochial school students.198 The “public purpose” theory used by the U.S. Supreme Court in *Everson* was cited as the controlling rationale for the Con- necticut Constitution. The Connecticut Court said: “It cannot be said that their transportation does not serve the purpose of education, and [e]ducation in itself serves a public purpose. . . .”199 Similarly, the Indiana Constitution has been

held to be no more forceful in the separation of church and state than is the First Amend- ment.200 Other states, including Iowa,201 Kan- sas,202 Maine,203 Michigan,204 Minnesota,205 New Jersey,206 and Wisconsin,207 have applied the U.S. Supreme Court’s First Amendment rationale to the church–state provisions of their own consti- tutions. The judicial precedents of many of these states explicitly follow the establishment of reli- gion tests used by the U.S. Supreme Court.

It remains to be seen whether a lessening of the strictures by the U.S. Supreme Court in in- terpreting the Establishment Clause of the First Amendment—as indicated by the “new Estab- lishment jurisprudence” of *Agostini v. Felton*208 and by the current makeup of the membership of the Court—will in turn elicit a corresponding further lowering of the establishment standards of state constitutions. It is possible, of course, that state supreme courts will choose instead to maintain a higher standard in the protection of religious liberties. There is precedent for greater

assertiveness on the part of state courts in the protection of individual rights and freedoms.209

*States with “Independent Vitality.”* The history and legal precedents of some states do indicate that there may be substantial resistance to re- interpretation that would diminish present reli- gious liberty protections in state constitutions. A recent example of a state’s independent vitality is a 2010 interpretation of the state constitution rendered by the Kentucky Supreme Court.210 In this case, the Court held that a state appropria- tion for the constitution of a pharmacy school at a Baptist college violated the Kentucky Constitu- tion, in particular, the right of religious freedom provision that forbids that anyone (a taxpayer) “be compelled . . . to contribute to the erection or maintenance” of any place of “ecclesiastical polity.”211 The Court rejected the Baptist school’s argument, based on Justice Thomas’ “bigotry the- sis” in *Helms,*212 that the Kentucky Constitution’s prohibition of public appropriations to religious schools was founded in “Blaine Amendment” type of animosity toward clerical institutions. The Kentucky court cited Justice Rehnquist’s dictum in *Locke v. Davey* to the effect that it is per- missible for states to draw “a more stringent line than that drawn by the United States Constitu- tion” in advancing the state’s “anti-establishment interests.” Other states, including Alaska, Colo- rado, Hawaii, Idaho, Iowa, Kentucky, Massa- chusetts, Missouri, Montana, New Hampshire, Washington, and Wyoming, have constitutional provisions that would suggest strong and defi- nite opposition to legislative action to use public monies to aid parochial schools. For example, the Alaska Supreme Court in *Matthews v. Quinton*213 found “unpersuasive” the U.S. Supreme Court’s rationale in *Everson* that the transportation of school children to parochial schools was for the benefit of the children only. Rather, the Alaska court concluded that furnishing transportation to nonpublic school students at public expense was a direct benefit to the school, just as would be the payment of teachers’ salaries or building and equipment costs.214 Reasoning thusly, the court in *Matthews* held that furnishing transpor- tation to parochial school students violated the provision in the Alaska Constitution that forbade the use of “public funds for the direct benefit of any religious or other private educational foundation.”215

The Colorado Constitution, too, appears to contain a stronger church–state provision than that of the First Amendment. Article V, § 34 of the Colorado Constitution forbids state appro- priation for educational purposes to any person or corporation not under absolute control of the state or to any denominational or sectarian insti- tution.216 Moreover, Article IX, § 7 of the Colo- rado Constitution provides that

[n]either the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appro- priation, or pay from any public fund or moneys whatever, anything in aid of any church or sectar- ian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever 217

Similarly, the Hawaii Constitution is quite specific in banning the use of public money for aid to parochial schools. In *Spears v. Honda,*218 a 1968 case, the Hawaii Supreme Court refused the permissive interpretation advanced by the U.S. Supreme Court in *Everson,* saying, “We find that the framers did not open the door one bit. The language of the Constitution itself is unequivo- cal. It explicitly states, ‘Nor shall public funds be appropriated for the support or benefit of any sectarian or private educational institution.’”219

In the same vein, the Idaho Supreme Court has said, “The Idaho Constitution places much greater restriction upon the power of state gov- ernment to aid activities undertaken by religious sects than does the First Amendment to the Con- stitution of the United States.”220

The 1918 Iowa case of *Knowlton v. Baumhover*221 enunciates a stronger state separation require- ment than does the federal First Amendment. In this case, the Iowa Supreme Court rejected the idea that a religious school could be publicly funded because it had both secular and sectar- ian purposes. In dismissing the reasoning that was later given currency by the U.S. Supreme Court in *Allen,*222 the Iowa court denied the con- stitutionality of an Act that provided state funds to parochial schools for aspects of the secular school program. In 1969, the attorney general of Iowa223 relied on *Knowlton,*224 saying that “[t]he case held that every church or other organization upholding or promoting any form of religion or

religious faith or practice is a ‘sect’ and that the right to use public school funds for the advance- ment of religious or sectarian teaching is denied to each and all. The Court found that to consti- tute a sectarian school or sectarian instruction which may not lawfully be maintained at pub- lic expense, it is not necessary to show that the school is wholly devoted to religious or sectarian teaching.” The reasoning by the Iowa court in *Knowlton* appears to reject both the child benefit and the public purpose rationales used to justify aid to parochial schools.

The Massachusetts Supreme Court has held that “the language of our anti-aid amendment,” Article 46, Section 2 of the Amendments to the Massachusetts Constitution rewritten in 1974, which says:

No grant, appropriation or use of public money . . . shall be made or authorized by the Common- wealth . . . for the purpose of funding, maintaining or aiding any . . . primary or secondary school, . . . which is not under the exclusive control . . . of public officers or public agents . . .

prohibits the state from creating tax deductions for school expenditures for tuition, textbooks, and transportation for parents of children who at- tend private and parochial schools.225 The Court exerted the independent vitality of the Massa- chusetts Constitution from the U.S. Constitution, holding: “[The] First Amendment of the U.S. Constitution need not enter our analysis. The language of our anti-aid amendment is ‘much more specific’ than the First Amendment,226 and its restrictions are ‘more stringent.’”227 More- over, the Massachusetts court refused to distin- guish between direct and indirect aid schemes. According to the Court, “[T]he form of payment to a private school is not dispositive on the issue of whether aid is prohibited. If the aid has been channeled to the student, rather than to the pri- vate school, the focus still is on the effect of the aid, not on the recipient.”228 The Massachusetts court has also ruled that vouchers would be unconstitutional in Massachusetts, saying that money allocated in “the form of vouchers to students attending private elementary and sec- ondary schools . . . paid only upon the payee’s endorsement of the voucher to the school of his or her choice . . .”229 is in “practical effect . . . an indirect form of aid to nonpublic schools,”230

which would violate Article 46, Section 2 of the Constitution of Massachusetts.

The Missouri Supreme Court has made it clear that the Missouri constitutional re- straint is more restrictive than the federal First Amendment.231 The Missouri Supreme Court has said that “[t]he constitutional policy of our state has decreed the absolute separation of church and state, not only in governmental matters, but in educational ones as well.”232 In comparing the Missouri establishment standard to the Establishment Clause of the First Amend- ment, the Missouri court said:

[I]t becomes readily apparent that the provisions of the Missouri Constitution declaring that there shall be a separation of church and state are not only more explicit but [also] more *restrictive than the Establishment Clause of the United States Constitution* [emphasis added].233

Thus, the Missouri Constitution has “indepen- dent vitality” and is a definitive obstacle to leg- islation designed to provide public funds for parochial schools.

Both Montana and Wyoming have religious liberty protections that are stronger than those of the First Amendment. The Montana Supreme Court in 1971,234 in barring the employment of public school teachers in parochial schools, noted that the practice would probably have vio- lated the First Amendment as interpreted by the *Lemon v. Kurtzman*235 tripartite test, but the Mon- tana court made it clear that the Montana Con- stitution was actually more pervasive than the federal Constitution. The Montana Constitution of 1972 retained the strict separation language of the old 1889 constitution, which prohibited appropriations “for religious, charitable, in- dustrial, educational or benevolent purposes to any private corporation not under the control of the state.”236 It is unlikely that such strong lan- guage could be watered down to the point that it would permit the use of state funds for parochial schools, whether the aid was extended through direct or indirect funding devices. In support of this supposition, Howard has noted that “Mon- tana’s Constitution appears to establish stricter barriers to denominational schools and colleges than does the First Amendment to the United States Constitution.”237

There are several other examples of such strong constitutional restraints. A notable provision is Article 1, § 19 of the Wyoming Constitution, which simply states that “[n]o money of the state shall ever be given or appropriated to any sec- tarian or religious society or institution.” The conclusiveness of this provision imposes “strong bars to any state funding for private or sectarian schools.”238

The Oregon Constitution, like that of Missouri, has an anti-establishment provision that has been held to constitute a more restrictive barrier than the First Amendment in preventing the flow of public funds to church schools. Article I, § 5 of the Oregon Constitution states in part: “No money shall be drawn from the Treasury for the benefit of any religious or theological institution. . . .”

The Supreme Court of Oregon has interpreted this provision as precluding the use of public funds to provide textbooks to students in paro- chial schools.239 In so holding, the court rejected the “child benefit” theory and found that text- books, being essential to the educational process and not an incidental, were an asset to the reli- gious institution. In 1991, proponents of parochial schools in Oregon placed on the ballot a proposed amendment to Article I, § 5 that would have al- lowed tax credits for parents sending their chil- dren to parochial schools. The plan called for tax credits of up to $2,500 per child for tuition and costs incurred for private schools or for home school education. This effort was roundly de- feated by the Oregon voters in the spring of 1991. The State of Washington has perhaps one of the strongest provisions for guaranteeing reli- gious liberty and separation of church and state. The Washington Supreme Court rejected the reasoning of the U.S. Supreme Court in *Everson* as to a precedent applicable to the provisions of the Washington Constitution. The “indepen- dent vitality” of that state’s constitution appears to more strictly adhere to more basic prin- ciples of religious freedom than does the First

Amendment.

Therefore, the anti-establishment provisions of state constitutions may be strong or weak, effec- tual or ineffectual, depending on their wording and the interpretations of the state supreme courts. Whether the state supreme courts, though, will follow new U.S. Supreme Court precedents such

as *Agostini v. Felton* in a diminution of religious liberty and an erosion of the wall of separation remains to be seen.

*State Constitution’s “Compelled Support Clause” Renders Tuition Reimbursement to Sectarian*

*Schools Unconstitutional*

#### Chittenden Town School District v.

**Department of Education**

*Supreme Court of Vermont, 1999.*

*169 Vt. 310, 738 A.2d 539.*

DOOLEY, J.

. . . Today we confront a question . . . whether the tuition reimbursement scheme transgresses the Compelled Support Clause of the Vermont Constitution, Vt. Const. Ch. I., Art. 3, which speaks not to establishment of religion but to state support of religious worship. . . . We focus on the Vermont Constitution and conclude that a school district violates Chapter I, Article 3 when it reimburses tuition for a sectarian school under § 822 in the absence of adequate safe- guards against the use of such funds for reli- gious worship. Because of the absence of such safeguards in this case, we affirm the judgment of the superior court.

The case was submitted to the superior court on stipulated facts, which we summarize in rel- evant part. Plaintiff Chittenden Town School District has ninety-five students in grades nine through twelve. It does not maintain a high school for the education of these second- ary students. Instead, it pays tuition to public high schools or approved independent schools for this purpose, as explicitly authorized by 16

V.S.A. § 822. Pursuant to §§ 822(a)(1) and 824(b), parents of the students may select an approved school to which to send their children.

Until the 1996–97 school year, the Chittenden School Board authorized tuition payments only for public high schools or approved second- ary schools that it found to be nonsectarian. In the 1995–96 school year, it paid tuition for seventy-fivesecondaryschoolstudents. Ofthese, seventy-two attended one of the five public

high schools operating in Rutland County, and three attended approved private secondary schools.

In December of 1995, the Chittenden School Board adopted a new secondary education tuition-reimbursement policy that would allow tuition to be paid to sectarian schools. One ap- proved independent sectarian secondary school operates in Rutland County. That school is Mount Saint Joseph Academy (MSJ), a parochial high school located in the City of Rutland. MSJ is owned and operated by the Sisters of Saint Joseph, under the authority of the Roman Catholic Diocese of Burlington. MSJ is an institu- tion in which the secular and sectarian aspects of its educational program are intertwined. Its statement of philosophy reveals that its aca- demic program incorporates religious and moral education through a broad range of curricu- lar and co-curricular activities and that “[w]e believe that learning occurs in an atmosphere where faith and community are emphasized and overtly practiced. . . .”

Consistent with its educational philosophy, MSJ requires instruction in theology, constituting four of twenty-three credits required for gradu- ation. The four theology courses are entitled “Salvation History,” “Sacraments,” “Ethics” and “Commitment.” . . .

Among the expected outcomes of the theol- ogy education and the religious life activities of the school are that the students will “witness a sense of Catholic identity” and will “continue to proclaim the Gospel of Jesus and work to- wards fulfilling the kingdom through service/ ministry/action.”

The MSJ school day begins with a prayer, to which all students are required to give quiet at- tention. Once a month, the entire school attends a celebration of the Roman Catholic mass led by a priest. Non-Catholics must attend, but are not required to participate in the sacrament. All students must attend annual spiritual retreats, which include prayers and a mass. All students must attend a twice-annual celebration of the sacrament of reconciliation; participation in the sacrament is not required.

MSJ faculty is required to adhere to Catholic doctrine in their teachings and must demonstrate and exemplify the values of the Catholic faith by

striving to live and teach the Gospel messages of Jesus. The principal of MSJ is a Roman Catholic nun. Of the twenty-seven teachers, four are nuns or priests.

Although we have been required by the issue before us to examine the sectarian aspects of education at MSJ, we emphasize that the record indicates that MSJ is a very good high school. Ninety-one percent of MSJ’s class of 1996 went on to college. In recent years, the percentage has been 83% to 93%. Of the 206 students enrolled in MSJ for the 1996–97 school year, 164 were Roman Catholics and the remainder were of different faiths.

In May 1996, the Chittenden School Board specifically approved payment of tuition to MSJ. Fifteen Chittenden students were enrolled in MSJ for the 1996–97 school year.

The Chittenden Town School District funds secondary education through a combination of revenues raised by the local property tax and aid to education received from the State of Vermont. For the 1996–97 school year, it intended to use $39,000 in public funds to pay tuition at MSJ. MSJ has a three-tiered tuition policy, charg- ing $3,000 annually to non-Catholics; $2,775 to Catholics who reside in the Diocese, but not in the City of Rutland; and $2,525 to Catholics who reside in the City of Rutland. MSJ projected its per-pupil cost of education at $5,021 for 1996–97. The Diocese and local Rutland parishes would make up the bulk of the difference.

When the Chittenden School Board voted to allow tuition reimbursement to MSJ, the Com- missioner of Education terminated state aid to education to the district. The Chittenden Town School District then brought this action against the Commissioner and the Vermont Department of Education, asserting, among other claims, that tuition reimbursement to MSJ was constitu- tional and seeking an order to restore state-aid funding. Defendants counterclaimed that the Chittenden decision to make tuition payments to MSJ violated the Establishment Clause of the First Amendment to the United States Constitu- tion and Chapter I, Article 3 of the Vermont Con- stitution. They also sought an injunction.

. . . On June 27, 1997, the superior court issued its opinion and order concluding that “tuition payments from a school district to pervasively sectarian high schools, or the parents of the

children who attend, would have the effect of a direct subsidy to religious schools in violation of the United States and Vermont Constitutions.” . . . Before reaching the constitutional questions, we find it helpful to look at the controlling stat- utes. The basic scheme is quite simple. Since the Chittenden Town School District provides ele- mentary education, it is required to provide sec- ondary education. See 16 V.S.A. § 822(a). It has a number of options in meeting this obligation. The two main ones are to maintain a public high school or to pay tuition “to an approved public or independent high school, to be selected by the parents or guardians of the pupil, within or without the state.” Chittenden has taken the sec- ond of these options.

The approval for public or independent high schools is given by the Vermont Board of Educa- tion. . . . The sending district must pay the full tuition rate of any independent school meeting public school standards. . . . Although the term “tuition” is not defined, we see nothing in the statutory scheme to suggest that it is other than the rate charged by the approved independent school for whatever educational services it deliv- ers. Thus, the cost of purely religious education can be included in the tuition payment made to a sectarian school.

We do not mean to suggest that our present inquiry implicates the ability of a . . . sectarian school to charge tuition for religious education, rather than requiring that the cost of such educa- tion be borne by voluntary donations of religious adherents. This is a policy choice of the religious school. However, for reasons discussed fully below, we deem it highly relevant that, in the absence of any kind of regulatory process, the tuition payment system adopted by the Chitten- den Town School District can, and presumably will, expend public money on religious educa- tion as long as some undetermined percentage of the money funds education on secular subjects required in the state’s minimum course of study. The stipulated facts indicate that this is happen- ing at MSJ. Apparently, the public and private sources of revenue are commingled so that each supports religious education.

. . . Defendants argue that the Chittenden tu- ition payment policy violates both the federal and Vermont constitutions, and the superior court accepted both claims. In *Swart*, this Court

chose to analyze a virtually identical case under the First Amendment because the federal law was clear, and the Court was uncertain of the outcome under Chapter I, Article 3 of the Ver- mont Constitution. The federal law has become less clear. See, e.g., *Agostini v. Felton*.

We are the final judicial interpreters of the Vermont Constitution, and our fundamental charter is a freestanding document. . . . Accord- ingly, we decide this case based solely on the Vermont Constitution and, since it is disposi- tive, need not consider whether the Establish- ment Clause of the First Amendment would also prohibit the tuition reimbursement policy at issue here. . . . Defendants argue that Chit- tenden’s tuition policy violates the Compelled Support Clause of Article 3. That is, the policy forces dissenting Chittenden and other Vermont taxpayers to “support [a] place of worship . . . contrary to the dictates of conscience.” Our de- cision must, therefore, turn on the meaning of the quoted language. . . .

In performing this analysis, we turn first to the text of Article 3. The relevant language pro- vides that “no person ought to, or of right can be compelled to . . . support any place of worship . . . contrary to the dictates of conscience.” Vt. Const. Ch. I, Art. 3. . . .

The disagreements come in two places. First, plaintiffs argue that a school, however sectar- ian, is not a place of worship as that term is used in Article 3. Second, they assert that the intent behind the language was to prohibit state-sponsored religious institutions—that is, a state establishment of religion—and there is no state sponsorship here because the parents, not the school district, chose the religious school.

At the outset, we can narrow the first disagree- ment about the meaning of Article 3. We do not read defendants as claiming that any payment of public money to a religious school, for whatever reason, necessarily offends Article 3 because it supports a place of worship. As narrowed, plain- tiffs’ claim is that religious education is not reli- gious worship within the meaning of Article 3. To reinforce this point, they note that the Vermont Constitution contains no specific provision on support of sectarian education, a subject we ad- dress in a later section of this opinion. Plaintiffs also draw our attention to Chapter II, § 68, the section on public education, which provides:

All religious societies, or bodies of people that may be united or incorporated for the advancement of religion and learning, or for other pious and chari- table purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities, and estates, which they in justice ought to enjoy, under such regulations as the general assembly of this state shall direct.

Vt. Const. ch. II, § 68. Plaintiffs see in this lan- guage an intent to aid religious education, which can occur through financial support. Defendants necessarily take the opposite side of the issue. We do not try to resolve this disagreement on the language alone and consider it in later sections of the opinion.

The second disagreement over the meaning of the text is central to the relationship between Article 3 and the First Amendment. The First Amendment prohibits any law “respecting an establishment of religion.” U.S. Const. Amend. I. Plaintiffs argue that Article 3 expresses the same policy aimed at the same governmental wrong. Thus, they assert that as long as government does not take sides among religions, it may com- pel support for religious activities. Here, govern- ment is not endorsing any religion because the parents have free choice of religious or secular institutions.

Again, defendants disagree with this in- terpretation, and we do not attempt to resolve it on the language alone. We emphasize, how- ever, that the text appears to be inconsistent with plaintiffs’ position. Rather than prohibit- ing compelled support of a particular or state- selected place of worship, it prohibits compelled support of “any place of worship.” Vt. Const. Ch. I, Art. 3. . . . Even if we were prepared to say that the phrase “support any place of worship” has a plain meaning for the case before us, if it were included in a modern statute, we cannot say that it has such a meaning as placed in Article 3. We must proceed to other evidence of the meaning of the Article.

One of our most useful tools to determine the meaning of a constitutional provision is an understanding of its historical context, and we have often relied upon history to illuminate the meaning of our constitution. . . .

The . . . relevant element of the historical record is the history of the “Virginia Bill for Religious Liberty,” as enacted in 1785 based on

the draft of Thomas Jefferson. Because of its au- thor and the primary advocacy for it by James Madison, the Virginia law became an impor- tant building block for the First Amendment to the United States Constitution and the in- terpretation of that amendment by the United States Supreme Court. We also find this law, and its history, relevant to our interpretation of Article 3.

. . . The language of the Virginia law rel- evant to the controversy before us states that a man shall not be “compelled to . . . support any religious worship, place or ministry what- soever.” The preamble describes the policy of the language: “that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sin- ful and tyrannical.”

. . . The Virginia law was passed in response to a bill “Establishing a Provision for Teachers of the Christian Religion,” which almost passed in the years before the Jefferson law was enacted. It provided for taxpayer support of “learned teachers” of “Christian knowledge” in order “to correct the morals of men, restrain their vices, and preserve the peace of society.” Each owner of property on which the tax was levied would specify the “society of Christians” to which the owner’s tax money would be paid. If the taxpayer failed to specify the beneficiary, that money would be placed in the public treasury to be expended for the encouragement of seminar- ies of learning in the county.

In his “Memorial and Remonstrance” on the bill, James Madison described its provisions as “a dangerous abuse of power.” Madison’s main disagreement with the bill was because man’s duty is “to render to the Creator such homage, and such only, as he believes to be acceptable to him.” He argued that it discriminated against those who professed a non-Christian religion or no religion:

Whilst we assert for ourselves a freedom to em- brace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to men, must an account of it be rendered.

Jefferson was later to describe the Virginia law as creating “a wall of separation between church and State.” *Reynolds v. United States,* 98 U.S. 145, 164, 25 L. Ed. 244 (1878). What is in-

structive here is that the language used to cre- ate the wall is essentially the same as that in Article 3 of our constitution. . . . Moreover, the Virginia law was enacted in response to a plan that bears some similarities to that before us. It applied specifically to religious teachers, and although it required tax financing of education, it gave choice in the method of its implementa- tion. Christians could choose their beneficiary, and any taxpayer could choose to designate the money to the seminary education system of the time, rather than to a religious order. Despite the choice feature, the Virginia law responded that compelling “a man to furnish contribu- tions of money for the propagation of opinion which he disbelieves and abhors, is sinful and tyrannical.”

We believe that the Virginia experience un- dercuts plaintiffs’ position that the intent of Article 3 was to cover religious worship, but not religious education. The Virginia controversy was about religious education, and Madison saw no line between it and religious worship. Language virtually identical to Article 3 was ad- opted to prohibit compelled support of religious education. . . .

Public education in Vermont may have been only an ideal when our first constitution was adopted, but it quickly became a reality when state and local government could deal with matters other than the security of the inhabit- ants. We see no reason why, from its first adop- tion, Article 3 would not be seen to cover all forms of religious worship even as part of re- ligious education. As indicated above, the Vir- ginia religious-support controversy arose over what was being labeled as religious education. We believe that no artificial line between reli- gious worship and religious education emerged in Vermont. . . .

In conclusion, we return to the Article 3 tex- tual issues that divide the parties. In view of the history, as we have outlined above, and the decisions from other jurisdictions, we see no way to separate religious instruction from religious worship. The limited record we have

before us indicates that there is no line between these concepts. Nor are we persuaded that the constitutional drafters authorized public fi- nancing of religious education in Chapter II,

§ 68. The specification that such education be “encouraged and protected” does not extend to public financing in light of the prohibition of Article 3. . . .

Thus, we conclude that the Chittenden School District tuition-payment system, with no restric- tions on funding religious education, violates Chapter I, Article 3. . . .

By prohibiting compelled taxpayer support of religious worship, Chapter I, Article 3 of the Vermont Constitution renders unconstitutional the Chittenden Town School District tuition- payment policy to the extent that it authorizes tuition reimbursement to sectarian schools with- out appropriate restrictions. This application of state constitutional law does not implicate the Free Exercise Clause of the First Amendment. Because we conclude that the superior court correctly entered summary judgment in favor of defendants, their cross-appeal and plaintiffs’ motion to dismiss it are both moot and need not be considered.

Affirmed.

###### CASE NOTES

1. Wisconsin has a Compelled Support Clause in its Constitution, Act I, § 18, that is similar to that in Vermont’s constitution; however, the Wisconsin Supreme Court has not viewed this provision as having “independent vitality” as to give it greater strength than the Estab- lishment Clause of the U.S. Constitution. The Wisconsin Supreme Court has held that its own Compelled Support Clause is to be in- terpreted as meaning the same as the First Amendment’s Establishment Clause, and, in that sense, does not have independent vitality. *Jackson v. Benson,* 218 Wis. 2d 835, 578 N.W.2d 602 (1998).
2. On the other hand, the Compelled Support Clause of the Kentucky Constitution requiring that “no part of the common school fund shall ever be used in aid of or for the use of ben- efit of a sectarian or denominational school,” has been held by that state’s highest court to have “independent vitality,” preventing public

funds from flowing to parochial schools. *Wil- liams v. Board of Trustees of Stanton Common School District,* 173 Ky. 708, 191 S.W. 507 (1917).

*Oregon Law Providing Textbooks to Parochial Schools Cannot Be Justified on Child Benefit Theory*



#### Dickman v. School District No. 62 C

*Supreme Court of Oregon, 1961.*

*232 Or. 238, 366 P.2d 533, cert. denied,*

*93 A.L.R.2d 969.*

O’CONNELL, J.

