

**Coalition Networks and Policy Learning:
Interest Groups on the Losing Side of Legal Change**

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Abstract

Network, organizational, and policy learning literatures indicate that when interest groups face failure they will seek out alternative ideas and strategies that will enhance their potential for future success. Research with regard to interest groups and legal change has found that interest groups, using arguments that were once accepted as the legal standard for Supreme Court decisions, were unwilling or unable to alter their arguments when the Court reversed its position on these legal standards. This research project examined the conflicting findings of these literatures. Using the Advocacy Coalition Framework as a guide, this project studied the separationist advocacy coalition in cases regarding state aid to elementary and secondary sectarian schools from 1971 to 2002. The legal briefs filed by members of the separationist advocacy coalition with the Court were examined using content analysis to track changes in their legal arguments. Elite interviews were then conducted to gain an understanding of the rationale for results found in the content analysis. The research expectation was that the separationist advocacy coalition would seek out and incorporate into their briefs new and innovative legal arguments to promote their policy goals.

The research results demonstrated that prior to legal change interest groups did seek out and incorporate new legal arguments borrowed from other fora and sought to expand or reinterpret established legal arguments to better aid their policy goals. The changes that seemed to have the potential for adoption by the Court were quickly incorporated into the briefs of the other members of the coalition. Following legal change interest groups continued to analyze the decisions of the Court in order to seek out the best possible legal arguments to use in their briefs; however, the main focus of legal arguments examined and used by the coalition narrowed to those cited by the swing justice in the funding cases. Two innovative arguments were developed, but were either ignored or considered unsuitable, and were not used by the other members of the coalition. Counter to this project's research expectations new and innovative legal arguments were not adopted by the coalition. As the Court discontinued the use of various legal arguments the coalition quickly responded to these changes and dropped those obsolete legal arguments. Therefore, contrary to prior research, the interest groups and the coalition altered their arguments following legal change. Only those interest groups who no longer participated in coalition discussions reverted back to using pre-legal change arguments. Learning continued to occur in the coalition following legal change; however, the focus of analysis and the pool of arguments deemed worthy of use narrowed considerably.

Dedication

This dissertation is dedicated to Julia Pesak without whose emotional and material support my dissertation and graduate education would not have been possible. In addition, Julia acted as my editor and deserves the credit for any clarity of communication found in this paper, the remaining errors are entirely my own. Thank you Julia for being my partner in life and love. I eagerly look forward to the intellectual and physical journeys that this degree will take us.

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Introduction

This dissertation examines how interest groups, whose legal arguments were once used as *the* legal standards for Supreme Court decisions, respond when a majority of the Supreme Court no longer accepts their legal arguments. The research that sparked my interest in this topic is by Lee Epstein and Joseph F. Kobylka in their 1992 book *The Supreme Court & Legal Change: Abortion and the Death Penalty*. Their findings indicate that interest groups on the losing side of legal change do not modify their legal arguments in reaction to changes made by the Court. Epstein and Kobylka report,

In both cases [capital punishment and abortion], initial ‘liberal’ victories were forged and then lost, in significant part, because their defenders doggedly clung to their understanding of the Court’s logic. This fatally constrained their ability to shift argumentational grounds when those victories came under threat. This we have called the ‘tyranny of absolutes,’ the notion that legal arguments, once seemingly won, are absolute and defensible only on those grounds. Without the argumentational flexibility to adapt to new conditions, the tyranny of absolutes led abolitionists and pro-choice advocates to dig their own doctrinal graves by ignoring alternative arguments that might have saved the underlying goals their initial victories were intended to achieve and protect (311).

The implication that interest groups pursuing their policy objectives are unable, or unwilling, to modify their arguments “to adapt to new conditions” seems to violate basic tenets of organizational, policy, and network learning (see below), and is why I decided to explore this research topic in greater depth. Although published in 1992, no follow-up research has been conducted on Epstein and Kobylka’s findings until now.¹

This research project is not focused on how interest groups try to influence the Supreme Court, but rather on how interest groups respond when they find themselves on the losing² side of legal change. Understanding this research project necessitates some

¹In the spring of 2003 I contacted Dr. Epstein asking if subsequent research verified her findings from a decade ago. She replied that she had not conducted additional research on this issue nor was she aware of such research by others. My own literature search in on-line databases confirmed the lack of further research on this topic. I investigated: ABI/INFORM, Dissertation Abstracts Online, Expanded Academic Index ASAP, JStor, LexisNexis Academic, Proceedings First, PAIS International, and Web of Science.

² For the purposes of this project “losing” is defined as being with the minority decision of the Court in both policy outcome and legal argument. Interest groups decide to join cases based on a variety of reasons

general background information on the concept of legal change and how interest groups interact with the Supreme Court.

Legal Change

Legal change is the term used when the Court significantly modifies or reverses itself on a policy issue, as well as the legal arguments used to arrive at these revised policy decisions.³ For example, in 2003 the Supreme Court in *Lawrence v. Texas* ruled that state sodomy laws are unconstitutional, overturning its 1986 *Bowers v. Hardwick* precedent upholding such laws. In the *Bowers* decision the Court found that an anti-sodomy policy was allowable as a legitimate state interest in promoting morality; whereas, in *Lawrence* the Court held “that a state cannot constitutionally criminalize homosexual sodomy engaged in by consenting adults in the privacy of the home” based on the Court’s substantive due process jurisprudence (Schwartz 3). The existence of legal change demonstrates the mutability of the law outside of the actions of the executive and legislative branches and the important role the Supreme Court plays in the policy arena.

Interest Groups and the Supreme Court

It is too soon to evaluate how interest groups will respond to the Court in future gay civil rights cases based on the Court’s *Lawrence* decision. Immediately following the decision, however, Rev. Pat Robertson, whose American Center for Law and Justice (ACLJ) participated in the case, organized a public intercessional prayer vigil that initially called on the Divine to remove several of the justices who contributed to the

(as described on page 28) and the interest groups determination of success in a case may not be based on the outcome of the majority decision. For example, an organization may take on a case it knows it will lose if the organization believes its participation will help in fund-raising or membership building efforts. But even in this situation, I propose organizations would attempt to provide the best arguments available for the case as long as these arguments do not undermine their fund-raising or membership building activities.

³ Wahlbeck states that legal change occurs because, “The law is dynamic, not static. Instead of a closed process, wherein judges simply apply fixed, preexisting rules to resolve disputes, the legal process is more aptly described as an open process wherein legal rules are continually subject to modification” (781). He uses four elements to examine how and why the Supreme Court’s legal/policy opinions change: judicial preferences (i.e., the ideology and attitudes of the justices), legal constraints (i.e., preserving the Court’s legitimacy through adherence to constitutional text and precedent), litigation environment (i.e., the political and financial resources of the competing parties), and political environment (i.e., constraints from other political institutions, potential effects of decisions on the governing coalition, and the broader legitimacy of our democratic government).

majority decision. Later Robertson clarified he was praying for a change of the justices' hearts, not for the stopping of them. Although this interest group response to legal change is probably used frequently in private, it is an unusual public response. It is also not one that makes use of the formal means available for influencing the Court.

Currently, interest groups can attempt to influence the Court through only two formal channels: by bringing a case before the Court as a litigant or sponsor of a litigant, or filing an *amicus curiae* brief⁴ with regard to a case. As Baum states, "...because direct contact between lobbyists and justices is generally deemed unacceptable, interest group activity in the Court is basically restricted to the formal channels of legal argument" (3).

As litigants or the supporters of litigants, interest groups play a necessary role in the judicial process; however, Court scholars dispute the weight interest groups have in influencing judicial decision-making. One group of researchers (e.g., Segal and Spaeth) argues that judicial decision-making is predominantly a product of the facts of a case and the attitudes of the members of the Court toward these facts. The arguments made by interest groups are therefore inconsequential, according to this view of the Court. Other scholars find interest groups to be important contributors to Court decision-making (e.g. Bentley, Truman, Vose, Kobylka, and Kearney and Merrill). Some scholars within this group of researchers credit the creativity of interest groups for the success of their efforts in achieving their policy goals.

For example, Vose chronicles the activities of the NAACP's Legal Defense Fund and its allies in their successful quest to eliminate restrictive housing covenants. One innovation of this coalition⁵ was the use of economic and sociological data to support its legal arguments. Vose states that the coalition's Supreme Court legal brief "...was masterful in its blending of legal and sociological claims" (187). Caldeira and Wright

⁴ *Amicus curiae* (friend of the court) briefs are submitted by groups who are not litigants in a case, to supplement or emphasize the legal arguments made by the litigants. *Amicus* briefs are relatively inexpensive and simple to submit to the Court, and "because of the widespread perception that *amicus* briefs influence the Court, groups consider the effort of filing or joining in a brief to be worthwhile." (Baum 92).

⁵ Vose relates the interaction of this coalition in a meeting that took place on September 6, 1947 to prepare for the Supreme Court cases on restrictive covenants. Forty-four people attended this all-day conference from the following organizations: American Jewish Committee, American Jewish Congress, Anti-Defamation League, Anti-Nazi League, Columbia University, Congregational Board, Congress of Industrial Organizations, Lawyers Guild, NAACP, National Bar Association, and Protestant Council of Churches (160-165, 274).

found that at the very least interest group participation “provides the justices with an indication of the array of social forces at play in the litigation” (1111).

Without regard to their effectiveness, interest groups are participating in ever increasing numbers before the Court. Over a 13-year period Epstein found a significant increase in the number of organizations formed for the purpose of conducting litigation before the Court. A 1976 survey of public interest law groups found just 92 organizations. A similar survey from 1989 identified over 250 organizations. In addition, Epstein found that of all Supreme Court cases decided between 1986 and 1991 84.4 percent contained at least one *amicus* brief, compared with only 28.6 percent during the Warren Court era (1953-1969).

Although more interest groups are now participating in the judicial process, do they learn from their experiences? The next section reviews the relevant learning literatures.

Chapter 1: Review of Literature

Organizational and Policy Learning

Thompson credits the work of Simon, March and Simon, and Cyert and March with creating the groundwork for viewing the organization as:

...a problem-facing and problem-solving phenomenon. The focus is on organizational processes related to choice of courses of action in an environment which does not fully disclose the alternatives available or the consequences of those alternatives (9).

To solve problems an organization needs to have the ability to learn. Epstein and Kobylka's finding that advocacy groups did not adapt to changing conditions appears to contradict basic propositions of organizational learning. Vera and Crossan define organizational learning as:

...the process of change in individual and shared thought and action, which is affected by and embedded in the institutions of the organization. When individual and group learning becomes institutionalized, organizational learning occurs and knowledge is embedded in non-human repositories such as routines, systems, structures, culture and strategy (123).

This research project is focused on how learning changes an organization's strategy in regard to the Supreme Court following legal change. Vera and Crossan state that learning is important because the ability of an organization to learn faster than its competitors is seen as the key competitive advantage for organizational success (122).

Citing the research of Cyert and March, DiMaggio and Powell, Levitt and March, among others, Ebrahim states that organizations learn by doing, exploring, and imitating. For learning by doing, "An organization is likely to repeat a routine that is associated with success in meeting a target, whereas it is less likely to repeat one that is associated with failure" (108). With exploring, Ebrahim found that following a failure an organization will search for alternatives "sometimes employing unproven procedures or ideas or even developing new ones" (*ibid.*). Lastly, with imitation, organizations facing uncertain situations will "look to the activities or strategies of other similar organizations which they perceive to be more legitimate or successful" (109). Evidenced by these research results, interest groups appearing before the Supreme Court will likely repeat the

legal arguments that have been successful with the Court in prior cases, and conversely will likely seek out and employ new ideas following a failure before the Court.

March and Olsen found “...ample evidence that when performance fails to meet aspirations, institutions search for new solutions...;” however, “[t]here is evidence that failure-induced stress in social systems can produce persistence in behavior rather than change” (60 and 62). Citing research by Staw, Staw and Sz wajkowski, Manns and March, and others, March and Olsen go on to explain that even when change occurs in situations following failure, the changes might be minor modifications in effort or procedures rather than “major innovative changes” (60). They also suggest that since change is often driven by solutions rather than problems, this inability to adapt to changing conditions might reflect an absence of solutions available to the organization (62). This “failure-induced stress” could bring about the results shown in the research of Epstein and Koby lka. However, rather than being driven by a “tyranny of absolutes” the behavior they found may be caused by a lack of actual or perceived alternative arguments.

Similar to organizational learning, policy learning refers to significant changes of thought and/or actions that result from new experiences or new information that are connected to an individual or organization’s pursuit of a policy goal. The Advocacy Coalition Framework (ACF; described in more detail below) sees policy learning as a key factor in policy change (Sabatier and Jenkins-Smith 123). Proponents of the ACF believe that policy change can take place because of the policy learning that occurs within and between advocacy coalitions (145). The members of an advocacy coalition hold the same or similar belief systems and adopt strategies to promote their common goals (133). A coalition belief system, developed from the shared belief systems of the member organizations and their constituencies, may limit the number of solutions available to respond to failure. Alternative legal arguments that could promote an advocacy coalition’s goals may not be seen as acceptable when viewed through the lens of the coalition’s belief system.

Interest groups experiencing a rejection of their legal arguments before the Supreme Court will follow these organizational and policy learning paths in an attempt to

be more likely to succeed in future cases, but they may find that belief and constituency constraints limit the pool of potential solutions.

Network Learning

Learning within advocacy coalitions can be further understood through network learning. As Knight describes it,

Network learning is learning by a group of organizations as a group. If through their interaction, a group of firms change the group's behaviour or cognitive structures, then it is the group of organizations that is the 'learner', not just the individual organizations within the group. In such a case, the network can be said to have learnt (428).

Knight also refers to this type of learning as interorganizational learning. Two types of network learning are pertinent to my project: strategic networks and wide networks. Strategic networks are made up of organizations with a high level of cooperative working relationships. The working relationship among organizations in wide networks are less likely to engage in collaborative projects; however, they still share a similar interest or activity (430-431). Although both of these kinds of networks negotiate the sharing of organizational resources and the planning of joint activities, the more formalized structures and practices used to facilitate this negotiation will be found in strategic networks (431 and 437).

Kickert and Koppenjan citing the research findings of Fisher and Ury state that in successful negotiations,

...parties do not cling to their previously held positions, but go in search of joint interests during the negotiating process. 'Exploration' plays an important role in this: the creative searching for new solutions which take account of the problem and interest definitions of all parties concerned (40).

The ability to let go of "previously held positions" requires a shift in an organization's perception of a policy issue. Perceptions are unlikely to change when organizations interact only with other actors holding the same perceptions. Termeer and Koppenjan state that only a "...confrontation with other perceptions can create the opportunity for change. Confrontation can be seen as the driving force for change" (84). This concept

of confrontation reinforces the organizational learning tenet that organizations repeat actions that are successful and only seek out new solutions when faced with failure.

Within an advocacy coalition, Sabatier expands on the idea of perceptions by dividing them into “deep core” beliefs and outer policy beliefs. Deep core beliefs define an interest group’s identity. Deep core beliefs are resistant to change, but outer policy beliefs, which consist of policy positions and strategies, are less resistant to change (*Policy Sciences* 139). To produce a joint action, interest groups need only negotiate a consensus on the outer policy beliefs, leaving the deep core beliefs unchanged. Termeer and Koppenjan found the presence of new solutions alone is not enough to produce a change to policy beliefs. The interest groups’ perceptions of the policy beliefs must be shifted to allow new solutions to be incorporated into the organization. This can be done by: developing new procedures to foster the interaction of actors; preventing the exclusion of critics and “bringers of bad news;” and, introducing new actors with new ideas. These three factors can force a confrontation and shift perceptions (89-92). However, perceptions can remain unchanged in the face of failure even with the existence of new solutions, if a group of actors is either consciously unwilling or unconsciously unable to learn. Schaap and van Twist call this “closedness in networks” and is also called cognitive fixation. Like the literatures described above, the network learning literature also provide explanations of situations that both contest and support the findings of Epstein and Kobyłka.

Learning in Hostile Political Environments

The ability of interest groups to creatively respond to hostile policy environments has been researched by Herrnson *et al.*; they state that most interest groups “...are pragmatic. They use multifaceted strategies, adapting their tactics to suit new objectives and political circumstances. Groups forge, strengthen, and dissolve connections with various public officials, political institutions, and constituencies in order to pursue their goals better.” When faced with a changing political environment, “Groups reorganize their priorities and make adjustments to their strategies...” (328).

Shaped by a constitutional foundation where policy decisions based on legal arguments are made by life-time appointed justices, the Supreme Court is obviously a

much different sort of policy making institution than either the legislative or executive branches. Yet even in this policy forum, the basic drive of interest groups to obtain their goals compels them to seek out innovative arguments to increase their chances for success.

Why Study This Issue Now?

The timing for this research project was ideal because of the instability of the Court's legal arguments regarding the Establishment Clause of the First Amendment⁶ contrasted with the stability of the Court's membership. In this section, I discuss these conditions in depth.

The Court's Establishment Clause policies are in transition. In the last ten years, the Court has substantially modified its use of the Establishment Clause legal standard, the *Lemon* test, and the litigants who helped to create the *Lemon* test have lost all state aid to sectarian school cases. Not only are these litigants losing their cases, but also precedents they helped establish are being overturned. For example, *Agostini v. Felton* (1997) overturned *Aguilar v. Felton* (1985) allowing for state paid secular instruction in sectarian schools; and, *Mitchell v. Helms* (2000) overturned parts of *Meek v. Pittenger* (1975) and *Wolman v. Walter* (1977) allowing the state to supply equipment and instructional materials to sectarian schools. With the substantial modification of the *Lemon* test and the overturning of precedent, state aid cases to sectarian elementary and secondary schools meet the requirements of having undergone legal change and can be used for this study.

The coalition of interest groups instrumental in creating the *Lemon* test include, the American Civil Liberties Union, the American Jewish Congress, and Americans United for Separation of Church and State. For the purposes of this paper the alliance of

⁶ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; ..." Article I of the Amendments to the Constitution. The first portion of the phrase is referred to as the Establishment Clause and the later half as the Free Exercise Clause. Taken together they form a unitary protection of religious freedom: the Establishment Clause prohibits government actions imposing religious beliefs on its citizens or even favoring certain beliefs, and the Free Exercise Clause prohibits government actions prohibiting its citizens from pursuing their religious beliefs (but actions can be regulated as long as the law has neutral applicability). Leo Pfeffer declares that these two clauses are "really two sides of a single coin. The fathers of the First Amendment were convinced that the free exercise of religion and the separation of church and state were two ways of saying the same thing: that separation guaranteed freedom and freedom required separation." (*First Freedom* 133).

interest groups that support a separation of church and state interpretation of the Establishment Clause will be called the separationist advocacy coalition and their opponents the accommodationist advocacy coalition. The Supreme Court produced the three-pronged *Lemon* test, to determine the constitutionality of church-state policy, by combining the legal arguments from earlier church-state cases such as *Everson* (1947), *Abington* (1963), and *Walz* (1970). This test required that the following conditions must all be present in order for a law or government action providing public aid to a religious institution to be found constitutional: 1) it must have a secular purpose, 2) the primary effect must neither advance nor inhibit religion, and 3) it must not foster an excessive government entanglement with religion. During the more than 15 years that the Supreme Court justices adhered to the standards of the *Lemon* test, the majority of Establishment Clause cases regarding public funding of sectarian schools were decided in favor of the positions taken by the parties of the separationist advocacy coalition.

Since the adoption of the *Lemon* test in 1971, Republican presidents have dominated Court appointments (9 to 2). The political environment has become increasingly hostile to the idea of a strict interpretation of the separation of church and state since the presidency of Ronald Reagan, and with the increased political influence of conservative religious interests. (Kobylka 93). Although the separationist advocacy coalition is losing its state aid to sectarian school Establishment Clause cases, the coalition is expanding its Establishment Clause victories in cases prohibiting prayer in public schools (for example, *Santa Fe Independent School District v. Doe*, 2000), which prohibited prayer at public high school football games). This seeming inconsistency in Establishment Clause decisions makes studying the Court extremely fascinating and impervious to superficial analysis.

The *Lemon* test was substantially modified because of the increasing influence of the following legal arguments: non-preferentialism (first promoted by Justice Rehnquist in *Wallace v. Jaffree* (1983)), whereby a policy is constitutional as long as it does not favor one religion over another; non-coercion (first promoted by Justice Kennedy in *County of Allegheny v. ACLU* (1989)), whereby a policy is constitutional as long it does not force a person to support a particular religion or provide a benefit to a particular religion; and, non-endorsement (first promoted by Justice O'Connor in *Lynch v. Donnelly*

(1984)), whereby a policy is constitutional as long as it does not endorse or disapprove of religion, or excessively entangle government in religion (Epstein and Walker 164). Thus far none of these alternatives to the *Lemon* test have obtained a consistent five-member majority of the Court; however, the combination of these opinions (into what I will refer to as a neutrality test) has relegated the separationist interpretation of the *Lemon* test to the dissent.

Following the modification of the *Lemon* test in *Agostini*, the emergence of the aforementioned alternatives, and a decade of increased government aid to sectarian schools, my objective was to determine if the separationist advocacy coalition adapted their legal arguments to these new conditions. If they did change their legal arguments, I would examine what situations encouraged or allowed this learning to take place. Conversely, I could have uncovered additional evidence that supports Epstein and Kobylka's findings that interest groups simply cling to legal arguments that have been abandoned by the Court. If so, I would have again examined the factors that prevented learning from occurring.

The other advantage of studying this issue now is that the membership of the Court remained unchanged from 1994, when Stephen Breyer took the seat formerly held by Justice Harry Blackmun, to 2005, when John Roberts replaced William Rehnquist as Chief Justice.⁷ This is the second-longest period without a membership change (the longest was 1811-1824 under Chief Justice Marshall). The stability provides a particular benefit for studying how interest groups respond to the decisions of the Court. New members on the Court produce uncertainty about both their positions on policy issues, and their influence on the group decision-making dynamics of the Court (Murphy). With a long-serving Court membership it will be easier to determine if experience with the same Court for the past ten years has given interest groups any special insight into the policy positions and rationales held by the justices, and also to see if these interest groups are using this information to create innovative approaches for arguing before the Court.

The next section describes the research method used in this dissertation project.

⁷ The following are the current members of the Supreme Court (and who appointed them): Chief Justice Roberts (Bush II), Justices Stevens (Ford), O'Connor (Reagan), Scalia (Reagan), Kennedy (Reagan), Souter (Bush I), Thomas (Bush I), Ginsburg (Clinton), and Breyer (Clinton). As this dissertation was being completed Justice O'Connor announced her retirement.

Chapter 2: Research Method

From the literatures on organizational, policy, and network learning, described in detail in Chapter 1, there appear to be a set of factors that may help us predict whether or not learning will occur in a changing environment. The key factors appear to be the willingness and ability of interest groups to change, and the availability of solutions and the means to encounter and adopt these solutions when faced with failure. I have divided these factors into those that promote learning (Scenario A), and those factors that inhibit learning (Scenario B). See Table 1 below.

Table 1

Learning Factors and Scenarios

Learning Factors	<i>Scenario A – Promoting Learning in a Changing Policy Environment</i>	<i>Scenario B – Inhibiting Learning in a Changing Policy Environment</i>
Willingness to change	Interest groups seek to learn faster than their competition to obtain a competitive advantage for success (Vera and Crossan)	The values and beliefs of the interest group’s constituency may limit the alternatives available to the organization (Sabatier and Jenkins-Smith);
Ability to change	When encountering a hostile policy environment interest groups will make adjustments to their strategies (Herrnson <i>et al.</i>)	A failure-induced stress on the interest group produces persistence in behavior rather than change (March and Olsen)
Existence of alternative solutions	When faced with failure interest groups will search for new solutions (Ebrahim)	Viable alternatives may simply not be available (March and Olsen)
Means to encounter and adopt alternative solutions	The advocacy coalition of interest groups facilitate the learning of new solutions through confrontation and negotiation (Termeer and Koppenjan).	Interest groups in an advocacy coalition may be consciously unwilling or unconsciously unable to learn because of a closedness in networks/cognitive fixation (Schaap and van Twist).

These learning factors and scenarios can be applied to advocacy coalitions pursuing their policy goals. If an advocacy coalition has no competition in a policy subsystem it is unlikely to change its policy strategy. However, if there is competition in the policy subsystem, the advocacy coalition is more likely to engage in learning to obtain a competitive advantage over its competition. If the advocacy coalition is successful in their policy strategy then they are likely to repeat the successful strategy reducing the need for additional learning; however, if the policy strategy is unsuccessful then the advocacy coalition will likely search for new solutions. If no viable policy alternatives are perceived to exist or the policy failure creates a disabling stress within the advocacy coalition then no learning will occur. If new and viable alternative policy solutions are found, negotiations will occur within the coalition to determine what alternatives will be adopted and how they will be used to create a new policy strategy. Encountering and negotiating new solutions to policy failures will be facilitated by the advocacy coalition's openness to new and divergent ideas and interest groups. Advocacy coalitions not open to new ideas and interest groups are unlikely to learn and change their policy strategy.

According to Scenario A, it follows that the separationist advocacy coalition, examined in this research project, will be willing and able to learn from prior decisions of the Court and adapt their legal arguments for future cases. In cases in which the separationist advocacy coalition is successful, they are likely to repeat these successful arguments in future cases. In cases where the separationist advocacy coalition fails, the members of the coalition are likely to seek out and use new legal arguments that are viewed as enhancing the potential of success in future cases. Processes allowing confrontation and negotiation within the coalition facilitate the learning of new legal arguments. Applying the indicators from Scenario B would result in the conclusions found by Epstein and Kobylka in which the interest groups were either unable to unwilling to alter their legal arguments.

Research Strategy

This project is a case study that explores whether or not interest group learning occurs following legal change. If learning is detected then further analysis will determine how and why the learning occurred. If learning is not detected then further analysis will determine why learning did not occur. As Yin states, "... 'how' and 'why' questions are more *explanatory* and lead to the use of case studies... as the preferred research strategies. This is because such questions deal with operational links needing to be traced over time..." (6). Using a case study approach follows that of Epstein and Kobylka except for the following important distinctions. Epstein and Kobylka's research was designed to track and understand the process of legal change. Their discovery of the lack of innovation of interest groups in the face of legal change was an addendum to their main research findings. To track and understand legal change, Epstein and Kobylka chose cases that reflected a shift in the law as presented by the opinions of the Supreme Court. They focused on three Court cases spanning 15 years in their capital punishment case study, and two Court cases spanning 16 years in their abortion case study. This design is appropriate for studying legal change, but is not conducive for studying learning. To effectively study learning, additional cases must be added to the case study following the case in which legal change took place to determine if learning occurred in subsequent cases, and cases prior to the occurrence of legal change must be included to see if the learning patterns found following legal change are different than the learning patterns found prior to legal change. This project focuses on the innovation of interest groups by looking at briefs from many more Supreme Court cases (16) and by providing a longer time frame (31 years) for looking at potential learning. This time frame provides cases in which the separationist advocacy coalition was successful, received mixed results, and failed in obtaining their policy goals. This research design provides more and varied case experiences and a longer timeframe than provided by Epstein and Kobylka for the interest groups to learn from their Court experiences and incorporate this learning into their subsequent legal arguments.

The cases for this study fall into three research timeframes (see Table 2 below): from 1971 to 1973 the Court generally rules in favor of the separationist coalition and the *Lemon* test is solidified as a legal standard for these cases (Section I); from 1975 to 1985

Lemon remains the legal standard, but case outcomes are mixed for the separationist coalition (Section II); and, from 1993 to 2002 the *Lemon* test is substantially modified and the Court rules against the separationist coalition (Section IV)⁸. This paper analyzed these cases keeping in mind these three distinct timeframes to see how learning varied over these different periods. Using these three timeframes provides internal validity for the project. When their legal arguments are successful the interest groups should continue to use these arguments in future cases. When arguments fail to sway the Court, the interest groups will seek out and use new arguments. Using a range of cases in which the separationist advocacy coalition is successful and then unsuccessful allowed me to track changes in legal arguments and provided evidence for causal relationships. This research design represents an interrupted time series analysis comparing legal arguments used before and after the Court substantially modified the *Lemon* test standard and overturned precedent.

Table 2

Supreme Court Cases Examined in This Study

<u>Case</u>	<u>Year</u>	<u>Decision</u>	<u>Successful Litigant</u>	<u>Standard</u>
Section I				
<i>Lemon v. Kurtzman</i>	1971	8-1	Separationist	Lemon
<i>Lemon v. Kurtzman II</i>	1973	5-3	Accommodationist	Lemon
<i>CPEARL v. Nyquist</i>	1973	6-3	Separationist	Lemon
<i>Levitt v. CPEARL</i>	1973	8-1	Separationist	Lemon
<i>Sloan v. Lemon</i>	1973	6-3	Separationist	Lemon
Section II				
<i>Meek v. Pittenger</i>	1975	6-3	Mixed	Lemon
<i>Wolman v. Walter</i>	1977	6-3	Mixed	Lemon
<i>New York v. Cathedral Academy</i>	1977	6-3	Separationist	Lemon
<i>CPEARL v. Regan</i>	1980	5-4	Accommodationist	Lemon
<i>Mueller v. Allen</i>	1983	5-4	Accommodationist	Lemon
<i>Grand Rapids School District v. Ball</i>	1985	5-4	Separationist	Lemon
<i>Aguilar v. Felton</i>	1985	5-4	Separationist	Lemon
Section IV⁸				
<i>Zobrest v. Catalina Foothills</i>	1993	5-4	Accommodationist	Neutrality
<i>Agostini v. Felton</i>	1997	5-4	Accommodationist	Neutrality
<i>Mitchell v. Helms</i>	2000	6-3	Accommodationist	Neutrality
<i>Zelman v. Simmons-Harris</i>	2002	5-4	Accommodationist	Neutrality

⁸ Section III explores the hiatus in cases from 1986 to 1992.

Research Framework

The basic premises of the Advocacy Coalition Framework (ACF)⁹ are applicable to this project and provide a lens to view how policy change occurs. ACF is grounded in the understanding that policy change requires a research perspective of at least a decade or more, the focus of study is the policy subsystem¹⁰, and the opposing views within the policy subsystem are based on competing belief/value systems (Sabatier *Policy Sciences* 131).

The analysis in this framework is focused on the policy subsystem, which in turn is comprised of "...actors from a variety of public and private organizations who are actively concerned with a policy problem or issue" (131). Policy subsystems contain a set of actors, both individuals and groups, from a wide spectrum of backgrounds serving an extensive number of roles (e.g., federal, state, and local government agencies, legislative committees, public interest groups, professional/business associations, academic institutions, foundations, and the media). These actors hold diverse beliefs

⁹ The Advocacy Coalition Framework (ACF) is just one of a number of recent frameworks to be developed to gain a better understanding of the policy process. The policy process has been dominated by the Stages Heuristic, which divides the policy process into a series of phases (agenda setting, policy formulation, policy adoption, implementation, evaluation, and issue transformation – the last stage value-added by Dr. Philip S. Kronenberg). The Stages Heuristic provided a means to understand the policy process, but does not sufficiently capture the forces that govern the policy process and the interactions across policy subsystems and across policy stages (Sabatier *Theories* 7). New frameworks have been developed to capture these elements. Other frameworks that have been developed include: Institutional Rational Choice, Kingdon's Multiple-Streams, and Punctuated-Equilibrium. See Paul A. Sabatier, Ed., *Theories of the Policy Process*. The ACF is the most appropriate framework for this project because of its focus on interest groups that form advocacy coalitions based on shared policy beliefs and that policy learning is seen as a key causal factor in policy change. Institutional rational choice looks at "how institutional rules alter the behavior of intendedly rational individuals motivated by material self-interest" (8). One proposition of my project is that the interest groups are motivated by their policy beliefs/goals rather than their material self-interest. The multiple-streams framework is based upon the garbage can model of organizational behavior, and views the policy process as the intersection of three independent streams (problem, policy, politics) coupled by a policy entrepreneur. Although this framework would be appropriate to track the creation and adoption of a specific policy solution, my project is more of a fishing expedition to see if and what new policy options exist. The punctuated-equilibrium framework assumes that policy change is incremental until a major development creates an opportunity for major policy change followed by continued incremental change. For this project I am less interested in the external factors that create policy change than in how interest groups respond to these changes.

¹⁰ A policy subsystem, as explained in more detail in this paper, is a network of individuals and groups both governmental and nongovernmental advocating positions on a policy issue. A policy system, or policy domain, is a general issue area of public policy that covers several policy subsystems. For example, the religious liberty policy domain houses the policy subsystems of public funding of sectarian schools, the rights of religious minorities, and religious instruction/prayer in public schools. The policy domain captures the interaction among the subsystems. Activities taking place in one subsystem will likely affect other subsystems in the policy domain; however, the participants in the policy domain will likely vary from one subsystem to another.

about problem identification and causal assumptions. Within the policy subsystem, those actors holding the same or similar belief systems will form advocacy coalitions and adopt strategies to promote their common goals (133). Like the wide and strategic networks described above, the interaction of interest groups within an advocacy coalition also are seen to vary. One important distinction ACF makes is between “purposive” and “material” groups. Purposive groups are described as having “...a tightly integrated set of beliefs;” whereas, material groups “...focus on promoting their members’ material self-interest.” Learning by purposive groups is constrained by the organization’s deep-seated beliefs; however, material groups have more latitude for incorporating new ideas to promote policy objectives (Sabatier and Jenkins-Smith 134). Even though ACF researchers make this distinction between organizations in advocacy groups, research into learning processes within coalitions has not taken place “Because learning among members of the same coalition is relatively unproblematic, attention has focused on identifying the conditions for learning *across* coalitions” (Sabatier and Jenkins-Smith 145).