This is a suit in equity brought by plaintiff taxpayers against School District No. 62 C, its board and clerk, to enjoin defendants from sup- plying textbooks without charge for the use of pupils enrolled in St. John’s The Apostle School, a parochial school maintained and operated by the Catholic Church. Plaintiffs also seek a judi- cial declaration that the so-called free textbook statute (ORS 337.150), under which distribution was made to the St. John’s school and other pa- rochial schools, does not authorize defendants to supply textbooks free of charge to church or parochial schools, or if the statute is so construed that it be declared unconstitutional. . . .

For a period of several years the defendant district has furnished free textbooks for the use of the pupils of St. John’s school. In a period of three school years these books have cost the district approximately $4,000. The books were purchased by the district from money in its Gen- eral Fund, a part of which was derived from taxes levied upon real property in the district, including real property owned by plaintiffs. . . . The district retains title to the books, a matter of little practical significance however, because the books are not ordinarily retrieved by the district. Textbooks furnished for the use of parochial school students do not differ from those deliv- ered to public schools. A school is not entitled to receive free textbooks unless it complies with standards established by the Oregon statutes as

implemented by administrative regulation. The St. John’s school met these standards.

The evidence establishes, and the trial judge found, that the purpose of the Catholic church in operating in the St. John’s school and other simi- lar schools under this supervision is to permeate the entire educational process with the precepts of the Catholic religion. . . .

. . . The principal issue presented to us is whether the expenditure of public funds by the defendant school district for the purpose of fur- nishing textbooks free of charge to pupils of a parochial school is within these constitutional prohibitions.

We have concluded that the expenditure autho- rized by ORS 337.150 is within the proscription of Article I, § 5 of the Oregon Constitution. . . . Nor is it necessary to consider whether Article VIII, § 2 of the Oregon Constitution has been violated.

Article I, § 5 prohibiting the use of public monies “for the benefit of any religious or theological insti- tution,” was designed to keep separate the functions of state and church and to prevent the influence of one upon the other. In this respect our constitution follows the general pattern of other state constitu- tions and may be regarded as expressing, in more specific terms, the policy of the First Amendment as it has been explained in the *Everson* case.

The historical setting in which constitutional provisions such as Article I, § 5 were written and the factors which prompted their adoption have been thoroughly explained elsewhere; it is not necessary, therefore, to restate those observa- tions here. We need only say that we regard the separation of church and state no less important today than it was at the time Article I, § 5 and its counterpart in other constitutions were adopted.

The general policy is clear. Our problem is to determine whether that policy is violated by the distribution of free textbooks to parochial schools under ORS 337.150. . . .

Defendants’ principal argument in support of the statute is that the expenditure of public funds for the purpose of furnishing books to pupils of parochial and public schools benefits the pupils who receive these books and not the schools themselves. . . .

This so-called “child benefit theory” has been applied in other cases in which the expenditure of public funds is made for the purpose of meeting the educational needs of pupils, including those

attending parochial schools. The difficulty with this theory is, however, that unless it is qualified in some way, it can be used to justify the expen- diture of public funds for every educational pur- pose, because all educational aids are of benefit to the pupil. . . .

It is argued that the aid to school children is for a public purpose because the compulsory school law compels all children to attend school and that the state may, therefore, make expen- ditures to further compliance. But this begs the basic question—the state may not compel com- pliance through the device of furnishing aid to religious schools if that aid is in violation of the constitution. Moreover, the state does not com- pel pupils to attend *parochial* schools. . . .

We recognize that whether an expenditure is an aid to a religious institution in its religious function or in some other capacity is a question of degree. But it seems clear that the line must be drawn to include within the constitutional pro- scription the furnishing of textbooks to pupils of parochial schools. This conclusion is compelled because such books are an integral part of the educational process. As we have already pointed out, the teaching of the precepts of Catholicism is an inseparable part of the educational process in the St. John’s school. Considering the purpose of Article I, § 5, we are unable to see any substantial distinction between the furnishing of textbooks and the furnishing of blackboards, desks, labo- ratory instruments, or other equipment clearly necessary to the operation of the school. In com- paring these various essential tools we agree with the dissenting opinion in *Everson v. Board of Educa- tion of Ewing Twp*. . . . that there is no way of “satis- factorily distinguishing one item of expense from another in the long process of child education.”

It is argued that the strict notions of separa- tion in vogue at the time of the adoption of our constitutional provisions no longer exist and that these provisions should be interpreted to reflect this change in attitude. Conceding that such change has occurred, there are still impor- tant considerations warranting the resolve that the wall of separation between church and state “must be kept high and impregnable.” *Everson*

*v. Board of Education,* supra. . . . These consider- ations convince us that the wall of separation in this state must also be kept “high and impreg- nable” to meet the demands of Article I, § 5. . . .

The trial judge was of the opinion that the expenditures in question constituted a violation of the constitutional principle of separation of church and state, but he concluded that he was bound by *Everson v. Board of Education*. . . . A de- cision of the Supreme Court of the United States holding that certain legislation is not in violation of the federal constitution is not an adjudication of the constitutionality of the legislation under a state constitution. In such a case it is not only within the power of the state courts, it is their duty to decide whether the state constitution has been violated. Our views on the policy or interpretation of a particular constitutional pro- vision do not always coincide with those of the Supreme Court of the United States. As we have indicated, *Everson v. Board of Education,* supra, is distinguishable from the case at bar. Even if it were not, our conclusion would be the same.

The judgment is reversed. The trial court is directed to enter a decree in accordance with the prayer in plaintiffs’ complaint.

###### CASE NOTE

The Oklahoma Supreme Court has held that Article II, § 5 of that state’s constitution prevents use of public funds to transport parochial school students to school. *Gurney v. Ferguson,* 190 Okla. 254, 122 P.2d 1002 (1941); *Board of Education v.*

*Antone*, 384 P.2d 911 (Okla. 1963). In *Antone,* the court wrote:

The law leaves to every man the right to entertain such religious views as appeal to his individual conscience, and to provide for the religious instruc- tion and training of his own children to the extent and in the manner he deems essential or desirable. When he chooses to seek for them educational facil- ities which combine secular and religious instruc- tion, he is faced with the necessity of assuming the financial burden which that choice entails.

In specifically rejecting the *Everson* precedent as applicable to Oklahoma, the Oklahoma Su- preme Court pointed out that Everson is merely an interpretation of federal law and does not ne- gate the more restrictive provisions of the Okla- homa Constitution.

The Oklahoma Supreme Court said further:

As we pointed out in *Gurney v. Ferguson* . . . , if the cost of school buses and the operation and mainte- nance thereof is in aid of the public schools, then it would seem to necessarily follow that when

pupils of parochial schools are transported by them, such service is in aid of that school. Any such aid or benefit, either directly or indirectly, is ex- pressly prohibited by the above quoted provision of the constitution of Oklahoma. *Antone*, 384 P.2d 911 (Okla. 1963); the provision referred to is Article II,

§ 5 of the Oklahoma Constitution.

### Supreme Court’s Secularization of Public Schools: A Bifurcated Standard

###### RELEASED TIME FOR RELIGIOUS INSTRUCTION

In spite of the fact that U.S. Supreme Court de- cisions today permit public funding of clerical schools, even those that are “pervasively sectar- ian,” the Court is now and has been very strict in enforcing the secularization of public schools. In this, the Supreme Court appears to have es- tablished a bifurcated standard of separation by which one branch of cases, represented by *Abington Township,*240 *Stone,*241 *Weisman,*242 and *Santa Fe,*243 are strong on secularizing the pub- lic schools, whereas another branch of cases, represented by *Mueller,*244 *Zobrest,*245 *Agostini,*246 *Helms,*247 and *Zelman,*248 allow almost unlimited constitutional leeway for state and federal gov- ernments to provide public funds to sectarian schools.

The effort to secularize the public schools is a long-running melodrama that has produced much antipathy toward the public schools. As a plethora of Supreme Court decisions indicate, from *McCollum* in 1948 through *Weisman* in 1992 and *Santa Fe* in 2000, attempts at incursions into public schools by religious groups are an un- ceasing phenomenon. The struggle to prevent public schools from being controlled by any church or religious sect has been the most dif- ficult issue to face public schools since the idea of public schools was conceived in Europe in the eighteenth century and came to fruition in the United States in the nineteenth century.

The material in the following pages discusses the many and continuing attempts by religious sects to conduct activities in the public schools in an effort to inculcate their own religious beliefs. The list of attempts to reduce the public schools to sectarian educational enclaves reflecting the

majority beliefs of a locality or state is virtually endless, and many of the episodes have been memorialized in U.S. Supreme Court precedents. The discussion and cases following seek to cap- ture the essence of the many and multifaceted innovations used by religious sects to enter the public schools and to inculcate religion. Many of the cases address the conduct of prayer and Bible reading and various issues regarding the protec- tion of religious liberty in the public schools.

More than half the states have, at some point, permitted or required prayer and Bible reading in public schools. Prior to 1962, at least 12 states and the District of Columbia required Bible read- ing. The typical attitude of the courts was that the Bible and general prayer were not sectarian in nature and their use did not violate constitu- tional religious guarantees.249 That the Bible was not sectarian was even reflected in statute; the North Dakota legislature had observed that

[T]he Bible shall not be deemed a sectarian book. It shall not be excluded from any public school. It may be the option of the teacher to read in school without sectarian comment, not to exceed ten min- utes daily. No pupil shall be required to read it nor be present in the schoolroom during the reading thereof contrary to the wishes of his parents or guardian or other person having him in charge.250

The practice of releasing public schoolchildren during regular school hours for religious in- struction first began in the United States in Gary, Indiana, in 1914. Since then, the Supreme Court has had before it two cases involving release time. The first was the *McCollum* case in 1948,251 in which pupils were released to attend reli- gious instruction in the classrooms of the public school building. Students who did not want to participate were not released but were required to leave their classrooms and go to another part of the building to pursue their secular studies. The Supreme Court held that this “release time” program violated the First Amendment of the Constitution.

In 1952, the Supreme Court was once again called upon to test the constitutionality of “re- lease time.” In this case, a New York statute permitted pupils to leave the school building and grounds to attend religious centers for reli- gious instruction.252 Students who did not wish to participate in such services stayed in their

classrooms, and no supervision or approval of their activities was required. The Supreme Court found that this statute did not violate the doctrine of separation of church and state. The Court pointed out that although the Constitu- tion forbids the government to finance religious groups and promote religious instruction, the First Amendment does not require governmen- tal hostility toward religion. From this decision, it is clear that the Supreme Court does not pro- hibit some cooperation between schools and churches, but the nature and degree of the coop- eration are important; if they exceed certain rea- sonable limitations, the relationship will violate the Constitution.

*Released Time for Religious Instruction on Public School Premises Is Unconstitutional*



**Illinois ex rel. McCollum v. Board of Education of School District No. 71, Champaign County, Illinois**

*Supreme Court of the United States, 1948.*

*333 U.S. 203, 68 S. Ct. 461.*

Mr. Justice BLACK delivered the opinion of the Court.

This case related to the power of a state to utilize its tax-supported public school system in aid of religious instruction insofar as that power may be restricted by the First and Fourteenth Amendments to the Federal Constitution. . . .

Appellant’s petition for *mandamus* alleged that religious teachers, employed by private religious groups, were permitted to come weekly into the school buildings during the regular hours set apart for secular teaching, and then and there for a period of thirty minutes substitute their religious teaching for the secular education pro- vided under the compulsory education law. The petitioner charged that this joint public-school- religious-group program violated the First and Fourteenth Amendments to the United States Constitution. The prayer of her petition was that the Board of Education be ordered to “adopt and

enforce rules and regulations prohibiting all in- struction in and teaching of all religious educa- tion in all public schools in Champaign District Number 71 . . . and in all public school houses and buildings in said district when occupied by public schools.” . . .

Although there are disputes between the par- ties as to various inferences that may or may not properly be drawn from the evidence concern- ing the religious program, the following facts are shown by the record without dispute. In 1940 interested members of the Jewish, Roman Catho- lic, and a few of the Protestant faiths formed a voluntary association called the Champaign Council on Religious Education. They obtained permission from the Board of Education to offer classes in religious instruction to public school pupils in grades four to nine inclusive. Classes were made up of pupils whose parents signed printed cards requesting that their children be permitted to attend; they were held weekly, thirty minutes for the lower grades, forty-five minutes for the higher. The council employed the religious teachers at no expense to the school authorities, but the instructors were subject to the approval and supervision of the superinten- dent of schools. The classes were taught in three separate religious groups by Protestant teachers, Catholic priests, and a Jewish rabbi, although for the past several years there have apparently been no classes instructed in the Jewish religion. Classes were conducted in the regular class- rooms of the school building. Students who did not choose to take the religious instruction were not released from public school duties; they were required to leave their classrooms and go to some other place in the school building for pur- suit of their secular studies. On the other hand, students who were released from secular study for the religious instructions were required to be present at the religious classes. Reports of their

instruction carried on by separate religious sects. Pupils compelled by law to go to school for secu- lar education are released in part from their legal duty upon the condition that they attend the re- ligious classes. This is beyond all question a uti- lization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in *Everson v. Board of Education,* 330 U.S. 1, 67 S. Ct. 504. . . .

To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all reli- gious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hos- tility would be at war with our national tradition as embodied in the First Amendment’s guar- anty of the free exercise of religion. For the First Amendment rests upon the premise that both re- ligion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the *Everson* case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable.

Here not only is the state’s tax supported pub- lic school buildings used for the dissemination of religious doctrines. The State also affords sec- tarian groups an invaluable aid in that it helps to provide pupils for their religious classes through the use of the state’s compulsory public school machinery. This is not separation of Church and State.

The cause is reversed and remanded to the State Supreme Court for proceedings not incon- sistent with this opinion.

Reversed and remanded.

presence or absence were to be made to their

secular teachers.

The foregoing facts, without reference to oth- ers that appear in the record, show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promot- ing religious education. The operation of the state’s compulsory education system thus assists and is integrated with the program of religious

###### CASE NOTE

*Released Time.* Courts upholding the discretion- ary power of boards of education to provide released time programs: *People ex rel. Lewis v. Graves,* 245 N.Y. 195, 156 N.E. 663 (1927); *People*

*ex rel. Latimer v. Board of Education of City of Chi- cago,* 394 Ill. 228, 68 N.E.2d 305 (1946); *Dilger v.*

*School District 24 CJ*, 222 Or. 108, 352 P.2d 564 (1960). Some decisions indicated parents had the

right to have children excused or released from school for religious purposes: *Lewis v. Spauld- ing,* 193 Misc. 66, 85 N.Y.S.2d 682 (1948), appeal

dismissed, 299 N.Y. 564, 85 N.E.2d 791 (1949);

*Gordon v. Board of Education of City of Los Angeles,*

78 Cal. App. 2d 464, 178 P.2d 488 (1947); *Perry v.*

*School District No. 81,* 54 Wash. 2d 886, 344 P.2d

1036 (1959).

*Released Time for Public School Students to Attend Religious Classes Off Public School Grounds Is Constitutional*



#### Zorach v. Clauson

*Supreme Court of the United States, 1952.*

*343 U.S. 306, 72 S. Ct. 679.*

Mr. Justice DOUGLAS delivered the opinion of the Court.

New York City has a program which permits its public schools to release students during the school day so that they may leave the school buildings and school grounds and go to reli- gious centers for religious instruction or devo- tional exercises. A student is released on written request of his parents. Those not released stay in the classrooms. The churches make weekly reports to the schools, sending a list of children who have been released from public school but who have not reported for religious instruction.

This “released time” program involves neither religious instruction in public school classrooms nor the expenditure of public funds. All costs, including the application blanks, are paid for by the religious organizations. The case is therefore unlike *McCollum v. Board of Education. . . .*

Appellants, who are taxpayers and residents of New York City and whose children attend its public schools, challenge the present law, con- tending it is in essence not different from the one involved in the *McCollum* case. . . . The New York Court of Appeals sustained the law against this claim of unconstitutionality. . . .

It takes obtuse reasoning to inject any issue of the “free exercise” of religion into the present

case. No one is forced to go to the religious class- room and no religious exercise or instruction is brought to the classrooms of the public schools. A student need not take religious instruction. He is left to his own desires as to the manner or time of his religious devotions, if any.

There is a suggestion that the system involves the use of coercion to get public school students into religious classrooms. There is no evidence in the record before us that supports that conclu- sion. The present record indeed tells us that the school authorities are neutral in this regard and do no more than release students whose par- ents so request. If in fact coercion were used, if it were established that any one or more teachers were using their office to persuade or force stu- dents to take the religious instruction, a wholly different case would be presented. Hence we put aside that claim of coercion both as respects the “free exercise” of religion and “an establish- ment of religion” within the meaning of the First Amendment. . . .

We would have to press the concept of sepa- ration of Church and State to these extremes to condemn the present law on constitutional grounds. . . .

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of govern- ment that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.

When the state encourages religious instruc- tion or cooperates with religious authorities by adjusting the schedule of public events to sectar- ian 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. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional

requirement which makes it necessary for gov- ernment to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here. . . .

In the *McCollum* case the classrooms were used for religious instruction and the force of the public school was used to promote that instruc- tion. Here, as we have said, the public schools do no more than accommodate their schedules to a program of outside religious instruction. We fol- low the *McCollum* case. But we cannot expand it to cover the present released time program unless separation of Church and State means that pub- lic institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion.

Affirmed.

###### CASE NOTES

1. *Shared Time*. “Dual enrollment,” or “shared time,” is an arrangement between a pub- lic school and a private school by which the shared use of the public school facilities is provided for public school teachers or stu- dents. A pupil may be a part-time student in a public school while attending a nonpublic school part time.
2. The U.S. Court of Appeals, Tenth Circuit, has held that provisions in a released time program in which students attended church- related seminaries and received public school credit for classes that were “mainly denomina- tional” in content were unconstitutional. Also unconstitutional was a procedure whereby the public school bore the burden of gather- ing the seminary’s attendance slips. *Lanner v*. *Wimmer*, 662 F.2d 1349 (10th Cir. 1981).
3. In a case where parents of a nonpublic school student filed suit to compel a public school district to enroll their child in a band

class, the Michigan Supreme Court held that

* 1. nonessential elective courses offered to public school students must be offered to resi- dent nonpublic school students on a shared- time basis and (2) provision of nonessential elective courses to resident nonpublic school students on a shared-time basis does not vio- late the Establishment Clause where shared- time instruction is conducted on public school premises. *Snyder v. Charlotte Public School District,* 421 Mich. 517, 365 N.W.2d 151 (1984).

###### VOLITIONAL EXERCISES

The voluntariness of the exercise, whether it was Bible reading or prayer, was thought to be an important factor, as evidenced by this type of legislation. Proponents of religious exercise generally relied upon voluntariness, tradition, and the nonsectarian nature of the Bible as the primary defenses of the practice. In 1962, how- ever, the U.S. Supreme Court in *Engel v. Vitale*253 found a New York Regents prayer unconsti- tutional, and a year later held both prayer and Bible reading offensive to the First Amendment even though the defendants claimed that the exercises were voluntary and the Bible was non- denominational. This result could probably have been anticipated, since the position established by the Court in *McCollum* in 1948 indicated that neither the nature of the religious instruction nor the voluntariness of the exercise was a valid de- fense. In *McCollum,* Justice Frankfurter stated:

That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to con- science and outside the school’s domain. The law of imitation operates, and nonconformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend. 254

Likewise, the nondenominational nature of a prayer was found to be no defense when the issue was raised in *Engel*. The Court explained that neither the fact that a prayer is denomina- tionally neutral nor the fact that it is voluntary can serve to free it from the limitations of the Establishment Clause of the First Amendment. According to the Court:

The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of di- rect governmental compulsion and is violated by

the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not. 255

###### RELIGIOUS EXERCISES

The result of *Engel, Schempp,* and *Schempp*’s companion case, *Murray,*256 in 1963 was that re- ligious exercises in the public schools are clearly unconstitutional. Neither state, nor school, nor teacher can hold religious services of any type in the public schools. The Court did point out, however, that the study of the Bible as part of a secular program of education for its literary and historic values would not be unconstitutional.

In 1980, the Supreme Court in *Stone v. Gra- ham*257 followed the precedents of *Schempp* and *Murray* in holding unconstitutional a Kentucky statute that required the posting of the Ten Com- mandments in each public school classroom. In spite of an avowal by the state that the posting was premised on a secular legislative purpose, the High Court said that no legislative recitation of a supposed secular purpose could deny that the Ten Commandments are a sacred text of the Jewish and Christian faiths.258

###### SILENT MEDITATION

During the past few years, a plethora of school prayer cases has been decided by the courts. Legislatures have passed statutes permitting voluntary prayer in public schools,259 state constitutions have been changed,260 challenges have been made to prayers at football games261 and graduation exercises, and there have been cases in which teachers have maintained that the Free Exercise Clause of the First Amend- ment permits them to conduct prayers in the classroom.262

The U.S. Supreme Court in 1985 held in *Wal- lace v. Jaffree*263 that a period of silence for medita- tion or voluntary prayer in the public schools is unconstitutional. The Court ruled that the pur- pose of the legislative enactment was not secular and therefore violated the Establishment Clause. In 1984, the people of West Virginia voted to amend the state constitution, permitting pub- lic schools to designate time at the beginning of the day for student contemplation, meditation, or prayer. A federal court ruled that the “prayer amendment” failed all three aspects of the *Lemon* test and therefore violated the Establishment

Clause of the First Amendment. The court, in referring to the “Prayer Amendment,” said it was “a hoax conceived in political expediency . . . perpetrated upon those sincere citizens of West Virginia who voted for this amendment to the West Virginia Constitution in belief that even if it violated the United States Constitution, ‘majority rule’ would prevail.”264

###### STUDENT-INITIATED RELIGIOUS SPEECH

Religious speech in public schools is not banned by any constitutional provision, and no fed- eral or state court has ever prohibited religious speech unless the exercise of such speech results in the use of the school as a sectarian forum to inculcate religion. Students may speak about re- ligion and engage in religious activities so long as religion is not advanced or sponsored by the public school.265 “What is crucial is that govern- ment practices not have the effect of communi- cating a message of government endorsement or disapproval of religion.”266 State employees can- not prescribe prayer, conduct Bible reading, or lead, participate in, or endorse prayer or religious exercises during curricular or extracurricular events.267 Nothing in the Constitution implies that the public schools should be “cleansed” of all religious expression268; only state-promulgated or endorsed religious expression must be ex- cluded. The government cannot prefer disbelief over belief, or belief over disbelief. “The First Amendment requires only that the State tolerate both, while establishing neither.”269

Genuinely student-initiated religious speech or prayer is valid and must be permitted.270 Reli- gious speech is protected speech, and, of course, the public schools cannot censor its content.271 Yet, even genuinely student-initiated prayer or religious speech may constitute state action and thereby be unconstitutional if the state partici- pates in or supervises, encourages, suggests, or requires the speech.272

Teacher participation in religious speech brings the state into play because teachers are employees and thereby constitute arms of the state. In *Mergens*273 and *Edwards,*274 the Supreme Court observed that the Equal Access Act ex- pressly prohibits teacher participation in reli- gious exercises for the very good reason that it avoids the problems of the “students’ emulation of teachers as role models.”275 Thus, religion is

not foreclosed from schools. Students can pray, read the Bible, and conduct whatever religious rites, rituals, or ceremonies, no matter how con- ventional, heretical, or pagan, so long as the ac- tivity or event is not under the supervision and oversight of the school and it is held at a reason- able time, place, and manner, as pertains to all other student speech in school.276 Supervision or oversight that is merely custodial is not constitu- tionally objectionable; however, if school super- vision or oversight crosses the line and becomes endorsement, encouragement, or participation, then the boundaries of constitutionality have been exceeded.277

The right to engage in student-initiated prayer or religious rites is not, however, without limit. Of course, as aforementioned, reasonable restrictions, in keeping with freedom of speech conditions as to time, place, and manner, can be placed on the student’s religious activities, but importantly a student cannot use the school as a pulpit to conduct missionary work or use the “machinery of the state as a vehicle for con- verting his audience.”278 Public schools are not required to permit religious proselytizing. As observed in *Lee v. Weisman,* proselytizing speech is inherently coercive.279

###### PRAYER AT GRADUATION AND EXTRACURRICULAR ACTIVITIES

Insistence by various groups that religious ex- ercises be included in the public schools has assumed many shapes and definitions over the years. Those advocating more religious exercises in the schools maintain that the prohibitions of the Free Exercise Clause apply only to the class- room and do not prevent religious exercises in ancillary activities, such as commencement exer- cises, baccalaureate services, and related school events. The U.S. Supreme Court has, however, not drawn definitive lines between curricu- lar and extracurricular activities. The Supreme Court in *Lee v. Weisman*280 invalidated prayer at high school graduation ceremonies conducted by clergy. In this case, the school principal had invited a rabbi to offer prayers at high school graduation. The principal had, as a precaution, provided the rabbi with guidelines to ensure that the prayer was nonsectarian and could be defended as a “public prayer.” The Court re- jected the argument that the prayer was a kind

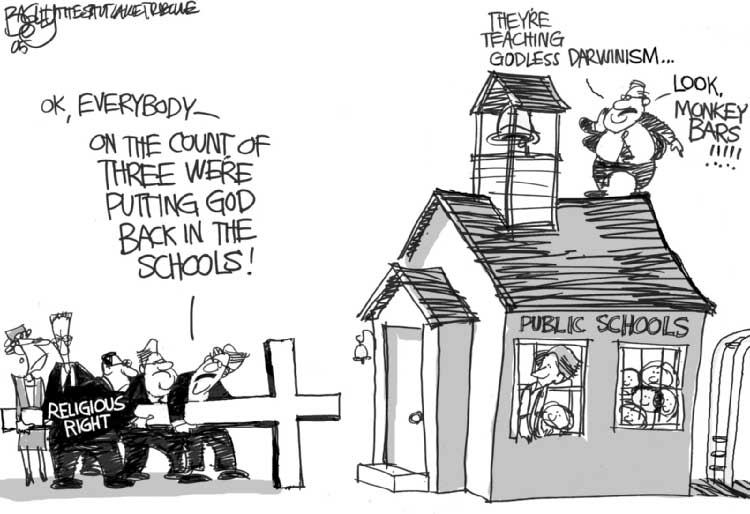
of “nonsectarian prayer” legitimately conveyed by the state to advance a “civic religion.” The Court said that although some common ground of moral and ethical behavior is highly desirable for any society, for the state to advance a Judeo- Christian religious doctrine under the mantle of some preconceived civic religious motivation is clearly in conflict with the religion clauses. The Court explained the intent of the religion clauses of the First Amendment to mean that “religious beliefs and religious expression are too pre- cious to be either proscribed or prescribed by the state.” The Court gave substantial weight to what it called “coercive” pressure, which, though subtle, nevertheless can create great dis- comfort for students who do not believe in the particular brand of religion that is being visited upon them.

Less than a year after *Weisman,* the U.S. Su- preme Court remanded a student-initiated prayer case, *Jones v. Clear Creek Independent School District,*281 to the Fifth Circuit. The Fifth Circuit distinguished *Jones* from *Weisman* because the prayer in *Jones* was student initiated and stu- dent led; therefore, the Fifth Circuit concluded that there was no violation of the Establishment Clause. The rationale was, of course, that vol- untary, student-initiated prayers do not imply government endorsement of religion and are therefore not unconstitutional. This reasoning was not convincing to the Supreme Court.

As a result of conflicting lower court inter- pretations, the U.S. Supreme Court took up the issue of student-led, student-initiated prayer at public school extracurricular events in the case of *Santa Fe Independent School District v. Doe,*282 and in following the rationale in *Lee v. Weisman,* the Court concluded that such practices were unconstitutional as violative of the Establish- ment Clause.

The Santa Fe school district had tried vari- ous devices to circumvent the Supreme Court precedents that eliminate sectarian religious influences in the public schools. The Supreme Court held that a carefully contrived procedure whereby a student elected as the high school student council chaplain would deliver a prayer over the public address system at foot- ball games was a veiled attempt to advance the religious beliefs of a heavily conservative Bap- tist community that controlled the school board

**FIGURE 5.1** *Religion and Public Schools*



policy. The school board policy was challenged by a Catholic and a Mormon student, both alumni, and their mothers. The Court in rein- forcing the secularization of the public schools held unequivocally that the school’s defense, maintaining that the policy constituted a sec- ular activity, and not a sectarian one, was a “sham” whose true intent was to perpetuate a previously invalidated school prayer policy. Justice Stevens, writing for the majority of the Court, held that the district’s claim that the in- vocation was private student speech, and not public speech, belied the fact that the message was religious in nature and was conducted under the auspices of the public school itself. Thus, *Santa Fe* joins a rather consistent array of precedents that enforce the secularization of the public schools.

This no-nonsense position taken by the Court in secularizing the public schools is dramatized by the contrast with the Court’s position in *Agostini* and *Helms,* where the Establishment Clause is loosely interpreted to permit pub- lic funds to be channeled to sectarian schools, which in turn may use those funds to advance

particular spiritual beliefs. The Establishment Clause appears to be solid on one front but amazingly porous on the other.

*State-Enforced Bible Reading and Prayer in the Public Schools Are Unconstitutional*



#### School District of Abington Township v. Schempp and Murray v. Curlett

*Supreme Court of the United States, 1963.*

*374 U.S. 203, 83 S. Ct. 1560.*

Mr. Justice CLARK delivered the opinion of the Court.

Once again we are called upon to consider the scope of the provision of the First Amendment to the United States Constitution which declares that “Congress shall make no law respecting an

establishment of religion, or prohibiting the free exercise thereof . . . ” These companion cases present the issues in the context of state action requiring that schools begin each day with read- ings from the Bible. While raising the basic ques- tions under slightly different factual situations, the cases permit of joint treatment. In light of the history of the First Amendment and of our cases interpreting and applying its requirements, we hold that the practices at issue and the laws re- quiring them are unconstitutional under the Establishment Clause, as applied to the States through the Fourteenth Amendment.

*The Facts in Each Case:* No. 142. The Com- monwealth of Pennsylvania by law, 24 Pa. Stat.

§ 151516, as amended, Pub. Law 1928 (Supp. 1960) Dec. 17, 1959, requires that “At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.” The Schempp family, husband and wife and two of their three children, brought suit to enjoin enforcement of the statute, contending that their rights under the Fourteenth Amend- ment to the Constitution of the United States are, have been, and will continue to be violated un- less this statute be declared unconstitutional as violative of these provisions of the First Amend- ment. They sought to enjoin the appellant school district, wherein the Schempp children attend school, and its officers and the Superintendent of Public Instruction of the Commonwealth from continuing to conduct such readings and recita- tion of the Lord’s Prayer in the public schools of the district pursuant to the statute. . . .

No. 119. In 1905 the Board of School Commissioners of Baltimore City adopted a rule pursuant to Art. 77, § 202 of the Annotated Code of Maryland. The rule provided for the holding of opening exercises in the schools of the city, consisting primarily of the “reading, without comment, of a chapter in the Holy Bible and/ or the use of the Lord’s Prayer.” The petitioners, Mrs. Madalyn Murray and her son, William J. Murray III, are both professed atheists. Following unsuccessful attempts to have the respondent school board rescind the rule, this suit was filed for *mandamus* to compel its rescission and cancellation. It was alleged that William was

a student in a public school of the city and Mrs. Murray, his mother, was a taxpayer therein; that it was the practice under the rule to have a reading on each school morning from the King James version of the Bible; that at petitioners’ insistence the rule was amended to permit children to be excused from the exercise on request of the parent and that William had been excused pursuant thereto; that nevertheless the rule as amended was in violation of the petitioners’ rights “to freedom of religion under the First and Fourteenth Amendments” and in violation of “the principle of separation between church and state, contained therein.” The rules, as amended, provide as follows: Opening Exercises. Each school, either collectively or in classes, shall be opened by the reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord’s Prayer. The Douay version may be used by those pupils who prefer it. Appropriate patriotic exercises should be held as a part of the general opening exercise of the school or class. Any child shall be excused from participating in the opening exercises or from attending the opening exercises upon the written request of his parent or guardian.

Applying the Establishment Clause principles to the cases at bar we find that the States are re- quiring the selection and reading at the open- ing of the school day of verses from the Holy Bible and the recitation of the Lord’s Prayer by the students in unison. These exercises are pre- scribed as part of the curricular activities of stu- dents who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teach- ers employed in those schools. . . . The trial court in No. 142 has found that such an opening exer- cise is a religious ceremony and was intended by the State to be so. We agree with the trial court’s finding as to the religious character of the exer- cises. Given that finding, the exercises and the law requiring them are in violation of the Estab- lishment Clause.

. . . [I]n No. 119, and the State contends (as does the State in No. 142) that the program is an effort to extend its benefits to all public school children without regard to their religious belief. Included within its secular purposes, it says, are the promotion of moral values, the contradic- tion to the materialistic trends of our times, the

perpetuation of our institutions and the teaching of literature. The case came up on . . . a petition which alleged that the uniform practice under the rule had been to read from the King James version of the Bible and that the exercise was sectarian. The short answer, therefore, is that the religious character of the exercise was admitted by the State. . . .

The conclusion follows that in both cases the laws require religious exercises and such exer- cises are being conducted in direct violation of the rights of the appellees and petitioners. Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause. . . . Further, it is no de- fense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, “it is proper to take alarm at the first experiment on our liberties.” *Memorial and Remonstrance against Religious Assessments*. . . .

It is insisted that unless these religious exer- cises are permitted a “religion of secularism” is established in the schools. We agree of course that the State may not establish a “religion of secularism” in the sense of affirmatively oppos- ing or showing hostility to religion, thus “pre- ferring those who believe in no religion over

Finally, we cannot accept that the concept of neutrality, which does not permit a State to re- quire a religious exercise even with the consent of the majority of those affected, collides with the majority’s right to free exercise of religion. While the Free Exercise Clause clearly prohib- its the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the State to practice its beliefs. . . .

The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relation- ship between man and religion, the State is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment. Applying that rule to the facts of these cases, we affirm the judgment in No. 142. In No. 119, the judgment is reversed and the cause remanded to the Maryland Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

Judgment in No. 142 affirmed; judgment in No. 119 reversed and cause remanded with directions.

those who do believe.” *Zorach v. Clauson*. . . .

We do not agree, however, that this decision in any sense has that effect. In addition, it might well be said that one’s education is not complete without a study of comparative religion or the history of religion and its relationship to the ad- vancement of civilization. It certainly may be said that the Bible is worthy of study for its liter- ary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively, as part of a secular program of education, may not be affected consistently with the First Amendment. But the exercises here do not fall into those categories. They are religious exer- cises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion.

###### CASE NOTE

Before the *Engel* and *Schempp* cases, many deci- sions were rendered by state courts that found that morning religious activities did not violate constitutional or statutory provisions. Some of these were *Hackett v*. *Brooksville Graded School District,* 120 Ky. 608, 87 S.W. 792 (1905); *Donahoe*

*v. Richards,* 38 Me. 379, 61 Am. Dec. 256 (1854);

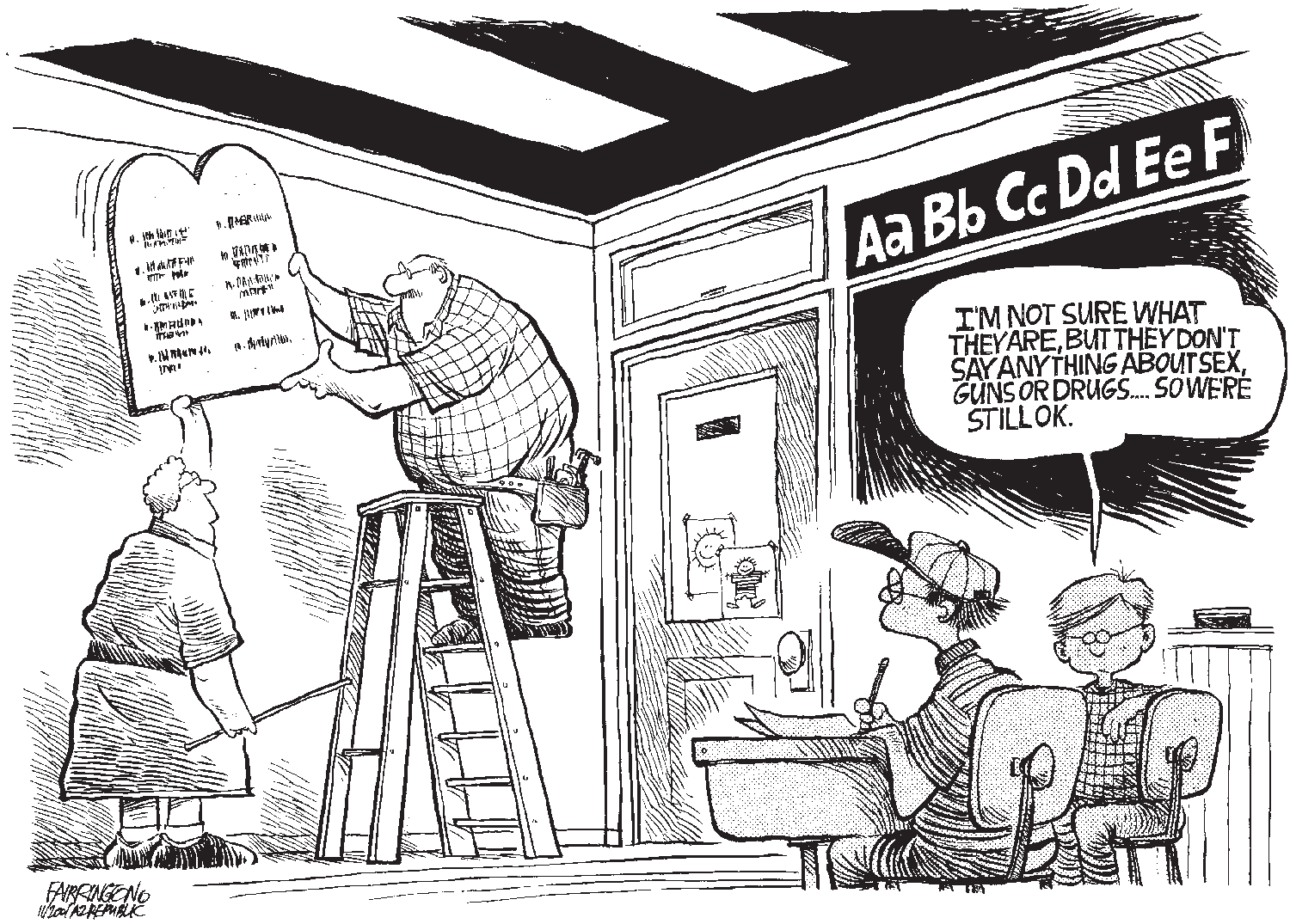
*Moore v. Monroe,* 64 Iowa 367, 20 N.W. 475 (1884); *Billard v*. *Board of Education of City of Topeka,* 69 Kan. 53, 76 P. 422 (1904); *Knowlton v. Baumhover,*

182 Iowa 691, 166 N.W. 202 (1918); and *McCor-*

*mick v*. *Burt,* 95 Ill. 263 (1880).

The following state courts held that religious exercises offended their constitutions: *State ex rel. Weiss v*. *District Board,* 76 Wis. 177, 44 N.W. 967 (1890); *State ex rel*. *Freeman v*. *Scheve*, 65 Neb. 853, 91 N.W. 846 (1902); *People ex rel*. *Ring v*. *Board of*

**FIGURE 5.2** *Religion in Public School*



*Education of District 24,* 245 Ill. 334, 92 N.E. 251 (1910); *Herold v*. *Parish Board of School Directors,* 136 La. 1034, 68 So. 116 (1915); *State ex rel*. *Finger*

*v*. *Weedman,* 55 S.D. 343, 226 N.W. 348 (1929).

*State Statute Requiring Posting of Copy of Ten Commandments in Walls of Each Public Classroom Is Violative of Establishment Clause*



#### Stone v. Graham

*Supreme Court of the United States, 1981.*

*449 U.S. 39, 101 S. Ct. 192.*

PER CURIAM.

A Kentucky statute requires the posting of a copy of the Ten Commandments, purchased with private contributions, on the wall of each pub- lic classroom in the State. Petitioners, claiming that this statute violates the Establishment and

Free Exercise Clauses of the First Amendment, sought an injunction against its enforcement. The state trial court upheld the statute, finding that its “avowed purpose” was “secular and not religious,” and that the statute would “neither advance nor inhibit any religion or religious group” nor involve the State excessively in reli- gious matters. The Supreme Court of the Com- monwealth of Kentucky affirmed by an equally divided court. We reverse.

The statute provides in its entirety:

1. It shall be the duty of the superintendent of pub- lic instruction, provided sufficient funds are avail- able as provided in subsection (3) of this Section, to ensure that a durable, permanent copy of the Ten Commandments shall be displayed on a wall in each public elementary and secondary school class- room in the Commonwealth. The copy shall be six- teen (16) inches wide by twenty (20) inches high.
2. In small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: ‘The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civiliza- tion and the Common Law of the United States.’
3. The copies required by this Act shall be pur- chased with funds made available through volun- tary contributions made to the state treasurer for the purposes of this Act. 1978 Ky. Acts, ch. 436, § 1 (effective June 17, 1978), Ky.Rev.Stat. § 158.178 (1980).

This Court has announced a three-part test for determining whether a challenged state statute is permissible under the Establishment Clause of the United States Constitution:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally the statute must not foster ‘an excessive government entanglement with religion.’

If a statute violates any of these three prin- ciples, it must be struck down under the Estab- lishment Clause. We conclude that Kentucky’s statute requiring the posting of the Ten Com- mandments in public schoolrooms had no secular legislative purpose, and is therefore unconstitutional.

The Commonwealth insists that the statute in question serves a secular legislative purpose, observing that the legislature required the fol- lowing notation in small print at the bottom of each display of the Ten Commandments: “The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Com- mon Law of the United States.”

This is not a case in which the Ten Command- ments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, eth- ics, comparative religion, or the like. Posting of religious texts on the wall serves no such edu- cational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, medi- tate upon, perhaps to venerate and obey, the Com- mandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.

It does not matter that the posted copies of the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies under the auspices of the legislature provides the “official support of the State . . . Government” that the Establishment Clause pro- hibits. Nor is it significant that the Bible verses involved in this case are merely posted on the wall, rather than read aloud as in *Schempp* and *Engel,* for “it is no defense to urge that the reli- gious practices here may be relatively minor encroachments on the First Amendment.” We conclude that § 158.178 (1980) violates the first part of the *Lemon v. Kurtzman,* test, and thus the Establishment Clause of the Constitution.

The petition for a writ of *certiorari* is granted, and the judgment below is reversed.

It is so ordered.

The trial court found the “avowed” purpose

of the statute to be secular, even as it labeled the statutory declaration “self-serving.” Under this Court’s rulings, however, such an “avowed” secular purpose is not sufficient to avoid conflict with the First Amendment. . . .

The preeminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Chris- tian faiths, and no legislative recitation of a sup- posed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one’s parents, killing or murder, adultery, steal- ing, false witness, and covetousness. Rather, the first part of the Commandments concerns the re- ligious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord’s name in vain, and observing the Sabbath Day. See Exodus 20:1–11; Deuteronomy 5:6–15.

###### CASE NOTES

1. In 2005, the U.S. Supreme Court rendered two opinions further clarifying the constitution- ality of displays of the Ten Commandments on public sites. In one of the cases, the Su- preme Court, with Justice Souter writing for the majority, ruled that a McCreary County, Kentucky, display of the Decalogue violated the Establishment Clause because evidence in- dicated that the purpose was to advance reli- gion. The Court noted that the facts indicated that as in *Stone v. Graham,* the Ten Command- ments was on display alone and was not a part of a secular display of historically important documents imparting some social, moral, and secular purpose. The Court stressed the im- portance of integrating the Commandments with a secular theme of other documents in order to prevent the interpretation that the government’s purpose was solely to advance

religion. In this case, the county government had by resolution required placement of the Commandments in a gold frame alone in a high traffic area of the county courthouse. As in *Stone v. Graham,* the Supreme Court con- cluded that evidence “supported the common sense conclusion that a religious objective per- meated the government’s action.” *McCreary County, Kentucky v. American Civil Liberties Union,* 545 U.S. 844, 125 S. Ct. 2722 (2005).

1. In a companion case to *McCreary County,* ren- dered by the Supreme Court on the same day, a Texas display of the Ten Commandments was upheld as constitutional. The facts dif- fered from *McCreary County* in that in the latter instance the Ten Commandments had been on display on the 22 acres surrounding the Texas State Capitol building among 17 monuments and 21 historical markers commemorating the “people, ideals, and events that compose the Texas identity.” The monument had stood on the site for 40 years and had been donated to the state by a national social, civic, and pa- triotic organization. The Court observed that the fact that the Decalogue had been there for 40 years and was among other historical me- morials indicated that the Decalogue was intended as a part of American history and her- itage. In holding that the Texas display did not offend the Establishment Clause, Chief Justice Rehnquist observed that the Nation’s Capital is replete with friezes and statutes and refer- ences to the Ten Commandments, including the Chamber of the U.S. House of Represen- tatives, the Courtroom of the Supreme Court, the exterior of the Supreme Court building, Library of Congress, and the Lincoln Memo- rial. According to the Court, these displays in Washington, D.C., recognize the role of the Dec- alogue in America’s heritage and, likewise, in the Texas State Capitol, and even though of re- ligious basis, have undeniable “historical” sec- ular meaning as well as religious significance. The difference in this Texas case and the two Kentucky cases, *Stone* and *McCreary County,* is that the purpose and intent in Kentucky was directly religious. Moreover, the Court noted that in *Stone* the placement of the Ten Com- mandments was in every classroom, the text of which, “confronted elementary school students every day.” *VanOrden v. Rick Perry, Governor of Texas,* 545 U.S. 677, 125 S. Ct. 2854 (2005).
2. The Establishment Clause is not violated by a Las Cruces, New Mexico, public school dis- trict logo showing three crosses. The logo was also used by the city as a historical reminder of graves that marked the sites of Spanish colonial and Mexican period massacres in the area. The U.S. Court of Appeals, Tenth Circuit, 2008, noted the unique history of the area and concluded that an objective observer would not understand the logo to be a reli- gious symbol. *Weinbaum v. City of Las Cruces, New Mexico,* 541 F.2d 1017 (10th Cir. 2008).
3. In 2009, the U.S. Supreme Court inserted a new twist into the Ten Commandments and forum analysis. The twist is that no prior decision of the Court has addressed the application of the Free Speech Clause to a government entity’s acceptance of a private entity’s donated place- ment of a permanent monument in a public park. Although a public park is considered to be a traditional open forum, the question arises as to whether a monument placed there is private speech or public speech. The Supreme Court in *Pheasant Grove City, Utah v. Summum,* held that it is actually public or government speech and as such is not subject to scrutiny under the Free Speech Clause which applies only to private speech. The Court cited *Board of Regents of the University of Wisconsin System v. Southworth,* 529

U.S. 217, 120 S. Ct. 1346 (2000) which held that “A government entity has the right to ‘speak for itself’” and *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510 (1995), where the Court held that govern- ment “is entitled to say what it wishes.”

Government, of course, is not unlimited in what it says, for example, violating the Estab- lishment or Free Exercise clauses by advanc- ing religion, but a government entity is not required to permit a private person or entity, to capture public space and implicitly represent that its private message is that of government. *Pheasant Grove City, Utah v. Summum,* U.S.

, 129 S. Ct. 1125 (2009).

1. In 2010, the Kentucky Ten Commandments saga continued, this time in Grayson County, where a Reverend Chester Shartzer requested that the Ten Commandments be placed on the Grayson County Courthouse wall as a part of a “Foun- dations of American Law and Government Display.” The display includes the Mayflower Compact, the Declaration of Independence,

Magna Carta, etc. The Reverend Shartzer in deposition said his reason for requesting the display and supporting his motion before the Grayson County Fiscal Court was, thus:

I simply said, ‘I was on my way up here, and I seen a stop sign. . . . If I had went straight, I’d have went over a bank. . . . Some people will not be more in- terested in the Declaration of Independence than a fly. Neither are they the Ten Commandments, but they’re signs, . . . they’re about turning right. . . . I’d like my kid to hear somebody say, ‘you oughtn’t to kill somebody,’ . . . I said, ‘That sign was put up for me. It’s a road sign. I’m just wanting to put a road sign in the courthouse . . . for young people to see where the heritage of America is’ —‘how it’s em- bedded in my heart, and I want it in other hearts.

The Fiscal Court voted to permit the display and the Reverend installed it. The U.S. Court of Appeals, Sixth Circuit, upheld the display, observing that the county did not adopt the donor’s purpose, nor did the display indicate a religious purpose of the county. The court cited *Croft v. Governor of Texas,* 562 F.3d 735 (5th Cir. 2009) that had held that references to avowedly religious acts such as “prayer” do not, by themselves, indicate a religious purpose. The Sixth Circuit, thus, concluded that the Ten Commandments included with other documents do not provide evidence of a predominately religious purpose. *American Civil Liberties Union of Kentucky v. Grayson County, Kentucky,* 591 F.3d 837 (6th Cir. 2010). See also: distinguished in *ACLU v. McCreary Co., Kentucky*, 607 F.3d 439 (6th Cir. 2010).

*State Statute Authorizing a Period for Meditation or Voluntary Prayer Violates the Establishment Clause*



#### Wallace v. Jaffree

*Supreme Court of the United States, 1985.*

*472 U.S. 38, 105 S. Ct. 2479.*

Justice STEVENS delivered the opinion of the Court.

At an early stage of this litigation, the constitu- tionality of three Alabama statutes was questioned:

(1) § 16-1-20, enacted in 1978, which authorized a one-minute period of silence in all public schools “for meditation”; (2) § 16-1-20.1, enacted in 1981, which authorized a period of silence “for medita- tion or voluntary prayer”; and (3) § 16-1-20.2, en- acted in 1982, which authorized teachers to lead “willing students” in a prescribed prayer to “Al- mighty God . . . the Creator and Supreme Judge of the world.”

. . . [T]he narrow question for decision is whether § 16-1-20.1, which authorizes a period of silence for “meditation or voluntary prayer,” is a law respecting the establishment of religion within the meaning of the First Amendment. . . . On August 2, 1982, the District Court held an evidentiary hearing on appellees’ motion for a preliminary injunction. At that hearing, State Senator Donald G. Holmes testified that he was the “prime sponsor” of the bill that was enacted in 1981 as § 16-1-20.1. He explained that the bill was an “effort to return voluntary prayer to our public schools . . . it is a beginning and a step in the right direction.” Apart from the purpose to return voluntary prayer to public schools, Sena- tor Holmes unequivocally testified that he had

“no other purpose in mind.” . . .

In its lengthy conclusions of law, the District Court reviewed a number of opinions of this Court interpreting the Establishment Clause of the First Amendment, and then embarked on a fresh examination of the question whether the First Amendment imposes any barrier to the establishment of an official religion by the State of Alabama. After reviewing at length what it perceived to be newly discovered historical evi- dence, the District Court concluded that “the es- tablishment clause of the first amendment to the United States Constitution does not prohibit the state from establishing a religion.” In a separate opinion, the District Court dismissed appellees’ challenge to the three Alabama statutes because of a failure to state any claim for which relief could be granted. The court’s dismissal of this challenge was also based on its conclusion that the Establishment Clause did not bar the States from establishing a religion.

The Court of Appeals consolidated the two cases; not surprisingly, it reversed. . . . Our unanimous affirmance of the Court of Appeals’ judgment concerning § 16-1-20.2 makes it un- necessary to comment at length on the District

Court’s remarkable conclusion that the Federal Constitution imposes no obstacle to Alabama’s establishment of a state religion. Before analyz- ing the precise issue that is presented to us, it is nevertheless appropriate to recall how firmly embedded in our constitutional jurisprudence is the proposition that the several States have no greater power to restrain the individual free- doms protected by the First Amendment than does the Congress of the United States. . . .