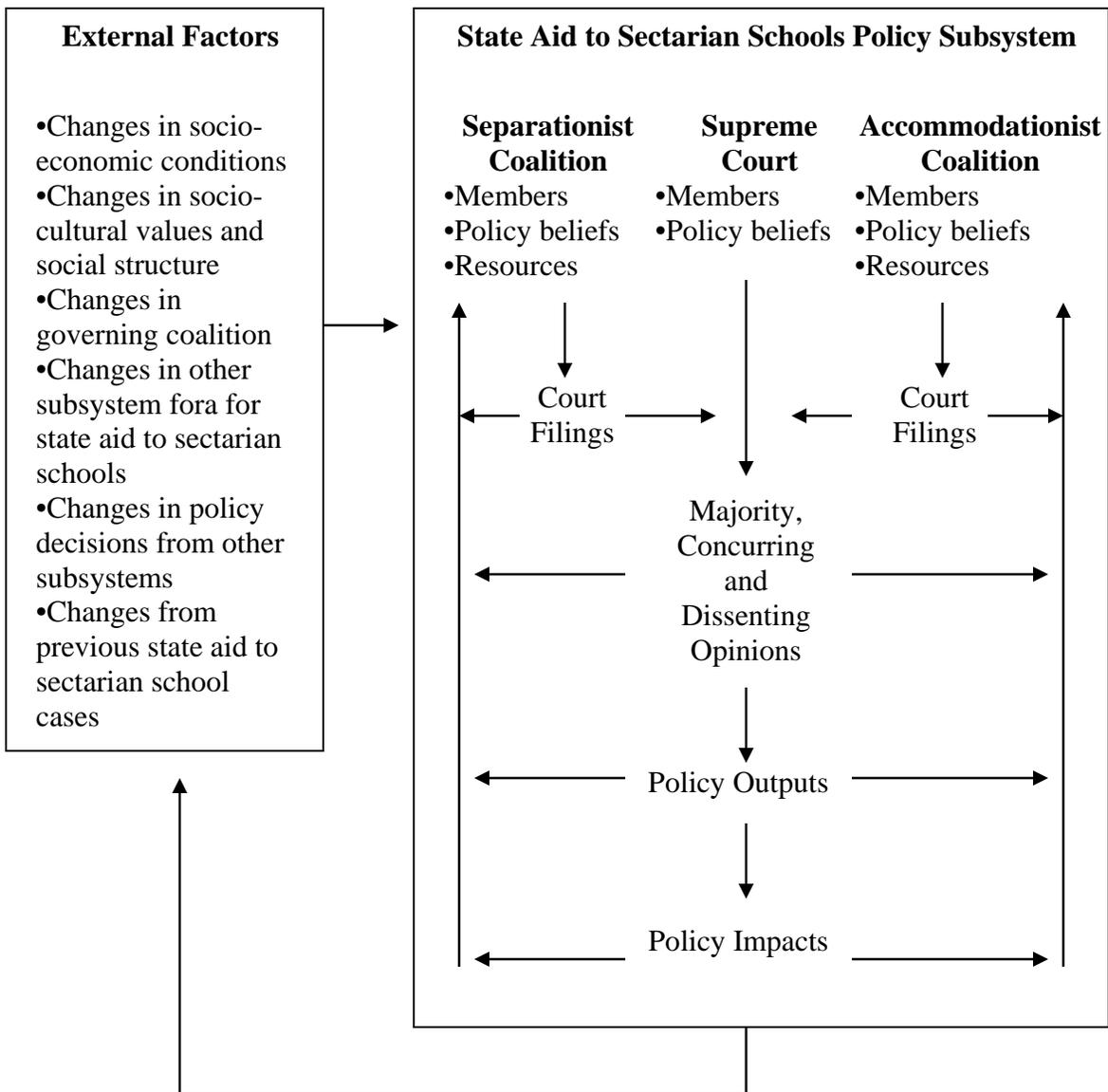
ACF contends that the key causal factor in the process of policy change is the role of information and learning within the policy subsystem. The required 10-year plus timeframe for ACF research is considered essential to understand the development of the policy subsystem. The policy subsystem development is caused by the multiple cycles through the policy-making process of agenda setting, policy formulation, policy adoption, policy implementation, policy evaluation, and issue transformation. Each case decided by the Supreme Court marks the end of one policy cycle and the beginning of another. The policy cycle is at an end because the Court rules on the constitutionality of a policy that has been adopted and implemented. The Court ruling also marks the beginning of a new policy cycle because the Court decision opens the door for issue transformation, agenda setting, and policy formulation. The effect of the lessons learned from these multiple cycles/cases within the policy subsystem is the key source of policy change. It is the learning process, rather than the political clout of the advocacy coalition, that proponents of ACF believe changes the preferences and beliefs of critical actors, whose actions result in policy change. “The framework assumes that such learning is

instrumental, that is, that members of various coalitions seek to better understand the world in order to further their policy objectives” (Sabatier *Policy Change*19).

Figure 1 shows the sources of learning in the policy subsystem studied in this dissertation and the feedback loops carrying information to the advocacy coalitions.

Figure 1

Learning Sources and Feedback Loops¹¹



¹¹ Adapted from Sabatier and Jenkins-Smith’s 1998 Diagram of the Advocacy Coalition Framework (149)

As shown in Figure 1, learning can occur from within the policy subsystem with new ideas being introduced by members of the separationist coalition, the accommodationist coalition, and the Supreme Court. These new ideas can be gleaned from *amicus* briefs filed with the Court and the Court's majority and dissenting opinions. The policy outputs and policy impacts of Supreme Court decisions can also generate new ideas regarding a policy issue. Learning can also occur outside of the policy subsystem and subsequently be adopted for use in the policy subsystem. These new ideas can be generated from changes in socio-economic conditions, the governing coalition, other policy fora, and other policy subsystems.

Researchers studying issues such as public education, airline deregulation, offshore drilling, water rights and conservation, and environmental policy have used ACF to understand how policy change occurred in these policy subsystems. Rather than using ACF to track policy change on an entire policy subsystem, I focused on the policy learning and change of one advocacy coalition in only one forum: the separationist advocacy coalition working to prohibit state aid to sectarian schools in cases before the Supreme Court from 1971 to 2002.

Research Design

Selecting to study the separationist advocacy coalition that is working to prohibit state aid to sectarian elementary and secondary schools in cases before the Supreme Court answers one of the research design questions presented by Yin in developing a research project. According to Yin, a research design answers four questions: what to study, what data are relevant, what data to collect, and how to analyze the results (20). As described above interest groups can only formally interact with the Supreme Court by presenting themselves as litigants before the Court or filing *amicus* briefs with the Court. Therefore, the litigant and *amicus* briefs filed with the Court answer the second question about which data are relevant. These briefs contain the legal arguments used by the interest groups to influence the Court. These legal arguments respond to Yin's third question of what data to collect. Lastly, content analysis and elite interviewing were used to analyze the data and produce the study's results. Using content analysis to find the

legal arguments in the litigant and *amicus* briefs provides construct validity for this project; since interest groups can only formally influence the Court using legal arguments as litigants and *amicus* filers, and their legal arguments are contained in their briefs.

Research Method

Each of the 16 cases studied (see Appendix A) were briefed to present: the circumstances and parties originating the suit; the results of lower court opinions; the basic legal questions being put to the Court; the parties involved as litigants and *amici*; the majority, minority, and concurring Court opinions; the legal reasoning supporting the Court's decisions; the shifts, if any, in Court doctrine from prior cases; and, implications of the decision(s) for future cases. The parties involved were analyzed to examine how interest group participation changes from case to case: new interest groups entering, former participants leaving, changes in participation roles as litigant and *amicus* filers, and changes in joint party filings of litigant and *amicus* briefs. This helped distinguish interest groups involvement within the strategic and wide networks of the separationist advocacy coalition.

The legal briefs of the separationist advocacy coalition were examined using content analysis to produce a complete assessment of the arguments presented by the coalition members.¹² ACF provides a framework for determining the factors and feedback loops where learning can occur (see Figure 1). Because legal briefs use detailed references for their arguments, the briefs provide the answer to the source of where the new ideas were obtained. The raw data (interest group legal briefs filed with the Supreme Court) for this study came from three sources: 1) Virginia Tech's electronic subscription to Lexis Nexis provided litigant briefs from 1980 to the present and *amicus* briefs from 1985 to present; 2) Virginia Tech's electronic subscription to Westlaw provided litigant briefs from 1971 to 1979; and, 3) *amicus* briefs from 1971 to 1984 came from the microfiche files at George Mason University Law School Library.

The content analysis identified in the raw data the legal arguments used by the interest groups and recorded them as themes. *Empirical Political Analysis* by Jarol

¹² Because of the adversarial nature of the judicial process identification of coalition members is less problematic than in other policy fora.

Manheim, Richard C. Rich, and Lars Willnat and *The Content Analysis Guidebook* by Kimberley A. Neuendorf assisted in the design and implementation of the content analysis. The cases listed in Appendix A contain the complete population of cases that held oral argument before the Court from 1971 to 2002 with regard to state funding of sectarian elementary and secondary schools. Using the full population of cases was necessary to track any changes in interest groups' legal arguments as well as changes in the membership of the separationist advocacy coalition. The briefs to be examined contain the legal arguments used by interest groups to influence the decision-making of the Supreme Court. Using the complete population of relevant cases and all of the associated briefs filed before the Court enhanced the validity of the data.

The items identified in these documents were the legal arguments made by the interest groups. Analyzing the legal arguments used in the briefs determined if interest groups adapted to the changed policy environment following legal change or fell under the "tyranny of absolutes" described by Epstein and Kobyłka. As Manheim *et al.* hold, content analysis can be conducted on individual words, a combination of words (a theme), or an item (the entire communication or document). Using themes was the best method for tracking the use of legal arguments. I used findings from my pilot study (see below), multiple academic references (e.g., Ackerman, Monsma, Epstein and Walker, Finkelman, and Levy), and comments on my content coding tool by lawyers and researchers (see Acknowledgements above) to develop a comprehensive list of legal arguments used in cases involving state funding of sectarian schools (see Code Book in Appendix B). An accurate and complete list of legal arguments was needed to ensure the validity of my data. These legal arguments became the themes to be searched for in the legal briefs. Manheim *et al.* warn that simply finding the theme is not enough because themes can be used in different ways. For the purpose of this study, themes were divided into two groupings: those legal arguments that are supported and opposed by the separationist advocacy coalition.

To ensure that my use of content analysis was objective and provided reliability for my data collection, I hired Laurie Proctor, a student from George Mason University Law School, to code a sample of the briefs. A total of 25 briefs were selected for Ms. Proctor to code. One brief from each of the 16 cases was randomly selected to ensure

that she saw a full range of briefs and then the last 9 were randomly selected from the remaining briefs. I compared our coding results and calculated a coefficient of intercoder reliability to test observer error. Our agreement was .94 or 94%.¹³ Achieving a coefficient of .9 or over determined that I had reliable data (Manheim *et al.*). If I had fallen below .9, I would have revised the process for collecting my data by hiring two law students to code all the briefs, and select the themes captured by at least two of the three coders. Ms. Proctor was not told of the research question guiding the project, but simply that the project was examining legal arguments made by interest groups supporting the separation of church and state. This blind coding prevented possible influence on the coding response (Neuendorf 133). I met with Ms. Proctor to discuss the coding project, trained her in the use of coding and the coding form, and provided her with a test brief to code to ensure she understood the training. Following the coding I informed her of the purpose of the project and we met to discuss our disagreements and agreements regarding coding and impressions from the coding experience. The idea of using a George Mason law student appealed to me because I was able to find a student with an accommodationist approach¹⁴ to church-state relations to counter any bias created by my separationist perspective. All documents used in this project are archived to allow for replication of the study to ensure the reliability of the results.

The content analysis of each brief (supporting the separationist position) in a case produced a coding sheet that lists each argument used by the sponsor(s) of the brief. This information is summarized in tables to compare the arguments used by all the brief sponsors for each case. This information was analyzed to compare and contrast the arguments used by the members of the separationist coalition in each case. This analysis was then compared to previous cases to see if new arguments had been incorporated, by which interest group(s), and the source (as referenced in the brief) of the new argument. The referenced source also provided a means to measure the lag time of when a new argument is originated and when it is presented before the Court.

¹³ From the sample we observed a total of 139 legal arguments. The total agreed upon arguments were 131. Agreement = 131/139 = .94 or 94 percent.

¹⁴ Wood states the accommodationist perspective “holds that the Establishment Clause is not to be directed toward independence between the institutions of church and state, and certainly not toward a ‘benevolent neutrality’ between religion and irreligion, but toward non-preferential treatment of any particular church or religion. This requires not separation, it is argued, but accommodation and close cooperation between church and state, religion and government.” (11).

Sabatier and Jenkins-Smith define policy learning for the ACF as “relatively enduring alterations of thought or behavioral intentions that result from experience and/or new information and that are concerned with the attainment or revision of policy objectives” (123). For this project, learning is defined as how prior experiences of the advocacy coalition and exposure to new ideas result in adaptations, or changes, to the separationist advocacy coalition’s legal arguments used to pursue its policy goals. The evidence for the existence of adapted legal arguments will be researched within the briefs filed by the separationist advocacy coalition. I identified the occurrence of learning from either the presence of change in the legal arguments used, or from the stasis in the use of legal arguments. Content analysis of the briefs identified if and how new legal arguments are used. Such new legal arguments may range from the trivial to innovative. For example, a minor strategic adaptation would be the incorporation in the advocacy coalition’s briefs of a justice’s prior opinions to attempt to sway his/her decision-making; whereas a major innovation would be the presentation of new legal arguments in the briefs portraying a constitutional issue in a new way.

If no new legal arguments were found in the cases studied then the separationist advocacy coalition would have “doggedly” clung to its legal arguments, and I would have contributed to the literature by confirming the findings of Epstein and Kobylka; however, if new legal arguments were progressively found in successive cases then the interest groups who form the separationist advocacy coalition did innovatively adapt to the changing political/legal environment and new knowledge would be added to the literature.

This study looked for the presence or absence of new legal arguments – was there stasis or adaptation? Notably, there was not necessarily a bright line dividing new arguments from previous ones. New arguments are not necessarily major shifts from previous arguments, and so can be subtle yet of great consequence for case outcomes. For example, Justice O’Connor’s test on endorsement or disapproval of religion (see above) is a subtle but important modification of *Lemon’s* purpose and effects prongs (Gedicks 192). The purpose of a governmental act or action or its actual effect is analyzed to see if it favors one religion over the others. If the action or act is neutral with regard to religion, then the act must be analyzed to see if it endorses religion over non-

religion. Guliuzza claims that O'Connor's endorsement test returns to "the softer definition of separation introduced in *Everson*" (61).

In this project, I did not track the intensity of the arguments used (the number of instances legal argument A is used in comparison to argument B) or the rate of success of the arguments used (the number of instances the interest group's legal arguments are used in the Court's opinion). Neither of the above contributed to the core question of my project.

The results of my content analysis alone did not provide a full understanding of interest group innovation, or lack thereof, in the separationist advocacy coalition. So I used elite interviewing to gain an understanding of the interest group's rationale for the pattern of behavior found in the content analysis. See Appendix C for a list of interview subjects. The elite interviewing provided a deeper understanding how and why advocacy coalition learning did, or did not, take place. ACF has not looked at learning within advocacy coalitions because, as Sabatier and Jenkins-Smith state, "...learning among members of the same coalition is relatively unproblematic, attention has focused on identifying the conditions for learning *across* coalitions" (145). Regardless of its "unproblematic" nature the following are some ways an advocacy coalitions can learn: the adoption by the coalition of new legal arguments introduced by new leadership within interest groups or new interest groups joining the coalition; shifts in the constituencies of interest groups within the coalition creating a realignment of interests and approaches that change the legal arguments used by the coalition; and, communications and negotiations between interest groups in the coalition that generate new legal arguments to be used by the coalition. The interviews also shed light on instances when learning does not occur across the coalition. For example, if an interest group within the coalition uses a new legal argument in a brief and that legal argument is not subsequently adopted by the coalition, then learning did not occur in the advocacy coalition.

The interviews were guided by these possible outcomes and the questions varied depending on the findings on each interest group studied. The interviews also were intended to gain an understanding of membership and role changes within the separationist advocacy coalition and their effect on learning. To prepare for the interviewing process, I referenced *Qualitative Interviewing: The Art of Hearing Data* by

Rubin and Rubin. The interviews were not conducted until the content analysis was completed. Gaining access to interview subjects was facilitated by using common acquaintances and having successful interview subjects make additional introductions. Cold interview introductions started with an email to the subject introducing myself and the project. The email was followed up by a telephone call to the subject to arrange a meeting. Each interview was conducted in a semi-structured, or focused, format. I introduced the discussion topic and then guided the discussion by asking specific questions. These questions were based on findings from the content analysis as they applied to the actions of the interviewee and his/her interest group. The questions generally fell into two categories: process and evaluation. Process questions sought information on the structures that facilitated communication and learning within the advocacy coalition. The evaluation questions asked the interviewee to assess the effect their briefs and legal arguments had on the case and the lessons learned from their participation in the case. Interpretation of the interviews results is subjective and other researches may have reached different conclusions than I have. Information provided from each subject was compared to information provided by other interview subjects, results of the content analysis, and other research materials to gauge reliability and validity. Each interview was recorded (when permitted by the interviewee) and confidentiality was provided when requested. The interview process was approved by Virginia Tech's Institutional Review Board (IRB) on February 2, 2005 (IRB # 05-058). See Attachment C for a list of interview subjects and Attachment D for a copy of the Informed Consent.

Both my content analysis of briefs and my elite interviews led me to refine both the definition and empirical indicators of advocacy coalition learning in a networked context consistent with the Advocacy Coalition Framework (ACF). As already indicated, learning, for this project, is defined as how prior experiences of the advocacy coalition and exposure to new ideas result in adaptations, or changes, to the coalition's legal arguments. The inability or unwillingness of interest groups to respond to legal change prompted Epstein and Kobylka's finding of a "tyranny of absolutes." Therefore an important aspect of learning is the ability to respond to a changing environment (legal change). To respond to a changing environment, the coalition must be aware that it is

changing and develop a strategy to respond to the changes. Do the interest groups analyze the Court's decisions in prior cases and the cases from other fora to track possible changes to the litigation environment? If yes, are the results of this analysis shared with other members of the coalition? If yes, how does the coalition develop strategies to respond to these changes? Interest groups bound by a "tyranny of absolutes" would have no need to analyze the litigation environment.

Using two sources of data (content analysis and elite interviews) provided a corroboration of my results. A case study database is available for interested researchers containing all the coding sheets from the content analysis and the tapes, summary transcripts, and notes from the elite interviews.

A Pilot Study

To test my research design and obtain a sense of the pitfalls I would encounter in my dissertation project, I conducted a small pilot content analysis study. I selected the briefs filed with the Supreme Court by the interest group Americans United for Separation of Church and State in the following sample of six cases: *Lemon v. Kurtzman* (1971), *Tilton v. Richardson* (1971), *Witters v. Washington Dept. of Services for the Blind* (1986), *Zobrest v. Catalina Foothills School District* (1993), *Zelman v. Simmons-Harris* (2002), and *Locke v. Davey* (2004). I selected these cases and briefs because they include a variety of characteristics that I would encounter in my dissertation project. They cover the entire range of the research timeframe, deal with elementary and secondary and college and university cases, represent filings at both pre- and post-certiorari, and were developed both singly and with multiple interest group contributors. For the pilot study, I developed a set of legal arguments used by the separationist advocacy coalition and a corresponding coding sheet to capture these arguments as themes for my content analysis. Tables were developed to record the data and summarize the captured information.

From the results of my pilot study, I felt confident that my research design of using themes in the content analysis of briefs would capture the changes in legal arguments from the separationist advocacy coalition, and that I would be able to identify and code these themes. The legal arguments in the briefs were easily identified as themes because of the regular use of source quotes and citations of legal arguments and

their use in precedent. The pilot study did prompt me to make changes to the scope of my project. Initially, I had hoped to use state support of all sectarian educational institutions. Based on the results of the pilot study, I decided to limit my study to cases involving the Establishment Clause in public funding of elementary and secondary sectarian schools, eliminating cases involving religious colleges and universities. The Court views university cases as distinct from elementary and secondary cases using different criteria in making their decisions on these cases. Removing university and college cases will prevent confusion between innovations in arguments with variations in Court decision-making criteria. *Locke v. Davey* (2004) was also not appropriate for my study because it was argued on the basis of the Free Exercise Clause rather than the Establishment Clause.

Limitations of this Project

As a case study this project does not provide results that can be generalized for all instances of legal change and advocacy coalition learning – thus limiting its external validity. However, future research should consider findings from organizational, policy, and network learning, in designing their research project, and incorporate the key elements of ACF into their designs. I believe these additions to the research of interest group involvement in jurisprudence will be helpful to future researchers in this area of study.

This project will not examine other avenues that could be taken by advocacy coalitions to influence judicial policy, such as activities to influence presidential Court appointments and Senate confirmations for changing the Court membership, or efforts to manage the media and/or produce mass demonstrations to sway public and elite opinion. The separationist advocacy coalition may also have shifted the majority of their efforts to other political fora to promote their policy goals. This information when found was reported; however, it was not examined in any detail in this project. I believe exploring these issues would have led this project in too many different directions, resulting in an unmanageable endeavor. To examine these issues thoroughly would also require an expansion and extensive redesign of the research method. Such a diffusion of effort would have shifted the attention away from the purpose of the project.

Because the unit of analysis is the advocacy coalition, this project did not attempt to examine the internal decision-making used by each interest group to arrive at its judicial strategy. Doing so would again have expanded the scope of my project, required an expanded research method with additional data sources, and shifted attention away from the purpose of the project. However, findings on how new ideas came into the separationist advocacy coalition and through what means they were, or were not, embraced by the coalition itself are reported.

Lastly, my proposition that interest groups appear before the Court to promote their policy goals may be erroneous. Interest groups may appear before the Court for a variety of other reasons: enhancing organizational visibility and legitimacy, building membership, fund-raising from members, bringing the case to public attention to sway opinion for other fora, etc. This issue was not examined due to the focus of this project, which is to determine if advocacy coalitions respond to legal change through the legal arguments used in their briefs.

Sorauf, in his research of interest group participation in church-state litigation from 1951 to 1971, looked at the motivating goals of the interest groups to pursue litigation. With the American Civil Liberties Union (ACLU) and American Jewish Congress (AJC) the motivation was almost purely legal to “secure favorable precedents and to avoid unfavorable ones” (94). Organization building and constituency mobilization, especially in the early portion of Sorauf’s study, was an important concern to Americans United (AU) regardless of the outcome of the case. However, at the appellate and especially at the Supreme Court stage, “AU has always tried to shift its goals to the constitutional” or purely legal (95).

The next section provides a short history of Establishment Clause jurisprudence and Court decisions with regard to state aid to sectarian elementary and secondary schools.

Chapter 3: Establishment Clause Jurisprudence to 1971

Historical Overview of Establishment Clause Jurisprudence

The First Amendment states in part, “Congress shall make no law respecting an establishment of religion...” At the founding of our nation the First Amendment applied only to the federal government, and the states with established churches were in the process of disestablishment. At the end of the colonial period, nine of the thirteen colonies had some form of established religion (the four without were Rhode Island, Pennsylvania, New Jersey, and Delaware). By the time the First Amendment was adopted only three states had an established church (Massachusetts, New Hampshire, and Connecticut), and in these states their constitutions contained provisions providing for religious liberty. The support of religious liberty at the federal and state level was necessary because it was “...an important way of building a consensus in the face of religious diversity and thereby garnering political support for the new state and federal governments” (Wood 7-10).

Elementary and Secondary Secular and Sectarian Schools

The history of the development of public schools is closely tied to the issues of state disestablishment and religious freedom. As support for free public education grew in our country, the vast majority of the elementary and secondary schools founded through state and local taxes were sectarian and predominantly Protestant. As the states began religious disestablishment, publicly funded schools eventually came under secular control, thereby gradually removing religious content from school curriculum (Pfeffer *Church* 274-290). However, up until the 1960s, in some regions of the nation, public elementary and secondary schools still included religion in their curriculum as a means of teaching morality and other subjects. Although the religious education was designed to teach religion in general it had “Protestant overtones” (Miller and Flowers 412). The Catholic Church and some Jewish congregations found the Protestant influence in the public schools incompatible with their educational missions and developed their own private religious schools. Additionally, a number of Protestant denominations developed their own schools because they felt the public schools were not Protestant enough (*ibid.*).

The Supreme Court decided in *Pierce v. Society of Sisters* (1925) that an Oregon law requiring all children to attend public school “impermissibly denied private and parochial schools the right to do business and interfered with the liberty of parents to educate their children as they chose” (*ibid.*). The decision was based on the Due Process Clause of the Fourteenth Amendment because the First Amendment and the Free Exercise Clause had not yet been applied to the states.¹⁵

This ruling provided for the development of coexisting educational systems: privately supported sectarian schools and publicly supported secular schools. The concomitant development of secular and sectarian elementary and secondary schools in the United States and the appropriate use of public resources to fund these dual education tracks explains much in regard to the development of Establishment Clause jurisprudence. This topic continues to be a challenge to the Court in defining and redefining its interpretation of the Establishment Clause.

For almost 150 years the Supreme Court had little occasion to interpret the meaning of the Establishment Clause in the context of public aid to sectarian schools. But that changed in 1947 when, in *Everson v. Board of Education*, the Court for the first time held the Establishment Clause to apply to the states as well as to the federal government. Cases requiring the Court to interpret the Establishment Clause then began to arise with increasing frequency. Nonetheless, two earlier cases deserve mention because they articulated principles that have been important in the Court’s subsequent Establishment Clause jurisprudence. In *Bradfield v. Roberts* (1899) the Court ruled that federal monies paid to a religious hospital in the District of Columbia for the purpose of caring for the poor did not violate the First Amendment; however, the Court stated that public funds could not be used for religious purposes. In *Cochran v. Louisiana State Board of Education* (1930), the Court ruled (using the Fourteenth Amendment) that state provision of secular textbooks to students attending all schools, including sectarian schools, was permissible because it benefited the children rather than the sectarian

¹⁵ With the Supreme Court case of *Cantwell v Connecticut* (1940) the Free Exercise Clause of the First Amendment was determined to be binding on state and local governments by incorporating it into the Fourteenth Amendment. *Everson v. Board of Education* (1947) added the Establishment Clause (see below).

schools. This was the first use of the child benefit test in determining the permissibility of aid to sectarian schools (Sorauf 18-19).¹⁶

The prohibition on using public funds for religious purposes reappears in *Everson* and is a major tenet of the separationist advocacy coalition, and the child benefit principle also reappears in *Everson* as part of a general welfare principle, but more directly in subsequent cases and, as seen below, will become a major problem for the separationists in pursuing their policy goals. Using the Establishment Clause, the Court, in the 5-4 *Everson* decision, upheld a state subsidy that reimbursed parents for the cost of public transportation to and from sectarian schools. Justice Hugo Black, writing for Court, provided guiding principles for interpreting the Establishment Clause:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a state church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or 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 organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by laws was intended to erect ‘a wall of separation 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. (Sorauf 19-20).

Using the rhetoric of Jefferson’s wall metaphor¹⁷ but basing his decision on a nondiscriminatory general welfare interpretation of the child benefit test, Justice Black determined that the subsidy did not violate the Establishment Clause. The dissenting

¹⁶ *Cochran* was not the first Court case regarding public funding of sectarian schools. In *Quick Bear v. Leupp* (1908) the Court ruled that payments to Roman Catholic schools on an Indian reservation were allowable because the funds were derived from a treaty and held in trust for the Native Americans by the federal government, therefore the funds involved were not public funds.

¹⁷ This metaphor comes from Thomas Jefferson’s letter to the Danbury Baptist Association in 1802, which reads in part, “I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between church and State” (O’Neill 286).

justices concurred with Justice Black's separationist rhetoric, supporting his interpretation of the Establishment Clause, but disagreed with his finding that this subsidy did not breach the wall. Justice Robert Jackson critiqued the logic of Black's decision comparing it to Bryon's Julia who "whispering 'I will ne'er consent' – consented" (20). The dissent led by Justice Wiley Rutledge called for a stricter interpretation of the separation of church and state. He wrote, "It [the Establishment Clause] was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion" (Levy 151).

A year later, in *McCullum v. Board of Education* (1948), the Court, with Justice Black again writing for the majority and using his argument in *Everson*, ruled for the first time that a program was unconstitutional based on the Establishment Clause (Miller and Flowers 412). The case involved a shared-time program in the Champaign, Illinois public schools where students received an hour of religious instruction of their choice each week. In this program, clergy, selected by the schools, volunteered their time to conduct the religious instruction in the public school facilities. In the 8-1 decision, Justice Black declared that the released-time program was "beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faiths" (Ivers 81).

Encouraged by the *McCullum* decision, separationist groups attempted to expand their victory in a released-time case. However, in the 6-3 decision *Zorach v. Clauson* (1952), the Court upheld the New York City released-time program because the instruction was not held in public school facilities and the religious groups, rather than the public schools, selected teachers and administered the program (Sorauf 20-21). Justice William O. Douglas, writing for the Court, explained,

When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. 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 (Ivers 90).

Justice Black in his dissent wrote, “Here the sole question is whether New York can use its compulsory education laws to help religious sects get attendants presumably too unenthusiastic to go unless moved to [do] so by the pressure [of] this state machinery” (91). Justice Jackson was equally dismissive of the majority’s legal argument, “This distinction attempted between *McCullum* and this [case] is trivial, almost to the point of cynicism, magnifying its nonessential details and disparaging compulsion which was the underlying reason for invalidity” (92).

In *Engel v. Vitale* (1962) the Court ruled that a state sponsored prayer written by the New York Board of Regents, which was required to be recited by public school children each morning, was unconstitutional. In 1963, the Court ruled in *Abington School District v. Schempp* and *Murray v. Curlett* that state sponsored Bible reading and recitation of the Lord’s Prayer in the public schools were unconstitutional. Justice Potter Stewart was the only dissenter in all three of these cases (Sorauf 22). These cases marked an important development in Establishment Clause jurisprudence with the introduction of the secular purpose and effect test used in *Schempp*.

In 1968 the Court again tackled the issue of aid to sectarian schools in *Board of Education v. Allen*. The Court’s 6-3 decision in *Allen* reaffirmed *Cochran* in allowing state loans of secular textbooks to children in sectarian schools. The child benefit test was again used by the Court, and the loan program was determined to be constitutional because the program had a secular purpose and did not have the effect of advancing or inhibiting religion (Miller and Flowers 413). Although the *Cochran* and *Allen* cases reached the same conclusion with regard to the provision of textbooks, the decisions were based on different constitutional principals: *Cochran* the Due Process Clause and *Allen* the Establishment Clause. *Allen* was also the first sectarian aid case to use the purpose and effect test developed in *Schempp*.

Ivers describes an instance of advocacy coalition learning based on the interest groups experiences in the *Allen* case. He states that the separationist interest groups realized that the secular purpose and effect test, as it was used by the Court in *Allen*, was not sufficient in itself to promote the policy interests of the coalition. Justice Black, in his dissent in *Allen*, referenced that the Court’s decision would allow linkages to occur between states and religious institutions to support religious purposes. Black’s linkage

idea was picked up by the interest groups involved in the *Allen* case and they soon developed the “excessive entanglement” rule to introduce into the next set of cases to reach the Court (164). This is an example of advocacy coalition learning during the ascendancy of the acceptance by the Court of the interest groups’ legal arguments and policy goals; whereas, in my research I am looking at learning on the descending slope.

In 1970, the excessive entanglement test was added to the Court’s jurisprudence for interpreting the Establishment Clause in *Walz v. Tax Commission*. However, this 8-1 decision ruled against the separationist coalition, and held that state property tax exemptions for religious organizations that own and use property for religious purposes were constitutional (Miller and Flowers 413). Chief Justice Warren Burger writing for the Court stated, “we will not tolerate either governmentally established religion or governmental interference with religion... there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference” (Jamar 465). In this case the Court used two main tests: legislative intent and excessive entanglement. The Court determined that the legislative intent was to enable the free exercise of religion not to favor one religion over another. Regarding the entanglement test, the Court determined that some involvement was unavoidable, but the level of involvement regarding tax exemptions was not excessive (*ibid.*).

The separationist coalition now had the legal argument tools in place to craft their important victory in *Lemon v. Kurtzman* (see below – Chapter 4). The next section provides an overview of the interest groups involved in Establishment Clause litigation prior to *Lemon*.

Interest Groups and the First Amendment

Sorauf examined the interaction of interest groups involved in all First Amendment religion litigation (67 cases) in appellate courts from 1951 to 1971. He found that,

Three groups have dominated separationist activity in these cases: the American Civil Liberties Union and its affiliates, the American Jewish Congress, and Protestants and Other Americans United for Separation of Church and State, lately known as Americans United. In only sixteen

cases of these sixty-seven cases, indeed, are there no signs of activity by at least one of the three. No other groups or individuals have been remotely as influential in shaping the direction of church-state law in recent years (31).

These three groups, Sorauf states, are “united by the consistent and virtually absolutist approach they share to the separation of church and state;” however, the groups have “little in common, ideologically or organizationally” (33 and 31). Regarding the American Civil Liberties Union (ACLU), he asserts that its separationist ideology is founded on a number of traditions: secular humanism with its skepticism and freethinking; the ideals of Madison and Jefferson “and other children of the Enlightenment” including “the New England tradition of the Congregationalists, Unitarians, and Universalists;” and, agnosticism and “militant atheism” (32-33). Accordingly, the American Jewish Congress’ (AJC) separationist perspective “springs directly from the experiences of Reform and Conservative Judaism,” reinforcing the “vulnerabilities of a religious minority that understands that accommodations between church and state have in the past too often served as vehicles of majority intolerance” (33). Lastly, Americans United’s (AU) separationist stance is based on the “conservative, traditionalist, and fundamentalist Protestantism” that has an “underlying, pervasive fear of Roman Catholic social and political power” (*ibid.*).

The origins of the ACLU and AJC both stem from controversies resulting from World War I. The ACLU was founded to resist the curtailment of free speech and other civil liberties by the U.S. government during and following this conflict. The AJC was formed to assist Jewish refugees and petition the delegates at Versailles for a Jewish homeland. As these organizations grew, their missions encompassed a broad array of concerns. Conversely, AU was formed following the *Everson* decision in 1947 to work solely on church/state separation issues and almost exclusively on separationist issues regarding the Catholic Church. In fact, “AU has not found it easy to challenge Protestant influences in public institutions” (31-32, 34-35).

Sorauf characterized the remaining separationist groups as: atheists, educators, churches, Masons, and local groups, but he reiterated that the ACLU, AJC, and AU dominated this policy arena to the extent that, “It is probably no exaggeration to say that

their efforts [these latter groups] taken together did not really match those of any one of the leading three between 1951 and 1971” (48).

Making up the atheist groups were the: Freethinkers of America, National Liberal League, American Association for the Advancement of Atheism, Society of Separationists, Freethought Society of America, and Other Americans, Inc. Sorauf discovered that the atheists operated independently of other groups. In fact, “the AJC and AU avoided them as a ‘kiss of death,’ both for their impact on the courts ... and because of the reaction of their own members to alliances with the aggressively godless” (49).

The educators were the: Horace Mann League, Council of Chief State School Officers, National Education Association, and American Association of School Administrators. Sorauf’s research revealed that these organizations generally allied with one of the big three (ACLU, AJC, and AU) in bringing forth cases. The educational groups were also instrumental in forming umbrella organizations to oppose state aid to sectarian schools. The educational groups were active in creating the state Committees on Public Education and Religious Liberty (PEARL). State PEARLs consist of a number of organizations and typically include the state affiliates of the ACLU and the AJC (49-52).

Sorauf’s church groups include the: Seventh-day Adventists, Southern Baptists, Baptist Joint Committee on Public Affairs, and National Council of Churches of Christ in the United States of America. The Seventh-day Adventists hold a “virtually absolutist” position on separationist issues, while the Baptist Joint Committee and National Council of Churches hold a strict separationist interpretation of the Establishment Clause, according to Sorauf. The members of the Southern Baptists and their state conventions were prominent members in the founding of AU and have continued to be some of AU’s “most loyal individual members” (52-53).

In discussing the Masons, Sorauf only references the Scottish Rite Masons. This national group represents the Masonic groups in the south and all Masonic groups west of the Mississippi. They have not participated in litigation, but they are noteworthy for their financial support of AU. The leaders of AU, during Sorauf’s research period, were also high-ranking members of the Scottish Rite Masons. The Masons have also assisted AU in establishing ad hoc organizations such as the Friends of the Public Schools (53-55).

Sorauf categorizes local groups into two types: existing and ad hoc. These groups are important because they frequently provide the initiative in litigating cases. The majority of local existing organizations are affiliated with the big three mentioned earlier, while the ad hoc organizations formed to address a single case are either local representatives of the national groups or an independent collection of individual community separatists (55-57).

Because of the domination of litigation by the big three, Sorauf asserts that there is an "...impressive degree of order and stability on church-state litigation" (59). The big three cooperated in some cases and competed in others "occasionally even to the extent of setting up their own test cases and racing each other to court" (*ibid.*) Sorauf claims that from the "...combination of cooperation, competition, and division of labor in these cases there are the outlines of an interest-group 'system' at work" (*ibid.*).

Sorauf saw the interorganizational contacts among the ACLU, AJC, and AU become stronger over the course of his research period. Stating that, "their interventions in these sixty-seven cases overlap and produce a complex set of two and three-way relationships. Those relationships mix trust and suspicion, competition and cooperation, informal ties and formal organization" (81). The one factor he found that affected the coalition above all others was "the relatively low esteem in which other groups hold AU" (*ibid.*). This severely strained relationships in the coalition, but did not prevent group cooperation. In September of 1965, the big three held a conference of about 50 attorneys to discuss litigation goals and strategy. At the conference, the ACLU, AJC, and AU agreed to establish a litigation consortium to exchange information and coordinate their litigation. The consortium also included the National Council of Churches and the Baptist Joint Committee and several educational groups. At first this consortium just resulted in more frequent communications among the interest groups' lead attorneys; however, by 1968 the consortium had established regular formal meetings and created various agreements on plans of action. The activities of the consortium laid the groundwork for the litigation that would eventually bring *Lemon v. Kurtzman* (1971) to the Supreme Court (81-84).

Although the consortium disbanded in 1969, the attorneys continued to work together regarding specific litigation. Sorauf believes the consortium efforts ended

because it fulfilled one of its main goals – bringing AU litigation more in line with that of the ACLU and AJC. He further contends that when the consortium members realized they could not control the litigation activities of local ACLU affiliates and other local organizations there was no need for the consortium to continue (86). Sorauf writes, “There is ... no master battle plan for litigating church-state issues.... Theirs [separationist interest groups] is often short-range or short-term strategy, frequently a strategy that sees no further than the case at hand” (91).

Sorauf attributes this inability to create a “master battle plan” to the fact that the big three disagree on their overall strategy in litigation. He states that the AJC prefers an incremental strategy that pursues small steps forward toward their separationist goals. The AJC prefers to initiate cases that focus on just one constitutional violation, which they feel would be the next logical step in the church-state jurisprudence. Conversely, the ACLU and especially AU are more likely to initiate cases that have a variety of constitutional violations, which have the potential of setting major precedents in church-state jurisprudence. He believes these differences prohibited the big three interest groups from creating a master strategy on what cases to pursue (128-129).

With regard to strategy, Sorauf states that naturally the litigants coordinate their efforts; however, *amicus* filers confounded most coordination attempts. Sorauf affirmed that there were instances of coordination of *amicus* briefs, but these instances were rare. These coordinated activities sought to supplement or complement the legal arguments of the litigants, or provided alternative arguments or constitutional trial balloons that the litigants felt they could not communicate to the courts. Sorauf concludes that *amicus* filers, “take the position of their organization, and not necessarily the position the [litigant] would prefer” (125).

Lastly, a discussion of the separationists would not be complete without recognition of Leo Pfeffer. Sorauf states that, “...by general consensus Leo Pfeffer was the dominant, driving force among separationist attorneys” (159). He joined the legal staff of the AJC in 1945 and became its director in 1957. Through his litigation and scholarly works Pfeffer advocated a strict separationist position of church-state relations. Pfeffer “...advised, planned, rehearsed, reviewed, helped and argued more church-state cases than any other attorney of his generation, and by a considerable margin” (159-60).

In the late 1960s and 70s Pfeffer focused his litigation efforts through PEARL making it “the centralizing force in church-state litigation” (Ivers 185). His dominant influence continued through the early 1980s when due to illness he resigned as PEARL’s chief counsel. As Ivers states, at this time “an institutional and personal leadership void was created within the separationist community. For the first time in over thirty years, Leo Pfeffer was not there to serve as the guiding force in church-state law and litigation” (186).

This brief review of Establishment Clause jurisprudence, the history of sectarian and secular schools, and Sorauf’s research on interest groups provides an introduction to my examination of separationist advocacy coalition participation in Supreme Court cases regarding state aid to elementary and secondary sectarian schools from 1971 to 2002. My analysis of the separationist advocacy coalition picks up where Sorauf concludes – *Lemon v. Kurtzman* (1971).

Section I: *Lemon to Sloan* (1971-1973)

During this period the Supreme Court created and embraced the three-prong *Lemon* test in which, to be constitutional, a government act must: 1) be secular in purpose; 2) have a principal or primary effect that neither advances nor inhibits religion; and, 3) does not lead to excessive entanglement with religion. The five cases in this section, using the *Lemon* test, prohibited both direct and indirect aid to sectarian schools. Although the *Lemon* test did not provide an absolutist prohibition against funding sectarian schools as advanced by some members of the separationist advocacy coalition, the test does create a strong barrier – what Justice Byron White called an “insoluble paradox” – against attempts to provide aid to sectarian schools.

The five decisions examined in this section provide the core legal arguments used by the separationist advocacy coalition in the pursuit of their policy goals. Legal arguments in subsequent cases will be examined and then compared to this foundation of case law to determine if the separationist advocacy coalition modifies its legal arguments.

Chapter 4: *Lemon v. Kurtzman* (1971)

Case Overview

Lemon v. Kurtzman (1971) combines three cases (*Lemon v. Kurtzman*, *Early v. DiCenso*, and *Robinson v. DiCenso*) stemming from legislation enacted in two states, Rhode Island and Pennsylvania.

In 1968 Pennsylvania enacted the Nonpublic Elementary and Secondary Education Act to reimburse private, and predominantly sectarian, schools for their secular teaching services, and for the costs of instructional materials in subjects such as mathematics, foreign languages, physical sciences, and physical education. A special fund collected from state gambling proceeds was to pay for this reimbursement program. At the time the complaint was filed the law had been in effect for almost a year and 1,181 nonpublic schools in 55 counties had received payments.

Litigants¹⁸	
Separationists	Accommodationists
<p>Alton J. Lemon, Priscilla Reardon, Betty J. Worrel, Pennsylvania State Education Association, Pennsylvania Conference National Association for the Advancement of Colored People, Pennsylvania Council of Churches, Pennsylvania Jewish Community Relations Conference, Protestants and Other Americans United for Separation of Church and State, and American Civil Liberties Union of Pennsylvania, Inc. (1,2)</p> <p>Joan DiCenso, Donald R. Hill, Ann Clanton, Alice Chase, Helen King, and Marie Friedel (3)</p>	<p>David H. Kurtzman, Superintendent of Public Instruction of the Commonwealth of Pennsylvania; Grace Sloan, State Treasurer of the Commonwealth of Pennsylvania; St. Anthony's Roman Catholic Church School; Archbishop Woods Girls High School; Ukrainian Catholic School; Germantown Lutheran Academy; Akiba Hebrew Academy; Philadelphia Montgomery Christian Academy, and Beth Jacobs Schools of Philadelphia.</p> <p>Pennsylvania Association of Independent Schools</p> <p>William P. Robinson, Jr., Commissioner of Education State of Rhode Island; Raymond H. Hawksley, General Treasurer of the State of Rhode Island; and, Charles W. Hill, Controller of the State of Rhode Island.</p> <p>John R. Early, William A. Hanson, Madelyn Law, Ralph F. McElroy, Alan E. Moss, Frank J. Shealey, Phyllis A. Walter, Margaret-Mary Cumiskey, and Cornelius A. Cumiskey.</p>

¹⁸ Litigants listed include those appellants and appellees in the cited case as well as those in the combined cases and any intervenors in these cases. All the litigants are listed for each case to provide the reader with a complete set of individuals and organizations involved in the litigation.

The District Court for the Eastern District of Pennsylvania upheld the law, determining that the purpose of the act was secular (providing secular education to nonpublic school students) and that it did not advance religion because the state and the schools were able to keep the secular and sectarian educational components separate (*Lemon* 609-612).

In 1969, Rhode Island adopted the Salary Supplement Act to assist nonpublic schools by providing up to 15 percent of the salary of those teaching secular subjects. At the time about 25 percent of Rhode Island’s children attended nonpublic schools, the vast majority of which were Catholic run and were facing financial difficulties. The Rhode Island legislators feared that if the Catholic schools closed the public school system would have difficulty accommodating the additional students. Approximately 250 nonpublic teachers were subsidized when the complaint to the District Court of Rhode Island was filed. The District Court ruled that the

Amici¹⁹	
Separationists	Accommodationists
<ul style="list-style-type: none"> • American Association of School Administrators, American Vocational Association, Association for Supervision and Curriculum Development, Horace Mann League of the United States, National Association of Elementary School Principals, National Education Association, National School Boards Association, and Rural Education Association (4) • American Jewish Committee, American Jewish Congress, Anti-Defamation League of B’nai B’rith, Central Conference of American Rabbis, National Council of Jewish Women, and Union of American Hebrew Congregations (5) • Center for Law and Education - Harvard University, East Harlem Block Schools, Milwaukee Federation of Independent Community Schools, Federation of Boston Community Schools, Bay High School, The Learning Place, Minuscule, New Community School, Primary Life School, and Symbas School (6) • Connecticut State Conference of Branches of the NAACP, Connecticut Civil Liberties Union, Connecticut Council of Churches, Connecticut Jew Community Relations Council, Protestants and Other Americans United for Separation of Church and State, Rita Johnson, Robert S. Earley, Donald L. Wassman, Laura Wiley Hansen, William Manchester, and Edgar W. Davis (7) 	<ul style="list-style-type: none"> • AFL-CIO, Pennsylvania State • Citizens for Educational Freedom • City of Erie • City of Philadelphia • City of Pittsburgh • Long Island Conference of Religious Elementary and Secondary School Administrators • National Association of Independent Schools, Inc. • The National Catholic Educational Association, The National Association of Episcopal Schools, The National Union of Christian Schools, The National Conference of Yeshiva Principals, and The Lutheran Education Association • National Jewish Commission on Law and Public Affairs • Ohio Public School Districts, State of Ohio School District of Cleveland, School District of Cincinnati, and School District of Youngstown • Polish American Congress, Inc., Order of Sons of Italy in America, Ukrainian National Association, Inc., League of United Latin American Citizens, Slovak Catholic Federation of America, Croatian Catholic Union of U.S.A., American Slovenian Catholic Union, Lithuanian Roman Catholic Alliance of America, Hungarian Catholic League of America, Inc., Ancient Order of Hibernians in America, Inc., Greek Catholic Union of the U.S.A., (continued below)

¹⁹ Several organizations (e.g. Americans United and American Jewish Congress) filed briefs in both *Lemon* and *DiCenso*. Only the briefs filed in *Lemon* will be used for the purposes of this study. All the organizations that filed briefs in *DiCenso* also filed briefs in *Lemon*. Each bullet represents a separate amicus brief and the participants of the brief. All the *amicus* filers are listed for each case to provide the reader with a complete set of individuals and organizations involved in the litigation.

law violated the Establishment Clause because the secular and sectarian functions of the schools could not be easily separated and therefore the public funding aided religion (607-609).

The rulings were appealed²⁰. The Supreme Court granted certiorari, combined the cases, held oral argument on March 3, 1971, and delivered its opinion on June 28, 1971.

Separationist Arguments

The litigants and *amici* show the variety of interest groups supporting the separationist perspective with regard to state aid to sectarian elementary and secondary schools. The participating interest groups represented educators, civil libertarians, Christians, Jews; and, included Sorauf’s big three: the ACLU, American Jewish Congress, and

Amici (continued)	
Separationists	Accommodationists
<ul style="list-style-type: none"> • National Association of Laymen (8) • Protestants and Other Americans United for Separation of Church and State (9) • United Americans for Public Schools (10) 	<p>(continued from above) Union Saint-Jean-Baptiste, Catholic Central Union of America, Ukrainian Workingmen’s Association, and Polish Roman Catholic Union in America</p> <ul style="list-style-type: none"> • School District of Philadelphia • School District of the City of Scranton • U.S. Solicitor General

Americans United for the Separation of Church and State (AU).

The litigant brief for Lemon contended that the District Court misapplied the purpose and effect test by not examining the legislative history and intent of the act to determine its purpose. They argued that the District Court also failed to examine the effect of the legislation, which provided the vast majority of its aid to Catholic run schools. Lastly, they chastised the District Court for not considering the entanglement test introduced in *Walz*.

In promoting arguments the Lemon litigants urged the Court to find that religious institutions should not be used to accomplish governmental functions – advancing Brennan’s religious means test. The litigants quoted Brennan from *Abington School District v. Schempp* (1963) that “government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest

²⁰ An appeals court did not hear this case because in the 1970s the law permitted a three-judge district court to sit at trial with direct appeal to the Supreme Court for certain cases. This procedure was repealed by the time *Mueller v. Allen* (1983) came before the courts. With *Mueller* and subsequent cases the procedure was for a single judge to sit at trial at the district court, with appeals then allowed to the intermediate federal courts of appeal, and thereafter to the Supreme Court.

demonstration that nonreligious means will not suffice” (39). The litigant brief also reinforced the importance of the *Everson* elements that rejected direct public funding of religious activities or religious institutions that practice or teach religion. The litigants’ final argument was that the program violated the Equal Protection Clause because in nonpublic schools there were no anti-discrimination protections regarding admissions or the hiring of faculty/administrators, therefore this program would assist those seeking to circumvent integration efforts.

The litigant brief for DiCenso mirrored the aforementioned arguments regarding *Everson*, purpose and effect, entanglement, religious means, and racial segregation. The DiCenso litigants added two additional arguments: 1) that history and tradition supported the prohibition of aid to sectarian schools; and, 2) support of sectarian schools was the equivalent of supporting the religion itself because of the pervasive religious nature of the schools.

The *amicus* briefs reinforced the litigant’s arguments. The brief from educators (American Association of School Administrators *et al.*) added to the litigant’s argument by stating that the *Schempp* purpose and primary effect test used in *Allen* did not supercede the tests used in *Everson*. The brief goes on to argue that the “primary” in “primary effect” does not mean “first in order of importance” but rather “essential” or “fundamental” (29). Under the latter interpretation the use of the effect test would be broader. For this case, the legislators stated the most important effect of the program was to promote secular education; however, the funding also provided assistance to the ailing sectarian schools thereby having the effect of aiding religion in the broader interpretation of “primary.”

The *amicus* brief from the Connecticut interest groups (Connecticut State Conference of Branches of the NAACP *et al.*) focused entirely on expanding the argument for an Equal Protection Clause violation by providing evidence of discrimination. The Americans United brief expanded on the argument advancing the Court’s use of the religious means test. The briefs for the National Association of Laymen and United Americans for Public Schools reiterated the pervasively religious nature of the schools and the inability to separate secular and sectarian education, as did the Center for Law and Education of Harvard University, representing experimental

secular nonpublic schools. The Harvard brief agreed with the other separationist litigants that the Pennsylvania and Rhode Island programs were unconstitutional, but explained that constitutional alternatives were available such as public aid in the form of vouchers provided to parents and funding based on standardized tests to reward attainment of educational standards. The Harvard brief was prophetic. The Court permitted providing aid for standardized tests in *Wolman* in 1977 (although not as envisioned by Harvard) and vouchers in *Zelman* in 2002.

Decision of the Court

In an 8-1 decision²¹, the Court ruled in favor of the separationist litigants, declaring these direct aid programs unconstitutional. Chief Justice Warren Burger wrote for the majority and was joined by Justices Hugo Black, William O. Douglas, John Marshall Harlan, Potter Stewart, Harry Blackmun, and Thurgood Marshall. Justice Douglas wrote a concurring opinion joined by Justice Black, and Justice Marshall in part. Justice William Brennan wrote a separate concurring opinion, while Justice Byron White filed an opinion concurring in part and dissenting in part.

The Court for the first time consolidated the criteria it had used in previous cases to create the three-prong test. The majority ruled that in keeping with the Establishment Clause tests used in *Board of Education v. Allen* (1968) these laws did have a secular purpose and the legislatures of both states did not intend the law to have the effect of advancing religion. However, the mechanisms put into place by the state legislators to ensure that no public funds were used for religious instruction violated the Establishment Clause because these precautions created an impermissible entanglement of church and state. In *Allen* the program to provide textbooks to children attending sectarian schools was deemed to be constitutional because the state could easily monitor the content of the books, that was not so in *Lemon*. The Court found that the states could not monitor the content of the teachers' daily lessons without the monitoring being "comprehensive, discriminating, and continuing" (*Lemon* 619). The majority stated, "This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement the Constitution forbids" (620). In addition to the

²¹ Justice Marshall took no part in the decision with respect to the Pennsylvania program.

prohibited administrative entanglement, the Court also feared that these types of programs would produce a political entanglement between church and state. “Ordinary political debate and division, however, vigorous or even partisan, are normal and healthy manifestations of our democratic system of government,” the Court stated, “but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect” (622). The need for close state surveillance of the sectarian schools and the resulting excessive administrative entanglement exists because as Burger’s opinion stated “parochial schools involve substantial religious activity and purpose” (616). Although the Court does not rule out the possibility of being able to separate secular from sectarian education in these schools; the Court’s tone had shifted since *Allen* in which the division between religious and nonreligious was generally determined to be easily discernable. The Court did not rule on the Equal Protection Clause issues presented, because the Court determined the litigants did not have standing with regard to this question.²²

Justice Douglas’s concurring opinion joined by Justices Black and Marshall stated that any public funding of pervasively religious organizations is unconstitutional because each sectarian school is “an organism living on one budget” regardless of the bookkeeping efforts to separate secular from sectarian activities (641). Justice Douglas argued that in sectarian schools religion permeates all subjects because these schools “do not accept the assumption that secular subjects should be unrelated to religious teaching” (637). He further asserted that any direct public funding, even when secular functions could be distinguished from sectarian, would aid the religious activities of the sectarian school because the public funds would free other monies to be used to promote the school’s religious mission (640).

Justice Brennan provided an alternative test for the constitutionality of public funding of religious organizations in his concurring opinion. He stated that laws or government actions are unconstitutional if they “(a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends,

²² Justice Brennan in a footnote in his concurring opinion did state that the District Court’s determination that the *Lemon* litigants did not have standing to present an equal protection claim was incorrect.

where secular means would suffice” (643). Brennan previously used this test for his concurring opinions in *Abington School District v. Schempp* (1963) and *Walz v. Tax Commission* (1970). Under his test, the statutes in *Lemon* were unconstitutional because they used religious institutions to perform secular functions that the state already performs through the public schools.

The single dissenting opinion written by Justice White stated, “...religion may indirectly benefit from governmental aid [for] the secular activities of churches [however this indirect benefit] does not convert that aid into an impermissible establishment of religion” (664). He believed that as long as the aid was for secular functions public funds could be directly provided to sectarian schools. Justice White found the majority’s entanglement test problematic for any future direct aid cases because to ensure that public funds are used for secular purposes, mechanisms need to be in place to monitor the use of these funds; however, any mechanism used will lead to an impermissible entanglement. He wrote,

The Court thus creates an insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught – a promise the school and its teachers are quite willing and on this record able to give – and enforces it, it is then entangled in the “no entanglement” aspect of the Court’s Establishment Clause jurisprudence (668).

Implications for Future Cases

From the majority opinion the three-prong *Lemon* test was established. The test states that a law or government action is constitutional if it: has a secular purpose, has a primary effect that neither promotes nor inhibits religion, and does not lead to excessive entanglement with religion. Justice White’s fears that use of this three-prong test would severely curtail direct public aid to sectarian schools would soon be realized.

However, the Court’s decision fell short of adopting the stricter tests promoted by the separationist advocacy coalition. Chief Justice Burger writing for the majority does not incorporate *Everson’s* prohibition of direct funding to religious institutions that teach or practice religion, nor does it include Brennan’s religious means test. Burger also accepts the legislature’s stated purpose in promoting secular education and declines to

examine the primary effect of the programs, leaving open how the Court will interpret the word “primary” in future cases. Lastly, Burger did not accept the DiCenso litigant argument that the pervasively sectarian nature of the religious schools made it impossible to differentiate between secular and sectarian education.

In concurring opinions, Douglas, Black, and Marshall reiterated the *Everson* prohibitions of direct funding. Brennan again promoted his three-part test which includes the religious means test, but was unable to attract any other justices to sign on to his concurring opinion. Even combining these concurring opinions the separationist coalition would still be one justice short of having the *Everson* prohibitions and/or the religious means test adopted by the Court.

As noted earlier, *Lemon* provides the starting point to examine future modifications of the legal arguments used by the separationist coalition and changes in membership of the separationist coalition.

Chapter 5: *Lemon v. Kurtzman* (1973)

Case Overview

Lemon v. Kurtzman (1973) resulted from the District Court’s handling of *Lemon v. Kurtzman* (1971), hereafter referred to as *Lemon I*, on remand. The District Court permitted Pennsylvania to reimburse nonpublic schools for services incurred prior to the *Lemon I* decision. The separationist litigants opposed this decision and appealed. They did not seek to have prior payments returned to the state, but they did not want the state of Pennsylvania to provide \$24 million to sectarian schools for the 1970-71 school year.

The Supreme Court granted certiorari, held oral argument on November 8, 1972, and delivered its opinion on April 2, 1973.

Separationist Arguments

The separationist litigants argued that future payments would either violate the entanglements described in *Lemon I* or violate the prohibition of state support of religious indoctrination described in *Everson*. The litigants contended,

If the funds now sought by appellees are to be disbursed, the state is presented with a Hobson’s choice. Either the state must, in an effort to insure proper use of the subsidy, examine into each school’s curriculum content, methods of teaching, and segregation of expenses between “secular” and “religious” activities – thereby engaging in precisely the kind of entangling inquiry and surveillance that was explicitly forbidden by this Court – or else the state must simply turn the funds over blindly to

Litigants	
Separationists	Accommodationists
Alton J. Lemon, Priscilla Reardon, Betty J. Worrel, Pennsylvania State Education Association, Pennsylvania Conference National Association for the Advancement of Colored People, Pennsylvania Council of Churches, Pennsylvania Jewish Community Relations Conference, Americans United for Separation of Church and State, and American Civil Liberties Union of Pennsylvania, Inc. (11,12)	David H. Kurtzman, Superintendent of Public Instruction of the Commonwealth of Pennsylvania; Grace Sloan, State Treasurer of the Commonwealth of Pennsylvania; St. Anthony’s Roman Catholic Church School; Archbishop Woods Girls High School; Ukrainian Catholic School; Germantown Lutheran Academy; Akiba Hebrew Academy; Philadelphia Montgomery Christian Academy, and Beth Jacobs Schools of Philadelphia. Pennsylvania Association of Independent Schools
No <i>amicus</i> briefs were filed.	No <i>amicus</i> briefs were filed.

the religious and church-related schools, thus providing a subsidy which may directly support religious practices and teaching, in flagrant contravention of the Establishment Clause (Appellant Brief 16).

The litigants also argued that allowing these payments would encourage legislatures to create programs of questionable constitutionality simply to provide public aid to sectarian schools for a short period of time.

Decision of the Court

The Court's 5-3 decision (Justice Thurgood Marshall did not participate in the case) found in favor of the accommodationist litigants, that payments for services rendered prior to the decision in *Lemon I* were proper. Chief Justice Warren Burger wrote for the plurality opinion and was joined by Justices Harry Blackmun, Lewis Powell, and William Rehnquist. Justice Byron White concurred, but did not join the Burger opinion nor file a separate opinion. Justice William O. Douglas filed a dissenting opinion joined by Justices William Brennan and Potter Stewart. Since the *Lemon I* decision Justices Hugo Black and John Marshall Harlan retired and were replaced by Lewis Powell and William Rehnquist.

Chief Justice Burger stated that the sectarian schools should be reimbursed because the schools entered into the contracts with the state in good faith that the program was constitutional. The state officials who implemented the program also did so in good faith and were under no obligation to have a program validated by federal courts before its implementation. Lastly, both the schools and state could not have predicted the outcome of the case (*Lemon II* 198-209).

Justice Douglas' dissenting opinion declared that the decision in *Lemon I* "did not announce a change in the law" (209). He explained that direct public support of sectarian schools was clearly a violation of the Establishment Clause therefore the taxpayers of Pennsylvania should not be forced to provide further support to these schools.

Implications for Future Cases

While the accommodationist litigants were successful in this case, the resolution in their favor did not alter the Court's jurisprudence regarding direct public aid to

sectarian schools; however, it does provide an opening for short-term or one-time only funding of sectarian schools seeking to circumvent the Court. Chief Justice Burger writing the plurality opinion again declined to include in his opinion the *Everson* prohibitions regarding direct funding. With the retirement of Justice Black the separationist coalition lost an important advocate for their cause.

Chapter 6: *CPEARL v. Nyquist* (1973)

Case Overview

Amendments to the state of New York’s Education and Tax Laws produced several cases (*Nyquist v. Committee for Public Education & Religious Liberty* (*CPEARL*), *Anderson/Brydes v. CPEARL*, and *Cherry v. CPEARL*) which were combined in *CPEARL v. Nyquist* (1973). The amendments provided three aid programs for nonpublic elementary and secondary schools. At this time, almost 20% of the state’s students attended nonpublic schools, of which 85% were sectarian.

Litigants	
Separationists	Accommodationists
Committee for Public Education & Religious Liberty (<i>CPEARL</i>) ²³ , Bert Adams, Bernard Backer, Algernon D. Black, Theodore Brooks, Herschel Chanin, Naomi A. Cowen, Robert B. Essex, Florence Flast, Rebecca Goldblum, Benjamin Haiblum, Martha Lattes, Blanche Lewis, Ellen A. Meyer, Edward D. Moldover, Aryeh Neier, David Seeley, Albert Shanker, Howard M. Squadron, and Charles H. Sumner (13)	Ewald B. Nyquist, Commissioner of Education of New York; Arthur Levitt, Comptroller of the State of New York; and, Norman Gallman, Commissioner of Taxation and Finance of the State of New York. Warren M. Anderson ²⁴ , Majority Leader and President Pro Tem of the New York Senate Priscilla L. Cherry, Geraldine M. Boylan, Joan M. Ducey, Nora H. Ferguson, Angelina M. Ferrarella, Ernest E. Roos, Jr., and Adamina Ruiz

²³ CPEARL is an association of organizations. The organizations who sign on to each CPEARL, and later National PEARL, brief are listed to provide the reader with a complete list of organizations involved in the litigation and to gauge the relative strength of PEARL through the time period studied. The members of CPEAR for this case were: American Ethical Union; Americans for Democratic Action; Americans for Public Schools; American Jewish Committee, New York Chapter; American Jewish Congress; A. Philip Randolph Institute; Association of Reform Rabbis of New York City and Vicinity; B’nai B’rith; Citizens Union of the City of New York; City Club of New York; Community Services Society, Committee on Public Affairs; Council of Churches of the City of New York; Episcopal Diocese of L.I., Department of Christian Social Relations; Humanist Society of Greater New York; Jewish Reconstructionist Foundation; Jewish War Veterans, New York Department; League for Industrial Democracy, New York City Chapter; National Council of Jewish Women; National Women’s Conference of American Ethical Union; New York Civil Liberties Union; New York Jewish Labor Committee; New York State Americans United for Separation of Church and State; New York State Council of Churches; New York State Federation of Reform Synagogues; State Congress of Parents and Teachers, New York City District; Union of American Hebrew Congregations, New York State Council; Unitarian-Universalist Ministers Association of Metropolitan New York; United Community Centers; United Federation of Teachers; United Parents Associations; United Synagogue of America, New York Metropolitan Region; Women’s City Club of New York; and, Workmen’s Circle, New York Division.

²⁴ Senator Warren M. Anderson succeeded Senator Earl W. Brydes who retired as the Majority Leader and President Pro Tem of the New York Senate and was the original party to the suit.

The first financial aid program provided direct public funding for maintenance and repair of school facilities to those nonpublic schools with a high concentration of students from low income families. The second program created a tuition reimbursement program for low-income families with children at nonpublic schools. The third program provided state tax relief to parents with children in nonpublic schools who did not qualify for the tuition reimbursement program.

Amici	
Separationists	Accommodationists
<ul style="list-style-type: none"> • Baptist Joint Committee on Public Affairs (14) • National Education Association and The Horace Mann League (15) • Sidney A. Seegers, Stanley P. Babin, F. Charles Delana, Arthur F. Lamm, Alfred J. O'Banion, Mrs. Mary Ellis Roche, Theodore H. Shephard, Jr., Mrs. Velma D. Snow, Mrs. Catherine N. Cory, and Mrs. Madelyn Willis (16) • United Americans for Public Schools (17) 	<ul style="list-style-type: none"> • Lawrence E. Klinger • National Jewish Commission on Law and Public Affairs • U.S. Solicitor General

The District Court ruled that the direct payments to nonpublic schools and to parents with children in nonpublic schools were unconstitutional, but determined that the state income tax provision did not violate the Establishment Clause. The rulings were appealed. The Supreme Court granted certiorari, combined the cases, held oral argument on April 16, 1973, and delivered its opinion on June 25, 1973.

Separationist Arguments

The CPEARL litigant brief provided the Court with a three-part test to determine the constitutionality of an act under the Establishment Clause:

- (1) the *Everson* test, which forbids financial support or subsidization of sectarian instruction or religious worship;
- (2) the *Schempp* test, which forbids governmental action whose purpose or primary effect is to advance religion;
- and (3) the *Walz* test which forbids governmental action that involves excessive entanglement in religion (8).

The brief stated that the direct payments made to the sectarian schools were a clear violation of the *Everson* test. The tuition reimbursement violated the *Schempp* test because there were no provisions to prevent the public funds from being used for religious instruction and therefore advanced religion. The tax relief program entangled church and state in a funding scheme that would promote political divisiveness along religious lines, which was a threat to society and the political process.

The *Schempp* purpose and primary effect test was not as useful as it could be, the litigants argued, because the Court had been “reluctant to go behind the stated legislative purpose in measures for aid to religious schools” (14). In both *Allen* and *Lemon I*, the Court accepted the stated purpose of the act as presented by the legislatures responsible for the statutes. The litigants also explained that the effect test was flawed because it could be narrowly interpreted to mean only the most important effect of a program. Therefore if a legislature said that the primary effect of the act was to promote secular education, but the Court determined that a side effect of the act aids religion the act would not necessarily violate the primary effect test. However, this flaw in the interpretation of the effect test was mitigated by the *Walz* entanglement test because a state seeking to provide funding to sectarian schools would find itself in an impossible quandary of attempting “to avoid the Scylla of advancement the State would be engulfed in the Charybdis of entanglement” (37).²⁵ Lastly, the litigants observed that history and tradition support the proposition that public aid should not be provided to sectarian schools. They felt that the tax relief programs had only been developed because of the Court’s decision in *Brown v. Board of Education* (1954) “to open new avenues through constitutional barriers as promptly as old ones are closed by the courts” (49).

The *amicus* brief filed by the National Education Association and the Horace Mann League was the first separationist brief to specifically cite *Lemon I* as having developed a three-prong test to determine Establishment Clause constitutionality. Using the *Lemon* test as a framework, but focusing on the effect prong, the brief then explained how the New York programs violated the *Lemon* test and therefore the Establishment Clause. The other separationist briefs retained the separate tests of *Schempp* and *Walz* to make their arguments against the programs. They also focused attention on the political entanglement element of the *Walz* test stating how these programs would foster political controversy and strife along religious lines, the inability to separate secular and sectarian

²⁵ In Greek mythology, Scylla was a six-headed monster who lived in a sea-side cave and devoured sailors, and Charybdis (also a sea monster) created a dangerous whirlpool, which drowned unfortunate sailors who came too near. These two monsters lived very near one another in the Straits of Messina. Odysseus was tasked with sailing between the two and successfully did so – although he lost six of his sailors to Scylla. This myth is used to describe being caught between two perils neither of which can be evaded without risking the other.

education in religious schools, and how these programs break with the long tradition of using only private funding to support sectarian schools.

Decision of the Court

The Court (8-1) ruled that the direct aid for the maintenance and repair program was unconstitutional, and (6-3) that the tuition reimbursement and tax deduction programs were unconstitutional. Justice Lewis Powell wrote for the majority and was joined by Justices William O. Douglas, William Brennan, Potter Stewart, Thurgood Marshall, and Harry Blackmun. Chief Justice Warren Burger, and Justices Byron White and William Rehnquist supported the constitutionality of the tuition reimbursement and tax deduction programs. Chief Justice Burger and Justice Rehnquist joined with the majority in regard to the maintenance and repair program, leaving Justice White as the sole dissenter. The divided dissent produced a maze of dissenting opinions: Chief Justice Burger filed an opinion concurring in part joined by Justice Rehnquist, and dissenting in part, in which Justices Rehnquist and White joined; Justice Rehnquist filed a dissenting opinion in which Chief Justice Burger and Justice White joined; and, Justice White filed a dissenting opinion in which Chief Justice Burger and Justice Rehnquist joined.

The majority agreed with the District Court and ruled that the maintenance and repair program and the tuition reimbursement program had the effect of advancing religion because the use of the funds could not be strictly separated into secular purposes, and therefore supported the religious functions of the schools. The fact that the tuition reimbursement was provided to the parents rather than to the sectarian schools did not prevent the aid from having the effect of advancing religion. The state tax deductions, which the District Court allowed, were also determined by the majority to provide an impermissible advancement of religion (*Nyquist* 774-89).

Although *Walz* allowed tax exemptions for church property, the majority in *Nyquist* determined that the tax deductions in this instance did not have the historical foundations of *Walz* and the exemptions allowed in *Walz* were found by the Court to actually limit potential entanglement issues by removing the problems associated with valuation of church property, liens, foreclosures, etc. The majority found that indirect

funding programs (the tax deduction and tuition reimbursement) were impermissible because they were designed to assist sectarian schools by rewarding and providing an incentive to parents who sent their children to sectarian schools (789-95). However, in a footnote (#38) the Court leaves open the constitutionality of future tuition aid programs that benefit the parents of children in both public and private schools, regardless of the sectarian nature of the private schools:

Because of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g. scholarships) made available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefited (782-3).

Justice Powell stated that these programs would also have failed to pass the entanglement prong of *Lemon*, but use of this test was not necessary due to the fact that the programs violated the effect prong of *Lemon*. In addition, Justice Powell was concerned that these types of programs would produce political divisiveness and conflict between religious sects. He stated, "while the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a 'warning signal' not be ignored" (798-799). Lastly, Powell described the pervasively sectarian nature of the religious schools as prohibiting unrestricted aid, but allowed for the possibility of providing aid "to the secular without providing direct aid to the sectarian. But the channel is a narrow one" (775).

Chief Justice Burger concurred with the majority finding that the maintenance and repair program was unconstitutional, but he argued that the tuition reimbursements and tax deductions should be permissible. Aid to individuals, even though it may be used by individuals to support religious institutions, is permissible because *Everson* and *Allen* "held that such an indirect or incidental 'benefit' to the religious institutions that sponsored parochial schools was not a conclusive indicium of a 'law respecting an establishment of religion'" (801). Burger's stance attempts to strictly differentiate between direct and indirect aid and grants greater leeway for legislatures to provide indirect aid.

Justice Rehnquist in his dissenting opinion stated that *Walz* should be the controlling precedent with regard to the tax deduction, and that the neutral nature of the program, rather than its historical background, should be analyzed to determine permissibility. He also noted that *Everson* and *Allen* promoted the Court's concept of "benevolent neutrality" in that indirect aid to the parents does not provide an incentive to send their children to sectarian schools, but rather works to equalize the financial burden of the parents who choose to send their children to nonpublic schools. He further stated that indirect aid programs should not be a matter decided by the courts, but "these decisions are quite rightly hammered out on the legislative anvil" (813).

Justice White's dissent brings into play the Free Exercise Clause in explaining the undue burden imposed on parents who choose to send their children to sectarian schools. He held that the goal of the New York programs was to support the ailing sectarian schools so that the public school systems would not be inundated with students, should these sectarian schools close. He saw no Establishment Clause limitations in supporting either directly or indirectly the secular functions of sectarian schools, and he disagreed with the majority that the primary effect of the programs was to advance religion. "Preserving the secular functions of these [sectarian] schools is the overriding consequence of these laws and the resulting, but incidental, benefit to religion should not invalidate them," he wrote (823-4).

Implications for Future Cases

Only one separationist coalition *amicus* brief, the National Education Association with the Horace Mann League, embraced the *Lemon* test. The other separationist interest groups, ignoring the *Lemon* test, promoted other combinations of arguments attempting to strengthen the Court's separationist jurisprudence. They urged the Court to embrace the *Everson* prohibitions on aid to religious institutions and activities, political entanglement, the inability to separate secular and sectarian instruction in religious schools, and the tradition argument that religious funding should be entirely non-governmental and voluntary.