Just as the right to speak and the right to re- frain from speaking are complementary com- ponents of a broader concept of individual freedom of mind, so also the individual’s free- dom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the con- science of the infidel, the atheist, or the adherent of a non-Christian faith such as Mohammedism or Judaism. 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. This conclusion derives support not only from the in- terest in respecting the individual’s freedom of conscience, but also from the conviction that re- ligious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political in- terest in forestalling intolerance extends beyond intolerance among Christian sects—or even in- tolerance among “religions”—to encompass in- tolerance of the disbeliever and the uncertain. As Justice Jackson eloquently stated in *Board of Education v. Barnette:*

If there is any fixed star in our constitutional con- stellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nation- alism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

The state of Alabama, no less than the Con- gress of the United States, must respect that basic truth.

When the Court has been called upon to con- strue the breadth of the Establishment Clause, it

has examined the criteria developed over a period of many years. Thus, in *Lemon v. Kurtzman, . . .* we wrote:

Every analysis in this area must begin with consid- eration 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, . . .* finally, the statute must not foster ‘an excessive government entanglement with religion.’ . . .

It is the first of these three criteria that is most plainly implicated by this case. As the District Court correctly recognized, no consideration of the second or third criteria is necessary if a stat- ute does not have a clearly secular purpose. For even though a statute that is motivated in part by a religious purpose may satisfy the first cri- terion, . . . the First Amendment requires that a statute must be invalidated if it is entirely moti- vated by a purpose to advance religion.

In applying the purpose test, it is appropriate to ask “whether government’s actual purpose is to endorse or disapprove of religion.” In this case, the answer to that question is dispositive. For the record not only provides us with an un- ambiguous affirmative answer, but it also reveals that the enactment of § 16-1-20.1 was not moti- vated by any clearly secular purpose—indeed, the statute had no secular purpose.

The sponsor of the bill that became § 16-1-20.1, Senator Donald Holmes, inserted into the leg- islative record—apparently without dissent—a statement indicating that the legislation was an “effort to return voluntary prayer” to the public schools. Later Senator Holmes confirmed this purpose before the District Court. In response to the question whether he had any purpose for the legislation other than returning voluntary prayer to public schools, he stated, “No, I did not have no other purpose in mind.” The State did not present evidence of *any* secular purpose. . . .

The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student’s right to engage in voluntary prayer during an appropriate mo- ment of silence during the school day. The 1978 statute already protected that right, containing nothing that prevented any student from engag- ing in voluntary prayer during a silent minute

of meditation. Appellants have not identified any secular purpose that was not fully served by

§ 16-1-20 before the enactment of § 16-1-20.1. Thus, only two conclusions are consistent with the text of § 16-1-20.1: (1) the statute was enacted to convey a message of State endorsement and pro- motion of prayer; or (2) the statute was enacted for no purpose. No one suggests that the statute was nothing but a meaningless or irrational act. . . .

The Legislature enacted § 16-1-20.1 despite the existence of § 16-1-20 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 char- acterize prayer as a favored practice. Such an en- dorsement is not consistent with the established principle that the Government must pursue a course of complete neutrality toward religion.

The importance of that principle does not permit us to treat this as an inconsequential case involving nothing more than a few words of symbolic speech on behalf of the political majority. For whenever the State itself speaks on a religious subject, one of the questions that we must ask is “whether the Government intends to convey a message of endorsement or disapproval of religion.” The well-supported concurrent findings of the District Court and the Court of Appeals—that § 16-1-20.1 was intended to convey a message of State-approval of prayer activities in the public schools—make it unnecessary, and indeed inappropriate, to evaluate the practical significance of the addition of the words “or voluntary prayer” to the statute. Keeping in mind, as we must, “both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded,” we conclude that § 16-1-20.1 violates the First Amendment.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

###### CASE NOTES

1. In 2009, the Illinois legislature tried its hand at circumventing the Establishment Clause by mandating that school districts institute the practice of observing a period of silence each day. The law provided that the period

of silence could be for prayer or reflection. A

U.S. District Court in Illinois held the act un- constitutional as violating the “secular pur- pose” test of *Lemon*. The court observed that the act would probably have been permissible if it had been prescribed for only a period of reflection, without the reference to a prayer option. The court concluded that there was no clear secular purpose and the stated pur- pose was a “sham.” *Sherman v. Township High School District 214,* 594 F. Supp. 2d 981 (N.D. Ill. 2009).

In drawing its conclusions, the federal court in Illinois followed the rationale of the U.S. Court of Appeals, Eleventh Circuit, that upheld a Georgia statute that authorized or permitted teachers in public schools to “conduct a brief period of quiet reflection,” for not more than sixty seconds, for the purpose of silent reflection on the anticipated activi- ties of the day. Since there was no explicit or implied purpose for state-encouraged prayer, the statute passed constitutional muster. *Bown v. Gwinnett County School District*, 112 F.3d 1464 (11th Cir. 1997).

1. In an attempt to circumvent *Wallace v*. *Jaffree,* the Virginia legislature enacted a “minute of silence.” The statute required the local school board to have a daily observance of one min- ute of silence in each classroom. The Fourth Circuit distinguished this from *Jaffree,* hold- ing that the purpose was secular. In applying the *Lemon* test, the court stated: “We conclude that the statute has at least two purposes, one of which is clearly secular and one of which may be secular even though it addresses re- ligion. Where it permits students to pray it is only accommodating religion, which “is itself secular.” *Brown v*. *Gilmore,* 258 F.3d 265 (4th Cir. 2000).
2. The Louisiana legislature in 1976 passed legis- lation to permit “. . . school authorities to allow students and teachers to observe a ‘brief time in silent meditation’ at the beginning of each school day.” In 1992, the Act was amended to allow a “brief time in silent prayer or medi- tation.” Then in 1999, it was amended again, deleting the word *silent.* The U.S. Fifth Circuit Court of Appeals ruled “this case is virtually identical to *Wallace v*. *Jaffree*.” The amend- ment sponsor stated that the amendment was to allow verbal prayers in schools. The court stated: “The plain language and nature of the

1999 amendment as well as the legislators’ contemporaneous statements demonstrate that the sole purpose of the amendment was to re- turn verbal prayer to the public schools. This purpose runs afoul of the Establishment Clause and the Louisiana statute at issue here is there- fore unconstitutional.” *Doe v*. *School Board of Ouachita Parish,* 274 F.3d 289 (5th Cir. 2001).

*Nonsectarian Prayer at School Graduation Is Unconstitutional*



#### Lee v. Weisman

*Supreme Court of the United States, 1992.*

*505 U.S. 577, 112 S. Ct. 2649.*

Justice KENNEDY delivered the opinion of the Court.

School principals in the public school system of the city of Providence, Rhode Island, are per- mitted to invite members of the clergy to offer invocation and benediction prayers as part of the formal graduation ceremonies for middle schools and for high schools. The question before us is whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment, provisions the Four- teenth Amendment makes applicable with full force to the States and their school districts. . . .

Deborah Weisman graduated from Nathan Bishop Middle School, a public school in Provi- dence, at a formal ceremony in June 1989. She was about 14 years old. . . . Acting for himself and his daughter, Deborah’s father, Daniel Weisman, objected to any prayers at Deborah’s middle school graduation, but to no avail. The school principal, petitioner Robert E. Lee, in- vited a rabbi to deliver prayers at the graduation exercises for Deborah’s class. . . .

It has been the custom of Providence school officials to provide invited clergy with a pam- phlet entitled “Guidelines for Civic Occasions,” prepared by the National Conference of Chris- tians and Jews. The Guidelines recommend that

public prayers at nonsectarian civic ceremonies be composed with “inclusiveness and sensitiv- ity,” though they acknowledge that “[p]rayer of any kind may be inappropriate on some civic occasions.” The principal gave Rabbi Gutterman the pamphlet before the graduation and advised him the invocation and benediction should be nonsectarian. . . .

The principle that government may accom- modate the free exercise of religion does not su- persede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guaran- tees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which “establishes a [state] religion or religious faith, or tends to do so.” . . . The State’s involvement in the school prayers challenged today violates these central principles.

That involvement is as troubling as it is un- denied. A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur. The principal chose the religious partici- pant, here a rabbi, . . . and that choice of a rabbi is not disclosed by the record, but the potential for divisiveness over the choice of a particular member of the clergy to conduct the ceremony is apparent.

. . . The potential for divisiveness is of par- ticular relevance here though, because it centers around an overt religious exercise in a second- ary school environment where, as we discuss below, subtle coercive pressures exist and where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation.

The State’s role did not end with the decision to include a prayer and with the choice of clergy- man. Principal Lee provided Rabbi Gutterman with a copy of the “Guidelines for Civic Occa- sions,” and advised him that his prayers should be nonsectarian. Through these means the prin- cipal directed and controlled the content of the prayer. . . . It is a cornerstone principle of our Establishment Clause jurisprudence that “it is no part of the business of government to compose official prayers for any group of the American

people to recite as a part of a religious program carried on by government,” . . . and that is what the school officials attempted to do. . . .

The First Amendment’s Religious Clauses mean that religious beliefs and religious expres- sion are too precious to be either proscribed or prescribed by the State. The design of the Con- stitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. . . .

These concerns have particular application in the case of school officials, whose effort to moni- tor prayer will be perceived by the students as inducing a participation they might otherwise reject. Though the efforts of the school officials in this case to find common ground appear to have been a good-faith attempt to recognize the common aspects of religions and not the divi- sive ones, our precedents do not permit school officials to assist in composing prayers as an in- cident to a formal exercise for their students. . . . And these same precedents caution us to mea- sure the idea of a civic religion against the cen- tral meaning of the Religious Clauses of the First Amendment, which is that all creeds must be tolerated and none favored. The suggestion that government may establish an official or civic re- ligion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.

The degree of school involvement here made it clear that the graduation prayers bore the im- print of the State and thus put school-age chil- dren who objected in an untenable position. We turn our attention now to consider the posi- tion of the students, both those who desired the prayer and she who did not. . . .

As we have observed before, there are height- ened concerns with protecting freedom of con- science from subtle coercive pressure in the elementary and secondary public schools. . . . We recognize, among other things, that prayer exercises in public school carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there. . . . What to most believers may seem nothing more than a reasonable re- quest that the nonbeliever respect their religious practices, in a school context may appear to the

nonbeliever or dissenter to be an attempt to em- ploy the machinery of the State to enforce a reli- gious orthodoxy.

We need not look beyond the circumstances of this case to see the phenomenon at work. The undeniable fact is that the school district’s su- pervision and control of a high school gradua- tion ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. . . . It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conven- tions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it. . . .

The injury caused by the government’s ac- tion, and the reason why Daniel and Deborah Weisman object to it, is that the State, in a school setting, in effect required participation in a reli- gious exercise. It is, we concede, a brief exercise during which the individual can concentrate on joining its message, meditate on her own reli- gion, or let her mind wander. But the embarrass- ment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers, and similar ones to be said in the future, are of a *de minimis* character. . . .

There was a stipulation in the District Court that attendance at graduation and promotional ceremonies is voluntary. Petitioners and the United States, as *amicus,* made this a center point of the case, arguing that the option of not attending the graduation excuses any induce- ment or coercion in the ceremony itself. The ar- gument lacks all persuasion. Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school gradua- tion is formalistic in the extreme. True, Deborah could elect not to attend commencement without renouncing her diploma; but we shall not allow the case to turn on this point. Attendance may not be required by official decree, yet it is ap- parent that a student is not free to absent herself from the graduation exercise in any real sense of the term “voluntary,” for absence would require forfeiture of those intangible benefits which have

motivated the student through youth and all her high school years. Graduation is a time for fam- ily and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts.

The importance of the event is the point the school district and the United States rely upon to argue that a formal prayer ought to be permit- ted, but it becomes one of the principal reasons why their argument must fail. Their contention, one of considerable force were it not for the con- stitutional constraints applied to state action, is that the prayers are an essential part of these cer- emonies because for many persons an occasion of this significance lacks meaning if there is no recognition, however brief, that human achieve- ments cannot be understood apart from their spiritual essence. We think the Government’s po- sition that this interest suffices to force students to choose between compliance or forfeiture dem- onstrates fundamental inconsistency in its ar- gumentation. It fails to acknowledge that what for many of Deborah’s classmates and their par- ents was a spiritual imperative was for Daniel and Deborah Weisman religious conformation compelled by the State. While in some societ- ies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects the balance urged upon us. The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Con- stitution commands. . . .

We do not hold that every state action impli- cating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious mes- sages, but offense alone does not in every case show a violation. We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity. But, by any reading of our cases, the conformity re- quired of the student in this case was too high an exaction to withstand the test of the Establish- ment Clause. The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and

participation in an explicit religious exercise at an event of singular importance to every stu- dent, one the objecting student had no real alter- native to avoid. . . .

For reasons we have stated, the judgment of the Court of Appeals is Affirmed.

*School District’s Policy Permitting Student-Led, Student-Initiated Prayer at Football Games Violates the Establishment Clause*



#### Santa Fe Independent School District v. Doe

*Supreme Court of the United States, 2000.*

*530 U.S. 290, 120 S. Ct. 2266.*

Justice STEVENS delivered the opinion of the Court.

Prior to 1995, the Santa Fe High School stu- dent who occupied the school’s elective office of student council chaplain delivered a prayer over the public address system before each varsity football game for the entire season. This practice, along with others, was challenged in District Court as a violation of the Establishment Clause of the First Amendment. While these proceedings were pending in the District Court, the school district adopted a different policy that permits, but does not require, prayer initiated and led by a student at all home games. The District Court entered an order modifying that policy to permit only nonsectarian, non-proselytizing prayer. The Court of Appeals held that, even as modified by the District Court, the football prayer policy was invalid. We granted the school district’s petition for *certiorari* to review that holding.

. . . Respondents are two sets of current or for- mer students and their respective mothers. One family is Mormon and the other is Catholic. The District Court permitted respondents (Does) to litigate anonymously to protect them from in- timidation or harassment. . . .

[In August the school passed a policy] which was titled “Prayer at Football Games,” . . . It authorized two student elections, the first to

determine whether “invocations” should be de- livered, and the second to select the spokesperson to deliver them. [The policy] contained two parts, an initial statement that omitted any requirement that the content of the invocation be “nonsectar- ian and nonproselytizing,” and a fallback provi- sion that automatically added that limitation if the preferred policy should be enjoined [by the court]. On August 31, 1995, according to the par- ties’ stipulation, “the district’s high school stu- dents voted to determine whether a student would deliver prayer at varsity football games. . . . The students chose to allow a student to say a prayer at football games.” . . . A week later, in a separate election, they selected a student “to de- liver the prayer at varsity football games.” . . .

The final policy (October policy) is essentially the same as the August policy, though it omits the word “prayer” from its title, and refers to “messages” and “statements” as well as “invo- cations.” It is the validity of that policy that is before us. . . .

We granted the District’s petition for *certiorari*, limited to the following question: “Whether pe- titioner’s policy permitting student-led, student- initiated prayer at football games violates the Establishment Clause.” . . . We conclude, as did the Court of Appeals, that it does. . . .

The first Clause in the First Amendment to the Federal Constitution provides that “Con- gress shall make no law respecting an establish- ment of religion, or prohibiting the free exercise thereof.” The Fourteenth Amendment imposes those substantive limitations on the legislative power of the States and their political subdivi- sions. . . . In *Lee v. Weisman, . . .* we held that a prayer delivered by a rabbi at a middle school graduation ceremony violated that Clause. Al- though this case involves student prayer at a different type of school function, our analysis is properly guided by the principles that we en- dorsed in *Lee*. . . .

These invocations are authorized by a gov- ernment policy and take place on government property at government-sponsored school- related events. Of course, not every message delivered under such circumstances is the gov- ernment’s own. We have held, for example, that an individual’s contribution to a government- created forum was not government speech. . . . Although the District relies heavily on *Rosenberger*

and similar causes involving such forums, it is clear that the pregame ceremony is not the type of forum discussed in those cases. The Santa Fe school officials simply do not “evince either ‘by policy or by practice,’ any intent to open the [pregame ceremony] to ‘indiscriminate use,’ . . . by the student body generally.” . . . Rather, the school allows only one student, the same student for the entire season, to give the invocation. The statement or invocation, more- over, is subject to particular regulations that confine the content and topic of the student’s message. . . .

Granting only one student access to the stage at a time does not, of course, necessarily pre- clude a finding that a school has created a lim- ited public forum. Here, however, Santa Fe’s student election system ensures that only those messages deemed “appropriate” under the Dis- trict’s policy may be delivered. That is, the ma- joritarian process implemented by the District guarantees, by definition, that minority candi- dates will never prevail and that their views will be effectively silenced. . . .

In *Lee*, the school district made the related ar- gument that its policy of endorsing only “civic or nonsectarian” prayer was acceptable because it minimized the intrusion on the audience as a whole. We rejected that claim by explaining that such a majoritarian policy “does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront.” . . . Similarly, while Santa Fe’s majoritarian election might en- sure that most of the students are represented, it does nothing to protect the minority; indeed, it likely serves to intensify their offense.

Moreover, the District has failed to divorce itself from the religious content in the invoca- tions. It has not succeeded in doing so, either by claiming that its policy is “one of neutrality rather than endorsement” or by characterizing the individual student as the “circuit-breaker” in the process. Contrary to the District’s repeated assertions that it has adopted a “hands-off” ap- proach to the pregame invocation, the realities of the situation plainly reveal that its policy in- volves both perceived and actual endorsement of religion. In this case, as we found in *Lee*, the “degree of school involvement” makes it clear that the pre-game prayers bear “the imprint of

the State and thus put school-age children who objected in an untenable position.” . . .

The District has attempted to disentangle it- self from the religious messages by developing the two-step student election process. The text of the October policy, however, exposes the extent of the school’s entanglement. The elections take place at all only because the school “board has chosen to permit students to deliver a brief invo- cation and/or message.” . . . The elections thus “shall” be conducted “by the high school student council” and “[u]pon advice and direction of the high school principal.” . . . The decision whether to deliver a message is first made by majority vote of the entire student body, followed by a choice of the speaker in a separate, similar ma- jority election. Even though the particular words used by the speaker are not determined by those votes, the policy mandates that the “statement or invocation” be “consistent with the goals and purposes of this policy,” which are “to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.” . . .

In addition to involving the school in the se- lection of the speaker, the policy, by its terms, invites and encourages religious messages. The policy itself states that the purpose of the mes- sage is “to solemnize the event.” A religious mes- sage is the most obvious method of solemnizing an event. . . .Thus, the expressed purposes of the policy encourage the selection of a religious message, and that is precisely how the students understand the policy. The results of the elec- tions described in the parties’ stipulation make it clear that the students understood that the cen- tral question before them was whether prayer should be a part of the pregame ceremony. We recognize the important role that public worship plays in many communities, as well as the sin- cere desire to include public prayer as a part of various occasions so as to mark those occasions’ significance. But such religious activity in pub- lic schools, as elsewhere, must comport with the First Amendment.

The actual or perceived endorsement of the message, moreover, is established by factors be- yond just the text of the policy. Once the student speaker is selected and the message composed, the invocation is then delivered to a large audi- ence assembled as part of a regularly scheduled,

school-sponsored function conducted on school property. . . .

In this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration. . . . Regardless of the listener’s support for, or objection to, the message, an objective Santa Fe High School stu- dent will unquestionably perceive the inevitable pregame prayer as stamped with her school’s seal of approval. . . .

Most striking to us is the evolution of the current policy from the long-sanctioned office of “Student Chaplain” to the candidly titled “Prayer at Football Games” regulation. This history indicates that the District intended to preserve the practice of prayer before football games. The conclusion that the District viewed the October policy simply as a continuation of the previous policies is dramatically illustrated by the fact that the school did not conduct a new election, pursuant to the current policy, to re- place the results of the previous election, which occurred under the former policy. Given these observations, and in light of the school’s history of regular delivery of a student-led prayer at athletic events, it is reasonable to infer that the specific purpose of the policy was to preserve a popular “state-sponsored religious practice.” . . .

The District next argues that its football policy is distinguishable from the graduation prayer in *Lee* because it does not coerce students to partici- pate in religious observances. . . .

One of the purposes served by the Establish- ment Clause is to remove debate over this kind of issue from governmental supervision or con- trol. We explained in *Lee* that the “preservation and transmission of religious beliefs and wor- ship is a responsibility and a choice committed to the private sphere.” . . . The two student elec- tions authorized by the policy, coupled with the debates that presumably must precede each, im- permissibly invade that private sphere. . . . the District’s decision to hold the constitutionally problematic election is clearly “a choice attribut- able to the State.” . . .

The District further argues that attendance at the commencement ceremonies at issue in *Lee ”*differs dramatically” from attendance at high school football games, which it contends “are of

no more than passing interest to many students” and are “decidedly extracurricular,” thus dis- sipating any coercion. . . . Attendance at a high school football game, unlike showing up for class, is certainly not required in order to receive a diploma. . . .

There are some students, however, such as cheerleaders, members of the band, and, of course, the team members themselves, for whom seasonal commitments mandate their atten- dance, sometimes for class credit. The District also minimizes the importance to many students of attending and participating in extracurricu- lar activities as part of a complete educational experience. As we noted in *Lee*, “[l]aw reaches past formalism.” . . . To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is “formalistic in the extreme.” . . . The constitution, moreover, demands that the school may not force this difficult choice upon these students for “[I]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state- sponsored religious practice.” . . .

Even if we regard every high school student’s decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship. For “the government

the context in which this policy arose, and that context quells any doubt that this policy was im- plemented with the purpose of endorsing school prayer. . . .

This policy likewise does not survive a fa- cial challenge because it impermissibly imposes upon the student body a majoritarian election on the issue of prayer. Through its election scheme, the District has established a governmental elec- toral mechanism that turns the school into a forum for religious debate. It further empowers the student body majority with the authority to subject students of minority views to constitu- tionally improper messages. The award of that power alone, regardless of the students’ ultimate use of it, is not acceptable. . . . Such a system en- courages divisiveness along religious lines and threatens the imposition of coercion upon those students not desiring to participate in a religious exercise. Simply by establishing this school- related procedure, which entrusts the inher- ently nongovernmental subject of religion to a majoritarian vote, a constitutional violation has occurred. . . .

. . . The policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events.

The judgment of the Court of Appeals is, ac- cordingly, affirmed.

It is so ordered.

may no more use social pressure to enforce ortho-

doxy than it may use more direct means.” . . . The constitutional command will not permit the Dis- trict “to exact religious conformity from a student as the price” of joining her classmates at a varsity football game. . . . The narrow question before us is whether implementation of the October policy insulates the continuation of such prayers from constitutional scrutiny. It does not. . . .

The District, nevertheless, asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly—that this policy is about prayer. The District further asks us to accept what is obviously untrue: that these messages are necessary to “solemnize” a football game and that this single-student, year- long position is essential to the protection of student speech. We refuse to turn a blind eye to

###### CASE NOTES

1. *School Board Prayer*. Whether school boards can open meetings with prayers is a subject of continuing dispute. In *Marsh v*. *Chambers,* 463 U.S. 783, 103 S. Ct. 3330 (1983), the U.S. Supreme Court upheld prayers at legisla- tive sessions. Based on this precedent many school boards continue to have prayers at board meetings. However, the U.S. Court of Appeals, Fifth Circuit, has ruled that such prayers at board meetings are unconstitu- tional. In this case, the prayers were presented by board members, school administrators, teachers, or students and each prayer over a two-year period had referenced Jesus Christ, God, and the Lord. The court said that a rea- sonable observer would conclude that the

prayers indicated an affiliation with Christi- anity and, thereby, violated the Establishment Clause. *Doe v*. *Tangipahoa Parish School Board*, 473 F.3d 188 (5th Cir. 2006). Similarly, the U.S. Court of Appeals, 9th Circuit, has held that re- peated references at school board meetings to Jesus Christ and solemnizing meetings in the name of Jesus Christ displayed government support and allegiance to a particular sect or creed, and was therefore unconstitutional. *Bacus v*. *Palo Verde Unified School District Board of Education*, 52 Fed. Appx. 355 (9th Cir. 2002). On the other hand, a federal district court in Delaware upheld a school board’s practice of opening meetings with a prayer as not of- fending the Establishment Clause. *Dobrich v*. *Walls*, 380 F. Supp. 2d 366 (D. Del. 2005). See also *Doe v. Indian River School District*, 685 F.Supp.2d 524 (D.Del.) 2010.

1. Prayers conducted by the Cleveland, Ohio, school board more closely resemble the school prayers in *Lee v*. *Weisman* than the legisla- tive prayers in *Marsh v*. *Chambers*. In holding the Cleveland prayers unconstitutional for violating the Establishment Clause, the U.S. Court of Appeals, Sixth Circuit, said that the board-conducted prayers violated all three *Lemon* tests. As to violating the purpose test, the court said that the purpose was religious because the board meetings could have been conducted without resort to prayers. Con- cerning the primary effect of endorsing reli- gion, the court found the prayers were clearly sectarian, having repeating references to Jesus and the Bible and conducted by a Christian minister. Moreover, the school board’s prac- tice of choosing a member from the local com- munity to give the prayers and the fact that the school board president composed and delivered some of the prayers created an ex- cessive entanglement. Thus, the school board prayers failed on all three counts. *Coles v. Cleveland Board of Education,* 171 F. 3d 369 (6th Cir. 1999).
2. Although commencement prayers are gener- ally held to be violative of either the Estab- lishment of Free Exercise Clause, the U.S. Court of Appeals, Eighth Circuit, has upheld the constitutionality of a board member’s recitation of the Lord’s Prayer, inviting par- ents and students to join him. The prayer

was not a part of the scheduled events and the school superintendent had earlier ad- vised that prayers by speakers were inappro- priate. No one sought to prevent the school board member from reciting the prayer. The court held that the prayer was the board member’s “private speech” and could not be attributed to the school district. *Doe v*. *School District of City of Norfolk,* 340 F.3d 605 (8th Cir. 2003).

1. Whether public schools are enhancing religion by having performances of religious music hit a high note of discord in the 2009 “Ave Maria” case. The school superintendent in Everett, Washington, had disallowed the playing of the piece at high school graduation, and a stu- dent, supported by the religious right Ruther- ford Institute, sued the school district and the superintendent, personally. The U.S. Court of Appeals, Ninth Circuit, upheld the school su- perintendent’s decision pointing out that at a graduation ceremony there is a “captive audi- ence” that is subjected to the program of the school. In such a situation it is reasonable for a school official to prohibit the performance of an “obviously religious piece.” The U.S. Supreme Court rejected an appeal, but not without controversy. Justice Alito, an adamant church advocate on the high court, disagreed vehemently with the high rejection indicating that he would have reversed the Ninth Circuit on the grounds that the student’s free speech trumped the school’s efforts to maintain “free exercise” of religion for those attending the graduation ceremony by not imposing and proselytizing religion upon them. *Kathryn Nurre (student) v. Carol Whitehead (Superinten- dent of Schools),* 580 F.3d 1087 (2009), *cert. den*., 130 S.Ct. 1939 (2010).
2. The U.S. Court of Appeals for the Fifth Cir- cuit has held unconstitutional the conduct of prayer by a coach at athletic games and prac- tices. This court ruled that it does not violate the Establishment Clause to permit the choir to adopt the theme of Christian religious songs. The choir had a legitimate secular pur- pose in teaching students to sight-read and sing a capella. Moreover, the court observed that given the dominance of religious music in the choral music, to forbid religious songs would constitute hostility toward religion.

*Doe v*. *Duncanville Independent School District,*

70 F.3d 402, 104 Educ. L. Rep. 1032 (5th Cir.

1995). *See also Bauchman v*. *West High School,*

900 F. Supp. 254, 104 Educ. L. Rep. 292 (D.

Utah 1995).

1. The U.S. Court of Appeals for the Sixth Cir- cuit has ruled that the use of a “Blue Devil” as the school athletic mascot does not violate the Establishment Clause. *Kunselman v*. *Western Reserve Local School District,* 70 F.3d 931, 105 Educ. L. Rep. 43 (6th Cir. 1995).
2. Where a school district allowed morning prayer to be broadcast over the school inter- com and allowed student-led prayer in the classrooms during school hours, the court enjoined the school’s action on the likelihood that the plaintiff would be successful on the merits in showing that the functions violated the Establishment Clause. *Herdahl v. Pontotoc County School District,* 887 F. Supp. 902, 101 Educ. L. Rep. 190 (D. Miss. 1995).
3. Is it constitutionally permissible for stu- dents to proselytize in the classroom? An elementary school student brought an action challenging the school’s policy of prohibit- ing him from distributing gifts (pencils and candy canes) containing religious messages in classroom during holiday parties; the fed- eral court ruled that the school prohibiting an elementary school student’s distribution of pencils and candy canes with religious messages did not violate the student’s First Amendment rights.

In upholding the school’s restrictions, the court assumed that the elementary school student was attempting to freely speak and exercise his religious beliefs. Although the court added, “The facts leave little doubt that plaintiff’s mother, Dana Walz, is the driving force behind the distribution of these items and this lawsuit. It is highly unlikely that plaintiff, who was only four at the time he at- tempted to distribute the pencils, was able to independently read and advocate the dissem- ination of the message on the pencils. Addi- tionally, Mrs. Walz has consistently inquired about and challenged the school’s limitations on the distribution of such items and she is the one who is dissatisfied with the accom- modations made by the school.” *Walz v. Egg Harbor Township Board of Education,* 342 F.3d 271 (3rd Cir. 2003).

1. The boundary between proselytizing and the exercise of free speech may be particularly difficult to discern at times. A high school student was co-salutatorian and was invited to deliver a speech at the school’s gradua- tion ceremony. The speech centered around language intended to inculcate religion. The principal requested a copy of the speech and determined that allowing the pupil to deliver proselytizing comments at a public gradua- tion would violate the Establishment Clause of both the U.S. and California Constitu- tions. The pupil delivered the speech without the proselytizing language. A year later, the pupil sued, alleging a violation of his free- dom of religion, speech, and equal protection rights under the federal Constitution. The court ruled that the school’s refusal to allow the student to deliver a sectarian speech or prayer as part of the graduation was *neces- sary* to avoid violating the Establishment Clause. *Lassonde v*. *Pleasanton Unified School District,* 320 F.3d 979 (9th Cir. 2003). *See also Cole v****.*** *Oroville Union High School District,* 228 F.3d 1092 (9th Cir. 2000), *cert. denied,* 532 U.S. 905, 121 S. Ct. 1228 (2001).
2. *Dancing*. Whether dancing is a religious ac- tivity has been ruled upon by the courts. In a case where a local school board policy prohibited dancing on school property, the students and parents filed suit, claiming the policy violated the Establishment Clause. Religious groups of the small rural commu- nity opposed dancing and spoke out in sup- port of the school policy. The court ruled that dancing was not religious, but that it was not unconstitutional for a school board to have a rule that is compatible with the belief of a large, vocal segment of the community. The court, in holding for the board, stated that the plaintiff’s remedy is to be found at the ballot box and not in the Constitution. *Clayton by Clayton v*. *Place,* 884 F.2d 376 (8th Cir. 1989).
3. *Religious Garb in Public Schools*. Whether public school teachers can wear religious garb of any particular religious order or so- ciety has been litigated on several occasions. Although there is no precise definition of what constitutes religious garments, some states have sought to prohibit any apparel showing the person belongs to a particular sect, denomination, or order. *See* Donald E.

Boles, *The Two Swords* (Ames: Iowa State University Press, 1967), p. 222.

In 1894, the Pennsylvania Supreme Court held that the wearing by nuns of garb and insignia of the Sisterhood of St. Joseph while teaching in the public schools did not consti- tute sectarian teaching. *Hysong v*. *School Dis- trict of Gallitzin Borough,* 164 Pa. 629, 30 A. 482 (1894). The court reasoned that to prohibit the wearing of such apparel would violate the teachers’ religious liberty. Later, the leg- islature of Pennsylvania prohibited the wear- ing of garb by public school teachers while in performance of their duties. This statute was subsequently upheld by the Pennsylvania Supreme Court. This time the court main- tained that the Act was a reasonable exercise of state power in regulating the educational system to prevent sectarian control. The court found that the legislation “is directed against acts, not beliefs, and only against acts of the teacher while engaged in the performance of his or her duties as such teacher.” *Common- wealth v. Herr,* 229 Pa. 132, 78 A. 68 (1910).

1. In a case where a West Virginia school board allowed a group to distribute Bibles from tables located in the school hallways (stu- dents were not coerced to accept the Bibles), the federal court held that the Constitution did not require the withholding of access to the Bible group. According to the court, if such access were withheld, it would cre- ate the impression that religious speech was disfavored. Although upholding the prac- tice as a valid exercise of freedom of speech in high schools, the court nevertheless held that such a practice could not be permitted in elementary schools because of the possibility of coercing younger and more impression- able children. *Peck v*. *Upshur County Board of Education,* 155 F.3d 274 (4th Cir. 1998).
2. The No Child Left Behind Act of 2001 (P.L. 107–110, 115 Stat. 1425) has a school prayer provision. It states the secretary of edu- cation shall provide guidelines on “constitu- tionally protected prayer in public elementary and secondary schools, including making the guidance available on the Internet.” The guid- ance will reflect the current state of the law concerning protected prayer. Each local educa- tional agency should certify in writing that no local policy prevents or denies participating in

protected prayer. The secretary of education is required to enforce this provision of NCLB.

1. *Holiday Displays*. In a New York case involv- ing the holiday display policy of the City of New York Department of Education, the fed- eral judge writing for the court started his opinion by saying:

No holiday season is complete, at least for the court, without one or more First Amendment challenges to public holiday displays.

The policy allowed the menorah (a nine- branch candelabrum) displayed as a symbol of the Jewish holiday Chanukah and the star and crescent to be displayed as a symbol of the Is- lamic holiday of Ramadan, but it did not allow a créche or nativity scene to be displayed as a symbol of the Christian holiday of Christmas.

Plaintiff Skoros, a Roman Catholic, sued claiming the policy violated her children’s rights under the Establishment and Free Exer- cise Clauses of the First Amendment and her rights of parental control under the First and Fourteenth Amendments. The policy of the Education Department stated that “The dis- play of secular holiday symbol decorations is permitted. Such symbols include, but are not limited to, Christmas trees, menorahs, and the star and crescent.” The holiday displays were not to celebrate or inculcate religion, but rather to foster understanding and respect for rights and beliefs of others. The Catholic League for Religious and Civil Rights had unsuccessfully petitioned to have the crèche included.

The Education Department defended its policy by pointing out that the U.S. Supreme Court had recognized both the menorah and the Christmas tree as secular symbols. The court noted that the display of the crèche as a part of a larger holiday display had been up- held by the U.S. Supreme Court in *Lynch v. Donnelly,* 465 U.S. 668, 104 S. Ct. 1355 (1984),

but a crèche displayed where it was the sole religious symbol had been stricken by the

U.S. Supreme Court in *County of Allegheny v. ACLU,* 492 U.S. 573, 109 S. Ct. 3086 (1989).

In making its decision the federal court applied the *Lemon* test: (a) purpose, (b) in- hibit or enhance, and (c) excessive entangle- ment. With regard to purpose, the court said that the purpose of the policy was secular and designed to promote pluralism. Second,

the court ruled that the policy to represent Christmas with a Christmas tree instead of a crèche did not indicate hostility toward or inhibiting of the Christian religion. The court examined the policy under the second prong of the *Lemon* test in light of Justice O’Connor’s “endorsement test” that she advanced in *Allegheny*. The court concluded with regard to this prong that the objective, reasonable observer would not conclude that the chal- lenged policy endorsed Judaism or Islam. With regard to the third prong of *Lemon,* the court ruled that there was not excessive en- tanglement because the policy did in no way encroach or become mixed with church sec- tarian functions. Moreover, the policy did not cede government authority to a sectar- ian group or take sides in a religious dispute. Finally, the court found the plaintiff’s free ex- ercise claim to be without merit because the school policy did not impose a belief on the plaintiff’s children with such secular displays. The court did note, however, that the secular nature of the menorah was misconstrued, but the problem was remedied by having it dis- played with other secular symbols. *Skoros v. City of New York,* 437 F.3d (1st Cir. 2006).

exists, then all groups, regardless of their religious, political, or philosophical beliefs, are allowed to form and hold meetings and activities in the pub- lic high school. Such groups must be student initi- ated and not sponsored by the school.

The Supreme Court on June 4, 1990, upheld the constitutionality of the Equal Access Act. In *Board of Education of the Westside Community Schools v. Mergens,*284 the Court ruled that if a school allows any noncurricular groups to meet, then a limited open forum is created, and any student-initiated group has a right to assemble. These groups would be allowed to convene dur- ing noninstructional time when other groups, such as the chess club, meet.

*Widmar* and *Mergens* led the courts to use the free speech test more frequently when dealing with church and state issues. The U.S. Supreme Court, when addressing free speech, uses a “forum analy- sis.” According to this analysis, freedom of speech must be classified into the type of forum in which it is delivered. As elaborated more extensively later in this book, there are three types of public forums:

* 1. the traditional public forum—open public ar- eas, parks, sidewalks—in these venues a speech is extensively protected and can only be withdrawn or restrained with a narrowly drawn and compel-

ling government interest; (2) the “limited public

### Equal Access Act

The Equal Access Act, passed by the U.S. Con- gress in 1984, was based on the free speech de- termination of *Widmar v. Vincent.*283 In *Widmar,* the University of Missouri had refused to allow a religious group the use of university facilities because of the possible violation of the Establish- ment Clause. The court ruled that to refuse reli- gious groups access to facilities, while allowing other groups to use the same facilities, violated the students’ right of free speech. The Reagan administration, using this case as a rationale, ap- plied the equal access concept to noncurricular high school activities in order to allow religious functions in public schools. The Equal Access Act provides that if a school district receives federal money and allows noncurricular activities and club meetings, then it is unlawful to deny students the right to meet for religious activities. There- fore, if a public high school has noncurricular meetings, such as a photography club, and this activity is not directly related to a specific class or a class requirement, then the school has created a “limited open forum.” If a limited open forum

forum,” where the state opens its property for pub- lic use—a public school is not generally considered to be a “limited public forum” unless school officials have granted use of the school to outsiders for use beyond the curricular interests of the school; and

(3) the “closed forum,” where the public school is not open for general public use by various interest groups not related to school curricular purposes.

*Students Have a Right to Organize Their Own Groups in Public Schools, Whether These Groups Be Religious, Political, or Philosophical*



#### Board of Education of the Westside Community Schools v. Mergens

*Supreme Court of the United States, 1990.*

*496 U.S. 226, 110 S. Ct. 2356.*

Justice O’CONNOR delivered the opinion of the Court. . . .

This case requires us to decide whether the Equal Access Act, 98 Stat. 1302, 20 U.S.C.

§§ 4071–4074, prohibits Westside High School from denying a student religious group permis- sion to meet on school premises during non- instructional time, and if so, whether the Act, so construed, violates the Establishment Clause of the First Amendment.

Respondents are current and former students at Westside High School, a public secondary school in Omaha, Nebraska. . . .

Students at Westside High School are permit- ted to join various student groups and clubs, all of which meet after school hours on school premises. The students may choose from ap- proximately 30 recognized groups on a volun- tary basis. . . .

School Board Policy 5610 concerning “Student Clubs and Organizations” recognizes these stu- dent clubs as a “vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills.” . . . Board Policy 5610 also provides that each club shall have faculty sponsorship and that “clubs and organiza- tions shall not be sponsored by any political or religious organization, or by any organization which denies membership on the basis of race, color, creed, sex or political belief.” Board Policy 6180 on “Recognition of Religious Beliefs and Customs” requires that “[s]tudents adhering to a specific set of religious beliefs or holding to little or no belief shall be alike respected.” In addition, Board Policy 5450 recognizes its students’ “Free- dom of Expression,” consistent with the author- ity of the Board.

There is no written school board policy con- cerning the formation of student clubs. Rather, students wishing to form a club present their re- quest to a school official who determines whether the proposed club’s goals and objectives are con- sistent with school board policies and with the school district’s “Mission and Goals”—a broadly worded “blueprint” that expresses the district’s commitment to teaching academic, physical, civic, and personal skills and values.

In January 1985, respondent Bridget Mergens met with Westside’s principal, Dr. Findley, and requested permission to form a Christian club at the school. . . .

Findley denied the request, as did associ- ate superintendent Tangdell. In February 1985,

Findley and Tangdell informed Mergens that they had discussed the matter with Super- intendent Hanson and that he had agreed that her request should be denied. The school of- ficials explained that school policy required all student clubs to have a faculty sponsor, which the proposed religious club would not or could not have, and that a religious club at the school would violate the Establishment Clause. In March 1985, Mergens appealed the denial of her request to the Board of Education, but the Board voted to uphold the denial. . . .

Respondents . . . then brought this suit in the United States District Court for the District of Nebraska. . . . They alleged that petitioners’ refusal to permit the proposed club to meet at Westside violated the Equal Access Act, 20 U.S.C.

§§ 4071–4074, which prohibits public secondary schools that receive federal financial assistance and that maintain a “limited open forum” from denying “equal access” to students who wish to meet within the forum on the basis of the content of the speech at such meetings. . . . Respondents further alleged that petitioners’ actions denied them their First and Fourteenth Amendment rights to freedom of speech, association, and the free exercise of religion. Petitioners responded that the Equal Access Act did not apply to West- side and that, if the Act did apply, it violated the Establishment Clause of the First Amendment and was therefore unconstitutional. . . .

In *Widmar v. Vincent,* 454 U.S. 263 (1981), we invalidated, on free speech grounds, a state uni- versity regulation that prohibited student use of school facilities “for purposes of religious wor- ship or religious teaching.” In doing so, we held that an “equal access” policy would not violate the Establishment Clause under our decision in *Lemon v. Kurtzman*. . . . In particular, we held that such a policy would have a secular purpose, would not have the primary effect of advancing religion, and would not result in excessive en- tanglement between government and religion. . . . We noted, however, that “[u]niversity students are, of course, young adults. They are less im- pressionable than younger students and should be able to appreciate that the University’s policy is one of neutrality toward religion.”

In 1984, Congress extended the reasoning of *Widmar* to public secondary schools. Under the Equal Access Act, a public secondary school with a “limited open forum” is prohibited from

discriminating against students who wish to conduct a meeting within that forum on the basis of the “religious, political, philosophical, or other content of the speech at such meetings.” . . . Specifically, the Act provides:

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal ac- cess or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the reli- gious, political, philosophical, or other content of the speech at such meetings. 20 U.S.C. § 4071(a).

A “limited open forum” exists whenever a public secondary school “grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school prem- ises during noninstructional time.” “Meeting” is defined to include “those activities of student groups which are permitted under a school’s limited open forum and are not directly related to the school curriculum.” “Noninstructional time” is defined to mean “time set aside by the school before actual classroom instruction be- gins or after actual classroom instruction ends.” Thus, even if a public secondary school allows only one “noncurriculum related student group” to meet, the Act’s obligations are triggered and the school may not deny other clubs, on the ba- sis of the content of their speech, equal access to meet on school premises during noninstruc- tional time.

The Act further specifies that “[s]chools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum” if the school uniformly provides that the meetings are voluntary and student initiated; are not sponsored by the school, the government, or its agents or employees; do not materially and substantially interfere with the orderly conduct of educational activities within the school; and are not directed, controlled, con- ducted, or regularly attended by “nonschool persons.” . . . “Sponsorship” is defined to mean “the act of promoting, leading, or participating in a meeting. The assignment of a teacher, adminis- trator, or other school employee to a meeting for custodial purposes does not constitute sponsor- ship of the meeting.” If the meetings are religious, employees or agents of the school or government

may attend only in a “non-participatory capac- ity.” Moreover, a State may not influence the form of any religious activity, require any per- son to participate in such activity, or compel any school agent or employee to attend a meeting if the content of the speech at the meeting is con- trary to that person’s beliefs. . . .

The parties agree that Westside High School receives federal financial assistance and is a pub- lic secondary school within the meaning of the Act. . . . The Act’s obligation to grant equal ac- cess to student groups is therefore triggered if Westside maintains a “limited open forum”— i.e., if it permits one or more “noncurriculum re- lated student groups” to meet on campus before or after classes.

Unfortunately, the Act does not define the crucial phrase “noncurriculum related student group.” Our immediate task is therefore one of statutory interpretation. We begin, of course, with the language of the statute. . . . The com- mon meaning of the term “curriculum” is “the whole body of courses offered by an educational institution or one of its branches.” *Webster’s Third New International Dictionary* 557 (1976); see also *Black’s Law Dictionary* 345 (5th ed. 1979) (“The set of studies or courses for a particular period, des- ignated by a school or branch of a school”). . . . Any sensible interpretation of “noncurriculum related student group” must therefore be an- chored in the notion that such student groups are those that are not related to the body of courses offered by the school. The difficult question is the degree of “unrelatedness to the curriculum” required for a group to be considered “noncur- riculum related.”

The Act’s definition of the sort of “meeting[s]” that must be accommodated under the statute . . . sheds some light on this question.

“[T]he term ‘meeting’ includes those activities of student groups which are . . . not *directly related* to the school curriculum.” . . . Congress’ use of the phrase “directly related” implies that student groups directly related to the subject matter of courses offered by the school do not fall within the “noncurriculum related” category and would therefore be considered “curriculum related.”

The logic of the Act also supports this view, namely, that a curriculum-related student group is one that has more than just a tangential or at- tenuated relationship to courses offered by the

school. Because the purpose of granting equal access is to prohibit discrimination between re- ligious or political clubs on the one hand and other noncurriculum-related student groups on the other, the Act is premised on the notion that a religious or political club is itself likely to be a noncurriculum-related student group. It fol- lows, then, that a student group that is “curric- ulum related” must at least have a more direct relationship to the curriculum than a religious or political club would have.

. . . During congressional debate on the sub- ject, legislators referred to a number of different definitions, and thus both petitioners and re- spondents can cite to legislative history favoring their interpretation of the phrase. . . .

We think it significant, however, that the Act, which was passed by wide, bipartisan majori- ties in both the House and the Senate, reflects at least some consensus on a broad legislative pur- pose. The committee reports indicate that the Act was intended to address perceived wide- spread discrimination against religious speech in public schools. . . . The committee reports also show that the Act was enacted in part in re- sponse to two federal appellate court decisions holding that student religious groups could not, consistent with the Establishment Clause, meet on school premises during noninstructional time. . . . A broad reading of the Act would be consistent with the views of those who sought to end discrimination by allowing students to meet and discuss religion before and after classes.

In light of this legislative purpose, we think that the term “noncurriculum related student group” is best interpreted broadly to mean any student group that does not *directly* relate to the body of courses offered by the school. In our view, a student group directly relates to a school’s curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject mat- ter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit. We think this limited definition of groups that directly relate to the curriculum is a commonsense interpreta- tion of the Act that is consistent with Congress’ intent to provide a low threshold for triggering the Act’s requirements.

For example, a French club would directly re- late to the curriculum if a school taught French in a regularly offered course or planned to teach the subject in the near future. A school’s student government would generally relate directly to the curriculum to the extent that it addresses concerns, solicits opinions, and formulates pro- posals pertaining to the body of courses offered by the school. If participation in a school’s band or orchestra were required for the band or or- chestra classes, or resulted in academic credit, then those groups would also directly relate to the curriculum. The existence of such groups at a school would not trigger the Act’s obligations.

On the other hand, unless a school could show that groups such as a chess club, a stamp-collecting club, or a community service club fell within our description of groups that directly relate to the curriculum, such groups would be “noncurricu- lum related student groups” for purposes of the Act. The existence of such groups would create a “limited open forum” under the Act and would prohibit the school from denying equal access to any other student group on the basis of the con- tent of the group’s speech. Whether a specific student group is a “noncurriculum related stu- dent group” will therefore depend on a particu- lar school’s curriculum, but such determinations would be subject to factual findings well within the competence of trial courts to make. . . .

The parties in this case focus their dispute on 10 of Westside’s approximately 30 voluntary student clubs: Interact (a service club related to Rotary International); Chess; Sub-surfers (a club for students interested in scuba diving); National Honor Society; Photography; Welcome to Westside (a club to introduce new students to the school); Future Business Leaders of America; Zonta (the female counterpart to Interact); Stu- dent Advisory Board (student government); and Student Forum (student government). . . . Peti- tioners contend that all of these student activities are curriculum-related because they further the goals of particular aspects of the school’s curric- ulum. Welcome to Westside, for example, helps “further the School’s overall goal of developing effective citizens by requiring student mem- bers to contribute to their fellow students.” . . . The student government clubs “advance the goals of the School’s political science classes by providing an understanding and appreciation of

government processes.” Sub-surfers furthers “one of the essential goals of the Physical Edu- cation Department—enabling students to de- velop lifelong recreational interests.” Chess “supplement[s] math and science courses be- cause it enhances students’ ability to engage in critical thought processes.” Participation in Interact and Zonta “promotes effective citizen- ship, a critical goal of the WHS curriculum, specifically the Social Studies Department.”

To the extent that petitioners contend that “curriculum related” means anything remotely related to abstract educational goals, however, we reject that argument. To define “curricu- lum related” in a way that results in almost no schools having limited open fora, or in a way that permits schools to evade the Act by strategi- cally describing existing student groups, would render the Act merely hortatory. . . . (“[A] lim- ited open forum should be triggered by what a school does, not by what it says.”) As the court below explained:

Allowing such a broad interpretation of “curriculum-related” would make the [Act] mean- ingless. A school’s administration could sim- ply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those clubs to some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content. This is exactly the result that Congress sought to prohibit by enacting the [Act]. A public secondary school cannot simply declare that it maintains a closed forum and then dis- criminate against a particular student group on the basis of the content of the speech of that group. . . .

Rather, we think it clear that Westside’s exist- ing student groups include one or more “non- curriculum related student groups.” Although Westside’s physical education classes apparently include swimming, . . . counsel stated at oral ar- gument that scuba diving is not taught in any regularly offered course at the school. . . . Based on Westside’s own description of the group, Sub- surfers does not directly relate to the curriculum as a whole in the same way that a student gov- ernment or similar group might. . . . Moreover, participation in Sub-surfers is not required by any course at the school and does not result in extra academic credit. Thus, Sub-surfers is a

“noncurriculum related student group” for pur- poses of the Act. Similarly, although math teach- ers at Westside have encouraged their students to play chess, chess is not taught in any regularly offered course at the school, . . . and participation in the chess club is not required for any class and does not result in extra credit for any class. . . . The chess club is therefore another “noncurriculum- related student group” at Westside. . . . The record therefore supports a finding that Westside has maintained a limited open forum under the Act.

Although our definition of “noncurriculum re- lated student activities” looks to a school’s actual practice rather than its stated policy, we note that our conclusion is also supported by the school’s own description of its student activities. . . . [T]he school states that Band “is included in our regular curriculum”; Choir “is a course offered as part of the curriculum”; Distributive Education “is an extension of the Distributive Education class”; International Club is “developed through our foreign language classes”; Latin Club is “de- signed for those students who are taking Latin as a foreign language”; Student Publications “includes classes offered in preparation of the yearbook (Shield) and the student newspaper (Lance)”; Dramatics “is an extension of a regular academic class”; and Orchestra “is an extension of our regular curriculum.” These descriptions constitute persuasive evidence that these student clubs directly relate to the curriculum. By infer- ence, however, the fact that the descriptions of student activities such as Sub-surfers and chess do not include such references strongly suggests that those clubs do not, by the school’s own ad- mission, directly relate to the curriculum. We therefore conclude that Westside permits “one or more noncurriculum related student groups to meet on school premises during noninstructional time” . . . Because Westside maintains a “limited open forum” under the Act, it is prohibited from discriminating, based on the content of the stu- dents’ speech, against students who wish to meet on school premises during noninstructional time.

The remaining statutory question is whether petitioners’ denial of respondents’ request to form a religious group constitutes a denial of “equal access” to the school’s limited open fo- rum. Although the school apparently permits respondents to meet informally after school, . . . respondents seek equal access in the form of

official recognition by the school. Official rec- ognition allows student clubs to be part of the student activities program and carries with it ac- cess to the school newspaper, bulletin boards, the public address system, and the annual Club Fair. Given that the Act explicitly prohibits denial of “equal access . . . to . . . any students who wish to conduct a meeting within [the school’s] limited open forum” on the basis of the religious con- tent of the speech at such meetings, . . . we hold that Westside’s denial of respondents’ request to form a Christian club denies them “equal access” under the Act.