Nyquist was important because it confirmed the Court's reliance on the *Lemon* test and its three prongs, and broadens the test's scope to include indirect as well as direct

funding of sectarian schools. The Court's ruling also provided the separationist advocacy coalition with its desired broader interpretation of the primary effect test. Although the Court cited the political entanglement argument it determined that alone this argument would not be sufficient to declare a program unconstitutional. The Court did not use the separationist no-funding interpretation of *Everson*, but it did incorporate the pervasively sectarian argument; however, it refused to accept the separationist argument that this designation would preclude all funding. Lastly, the majority's footnote 38 opens the door to indirect aid programs designed to support parents and children from both public and private schools – see *Mueller v. Allen* (1983) below.

Chapter 7: *Levitt v. CPEARL* (1973)

Case Overview

Levitt v. Committee for Public Education & Religious Liberty (CPEARL) (1973) combined three cases (*Levitt v. CPEARL*, *Anderson/Brydes v. CPEARL*, and *Cathedral Academy v. CPEARL*) resulting from New York State legislation providing funds to reimburse nonpublic schools for expenses associated with the administration of tests and reporting requirements that were state mandated and prepared as well as those that were prepared by sectarian school teachers. The District Court rejected the claim that the direct aid was only for “secular, neutral, or nonideological” services and declared the funding unconstitutional (*Levitt* 472).

The accommodationists appealed the ruling. The Supreme Court granted certiorari, combined the cases, held oral argument on March 19, 1973, and delivered its opinion on June 25, 1973.

Separationist Arguments

The CPEARL brief used the legal arguments of: *Everson* and *Lemon I* in the prohibition of the funding of religious indoctrination and direct funding of sectarian schools, *Lemon I* in prohibiting an administrative entanglement between church and state,

Litigants	
Separationists	Accommodationists
Committee for Public Education & Religious Liberty (CPEARL), Bernard Backer, Algernon D. Black, Theodore Brooks, Herschel Chanin, Naomi Cowan, Rebecca Goldblum, Benjamin Haiblum, Blanche Lewis, Edward D. Moldover, Aryeh Neier, David Sheeley, Albert Shanker, and Howard M. Squadron (18)	Arthur Levitt, Comtroller of the State of New York and Ewald B. Nyquist, Commissioner of Education of the State of New York. Warren M. Anderson ²⁶ , Majority Leader and President Pro Tem of the New York Senate Cathedral Academy, St. Ambrose School, Bishop Loughlin Memorial High School, Bais Yaakov Academy for Girls, and Yeshivah Rambam

Amicus	
Separationist	Accommodationist
<ul style="list-style-type: none"> • No <i>amicus</i> briefs filed 	<ul style="list-style-type: none"> • New York State Association of Independent Schools

²⁶ Senator Warren M. Anderson succeeded Senator Earl W. Brydes who retired as the Majority Leader and President Pro Tem of the New York Senate and was the original party to the suit.

and *Schempp* and *Lemon I* in prohibiting a non-secular purpose or an effect that aided religion. The brief did not tie the latter two legal arguments together to be used as a comprehensive test for Establishment Clause cases. The key argument made in the brief was that the internally developed academic tests were instruments of instruction and the sectarian schools would use them for religious indoctrination.

Decision of the Court

The Court ruled (8-1) in favor of the separationist litigants declaring the direct aid impermissible. Chief Justice Warren Burger wrote for the majority and was joined by Justices Potter Stewart, Harry Blackmun, Lewis Powell, and William Rehnquist. Justices William O. Douglas, William Brennan, and Thurgood Marshall filed a separate concurring statement. Justice Byron White dissented.

Using *Nyquist* as the controlling precedent, the majority found that the secular and sectarian functions of the academic tests could not be separated because the teacher prepared tests are central to the instruction process. Therefore, the public funding of the tests had the effect of aiding religion. Chief Justice Burger stated, “We cannot ignore the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church” (*Levitt* 480). Although these services are required by the state, the state is under no obligation to fund these services. He goes on to argue, “State or local law might, for example, ‘mandate’ minimum lighting or sanitary facilities for all school buildings, but such commands would not authorize a State to provide support for those facilities in church-sponsored schools” (481).

Justice Douglas’ concurring statement simply referenced the decisions in *Nyquist* (see above) and *Sloan* (see below) as compelling the ruling against the program in *Levitt*. Justice White dissented but did not file an opinion for his dissent. His arguments for this case were articulated in his dissenting opinions in *Nyquist* (see above).

Implications for Future Cases

The separationist litigants came closer to embracing the *Lemon* test by incorporating all the elements of *Lemon* into its brief; however, they did not tie the

elements together as a single comprehensive test for Establishment Clause cases. The litigants continued their efforts to persuade the Court, again unsuccessfully, to enhance the *Lemon* test by adding *Everson's* no aid principle for religious institutions. Burger's opinion left the door open for direct funding of sectarian schools for academic tests as long as the as the examinations are prepared by the state (see *Regan* below).

Chapter 8: *Sloan v. Lemon* (1973)

Case Overview

Sloan v. Lemon (1973) combined with *Crouter v. Lemon* concerns legislation enacted by Pennsylvania following the *Lemon I* decision. The “Parent Reimbursement Act for Nonpublic Education” reimbursed parents for a portion of tuition expenses incurred in sending their children to nonpublic schools. The District Court ruled that the act was unconstitutional.

The rulings were appealed. The Supreme Court granted certiorari, combined the cases, held oral argument on April 16, 1973, and delivered its opinion on June 25, 1973.

Separationist Arguments

Like the litigant briefs described above in *PEARL v. Nyquist*, and *Levitt*

v. PEARL, this brief did not acknowledge the Court’s new three-prong test developed in *Lemon I*.²⁷ The litigants used elements from *Everson* and *Lemon* to argue that even though the reimbursement was provided to the parents rather than directly to the schools the effect of the program was to aid religion. The reimbursement also produced a political entanglement prohibited in *Lemon I*. The brief stated, “Our founding fathers were so revolted by that *particular kind* of political division – along religious lines – that they ‘stripped’ the legislature ‘of all power to tax, to support, or otherwise to assist any or

Litigants	
Separationists	Accommodationists
Alton J. Lemon, Neal F. Bracken, and Benjamin S. Lowenstein (19)	Grace Sloan, State Treasurer of the Commonwealth of Pennsylvania Jose and Enilda Diaz, William and Nancy Zimmerspitz, F. Carl and Katheryn L. Kretzman, Arthur and Muriel Harvey, Daniel F.X. and Anna T. Powell, and Seth W. and Anne P. Watson, Jr. Henry E. Crouter

Amici	
Separationists	Accommodationists
<ul style="list-style-type: none"> • American Jewish Committee, American Jewish Congress, Anti-Defamation League of B’nai B’rith, Central Conference of American Rabbis, National Council of Jewish Women, and Union of American Hebrew Congregations (20) • National Education Association and the Horace Mann League (21) 	<ul style="list-style-type: none"> • City of Philadelphia • National Association of Independent Schools, Inc. • U.S. Solicitor General

²⁷ All three of these briefs were written by Leo Pfeffer.

all religions” (19-20, quoting *Everson*). In addition, the litigants claimed that the program violated freedom of conscience protected in the Free Exercise Clause by compelling tax payers to support religion, and the Equal Protection Clause by encouraging a dual and segregated educational system.

In contrast, the *amicus* brief filed by the National Education Association and the Horace Mann League clearly accepted the three-prong *Lemon* test as determinant in deciding Establishment Clause cases; however, the entire brief was focused solely on how the program in question violated the primary effect prong. The *amicus* brief filed by the American Jewish Committee and other national Jewish organizations also recognized the three-prong *Lemon* test as controlling the determination of this case. They structured their brief to address each prong, listing the violations of the program in turn. The Court was chastised, in this brief, for not looking at the legislative intent of the program in *Lemon* and just accepting the legislature’s stated purpose of the act. They stated, “it would be naïve to unquestionably accept as the purpose of any Act whatever language the draftsmen put in the preamble” (12). They warned against continuing this practice of ignoring an act’s legislative intent would make the purpose prong of the *Lemon* test useless.

Decision of the Court

The Court decided (6-3) in favor of the separationist litigants declaring this program was constitutionally indistinguishable from the New York State program struck down in *Nyquist* (see above). Justice Lewis Powell wrote for the majority and was joined by Justices William O. Douglas, William Brennan, Potter Stewart, Thurgood Marshall, and Harry Blackmun. Chief Justice Warren Burger filed a dissenting opinion joined by Justices William Rehnquist and Byron White. Justice White also filed an additional dissenting opinion, which Chief Justice Burger and Justice Rehnquist joined.

The majority held that the program had the effect of advancing religion as in *Nyquist*. This opinion responded to an accommodationist claim that by using the Court’s logic only the aid to parents with children in sectarian schools violated the Establishment Clause, therefore parents with children in secular nonpublic schools could receive the legislation’s benefits. However, if parents of children in secular nonpublic schools can

receive benefits then the rights of the parents with children in sectarian schools are violated under the Equal Protection Clause. Justice Powell countered that, “The Equal Protection Clause has never been regarded as a bludgeon with which to compel a State to violate other provisions of the Constitution. Having held that tuition reimbursements for the benefit of sectarian schools violate the Establishment Clause, nothing in the Equal Protection Clause will suffice to revive that program” (*Sloan* 834).

Chief Justice Burger’s and Justice White’s dissent statements simply reference back to their opinions in *Nyquist* (see above).

Implications for Future Cases

The separationist coalition was still divided on the usefulness of the *Lemon* test in promoting their policy goals. The coalition continued to urge the Court, without success, to incorporate into its jurisprudence prohibitions regarding legislative intent, political entanglement, and *Everson’s* no-aid principle. Justice Powell did provide the separationist coalition with an important victory in this case by declaring that discrimination arguments based on the Equal Protection Clause cannot overturn prohibitions based on the Establishment Clause.

Section I: Summary

The cases in this section clearly showed the divisions on the Court with a six member separationist majority (Justices Douglas, Brennan, Stewart, Marshall, Blackmun, and Powell) prohibiting both direct and indirect funding of sectarian schools; Chief Justice Burger and Justice Rehnquist opposing direct funding but supporting indirect funding; and, Justice White supporting both direct and indirect funding. The six-member majority is not unified in their interpretation of the Establishment Clause. Justices Douglas and Brennan held a very strict separationist perspective with regard to public funding of sectarian schools. Justices Marshall and Stewart were strong separationists, but were more moderate than Douglas and Brennan, and Justice Powell held a more moderate stance than Justices Marshall and Stewart. As more cases were introduced by the competing advocacy coalitions to assess the parameters of the *Lemon* test, the differences between these six perspectives of the Justices will become more clearly defined. The separationist coalition will also work to craft their arguments to appeal to, and perhaps strengthen the separationist perspectives of, the more moderate justices to achieve pro-separationist decisions.

In *Lemon I* the Court declared the aid impermissible, but did not rule out the potential to be able to separate secular and sectarian functions. This would allow the Court to permit aid programs to purely secular functions. Justice Powell in *Nyquist* reiterated this argument, but stated that the channel between secular and sectarian was “a narrow one” (775). *Levitt* proved how narrow this channel was by prohibiting reimbursements for the administration of tests and state mandated reporting.

The separationist coalition was divided on the use of the *Lemon* test. PEARL, under the direction of Leo Pfeffer, viewed the *Lemon* test as too weak a structure to decide Establishment Clause cases. This was reflected in its attempts to combine the elements of the *Lemon* test with absolute prohibitions on funding derived from *Everson*. The national Jewish organizations (American Jewish Committee, American Jewish Congress, and Anti-Defamation League) and educational groups (NEA and Horace Mann League) embraced the *Lemon* test. The educational groups accepted the test as provided

by the Court in *Lemon*; however, the national Jewish groups attempted to strengthen the test by asking the Court to consider the legislative intent of the act in the purpose prong.

Since four of the five cases were decided in the same term, the separationist organizations did not have a chance to evolve their arguments between cases. This section simply provides the foundation for examining future arguments presented by the separationist advocacy coalition. Tables 3 and 4 provide a summary of the legal arguments used by the members of the separationist advocacy coalition in this section. Table 5 provides a summary of the justices' support for the separationist coalition.

Table 3

Legal Arguments Used to Support the Separationist Stance 1971-1973

Brief* /Argument	A	B	C	D	E	F	G	H	I	J
Lemon										
1	X	X		X	X	X			X	
**2										
3	X			X	X	X		X	X	T
4		X		X	X			X		T
5	X	X		X	X					
6	X			X	X					N
7										
8				X	X				X	
9				X	X			X	X	
10				X						
Lemon II										
11	X				X			X	X	
**12					X					
Nyquist										
13	X			X	X				X	T
14	X			X	X					
15			X	X						
16				X	X					T
17				X	X				X	
Levitt										
18	X	X		X	X					
Sloan										
19	X			X	X				X	
20	X	X	X	X						
21			X							

*Brief numbers are listed next to the litigant and amici names listed at the beginning of each chapter.

**Litigant Reply Brief

Legal Argument Codes:	Other:
<p>A = <i>Everson</i> Tests B = <i>Everson</i> Progeny C = <i>Lemon</i> Test D = Purpose/Effect and Legislative Intent Tests E = Prohibited Relationships F = Religious Means/Nature of Institution Test G = Brennan Test H = Original Intent – Founders I = Original Intent – Fratricide/Diversion/Corruption J = Other – Establishment Clause K = Other – Non-Establishment Clause</p>	<p>T = Tradition – breaks traditional practices N = True Neutrality – does not promote religion over nonreligion</p>

Table 4

Arguments Used to Counter Accommodationist Stances 1971-1973

Brief* /Argument	AA	BB	CC	DD	EE
<i>Lemon</i>					
1			X		
**2					
3					
4			X		
5					
6					
7					
8					
9	X				
10					
<i>Lemon II</i>					
11					
**12					
<i>Nyquist</i>					
13			X		
14					
15	X				
16					
17			X		
<i>Levitt</i>					
18					
<i>Sloan</i>					
19				X	
20			X	X	
21					

*Brief numbers are listed next to the litigant and *amici* names listed at the beginning of each chapter.

**Litigant Reply Brief

Legal Argument Codes:
AA = Neutrality Tests
BB = Discrimination
CC = Parent/Child Benefit
DD = Individual Choice
EE = Free Exercise Trumps Establishment Clause

Table 5

Court and Justices Voting Patterns 1971-1973

Case/J	CJ	J1	J2	J3	J4	J5	J6	J7	J8	Court
<i>Lemon I</i>	+	+	+	+	+	+	-	+	+	8-1
<i>Lemon II</i>	-	-	+	-	+	+	-	*	-	3-5
<i>Nyquist-a</i>	+	+	+	+	+	+	-	+	+	8-1
<i>Nyquist-b</i>	-	+	+	-	+	+	-	+	+	6-3
<i>Levitt</i>	+	+	+	+	+	+	-	+	+	8-1
<i>Sloan</i>	-	+	+	-	+	+	-	+	+	6-3
% pro	50%	83%	100%	50%	100%	100%	0%	100%	83%	83%

Nyquist-a = direct aid for the maintenance and repair program

Nyquist-b = tuition reimbursement and tax deduction programs

Voting Codes:

+ voted with the separationist coalition

- voted against the separationist coalition

* did not participate in the case

Justices Codes:

CJ = Chief Justice Warren Burger (1969-86)

J1 = Hugo Black (1937-71) and Lewis Powell (1972-87)

J2 = William O. Douglas (1939-75)

J3 = John Marshall Harlan (1955-71) and William Rehnquist (1972-86; as CJ 1986-2005)

J4 = William Brennan (1956-90)

J5 = Potter Stewart (1958-81)

J6 = Byron White (1962-93)

J7 = Thurgood Marshall (1967-91)

J8 = Harry Blackmun (1970-94)

Justices Codes by Case:

Lemon: Chief Justice Warren Burger (**CJ**), Justices Hugo Black (**J1**), William O. Douglas (**J2**), John Marshall Harlan (**J3**), William Brennan (**J4**), Potter Stewart (**J5**), Byron White (**J6**), Thurgood Marshall (**J7**) and, Harry Blackmun (**J8**).

Lemon II, Nyquist, Levitt, and Sloan: Chief Justice Warren Burger (**CJ**), Justices Lewis Powell (**J1**), William O. Douglas (**J2**), William Rehnquist (**J3**), William Brennan (**J4**), Potter Stewart (**J5**), Byron White (**J6**), Thurgood Marshall (**J7**) and, Harry Blackmun (**J8**).

Section II: *Meek to Aguilar* (1975-1985)

The Court during this period altered their application of the elements of the *Lemon* test and opened the way for direct and indirect public funding of sectarian schools. Although never adopting a strict separationist stance (allowing transportation in *Everson* and textbooks in *Allen*), the Court's decisions during this period reflect a philosophical shift away from the separationist stance and toward a more accommodationist approach to religion in public life. As stated in *Kelly et al.'s American Constitution*,

If one assumes that the purpose of the establishment clause is to make public life rigorously secular, the Court's subsequent application of the *Lemon* test was a failure because it led to inconsistent results. If one assumes that the First Amendment is intended to promote religious liberty and effect an accommodation between religion and politics, the Court's mixed holding struck an appropriate balance. (736).

Examining the legal arguments in this section demonstrates whether the separationist advocacy coalition recognizing this shift modifies its legal arguments.

Chapter 9: *Meek v. Pittenger* (1975)

Case Overview

The Pennsylvania legislature adopted two programs to assist children in nonpublic schools. The first program sought to make certain instructional and health services already provided to public school children available to the students of nonpublic schools. This included: remedial and accelerated instruction, guidance counseling and testing, and speech and hearing therapy; all of which would be performed by public school personnel in the nonpublic schools. The second program provided secular textbooks to nonpublic school children and the loan of instructional equipment and materials directly to nonpublic schools.

The District Court for the Eastern District of Pennsylvania, using the *Lemon* test, ruled that the loan of textbooks to nonpublic school children was constitutional, as was the provision of non-sectarian services to children in nonpublic schools, and the loan of instructional materials to nonpublic schools. Yet, the court did find unconstitutional the loan of any instructional equipment and materials such as projectors and recording equipment that could be “diverted to religious purposes” (*Meek* 357).

The ruling was appealed. The Supreme Court granted certiorari, held oral argument on February 19, 1975, and delivered its opinion on May 19, 1975.

Litigants	
Separationists	Accommodationists
Sylvia Meek, Bertha G. Myers, Charles A. Weatherley, American Civil Liberties Union, National Association for the Advancement of Colored People, Pennsylvania Jewish Community Relations Council, and American United for Separation of Church and State (22, 23)	John C. Pittenger, Secretary of Education of the Commonwealth of Pennsylvania; and, Grace Sloan, Treasurer of the Commonwealth of Pennsylvania Jose and Enilda Diaz, and their children Dalila, Jose, Jr., and Sergio; William and Nancy Zimmerspitz, and their daughter Rochelle; Thomas J. and Marie Hassall, and their daughter Patricia Anne; Daniel F.X. and Anna T. Powell, and their children Kathleen A. and Daniel F.X., Jr.; and, Seth W., Jr. and Anne P. Watson, and their daughter Ellen P. John P. Chesik and his daughter Emily; Mrs. Robert Boozer and her daughter Debra McKissick; the Springside School; and, the Pennsylvania Association of Independent Schools

Separationist Arguments

The separationist litigants argued that the Pennsylvania program “subsidizes the teaching of secular subjects in church schools” and it “propels the State in partnership with the church,” (16) both of which were prohibited by *Lemon I*. Using the elements of the *Lemon* test, but without endorsing it as a unified test,²⁸ the litigants declared that the program would require “comprehensive, discriminating, and continuing state

surveillance” (16) to be certain the teachers did not teach religion. This monitoring would produce administrative entanglement prohibited in *Lemon I*. Such “state surveillance” would be necessary because of the “environment of a given religious institution where a religious atmosphere may be pervasive” (19). The litigants also deemed that the supply of materials and equipment was impermissible because the aid went directly to the sectarian schools and therefore was a direct “subsidy for the operation of religious schools” (26). They explained that these items could easily be used by the sectarian schools for religious indoctrination.

As for the textbook program, the litigants asked the Court to “re-examine and reconsider *Allen*” (21). Based on *Everson*, *Everson*’s progeny, Justice Black’s dissent in *Allen*, and *Lemon I* and its progeny, the litigants “suggest that *Allen* cannot be reconciled with the letter or spirit of all the judicial history that preceded it, and even less so with that which followed it. In short, we think the time has arrived for the Court to reconsider *Allen* and on reconsideration to overrule it” (23). The litigants stated that if the Court was not prepared to overturn the *Allen* precedent the textbook program should still be held unconstitutional because it produces the administrative and political entanglement prohibited in *Lemon I*.

Amici	
Separationists	Accommodationists
<ul style="list-style-type: none"> American Association of School Administrators, American Jewish Committee, American Jewish Congress, Anti-Defamation League of B’nai B’rith, Baptist Joint Committee on Public Affairs, Board of Church and Society of the United Methodist Church, Jewish Labor Committee, Jewish War Veterans, National Education Association, National Council of Jewish Women, Union of American Hebrew Congregations, United Synagogue of America, and Unitarian Universalist Association (24) 	<ul style="list-style-type: none"> Council for American Private Education National Audio-Visual Association, Inc.

²⁸ The litigants were represented by Leo Pfeffer.

The litigants reply brief countered the accommodationist position that the program's benefits were provided to the students and their parents therefore any benefit to the sectarian schools were indirect and incidental. The separationist litigants argued that the program created a special class of citizens to receive an economic benefit. The aid was not to parents and students in general but to specifically targeted parents who send their children to sectarian schools. The program was designed to reward these parents and the program's effect was to "preserve and support religion-oriented institutions" (2).

Unlike the litigants, the *amicus* brief of the American Association of School Administrators *et al.* used the *Lemon* test, declaring that the Pennsylvania program violates all three of its prongs. They demonstrated that the Court had indirectly used legislative intent in declaring programs unconstitutional: in *Nyquist* the Court said the program's "purpose and inevitable effect are to aid and advance" religion; and, in *Sloan* the Court spoke of "intended consequences" of the program (14). These separationist groups argued "the Court's acceptance of the legislature's declaration of secular intent as a matter of law is in conflict with its recognition of a sectarian intent as a matter of fact" (*ibid.*). They asked the Court to make the first prong of the *Lemon* test meaningful by closely examining the legislature's actual intent in designing these programs and refraining from accepting at face value a legislature's declared purpose.

They stated that previous Court rulings did not interpret "primary effect" as meaning "exclusive" or "even predominant effect" (16), but rather the Court stated that "a statute cannot be upheld if it has a substantial sectarian effect even though it also has a substantial secular effect" (17). Using these interpretations of the primary effect this program failed the effect prong of *Lemon*. The entanglement prong was also violated, they argued, because based on prior Court decisions whenever safeguards to prevent religious indoctrination were needed then the program was impermissible regardless of whether or not the safeguards were present. Failing to include safeguards in a program cannot satisfy administrative entanglement. The *amici* argued that pervasively sectarian schools would always require safeguards when teachers or equipment entered these schools. The entanglement prong also encompassed political entanglement arising from the potential for strife or division along religious lines.

This brief was meant to strengthen the prongs of the *Lemon* test by incorporating the following as major elements of the test: legislative intent, pervasively sectarian nature, substantial effect, and political entanglement. Lastly, these groups asked the Court to reexamine its stance on textbooks as allowed in *Allen*. They cited academic research published in the *Yale Law Journal*, which found that sectarian textbooks were being purchased using public funds. The study determined that this occurred because: of lax criteria and supervision for determining secular from sectarian textbooks; turning this responsibility over to the sectarian schools; and, the difficulty public personnel had in making judgments about what was secular or sectarian. The *amici* concluded, “at least one function of the separation principle is to ensure that public officials are not placed in this kind of dilemma” (27).

Decision of the Court

In a 6-3 decision, the Court declared the instructional equipment and material loan programs impermissible along with the on-site instruction; however, the textbook loan program was determined to be permissible. Justice Potter Stewart wrote for the Court and was joined by Justices Harry Blackmun, Lewis Powell, William O. Douglas, William Brennan, and Thurgood Marshall.²⁹ Justice Brennan filed an opinion concurring in part and dissenting in part in which Justices Douglas and Marshall also joined. Chief Justice Warren Burger wrote an opinion, which concurred in part and dissented in part. Justice William Rehnquist filed an opinion, which also concurred in part and dissented in part that was joined by Justice Byron White.

Stewart, writing for the Court,³⁰ opened by stating that while *Everson* did articulate a principle prohibiting the use of tax funds for the support of any religious activities and institutions, “it is clear that not all legislative programs that provide indirect or incidental benefit to a religious institution are prohibited by the Constitution” (*Meek* 359). Using the *Lemon* test to determine the constitutionality of the programs, Stewart

²⁹ The last three justices (Douglas, Brennan, and Marshall) did not agree with Powell’s opinion regarding the constitutionality of the textbook loan program. Powell in his opinion wrote that in keeping with *Allen* the textbook loan program was constitutional. The textbook loan program remained permissible because a majority of justices (Powell, Stewart, Blackmun, Burger, Rehnquist, and White) supported its constitutionality.

³⁰ Justice Stewart wrote for the Court in this decision except with regard to the textbook program where he authored the plurality opinion.

found that the primary effect of the direct loan programs were to advance religion “because of the predominantly religious character of the schools benefiting [from the programs]” (363). The effect of advancing religion was further exacerbated, he claimed, because more than 75 percent of the nonpublic schools eligible for the program were sectarian institutions. Quoting in part from *Hunt v. McNair* (1973) Stewart wrote “though earmarked for secular purposes, ‘when it [public funds] flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission’ state aid has the impermissible primary effect of advancing religion” (366).

Despite that the instructors and service providers for the Pennsylvania programs were public school employees, the Court ruled that because the instruction and services occurred inside the sectarian schools the “potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present” (372). The surveillance necessary to ensure that the public school personnel remained religiously neutral would create an impermissible administrative entanglement between the state and the sectarian schools. The Court also noted that the services program failed the political entanglement test because the annual appropriation process to fund the program “provides successive opportunities for political fragmentation and division along religious lines, one of the principal evils against which the Establishment Clause was intended to protect” (372).

Just as Stewart used the political entanglement test for the instruction and services, Justices Brennan, Douglas, and Marshall believed that the test should have also made the textbook program impermissible. Justice Brennan stated that the textbooks constituted more than a fourth of the cost of the programs so the annual appropriation process could lead to political fragmentation and division along religious lines. Brennan argued that *Allen* should not be considered the controlling precedent in this case because *Allen* was decided before the Court adopted the political entanglement test in *Lemon I* and *Nyquist*. His argument attempted to raise the political entanglement test to the same level as that of the administrative entanglement test. Lastly, Brennan argued that the benefit of the program was to the sectarian schools, not the students. Since it was the sectarian school and not the students who requested, obtained delivery of, and retained

the textbooks, he said, “it is pure fantasy to treat the textbook program as a loan to students” (379).

Chief Justice Burger’s dissent focused on what he deemed a violation of the Free Exercise Clause – the discrimination against religion and the children who happened to attend religious schools. In addition, he believed the Court’s decision was a violation of the Equal Protection Clause of the Fourteenth Amendment because, he said, parents must choose between “their judgment as to their children’s spiritual needs and their temporal need for special remedial learning assistance” (387). Justice Rehnquist, joined by Justice White, wrote that determining a basic constitutional principle by calculating the percentage of sectarian schools benefiting from a program was “unsupportable” from the Court’s jurisprudence (389). He stated, as long as there was “no danger of diversion” the educational equipment and materials should not have been treated any differently than textbooks as allowed in *Allen* (391). Rehnquist also found no evidence that instructors or service providers would become involved in the religious mission of the schools simply by being in these schools. He believed that this was an unwarranted extension of the entanglement test as presented in *Lemon I* since the personnel in this case were public school employees, while in *Lemon I* they were sectarian school employees. Rehnquist feared that this decision moved the Court far beyond the First Amendment’s mandate for “neutrality on the part of government,” and instead put the Court’s weight “on the side of those who believe that our society as a whole should be a purely secular one” (395).

Implications for Future Cases

The *amici* succeeded with three of the four *Lemon* test enhancements they sought concerning: pervasively sectarian, political entanglement, and substantial effect. Justice Stewart agreed with their position and advanced the concept that no direct aid can be provided to pervasively sectarian institutions and that political entanglement, leading to religious divisiveness, could be a reason to declare an act unconstitutional. The Court in *Nyquist* declared political entanglement to be a “warning signal” but not enough on its own to make an act unconstitutional (798); however, Justice Brennan, in his opinion, advanced the argument that political entanglement should be given as much weight as administrative entanglement. The majority of the Court put to rest the separationist fears

that the primary effect test would only apply to the “first order of importance” regarding whether or not a program advanced religion. The majority embraced the idea that as long as a program had a substantial effect of advancing religious it would be impermissible. Unfortunately for the separationists, no justice accepted the invitation to examine the legislative intent of the statute under *Lemon*’s secular purpose prong.

Chapter 10: *Wolman v. Walter* (1977)

Case Overview

Wolman v. Walter (1977) further defined what was permissible and impermissible with regard to aid to sectarian schools and the children attending sectarian schools. This case considered an Ohio program that provided secular textbooks, standardized tests and scoring services, diagnostic services for speech and hearing, mental and physical health services, remedial and guidance

Litigants	
Separationists	Accommodationists
Benson A. Wolman, Frederick Chambers, Patricia J. Keenan, Barbara Kaye Besser, Nancy R. Terjesen, and Marjorie Wright ³¹ (25,26)	Franklin B. Walter, Superintendent of Public Instruction of the State of Ohio, State Board of Education (the case originated under Superintendent Martin W. Essex); Gertrude W. Donahey, Treasurer of Ohio; and, the Board of Education of the City School District of Columbus, Ohio James Grit, Ewald Kane, Helen S. Kowloski, and Alvin Shames

services, instructional materials and equipment, and field trip transportation and services. Responding to the Court’s decision in *Meek* the remedial and guidance services were not provided in the nonpublic schools, but in public schools, public centers, or in mobile units. The instructional materials and equipment were loaned directly to the parents of nonpublic school students, at their request, rather than to the nonpublic schools themselves.

The District Court held all the parts of the program to be constitutional. The separationist litigants appealed, the Supreme Court granted certiorari, held oral argument on April 25, 1977, and delivered its opinion on June 24, 1977.

Separationist Arguments

The separationist litigants, using the *Lemon* test, argued that almost all the program components (excluding the medical, dental and nursing diagnostics) in one way or another violated the Establishment Clause. The provision of equipment and materials had the effect of aiding religious activity even though they were legally loaned to the students or their parents and that the loaned items were officially stated to be “incapable

³¹ The ACLU represented these litigants.

of diversion to religious use” (22). Because of the pervasively sectarian nature of these schools “it would simply ignore reality to attempt to separate educational functions” from religious functions (23); and as the Court concluded in *Sloan* there is “no constitutional significance that state aid goes indirectly” rather than directly to sectarian schools (26).

The litigants opposed the use of the child benefit theory in this case due to the fact that the Court upheld only those acts in which the benefit clearly went to the parent or student, rather than to the sectarian school. Even though the Court found in *Everson* and *Allen* that the bus rides and textbooks were “customarily purchased by the parents... The Court has resisted any

Amici	
Separationists	Accommodationists
<ul style="list-style-type: none"> • Anti-Defamation League of B'nai B'rith (27) • National Coalition for Public Education and Religious Liberty (PEARL)³² (28) • State Convention of Baptists in Ohio, The Churches of God in Ohio, The Ohio Free Schools Association, and The Ohio Conference of Seventh-day Adventists (29) 	<ul style="list-style-type: none"> • City of New York • Ohio Independent Schools • U.S. Solicitor General

reductio-ad-absurdum extension of the child-benefit principle which would hold that the state can fund education in church schools because education is a benefit to children” (27-8).

According to the separationist litigants the remedial and guidance services provided in the sectarian schools were impermissible based on the Court’s ruling in *Meek* because of the administrative entanglement necessary to supervise these public employees to ensure that they did not foster religious instruction. The litigants argued that this limitation should also apply to the psychological diagnostic services because of the “intercommunication between the diagnostician and the pupil, and an intrusion into the social and behavioral aspects of the pupil’s personality” (32), and to speech and hearing diagnostic services because the staff “can be expected to communicate with a

³² National PEARL represents: American Association of School Administrators; American Ethical Union; American Humanist Association; American Jewish Congress; Americans United for Separation of Church and State; Baptist Joint Committee on Public Affairs; Board of Church and Society of the United Methodist Church; Central Conference of American Rabbis; Illinois PEARL; Missouri Baptist Christian Life Commission; Missouri PEARL; New York PEARL; Monroe County, New York PEARL; Michigan Council Against Parochialism; National Association of Laity; National Council of Jewish Women; National Education Association; National Women’s Conference, American Ethical Union; Preserve Our Public Schools; Public Funds for Public Schools of New Jersey; New York State United Teachers; Ohio Free Schools Association; Union of American Hebrew Congregations; and, Unitarian Universalist Association.

pupil at length in order to assess the child's communicative abilities" (34). The litigants felt that these services could be conducted in the public schools, allowing parochial school students along with all other students in the community to receive the services; however, the litigants did challenge the mobile units because they felt these units would be perceived to operate as an "annex to the parochial school" (42). The distinction between a unit parked next to the religious school and the services taking place in the classroom of the religious school was negligible, they argued. The furnishing of these programs in mobile units or even in public centers specifically for sectarian school students, they stated, "constitutes a special benefit to a sectarian class without essential guarantees against fostering religion or excessive entanglement" (45). The litigants believed these programs were designed to support specific sectarian groups therefore:

the Establishment Clause would appear to be violated by the government's furnishing of even secular benefits to a distinctly sectarian class. For example, the furnishing of free toothbrushes – as well as free Bibles – only to Christians or only to Jews would be inconsistent with the Establishment Clause injunction against an officially preferred church (47).

The testing and scoring services were also determined by the litigants to be impermissible. They said, "testing is not a denominationally neutral health service" but was an "integral part of the teaching process" (49); therefore the "the predominantly sectarian teaching mission of the parochial school is a primary and direct beneficiary" (50). The field trips were impermissible because, as advanced by *Everson*, they cannot be "indisputably marked off from the religious function" (51), and because of the administrative entanglements to determine the number of trips, appropriateness of the destination, as well as allocation and scheduling.

As in *Meek*, the litigants again urged the Court to overturn its decision in *Allen* regarding textbooks. They explained that because of the pervasively sectarian nature of the schools their secular function could not be extracted from their sectarian mission; therefore the provision of textbooks advances religion. Providing textbooks also violated the political entanglement prong of the *Lemon* test because of the "need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow" (55).

The accommodationist litigants stated that since no actual instances of Establishment Clause abuses have been documented, the Court should not be swayed by hypothetical violations created by the separationist litigants. The separationist litigants responded in their reply brief that at least since *Lemon I* the Court had decided these types of cases based on “their potential for Establishment Clause abuse, rather than by the demonstrated record of abuse” (3). The separationist litigants also responded to the charge that denying services to nonpublic school students that are provided to public school students would be a violation of the Free Exercise Clause. The litigants quoted the District Court for the Southern District of Ohio in that the Free Exercise Clause “has never been interpreted as placing an affirmative duty upon the state to appropriate money so that religious beliefs might be more effectively exercised” (19); along with the Court in *Norwood v. Harrison* (1973) when it determined, “constitutional neutrality as to sectarian schools might be best achieved by withholding all state assistance” (*ibid.*).