Because we rest our conclusion on statutory grounds, we need not decide—and therefore ex- press no opinion on—whether the First Amend- ment requires the same result.

Petitioners contend that even if Westside has created a limited open forum within the mean- ing of the Act, its denial of official recognition to the proposed Christian club must nevertheless stand because the Act violates the Establishment Clause of the First Amendment, as applied to the States through the Fourteenth Amendment. Specifically, petitioners maintain that because the school’s recognized student activities are an integral part of its educational mission, offi- cial recognition of respondents’ proposed club would effectively incorporate religious activi- ties into the school’s official program, endorse participation in the religious club, and provide the club with an official platform to proselytize other students.

We disagree. In *Widmar,* we applied the three- part *Lemon* test to hold that an “equal access” policy, at the university level, does not violate the Establishment Clause. . . . We concluded that “an open-forum policy, including nondiscrimi- nation against religious speech, would have a secular purpose,” . . . and would in fact *avoid* entanglement with religion. . . . We also found that although incidental benefits accrued to re- ligious groups who used university facilities, this result did not amount to an establishment of religion. . . .

We think the logic of *Widmar* applies with equal force to the Equal Access Act. As an initial matter, the Act’s prohibition of discrimination on the basis of “political, philosophical, or other” speech as well as religious speech is a sufficient basis for meeting the secular purpose prong of

the *Lemon* test. . . . Congress’ avowed purpose— to prevent discrimination against religious and other types of speech—is undeniably secular. . . . Petitioners’ principal contention is that the Act has the primary effect of advancing religion. Specifically, petitioners urge that, because the student religious meetings are held under school aegis, and because the state’s compulsory at- tendance laws bring the students together (and thereby provide a ready-made audience for stu- dent evangelists), an objective observer in the position of a secondary school student will per- ceive official school support for such religious

meetings. . . .

We disagree. . . . We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis. . . .

. . . To the extent that a religious club is merely one of many different student-initiated volun- tary clubs, students should perceive no message of government endorsement of religion. Thus, we conclude that the Act does not, at least on its face and as applied to Westside, have the pri- mary effect of advancing religion. . . .

Petitioners’ final argument is that by com- plying with the Act’s requirement, the school risks excessive entanglement between govern- ment and religion. The proposed club, petition- ers urge, would be required to have a faculty sponsor who would be charged with actively directing the activities of the group, guiding its leaders, and ensuring balance in the presenta- tion of controversial ideas. Petitioners claim that this influence over the club’s religious program would entangle the government in day-to-day surveillance of religion of the type forbidden by the Establishment Clause.

Under the Act, however, faculty monitors may not participate in any religious meetings, and nonschool persons may not direct, control, or regularly attend activities of student groups. . . . Moreover, the Act prohibits school “sponsorship” of any religious meetings, . . . which means that school officials may not promote, lead, or partici- pate in any such meeting. . . . Although the Act permits “[t]he assignment of a teacher, adminis- trator, or other school employee to the meeting for custodial purposes,” . . . such custodial oversight of the student-initiated religious group, merely

to ensure order and good behavior, does not impermissibly entangle government in the day- to-day surveillance or administration of religious activities. . . . Accordingly, we hold that the Equal Access Act does not on its face contravene the Establishment Clause. Because we hold that pe- titioners have violated the Act, we do not decide respondents’ claims under the Free Speech and Free Exercise Clauses. For the foregoing reasons, the judgment of the Court of Appeals is affirmed.

It is so ordered.

###### CASE NOTES

1. Interpretation of the Equal Access Act after *Mergens* has become an interesting amalgama- tion of the statute and various provisions of the U.S. Constitution, including the Establish- ment, Free Exercise, Freedom of Speech, and Equal Protection Clauses. In *HSU v*. *Roslyn Union Free School District No*. *3,* the U.S. Court of Appeals, Second Circuit, addressed the is- sue of whether a Bible club could operate in a public high school if the club charter stated that only Christians could be club officers. The school refused the club charter for this reason, and the students sued. The court, in a com- plicated web of reasoning, concluded that the club’s Christian officers requirement is essen- tial to the expressive content of the meetings and to the club’s preservation of its purpose and identity and is therefore protected by the Equal Access Act. The leadership provision of the club’s constitution applied only to the president, vice-president, and music coordina- tor. The court concluded that unconditioned recognition of the club would not violate the Establishment Clause or the Equal Protection Clause of the U.S. Constitution. Moreover, in spite of the club’s exclusionary requirements, to deny the club recognition as an after-school Bible group would constitute irreparable in- jury to the Bible club students and violate their rights under the Equal Access Act. *HSU v*. *Roslyn Union Free School District No*. 3, 85 F.3d 839 (2nd Cir. 1996).
2. The Equal Access Act was passed, at least partially, with religious motivation as a re- monstrance against public school secularism, which effectively prevented sectarian activi- ties on school grounds and during the school day. The words of the Act requiring schools to

provide for a “limited open forum on the ba- sis of religious, political philosophy and other content” were carefully fashioned but are now having some effects that were not fully antici- pated. The Act in effect removes the discretion and autonomy in deciding what school activi- ties will be permitted from the hands of school boards and vests them in the courts. Moreover, for the Equal Access Act itself to be constitu- tional, it had to be broader than simply a sub- terfuge to assure that religious clubs had access to school buildings and school time. As it turns out, as *Mergens* indicates, the only meetings that schools can prohibit are those that would materially and substantially interfere with the orderly conduct of the school. Thus, we have begun to see considerable waffling by school boards and courts as they experience some discomfort as a result of less conventional club meetings. A good example is a recent lower federal court case in California where the court found that a school district had violated the Equal Access Act when the school board voted to deny the application for club status of the Gay Straight Alliance Club. The court observed that the school board would likely be able to show that groups of students dis- cussing homophobia and acceptance of homo- sexuals would not disrupt the school. Thus, because the board had created a “limited open forum” with several other clubs being recog- nized, the gay students group had to be given the same rights and privileges as the other student groups. *Colin v*. *Orange Unified School District,* 83 F. Supp. 2d 1135 (C.D. Cal. 2000). *See also Boyd County High School Gay Straight Alliance v*. *Board of Education of Boyd County,* 258 F. Supp. 2d 667 (E.D. Ky. 2003) (ruling it violated Equal Access Act to deny club same access to school facilities as given other non- curricular club); *Franklin Central Gay/Straight Alliance v. Franklin Township Community School Corp.,* 2002 WL 32097530 (S.D. Ind. 2002).

1. The definition of “curricular” and “noncur- ricular” groups continues to cause consider- able litigation. Where a gay tolerance group challenged a Minnesota school district’s cat- egorization of cheerleading and synchronized swimming as “curricular,” the U.S. Court of Appeals, Eighth Circuit, 2008, ruled that the categorization did not comport with the

Equal Access Act’s definition of “curricular.” Accordingly, the school was determined to be a limited open forum and the gay toler- ance group could be provided equal access to school accommodations. *Straights and Gays for Equality v. Osseo Area Schools—District No. 279*, 540 F.3d 911 (8th Cir. 2008).

In 1995, the U.S. Court of Appeals for the Ninth Circuit ruled the Equal Access Act was violated when students were not permitted to have a religious club meeting during lunch- time. The school had previously allowed other nonreligious clubs to hold such meet- ings. The court noted that the lunch period was noninstructional time within the mean- ing of the Equal Access Act and that to hold voluntary religious meetings during that time did not violate the Establishment Clause. *Ceniceros v*. *Board of Trustees of the San Diego Unified School District,* 66 F.3d 1535, 103 Educ.

L. Rep. 934 (9th Cir. 1995).

1. If a school recognizes a nonreligious club, it must not deny recognition to a religious one. Where a school board recognized the school Key Club but refused recognition to the Bible Club, the court ruled that because the Key Club was not curriculum related, the school had created a “limited open forum” under the Equal Access Act and must therefore recog- nize religious clubs such as the Bible Club as well. Not to do so would violate the Equal Ac- cess Act. *Pope by Pope v*. *East Brunswick Board of Education,* 12 F.3d 1244, 88 Educ. L. Rep. 552 (3rd Cir. 1993).
2. A school refused to allow Bible Club to meet during “activity period” held from 8:15 a.m. until 8:54 a.m. During this activity period, students normally could take makeup tests, hang out in the gymnasium, attend tutoring sessions, etc. The court ruled this “activity pe- riod” could be classified as “noninstructional time” within Equal Access Act; therefore, the Bible Club could meet during “activity pe- riod.” *Donovan v*. *Punxsutawney Area School Board,* 336 F.3d 211 (3rd Cir. 2003).

### Facilities

After *Widmar* and *Mergens,* the courts began to rely on the free speech test more frequently when dealing with church–state issues. They

reasoned that if religious groups were denied the use of school facilities, while other groups, such as civic organizations, scouts, and so forth, were permitted use of them, then the religious groups’ free speech rights would be denied. To hold otherwise would violate the requirement of neutrality. The *free speech test,* sometimes called the *public forum test,* has been applied to the use of school facilities. In earlier cases, the courts ruled that school boards could adopt policies that allowed groups to use school facilities based on the type of organization and the nature of its activities. For example, a school board could allow school facilities to be used by the Boy Scouts and Girl Scouts but could deny access to religious groups.

When the free speech/public forum rationale is applied to the use of school facilities, the school must show that the decision as to facility use is “viewpoint neutral.” The viewpoint neutrality analysis was used by the U.S. Supreme Court in *Lamb’s Chapel v. Center Moriches Union Free School District*.285 In this case, Center Moriches school district in New York denied Lamb’s Chapel Church the after-hours use of school facilities for showing a series of “family values” films.

The Supreme Court ruled that such exclusion effectively violated the religious group’s freedom of speech because evidence was presented show- ing that the school district had created a “limited public forum” by opening the school premises for “social, civic, and recreational” purposes, such as the Salvation Army Band, Center Moriches Quilting Bee, Center Moriches Drama Club, Girl Scouts, Boy Scouts, and Center Moriches Music Awards Association, among others. According to the Court, to open school premises for other groups but to close them to religious groups is not to remain viewpoint neutral.

A result similar to *Lamb’s Chapel* was rendered by the U.S. Court of Appeals, First Circuit, in 1991, two years before *Lamb’s Chapel*.286 Here the court determined that the school district had cre- ated a public forum and that subsequent denial of use of the high school cafeteria for a Christmas dinner violated the free speech rights of members of the organization. Additionally, a Wyoming fed- eral court has found the religious clauses of the First Amendment did not bar such religious ac- commodation by the school district.287 If a school board allows any group to use school facilities,

then it cannot exclude another simply because it disagrees with the group’s philosophy.

This issue was addressed again in *Good News Club v. Milford Central School*. The Supreme Court said that they did not understand why the Circuit Court had not applied the precedent in *Lamb’s Chapel* since the issues were almost identical.

*School’s Viewpoint Discrimination Was Not Required to Avoid Violating the Establishment Clause*



#### Good News Club v. Milford Central School

*Supreme Court of the United States, 2001.*

*533 U.S. 98, 121 S. Ct. 2093.*

This case presents two questions. The first ques- tion is whether Milford Central School vio- lated the free speech rights of the Good News Club when it excluded the Club from meeting after hours at the school. The second question is whether any such violation is justified by Milford’s concern that permitting the Club’s ac- tivities would violate the Establishment Clause. We conclude that Milford’s restriction violates the Club’s free speech rights and that no Estab- lishment Clause concern justifies that violation.

The State of New York authorizes local school boards to adopt regulations governing the use of their school facilities. In particular, N.Y. Educ. Law § 414 (McKinney 2000) enumerates sev- eral purposes for which local boards may open their schools to public use. In 1992, respondent Milford Central School (Milford) enacted a com- munity use policy adopting seven of § 414’s pur- poses for which its building could be used after school. . . . Two of the stated purposes are rel- evant here. First, district residents may use the school for “instruction in any branch of educa- tion, learning or the arts.” . . . Second, the school is available for “social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public.” . . .

Stephen and Darleen Fournier reside within Milford’s district and therefore are eligible to use the school’s facilities as long as their proposed use is approved by the school. Together they are sponsors of the local Good News Club, a private Christian organization for children ages 6 to 12. Pursuant to Milford’s policy, in September 1996 the Fourniers submitted a request to Dr. Robert McGruder, interim superintendent of the dis- trict, in which they sought permission to hold the Club’s weekly afterschool meetings in the school cafeteria. . . . The next month, McGruder formally denied the Fourniers’ request on the ground that the proposed use—to have “a fun time of singing songs, hearing a Bible lesson and memorizing scripture,” . . . — was “the equivalent of religious worship.” . . . According to McGruder, the community use policy, which prohibits use “by any individual or organization for religious purposes,” foreclosed the Club’s activities. . . .

. . . In February 1997, the Milford Board of Education adopted a resolution rejecting the Club’s request to use Milford’s facilities “for the purpose of conducting religious instruction and Bible study.” . . .

In March 1997, petitioners, the Good News Club, Ms. Fournier, and her daughter Andrea Fournier (collectively, the Club), filed an action . . . against Milford in the United States District Court for the Northern District of New York. The Club alleged that Milford’s denial of its application violated its free speech rights under the First and Fourteenth Amendments, its right to equal protec- tion under the Fourteenth Amendment. . . .

The Club moved for a preliminary injunction to prevent the school from enforcing its religious exclusion policy against the Club and thereby to permit the Club’s use of the school facilities. On April 14, 1997, the District Court granted the injunction. The Club then held its weekly after- school meetings from April 1997 until June 1998 in a high school resource and middle school special education room. . . .

In August 1998, the District Court vacated the preliminary injunction and granted Milford’s motion for summary judgment. . . . The court found that the Club’s “subject matter is decidedly religious in nature, and not merely a discussion of secular matters from a religious perspective that is otherwise permitted under

[Milford’s] use policies.” . . . Because the school had not permitted other groups that provided religious instruction to use its limited public fo- rum, the court held that the school could deny access to the Club without engaging in uncon- stitutional viewpoint discrimination. The court also rejected the Club’s equal protection claim.

The Club appealed, and a divided panel of the United States Court of Appeals for the Sec- ond Circuit affirmed. . . . First, the court rejected the Club’s contention that Milford’s restriction against allowing religious instruction in its fa- cilities is unreasonable. Second, it held that, be- cause the subject matter of the Club’s activities is “quintessentially religious,” . . . and the activi- ties “fall outside the bounds of pure ‘moral and character development,’ ” . . . Milford’s policy of excluding the Club’s meetings was constitu- tional subject discrimination, not unconstitu- tional viewpoint discrimination. . . .

The standards that we apply to determine whether a State has unconstitutionally excluded a private speaker from use of a public forum de- pend on the nature of the forum. . . . If the forum is a traditional or open public forum, the State’s restrictions on speech are subject to stricter scrutiny than are restrictions in a limited public forum. . . . We have previously declined to decide whether a school district’s opening of its facili- ties pursuant to N.Y. Educ. Law § 414 creates a limited or a traditional public forum. . . . Because the parties have agreed that Milford created a limited public forum when it opened its facilities in 1992, . . . we need not resolve the issue here. Instead, we simply will assume that Milford operates a limited public forum.

When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified “in reserving [its forum] for certain groups or for the discussion of certain topics.” . . . The State’s power to re- strict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, . . . and the restric- tion must be “reasonable in light of the purpose served by the forum,” . . .

Applying this test, we first address whether the exclusion constituted viewpoint discrimina- tion. We are guided in our analysis by two of our prior opinions, *Lamb’s Chapel*. . . . In *Lamb’s*

*Chapel,* we held that a school district violated the Free Speech Clause of the First Amendment when it excluded a private group from present- ing films at the school based solely on the films’ discussions of family values from a religious per- spective. Likewise, in *Rosenberger,* we held that a university’s refusal to fund a student publication because the publication addressed issues from a religious perspective violated the Free Speech Clause. Concluding that Milford’s exclusion of the Good News Club based on its religious na- ture is indistinguishable from the exclusions in these cases, we hold that the exclusion consti- tutes viewpoint discrimination. Because the re- striction is viewpoint discriminatory, we need not decide whether it is unreasonable in light of the purposes served by the forum. . . .

Milford has opened its limited public forum to activities that serve a variety of purposes, in- cluding events “pertaining to the welfare of the community.” . . . Milford interprets its policy to permit discussions of subjects such as child rear- ing, and of “the development of character and morals from a religious perspective.” . . . For ex- ample, this policy would allow someone to use Aesop’s Fables to teach children moral values. . . . Additionally, a group could sponsor a debate on whether there should be a constitutional amend- ment to permit prayer in public schools, . . . and the Boy Scouts could meet “to influence a boy’s character, development and spiritual growth,” . . . In short, any group that “promote[s] the moral and character development of children” is eli- gible to use the school building. . . .

Just as there is no question that teaching mor- als and character development to children is a permissible purpose under Milford’s policy, it is clear that the Club teaches morals and character development to children. For example, no one disputes that the Club instructs children to over- come feelings of jealousy, to treat others well regardless of how they treat the children, and to be obedient, even if it does so in a nonsecu- lar way. Nonetheless, because Milford found the Club’s activities to be religious in nature—“the equivalent of religious instruction itself,” . . . —it excluded the Club from use of its facilities.

Applying *Lamb’s Chapel,* . . . we find it quite clear that Milford engaged in viewpoint dis- crimination when it excluded the Club from the after-school forum. In *Lamb’s Chapel*, the local

New York school district similarly had adopted

§ 414’s “social, civic or recreational use” category as a permitted use in its limited public forum. The district also prohibited use “by any group for religious purposes.” . . . Citing this prohibi- tion, the school district excluded a church that wanted to present films teaching family values from a Christian perspective. We held that, be- cause the films “no doubt dealt with a subject otherwise permissible” under the rule, the teach- ing of family values, the district’s exclusion of the church was unconstitutional viewpoint dis- crimination. . . .

Like the church in *Lamb’s Chapel*, the Club seeks to address a subject otherwise permitted under the rule, the teaching of morals and char- acter, from a religious standpoint. Certainly, one could have characterized the film presentations in *Lamb’s Chapel* as a religious use, as the Court of Appeals did, . . . And one easily could conclude that the films’ purpose to instruct that “society’s slide toward humanism . . . can only be coun- terbalanced by a loving home where Christian values are instilled from an early age,” . . . was “quintessentially religious,” . . . The only appar- ent difference between the activity of Lamb’s Chapel and the activities of the Good News Club is that the Club chooses to teach moral lessons from a Christian perspective through live story- telling and prayer, whereas Lamb’s Chapel taught lessons through films. This distinction is inconsequential. Both modes of speech use a religious viewpoint. Thus, the exclusion of the Good News Club’s activities, like the exclusion of Lamb’s Chapel’s films, constitutes unconstitu- tional viewpoint discrimination.

. . . [T]he Court of Appeals, like Milford, be- lieved that its characterization of the Club’s ac- tivities as religious in nature warranted treating the Club’s activities as different in kind from the other activities permitted by the school. . . . (the Club “is doing something other than simply teaching moral values”). The “Christian view- point” is unique, according to the court, because it contains an “additional layer” that other kinds of viewpoints do not. . . . That is, the Club “is focused on teaching children how to culti- vate their relationship with God through Jesus Christ,” which it characterized as “quintessen- tially religious.” . . . With these observations, the court concluded that, because the Club’s

activities “fall outside the bounds of pure ‘moral and character development,’” the exclusion did not constitute viewpoint discrimination. . . .

We disagree that something that is “quintes- sentially religious” or “decidedly religious in nature” cannot also be characterized properly as the teaching of morals and character devel- opment from a particular viewpoint. . . . What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind be- tween the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or pa- triotism by other associations to provide a foun- dation for their lessons. It is apparent that the unstated principle of the Court of Appeals’ rea- soning is its conclusion that any time religious instruction and prayer are used to discuss mor- als and character, the discussion is simply not a “pure” discussion of those issues. According to the Court of Appeals, reliance on Christian prin- ciples taints moral and character instruction in a way that other foundations for thought or view- points do not. We, however, have never reached such a conclusion. . . . *Thus, we conclude that Milford’s exclusion of the Club from use of the school, pursuant to its community use policy, constitutes impermissible viewpoint discrimination. . . .*

Milford argues that, even if its restriction con- stitutes viewpoint discrimination, its interest in not violating the Establishment Clause outweighs the Club’s interest in gaining equal access to the school’s facilities. In other words, according to Milford, its restriction was required to avoid vio- lating the Establishment Clause. We disagree.

We have said that a state interest in avoid- ing an Establishment Clause violation “may be characterized as compelling,” and therefore may justify content-based discrimination. *Widmar v. Vincent,* 454 U.S. 263, 271, 102 S. Ct. 269, . . .

(1981). However, it is not clear whether a State’s interest in avoiding an Establishment Clause vio- lation would justify viewpoint discrimination. . . . We need not, however, confront the issue in this case, because we conclude that the school has no valid Establishment Clause interest.

We rejected Establishment Clause defenses similar to Milford’s in two previous free speech cases, *Lamb’s Chapel* and *Widmar*. In particular, in *Lamb’s Chapel*, we explained that “[t]he showing of th[e] film series would not have been during school hours, would not have been sponsored

by the school, and would have been open to the public, not just to church members.” . . . Accord- ingly, we found that “there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed.” . . . Likewise, in *Widmar*, where the university’s forum was already available to other groups, this Court concluded that there was no Establishment Clause problem. . . .

The Establishment Clause defense fares no better in this case. As in *Lamb’s Chapel*, the Club’s meetings were held after school hours, not sponsored by the school, and open to any student who obtained parental consent, not just to Club members. As in *Widmar,* Milford made its forum available to other organizations. The Club’s activities are materially indistinguishable from those in *Lamb’s Chapel* and *Widmar*. Thus, Milford’s reliance on the Establishment Clause is unavailing. . . .

. . . [We] can find no reason to depart from our holdings in *Lamb’s Chapel* and *Widmar*. Accord- ingly, we conclude that permitting the Club to meet on the school’s premises would not have violated the Establishment Clause. . . .

When Milford denied the Good News Club access to the school’s limited public forum on the ground that the Club was religious in nature, it discriminated against the Club because of its re- ligious viewpoint in violation of the Free Speech Clause of the First Amendment. Because Milford has not raised a valid Establishment Clause claim, we do not address the question whether such a claim could excuse Milford’s viewpoint discrimination. . . .

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

###### CASE NOTES

1. Two lower courts, citing the *Good News Club* case, ruled that the schools must let religious groups have access to the schools. In *Camp- bell v. St. Tammany Parish School Boards,* 2003 WL 21783317 (E.D. La. 2003), refusal to let the Christian Coalition of Louisiana use the local school was held unconstitutional on viewpoint discrimination. The U.S. Court of Appeals, in *The Bronx Household of Faith v. Board of Education of the City of New York,* 331

F.3d 342 (2nd Cir. 2003), held that to deny the Bronx Household of Faith Church the oppor- tunity to rent space violated the free speech rights of the First Amendment.

1. Where a school board charged churches higher rental fees for school facilities than it charged other nonprofit organizations, the court ruled that the practice violated the Free Speech Clause and interfered with and/ or burdened the church’s right to speak and practice religion as protected by the Free Exercise Clause. *Fairfax Covenant Church v. Fairfax County School Board,* 17 F.3d 703 (4th Cir. 1994). *See also Shumway v. Albany County School District No. 1 Board of Education,* 826

F. Supp. 1320, 84 Educ. L. Rep. 989 (D. Wyo. 1993); *Trinity United Methodist Parish v. Board of Education of the City School District of the City of Newburgh,* 907 F. Supp. 707, 105 Educ. L. Rep. 943 (D. N.Y. 1995).

### Flag Salute

The flag-salute ceremony in the United States originated in 1892 after a substantial rise in national sentiment to stimulate patriotism in the schools. In 1898, New York passed the first flag-salute statute only one day after the United States declared war on Spain.288 By 1940, 18 states had statutes making provision for “some sort of teaching regarding the flag.”289

Even though the statutes did not specifically require individual recitation, the reality of the classroom regimentation tended to make such statutory pronouncement unnecessary.290 Oppo- sition sprang up on sporadic bases from certain religious groups, the most persistent of which was Jehovah’s Witnesses. In early litigation, the Georgia Supreme Court held that the Witnesses’ religious freedom was not violated, since the flag salute was merely an exercise in patriotism and not a religious rite.291 The plaintiffs received other unfavorable rulings, the most intolerant of which stated that “[t]hose who do not desire to conform with the demands of the statute can seek their school elsewhere.”292 In California, the state’s high court upheld the expulsion of pupils for refusing to salute the flag.293 Similarly, a New York court in 1939 held that “[t]he flag has noth- ing to do with religion”; therefore, religious free- doms could not be offended.294

Nationalistic fervor just before World War II brought on more heated controversy, and the Supreme Court, in 1940, rendered a decision. In this case, Justice Frankfurter, speaking for an 8–1 majority, held that freedom of religion guaran- teed by the First Amendment was not violated by a Pennsylvania statute that required a flag salute and pledge of allegiance. Significantly, the *Gobitis* opinion concluded that

[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convic- tions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.295

This decision engendered substantial con- troversy, and the legal and academic commu- nity generally disapproved of the decision as an infringement on individual constitutional rights.296 Some state courts tended to ignore the federal constitutional implications and held that flag-salute requirements violated their own state constitutions.297 Other state courts followed the decision.298 Disenchantment with the *Gobi- tis* decision was so great and the constitutional foundation so weak that the case was officially overruled in *West Virginia State Board of Education*

*v. Barnette* in 1943.299 In reconsideration of the is- sues, Justice Jackson, writing for a six-person majority, held that a state may require pupils to attend educational exercises based on American history and civics to teach patriotism, but that ceremonies involving compulsory rituals, such as the flag salute, were unconstitutional. Justices Black, Douglas, and Murphy had changed their minds, and even though Justice Frankfurter re- mained steadfast, the precedent of *Gobitis* was overturned. The swing vote of the three justices was predictable; a year earlier, in 1942, in *Jones v. Opelika,*300 the Court announced that “[s]ince we joined in the opinion in the *Gobitis* case, we think this is an appropriate occasion to state that we now believe that it was . . . wrongly decided.”

In 1942, Congress first codified the Pledge of Allegiance. Then, in 1954, Congress amended the pledge to include “under God” after the word *Nation* at a time “when the government was publicly inveighing against atheistic commu- nism.” When President Eisenhower signed the

bill, he stated, “From this day forward, the mil- lions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty.” In 2002, the U.S. Circuit Court of Appeals for the Ninth Circuit ruled that a school policy requiring teacher-led recitation of the Pledge of Allegiance inserting the words *under God* violated the Establishment Clause. The court ruled that the policy failed the purpose prong of the *Lemon* test.301

*Required Participation in Flag Salute Is Unconstitutional*



#### West Virginia State Board of Education v. Barnette

*Supreme Court of the United States, 1943.*

*319 U.S. 624, 63 S. Ct. 1178.*

Mr. Justice JACKSON delivered the opinion of the Court.

Following the decision by this Court on June 3, 1940, in *Minersville School District v. Gobitis,* 310 U.S. 586, 60 S. Ct. 1010, the West Virginia legislature amended its statutes to require all schools therein to conduct courses of instruction in history, civics, and in the Constitutions of the United States and of the State “for the purpose of teaching, fostering and perpetuating the ide- als, principles and spirit of Americanism, and in- creasing the knowledge of the organization and machinery of the government.” Appellant Board of Education was directed, with advice of the State Superintendent of Schools, to “prescribe the courses of study covering these subjects” for public schools. The Act made it the duty of private, parochial and denominational schools to prescribe courses of study “similar to those required for the public schools.”

The Board of Education on January 9, 1942, adopted a resolution containing recitals taken largely from the Court’s *Gobitis* opinion and ordering that the salute to the flag become

“a regular part of the program of activities in the public schools,” that all teachers and pupils “shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an Act of insubordination, and shall be dealt with accordingly.” . . .

Appellees, citizens of the United States and of West Virginia, brought suit in the United States District Court for themselves and others simi- larly situated asking its injunction to restrain en- forcement of these laws and regulations against Jehovah’s Witnesses. The Witnesses are an un- incorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their re- ligious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: “Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them.” They consider that the flag is an “image” within this command. For this reason they refuse to salute it. . . .

This case calls upon us to reconsider a prece- dent decision, as the Court throughout its history often has been required to do. Before turning to the *Gobitis* case, however, it is desirable to notice certain characteristics by which this controversy is distinguished.

The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such con- flicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to con- dition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both par- ent and child. The latter stand on a right of self- determination in matters that touch individual opinion and personal attitude. . . .

Nor does the issue as we see it turn on one’s possession of particular religious views or the

sincerity with which they are held. While religion supplies appellees’ motive for enduring the dis- comforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitu- tional liberty of the individual. It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.

The *Gobitis* decision, however, *assumed,* as did the argument in that case and in this, that power exists in the State to impose the flag sa- lute discipline upon school children in general. The Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule. The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. . . .

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, deli- cate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes. . . .

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to estab- lish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. . . .

National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement. . . .

If there is any fixed star in our constitutional constellation, it is that no official, high or petty,

can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opin- ion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and in- vades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Con- stitution to reserve from all official control.

The decision of this Court in *Minersville School District v. Gobitis* and the holding of those few *per curiam* decisions which preceded and foreshad- owed it are overruled, and the judgment enjoin- ing enforcement of the West Virginia Regulation is affirmed. . . .

###### CASE NOTES

1. When a student was offered the option of either leaving the classroom or standing si- lently during the Pledge of Allegiance, the court held that to leave the classroom is a benign type of punishment for nonparticipa- tion, whereas to compel the student to stand in silence was to compel an act of acceptance of the pledge over the student’s deeply held contrary convictions. The requirement of the school was therefore unconstitutional, re- gardless of option. *Goetz v. Ansell,* 477 F.2d 636 (2nd Cir. 1973). See also: *Freedom from Religion Foundation v. Hanover School Dist.,* 665 F.Supp.2d 58 (D.N.H. 2009).
2. It is clear under *Barnette* that the state cannot compel a student to recite the Pledge of Alle- giance, but can a student who objects to the content of the Pledge prevent the teacher and other students from reciting it in his or her presence? The U.S. Court of Appeals, Seventh Circuit, has answered this question in the negative. This court said:

By remaining neutral on religious issues, the state satisfies its duties under the free exercise clause. All that remains is *Barnette* itself, and so long as the school does not compel pupils to espouse the con- tent of the Pledge as their own belief, it may carry on with patriotic exercises. Objection by the few does not reduce to silence the many who want to pledge allegiance to the flag “and to the Republic for which it stands.”

According to this court, the reference “under God,” because of its “history and ubiquity,” is not understood to convey approval of any particular religious belief. *Sherman v. Community Consolidated School District 21,* 980 F.2d 437 (7th Cir. 1992).

1. A student cannot be punished for “unpatri- otic views.” Where a student raised his fist but remained silent while others in class re- cited the Pledge and was subsequently pun- ished by paddling, the federal circuit court ruled that the student’s free speech rights had been violated. The student’s actions did not constitute a disruption of the school and he could not be punished simply for his “un- patriotic views.” *Holloman v. Harland,* 370 F.3d 1252 (11th Cir. 2004).
2. According to the U.S. Court of Appeals, Fourth Circuit, the Pledge of Allegiance, with the words *under God,* does not constitute a prayer and does not violate the Establishment Clause. In Virginia a law provides for daily, voluntary recitation of the Pledge and place- ment of the U.S. flags in each public school classroom. A parent, an Anabaptist Menno- nite, sued claiming that the Pledge was state indoctrination of children with a “God and Country” worldview that violated tenets of the Mennonite Confession of Faith. The fed- eral court held against the parent conclud- ing that the fleeting reference to God did not make the Pledge a daily prayer. Citing Justice Sandra Day O’Connor characterization of the words *under God* as a “legitimate secular way of solemnizing public occasions,” the court noted that the Pledge was a statement of loyalty to the United States and its flag and should not be viewed as religious worship. *Myers v. Loudoun County Public Schools,* 418 F.3d 395 (4th Cir. 2005).

### Summation of Case Law

*Public Funding of Religion: Establishment Clause*

*Everson*

1. The “establishment of religion” clause of the First Amendment means that neither a state nor the federal government can set up a church, and neither can pass laws which aid

one religion, aid all religions, or prefer one re- ligion over another.

1. The “establishment of religion” clause of the First Amendment means that neither a state nor the federal government can force nor in- fluence a person to go to or to remain away from church against his will or force him to confess a belief or disbelief in any religion.
2. The “establishment of religion” clause of the First Amendment means that no tax in any amount 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.
3. The “establishment of religion” clause of the First Amendment does not prohibit a state from spending tax-raised funds to pay the bus fares for parochial school pupils as a part of a general program under which the state pays the fares of pupils attending public and other schools.

*Allen*

A state statute requiring a public school author- ity to lend textbooks free of charge to students in parochial schools was not a “law respecting an establishment of religion, or prohibiting the free exercise thereof” in conflict with the federal Constitution.

*Lemon*

1. The Establishment Clause of the First Amend- ment was intended to afford protection against sponsorship, financial support, and active involvement of the sovereign in reli- gious activity.
2. To avoid conflict with the religion clauses of the First Amendment, a statute must have
   1. secular legislative purpose, (2) its princi- pal or primary effect must be one that neither advances nor inhibits religion, and (3) it must not foster excessive government entangle- ment with religion.
3. Programs of state financial aid to nonpublic schools, having self-perpetuating and self- expanding propensities, present more danger that they will, contrary to the First Amend- ment, lead to the establishment of state churches and state religion than do the long- established benefits involved in tax exemp- tion for places of religious worship.

*Mueller*

1. Any program which in some manner aids in- stitutions with religious affiliation does not necessarily violate the Establishment Clause.
2. A state may constitutionally reimburse parents for expenses incurred in transporting their children to school and may loan secular text- books to all schoolchildren within the state.
3. Where aid to parochial schools is available only as result of decisions of individual par- ents, no “imprimatur of State approval” can be deemed to have been conferred on any particular religion, or on religion generally, in violation of the Establishment Clause.
4. The “divisive political potential” test of con- stitutionality under the Establishment Clause is confined to cases in which direct financial subsidies are paid to parochial schools or to teachers in parochial schools.

*Agostini*

1. Entanglement between church and state must be excessive before it runs afoul of the Estab- lishment Clause.
2. The *stare decisis* doctrine did not preclude the Supreme Court from recognizing substantial change in Establishment Clause jurisprudence and overruling earlier cases inconsistent with the Supreme Court’s more recent Establish- ment Clause decisions that permit state finan- cial aid to parochial schools.
3. The *stare decisis* doctrine is not an inexorable command, but instead reflects policy judg- ment that in most matters it is more impor- tant that applicable rule of law be settled than that it be settled right.
4. A board of education’s program of sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to a program mandated by Title I of the ESEA did not violate the Estab- lishment Clause. The program did not result in governmental indoctrination, define its re- cipients by reference to religion, or create ex- cessive entanglement, and the program could not be viewed as an endorsement of religion.

*Helms*

1. The Establishment Clause does not require the exclusion of pervasively sectarian schools from otherwise permissible public aid programs.
2. If public aid to schools, even “direct aid,” is neutrally available and, before reaching or benefiting any clerical school, it first passes through the hands, literally or figuratively, of numerous private citizens who are free to direct the aid elsewhere, the government has not provided “support of religion” for Estab- lishment Clause purposes.

*Zelman*

1. A school voucher program, enacted for a valid secular purpose of providing educational as- sistance to poor children, did not violate the Establishment Clause, even though the ma- jority of participating students had enrolled in Catholic schools.
2. Where a government aid program is neutral with respect to religion, and provides as- sistance directly to a broad class of citizens who, in turn, direct government aid to reli- gious schools wholly as a result of their own genuine and independent private choice, the program is not subject to challenge under the Establishment Clause.

*Independent Vitality of State Constitution*

*Chittenden*

1. Public funds may not pay for religious wor- ship within the meaning of a state constitu- tion’s compelled support clause, that provides that no person can be compelled to support any place of religious worship, wherever such worship occurs.
2. A tuition payment scheme for sectarian schools that does not offend the First Amend- ment is not consistent with the compelled support clause of a state constitution, what- ever their interrelationship.
3. There is no way to separate religious instruction from religious worship for purposes of a com- pelled support clause of a state constitution, providing that no person can be compelled to support any place of religious worship.

*Dickman*

1. A constitutional prohibition against the use of public money for religious institu- tions requires a state to be neutral in its rela- tions with groups of religious believers and nonbelievers.
2. An expenditure under statute authorizing dis- tribution of free textbooks to Catholic schools violates the section of the state constitution prohibiting use of public money for benefit of any religious institution.
3. The denial of the use of free textbooks to pupils solely because they attend Catholic schools does not deny those pupils Equal Protection.

*Released Time for Religious Services in Public Schools*

*McCollum*

1. A program whereby pupils were compelled by a state’s compulsory education system to go to school for secular education, but were released temporarily from secular study on condition that they attend religious classes conducted in the public school building in- volved a utilization of a tax-supported public school system to aid religious groups to spread their faith and violated the establishment of religious clause of the First Amendment.
2. The federal constitutional principle of sepa- ration of church and state is violated where public school buildings are used for dis- semination of religious doctrines and state’s compulsory education system helped to pro- vide pupils for religious classes of sectarian groups.

*Zorach*

1. A state statute providing for the release of public school pupils from school attendance to attend religious classes is constitutional.
2. The validity of a statutory “released time” pro- gram for religious instruction of public school children, off school grounds, did not implicate school authorities in use of coercion and was not violative of the Free Exercise Clause.

*Prayer and Bible Reading*

*Abington Township*

1. The Free Exercise Clause of the First Amend- ment, like the Establishment Clause, with- draws from legislative power, state and federal, the exertion of any restraint on free exercise of religion.
2. The purpose of the Free Exercise Clause of the First Amendment is to secure religious liberty

in the individual by prohibiting any invasion thereof by civil authority.

1. It is necessary in a case under the Free Exer- cise Clause for one to show a coercive effect of a state enactment as it operates against him or her in the practice of religion and the violation of the Free Exercise Clause is predi- cated on coercion, whereas the Establishment Clause violation need not be so attended.
2. The practices of selection and reading of verses of the Bible and the recitation, by students in unison, of the Lord’s Prayer, at opening of school day, as part of curricular activities of students required by law to attend school, were religious in character and they and the laws re- quiring them were unconstitutional under the Establishment Clause of the First Amendment.
3. The fact that individual students could absent themselves from religious exercises in public schools upon parental request furnished no defense to the claim of unconstitutionality under the Establishment Clause.
4. The study of the Bible for its literary and his- toric qualities and study of religion, when presented objectively as part of secular pro- gram of education, may be effected consistent with the First Amendment.

*Ten Commandments in Public School*

*Stone*

1. A state statute requiring the posting of a copy of the Ten Commandments on the walls of each public school classroom in the state had a preeminent purpose which was plainly reli- gious in nature, and the statute was thus vio- lative of the Establishment Clause.
2. To induce schoolchildren to read, meditate upon, perhaps to venerate and obey, the Ten Commandments is not a permissible state ob- jective under the Establishment Clause.

*Meditation*

*Jaffree*

1. An individual’s freedom to choose his or her own creed is counterpart of his or her right to refrain from accepting a creed established by the majority.
2. The individual freedom of conscience pro- tected by the First Amendment embraces the right to select any religious faith or none at all.
3. A state statute authorizing a daily period of silence in public schools for meditation or vol- untary prayer was an endorsement of religion lacking any clearly secular purpose, and thus was a law respecting the establishment of reli- gion in violation of the First Amendment.

*Nonsectarian Prayer by Clergy*

*Weisman*

1. It is beyond dispute that, at a minimum, the Constitution guarantees that the government may not coerce anyone to support or partici- pate in religion or its exercise, or otherwise act in a way which establishes state religion or religious faith or tends to do so.
2. The Establishment Clause prohibits public school students from being exposed to re- ligion in the form of “nonsectarian” prayer given by a school-selected clergyman at the graduation ceremony.
3. A requirement that students stand and remain silent during the giving of “nonsectarian” prayer at a graduation ceremony in a pub- lic school violates the Establishment Clause, even though attendance at the ceremony is completely voluntary. A student is not re- quired to give up attendance at a ceremony, an important event in his or her life, in order to avoid unwanted exposure to religion.

*Student-Led Invocations*

*Santa Fe*

1. Freedom of religion is a fundamental right and fundamental rights may not be submit- ted to vote; they depend on the outcome of no elections.
2. The Establishment Clause forbids a state to hide behind the application of formally neu- tral criteria and remain studiously oblivious to the effects of its actions.
3. In cases involving state participation in a re- ligious activity, one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and imple- mentation of the statute, would perceive it as a state endorsement of prayer in public schools.
4. A public school district’s policy of permit- ting student-led, student-initiated invoca- tions or statements before high school football games lacked a valid secular purpose, but was

instead implemented with purpose of endors- ing school prayer, in light of text of the policy, which reflected district’s involvement in elec- tion of the speaker and content of the message and the evolution of the policy, which had arisen in response to the issue of school prayer.

*Equal Access Act*

*Mergens*

1. The Equal Access Act requirement that student religious groups be given the same access to schools as other noncurriculum-related stu- dent groups does not risk excessive entangle- ment between government and religion.
2. The prohibition of the Equal Access Act of discrimination against student groups on the basis of political, philosophical, or other speech, as well as religious speech, showed a secular purpose for the Act.
3. Even though some members of Congress were motivated by a conviction that religious speech in particular is valuable and worthy of protection, that alone would not invalidate the Equal Access Act.
4. The Equal Access Act does not have the primary effect of advancing religion, even though student religious meetings would be held under school aegis and state compulsory attendance laws bring the students together.
5. The Equal Access Act requirement that schools which create a limited open forum for noncur- riculum-related student groups, and must pro- vide equal access to student religious groups, does not violate the Establishment Clause.
6. The term *curriculum related* as used in the Equal Access Act does not include everything remotely related to abstract educational goals.
7. A scuba diving club for high school students did not directly relate to the curriculum and was a “noncurriculum-related student group” whose existence triggered the school’s obliga- tions under the Equal Access Act.

*Good News Club*

1. If a forum is a *traditional* or *open public forum*, the state’s restrictions on speech are subject to stricter scrutiny than are restrictions in a *lim- ited public forum*.
2. When the state establishes a limited public forum, the state is not required to and does not allow persons to engage in every type of

speech, and may be justified in reserving its forum for certain groups or for the discussion of certain topics, but the restriction must not discriminate against speech on the basis of viewpoint, and must be reasonable in light of the purpose served by the forum.

1. Public school’s exclusion of a Christian chil- dren’s club from meeting after hours at school based on its religious nature was unconstitu- tional viewpoint discrimination, where school had opened its limited public forum to activi- ties that served a variety of purposes.
2. A speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint.

*Flag Salute*

*Barnette*

1. The purpose of the Bill of Rights is to with- draw certain subjects from the vicissitudes of the political controversy and to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.
2. One’s right to life, liberty, and property; to free speech; a free press; freedom of worship and assembly; and other fundamental rights may not be submitted to vote, and they de- pend on the outcome of no election.
3. A resolution of a state board of education requiring children, as prerequisite to contin- ued attendance at public school, to salute the American flag and give pledge, is invalid.

### Research Aids

Research citations below are abbreviated as: *American Law Reports* (A.L.R.), *American Jurisprudence* (Am.Jur.), *Corpus Juris Secundum* (C.J.S.), and *McQuillen Municipal Corporations* (McQuillen Mun.Corp.). Explanations for each of these sources of law are found in Chapter 1 of this text. Also, see Appendix B of this book.

41 A.L.R.3d. 344. Constitutionality, Un- der State Constitutional Provision Forbidding Financial Aid to Religious Sects, of Public Provision of School Bus Service for Private School Pupils.

68 Am.Jur.2d Schools § 456. Schools, Religion and the First Amendment: State Aid to and Reg- ulation of Religiously Oriented Schools.

78A C.J.S. Schools and School Districts § 1116.

Private Schools, Public Aid: Transportation.

16A C.J.S. Constitutional Law § 753. Religious Liberty and Freedom of Conscience: In General.

16A Am.Jur.2d Constitutional Law § 417. Fun- damental Rights and Privileges: Federal Consti- tutional Guarantees.

15 A.L.R. Fed.2d 573. Construction and Appli- cation of Establishment Clause—Supreme Court Cases.

93 A.L.R.2d 986. Furnishing Free Textbooks to Sectarian Schools or Students Therein.

16B McQuillen Mun.Corp. § 46.02.40 (3rd ed.).

Public Schools and Religion.

16A C.J.S. Constitutional Law § 764. Religious Liberty and Freedom of Conscience: Particular Subjects Affected, Education.

16A C.J.S. Constitutional Law § 754. Establish- ment of Religion: *Lemon* Three-part Test.

16A Am.Jur.2d Constitutional Law § 438. Fun- damental Rights and Privileges: Establishment of Religion, *Lemon* Test and its Modifications.

78 A.L.R.5th 133. Validity and Construction of School Choice Programs: Post-*Lemon*.

81 A.L.R.2d 1309. Public Payment of Tuition, Scholarship—as Respects Sectarian Schools.

71 Am.Jur.2d State and Local Taxation § 480.

Income Taxes: Personal Deductions.

67B Am.Jur.2d Schools § 379. Federal Assis- tance Mandates: No Child Left Behind Act.

78A C.J.S. Schools and School Districts § 1012. Admission and Attendance of Pupils: Payment for Tuition and Other School Purposes.

39 Am.Jur. Colleges § 39. Governmental Ap- propriations: Public Aid to Sectarian Institutions, Aid to Religion.

81 C.J.S. States § 333. Fiscal Management: Legislative Power—Limitations on Use of Funds or Credit.

2 A.L.R.2d 1371. Right of School Authorities to Release Pupils During School Hours for Pur- pose of Attending Religious Education Classes.

68 Am.Jur.2d Schools § 454. “Released Time” Programs for Religious Instruction.

63 Am.Jur. Proof of Facts 3d 195. Interference with the Right to Free Exercise of Religion.

25 Causes of Action 2d 221. Cause of Action to Prevent the Display of Religious Symbols on Public Property.

16 Am.Jur.2d Constitutional Law § 452. Erec- tion, Maintenance or Display of Religious Sym- bols on Public Property.

107 A.L.R.5th 1. First Amendment Chal- lenges to Display of Religious Symbols on Public Property.

110 A.L.R. Fed. 211. Constitutionality of Regu- lation or Policy Governing Prayer, Meditation or “Moment of Silence” in Public Schools.

68 Am.Jur.2d Schools § 437. Moment-of- Silence Provisions.

98 A.L.R. Fed. 206. Giving of Invocation with Religious Content at Public Schools.

762 C.J.S. Constitutional Law § 762. Prayer and Other Religious Observances.

174 A.L.R. Fed. 407. Validity, Construction, and Application of Equal Access Act.

67B Am.Jur.2d Schools § 104. Limited Open Forum: Equal Access Act.

66 Am.Jur.2d Religious Societies § 31. Meet- ings in Public Schools.

### ■ Endnotes

* 1. The authors are indebted to Professor Paul M. Secunda for providing this clarifying statement regarding world religious strife.

**2.** *The Economist,* July 22–28, 1995, pp. 15–16.

**3.** Samuel P. Huntington, *The Clash of Civilizations and the Remaking of the World Order* (London: Simon & Schuster, 1997), p. 47.

**4.** Ibid., p. 208.

1. *The Economist*, “God Meets the Lawyers,” December 6, 2003, p. 48.
2. Ibid.
3. *The Economist,* October 7–13, 1995, p. 58.
4. Harvey Cox, “The Warring Visions of the Religious Right,” *Atlantic Monthly,* November 1995, pp. 59–69.
5. *Reynolds v. United States,* 98 U.S. (8 Otto) 145 (1879).
6. *Everson v. Board of Education,* 330 U.S. 1, 67 S. Ct. 504 (1947).

**11.** *Wallace v. Jaffree,* 472 U.S. 38, 107, 105 S. Ct. 2517.

1. Evarts B. Green, *Religion and the State in America* (New York: New York University Press, 1941), p. 83.
2. Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution,* 2nd ed. (Philadelphia, Penn.: J. B. Lippincott & Co., 1988), p. 131.
3. Leo Pfeffer, *Church, State and Freedom* (Boston: Beacon Press, 1967), p. 123.
4. R. Freeman Butts, *The American Tradition in Religion and Education* (Boston: Beacon Press, 1950), p. 72.
5. Pfeffer, *Church, State and Freedom,* p. 125.
6. Ibid.

**18.** Ibid., p. 126.

**19.** R. Freeman Butts and Lawrence A. Cremin, *A History of Education in American Culture* (New York: Henry Holt and Co., 1953), p. 15.

**20.** Ibid., p. 22.

**21.** Ibid., p. 21.

1. Ibid.
2. Pfeffer, *Church, State and Freedom,* p. 26.
3. John Locke, *Letter Concerning Toleration,* 1679*.* Reprinted in *Locke Political Essays,* ed. Mark Goldie (Cambridge: Cambridge University Press, 2002) pp. 276–277.
4. Saul K. Padover, *The Complete Jefferson* (New York: Duell, Sloan & Pearce, 1943).
5. Ibid.
6. Pfeffer, *Church, State and Freedom,* p. 109.
7. Decl. Rights, Art. 16. [Note in the original.]
8. Ibid.
9. Daniel Roche, *France in the Enlightenment*, trans. Arthur Goldhammer (Cambridge, Mass.: Harvard University Press, 1998), p. 339.
10. Isser Woloch, *The New Regime: Transformations of the French Civic Order, 1789–1820’s* (New York: W. W. Norton, 1994), p. 174.
11. Ibid.
12. Ibid.
13. Ibid.

**35.** Ibid., p. 195.

1. Ibid.
2. Ibid.
3. Ibid.
4. Ibid.
5. Henry Steele Commager, *The Empire of Reason: How Europe Imagined and America Realized the Enlightenment* (Garden City, N.Y.: Anchor Press/Doubleday, 1978).

**41.** Ibid., p. 250.

**42.** Ibid., p. 229.

**43.** Ibid.

**44.** Ibid., p. 230.

**45.** Ellwood P. Cubberley, *Public Education in the United States* (Boston: Houghton Mifflin, 1934), p. 163.

**46.** Ibid., p. 166.

**47.** Ibid., p. 234.

1. Ibid.
2. Ibid.
3. Ibid.
4. Vincent P. Lannie, *Public Money and Parochial Education* (Cleveland, Ohio: Press of Case Western Reserve University, 1968), p. 62.

**52.** Ibid., p. 88.

**53.** Ibid., p. 90.

**54.** *Agostini v. Felton,* 521 U.S. 203, 117 S. Ct. 1997 (1997).

**55.** *Mitchell v. Helms,* 530 U.S. 793, 120 S. Ct. 2530 (2000).

1. *Zelman v. Simmons-Harris*, 536 U.S. 639, 122 S. Ct. 2460 (2002).
2. *Knowlton v. Baumhover,* 182 Iowa 691, 166 N.W. 202 (1918).
3. Ibid.
4. *Prince v. Massachusetts,* 321 U.S. 158, 64 S. Ct. 438 (1944).
5. Pfeffer, *op. cit.,* p. 338.

**61.** *Wisconsin v. Yoder,* 406 U.S. 205, 92 S. Ct. 1526 (1972).

1. *Cochran v. Louisiana State Board of Education,* 281 U.S. 270, 50 S. Ct. 335 (1930).
2. *Cantwell v. Connecticut,* 310 U.S. 296, 60 S. Ct. 900 (1940).
3. *Board of Education of Central School District No. 1 v. Allen,* 392 U.S. 236, 88 S. Ct. 1923 (1968).
4. *Board of Education of Central School District No. 1 v. Allen,* 392 U.S. 236, 88 S. Ct. 1923 (1968).
5. Ibid.
6. *Sloan v. Lemon,* 413 U.S. 825, 93 S. Ct. 2982, *reh’g de- nied,* 414 U.S. 881, 94 S. Ct. 30 (1973); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 93 S. Ct. 2955 (1973).
7. *Kosydar v. Wolman*, 353 F. Supp. 744 (S.D. Ohio 1972).
8. Ibid., *aff’d sub nom., Grit v. Wolman*, 413 U.S. 901, 93 S. Ct. 3062 (1973).
9. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 93 S. Ct. 2955 (1973).
10. *Byrne v. Public Funds for Public Schools*, 442 U.S. 907, 99 S. Ct. 2818 (1979), *aff’g* 590 F.2d 514 (3d Cir. 1979).