The *amicus* brief of the Anti-Defamation League of B’nai B’rith focused on the impermissibility of any educational aid, either on-site or off. They argued this aid inherently aids religion because of the pervasively sectarian nature of the schools. As for the non-educational aid, they stated that it would only be permissible if the aid were delivered in a manner that is available to all students, public and private, in public spaces. The programs could not be formulated in such a way that was simply “a subterfuge that gives the appearance of being public but are actually used to provide the allowed services only or predominantly to parochial school students” (14).

The National PEARL brief described the Court’s entire recent case history regarding aid to sectarian elementary and secondary schools to demonstrate that all attempts to provide aid to sectarian schools had failed, with the exceptions of *Everson* and *Allen*. The brief admonished the legislatures for their continuing attempts to devise means to fund these schools since the case history was so clearly against these efforts. The case at hand, they found, was just another inappropriate attempt to circumvent the Court’s rulings, such as declaring that the equipment loans were to the parents rather than the sectarian schools. The brief stated that the entire statute authorizing these programs should be declared unconstitutional because, “Judicial acceptance of this transparent fiction, we respectfully suggest, would make the Bill of Rights what Madison called a

‘parchment barrier.’ If the Establishment Clause can be so easily and effectively pierced, so too can every other guaranty in the Bill of Rights” (16).

In the brief of the State Convention of Baptists of Ohio *et al.* they stated that, as religious groups themselves, the aid should be prohibited because of the pervasively sectarian nature of the schools. Secular and sectarian functions could not be separated because the schools were “combined around a central and all-pervasive religious purpose, they [sectarian schools] comprise a religious entity, with every part partaking of the nature and orientation of the sectarian totality” (4). Therefore, they argued, the use of public funds to support religious schools would be a violation of religious liberty because individual taxpayers would be forced to support religious groups. They stated that religious aid decisions must only be made voluntarily by each individual. The *amici* strongly urged the Court to overturn *Allen* because it “is a constitutional fossil, based upon a faulty premise, namely that the secular and religious mission of the religiously oriented primary and secondary school can be divided into a pure religious component and an untarnished non-religious component” (9). They determined that *Allen* has been a source of confusion with regard to Establishment Clause cases, and overturning *Allen* and replacing the *Lemon* test could resolve this confusion. The amici recommended that the Court adopt the following new test in which aid would be permissible if either of the following conditions were met:

- (1) it [the aid] confers a benefit which is a by-product of unintended aid, i.e., fire and police protection ...; or
- (2) (i) the aid does not, either directly or indirectly, cross the threshold of the religious institution, and (ii) the student is the sole beneficiary of the aid. (29-30)

Using this test, the *amici* said, the transportation in *Everson* would be permissible; however, textbook loans in *Allen* and *Meek* would be impermissible. Using this test in *Wolman*, only the off-campus medical, dental, and social services programs would be permissible.

Decision of the Court

In a maze of mixed concurring and dissenting opinions the Court ruled the following programs were permissible: textbooks and testing and scoring (6-3) per

Justices Harry Blackmun, Lewis Powell, William Rehnquist, Potter Stewart, Byron White, and Chief Justice Warren Burger; and, diagnostic services (8-1) per Justices Blackmun, Thurgood Marshall, Powell, Rehnquist, John Paul Stevens,³³ Stewart, White, and Chief Justice Burger; therapeutic services (7-2) per Justices Blackmun, Powell, Rehnquist, Stevens, Stewart, White, and Chief Justice Burger. The following were determined by the Court to be impermissible: educational equipment and materials (6-3) per Justices Blackmun, William Brennan, Marshall, Powell, Stevens, and Stewart; and field trips (5-4) per Justices Blackmun, Brennan, Marshall, Stevens, and Stewart.

Justice Blackmun, in his opinion,³⁴ used the *Lemon* test to determine the constitutionality of the programs. He found no constitutional conflict with the purpose of the programs, which were to promote the interests of the state's youth and their educational development. He upheld the textbook program based on the precedents of *Allen* and *Meek*. Since the standardized tests were not created or scored by the nonpublic schools and these schools did not receive aid for the costs of administering these tests, Blackmun found this program met the criteria for constitutionality expressed in *Levitt*. Because the diagnostic health services had no educational content, he determined they were permissible even though they were performed in the sectarian school. The therapeutic services, which had an educational component and created a relationship between the service provider and the student, he ruled were permissible because they were conducted outside of the sectarian school in religiously neutral facilities forgoing the entanglement problems described in *Meek*. Following the Court's ruling in *Meek*, Blackmun determined that the provision of instructional equipment and materials did advance religion because of the "impossibility of separating the secular education function from the sectarian" (*Wolman* 250). Since the sectarian school controlled the selection of the field trip site as well as its timing and frequency made this an impermissible direct aid program to sectarian schools as well as being "an integral part of the educational experience," wrote Blackmun, creating "an unacceptable risk of fostering of religion" (254). The supervision necessary to ensure that the field trips were used for a

³³ Since *Meek*, Justice William O. Douglas retired from the Court and was replaced by John Paul Stevens.

³⁴ Justice Blackmun's opinion wrote for the Court regarding all the programs except for the textbook loan and testing and scoring programs in which his opinion was the plurality opinion.

secular purpose also violated the excessive administrative entanglement prong of the *Lemon* test.

Justice Brennan, in his partial dissent, argued that the textbook and other programs upheld by the Court should be impermissible because of the large sums appropriated for their implementation and the resulting political entanglement that the appropriation process brings. Justice Marshall maintained that *Allen* should be overruled based on the determination of the Court in *Meek* that secular and sectarian education are “inextricably intertwined” and that there was no difference in lending textbooks to children attending sectarian schools or to these schools directly (257). He stated that *Allen* did not consider the political entanglement test (as described in *Lemon I*) of the appropriations for the textbooks. He also believed that since the therapeutic services had an educational component they should be impermissible regardless of where the services take place. Lastly, Marshall argued that the standardized testing and scoring were not used to assure compliance with state educational standards so their purpose seemed to “serve the purposes of the sectarian schools rather than the State” (262).

Justice Stevens, in his first opinion on aid to sectarian schools, rejected the *Lemon* test and promoted an absolutist interpretation of *Everson’s* “no tax in any amount, large or small, can be levied to support any religious activities or institutions” (265). Stevens argued,

This Court’s efforts to improve on the *Everson* test have not proved successful. “Corrosive precedents” has left us without firm principles on which to decide these cases. As this case demonstrates, the States have been encouraged to search for new ways of achieving forbidden ends... What should be a “high and impregnable” wall between church and state, has been reduced to a “blurred, indistinct, and variable barrier.” The result has been as Clarence Darrow predicted, harm to “both the public and the religion that [this aid] would pretend to serve” (266).

Justice Powell recognizing the confusing lines drawn between permissible and impermissible aid to sectarian schools stated, “Our decisions have sought to establish principles that preserve the cherished safeguard of the Establishment Clause without resort to blind absolutism. If this endeavor means a loss of some analytical tidiness, then that too is entirely tolerable” (263). Powell did not accept that all direct aid to sectarian schools was impermissible, but the key determinate was that the “aid is incapable of

diversion to religious uses” (*ibid.*). Chief Justice Burger and Justices Rehnquist and White simply referred to their briefs in *Meek* and *Nyquist* to explain their support for the constitutionality of all the programs presented.

Implications for Future Cases

Justice Stevens brings a strong absolutist position to the Court and becomes a major ally for the separationist advocacy coalition; however, the political entanglement test, promoted in *Meek*, did not enter into the decision-making of Blackmun’s opinion. Only Justices Brennan and Marshall made use of this element of *Lemon I*. Justice Powell reiterated his support for aid to sectarian schools as long as it serves a purely secular function, thus rejecting the pervasively sectarian argument and accepting the argument that secular and sectarian functions could be separated. None of the justices commented on the new test offered by the State Convention of Baptists in Ohio *et al.*

The justice’s opinions do not provide a clear indication of whether a majority of the justices subscribed to the *Lemon* test in determining the constitutionality of the programs in *Wolman*. Only Burger, Stewart, and Powell joined in Blackmun’s opinion where he describes the *Lemon* test as determining the constitutionality of the programs. Rehnquist, White, and Stevens either explicitly or implicitly rejected the *Lemon* test as the appropriate test to resolve Establishment Clause questions. Although they accepted the *Lemon* test in *Meek*, Brennan and Marshall did not join the *Lemon* test portion of Blackmun’s opinion, and did not use the *Lemon* test in their separate opinions. Subsequent cases reveal the highly unlikely embrace of the *Lemon* test by all the justices (even Rehnquist and White); however, the varied majority opinions produced vastly differing interpretations on how to use the test.

Chapter 11: *New York v. Cathedral Academy* (1977)

Case Overview

New York's Mandated Services Act authorized payment to nonpublic schools for the cost of state required record keeping and testing services. The District Court ruled the payments

Litigants	
Separationists	Accommodationists
State of New York (30)	Cathedral Academy
No <i>amicus</i> briefs were filed.	No <i>amicus</i> briefs were filed.

unconstitutional and forbade any future payments, even payments for expenses already incurred by the schools prior to the court's decision. The New York state legislature later enacted a new law which sought to modify this injunction and reimburse these schools for the expenses they had incurred prior to the ruling of unconstitutionality through a process using the New York Court of Claims. The Cathedral Academy attempted to seek payment through the Court of Claims, but the State of New York argued that payment could not be made because the new law was unconstitutional. The Court of Claims agreed with New York and dismissed the suit. The New York Court of Appeals reversed the Court of Claims decision. This decision was appealed. The Supreme Court granted certiorari, held oral argument on October 3, 1977, and delivered its opinion on December 6, 1977.

Separationist Arguments

To defend its position that payments through the Court of Claims would be unconstitutional the State of New York provided a broad review of the history of the Establishment Clause and the Court's jurisprudence with regard to aid to sectarian elementary and secondary schools. New York said the new law aided religion because the funds would be provided directly to the sectarian schools, and that the Court of Claims involvement would violate the entanglement test because of the need for the court to examine in-depth the school's functions to determine which reimbursement claims were appropriate for secular funding. *Lemon II* did not have these failings because the funds had been determined to be solely for secular purposes and the entangling auditing process had already been completed.

Decision of the Court

The Court ruled (6-3) that further payments to the sectarian schools would be unconstitutional. Justice Potter Stewart wrote for the Court and was joined by Justices William Brennan, Thurgood Marshall, Harry Blackmun, Lewis Powell, and John Paul Stevens. Chief Justice Warren Burger and Justice William Rehnquist filed a dissent, as did Justice Byron White.

Justice Stewart viewed *Lemon II* (see above) as the controlling precedent. However, unlike *Lemon II* the District Court ruled that further payments were prohibited and the state legislature could not modify the federal court's injunction. According to Stewart, if this was allowed "every such unconstitutional statute, like every dog, gets one bite, if anyone has relied on the statute to his detriment" (*New York* 130). He said the process created by the state legislature to have each sectarian school appear before the Court of Claims to seek reimbursement for their state mandated services would also entangle the state in ensuring the funds would be used to reimburse secular activities. Unlike in *Lemon II* where the examination of school expenditures was conducted before the statute was held unconstitutional in *Lemon I*, this process called for new audits of school expenditures. Stewart argued, "The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying it will happen only once" (133).

Chief Justice Burger and Justice Rehnquist in their shared dissent simply stated that the principles applied in *Lemon II* allowed for the reimbursement of these incurred expenses. Justice White's dissent just read, "Because the Court continues to misconstrue the First Amendment in a manner that discriminates against religion and is contrary to the fundamental educational needs of the country, I dissent here as I have in *Lemon ... Levitt ... Meek ... and Wolman*" (135).

Implications for Future Cases

This case limits the loophole the separationist advocacy coalition feared from *Lemon II* that state legislatures could unconstitutionally provide direct funding to

sectarian schools as long as it was done with one-time or short-term aid schemes. The State of New York easily used the *Lemon* test to defend its position, even though it argued against this result in *Nyquist* and *Levitt*.

Chapter 12: *CPEARL v. Regan* (1980)

Case Overview

Following the Court’s decision in *Levitt* (see above), the New York legislature formulated a new program to reimburse nonpublic schools for certain state-mandated record keeping, reporting, and testing requirements. The new program was designed to correct the deficiencies the Court found in *Levitt*. The District Court upheld the new law, and the separationists appealed the decision. The Supreme Court granted certiorari, held oral argument on November 27, 1979, and delivered its opinion on February 20, 1980.

Litigants	
Separationists	Accommodationists
Committee for Public Education and Religious Liberty (CPEARL) ³⁵ , Bert Adams, Barbara Brooks, Naomi Cowen, Robert B. Essex, Florence Flast, Charlotte Green, Helen Henkin, Martha Laties, Blanche Lewis, Ellen Meyer, Rev. Arthur W. Mielke, Edward D. Moldover, Aryeth Neier, David Seeley, Howard M. Squadron, Charles H. Sumner, and Cynthia Swanson (31)	Edward V. Regan, Comptroller of the State of New York, and Gordon Ambach, Commissioner of Education of the State of New York Horace Mann-Barnard School, LaSalle Academy, Long Island Lutheran High School, St. Michael School, and Yeshivah Rambam
No <i>amicus</i> briefs were filed.	No <i>amicus</i> briefs were filed.

Separationist Arguments

CPEARL *et al.*’s brief opened by citing the three-prong *Lemon* test as the tool to determine the constitutionality of a statute, but argued that *Everson*’s no-aid test should still be equally in force: “more recent decisions applying the purpose-effect-

³⁵ CPEARL represents: American Ethical Union; Americans for Democratic Action; Americans for Public Schools; American Jewish Committee, New York Chapter; American Jewish Congress; A. Philip Randolph Institute; Association of Reform Rabbis of New York City and Vicinity; B’nai B’rith; Bronx Park Community; Citizens Union of the City of New York; City Club of New York; Community Church of New York; Community Services Society, Committee on Public Affairs; Council of Churches of the City of New York; Episcopal Diocese of L.I., Department of Christian Social Relations; Humanist Society of Greater New York; Jewish Reconstructionist Foundation; Jewish War Veterans, New York Department; League for Industrial Democracy, New York City Chapter; National Council of Jewish Women; National Women’s Conference of American Ethical Union; New York Civil Liberties Union; New York Federation of Reform Synagogues; New York Jewish Labor Committee; New York Society for Ethical Culture; New York State Americans United for Separation of Church and State; New York State Council of Churches; State Congress of Parents and Teachers, New York City District; Union of American Hebrew Congregations; Unitarian-Universalist Ministers Association of Metropolitan New York; United Community Teachers; United Federation of Teachers; United Parents Associations; United Synagogue of America, New York Metropolitan Region; Women’s City Club of New York; and, Workmen’s Circle, New York Division. CPEARL membership has remained relatively unchanged since *Nyquist* (1980). Three new organizations are underlined, and no organizations withdrew.

entanglement test the Court manifested no intention of abandoning or weakening in any way the so-called *Everson* no-aid test” (8). The litigants contended that the challenged statute was unconstitutional because it provided direct aid to sectarian schools, advanced religion, and entailed excessive entanglement between church and state.

The litigants said direct aid to pervasively sectarian schools was impermissible because secular and sectarian functions were not divisible. Quoting the Court in *Meek*, the litigants declared the aid,

though earmarked for secular purposes, when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission, state aid has the impermissible effect of advancing religion (11).

Additionally, since the statute entails “careful auditing procedures” administrative entanglement and surveillance cannot be avoided (13). Even if the auditing function was removed, the state must make certain that the teachers’ time being reimbursed was used solely for the mandated services and not for teaching. Such a surveillance system, they argued, although necessary, would violate the entanglement test. Quoting Chief Justice Burger writing for the Court in *Walz*, “Obviously, a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards” (14). The litigants also reasoned that the aid would create the “danger of political entanglement and divisiveness across religious lines” (16).

Decision of the Court

The Court ruled (5-4) in favor of the accommodationists with Justice Byron White delivering the majority opinion. Justices Potter Stewart, Lewis Powell, William Rehnquist, and Chief Justice Warren Burger joined Justice White in his opinion. Justice Harry Blackmun wrote a dissent and was joined by Justices William Brennan and Thurgood Marshall. Justice John Paul Stevens filed a separate dissent.

Justice White interpreted *Wolman*’s diversion principle to conclude that secular and sectarian educational functions can be differentiated making obsolete *Meek*’s prohibition of direct aid to religious schools because of their pervasively sectarian nature. Using the *Lemon* test, White determined that the purpose of the aid was to fulfill the

state's compulsory education requirements. The program did not aid religion, he said, because the sectarian school did not prepare the tests so the tests could not be used to advance the religious mission of these schools. Unlike *Wolman*, personnel employed by the sectarian schools graded two of the three tests in this program; however, White wrote, "the grading of the examinations by nonpublic school employees afforded no control to the school over the outcome of any of the tests" (*Regan* 655). White determined that the record keeping and reporting requirements also had a secular purpose and effect, but unlike *Wolman* this program provided direct payment to sectarian schools to reimburse record keeping, reporting, and testing requirements. White concluded that the difference between the *Wolman* and *Regan* programs was inconsequential, "None of our cases requires us to invalidate these reimbursements simply because they involve payments in cash" (658). He quoted from *Hunt v. McNair* (1973) that the Court "has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends" (*ibid.*). Lastly, White found that the entanglement prong of *Lemon* did not constitute a problem for this program because the reimbursed items were "discrete and clearly identifiable" and the reimbursement process was "straightforward" (660). He stated, "we are not prepared to read into the plan as an inevitability the bad faith upon which any future excessive entanglement would be predicated" (660-1).

Justice Blackmun began his dissent, "The Court in this case, I fear, takes a long step backwards in the inevitable controversy that emerges when a state legislature continues to insist on providing public aid to parochial schools" (465). He argued that *Wolman* did not, as Justice White construed, "authorize direct financial aid of any type to religious schools" (666). Blackmun wrote that, "*Wolman* reaffirmed the finding of the Court in *Meek v. Pittenger* that direct aid to the educational function of religious schools necessarily advances the sectarian enterprise as a whole" (*ibid.*), and was the reason why *Wolman* prohibited field trip transportation and loans of instructional equipment and materials. Likewise in this case, Blackmun argued, the direct aid program had an impermissible effect, "because of the pervasively religious nature of the schools," of furthering the religious mission of the schools (667). The auditing of these reimbursements, Blackmun stated, would also "foster entanglement of the State in

religion” (*ibid.*) because of the need to supervise the sectarian personnel grading the tests, determining if new examinations or new questions in modified examinations aid religion, and the surveillance necessary to ensure that the reimbursed salaries of the sectarian school employees were used only for secular purposes.

Justice Stevens’ dissent stated that support of this subsidy will open the door to countless other subsidies required by state mandates such as paying for “staff time attributable to conducting fire drills or even for the constructing and maintaining fire-proof premises” (671). He reasserted his absolutist position that any direct subsidy for any purpose was a violation of the Establishment Clause.

Implications for Future Cases

This case marks the unexpected embrace of the *Lemon* test by both Justice White, who has consistently been opposed this test and the separationist decisions it has produced, and Leo Pfeffer, the leader of the separationist coalition. Prior to this case, Leo Pfeffer had never declared the *Lemon* test as the tool to use to determine the constitutionality of a case. Based on his briefs it appears he believed the *Lemon* test was too weak without the direct incorporation of the *Everson* no-aid principle. Justice White, writing for the Court, was able to transform the *Lemon* test from his “insoluble paradox” preventing legislative attempts to assist sectarian schools into a tool to justify a direct aid program for sectarian schools. Justices Stewart and Powell demonstrate their more moderate separationist stance in allowing direct funding as long as the funding is for purely secular purposes. Both the pervasively sectarian argument and *Everson* no-aid principle failed to sway these justices.

Chapter 13: *Mueller v. Allen* (1983)

Case Overview

Taxpayers with children attending elementary and secondary schools were granted deductions in their state income tax for expenses of tuition, textbooks, and transportation under a Minnesota law. Mueller and Noyes, Minnesota taxpayers, brought suit in District Court claiming that this

Litigants	
Separationists	Accommodationists
Van D. Mueller and June E. Noyes ³⁶ (32, 33)	Clyde E. Allen, Jr., Minnesota Commissioner of Revenue; Dennis J. and Karen Berthiaume; Thomas W. and Mary J. Dzik; Edward F. and Joleen A. Fujan; Brenda B. Becker; Richard C. and Marjorie Hollingsworth; and, Roger and Dorothy DeHaan

program violated the Establishment Clause because it provided aid to sectarian schools. The District Court ruled that the program had a secular purpose and did not have the effect of advancing religion. The Court of Appeals affirmed and the taxpayers appealed.

The Supreme Court granted certiorari, held oral argument on April 18, 1983, and delivered its opinion on June 29, 1983.

Separationist Arguments

The lower courts declined to apply the *Nyquist* ruling because they felt that Minnesota's deduction program was a neutral program and therefore did not have the effect of advancing religion. The litigants argued that the lower courts failed to recognize the distinction between deductions based on voluntary contributions and those of "user fees," for example payment of services such as tuition, textbooks, and transportation. They went on to note that user fee tax deductions represented a "reward for performing a narrowly defined activity" (23), whereas the Court had consistently treated these types of deductions as "subsidies for the purpose of constitutional review" (25-6). Since the items allowed in the deduction program were provided to students in public schools free of charge, the only taxpayers benefiting from this deduction program were those with children in nonpublic schools (a little over 10% of children in Minnesota attended nonpublic schools).

³⁶ The ACLU and the Minnesota Civil Liberties Union represented these litigants.

The vast majority of the nonpublic school children in Minnesota, over 95 percent, attended sectarian schools. Since those eligible for the benefit of the deduction are “dramatically skewed in favor of religious activities” this program cannot be considered to meet the test of neutrality (28-9). According to the litigants the Court “has refused to tolerate aid schemes which purport to be ‘neutral’ but which are, in fact, thinly disguised mechanisms for channeling public funds for parochial schools” (35).

Using the *Lemon* test, the litigants argued that all three prongs were violated by this program, while Justice Black’s no-aid principle from *Everson* was relegated to a footnote (51, footnote 20). They wrote, “This Court has firmly resisted attempts to provide unrestricted³⁸ subsidies to sectarian

elementary and secondary schools, recognizing that unrestricted payments must of necessity, aid sectarian schools in advancing the religious mission which is their *raison*

Amici	
Separationists	Accommodationists
<ul style="list-style-type: none"> • Americans United for Separation of Church and State (34) • Baptist Joint Committee on Public Affairs (35) • Minnesota Association of School Administrators, Minnesota Association of Secondary School Principals, Association of Metropolitan School Districts, and Minnesota Association of School Business Officials (36) • National Committee for Public Education and Religious Liberty (PEARL)³⁷, National Parent Teacher Association, American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and American Jewish Congress (37) • National School Boards Association (38) • United Americans for Public Schools (39) 	<ul style="list-style-type: none"> • Catholic League for Religious and Civil Rights • Citizens for Educational Freedom • Council for American Private Education, American Association of Christian Schools International, Association for Public Justice, Christian Educators’ Association; Christian Schools International, Citizen’s for Fairness in Education, Free Congress Research and Education Foundation, National Association for the Legal Support of Alternative Schools, National Coalition of Alternative Community Schools, and Parents Acting for Choice in Education • Mountain Legal States Foundation, The New Coalition for Social and Economic Change, The National Taxpayers Union, The American Association of Presidents of Independent Colleges and Universities, and the Education Voucher Institute • National Jewish Commission on Law and Public Affairs • Parents Rights, Inc. • United States Catholic Conference • U.S. Solicitor General

³⁷ The National PEARL members are: American Association of School Administrators; American Civil Liberties Union; ACLU National Capital Area; ACLU of Connecticut; American Ethical Union; American Humanist Association; American Jewish Congress; Americans United for Separation of Church and State; Anti-Defamation League of B’nai B’rith; Baptist Joint Committee on Public Affairs; Board of Church and Society of the United Methodist Church; Central Conference of American Rabbis; Illinois PEARL; Minnesota Civil Liberties Union; Missouri Baptist Christian Life Commission; Missouri PEARL; New York PEARL; Monroe County, New York PEARL; Nassau-Suffolk PEARL; Michigan Council Against Parochiaid; National Association of Catholic Laity; National Council of Jewish Women; National Education Association; National Women’s Conference; Preserve Our Public Schools; Public Funds for Public Schools of New Jersey; New York State United Teachers; Ohio Free Schools Association; Union of American Hebrew Congregations; and Unitarian Universalist Association.

³⁸ As opposed to aid restricted to secular purposes.

d'etre" (35). The litigants claimed this program failed the primary effect prong because the funds were unrestricted as to their use and disproportionately benefited parents with children in sectarian schools; therefore, the program advanced religion. If the state attempted to ensure that the funds were used for only secular purposes, which it must do to satisfy the effect prong, the program would fall victim to *Lemon*'s entanglement prong. The litigants pointed out that the Court had not effectively used the secular purpose prong, but rather had simply accepted the legislatures' assertions that programs had a secular purpose. However, they asserted, the Court should not be blind to the evidence that this program was specifically designed by the Minnesota legislature to aid sectarian schools. Lastly, they claimed, that this program failed the political entanglement aspect of *Lemon* because "aid to parochial schools pit neighbor against neighbor along religious lines" (34)

The *amicus* brief for Americans United for Separation of Church and State did not use the *Lemon* test, but did cite violations of the effect and entanglement elements. The majority of the brief focused on the harm this program would cause religion. Their argument began with the fear "that the religiosity of parochial schools will be watered down in an attempt to receive tax funds" (2). These types of aid programs would tempt sectarian schools to compromise their religious mission and the schools would lose their independence because with state aid comes state control.

Americans United also criticized the lower court's use of the child benefit theory to uphold the Minnesota law because "it permits public funds to be used for strictly religious purposes. Any further expansion of the child benefit concept would virtually eradicate any limitations on state aid to sectarian schools" (15). Expanding on this a bit more the neutrality found by the lower courts was also misapplied, since, AU argued, neutrality alone was not enough to determine constitutionality. *Everson* made clear that permissible services had to be "separate and ... indisputably marked off from the religious function" (5). The deductions for parents with children in pervasively sectarian schools are impermissible, because "there is no way of insuring that the tax benefit and resulting aid to the parochial school would cover only secular services" (10).

The brief of the Baptist Joint Committee on Public Affairs reiterated the argument of the litigants that tax deductions violated all the prongs of the *Lemon* test: secular

purpose, primary effect, and entanglement (both administrative and political), and that the statute did not pass the neutrality test. The briefs of United Americans for Public Schools, Minnesota Association of School Administrators *et al.*, and National School Boards Association claimed that the tax deduction program, and other programs like it, would harm public schools by diverting already limited resources away from the public schools. The brief of United Americans for Public Schools still did not embrace the *Lemon* test but rather used arguments based on administrative and political entanglement. The majority of the brief provided examples of how public schools in Holland disintegrated when the state funded sectarian schools, and included a history of conflicts along religious lines that occurred in the U.S. as states established public schools and withdrew funding from sectarian schools. The Minnesota Association of School Administrators *et al.* brief described the various deductions and explained that the public schools cover the vast majority of the expenses of the deductible items for the parents of public school students. They argued these parents would only be eligible for deductions of minimal expenses such as “pencils, paper, tennis shoes” while the “overwhelming benefit will inure to those parents whose children attend parochial schools” (10). The National School Boards Association stated that the “case law on the issue of state aid to education and, more specifically, aid for sectarian elementary and secondary schools, is confusing and inconsistent” (3). They provided the examples that textbooks and bus transportation were permissible in *Allen* and *Everson*, respectively; however, maps and transportation for field trips were impermissible as decided in *Wolman*. They suggested that the solution to this confusion is to adopt a no public aid position with regard to aid to sectarian schools. They stated that “public education is a right” and “private education is a privilege” (29 and 30), and the “federal and state government’s responsibility to the public is to support the public schools and leave the private schools alone” (10).

Like the litigant brief, PEARL *et al.*’s arguments centered on how the tax deductions violated all the prongs of the *Lemon* test and that the statute did not pass the neutrality test; however, unlike prior PEARL briefs, Justice Black’s no-aid principle from *Everson* was never mentioned.³⁹ Their brief clarified that *Lemon*’s purpose and effect prongs were violated because the tax deduction was created to provide “a special

³⁹ This was the first PEARL brief in which Leo Pfeffer did not participate.

advantage to sectarian-school parents” (12). Accordingly, to guarantee the neutrality of the deduction program and “the integrity of the Establishment Clause, each benefit must be separately analyzed under the *Lemon* test, as this Court repeatedly has done, and each benefit must stand or fall on its individual merits” (14).

Decision of the Court

The Court ruled (5-4) that the tax deduction program was permissible. Justice William Rehnquist wrote the majority opinion for the Court joined by Justices Byron White, Lewis Powell, Sandra Day O’Connor⁴⁰, and Chief Justice Warren Burger. Justice Thurgood Marshall wrote a dissenting opinion joined by Justices William Brennan, Harry Blackmun, and John Paul Stevens.

Justice Rehnquist used the *Lemon* test to determine the constitutionality of the case; however, he stated, “it provides ‘no more than [a] helpful signpos[t]’ in dealing with Establishment Clause challenges” (*Mueller* 394, quoting *Hunt v. McNair* in part). Rehnquist determined that the purpose of the program was secular “to defray the cost of educational expenses incurred by parents – regardless of the type of schools their children attend” (395). Unlike *Nyquist*, where the aid was only for parents of children in nonpublic schools, in this case he wrote, “the deduction is available for educational expenses incurred by all parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools” (397).

This neutral criterion in providing benefits, Rehnquist stated, did not confer state approval to any class of persons so the effect of the program did not advance religion. He argued, a program that “neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause” (398-9). Rehnquist also emphasized that even through this program would ultimately aid sectarian schools, this only occurred “as a result of numerous private choices of individual parents of school-age children” (399). Even though the state must monitor the textbook deduction to “disallow deductions taken for ‘instructional books and materials used in the teaching

⁴⁰ Justice O’Connor replaced Justice Potter Stewart who retired in 1981.

of religious tenets, doctrines or worship,’” (387) Rehnquist did not view this as excessive entanglement, but simply a modified application of *Allen*.

Although separationist litigants provided evidence that public school students did not incur tuition expenses and that the other deductible expenses for parents of children in public schools was negligible, and that 96 percent of the children in private schools attended sectarian schools so the overwhelming majority of the benefit of this program would go to parents with children in sectarian schools, Justice Rehnquist responded,

We need not consider these contentions in detail. We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such 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. Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled – under a facially neutral statute – should be of little importance in determining the constitutionality of the statute permitting such relief.

In addition to advancing the individual choice and strictly facially neutral arguments⁴¹ allowing indirect aid to sectarian schools, Rehnquist determined that the political entanglement test is obsolete. Quoting Justice Powell in *Walz*, he wrote, “The risk of significant religious or denominational control over our democratic process – or even of deep political division along religious lines – is remote” (400). Additionally, in footnote 11 of his opinion Rehnquist argued that based on prior Court opinions the political entanglement test only applies to cases in which direct funding of sectarian schools occurs.

Justice Marshall, writing for the four dissenting justices, stated, “The Establishment Clause of the First Amendment prohibits a State from subsidizing religious education, whether it does so directly or indirectly” (404). He argued that this case is no different than *Nyquist*, which established that both direct and indirect aid (a tax credit) benefiting sectarian schools, was impermissible. The tax deduction in this case, he wrote had “a direct and immediate effect of advancing religion” (405). Marshall argued that

⁴¹ A law is determined to be facially neutral (or achieves facial neutrality) if the language of the law itself does not advance or inhibit religion (i.e. the law has a secular purpose and does not express favoritism of one religion over another or the religious over the non-religious). Facial neutrality does not consider the actual or potential effects of the law.

“the vast majority of the taxpayers who are eligible to receive the benefits are parents whose children attend religious schools” (*ibid.*) thus “the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions” (406). He stated that there was no guarantee that the state aid would not be used to further the religious mission of these schools and that it provided an incentive to taxpayers to send their children to sectarian schools. Marshall also contended that the facial neutrality argument promoted by the majority was invalid; it was obvious, “the deduction permitted for tuition expenses primarily benefits those who send their children to religious schools” (410) ... “The statute is little more than a subsidy of tuition masquerading as a subsidy of general educational expenses” (408-9). Marshall concluded that,

The majority is simply mistaken in concluding that a tax deduction, unlike a tax credit or a direct grant to parents, promotes religious education in a manner that is only “attenuated.” A tax deduction has a primary effect that advances religion if it is provided to offset expenditures which are not restricted to the secular activities of parochial schools (414) ... For the first time, the Court has upheld financial support for religious schools without any reason at all to assume that the support will be restricted to the secular functions of those schools and will not be used to support religious instruction. This result is flatly at odds with the fundamental principle that a State may provide no financial support whatsoever to promote religion (416).

Implications for Future Cases

This decision was a major loss for the separationist advocacy coalition. The majority of the justices indicated their support for unrestricted indirect aid; facial neutrality over actual neutrality; individual choice over secular function; and, that the *Lemon* test was simply a “helpful signpost” and the obsolescence of the political entanglement argument. In her first appearance in an aid to sectarian school case, Justice O’Connor sided with the accommodationist majority.

Justice Powell, who authored the Court’s opinion opposing tax credits in *Nyquist*, refined his position and supported, for the first time, unrestricted indirect funding of sectarian schools. However, as indicated in *Nyquist* footnote #38 (see above), Powell stated he was open to the idea of tuition aid programs as long as they benefited the

parents of children in both public and private schools – regardless of the sectarian nature of the private schools.

The minority separationist dissent was united and combined the *Lemon* test with the *Everson* no-aid principle – reminiscent of the stance promoted by Pfeffer in *Lemon I* except that the secular purpose prong remains useless because the justices (even in the dissent) refused to consider legislative intent. It is ironic to see the resurrection of the no-aid principle by the dissent considering that the litigants relegated it to a footnote and PEARL did not even mention it in their brief (although it was promoted by the National School Boards Association). Americans United and United Americans for Public Schools continued to ignore *Lemon* as the determinate test in deciding Establishment Clause cases. This was the first appearance of the AFL-CIO in support of the separationist coalition; previously the Pennsylvania chapter supported the accommodationist litigants in *Lemon I*.

Chapter 14: *Grand Rapids v. Ball* (1985)

Case Overview

The School District of Grand Rapids, Michigan implemented two programs that provided instruction to nonpublic school students in classrooms located in and leased from the nonpublic schools. The Shared Time program offered instructional supplements to the curriculum of the nonpublic schools during the regular school day. Full-time public school employees taught these classes; however, the nonpublic schools

Litigants	
Separationists	Accommodationists
Phyllis Ball, Katherine Pieper, Gilbert Davis, Patricia Davis, Frederick L. Schwass, and Walter Bergman ⁴² (40)	School District of the City of Grand Rapids; Phillip Bunkel, Superintendent of Public Instruction of the State of Michigan; State Board of Education of the State of Michigan; Loren E. Monroe, State Treasurer of the State of Michigan; Irma Garcia-Aguilar and Simon Aguilar; Bruce and Linda Bylsma; Robert and Penelope Comer; Clarence and Rosalee Covert; Scipuo and Janice Flowers; and, John and Shirley Leetsma

had previously employed a number of these instructors. The Community Education program offered instruction at the conclusion of the regular school day. The teachers for this program were part-time public school employees; however, the vast majority of whom also worked full-time for the nonpublic schools during the regular school day. Forty of the 41 schools in the programs were sectarian schools.

The District Court ruled against the programs as did the Court of Appeals. The Supreme Court granted certiorari, held oral argument on December 5, 1984, and delivered its opinion on July 1, 1985.

Separationist Arguments

The separationist litigants began their argument by providing evidence from official statements and school recruiting materials that the participating schools were

⁴² In the original suit before the District Court, the six individual taxpayers and Americans United for Separation of Church and State filed the suit. The District Court determined that AU did not have standing in the case. The taxpayers were represented by Albert R. Dilley. Dilley asked University of Virginia law professor A.E. Dick Howard to represent the litigants during oral argument before the Supreme Court. According to interviews with Stanley Geller and Robert Maddox, Howard was brought into the case because he had a close relationship with Justice Lewis Powell, who was perceived as the swing justice in the case.

pervasively sectarian because their religious mission pervades the schools’ entire curriculum, “Secular and sectarian functions are, by admission, inseparably bound together such that aid to one is aid to the other” (9). They also countered the argument that the programs were designed as a benefit to the children and not the sectarian schools by pointing out that direct aid was provided to the schools in the form of salary supplements to sectarian teachers and rental fees for the sectarian classrooms.

The litigants then used the *Lemon* test to explain that the programs violated the primary effect prong because the aid “constitutes direct subsidy to the religious institution” and violated both the political and administrative elements of the entanglement prong. Administrative entanglement was violated because “a single person is found to be in charge of both sectarian school affairs and ‘public school’ programs” in the sectarian schools (22). The litigants expanded on this concept:

The cooperative dependency which indicates the attainment of forbidden administrative entanglement has approached the status of an *actual merger* of the two systems. In the oft-repeated quotation from *Everson* which spells out the impact of the Establishment Clause, it is stated that ‘neither

Amici	
Separationists	Accommodationists
<ul style="list-style-type: none"> • American Jewish Congress, American Civil Liberties Union, Americans for Religious Liberty, Anti-Defamation League of B’nai B’rith, National Committee on Public Education and Religious Liberty (PEARL),⁴³ and National Education Association (41) • Americans United for Separation of Church and State (42) • Baptist Joint Committee on Public Affairs, National Council of the Churches of Christ in the U.S.A, and American Jewish Committee (43) 	<ul style="list-style-type: none"> • National Jewish Commission on Law and Public Affairs • United States Catholic Conference • U.S. Solicitor General

⁴³ The members of National PEARL were: American Association of School Administrators; American Civil Liberties Union; ACLU National Capital Area; ACLU of Connecticut; American Ethical Union; American Federation of Teachers; AFL-CIO; American Humanist Association; American Jewish Congress; Americans for Religious Liberty; Americans United for Separation of Church and State; Anti-Defamation League of B’nai B’rith; Baptist Joint Committee on Public Affairs; Board of Church and Society of the United Methodist Church; Central Conference of American Rabbis; Illinois PEARL; Michigan Council About Parochiaid; Minnesota Civil Liberties Union; Missouri Baptist Christian Life Commission; Missouri PEARL; New York PEARL; Monroe County, New York PEARL; Nassau-Suffolk PEARL; National Association of Catholic Laity; National Council of Jewish Women; National Education Association; National Women’s Conference; Preserve Our Public Schools; Public Funds for Public Schools of New Jersey; New York State United Teachers; Ohio Free Schools Association; Union of American Hebrew Congregations; and, Unitarian Universalist Association. The membership of National PEARL remained relatively the same since *Allen* (1983). Three new organizations joined (see underlined) and no organizations withdrew.

a state nor the federal government can, openly or secretly, participate in the affairs of any religious organization or groups and vice versa... Here, we have an aggravated violation of that principle (22).

Not only did the litigants revive the *Everson* prohibition of government participation in religious it affairs it also used Justice Brennan’s religious means test that states “government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice” (48). This test had not been used by the separationist coalition since *Lemon I*. The litigants concluded that allowing these programs to exist would eventually produce a “dual system of public schools, one being the traditional system now enrolling the poor, black, and unchurched, and a second ... public school system enrolling mostly white children of middle class parents who could afford the modest tuition” (45). They argued this would segregate students based on religion and race and violate the Equal Protection Clause.

Using the *Schempp* fusion argument recently revived in *Larkin v. Grendel’s Den* (1982)⁴⁴ and combining it with O’Connor’s institutional entanglement from *Lynch*, the *amicus* brief by the American Jewish Congress *et al.* proposed that the “‘fusion’ of governmental and religious functions is one of the principal dangers the Establishment Clause was designed to prevent ... [because it] threatens the independence and integrity of both government and religion” (15). This fusion is also dangerous because it “poison[s] the institutions of government by creating ‘political constituencies defined along religious lines’” (17, quoting in part O’Connor from *Lynch*). The programs were a fusion violation because the sectarian schools received “substantial and recurring government support” and the government had “significant operational responsibility” for the education of the students so in effect the Grand Rapids school district “created a system of public religious education” (18). Under the *Lemon* test, the *amici* argued the program failed the primary effect and the entanglement (both administrative and political) prongs. Giving up on the secular purpose prong, the brief stated the “*amici* do not contend, in light of numerous decisions of this Court involving aid to religious

⁴⁴ In this case the Court declared unconstitutional a Massachusetts law that gave churches a veto over the issuance of alcohol permits to establishments within 500 feet of their property. Chief Justice Burger wrote for the Court and used the *Lemon* test to decide the case. Justice Rehnquist was the only dissenter.

schools, that the District’s program lacks a secular purpose” (30). These separationist groups also incorporated O’Connor’s endorsement test language into the primary effect prong:

Government may unconstitutionally aid religious exercise in a variety of ways: it may offer religious instruction, it may subsidize religious education, or it may ‘blend secular and sectarian education’... Where it does any of these, government communicates a message of endorsement of religion... In this case, the District has done all three (38).

The American Jewish Congress *et al.* challenged the idea that the child benefit test was applicable in this situation because the “child benefit theory is properly invoked only where religious institutions receive ‘indirect and incidental’ benefits from ‘secular and nonideological services unrelated to the primary religion-oriented educational function of the sectarian school’” (42, quoting in part from *Meek*). In this instance, they argued, the aid supported the primary educational function of the school, which because the schools are pervasively sectarian, cannot easily be separated between secular and sectarian functions. The *amici* concluded their argument by quoting the Court in *Larkin*, “The mere appearance of a joint exercise of ...authority by Church and State provides a significant symbolic benefit to religion” (51).

Unlike the brief described above, the brief of the Baptist Joint Committee *et al.* used the full *Lemon* test, stating that the programs violated all three prongs. They attempted to convince the Court that if the effect of the programs were to advance religion, which they argue the programs did, then “When that effect has been demonstrated, *amici* ask this Court to consider that the school board knew that the effect of its action in this case would be the advancement of religion and that, therefore, it had an unconstitutional purpose of advancing religion” (15). The *amici* argued that the primary effect prong was violated because the public school system provided necessary courses so the “religious schools are financially freed to offer religiously impregnated core courses, to teach religion, and to provide facilities for religious education and religious exercises” (18-9). Administrative entanglement was violated because there was both too much and too little supervision of the programs. They stated “not only the presence but also the absence of such monitoring creates constitutional problems for these programs” (23). The Baptist Joint Committee *et al.* argued that the programs also

violated the political entanglement prong and warned that if upheld the “current anti-clericalism would be multiplied many fold” (26).

Americans United dedicated more than half of its *amicus* brief to argue that the separationist litigants had standing since the accommodationist litigants had argued that simply being taxpayers did not entitle them to have standing to bring the case. In discussing the merits of the case, AU, for the first time, used the *Lemon* test with the greatest focus on the entanglement prong. Like the American Jewish Congress *et al.* brief, AU attempted to incorporate O’Connor’s endorsement language from *Lynch* into the entanglement prong. They stated that these programs interfered with the “autonomy of the church” because the government, through the lease agreement, controlled the classroom in the sectarian schools and the services provided on that site. They argued that some churches “refused the services provided by the School District of the City of Grand Rapids because they do not want such government intrusion” (23). Perhaps as a reminder to the swing vote, AU quoted Justice Powell’s concurring opinion from *Wheeler v. Barrera* (1974)⁴⁵ where he said, he “would have serious misgivings about the constitutionality of a statute that required the utilization of public school teachers in sectarian schools” (28).

Decision of the Court

The Court ruled that the programs were unconstitutional, 5-4 on the Shared Time program and 7-2 on the Community Education program. Justice William Brennan wrote for the majority joined by Justices Thurgood Marshall, Harry Blackmun, Lewis Powell, and John Paul Stevens. Chief Justice Warren Burger and Justice Sandra Day O’Connor each wrote separate opinions that both concurred and dissented with the majority opinion. Justice Byron White and Justice William Rehnquist each wrote their own dissenting opinions.

⁴⁵ In this case the Court ruled that states using federal education funds (e.g. Title I funds of the Elementary and Secondary Education Act of 1965) to provide services to public school students were required to provide comparable but not necessarily equal services to private school students. The use of funds for students of religious schools would be controlled by state and federal constitutional restrictions; however, the Court declined to review Establishment Clause restrictions until specific programs and guidelines were challenged.

Justice Brennan applied the *Lemon* test to the programs and determined that while the purpose was secular the effect advanced religion because the instruction occurred in sectarian schools and the religious mission of the schools benefited from these programs. According to Brennan, the schools supported by the programs were pervasively sectarian “the secular education those schools provide goes hand in hand with the religious mission ... the two are inextricably intertwined” (*Grand Rapids* 384). He argued that the programs could impermissibly advance religion in three ways:

First, the teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs. Second, the programs may provide a crucial symbolic link between government and religion, thereby enlisting – at least in the eyes of impressionable youngsters – the powers of government to support of the religious denomination operating the school. Third, the programs may have the effect of directly promoting religion by impermissibly providing a subsidy to the primary religious mission of the institutions affected (385).

Since the teachers employed by the public schools in the Community Education programs were also teachers in the sectarian schools, Brennan argued that this creates an “unacceptable risk” that either “overtly or subtly” these teachers would continue to advance the mission of the sectarian school through the publicly funded program. “Although Establishment Clause jurisprudence is characterized by few absolutes,” Brennan stated, “the Clause does absolutely prohibit government-financed or government-sponsored indoctrination” (386). Even the public school teachers assigned to the sectarian schools in the Shared Time program “in such an atmosphere may well subtly (or overtly) conform their instruction to the environment in which they teach” (388).

Brennan attempted to combine elements of his religious means test and *Lemon*’s effect and entanglement prongs with O’Connor’s endorsement test to create a new test, “symbolic union,” as a violation the Establishment Clause. When religious interests and the state create a “fusion of government and religious functions or a concert of dependency of one upon the other” the government endorses the tenets of the favored religion (390). Quoting from *Larkin v. Grendel’s Den, Inc.* (1982), Brennan declared,

The mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds

of some by reason of the power conferred... It follows that an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices (390-1).

Having the same teachers in the same classrooms alternating between secular and sectarian functions, he argued, clearly created a symbolic union between the church and state and violated the effect prong of *Lemon* because the students could not easily perceive the difference between secular and sectarian programs. As indicated by the passage quoted above, both programs gave tacit government approval, or endorsement, to the faiths of the participating sectarian schools.

In his opinion, Chief Justice Burger agreed with the majority that the Community Education program violated the Establishment Clause, but argued that the Shared Time program should be upheld based on his dissent in *Aguilar* (see below). Justice O'Connor agreed with Burger on the desired outcome of the case, stating that as full-time public school employees the Shared Time teachers were offering supplemental instruction and showed no indication that they would attempt to further the religious mission of the schools. The Community Education, she concluded, was quite a different matter,

When full-time parochial school teachers receive public funds to teach secular courses to their parochial school students under parochial school supervision, I agree that the program has the perceived and actual effect of advancing the religious aims of the church-related schools. This is particularly the case where, as here, religion pervades the curriculum and the teachers are accustomed to bring religion to play in everything they teach (399-400).

Justice White simply refers to his previous dissents in *Lemon I* and *Nyquist* that the Court has misinterpreted and misapplied the Establishment Clause with regard to state aid to sectarian schools. Justice Rehnquist dissented by writing that the Court has relied on the “faulty ‘wall’ premise” to decide this and prior cases and in doing so it “blinds itself to the first 150 years’ history of the Establishment Clause” (401). He argued that the “symbolic link” created in these programs is no greater than the “symbolic link” created in *Lynch v. Donnelly* (1984) allowing a municipal crèche or *March v. Chambers*

(1983) allowing legislative chaplains. Rehnquist concluded, as did White, that both of the Michigan programs should be permissible.

Implications for Future Cases

Justice Powell's swing vote again gave the separationists the majority. Justice Brennan, writing for the Court, adds another component to *Lemon's* effect and entanglement prongs – symbolic union. His partial use of O'Connor's endorsement test failed to sway her vote to completely join the majority. However, in her opinion, Justice O'Connor used the "pervasively sectarian" argument to declare that the Community Education program was impermissible.

Americans United finally embraced the *Lemon* test and Baptist Joint Committee was the last voice to urge the Court to examine legislative intent to use the neglected secular purpose prong of *Lemon*. American Jewish Congress *et al.* incorporate a new argument "fusion" from *Larkin*, which was used by Brennan and placed it in the context of "symbolic union."

Chapter 15: *Aguilar v. Felton* (1985)

Case Overview

Aguilar v. Felton (1985), combined with *Secretary of Education v. Felton* and *Board of Education v. Felton*, resulted from New York City's use of Title I funds from the federal Elementary and Secondary Education Act of 1965 to pay public school instructors teaching low-income

Litigants	
Separationists	Accommodationists
Betty-Louise Felton, Charlotte Green, Barbara Hruska, Meryl A. Schwartz, Robert H. Side and Allen H. Zelon ⁴⁶ (44)	Yolanda Aguilar, Lillian Colon, Miriam Martinez, and Belinda Williams Secretary, United States Department of Education Chancellor of the Board of Education of the City of New York

educationally deprived sectarian school students. The programs, conducted in the sectarian schools, included remedial reading and mathematics, English as a second language, and guidance services. Public school personnel selected students for the programs, used only government funded equipment and materials, and barred religious materials from the classrooms. The public school personnel were directed to avoid involvement with religious activities and compliance was supervised through at least one unannounced visit to the classroom each month by a field supervisor.

Title I stated that the programs funded by the Act must supplement and not supplant programs that would exist without Title I funding. The District Court upheld the constitutionality of the program; however, the Court of Appeals reversed the decision. The Court of Appeals stated that the Court's decisions in *Meek* and *Wolman* "constitutes an insurmountable barrier to the use of federal funds to send public school teachers and other professionals into religious schools to carry on instruction, remedial or otherwise, or to provide clinical and guidance services of the sort at issue here" (*Aguilar* 408). The Supreme Court granted certiorari, held oral argument on December 5, 1984, and delivered its opinion on July 1, 1985.

⁴⁶ Stanley Geller, the General Counsel of National PEARL, represented these litigants. All the litigants were members of PEARL.

Separationist Arguments

The separationist litigants said that the case would be “best determined” under the *Lemon* test (18). They admitted the program had a secular legislative purpose, but it did have “the primary effect of both advancing and inhibiting religion, as well as the potential for excessive entanglement” (*ibid.*). The inhibiting religion portion of *Lemon* had not been previously invoked by separationist litigants and adds a new twist to their primary effect prong argument. This inhibition of religion came about

Amici	
Separationists	Accommodationists
<ul style="list-style-type: none"> • American Civil Liberties Union, American Jewish Congress, National Education Association, National Coalition for Public Education and Religious Liberty (PEARL) et al.⁴⁷ (45) • Americans United for Separation of Church and State and G. Hugh Wamble (46) • Anti-Defamation League of B'nai B'rith (47) 	<ul style="list-style-type: none"> • Catholic League for Religious and Civil Rights • Citizens for Educational Freedom • Council for American Private Education, American Education Coalition, Association for Public Justice, Free Congress Research and Education Foundation, National Association for the Legal Support of Alternative Schools, National Coalition of Alternative Community Schools, and Parents Acting for Choice in Education • National Jewish Commission on Law and Public Affairs • Parents Rights, Inc. • United States Catholic Conference

because in those sectarian schools that participated in the New York program were directed to remove all religious symbols from classrooms, thereby becoming “less religious or sectarian in order to participate in the program” (*ibid.*). Quoting Justice Brennan in *Schempp*, a religious believer should “fear[] the secularization of a creed

⁴⁷ As members of National PEARL the following organizations are also participating in this brief: American Association of School Administrators, American Ethical Union, Americans for Religious Liberty, American Humanist Association, Baptist Joint Committee on Public Affairs, Board of Church and Society of the United Methodist Church, Central Conference of American Rabbis, Minnesota Civil Liberties Union, Missouri Baptist Christian Life Commission, Monroe Citizens for PEARL, Nassau-Suffolk PEARL, Michigan Council About Parochial Education, National Association of Catholic Laity, National Council of Jewish Women, National Service Conference of the American Ethical Union, Preserve Our Public Schools, Public Funds for Public Schools of New Jersey, Ohio Association for Public Education and Religious Liberty, Union of American Hebrew Congregations, Unitarian Universalist Association, Citizen’s Union (New York), New York Society for Ethical Culture, United Community Centers (New York), United Parents Association of New York City, and Women’s City Club of New York. No changes are indicated from the last case *Grand Rapids* since they were decided in the same year. The variation of membership between the 1985 cases of *Aguilar* and *Grand Rapids* demonstrates that the variation of PEARL membership is based on case interest. For example, the American Federation of Teachers, AFL-CIO and the Illinois PEARL participated in *Grand Rapids* but did not participate in *Aguilar*; therefore, case participation is a subset of PEARL’s total membership. In the interview with Joanne Goldsmith, former Executive Director of National PEARL, she said that each member of PEARL would be contacted regarding a case and they had the choice to opt out and not be listed in the brief as a member organization.

which becomes too deeply involved with and dependent upon the government” (29). The primary effect of the program aids religion because the equipment and teachers at a “school with a predominantly sectarian purpose inevitably aids the religious function of the school, which cannot be sufficiently differentiated from the secular function” (18). The litigants argued that the programs had the “potential for excessive entanglement [which was] sufficient to condemn the program. Proof of actual entanglement is not necessary...” (20). The litigants stated that it was “virtually impossible to monitor” all the interactions between program personnel and the personnel of the sectarian school, and any “such system of surveillance would have to be so oppressive as to create more controversy and, therefore, even more entanglement” (*ibid.*). The litigants countered the claim that the Court had recently shifted its burden so that now, “it must be shown to have actually generated controversy or constitutionally impermissible conduct” (49). They doubted the creation of this requirement, but if the Court had done so they requested that the case be remanded to provide time to develop this record of impermissible conduct. In addition to the administrative entanglement inherent in the program, the litigants also found the potential for political entanglement. This program could contribute to “the amount and intensity of religious controversy” (22).

In a variation of *McCollum*, the litigants argued that simply by having public school teachers providing instruction in sectarian schools the government was impermissibly “lending its prestige to a religious organization” (19). Quoting in part from the Court in *McCollum* the litigants stated:

The situation in the present case is, in one way, the reverse of that in *McCollum* in that, here the New York City program places the Title I teacher in a church school classroom in precisely the same position as the regular classroom teacher. The fact remains that “the prestige and capacity for influence of the religious teacher [read: church school]” is now “augmented by investiture of the symbols of authority at the command of the lay teacher for the enhancement of [religious] instruction” (37).

The litigants stated that the Title I programs would be permissible if performed in a public school or other public location because then “whatever admiration and respect” the teacher might inspire would not be transferred to the sectarian school and the prestige of the state would also not be connected to the sectarian school (38).

The litigants further addressed a host of arguments presented by the accommodationist litigants. The child benefit argument provided by the accommodationist litigants was not valid, they argued, because the program “is provided to a church school only if and when requested by the principal of that school, and may not be requested by a student” (20). Denying benefits to students of religious schools was not a form of discrimination impermissible under the Equal Protection Clause. The litigants cited both the majority and dissent in *Everson* in which both sides agreed nothing in the ruling compelled the government to support sectarian schools and that denying such support was a form of discrimination. Quoting the Court in *Sloan*, “The Equal Protection Clause has never been regarded as a bludgeon with which to compel a State to violate other provisions of the Constitution” (23). In addition, the separationist litigants argued that the schools were indeed pervasively sectarian. They cited prior cases, especially *Wolman*, that the schools in question required participation in daily religious exercises, restricted appointment of faculty members and students admissions, and that religious inculcation was the “only reason for the school’s existence” (40, quoting the Court of Appeals). Lastly, the litigants countered the claim that denying support to sectarian schools was a violation of the Free Exercise Clause. They quoted the *Nyquist* decision,

It is true that a state law interfering with a parent’s right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause. But this Court repeatedly has recognized that tension inevitably exists between the Free Exercise and Establishment Clause, ...and that it may often not be possible to promote the former without offending the latter (24).

The *amicus* brief for the ACLU *et al.* argued that the Court had consistently held that public instruction within the sectarian schools was impermissible:

this Court has refused to permit public subsidization of the on-premises teaching function of a religious school, recognizing that, quite apart from the substantial risk of unconstitutional entanglement...such subsidization constitutes unmistakable government aid to a religious institution in violation of the Establishment Clause” (13).

Religious schools, because they are pervasively sectarian, are unable to separate their educational functions into secular and sectarian categories – religious instruction exists in

every subject area. Cautioning the Court that if it ruled in favor of the program, it would find itself on a “slippery slope” of allowing massive aid programs to sectarian schools and would create “joint educational enterprises, with public school teachers undertaking to teach broad areas of secular curriculum and religious educators accepting responsibility for religious instruction” (15-6)

Using the *Lemon* test the *ACLU et al.* stated that the entanglement prong was designed to safeguard the “independence of religious institutions by assuring that secular officials do not acquire the power to influence or interfere with the decisions of religious bodies; and, second, it assures that religious bodies do not exercise influence in the administration of government programs” (23-4). They claimed that this program compromised both functions. With instruction taking place within the sectarian schools, the program was subject to religious influence. Public school teachers “will feel a degree of constraint in assuring that lessons are not incompatible with, or offensive to, their religious ‘hosts’” (31). The independence of the sectarian schools was at risk because in accepting public funds the schools ability to limit a child’s access to these public programs based on their adherence to certain religious practices required by the school could be questioned (40).

The *amicus* brief of the Anti-Defamation League of B’nai B’rith reiterated the litigants arguments presented above in that the programs advanced the religious mission of the pervasively sectarian institution by providing instruction on the school’s premises and that such interaction between public and religious authorities constituted excessive entanglement. Citing a lower court ruling and the Court’s decision in *Larkin v. Grendel’s Den* (1982), the Anti-Defamation League told the Court that the program provided an impermissible symbolic benefit to the participating schools and their religion.

For these young and impressionable students, importing public school teachers into the parochial schools and providing classes on the religious school premises places the imprimatur of the state upon the parochial schools.... Attempts by the religious authorities to emphasize neutral aspects of New York City’s church schools do not negate the powerful symbolic benefit to religion derived from on-premise Title I instruction. (9).

Citing Justice O’Connor in *Lynch*, the *amicus* continued that the “state had effectively endorsed the religious mission of the schools by entering into a joint education program

on the premises of church schools,” and that the students and community perceived this interaction as an endorsement by the government (10).

Although not relevant to the specific claims challenged in this case, the *amicus* bring into the discussion that, under *Wheeler v. Barrera* (1974), a variation of this program would be impermissible because the New York State standard is stricter than the federal standards in the area of church-state relations. In an earlier proposal for a Title I program a lower court held that providing Title I education to students in sectarian schools on public school property may be impermissible based on the New York state constitution. The stricter state standard argument will be important in later cases. The Anti-Defamation League concluded by countering that neither the child benefit nor individual choice arguments were valid defenses. The child benefit argument was not valid because the Court had consistently held that instruction could not be purely secular, unlike bus transportation or secular textbooks. This was because teachers “can absorb the religious atmosphere in which they work and, in turn, reflect that bias to students” (15). The individual choice argument, which allowed the tax deductions in *Mueller*, did not apply in this case because the aid was provided directly to the sectarian schools.

Americans United *et al.* espoused the same arguments as above regarding *Lemon*’s primary effect and entanglement tests, the child benefit test, and O’Connor’s endorsement test. Because AU had initiated similar cases in Missouri and Kentucky that had evidentiary hearings, they presented testimony in their brief from witnesses appearing in those cases to highlight the actual and potential constitutional violations from operating Title I programs in sectarian schools. Their brief stressed the pervasively sectarian nature of these schools in opposition to the accommodationist claim that such schools did not reach the threshold established in *Meek*. Americans United *et al.* submitted that the:

... courts are prohibited by the proscription of the First and Fifth Amendments from dividing church-affiliated elementary and secondary schools into two classes, those that are “too” religious or sectarian, and those that are less religious in determining whether public funds or benefits may be provided to church school (24-5).

The litigants and *amicus* filers were very careful to point out that in no way did their briefs question the constitutionality of Title I of the Elementary and Secondary

Education Act of 1965. The Baptist Joint Committee and the National Council of Churches were active in negotiating the compromises that made the passage of the Act possible. These two members of the separationist advocacy coalition did not take part in this case.

Decision of the Court

The Court ruled (5-4) that the program was unconstitutional. Justice William Brennan wrote for the majority joined by Justices Thurgood Marshall, Harry Blackmun, Lewis Powell, and John Paul Stevens. Justice Powell also wrote a separate concurring opinion. Chief Justice Warren Burger, Justice Byron White, and Justice William Rehnquist each wrote dissenting opinions, as did Justice Sandra Day O'Connor who was joined in part by Justice Rehnquist.

Justice Brennan stated that in programs involving pervasively sectarian schools ongoing supervision was necessary to ensure that secular programs did not promote religion; however, this supervision then violated the third prong of the *Lemon* test requiring a “permanent and pervasive state presence in the sectarian schools receiving aid” (*Aguilar* 413). The entanglement problem was further exacerbated, Brennan stated, by the necessary and frequent interaction between public and sectarian personnel regarding scheduling, room assignments, service requests, program information dissemination, and “reports on individual student needs, problems encountered, and results achieved” (*ibid.*).

The interaction and presence of public school personnel making judgments and decisions as to what was and what was not religiously permissible in the program and classroom also provided, he wrote, a danger of “political divisiveness along religious lines” and the presence of supervisors “prowling the halls of parochial schools and auditing classroom instruction surely raises more than an imagined specter of governmental secularization of a creed” (414).

In his concurring opinion, Justice Powell expanded on the political entanglement argument writing that any direct aid to sectarian schools may lead to “competition and strife among them [religious groups] and others to gain, maintain, or increase the financial support of government” (416). History, he stated, has shown that this kind of

competition and strife can “strain a political system to the breaking point” (417). He also argued that these programs relieve the sectarian schools “of the duty to provide the remedial and supplemental education their children require” and “inescapably results in the direct and substantial advancement of religious activity” (417-8).

Although he authored the Court’s opinion in *Lemon I*, Chief Justice Burger in his dissenting opinion expressed his break with the Court’s use of the *Lemon* test by quoting his dissenting opinion in *Wallace v. Jaffree* (1985) “our responsibility is not to apply tidy formulas by rote; our duty is to determine whether the statute or practice at issue is a step toward establishing a state religion” (419). Burger concluded that the Court’s majority opinion “exhibits nothing less than hostility toward religion and the children who attend church-sponsored schools” (420).

Justice Rehnquist in his dissenting opinion also demonstrates his break with the Court’s use of the *Lemon* test by stating that the Court “takes advantage of the ‘Catch-22’ paradox of its own creation ... whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause entanglement” (420-1). He referred to his dissent in *Wallace* to explain his dissent in this case. In *Wallace*, Rehnquist developed a test of constitutionality that would simply determine if a government act or action favored one religion over another (which would be impermissible); but that the Establishment Clause did not preclude supporting religion in general.

Justice O’Connor, in her opinion, joined her dissenting colleagues in criticizing the Court’s use of the *Lemon* test,

The Court greatly exaggerates the degree of supervision necessary to prevent public school teachers from inculcating religion, and thereby demonstrates the flaws of a test that condemns benign cooperation between church and state. I would uphold Congress’ efforts to afford remedial instruction to disadvantaged schoolchildren in both public and parochial schools (421).

O’Connor agreed with the *Lemon* test that a government program must have a secular purpose and effect. In this case, she stated, the evidence clearly showed that “in 19 years there has never been a single incident in which a Title I instructor ‘subtly or overtly’ attempted to ‘indoctrinate the students in particular religious tenets at public expense’”

(424). The problem with the Court's use of the *Lemon* test, O'Connor argued, was the entanglement prong. She stated, "Establishment Clause analysis should focus solely on the character of the government activity that might cause political divisiveness, and that the entanglement prong of the *Lemon* test is properly limited to institutional [administrative] entanglement" (429). Lastly, even the institutional entanglement must be excessive to warrant impermissible behavior. She wrote, "If a statute lacks a purpose or effect of advancing or endorsing religion, I would not invalidate it merely because it requires some ongoing cooperation between church and state or some state supervision to ensure that state funds do not advance religion" (430).

Justice White's dissent is contained in his dissenting opinion in *Grand Rapids*.

Implications for Future Cases

Justice Powell again provided the separationist coalition with a slim majority based on the idea that such aid cannot be limited to a strictly secular function. He also resuscitated the political entanglement test, whereas the dissenting justices made strong cases for the termination of the Court's use of the *Lemon* test. However, the dissent could not unite on a new test. Rehnquist advanced the alternative test he had presented in *Wallace* and O'Connor mentioned her endorsement test presented in *Lynch v. Donnelly* (1984).

The ACLU *et al.* introduced the concept of institutional entanglement as a component of the *Lemon* test to protect the autonomy of both religious institutions and the government. Both Americans United and the Anti-Defamation League of B'nai B'rith (ADL) used the endorsement test presented by O'Connor in *Lynch*. The ADL also presented the argument regarding stricter state constitutional standards taking precedence over the federal Establishment Clause.

Section II: Summary

These cases show a deeply divided Court. As the only justice to vote against all the funding programs in this section, Justice Brennan demonstrated his very strict separationist stance (he was the only justice to vote against the provision of diagnostic services in *Wolman*). Justice Marshall was the next strongest separationist voice on the Court, being only one of two (with Brennan) who opposed the therapeutic services offered in *Wolman*. Justices Douglas and Stevens (Stevens replaced Douglas on the bench in 1975) each demonstrated their strong separationist stance by joining Justices Marshall and Brennan in voting against the provision of textbooks in *Meek* and *Wolman*, respectively. Justice Blackmun supported the use of the *Lemon* test in prohibiting direct and substantial indirect aid to religious institutions, but supported the precedent in *Allen* to allow the provision of textbooks to students attending sectarian schools. These votes produced a clear four-member block supporting a separationist perspective on the Court.

The swing vote in these cases was Justice Powell. His vote produced the accommodationist rulings in *Regan* and *Mueller*. He believed that purely secular aid and certain indirect aid could be provided to sectarian schools. He did express in his concurring opinion in *Aguilar* a concern regarding the potential for political entanglement in providing aid to religious schools.

Chief Justice Burger, who also supported secular and indirect aid, had no fear that aid provided for these purposes would produce religious strife. He believed the Court went too far in denying aid to sectarian schools, but he did hold that there were limits in what aid could be provided. Both Burger and Justice O'Connor believed funding of sectarian school teachers in the after school program in *Grand Rapids* did have the effect of advancing religion.

Justice O'Connor supported the purpose and effect prongs of the *Lemon* test, but felt that the entanglement prong needed to be limited to instances of excessive institutional entanglement. She stressed that some administrative cooperation between a religious institution and government need not make a program unconstitutional (*Aguilar*). Justice Stewart, who O'Connor replaced on the Court, was a strong supporter of the separationist perspective. He wrote the Court's opinion in *Meek*; however, like

Blackmun he did support the precedent in *Allen* concerning textbooks. Stewart's departure from the Court and replacement by O'Connor was a loss for the separationist advocacy coalition.

Justices Rehnquist and White found no reasons to limit the aid being provided in the cases from this section. Rehnquist believed in a neutrality principle that allowed government to support religious institutions as long as it did not prefer one religion over another. Justice White maintained his stance from the previous section that a wide variety of aid could, and should, be provided to sectarian schools.

The fragile nature of the Court's majorities could be seen with the varying use of the pervasively sectarian argument in direct aid programs. In *Meek*, the Court found that, with the exception of the textbooks, the programs were impermissible; however, Stewart stated that not all programs that provide "incidental" benefits would be declared unconstitutional. In *Wolman*, Blackmun held that programs with no educational content or programs that were held off-site in neutral locations were permissible; however, equipment and materials loans were prohibited. In *Regan*, White writing for the Court rejected the separationist arguments regarding the pervasively sectarian nature of the schools. He found no constraints in reimbursing religious schools for the administration of state-mandated record keeping, reporting, and testing requirements; although unlike the testing reimbursements allowed in *Meek*, the personnel employed by the sectarian schools graded two of the three tests in the program. In *Grand Rapids*, Brennan determined that educational functions were "inextricably intertwined" (384), and even O'Connor used the pervasively sectarian argument in her concurring opinion regarding the Community Education Program. In *Aguilar*, the Court (Brennan authored the opinion) again used the pervasively sectarian argument in declaring the use of Title I funds unconstitutional.

The separationist coalition continued to be divided on the use of the *Lemon* test. PEARL, under the direction of Leo Pfeffer, finally embraced the *Lemon* test in *Regan* (his last case before the Court regarding aid to sectarian schools); however, PEARL stated that the *Everson* no-aid principle was still in effect. In subsequent briefs filed in *Mueller*, *Grand Rapids*, and *Aguilar* the no-aid principle was not mentioned; however, a host of other arguments such as political entanglement, fusion, and symbolic benefit were

incorporated into their use of the *Lemon* test. Americans United was also slow to embrace the *Lemon* test and did not do so until *Grand Rapids* and *Aguilar*. United Americans for Public Schools never embraced the *Lemon* test; however, they did not participate in any cases following *Mueller*. The ACLU adopted the *Lemon* test early in this period and spent a great deal of effort to encourage the Court to make the purpose prong useful by looking at legislative intent. They gave up on this endeavor in *Grand Rapids*.

The national religious organizations (Baptist Joint Committee, Anti-Defamation League, American Jewish Congress, and American Jewish Committee) had already incorporated the *Lemon* test into their briefs from the previous set of cases (Section I) and attempted to strengthen the test by incorporating other elements such as political entanglement, fusion, and symbolic benefit. The Anti-Defamation League and Americans United were quick to incorporate O'Connor's endorsement test their briefs. The Baptist Joint Committee took the lead in providing a history of the development of the Establishment Clause as a separationist history to fight against what they considered the skewed revised histories provided by the accommodationists.

The national educational groups (American Association of School Administrators, National Education Association, National School Boards Association, and the Horace Mann League) had also already embraced the *Lemon* test in cases described in Section I, and also attempted to strengthen the test. The National School Boards Association picked up PEARL's abandoned no-aid argument in *Mueller* and strongly urged the Court to adopt a no-aid principle to end the confusion over what aid was, and was not, permissible. From *Larkin v. Grendel's Den* (1982) the American Jewish Congress along with the ACLU, PEARL, NEA, and the Anti-Defamation League revived the "fusion" and "symbolic benefit" arguments in *Grand Rapids* and by the Anti-Defamation League in *Aguilar*. Justice Brennan writing for the Court in *Grand Rapids* incorporated the fusion and symbolic benefit arguments into the Court's decision. In this section Americans for Religious Liberty and the AFL-CIO joined the separationist coalition.

The members of the separationist advocacy coalition were also devoting more space in their briefs to counter the arguments of the accommodationist coalition. In the previous section only eight of the 21 (see Table 4) briefs spent any time countering the

legal arguments of the accommodationists; whereas, in this section 23 of the 26 briefs did so (see Table 7).

Tables 6 and 7 provide a summary of the legal arguments used by the members of the separationist advocacy coalition in this section. Table 8 provides a summary of the justices' support for the separationist coalition.