**72.** *Mueller v. Allen*, 463 U.S. 388, 103 S. Ct. 3062 (1983).

1. Ibid.
2. *Board of Education of Central School District No.1 v. Allen,* 392 U.S. 236, 88 S. Ct. 1923 (1968).
3. *School District of the City of Grand Rapids v. Ball,* 473 U.S. 373, 105 S. Ct. 3216 (1985).

**76.** *Aguilar v. Felton*, 473 U.S. 402, 105 S. Ct. 3232(1985).

**77.** *Wallace v. Jaffree*, 472 U.S. 38, 107, 114, 105 S. Ct. 2479,

2516, 2519 (1985).

1. Ibid.
2. Leonard Levy, *The Establishment Clause, Religion and the First Amendment* (New York: Macmillan Publishing Co., 1986), p. 92.

**80.** *Marsh v. Chambers,* 463 U.S. 783, 103 S. Ct. 3330 (1983).

**81.** *Larson v. Valente,* 456 U.S. 228, 102 S. Ct. 1673(1982).

1. *Committee for Public Education and Religious Liberty v. Nyquist, op. cit.*
2. *Mueller v. Allen, op. cit.*

**84.** *Lynch v. Donnelly,* 465 U.S. 668, 104 S. Ct. 1355(1984).

**85.** *Lee v. Weisman,* 505 U.S. 577, 112 S. Ct. 2649 (1992).

**86.** Ibid., 112 S. Ct. at 2650.

**87.** Ibid., 112 S. Ct. at 2655.

**88.** *Lamb’s Chapel v. Center Moriches Union Free School District,* 508 U.S. 384, 113 S. Ct. 2141 (1993).

**89.** Ibid., 113 S. Ct. at 2149–50.

**90.** *Board of Education of Kiryas Joel Village School District v. Grumet,* 62 U.S. 4665, 114 S. Ct. 2481 (1994).

**91.** Ibid., 114 S. Ct. at 2487.

**92.** Ibid., 114 S. Ct. at 2483.

**93.** Ibid., 114 S. Ct. at 2484.

**94.** 1997 WL 338583 (U.S.), June 23, 1997, 97 Cal. Daily

Op. Serv. 4765, Daily Journal D.A.K. 7843.

1. *Witters v. Washington Department of Services for the Blind,* 474 U.S. 481, 106 S. Ct. 748 (1986).
2. *Zobrest v. Catalina Foothills School District,* 509 U.S. 1, 113 S. Ct. 2462 (1993).
3. *Rosenberger v. Rector and Visitors of the University of Virginia,* 515 U.S. 819, 115 S. Ct. 2510 (1995).
4. *Board of Education of Kiryas Joel Village School District v. Grumet,* 512 U.S. 687, 114 S. Ct. 2481 (1994).

**99.** *Aguilar v. Felton,* 473 U.S. 402, 105 S. Ct. 3232 (1985).

1. *School District of the City of Grand Rapids v. Ball,* 473 U.S. 373, 105 S. Ct. 3216 (1985).
2. *See Witters v. Washington Department of Services for the Blind,* 474 U.S. 481, 485, 106 S. Ct. at 750 (1986); *Bowen v. Kendrick,* 487 U.S. 589, 108 S. Ct. 2562 (1988); *Board of Education of Westside Community Schools v. Mergens,* 496 U.S. 226, 115 S. Ct. 2356 (1990).
3. *Mitchell v. Helms, op. cit.*

**103.** *Agostini v. Felton,* 521 U.S. 203, 117 S. Ct. 1997 (1997).

**104.** 503 U.S. 793, 120 S. Ct. 2530 (2000).

**105.** 540 U.S. 712, 124 S. Ct. 1307 (2004). The Plaintiff in

*Davey* sought to have a state scholarship program de- clared unconstitutional as violative of the Free Exercise and Establishment Clauses because it excluded funding of scholarships for students pursuing devotional theology degrees. The plaintiff claimed that for the state not to give scholarship money for a religious purpose violated the U.S. Constitution. Even though the Court ruled against the plain- tiff, the fact that the case was accepted by the Supreme Court and even considered evidences an important change in the Supreme Court’s view of separation of church and state.

1. Washington is one of the states that have a very spe- cific prohibition against aid to religion.
2. *Witters v. Washington Department of Services for the Blind, op. cit.; Zobrest v. Catalina Foothills School District, op. cit.; Agostini v. Felton*, *op. cit.; Mitchell v. Helms*, *op. cit.; Zelman v. Simmons-Harris*, *op. cit*.
3. *Mitchell v. Helms*, *op cit*.
4. 44 Congressional Record, December 14, 1875, 44th Congress, 1st Session, Amendment Congressional Record, 1875.
5. Edward P. Carpol, *James G. Blaine: Architect of Empire*, (Wilmington, Delaware: SR Books, 2000).

**111.** Ibid., p. 20.

1. Ibid.
2. Ibid., p. 21., See: *Congressional Globe,* 38th Congress, 1st Session, Part 2, (Washington, DC, 1864), pp. 1797–1800.
3. Lewis L. Gould, *Grand Old Party: A History of the Republicans* (New York: Random House, 2003), p. 49.
4. James G. Blaine, *Twenty Year of Congress: From Lincoln to Garfield* (Norwich, CT.; Henry Bill Publishing Company, 1886), vol. 2, p. 340.
5. Amendment *XIV,* Sec. 2 (1868).
6. Kenneth D. Ackerman, *Dark Horse: The Surprise Election and Political Murder of President James A. Garfield* (New York: Carroll & Graf Publishers, 2004), p. 486.
7. Robert Kagan, *Dangerous Nation* (New York: Alfred

A. Knopf, 2006).

1. Ibid.
2. Morton Keller, *Affairs of State: Public Life in Late Nineteenth Century America* (Cambridge, Mass.: Harvard University Press, 1977), p. 4.
3. Kagan, *op. cit.,* p. 281.
4. Henry Blumenthal, *A Reappraisal of Franco-American Relations, 1830–1871* (Chapel Hill: University of North Carolina Press, 1959), p. 189.
5. Smith, *op cit*.*,* pp. 568–569.
6. Ibid.
7. Ibid.

**126.** Ibid., p. 569.

1. Steven K. Green, “The Blaine Amendment Reconsidered,” 36 *American Journal of Legal History*, pp. 38–39 (1992).
2. Smith, *op cit.,* p. 569, cited from the text of Grant’s speech to the army of Tennessee, Des Moines, Iowa, September 30, 1875, reprinted in *Harper’s Weekly,* October 30, 1875.
3. Ibid., p. 569, citing Grant, *op cit*.
4. Ibid.
5. Ibid.

**132.** Ibid., pp. 569–570*.*

**133.** Ibid., p. 570.

**134.** Ibid., p. 571.

1. The text of the Blaine Amendment provided: No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect or denomination; nor shall any money so raised or lands so devoted be divided between religious sects or denominations. This article shall not vest, enlarge, or diminish legislative power in the Congress.
2. See: *Santa Fe Independent School District v. Doe*, *530 vs. 290* (2000), and *Lee v. Weisman*, 505 U.S. 577 (1992).
3. John T. McGreevy, *Catholicism and American Freedom* (New York: W.W. Norton and Company, 2003), pp. 110–111.

**138.** Ibid, p. 111.

1. Ibid.
2. Slaughterhouse Cases, 16 Wall. (83 U.S.) 36 (1873).
3. Kermit L. Hall, et al. (eds.), *The Oxford Companion to the Supreme Court of the United States* (New York: Oxford University Press, 1992), p. 310.
4. *Frank Lambert, The Founding Fathers and the Place of Religion in America* (Princeton and Oxford: Princeton University Press, 2003), p. 238.

**143.** Ibid., p. 238.

**144.** Ibid., p. 270.

**145.** Ibid., p. 238.

1. Leonard W. Levy, *Origins of The Bill of Rights* (New Haven and London: Yale University Press, 1999), p. 102.
2. Leonard W. Levy, *Constitutional Opinions: Aspects of the Bill of Rights* (New York: Oxford University Press, 1986), p. 142.

**148.** Ibid., p. 144.

1. Ibid.
2. Ibid*.*

**151.** Ibid., p. 148.

1. Ibid.
2. Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Vintage Books, A Division of Random House, Inc., 1997), p. 312.
3. Ibid.
4. *See* Erwin Chemerinsky, *Constitutional Law, Principles and Policies* (New York: Aspen Law & Business, 2002), p. 1149.
5. *Everson v. Board of Education,* 330 U.S. 1, 67 S. Ct. 504 (1947).
6. *Reynolds v. United States,* 98 U.S. 145, 8 Otto 145, 25 L. Ed. 244 (1878).
7. *Everson v. Board of Education, op. cit.*
8. Ibid.

**160.** *Marsh v. Chambers,* 463 U.S. 783, 103 S. Ct. 3330 (1983).

1. Ibid.
2. *Mueller v. Allen, op. cit.*
3. Philip Kurland, “Of Church and State and the Supreme Court,” 29 *U. Chi. L. Rev.* 1, 96 (1961).

**164.** *Wallace v. Jaffree,* 472 U.S. 38, 105 S. Ct. 2479 (1985).

**165.** Ibid.

**166.** *Lynch v. Donnelly,* 465 U.S. 668, 104 S. Ct. 1355 (1984).

1. Erwin Chemerinsky, *Constitutional Law: Principles and Policies,* 2d ed. (New York: Aspen Law & Business, 2002), p. 1153.
2. Leonard W. Levy, *Origins of the Bill of Rights* (New Haven: Yale University Press, 2001), p. 87.

**169.** Ibid., p. 87.

**170.** Ibid., p. 92.

**171.** Chemerinsky, *op. cit.,* p. 1153.

**172.** *Lee v. Wisconsin,* 505 U.S. 577, 112 S. Ct. 2469 (1992).

**173.** Ibid.

**174.** *Locke v. Davey,* 540 U.S. 712, 124 S. Ct. 1307 (2004).

1. Isser Woloch, *The New Regime, Transformations of the French Civic Order, 1789–1820’s* (New York: W.W. Norton & Co., 1994), p. 180. The Bougier Law was adopted by the Convention on December 19, 1793.
2. *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686 (1954).
3. *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 84 S. Ct. 1226 (1964), *rev’g County School Board of Prince Edward County v. Griffin*, 204 Va. 650, 133 S.E.2d 565 (1963).
4. *County School Board of Prince Edward County v. Griffin*, 204 Va. 650, 133 S.E.2d 565 (1963), *rev’d sub. nom., Griffin v. County School Board of Prince Edward County,* 377 U.S. 218, 84 S. Ct. 1226 (1964).
5. *Griffin v. County School Board of Prince Edward County, op. cit., rev’g County School Board of Prince Edward County v. Griffin, op. cit.*
6. James S. Coleman, Thomas Hoffer, and Sally Kilgore, *High School Achievement, Public, Catholic and Private Schools Compared* (New York: Basic Books, Inc., 1982).
7. *See* Joseph E. Stiglitz, *Whither Socialism?* (Cambridge, Mass.: The M.I.T. Press, 1996), pp. 173–178, 262. *See also* Joseph E. Stiglitz, *Globalization and Its Discontents* (New York: W.W. Norton & Co., 2003), p. 76.
8. *See* Craig Timberg, “Williams Sheds Light on Vouchers’ Stance,” *Washington Post*, May 3, 2003, p. B1.
9. U.S. Department of Education, “A New Era: Revitalizing Special Education for Children and Families,” Presidential Commission on Excellence in Special Education, July 2002.
10. *Jackson v. Benson,* 578 N.W.2d 602 (Wis. 1998), *cert. denied,* 537 U.S. 1106, 123 S. Ct. 851 (2003).
11. Ibid.
12. Ibid.
13. *Zelman v. Simmons-Harris,* 536 U.S. 639, 122 S. Ct. 2460 (2002).
14. Ibid.
15. Ibid.
16. William J. Brennan, Jr., “State Constitutions and the Protection of Individual Rights,” 90 Harv. L.Rev. 489, (1977).
17. Clint Bolick, “Brennan’s Epiphany: The Necessity of Invoking State Constitutions to Protect Freedom,” *Texas Review of Law and Politics,* Vol 12, p. 137 (2007).
18. Brennan, *op. cit.,* **p. 550.**
19. Rhode Island Constitution, Article 1, § 3.

**194.** *Bowerman v. O’Connor,* 104 R.I. 519, 247 A.2d 82 (1968).

1. Constitution of Illinois, Article 1, § 3.
2. *Board of Education v. Bakalis,* 54 Ill. 2d 448, 299 N.E.2d 737 (1973). *See* A. E. Dick Howard, *State Aid to Private Higher Education* (Charlottesville, Va.: Michie, 1977), p. 254.
3. *Lemon v. Kurtzman*, *op. cit.*
4. *Snyder v. Town of Newton,* 147 Conn. 374, 161 A.2d 770 (1960), *appeal dismissed,* 365 U.S. 299, 81 S. Ct. 692 (1961). **199.** Ibid., 161 A.2d at 774–75.
5. Ibid.
6. Article I, § 3, Constitution of Iowa; *Knowlton v. Baumhover,* 166 N.W. 202 (Iowa 1918). *See also* Howard, *State Aid,* p. 303. Howard states that Article I, § 3 of the Iowa Constitution has the same meaning as the U.S. Supreme Court’s interpretation of the First Amendment.
7. Howard, *State Aid,* p. 314; *see Wright v. School District,*

151 Kan. 485, 99 P.2d 737 (1940).

1. *Squires v. City of Augusta,* 155 Me. 151, 153 A.2d 80 (1959); Opinion of the Justices, 261 A.2d 58 (Me. 1970).
2. *In re Opinion on the Constitutionality of Amendatory Act. No. 100 in the Public Acts of 1970,* 384 Mich. 82, 180 N.W.2d 265 (1970).
3. *Americans United Inc. v. Independent School District No. 622,* 288 Minn. 196, 179 N.W.2d 146 (1970).
4. *Everson v. Board of Education*, *op. cit.*
5. State *ex rel. Warren v. Nusbaum (III),* 64 Wis. 2d 314, 219 N.W.2d 577 (1974).
6. *Mueller v. Allen, op. cit*.
7. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 93 S. Ct. 1278, *reh’g denied,* 411 U.S. 959, 93 S. Ct. 1919 (1973).
8. *University of the Cumberlands v. Rev. Albert M. Pennypacker, et al*., *University of the Cumberlands v. Rev. Albert M. Pennypacker, et al.,* 308 S.W. 668 (Ky. S. Ct. 2010).
9. Ibid.

**212.** *Mitchell v. Helms,* 530 U.S. 793, 120 S. Ct. 2530 (2000).

1. *Matthews v. Quinton,* 362 P.2d 932 (Alaska 1961), *cert. denied, appeal dismissed,* 368 U.S. 517, 82 S. Ct. 530 (1961).
2. Ibid.
3. Alaska Constitution, Article VII, § 1. *See* Howard, *State Aid,* pp. 98–99. It should be noted that the Alaska legislature apparently violated this constitutional provi- sion when, in 1972, it enacted a law that provided aid for transportation of children attending non-public school.
4. People *ex rel. Vollmar v. Stanley,* 81 Colo. 276, 255 P. 610 (1927); Howard, *State Aid,* pp. 154–157.
5. West’s Colo. Rev. Stat. Ann. Constitution, Article IX, § 7.

**218.** *Spears v. Honda,* 51 Haw. 1, 449 P.2d 130 (1968).

1. Ibid.
2. *Board of County Commissioners v. Idaho Health Facilities Authority,* 96 Idaho 498, 531 P.2d 588 (1974).
3. *Knowlton v. Baumhover,* 182 Iowa 691, 166 N.W. 202 (1918).
4. *Board of Education of Central School District No. 1 v. Allen,* 392 U.S. 236, 88 S. Ct. 1923 (1968).
5. *See* Howard, *State Aid,* p. 300.
6. *Knowlton v. Baumhover, op. cit.*
7. Opinion of the Justices to the Senate, 401 Mass. 1201, 514 N.E.2d 353 (1987).
8. Opinion of the Justices, 357 Mass. 836, 258 N.E.2d 779 (1970).
9. *Attorney General v. School Committee of Essex,* 387 Mass. 326, 439 N.E.2d 770 (1982).
10. Opinion of the Justices to the Senate, *op. cit*.
11. Opinion of the Justices, 357 Mass 846, 259 N.E.2d 564 (1970).
12. Ibid.
13. *Paster v. Tussey,* 512 S.W.2d 97 (Mo. 1974), *cert. denied,*

419 U.S. 1111, 95 S. Ct. 785 (1975).

**232.** *Harfst v. Hoegen,* 349 Mo. 808, 163 S.W.2d 609, 614

(1941), *Berghorn v. Reorganized School District No. 8,* 364

Mo. 121, 260 S.W.2d 573, 582-83 (1953).

1. *Paster v. Tussey,* 512 S.W.2d at 101–2.
2. State *ex rel. Chambers v. School District No. 10,* 155 Mont. 422, 472 P.2d 1013 (1970).

**235.** *Lemon v. Kurtzman,* 403 U.S. 602, 91 S. Ct. 2105 (1971).

1. Article V, § II(5).
2. Howard, *State Aid,* p. 250.

**238.** Ibid., p. 987.

1. *Dickman v. School District No. 62 C,* 232 Or. 238, 366 P.2d 533 (1961), *cert. denied,* 371 U.S. 823, 83 S. Ct. 41 (1962); *see also Fisher v. Clackamas County School,* 13 Or. App. 56, 507 P.2d 839 (1973).
2. *Abington Township v. Schempp,* 374 U.S. 203, 83 S. Ct. 1560 (1963).

**241.** *Stone v. Graham,* 449 U.S. 39, 101 S. Ct. 192 (1981).

1. *Lee v. Weisman*, *op. cit.*
2. *Santa Fe Independent School District v. Doe,* 530 U.S. 290, 120 S. Ct. 2266 (2000).
3. *Mueller v. Allen, op. cit.*
4. *Zobrest v. Catalina Foothills School District, op. cit.*
5. *Agostini v. Felton, op. cit.*
6. *Mitchell v. Helms, op. cit.*
7. *Zelman v. Simmons-Harris, op. cit*.
8. *Hackett v. Brooksville Graded School District,* 120 Ky. 608, 87 S.W. 792 (1905).
9. North Dakota Compiled Laws, § 1388 (1913).
10. Illinois *ex rel. McCollum v. Board of Education of School District No. 71,* 333 U.S. 203, 68 S. Ct. 461 (1948).

**252.** *Zorach v. Clauson,* 343 U.S. 306, 72 S. Ct. 679 (1952).

**253.** *Engel v. Vitale,* 370 U.S. 421, 82 S. Ct. 1261 (1962).

1. Illinois *ex rel. McCollum v. Board of Education, op. cit.*
2. *Engel v. Vitale, op. cit.*
3. *School District of Abington Township v. Schempp* and

*Murray v. Curlett,* 374 U.S. 203, 83 S. Ct. 1560 (1963).

**257.** *Stone v. Graham,* 449 U.S. 39, 101 S. Ct. 192 (1980).

**258.** In spite of the Supreme Court’s ruling in *Stone,* both local school district and local governmental agen- cies in several states have continued to post the Ten Commandments. When these practices are challenged, the courts have followed *Stone*. A federal district court, using the *Lemon* test, ruled that displaying the Ten Commandments was unconstitutional. *Baker v. Adams County/Ohio Valley School Board* (6th Cir. 2002). *See also Doe v.*

*Harlan County School District*, 96 F. Supp. 2d 677 (E.D. Ky. 2000) (multiple displays with Ten Commandments vio- lated Establishment Clause); *ACLU of Kentucky v. McCreary County,* 2003 WL 23014362 (6th Cir. 2003) (including Ten Commandments along with documents of American his- tory in the courthouse and school classrooms violated First Amendment).

**259.** *Wallace v. Jaffree,* 472 U.S. 38, 105 S. Ct. 2479 (1985); *Duffy*

*v. Las Cruces Public Schools,* 557 F. Supp. 1013 (D. N. M. 1983).

1. *Walter v. West Virginia Board of Education,* 610 F. Supp. 1169 (S.D. W.Va. 1985).
2. *Jager v. Douglas County School District,* 862 F.2d 824 (11th Cir. 1989).
3. *Breen v. Runkel,* 614 F. Supp. 355 (W.D. Mich. 1985); *May v. Evansville-Vanderburgh School Corp*.*,* 787 F.2d 1105 (7th Cir. 1986).
4. *Wallace v. Jaffree, op. cit.*
5. *Walter v. West Virginia Board of Education, op. cit.*

**265.** *Chandler v. Jones,* 180 F.3d 1254 (1999).

**266.** *Lynch v. Donnelly,* 465 U.S. 668, 104 S. Ct. 1355 (1984).

**267.** *Lee v. Weisman,* 505 U.S. 577, 112 S. Ct. 2649 (1992);

*County of Alleghany v. ACLU*, 492 U.S. 573, 109 S. Ct. 3086 (1989); *Doe v. Duncanville Independent School District,* 70 F.3d 402 (5th Cir. 1995).

**268.** *Lynch v. Donnelly,* 465 U.S. 668, 104 S. Ct. 1355 (1984).

1. Ibid.
2. *Board of Education of Westside Community Schools v. Mergens, op. cit.*
3. *Lamb’s Chapel v. Center Moriches Union Free School District,* 508 U.S. 384, 113 S. Ct. 2141 (1993).
4. *Doe v. Duncanville Independent School District,* 70 F.3d at 406–7.
5. *Board of Education of Westside Community Schools v. Mergens,* 496 U.S. at 251, 110 S. Ct. 2356.
6. *Edwards v. Aguillard,* 482 U.S. 578, 107 S. Ct. 2573 (1987).
7. Ibid.
8. *Board of Education of Westside Community Schools v. Mergens, op. cit.*
9. Ibid.
10. *School District of Abington Township v. Schempp,* 374 U.S. 203, 83 S. Ct. 1560 (1963).
11. *Lee v. Weisman, op. cit.*
12. Ibid.
13. *Jones v. Clear Creek Independent School District,* 977 F.2d 963 (5th Cir.), *reh’g denied,* 983 F.2d 234 (5th Cir. 1992), *cert. denied,* 508 U.S. 967, 113 S. Ct. 2950 (1993).
14. *Santa Fe Independent School District v. Doe, op. cit.*

**283.** *Widmar v. Vincent,* 454 U.S. 263, 102 S. Ct. 269 (1981).

1. *Board of Education of the Westside Community Schools v. Mergens,* 496 U.S. 226, 110 S. Ct. 2356 (1990).
2. *Lamb’s Chapel v. Center Moriches Union Free School District,* 508 U.S. 384, 113 S. Ct. 2141 (1993).
3. *Grace Bible Fellowship v. Maine School Administration*

*#5,* 941 F.2d 45 (1st Cir. 1991).

1. *Shumway v. Albany County School District No. 1 Board of Education,* 826 F. Supp. 1320 (D. Wyo. 1993).
2. Boles, *op. cit.,* p. 139.
3. D. R. Manwaring, *Render unto Caesar: The Flag-Salute Controversy* (Chicago: University of Chicago Press, 1962).
4. Ibid.
5. *Leoles v. Landers,* 184 Ga. 580, 192 S.E. 218, *appeal dis- missed,* 302 U.S. 656, 58 S. Ct. 364 (1937).
6. *Hering v. State Board of Education,* 117 N.J.L. 455, 189 A. 629 (1937).
7. *Gabrielli v. Knickerbocker,* 12 Cal. 2d 85, 82 P.2d 391 (1938).
8. *People ex rel. Fish v. Sandstrom,* 279 N.Y. 523, 18 N.E.2d 840 (1939).
9. *Minersville School District v. Gobitis,* 310 U.S. 586, 60 S. Ct. 1010 (1940).
10. Boles, *op. cit.,* p. 148.

**297.** *State v. Smith,* 155 Kan. 588, 127 P.2d 518 (1942);

*Bolling v. Superior Court,* 16 Wash. 2d 373, 133 P.2d 803

(1943).

**298.** *In re Latrecchia,* 128 N.J.L. 472, 26 A.2d 881 (1942);

*State v. Davis,* 58 Ariz. 444, 120 P.2d 808 (1942).

**299.** *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S. Ct. 1178 (1943).

**300.** *Jones v. Opelika,* 316 U.S. 584, 62 S. Ct. 1231 (1942); *see*

Bates, *op. cit.,* pp. 151–152.

**301.** *Newdow v. U.S. Congress,* 328 F.3d 466, (9th Cir. 2002.)

### ■ Quoted Box Citations

*Works of Benjamin Franklin* (Sparks ed.), VIII, pp. 505–506; in Bigelow ed., VII, pp. 139–140. Cited in Anson Phelp Stokes and Leo Pfeffer, *Church and State in the United States* (New York: Harper & Row, Publisher, 1964), p. 41.

Richard Hooker, *Of the Lawes of Ecclesiasticall Politie; The Sixth and Eighth Books*, in *Devine Right and Democracy: An Anthology of Political Writings in Stuart England*, ed. David Wooten (Harmondsworth, Middlesex, England: Penguin Books, 1986), p. 219.

Isser Woloch, *The New Regime: Transformations of the French Civic Order, 1789–1820s* (New York: W. W. Norton & Company, 1994), p. 194.

John T. McGreevy, *Catholicism and American Freedoms*

(New York: W. W. Norton & Company, 2003), pp. 37–38.

*Locke v. Davey,* 540 U.S. 712, 124 S.Ct. 1307 (2004).

© Copyright 2006 Pat Bagley—All Rights Reserved / www

.Politicalcartoons.com

© Copyright 2001 Brian Fairrington—All Rights Reserved / [www.Politicalcartoons.com](http://www.Politicalcartoons.com/)