Table 6

Legal Arguments Used to Support the Separationist Stance 1975-1985

Brief* /Argument	A	B	C	D	E	F	G	H	I	J	K	L
<i>Meek</i>												
22	X	X	X					X				
**23		X	X		X							
24	X	X	X									G
<i>Wolman</i>												
25	X		X									B
**26			X									B
27		X	X		X			X				
28		X						X				
29	X	X	X					X	X			P
<i>New York</i>												
30	X	X	X	X	X			X				
<i>Regan</i>												
31	X	X	X		X							
<i>Mueller</i>												
32	X	X	X									
**33		X										
34	X	X		X	X			X	X			
35		X	X					X				
36			X	X								
37			X									
38		X	X						X			
39					X				X			
<i>Grand Rapids</i>												
40	X	X	X			X		X				
41		X	X		X			X				
42		X	X									
43		X	X					X	X			
<i>Aguilar</i>												
44		X	X		X			X	X			
45		X	X									
46		X	X		X					X		
47		X	X		X					X	X	

*Brief numbers are listed next to the litigant and *amici* names listed at the beginning of each chapter.

**Litigant Reply Brief

Explanation for coding is below.

Legal Argument Codes:	Other:
<p>A = <i>Everson</i> Tests B = <i>Everson</i> Progeny C = <i>Lemon</i> Test D = Purpose/Effect and Legislative Intent Tests E = Prohibited Relationships F = Religious Means/Nature of Institution Test G = Brennan Test H = Original Intent – Founders I = Original Intent – Fratricide/Diversion/Corruption J = Endorsement/Entanglement Test K = Stricter State Standards L = Other</p>	<p>B = Creating benefits for a distinctly sectarian class of beneficiaries G = Government officials should not be placed in a position to determine what is and what is not religious P = Two-part By-product/Threshold Test</p>

Table 7

Arguments Used to Counter Accommodationist Stances 1975-1985

Brief* /Argument	AA	BB	CC	DD	EE
<i>Meek</i>					
22					
**23			X		
24					
<i>Wolman</i>					
25			X		
**26			X		
27			X		
28					
29			X		
<i>New York</i>					
30			X		
<i>Regan</i>					
31			X		
<i>Mueller</i>					
32					
**33	X				
34	X		X		
35	X				
36	X				
37	X				
38	X		X	X	
39	X				
<i>Grand Rapids</i>					
40			X		
41			X		
42			X		
43			X		
<i>Aguilar</i>					
44		X	X		X
45			X		
46			X		
47			X	X	

*Brief numbers are listed next to the litigant and *amici* names listed at the beginning of each chapter.

**Litigant Reply Brief

Explanation for coding is below.

Legal Argument Codes:
AA = Neutrality Tests
BB = Discrimination
CC = Parent/Child Benefit
DD = Individual Choice
EE = Free Exercise Trumps Establishment Clause

Table 8

Court and Justices Voting Patterns 1975-1985

Case/J	CJ	J1	J2	J3	J4	J5	J6	J7	J8	Court
<i>Meek-a</i>	-	+	+	-	+	+	-	+	+	6-3
<i>Meek-b</i>	-	-	+	-	+	-	-	+	-	3-6
<i>Wolman-a</i>	-	+	+	-	+	+	-	+	+	6-3
<i>Wolman-b</i>	-	-	+	-	+	+	-	+	+	5-4
<i>Wolman-c</i>	-	-	+	-	+	-	-	+	-	3-6
<i>Wolman-d</i>	-	-	-	-	+	-	-	-	-	1-8
<i>New York</i>	-	+	+	-	+	+	-	+	+	6-3
<i>Regan</i>	-	-	+	-	+	-	-	+	+	4-5
<i>Mueller</i>	-	-	+	-	+	-	-	+	+	4-5
<i>Grand Rapids-a</i>	+	+	+	-	+	+	-	+	+	7-2
<i>Grand Rapids-b</i>	-	+	+	-	+	-	-	+	+	5-4
<i>Aguilar</i>	-	+	+	-	+	-	-	+	+	5-4
% pro	8%	50%	92%	0%	100%	42%	0%	92%	75%	71%

Meek-a = educational equipment and materials and on-site instruction

Meek-b = textbooks

Wolman-a = educational equipment and materials

Wolman-b = field trips

Wolman-c = textbooks and testing and scoring

Wolman-d = diagnostic services

Grand Rapids-a = Community Education Program

Grand Rapids-b = Shared Time Program

Voting Codes:

+ voted with the separationist coalition

- voted against the separationist coalition

Justices Codes:

CJ = Chief Justice Warren Burger (1969-86)

J1 = Lewis Powell (1972-87)

J2 = William O. Douglas (1939-75); John Paul Stevens (1975-present)

J3 = William Rehnquist (1972-86; as Chief Justice 1986-2005)

J4 = William Brennan (1956-90)

J5 = Potter Stewart (1958-81); Sandra Day O'Connor (1981-present)

J6 = Byron White (1962-93)

J7 = Thurgood Marshall (1967-91)

J8 = Harry Blackmun (1970-94)

Justices Codes by Case:

Meek: Chief Justice Warren Burger (**CJ**), Justices Lewis Powell (**J1**), William O. Douglas (**J2**), William Rehnquist (**J3**), William Brennan (**J4**), Potter Stewart (**J5**), Byron White (**J6**), Thurgood Marshall (**J7**) and Harry Blackmun (**J8**).

Wolman, New York, and Regan: Chief Justice Warren Burger (**CJ**), Justices Lewis Powell (**J1**), John Paul Stevens (**J2**), William Rehnquist (**J3**), William Brennan (**J4**), Potter Stewart (**J5**), Byron White (**J6**), Thurgood Marshall (**J7**) and Harry Blackmun (**J8**).

Mueller, Grand Rapids, and Aguilar: Chief Justice Warren Burger (**CJ**), Justices Lewis Powell (**J1**), John Paul Stevens (**J2**), William Rehnquist (**J3**), William Brennan (**J4**), Potter Stewart (**J5**), Byron White (**J6**), Thurgood Marshall (**J7**) and Harry Blackmun (**J8**).

Section III: The Hiatus (1986-1992)

For seven years the Court did not review any cases regarding public funding of sectarian elementary and secondary schools. President Ronald Reagan was seeking to recast the Supreme Court to be more reflective of his political philosophy. The degree of the change sought and the reaction to these changes were reflected in the battle over the nomination of Robert Bork. Although Bork did not take a seat on the Supreme Court important membership changes did occur during this period. This period also marked an increase in the number of accommodationist groups seeking to participate in Supreme Court cases.

Chapter 16: The Hiatus

Court Membership Changes

Between 1986 and 1992, four of the nine justices retired including two of the strongest voices for a strict separationist perspective. In 1986 Warren Burger retired as chief justice and William Rehnquist was appointed to his position. Rehnquist's associate position was filled by conservative judge Antonin Scalia. Both of these appointments were made by President Ronald Reagan, who sought to enable government to accommodate, and even favor, religion in public spaces (Ivers 190). As their opinions from the next section will demonstrate, Scalia and Rehnquist worked to make the president's vision of church-state relations a reality.

Following the retirement of the swing vote, Lewis Powell in 1987, and the battle over the appointment of Robert Bork and the embarrassing revelations about Douglas Ginsburg, the Reagan administration appointed a conservative acceptable to the Democrat controlled Senate, Anthony Kennedy. The last two retirements during this period were strong allies of the separationist coalition, William Brennan and Thurgood Marshall, and they occurred under the presidency of George. H.W. Bush. Justice Brennan was replaced by a relatively unknown judge David Souter in 1990 and Justice Marshall was replaced by conservative judge Clarence Thomas in 1991.

Organizational Changes

Spurred by the changing political environment, several accommodationist groups were formed, or established groups decided, to engage in Establishment Clause litigation. These groups include the Christian Legal Society, National Association of Evangelicals, and the American Center for Law and Justice (founded by Pat Robertson). As Kobylka stated, "With the recent creation and activation of these groups, accommodationists are now able to counter the organized separationist perspective that previously enjoyed a near monolithic status before the Court" (116). As Ivers reported,

The fusion of religious and secular conservative interests into a powerful public interest law movement in its own right created a much more complicated and confrontational environment in the federal courts – and nowhere was this reconfiguration more evident than in establishment clause litigation. Ever since the Court's decision in *Everson v. Board of*

Education (1947), church-state litigation has been dominated by a powerful nucleus of liberal, separationist civil liberties and religious organizations... But with the advent of the Reagan administration, this ceased to be the case (190).

On the separationist side People for the American Way was founded by the television producer Norman Lear in response to the rise of politically powerful conservative groups such as Robertson's Christian Coalition; and, the American Federation of Teachers, a national teacher's union, started to participate in Establishment Clause litigation at the Supreme Court level. A few separationist organizations had to battle with internal constituencies to retain their position on this issue. For example, the Baptist Joint Committee (BJC) saw its largest financial contributor, the Southern Baptist Convention, reverse its position with regard to the Establishment Clause. After failing to convince other conservative Baptist groups such as the North American Baptist Conference and the Baptist General Conference to help them take over BJC and revise its mission, the Southern Baptist Convention withdrew from the Baptist Joint Committee in the early 1990s (Walker).

Following this hiatus the separationist coalition was presented with an extensively changed Court and a larger opposition.

Section IV: *Zobrest to Zelman* (1993-2002)

With the changes to the Court's membership made by the appointments of Presidents Ronald Reagan and George H.W. Bush, Court observers expected corresponding changes to occur in Establishment Clause litigation. As described by Joseph F. Kobylka:

...with the onset of Ronald Reagan's presidency in 1981, observers expected the Court to either replace the relatively liberal standard it used to assess these cases with a far more conservative one, or interpret it in such a way as to produce outcomes more tolerable to some religious interests. This expectation grew when Reagan gained an opportunity to replace some supporters of this liberal standard with justices who presumably would oppose it. The expectation became a near certainty with George Bush's appointments of David H. Souter and Clarence Thomas to replace the liberal stalwarts William J. Brennan, Jr. and Thurgood Marshall (93).

Their expectations were realized with regard to government funding of sectarian school cases. The separationist coalition lost all four of the cases accepted by the Court, the *Lemon* test was modified and reinterpreted to support accommodationist policy goals, and separationist precedents were overturned.

Chapter 17: *Zobrest v. Catalina* (1993)

Case Overview

The parents of James Zobrest, a deaf child, requested a sign language interpreter from the local public school district (Catalina Foothills) to assist him

Litigants	
Separationists	Accommodationists
Catalina Foothills School District (48)	Larry, Sandra, and James Zobrest

at the sectarian Salpointe Catholic High School. The school district did provide interpreters to deaf students in public schools and had done so for James Zobrest when he attended public school. However, the school district refused to provide him with an interpreter at Salpointe and the Zobrests sued claiming that the Individuals with Disabilities Education Act (IDEA) and the First Amendment's Free Exercise Clause compelled the school district to provide an interpreter. The District Court ruled that the interpreter would act as a conduit for the child's religious inculcation, thereby promoting his religious development at government expense in violation of the Establishment Clause. The Court of Appeals affirmed the lower court's ruling.

The ruling was appealed. The Supreme Court granted certiorari, held oral argument on February 24, 1993, and delivered its opinion on June 18, 1993.

Separationist Arguments

Perhaps uncertain of the Court's approach toward public aid to sectarian education since it's seven-year hiatus, the brief of the Catalina School District covered all bases by stating that it should "prevail in this case not only under a *Lemon* analysis, but also using an endorsement analysis, a noncoercion-proselytization analysis or an analysis of historical traditions" (9). The school district argued that if the interpreter was approved it would be the first time a public employee was allowed to assist in the religious indoctrination of a student. They stated "the sign language interpreter would become James' and Salpointe's partner and coparticipant in James' religious studies. This direct, day in and day out government participation in religious education cannot be reconciled with the First Amendment" (10).

The litigant began by declaring that this was not a “traditional government practice that has existed relatively unchallenged thought out this country’s history” (14) referring to the Court decision in *Marsh v. Chambers* (1983) upholding chaplain’s prayers in legislatures. Rather than using the *Lemon* test to directly analyze the case, the school district simply compared the facts of this case to the findings of *Lemon I* and its progeny to show the impermissibility of supplying an interpreter to a sectarian school (e.g. inability to isolate secular and sectarian activities, pervasively sectarian nature of the school, and government participation in religious instruction). Promoting the doctrine of *stare decisis*, the school district implored, “It is not right – it is not constitutionally healthy – that this Court should feel authorized to refashion anew our civil society’s relationship with religion, adopting a

Amici	
Separationists	Accommodationists
<ul style="list-style-type: none"> • American Civil Liberties Union, Arizona Civil Liberties Union, American Jewish Committee, Americans United for Separation of Church and State, and Anti-Defamation League of B’nai B’rith (49) • Arizona School Boards Association (50) • Council on Religious Freedom (51) • National Committee for Public Education and Religious Liberty (PEARL)⁴⁸, People for the American Way, National Association of Secondary School Principals (52) • National School Boards Association (53) 	<ul style="list-style-type: none"> • Alexander Graham Bell Association for the Deaf • American Jewish Congress, Baptist Joint Committee on Public Affairs, and Union of American Hebrew Congregations • Christian Legal Society, Christian Life Commission, Church of Jesus Christ of Latter-Day Saints, First Liberty Institute, Lutheran Church-Missouri Synod, National Association of Evangelicals, and National Council of Churches of Christ in the USA (pre-cert) • Christian Legal Society, Church of Jesus Christ of Latter-Day Saints, First Liberty Institute, Lutheran Church-Missouri Synod, National Association of Evangelicals, and National Council of Churches of Christ in the USA, Catholic League for Religious and Civil Rights, Christian Life Commission of the Southern Baptist Convention, Association of Christian Schools International, Family Research Council and Joni and Friends (post-cert) • Deaf Community Center, Inc. • Institute of Justice • National Jewish Commission on Law and Public Affairs • U.S. Catholic Conference • U.S. Solicitor General

⁴⁸ National PEARL members participating: American Association of School Administrators, American Association of University Women, American Ethical Union, American Humanist Association, Americans for Religious Liberty, Central Conference of American Rabbis, Committee for Public Education and Religious Liberty, Council for Democratic and Secular Humanism, Michigan Council About Parochialism, Monroe Citizens for Public Education and Religious Liberty, National Association of Laity (Catholic), National Center for Science Education, National Council of Jewish Women, National Education Association, National PTA, National Service Conference of the American Ethical Union, and Ohio Association for Public Education and Religious Liberty. The membership of PEARL is in flux. Several new groups are joined (see underlined), but the various Protestant groups withdrew (the Baptist Joint Committee filed a brief on the side of the accommodationists). The ACLU, AU, and ADL filed briefs separately from PEARL, and are no longer listed as PEARL participants.

theory of church and state that is contradicted by current practice, tradition, and even our own case law” (38, quoting Justice Scalia in *Texas Monthly, Inc v. Bullock* (1989)).

Next the school district explained the impermissibility of the Zobrest’s request using O’Connor’s endorsement analysis, that the potential for endorsement reflected in the program should be viewed as stated in *Lee v. Weisman* (1992)⁴⁹ “from the vantage point of a reasonable nonbeliever” (39). In this case, the reasonable nonbeliever would see that this was an attempt to use the government to transmit religious information and therefore the government would be participating and endorsing the promotion of these religious beliefs. The school district then used Justice Kennedy’s coercion test, from *Allegheny County v. Greater Pittsburgh ACLU* (1989),⁵⁰ also used by Kennedy in *Weisman*, whose elements include: “excessive sponsorship, proselytization, and compulsion for the benefit of religion” (40). All of these elements apply to the case because the public would be forced to sponsor James’ religious education, the interpreter would facilitate the school’s proselytization, and the taxpayers, school district, and interpreter would be compelled to participate in the student’s religious indoctrination.

Responding to the Zobert’s claim that withholding the interpreter violated their Free Exercise rights, the school district citing *Sherbert v. Verner* (1963) and *Bowen v. Roy* (1986) stated, “There is no unconstitutional inhibition or discrimination when a school district refuses to provide a service available at a public school but not legally required to be provided in private schools, whether or not parochial” (46).

The school district reiterated its opening argument, “For the above reasons, the School District would prevail in this case regardless of whether it is analyzed using the *Lemon* test, an endorsement test, a noncoercion-proselytization test, or a historical traditions test. None allows the direct, ongoing involvement of the state in religious activities that the Zobrests demand here” (44).

⁴⁹ In this case the Court determined that having members of the clergy deliver prayers at a public high school graduation ceremony was impermissible. Justice Kennedy delivered the opinion of the Court basing his decision on the coercion test he advocated in *Allegheny*. Justices Stevens, Blackman, O’Connor, and Souter in concurring opinions felt that the coercion test was insufficient, but did reach an agreement on a test to replace it. Chief Justice Rehnquist and Justices Scalia, White and Thomas dissented. Justice Scalia, writing for the dissent, accepted Kennedy’s coercion test, but not his application of it.

⁵⁰ This case involved the religious displays on public property. A divided Court ruled that one display, a prominently and separately placed crèche, was unconstitutional and a menorah, part of a larger display of secular and sectarian items, was not. Kennedy, in a dissenting opinion, presented his coercion argument.

The interest groups filing *amicus* briefs were also uncertain of the Court's stance since its hiatus, and incorporated into their briefs a wide variety of legal arguments used by members of the Court.

Like the separationist litigants, the *amicus* brief for the National School Boards Association (NSBA) stated that regardless which test (*Lemon*, historical tradition, coercion, or endorsement) was used, the Court should reach the same conclusion that "a school district cannot pay a public employee to serve as a deaf interpreter during religious worship and religious instruction without unconstitutionally establishing religion" (4). Although it recognized the variety of tests available, the NSBA urged the Court to retain the three-prong *Lemon* test and stated that both the majority and dissent in all post *Lemon I* cases agreed that government support of religious indoctrination was unconstitutional. NSBA also argued that Court precedent had never upheld a program that was not restricted to secular function or was a generic aid program to individuals (e.g., *Witters*⁵¹ and *Mueller*). Individual choice could not be used in this case, they argued, because the aid directly supported a religious activity.

NSBA countered the accommodationist litigant's view that an interpreter was the equivalent of a hearing aid. They argued that a better comparison would be to a foreign language translator because "American Sign Language is as much a language as English, French or Russian... Anyone who has compared different translations of classical works, such as those by Aeschylus and Euripides, understands that each translation is unique without necessarily being dishonest to the intent of the author" (21). Nonetheless, after making this argument, the NSBA stated that regardless of how the interpreter was characterized the provision was unconstitutional because the government cannot provide aid to convey religious indoctrination. The *amicus* argued that the provision of an interpreter in a sectarian school may not qualify as coercion of the student, but they believed it was a coercion of the taxpayer to support religion and that such government aid enabled religious worship and was therefore an endorsement of religion.

NSBA concluded their brief by countering policy claims made by accommodationists in prior cases that private schools relieved public schools of the

⁵¹ In *Witters v. Washington Department of Services for the Blind* (1986), the Court found that the provision to a student of a vocational tuition grant to attend a Christian college for training to become a pastor, missionary, or youth director did not violate the Establishment Clause.

financial burden of educating students who attend them. They cited studies that questioned the effectiveness and efficiency of government aid to school choice and voucher programs. NSBA stated that they brought these issues to the attention of the Court so that it would not be swayed to make a decision based on the policy issues previously raised by the accommodationist coalition.

The ACLU *et al.* used the *Lemon* test, stating that the provision of an interpreter to a student in a pervasively sectarian school would impermissibly advance religion using government aid and create an excessive entanglement between church and state. The Court's precedent was clear that the government could not provide "a state employee to assist directly in the teaching and propagation of religious beliefs" (2). By providing an interpreter in the pervasively sectarian schools the government created an impermissible symbolic union of church and state by providing the "imprimatur of state approval" (12) and thereby conveys "an impermissible endorsement of religious education" (13, quoting Justice O'Connor in *Wallace*). The *amici* also quoted Justice Kennedy in *Lee v. Weisman* (1992) referencing his coercion test and his statement, "that the preservation and transmission of religious beliefs and worship is a responsibility and choice committed to the private sphere" (5).

They countered the accommodationist's view of the interpreter as the equivalent of a machine simply translating information for the student by stating that "Unlike a hearing aid, a sign language interpreter is both able and likely to respond to a signed question from his charge after class, such as 'What did the teacher mean by ...,' or 'Could you tell me again what the teacher said about ...'" (16). By spending the entire school day with the student the interpreter "would have countless opportunities either intentionally or inadvertently to inculcate religious tenets or beliefs, whether they be the same as those expressed by James's teachers or different" (15). It was their opinion that the accommodationist idea of funneling aid to pervasively sectarian schools through individual parents and students would "immunize the aid from Establishment Clause scrutiny" was erroneous (3).

Unlike the aid in *Mueller* (see above) and *Witters*, where the aid was provided to the individual and was essentially unseen by anyone but the supported individual, the interpreter would be "present and visible" and contribute to the symbolic union and

endorsement problems described previously. Court precedent regarding permissible parent or child benefit only applied to secular functions or materials, the *ACLU et al.* argued the interpreter would contribute directly to the student's religious education and was therefore impermissible.

The *amici* contended that the accommodationist litigants interpretation of neutrality was "inconsistent with most of this Court's prior decisions concerning aid to sectarian schools" (19). Providing benefits neutrally to all schools without regard to religion would (quoting the Christian Legal Society *et al. amicus* brief "require the Court to overturn most of the Court's prior decisions concerning aid to sectarian schools" (20).

Lastly, the *amici* objected to the claim that refusal of this request represents discrimination toward religion and religious schools because the Court had "never accepted the notion that the government's refusal to provide benefits for use in religious activities in sectarian schools burdens free exercise rights or violates the Equal Protection Clause" (20). They stated that the "Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government" (20, quoting Justice Douglas in *Sherbert* and used by the Court in *Bowen v. Roy* (1986)).

The Council on Religious Freedom also used the *Lemon* test and cited precedents prohibiting public employees to work in pervasively sectarian schools and to convey religious indoctrination. They countered arguments that facial neutrality was sufficient on its own to uphold a program and that the child benefit argument could be used for sectarian purposes. They also disagreed with the argument that prohibiting this aid would entail discrimination against religious institutions and individuals by explaining that providing such aid may actual harm religion because the sectarian schools would then be required to open up their admissions and hiring practices to members of other religions. The free exercise rights of the interpreter may also be violated because s/he may have to abide by the religious restrictions on dress and other activities imposed by the sectarian school.

The *amicus* brief of the Arizona School Boards Association Inc. (ASBA) argued that the statutes and regulations governing IDEA did not require the school district to provide an interpreter to a child at a private school and the provision of such services

would violate the Arizona Constitution. The ASBA urged the justices to maintain the Court's use of the three-prong *Lemon* test, "If the Court in this case develops a 'new test,' that action assuredly will send out a message to schools, students, parents, and communities throughout this country that all of the religion-in-the-schools cases are no longer 'good law' or at least questionable" (11) and would produce political divisiveness. Their analysis through the *Lemon* test found that the provision of an interpreter would have the primary effect of advancing religion and create an excessive entanglement between pervasively sectarian schools and the state.

The *amicus* brief for National PEARL, People For the American Way, and the National Association of Secondary School Principals provided a very focused argument that this case should be decided based only on the relevant federal regulation, which prohibited funds to be used "to pay for religious instruction or for equipment used in furtherance of religious instruction" (6), and not based on constitutional concerns. Illustrating the non-compliance with the federal regulation was the fact that in an undeniably pervasively sectarian setting – a parochial school – an interpreter could easily be used to transmit religious instruction. So regardless of whether or not the interpreter was characterized as an instructor, or like a machine, the provision of the interpreter was not permitted by the federal regulation. The *amici* urged the Court not to decide the constitutional questions presented,

Ignoring the possible applicability of the regulation, the parties and *amici* are prodding this Court to decide constitutional questions that need not be addressed. It has long been this Court's practice, however, not to decide constitutional issues when there is an adequate non-constitutional legal ground for resolving the dispute before it (12).

Although they urged the Court to remand the case for resolution of the regulation question, they used the term pervasively sectarian frequently in the brief and suggested in a footnote that the lower court examine the Arizona Constitution in determining the outcome of the case.

Decision of the Court

The Supreme Court decided (5-4) to reverse the lower court decision and declared the Establishment Clause did not bar the provision of a sign language interpreter. Chief

Justice William H. Rehnquist wrote the majority opinion joined by Justices Byron White, Antonin Scalia, Anthony M. Kennedy, and Clarence Thomas. Justice Harry Blackmun wrote a dissent joined by Justice David Souter and joined in part by Justices John Paul Stevens and Sandra Day O'Connor. Justice O'Connor also filed a dissenting opinion that was joined by Justice Stevens.

The majority opinion used the neutrality principle to allow provision of the interpreter. Chief Justice Rehnquist based his neutrality argument on *Mueller*(1983) and *Witters* (1986) stating,

...we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit” (*Zobrest* 8).

The service requested in this case, Rehnquist argued, was part of a general government program that provided benefits neutrally to all eligible recipients. The fact that the service was to be provided in a sectarian school was the “result of the private decision of individual parents” – not government decision-making – so the parents decision to send their child to a sectarian school was in no way influenced by the government program (10). Rehnquist stated that the precedents of *Meek* and *Ball*, prohibiting publicly funded employees in sectarian schools, did not apply to this case because the interpreter did not advance the educational function of the sectarian school or relieve it of a necessary cost of its educational function. Rehnquist concluded that the aid was constitutional because the support went to the individual rather than the sectarian institution, and because the interpreter’s task was much different than having a public school teacher or guidance counselor in a sectarian school in that the interpreter “will neither add to nor subtract from that environment, and hence the provision of such assistance is not barred by the Establishment Clause” (13).

Justice Blackmun’s dissent was based on his belief that important state constitutional, statutory, and regulatory issues in this case had not been fully considered in the lower court; therefore, the case should be returned to the lower court to rule on these issues to follow “the venerable principle that constitutional questions should be avoided when there are nonconstitutional grounds for a decision in the case” (16).

Justices O'Connor and Stevens joined Justice Blackmun on this point but not on the remainder of Blackmun's opinion. Regarding the constitutional question presented, Blackman, joined only by Justice Souter, argued that distinctions between permissible and impermissible aid were complex; however, "our cases make clear that government crosses the boundary when it furnishes the medium for communication of a religious message" (22). In aid programs involving pervasively sectarian schools, he stated the Court had been clear, until now, to have never "authorized a public employee to participate in religious indoctrination" (19). Blackmun also argued that providing an interpreter would create a symbolic union of church and state placing "the imprimatur of governmental approval upon the favored religion, conveying a message of exclusion to all those who do not adhere to its tenets" (23). Citing the argument made in the *amicus* brief of the Council of Religious Freedom, Blackmun concluded that by providing interpreters to sectarian schools the state might force the interpreter to obey religious requirements regarding dress and diet that "would impermissibly threaten individual liberty, but to fail [to observe these requirements] might endanger religious autonomy" (23). Further, the majority's decision strayed from "nearly five decades of Establishment Clause jurisprudence" that "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere" (23-24).

Justice O'Connor's dissent, joined by Justice Stevens, argued that the Court was deciding this case prematurely violating "a fundamental rule of judicial restraint;" therefore, she refused to participate in this "decidedly hypothetical issue addressed by the Court" (24).

Implications for Future Cases

This case marks a major change from previous cases examined. Prior cases arrived at the Supreme Court because separationist taxpayers opposed a government action or statute in providing funding to sectarian schools. In this case accommodationist litigants were the initiators of the suit. The changes of Court membership and the political environment may have encouraged the accommodationists

to take an offensive strategy with regard to Establishment Clause cases concerning public aid to elementary and secondary sectarian schools.

The long hiatus of the Court left the separationist coalition uncertain of the position of members of the Court. The National School Boards Association, ACLU, American Jewish Committee, Americans United, and the Anti-Defamation League advanced all the major tests: *Lemon*, endorsement, coercion, and tradition. The newest coalition participant, Council on Religious Freedom,⁵² took a different perspective focusing on the potential harm to religion and the religious rights of the public employees. Justice Blackmun cited their brief in his dissenting opinion. National PEARL, People for the American Way, and National Association of Secondary School Principals simply argued that the case was not ready for the Court's consideration.

This case marks the first split in the separationist coalition. The American Jewish Congress and Baptist Joint Committee sided with the Zobrest family. They urged the Court to retain the *Lemon* test and argued that the provision of an interpreter did not violate any prong of the test. They stated that *Witters* was the controlling precedent, which allowed the individual aid recipient to determine where to use the government support without regard to its sectarian nature. The National Council of Churches joined the *amicus* brief of the Christian Legal Society. They stated that the *Lemon* test had created a conflict between the Establishment Clause and the Free Exercise Clause and called for Court to abandon or modify the *Lemon* test. They argued that if the test was modified it should be made to function along the lines of Rehnquist's nonpreferentialism. This brief also rejected the use of the endorsement and coercion tests.

The Court's opinion furthers the legal argument that funding to sectarian schools was constitutional as long as it was done in a facially neutral and indirect fashion. This stance had a five-member majority of Rehnquist, White, Scalia, Kennedy, and Thomas. The adoption of the coercion argument, as presented by Justice Kennedy in *Allegheny* and *Weisman*, by several members of the separationist coalition was not enough to sway his vote. The adoption of this argument demonstrated the coalitions use of successful arguments from other Court fora (government display of religious symbols and school

⁵² The Council on Religious Freedom is a Seventh-day Adventist lay organization. Lee Boothby, who authored their briefs, was formerly with Americans United.

prayer) to enhance their potential for success. Justice O'Connor's opinion on the constitutional aspects of the case were unknown since she simply requested the case be returned to the lower court for reconsideration on other factors.

Chapter 18: *Agostini v. Felton* (1997)

Case Overview

Following the Court’s decision in *Board of Education of Kiryas Joel Village School District v. Grumet* (1994), in which five members of the Court stated the decision in *Aguilar* (see above) should be reconsidered, the accommodationist parties in *Aguilar* filed motions claiming that the injunction imposed upon them should be removed based on the Federal Rule of Civil Procedure 60(b)(5). They argued that since five members of the Court stated their desire to overturn the decision, *Aguilar* was no longer good law. The District Court denied the motion – upholding *Aguilar*, and the Second Circuit Court agreed. The ruling was appealed. The Supreme Court granted certiorari, held oral argument on April 15, 1997, and delivered its opinion on June 23, 1997.

Litigants	
Separationists	Accommodationists
Betty-Louise Felton, Charlotte Green, Barbara Hruska, Meryl A. Schwatz, Robert H. Side, and Allen H. Zelon ⁵³ (54)	Rachel Agostini, Maria Cosarca, Digna Duran, Ivette Encarnacion, Maria L. Fernandez, Dolly Cutrera Then and Joseph M. Then, Margaret Figueroa, Michele Gallo, Maria Sejour, Joan Jackson, Cheryl Malcouso, Tonya Stevens, and Rosemarie Vasquez Chancellor of the Board of Education of the City of New York and the Board of Education of the City School District of the City of New York Secretary of the U.S. Department of Education

Separationist Arguments

The separationist litigants argued that since there was not an actual change in the law, merely an expression of the desire to overturn *Aguilar*, Rule 60(b) was not the appropriate means to bring this case to the Court:

The legitimacy of the Court derives from its steadfast adherence to the rule of law and its refusal to allow constitutional doctrine to vacillate with changes in the Court’s membership. If the Court permits precedent to be reopened on the basis of prognostication and head-counting, it will feed the perception that the Court is no different from any political body (13).

⁵³ The litigants are represented by Stanley Geller from National PEARL. He also represented these litigants in 1985 and later became the president of National PEARL. However, unlike in *Aguilar* National PEARL did not participate as an organization in this case.

A departure from *stare decisis*, they argued, will harm the integrity of the Court if it appears to be made “based on Justices’ political ideology rather than principles of law” (26). These statements demonstrate the litigants fear that not only could *Aguilar* be overturned but also the *Lemon* test and precedents based on it.

The litigants argued that the accommodationist litigants had misinterpreted the neutrality principle: “Petitioners abuse the concept of ‘neutrality’ as if the mere repetition of the word will solve virtually any question relating to the Establishment Clause” (13). They contended that even with a neutral program the Establishment Clause requires the analysis of additional factors to determine the program’s constitutionality. With the chance that the Court might overturn the *Lemon* test along with more than 25 years of precedents, which rely on this test, the separationist litigants did not base their brief on the *Lemon* test. Instead they used legal arguments taken from a variety of Court precedent. They argued that the Title I program implemented by New York City violated the Establishment Clause in three ways:

Amici	
Separationists	Accommodationists
<ul style="list-style-type: none"> • American Jewish Congress, American Federation of Teachers, American Jewish Committee, Anti-Defamation League, Baptist Joint Committee on Public Affairs, Central Conference of American Rabbis, National Education Association, National Jewish Community Relations Advisory Council, People for the American Way, and Union of American Hebrew Congregations (55) • Americans United for Separation of Church and State, American Civil Liberties Union, and New York Civil Liberties Union (56) • Council on Religious Freedom, Americans for Religious Liberty, Mary L. Helms, Amy T. Helms, Marie L. Schneider, Darla Fernandez, and Duane C. Purdy (57) • New York County Lawyers Association (58) 	<ul style="list-style-type: none"> • Becket Fund for Religious Liberty • Christian Legal Society, Association of Christian Schools International, Catholic League for Religious and Civil Rights, Christian Life Commission of the Southern Baptist Convention, Family Research Council, Focus on the Family, Lutheran Church-Missouri Synod, National Association of Evangelicals, and Southern Center for Law and Ethics • Institute for Justice, Center for Educational Reform, Parents for School Choice, and Hope for Cleveland’s Children • Knights of Columbus • National Jewish Commission on Law and Public Affairs • Pacific Legal Foundation • Sarah Peter, Joan Peter, Aaron Westendorp, Krista Westendorp, and Douglas Westendorp • U.S. Catholic Conference • U.S. Senator Robert F. Bennett

- (1) The symbolic union of church and state inherent in public school teachers and guidance counselors providing instruction and counseling inside parochial schools conveyed a message of government support for the religious mission of the schools to the students attending them and the general public
- (2) The Program in effect subsidized the religious functions of the parochial schools by taking over a substantial portion of their

responsibility for teaching essential secular subjects to a substantial portion of their students.

- (3) The only reasonably certain way to make sure that the public school teachers and counselors obliged to teach and counsel parochial school students would not be encouraged by their surroundings to engage, deliberately, ignorantly or inadvertently, in conduct supportive of the parochial school and its religious mission was to prohibit them from performing their services inside the parochial school. (36-7)

By ignoring, but not denying, the *Lemon* test, the separationist litigants were able to draw from precedent and create a case specific argument structure to determine the impermissibility of the program. The symbolic union argument combined *Lemon's* entanglement prohibition and O'Connor's endorsement test and as stated by the litigants was the basis of the Court's decisions in *Grand Rapids*, *McCullum*, and *Schempp*. Prohibiting the subsidizing of religious functions continued a theme from *Everson* progeny that secular aid can supplement but not supplant educational programs at sectarian schools. The third argument maintained the Court's rulings that the pervasively sectarian nature of the schools created an environment that was untenable for public instructors to teach secular subjects.

Rather than shy away from the *Lemon* test the *amicus* brief of the American Jewish Congress *et al.* embraced the test and provided a strong defense of the entanglement prong, which the accommodationist litigants asked the Court to reject. The *amici* provided numerous examples of cases, both within and outside of the sectarian school aid forum, to demonstrate that "undue entanglement remains a living part of the law, not a remnant of abandoned doctrine" (10). They urged the Court not to view the entanglement prong as a Catch-22 but rather as a threshold measure to determine when government support would present an undue and unconstitutional intrusion. The Catch-22 characterization, they argued, "rests on the fallacy that government aid to religious institutions gives rise to no special concerns" (15). Accordingly, government aid to sectarian institutions would create political divisiveness, which existed in countries with established religions and was the motivation of the Founders to create the Establishment Clause. The *amici* stated that this case should not be the vehicle to reconsider the *Lemon* test, either in whole or in part, therefore the Court should reject the accommodationist

litigants and *amici* requests to “discard the long-settled no-aid-to-religion rule and replace it with a principle of equal funding of both secular and religious causes” (20).

The *amicus* filing of Americans United and the ACLU argued against the accommodationist litigants’ and *amici* interpretation of neutrality, as it was not that of the Court and that the Court had “never permitted the government to fund sectarian activities under the guise of neutrality” (8). The determination of the neutrality of a statute or activity, they stated, simply “begins the analysis; it does not end it” (9-10). Facial neutrality alone could not sustain a statute, it must, along with other factors, make sure that public aid was not used to advance religion. The *amici* rejected the request that the entanglement prong be discarded. In their view, the entanglement prong was designed to protect against government involvement in purely religious matters and “operates for the benefit of both religion and civil society, at times insisting on long-term goals in place of short-term gains. Its function is essential for Religion Clause jurisprudence, and it should be retained as an independent test” (22-3). The *amici* urged the Court to retain the *Lemon* test, unchanged, and argued that the Court’s understanding of *stare decisis* would require a “special justification” to alter the test or discarded it (17, quoting the Court in *Arizona v. Rumsey* (1984)).

The *amici* also argued that the Court’s decision in *Aguilar* should be upheld based on its original decision and because the Court had made a distinction between “massive” and “attenuated” aid (26). In *Meek* and *Grand Rapids* the Court found that funds provided to a pervasively sectarian school for secular purposes could become so substantial as to violate the Establishment Clause. The Court recognized this distinction in *Zobrest* and *Witters* where the aid to religious institutions was minor and identified it “attenuated.” Lastly, they pointed out that to the impressionable young students the public teachers and the religious teachers working in the same facility would be seen as “participating in a joint enterprise...supporting the obvious religious mission of the parochial school” creating an impermissible endorsement and symbolic union between religion and government. (28).

The *amicus* brief of the Council on Religious Freedom *et al.* stated that the accommodationist litigants, using an interpretation of the neutrality principle to mean evenhandedness, admitted that government provision of direct aid that subsidizes religion

would be unconstitutional. However, the accommodationist litigants argued that the aid was for purely secular services and was provided directly to the students. The *amici* used the pervasively sectarian argument to show that there cannot be a purely secular function in a sectarian school. Additionally, the aid was a direct benefit to the sectarian school in relieving them of the burden to provide the remedial and supplemental instruction their students needed.

The *amici* defended the use of, and need for, the entanglement prong and cited lower court decisions that provided evidence of impermissible entanglement regarding extensive interactions between public and private teachers and administrators. They also provided evidence of the difficulty in removing religious images and symbols from the classrooms in sectarian schools as required by Title I, and how this compromised the religious integrity of the sectarian schools; promoted dissension between the public and private teachers and administrators; and required state monitoring, all of which produced impermissible entanglement. They argued that placing a public school teacher in a sectarian school allowed the teacher to be influenced by the environment of the school and harmed the school by attempting to create a secular enclave within the parochial school. The necessity to create a secular enclave within the sectarian schools violated the independence of the schools. The *amici* quoted Justice O'Connor in *Lynch v. Donnelly* that "excessive entanglement with religious institutions, which may interfere with the independence of the institutions" was forbidden by the Establishment Clause (17).

All the separationist *amici* discussed how the use of Rule 60(b) was improper for this case; however, the *amicus* brief for the New York County Lawyers Association focused on nothing else and provided an exhaustive explanation of why it should not have been used in this instance. They took no position on how the case should be determined on its merits.

Decision of the Court

The Court decided (5-4) to overturn its decision in *Aguilar*. Justice Sandra Day O'Connor wrote for the Court joined by Justices Antonin Scalia, Anthony M. Kennedy, Clarence Thomas and Chief Justice William H. Rehnquist. Justice David Souter wrote a

dissent joined by Justices John Paul Stevens and Ruth Bader Ginsburg⁵⁴ and joined in part by Justice Stephen Breyer⁵⁵. Justice Ginsburg also wrote a dissenting opinion in which Justices Stevens, Souter, and Breyer joined.

Justice O'Connor wrote that the accommodationist parties were entitled to invoke Rule 60(b), not because the five justices favored it in *Grumet*, but because the Court's subsequent jurisprudence made *Aguilar* no longer good law. She argued that four elements supporting the *Aguilar* and *Ball* decisions had been undermined by the recent *Witters* and *Zobrest* decisions: 1) public teachers providing instruction in religious schools may inculcate religion because of the pervasively sectarian nature of the schools; 2) the presence of public teachers in sectarian schools created a symbolic union between church and state; 3) aid to the educational function of sectarian schools impermissibly subsidized their religious mission; and, 4) public teachers in sectarian schools required pervasive monitoring that would result in excessive entanglement.

Justice O'Connor stated the Court, through its decision in *Zobrest*, abandoned the presumption that the presence of public employees working within sectarian schools "inevitably results in the impermissible effect of state sponsored indoctrination or constitutes a symbolic union between government and religion" (*Agostini* 223). She contended that in *Witters*, where the Court determined that public aid was permissible as long as it was "made available generally and without regard to the sectarian nonsectarian, or public nonpublic nature of the institution benefited" (225), the Court removed "the rule relied on in *Ball* that all government aid that directly aids the educational function of religious schools is invalid" (*ibid.*). Lastly, because *Zobrest* removed the presumption of religious indoctrination "we must also discard the assumption that pervasive monitoring...is required" (234).

Justice O'Connor stipulated other revisions to the Court's previous understanding of the *Lemon* test. She stated that the Court in *Aguilar* "disregarded the lack of evidence" (220) regarding the charge that public employees advanced the religious indoctrination of students. Simply acknowledging that there was the potential for public employees in sectarian schools to modify their instruction (either subtly or overtly) to

⁵⁴ Since *Zobrest*, Justice Ginsburg replaced Justice Byron White who retired in 1993.

⁵⁵ Justice Breyer replaced Justice Harry Blackmun who retired in 1994.

include religious indoctrination was insufficient to declare a program unconstitutional; rather, actual evidence of religious indoctrination was necessary to make such a finding.

Justice O'Connor argued that public aid provided to individuals, which reaches religious institutions based on "genuinely independent and private choices," does not offend the Establishment Clause (226). She stated that public aid meeting the neutrality test used by the Court in *Mueller*, *Witters*, and *Zobrest*, would be permissible as long as it was "allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis" (231). In this instance the aid was available to all children who met the secular eligibility requirements and the aid did not provide the recipients "any incentive to modify their religious beliefs or practices in order to obtain those services" (232).

O'Connor determined that the entanglement prong no longer needed to be a separate prong as used in the *Lemon* test. She stated that the previous understanding of the entanglement prong contained three elements: "pervasive monitoring," "administrative cooperation," and "political divisiveness" (233). The problem of "pervasive monitoring" was solved in *Zobrest* because the Court had determined that the presence of public employees did not guarantee a problem of religious indoctrination and therefore did not require overly restrictive and unconstitutional monitoring. The impermissibility of "administrative cooperation" and "political divisiveness" were "insufficient by themselves to create an 'excessive' entanglement" (233-4). O'Connor argued that since these two elements of entanglement exist whether the services were performed on or off-campus, and the Court had determined that services to sectarian school students could be provided off-campus, these two issues could not be a threat to the Establishment Clause.

Justice O'Connor made no change to the secular purpose prong of *Lemon* (which had not been used by the Court to declare a funding case unconstitutional). The entanglement prong was incorporated into the effect prong because entanglement addressed factors similar to effect: "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority" (232, quoting *Lemon I*). Justice

O'Connor concluded her examination of the Court's changed understanding of the *Lemon* test by presenting the following instruction: the "three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in government indoctrination; define its recipients by reference to religion; or create an excessive entanglement" (234). Since the Title I aid was provided on a neutral basis and appropriate measures were in place to safeguard against indoctrination there was no reason for the program to "be viewed as an endorsement of religion" (235).

Justice Souter's dissent, joined by Justices Stevens and Ginsburg, defended the Court's prior interpretation of the *Lemon* test (Justice Breyer only joined in upholding the distinctions between direct and substantial aid and indirect and incidental aid – see below). In addition to affirming his support of the arguments used by the Court in *Aguilar*, Souter declared that the government "is forbidden to subsidize religion directly and is just as surely forbidden to act in any way that could reasonably be viewed as religious endorsement" (242, citing O'Connor in *Lynch*). He went on to explain that the Founders and the Court had, until this decision, upheld the separation of church and state because history had shown "that religions supported by governments are compromised just as surely as the religious freedom of dissenters is burdened when the government supports religion" (243).

Opposing the expansive readings of *Zobrest* and *Witters* used by O'Connor, Souter advocated a narrow interpretation of those decisions. He argued that the sign language interpreter was allowed by the Court in *Zobrest* because the role such an aide played was "much different from that of a teacher or guidance counselor" (248, quoting the Court in *Zobrest*). Justice Souter wrote "The Court may disagree with *Ball's* assertion that a publicly employed teacher working in a sectarian school is apt to reinforce the pervasive inculcation of religious beliefs, but its disagreement is fresh law" (249). Likewise he argued the Court's decision in *Zobrest* did not repudiate that public aid to sectarian schools could create an unconstitutional "symbolic union" between government and religion.

Lastly, Souter disagreed with the comparison of *Witters* and *Zobrest*, in which the aid was given to the individual, and with the Title I programs in this case, where the aid was given directly to the sectarian schools. He countered that "students eligible for such

[Title I] programs may not apply directly for Title I funds” rather the aid “must be seen as aid to a school system when so many individuals receive it that it becomes a significant feature of the system” (252). He concluded that “nothing since *Ball* and *Aguilar* and before this case has eroded the distinction between ‘direct and substantial’ and ‘indirect and incidental.’ That principled line is being breached only here and now” (*ibid.*).

Justice Ginsburg’s dissenting opinion focused on the inappropriateness of the Court’s rehearing of this case using Rule 60(b); her sole concern being the legal process itself. She felt the failure to wait for a relevant case to make its way through the appropriate channels of the U.S. court system harmed the Supreme Court’s “maintenance of integrity in the interpretation of procedural rules, preservation of the responsive, non agenda setting character of this Court, and avoidance of invitations to reconsider old cases based on speculations on chances from changes in the Court’s membership” (260).

Implications for Future Cases

Agostini overturned *Aguilar*, the Shared Time program decision in *Ball*, and the on-site instruction portion of *Meek*. As the most recent appointee to the bench, and because of his limited participation in this case, it is difficult to predict Justice Breyer’s future actions on state aid to sectarian schools. He joined only Justice Souter’s dissent regarding maintaining prior distinctions between types of aid and Justice Ginsburg’s Rule 60(b) dissent. This left just three justices (Souter, Ginsburg, and Stevens) fully supporting the Court’s prior interpretation of the *Lemon* test.

The majority opinion made the revised *Lemon* test less useful to the separationist advocacy coalition in several ways: by making the effect test reliant on actual evidence of impermissible effect rather than on merely the potential of such effect as decided in previous cases; by removing the pervasively sectarian prohibition in allowing aid to the educational function of a religious school; and by rejecting the unconstitutionality of a symbolic union between government and sectarian schools. Dropping the Court’s prior requirement of strict monitoring of public employees in sectarian schools and the threat of creating political divisiveness likewise weakened entanglement restrictions. Again, the Court required actual violations be present to create a record of an impermissible relationship between the sectarian school and a government agency. By citing both

Zobrest and *Witters* as the key precedents for changing the Court's interpretation of the *Lemon* standard, the Court also removed its prior critical distinction between the students' level of maturity in elementary and secondary schools and institutions of higher learning made in *Lemon I* and *Tilton*.⁵⁶

O'Connor's opinion did not produce the feared replacement of the *Lemon* test with Rehnquist's neutrality principle; however, the Court's drastic revision of the *Lemon* test removed most of the elements employed by the separationist coalition to argue such cases: potential harm versus actual evidence; pervasively sectarian nature of educational function; symbolic union; political entanglement; pervasive monitoring; and, impressionable nature of students. With Justice O'Connor writing this opinion, the separationist coalition should now have a better understanding of what arguments will be necessary to convince this swing justice to join in a separationist majority opinion in future cases.

⁵⁶ In *Tilton v. Richardson* (1971), the Court allowed federal aid through the Higher Education Facilities Act of 1963 to be used at religious colleges and universities to construct buildings for purely secular purposes. In the decision Chief Justice Burger made a distinction between aid to religious colleges and universities and elementary and secondary religious schools stating that younger students were more impressionable and susceptible to religious indoctrination; therefore, aid to religious elementary and secondary schools needed to be examined more closely to ensure that it did not advance religion.

Chapter 19: *Mitchell v. Helms* (2000)

Case Overview

The separationist litigants challenged the use of federal funds available through Chapter 2 of the Education Consolidation and Improvement Act of 1981 (ECIA) to purchase and lend educational materials and equipment (e.g. library and media materials and computer hardware and software) to sectarian elementary and secondary schools in Jefferson Parish, Louisiana. Chapter 2 funds were made available to state education agencies which then passed the funds to local educational agencies which in turn provided materials to public and private schools. ECIA required that the aid provided to nonprofit private schools be allocated based on student enrollment of participating schools; supplement – not supplant – funds from non-Federal sources; and, be used only for “secular, neutral, and nonideological” purposes (802). In Jefferson Parish approximately 30% of the Chapter 2 funds were spent on religious schools.

The District Court ruled that supplying materials directly to sectarian schools violated the *Lemon* test because these schools were pervasively sectarian and the loans had the effect of advancing religion. After the Chief Judge of the District Court, who

Litigants	
Separationists	Accommodationists
Mary L. Helms, Amy Helms, and Marie Schneider (59) ⁵⁷	Guy Mitchell, Jan Mitchell, Claire Taylor, Eddie Greer, Colleen Greer, Dennis Thornton, and Darlene Thornton Cecil J. Picard, Louisiana Superintendent of Public Education; Kenneth Duncan, Louisiana State Treasurer; and the Louisiana State Board of Elementary and Secondary Education The Jefferson Parish School Board System; Elton LaGasse, Superintendent; Barry Bordelon, President; Polly Thomas, Vice-President; and, Chris Roberts, Ray St. Pierre, Laurie Rolling Hogan, Karen Barnes, Gene Katsanis, Libby Moran, and Martin Marino, members of the Jefferson Parish School Board. Special Education Services Corporation Richard W. Riley, United States Secretary of Education, and the United States Department of Education

⁵⁷ Litigants were represented by the Council on Religious Freedom.

issued this decision, retired another judge on the District Court reversed the prior decision based on the Supreme Court’s decision in *Zobrest*.

The Court of Appeals for the Fifth Circuit reversed that decision and declared the in-kind aid program impermissible based on *Meek* and *Wolman*. The appeals court concluded that although the Court’s decision in *Agostini* had raised questions about the impermissibility of direct aid programs, the Court had not directly overruled these two cases therefore they remained the controlling precedents. The accommodationist litigants appealed. The Supreme Court granted certiorari, held oral argument on December 1, 1999, and delivered its opinion on June 28, 2000.

Separationist Arguments

The separationist litigants, instead of using the *Lemon* test, stated that there were “a few basic, interrelated principles” to examine Establishment Clause cases: “such as whether the aid

Amici	
Separationists	Accommodationists
<ul style="list-style-type: none"> • American Civil Liberties Union, American Federation of Teachers, American Jewish Committee, American Jewish Congress, Americans United for Separation of Church and State, Anti-Defamation League, Hadassah, Jewish Council for Public Affairs, and People for the American Way Foundation (60) • Baptist Joint Committee on Public Affairs (61) • Interfaith Religious Liberty Foundation (62) • National Committee for Public Education and Religious Liberty (PEARL)⁵⁸ and Americans for Religious Liberty (63) • National Education Association (64) • National School Boards Association, New York State School Boards Association, and Horace Mann League (65) 	<ul style="list-style-type: none"> • American Center for Law and Justice • AVI CHAI Foundation • Arizona Council for Academic Private Education, Association of Christian Schools International, Connecticut Council for American Private Education, Florida Council of Independent Schools, Illinois Coalition of Nonpublic Schools, Independent School Association of the Central States, Indiana Non-Public Education Association, International Christian Accrediting Association, Kentucky Non Public Schools Commission, Maryland Council for American Private Education, Michigan Association of Non-public Schools, Minnesota Independent School Forum, National Association of Independent Schools, National Catholic Educational Association, Nebraska Council for American Private Education, Texas Association of Non-Public Schools, Virginia Council for Private Education, Washington Federation of Independent Schools, and Wisconsin Council for Religious & Independent Schools <p style="text-align: right;">(continued below)</p>

⁵⁸ National PEARL members: A. Philip Randolph Institute; American Ethical Union; The American Federation of Teachers; American Humanist Association; American Jewish Committee; American Missionary Association, United Church Board for Homeland Ministries, United Church of Christ; Americans for Religious Liberty; The Community Church of New York; Council for Secular Humanism; Freethought Society of Greater Philadelphia; Minnesota Civil Liberties Union; Monroe Citizens for Public Education and Religious Liberty; National Council of Jewish Women; National Jewish Labor Committee; New York State United Teachers; and Washington Area Secular Humanists. The PEARL membership continues to transition. As new groups (those underlined) join, two of Sorauf’s Big Three (the ACLU and AU) have withdrawn from PEARL, as has the Baptist Joint Committee.

subsidizes religious indoctrination, whether it favors or disfavors any religion, and whether it supplants a core function of the religious school” (13). Countering the evenhanded neutrality principle proposed by the accommodationist litigants (and Chief Justice Rehnquist), the separationist litigants argued this was not what the Founders (referencing Madison and Jefferson) intended with the creation of the Establishment Clause. Madison, they wrote, believed “the corrupting and enervating effect that state aid has on religion – producing ‘superstition, bigotry and persecution’” could not be prevented by providing aid evenhandedly to both the religious and secular (16, quoting Madison’s *Memorial and Remonstrance*).

The prohibition by the Court against direct and non-incidental state aid to sectarian schools, the litigants contended, started with *Cochran* and *Everson* and runs through out the Court’s decisions. They stated that the Court consistently held two positions:

- (1) that state aid cannot constitutionally displace or directly and non-incidentally further or support the educational and religious mission of parochial schools; and (2), that state aid for use by students or their parents, or that only incidentally benefits parochial schools, cannot itself be sectarian or reasonably divertable to sectarian use (17).

Their position was that the safeguards in place to ensure that the materials provided to sectarian schools were both secular and nonideological were insufficient, as were the safeguards meant to prevent the materials and equipment from being used for religious purposes. As required by the Court in *Agostini*, the litigants provided actual evidence of the diversion of the aid for religious use. They also presented evidence of the “pervasive religious character” (10) of the sectarian schools to demonstrate that religion and religious indoctrination was an essential component of the schools entire curriculum and employment practices. Although the Court in *Agostini* overruled the precedent that public school teachers could not, because of the pervasively sectarian environment,

Amici
<p>Accommodationists</p> <ul style="list-style-type: none"> • Becket Fund for Religious Liberty • Catholic League for Religious and Civil Rights • Christian Legal Society and National Association of Evangelicals • City of New York and the Board of Education of the City of New York • Institute for Justice, American Education Reform Foundation, Center for Education Reform, CEO America, Floridians for School Choice, Greater Educational Opportunities Foundation, Milton and Rose D. Friedman Foundation, and Parents for School Choice • Knights of Columbus • National Jewish Commission on Law and Public Affairs • Ohio, Colorado, Florida, Iowa, Illinois, Kansas, Louisiana, Michigan, Mississippi, Nebraska, New Jersey, South Carolina, and the Commonwealth of Virginia • Pacific Legal Foundation • Rutherford Institute • U.S. Catholic Conference • Washington Legal Foundation

strictly separate secular from sectarian instruction for students in sectarian schools, the Court had not overturned this “longstanding view with regard to parochial school teachers” (12). Any government effort to ensure that sectarian school teachers provided purely secular instruction while using public aid would compromise the religious integrity of the sectarian school and cause “the state to unintentionally ‘bribe’ them into extensive secularization” (15).

The separationist litigants also described how the aid supplanted – not supplemented – the sectarian schools’ educational functions and that the aid directly benefited the school and teachers (e.g. duplicating machines, desks and chairs, cameras, and public address systems). The decisions in *Meek* and *Wolman* prohibiting the provision of instructional materials to sectarian schools followed “the *Cochran/Everson/Allen* doctrine that state aid must benefit the student and not the religious school enterprise and that the aid itself must not be sectarian or divertible to sectarian use. It also applied the *Lemon/Nyquist* insight that parochial school teachers will teach religiously even in secular courses” (25).

The pervasively sectarian standing of parochial schools was necessary for what it prevents as well as what it allowed. The pervasively sectarian status appropriately allowed the schools to “discriminate based on religion in hiring, firing, student admission and student and faculty discipline” (32); however, with these privileges comes prohibitions that prevent the state from providing aid that may advance their religion. To counter the use of materials to promote religion in sectarian schools the Secretary of Education required the creation of a “religion free zone” when using state aid. This was the action that prompted Marie Schneider to become a litigant supporting the separation of church and state, her “great fear – that state aid will be a tool that will secularize the teaching of most subjects in parochial schools” (33)

Lastly, they argued that the aid was not supplemental and was directed to the teachers rather than the students so it impermissibly advanced the educational mission of the sectarian school. The aid was also used for all subjects regardless of religious content and the state monitoring was insufficient to prevent the aid from being diverted for religious use.

The *amicus* brief of the ACLU *et al.* opened by stating, “There is no single test for determining compliance with the Establishment Clause” and a statute or action must be assessed “through a close examination of its facts” (5). They found that the Court had consistently used the framework of the *Lemon* test and now used its refined version developed in *Agostini*. In this instance the applicable criteria used by the Court prohibited aid from being diverted for religious education, and required that an effective method must be in place to ensure that the aid was used for only secular purposes. The *amici* focused their discussion on these issues, but were quick to assure the Court that other arguments, such as the public aid supplanting funding obligations of the sectarian schools, should also be considered by the Court in making their determination.

They argued that Court precedent was clear – the risk of diversion required safeguards to ensure the aid was used for secular purposes. If the risk of diversion could not be properly safeguarded or the safeguards required an inordinate intrusion (excessive entanglement) into the sectarian school then the aid should be determined to be impermissible. They noted that no Court decision required the litigants to provide evidence of actual diversion, but simply ruled that “the substantial risk of diversion, without appropriate attendant safeguards, renders a program unconstitutional” (15). The facts of this case, they argued, reveal that the aid provided in this program was “readily divertible to religious uses” and “there were no meaningful safeguards in place” (17).

The *amici* countered the accommodationist litigants use of the neutrality principle, explaining that taking this rationale to its logical conclusion “would allow – indeed it would require – the government, in the name of properly educating all American children, to provide unlimited aid to religious schools since similar aid is offered to public schools” (16). However, the neutrality principle as promoted did not deal with issues of concern to the Court such as diversion of state aid to advance religion and religious indoctrination.

The *amicus* brief of the Baptist Joint Committee (BJC) clarified a claim by the accommodationist litigants who stated that the BJC advocated for the adoption of the Elementary and Secondary Education Act of 1965. The brief declared that the BJC did not advocate for the adoption of the act, but did “work with Congress to ameliorate church-state concerns” (2). Because of how the act was being implemented BJC passed a

resolution in 1966 stating that the act provided improper aid to sectarian schools. The Baptist Joint Committee devoted its entire brief to clarify not only the misinterpretation of recent history as noted above, and also rectifying the distorted history of the creation of Establishment Clause presented by the accommodationist litigants. The *amicus* focused on James Madison “as the key architect of the First Amendment” (3) and that credible historical research demonstrated his “desire for a strict separation between church and state” (10). Counting each example of historical evidence provided by the accommodationist litigants, the Baptist Joint Committee concluded that, “James Madison’s writings and public pronouncements do not provide even a scintilla of support for nonpreferential [evenhanded neutrality] aid to religion” (11).

The *amicus* brief of the Interfaith Religious Liberty Foundation⁵⁹, a coalition of religious and educational leaders, denied the accommodationist litigant argument that the Chapter 2 aid was provided to the students rather than the schools. The Foundation stated that Chapter 2 aid was provided directly to the school because the school – and not the children – take possession of the aid, therefore the accommodationist reliance on cases involving the permissibility of indirect aid (e.g. *Witters* and *Zobrest*) was not applicable. They argued that Court precedent, starting with *Everson*, clearly prohibited direct aid to pervasively sectarian schools. The *amicus* provided a great deal of evidence from a variety of religious perspectives showing that secular and sectarian education cannot be separated in religious schools and that “Religious schools ARE the church, and aiding them is aiding the church, not some secular educational function” (11). Therefore “There are no secular subjects. Aid to any part of the educational endeavor is aid to the indoctrination function. Government simply cannot aid a ‘secular’ educational function without also partnering in the religious mission. It is impossible” (17). They also pointed out that the aid violated the endorsement test: “In this case, government isn’t just sending a message of approval or support, it is supplying the actual means of support in the form of educational equipment. Such actual support must also constitute prohibited endorsement” (18).

⁵⁹ This brief was prepared by Derek Davis from the J.M. Dawson Institute of Church State Studies, Baylor University and Alan J. Reinach from the Pacific Union Conference of Seventh-day Adventists.

The Interfaith Religious Liberty Foundation argued that the accommodationist use of the neutrality principle would harm religion and religious liberty. The evenhanded interpretation of neutrality providing government aid to sectarian schools would inevitably produce intrusive government regulations regarding student admissions and the certification and hiring criteria of teachers. Government regulation would threaten the autonomy of religious institutions and harm religion. If government provides sectarian schools with neutral government aid and excludes “them from public scrutiny and accountability. This would discriminate in favor of religion” (25). They argued that “the ‘no direct aid’ principle achieves true substantive neutrality, protecting religious liberty by forbidding direct aid and protecting against intrusive regulation of religion” (*ibid.*). The evenhanded neutrality promoted by the accommodationist litigants would result in the discrimination of religions that choose not to operate full-time sectarian schools, other sectarian schools will secularize their education to be eligible to obtain government aid, and sectarian schools will become dependent on public funds.

The *amicus* concluded by stating that direct government aid of religious institutions threatened the “principle of voluntarism, a central premise of the American scheme of ordered liberty” (29). Voluntary funding, rather than government funding, of religious enterprises had created in our country “an unparalleled explosion of religious vitality” (*ibid.*). The Foundation referenced Thomas Jefferson and John Leland (a colonial Baptist minister) in their support of voluntarism and their belief that the result of government support of religion was according to Jefferson the destruction of religious liberty and to Leland the corruption of religion. The Foundation concluded its brief by stating, “it is the principle of direct aid to religion that offends American notions of liberty and justice, and threatens to unravel both religious liberty and the vitality of religion in America” (30).

National PEARL and Americans for Religious Liberty, in their *amicus* brief, wanted the Court to uphold the precedents of *Meek* and *Wolman* which forbade direct aid that provided support for the overall educational function of the sectarian school, thereby impermissibly aiding in religious indoctrination and the advancement of religion. They refuted the accommodationist litigant’s claim that *Agostini* “disavowed *Meek* and *Wolman* and, in particular, any distinction between ‘direct and substantial’ and ‘indirect

and incidental' aid" (3). They urged the Court to uphold these precedents and the distinction between direct and indirect aid. They also argued that because of the pervasively sectarian nature of the schools, the teachers employed by these schools would inevitably use "the state-funded equipment for inculcating religious belief and aiding religious education" (9). Without the limitation of direct and indirect aid, they argued that the neutrality principle would allow unlimited state "sponsorship of religious education, including the construction of the religious schools themselves" (12). They concluded that in the event the Court did declare the aid to be indirect, the program was still impermissible because the aid did not provide effective safeguards to prevent it from being diverted to religious use.

The National School Boards Association *et al.* and the NEA *amicus* briefs reiterated the arguments used above regarding the prohibition of direct aid to pervasively sectarian schools, the distinction between direct and substantial and indirect and incidental aid, the impermissibility of aid that supplants rather than supplements, and the lack of effective safeguards allowing for diversion of aid. In addition to these arguments, the NEA asked the Court to be mindful of the fact that the decision in this case would have "significant implications for the constitutionality" of voucher cases that were making their way to the Court (2). They reminded the Court of Justice Jackson's statement that "sometimes the path that we are beating out by our travel is more important to the future wayfarer than the place in which we chose to lodge" (*ibid.* from *First National Bank v. United Air Lines* (1952)). They urged to Court to reject the path of the accommodationist litigants' "simplistic 'neutrality' principle that would open the door to unprecedented government funding of religious activities" (2-3). The NSBA *et al.* advanced the entanglement test by arguing that the "pervasive and ongoing monitoring" needed to ensure that the Chapter 2 aid was not diverted would "provoke the type of excessive entanglement which this Court in *Agostini* indicated would have an impermissible effect under the Establishment Clause" (14-15). They also urged the Court not to accede to the accommodationist litigants' arguments that would "subordinate the Establishment Clause to the Free Exercise Clause" (24).

Decision of the Court

In a plurality decision, the Court decided (6-3) that the aid program was permissible. Justice Clarence Thomas wrote for the plurality joined by Justices Antonin Scalia, Anthony M. Kennedy, and Chief Justice William H. Rehnquist. Justice Sandra Day O'Connor wrote a concurring opinion joined by Justice Stephen Breyer. Justice David Souter wrote the dissenting opinion joined by Justices John Paul Stevens and Ruth Bader Ginsburg.

Justice Thomas stated, in the plurality opinion, that the Court in *Agostini* had revised the *Lemon* test so that now only the first two prongs (i.e., secular purpose and primary effect) needed to be evaluated to determine constitutionality because excessive entanglement had been incorporated into the effect prong. The Court, he argued, now used three criteria to evaluate the primary effect of a statute, did it: “result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement” (*Mitchell* 808).

According to the plurality decision, in order for the Court to find a public-aid-to-sectarian school statute unconstitutional it must be shown that “any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action” (809). Proving this effect also resolves the question of whether the public aid impermissibly subsidized religion. The examination of government indoctrination, Thomas argued, hinged on the principle of neutrality, “If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government” (*ibid.*). Thomas combined the neutrality principle with the principle of individual choice, in which “aid that goes to a religious institution does so ‘only as a result of the genuinely independent and private choices of individuals’” (810, quoting *Agostini*), to ensure that when the aid goes to a religious institution it does so free of government influence. This new use of the individual choice principle greatly broadens its application. In prior cases individual choice was defined as providing public funds to individuals who then made private decisions on where to spend the funds. Thomas transformed individual choice by allowing direct government funding of sectarian

schools based on a “per capita allocation scheme” (830). Both Justice O’Connor and Souter critique this new interpretation of individual choice (see below).

Thomas stated that the intertwined principles of neutrality and individual choice were “prominent not only in *Agostini*, but also in *Zobrest*, *Witters*, and *Mueller*” (810-1). *Agostini*’s second criteria, defining aid recipients by reference to religion, was also satisfied by the neutrality and individual choice principles ensuring that aid does not “create a financial incentive to undertake religious indoctrination” (813). Since the separationist litigants did not question the secular purpose or the entanglement aspects of the statute, the Court did not need to respond to these issues. Thomas dismissed as irrelevant the separationist litigant arguments that direct and non-incidental aid to sectarian schools was unconstitutional and that any aid that has the potential of diversion should be impermissible. Both of these arguments were “inconsistent with our more recent case law, in particular *Agostini* and *Zobrest*, and we therefore reject them” (815). Thomas went on to claim that to label a “program ‘direct’ or ‘indirect’ was a rather arbitrary choice” and “one that does not further the constitutional analysis;” therefore, the direct/indirect criteria was not a component of the neutrality and individual choice principles (818). As for divertibility, Thomas argued that as long as the aid provided “is not itself unsuitable for use in the public schools because of religious content” it was permissible and any subsequent religious use of the aid “to indoctrinate cannot be attributed to the government and is thus not of constitutional concern” (820).

Thomas challenged the arguments used in the dissent by asserting that the Court no longer considers the issue of whether or not a school “is pervasively sectarian” (826), writing that it was once a criterion of the Court, “But that period is one that the Court should regret, and it is thankfully long past” (*ibid.*). Thomas also chastised the dissent for their “speculation as to the likelihood of a phenomenon” such as political divisiveness occurring from a statute and that this type of argument simply makes the Constitution “unnecessarily clouded” (825-6)

Thomas concluded that the Chapter 2 aid was permissible because the aid: was provided neutrally without regard to religion; had permissible content (with some exceptions noted below); and, was allocated based on the individual choices of parents regarding which type of elementary and secondary school their children attended.

Although the aid was not given directly to the child, he said the aid “follows the child” (830). Thomas did recognize that some of the materials supplied (i.e., library books) to the sectarian schools did have improper content, but he was “unwilling to elevate scattered *de minimis* statutory violations, discovered and remedied by the relevant authorities themselves prior to any litigation, to such a level as to convert an otherwise unobjectionable parishwide program into a law that has the effect of advancing religion” (835). Lastly, Thomas declared that the plurality decision overturned the Court ruling of prohibited activities in *Meek* and *Wolman*.

Justice O’Connor, joined by Justice Breyer, issued a concurring opinion. O’Connor agreed with Justice Thomas that *Agostini* was the controlling precedent and that portions of *Meek* and *Wolman* should be overturned; however, she could not join the Thomas opinion because she believed that he went too far with regard to: the use of the neutrality principle, the distinction between direct and indirect aid, and the permissibility of aid diversion.

She agreed with Justice Souter’s position (see below) that Thomas inappropriately elevated the neutrality principle as a singular and sufficient test to determine Establishment Clause cases. She stated, “we have never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid” (839), and “we have long been concerned that secular government aid not be diverted to the advancement of religion” (840). O’Connor objected to Thomas’ conclusion that diversion was permissible based on *Witters* and *Zobrest*, writing it was incorrect because of the important distinction between direct and indirect aid. She found diversion to be permissible when the aid is given to an individual and the individual then independently decides to provide the aid to a religious institution. Her analogy was of the government issuing a paycheck to an employee and then the employee deciding to donate a portion of his/her pay to a religious institution. O’Connor stated, “I do not believe we should treat a per-capita-aid program the same as the true private-choice programs considered in *Witters* and *Zobrest*” (842). O’Connor went on to explain that direct non-monetary aid to a sectarian school could be perceived as a government endorsement of religion, and there were special dangers involved when the government makes direct monetary support to religious institutions. She warned that

Thomas' opinion, "foreshadows the approval of direct monetary subsidies to religious organizations, even when they use the money to advance their religious objectives" (844).

Justice O'Connor reiterated her interpretation of Establishment Clause jurisprudence she established in *Agostini* describing that it was controlled by the answers to two questions: 1) was the government aid given with the purpose of advancing or inhibiting religion? and 2) did the aid have the effect of advancing or inhibiting religion? The latter question can be determined by three criteria: "1) whether the aid results in governmental indoctrination, 2) whether the aid program defines its recipients by reference to religion, and 3) whether the aid creates an excessive entanglement between government and religion" (845). She concluded that the same criteria should be evaluated "to determine whether a government-aid program constitutes an endorsement of religion" (*ibid.*).

Agreeing with Justice Thomas, O'Connor declined to review questions concerning the secular purpose of the statute and entanglement because the separationist litigants did not raise these issues. She determined that the Chapter 2 program did not violate the first effect criteria (advance or inhibit religion) because the aid was allocated on the basis of a neutral, secular criteria and the aid was used "only to supplement the funds otherwise available to a religious school, ...must in no case be used to supplant funds from non-Federal sources," and no "funds ever reach the coffers of a religious school" (848). O'Connor also found that the Chapter 2 program did not violate the second criteria (defining its recipients by religion), because the aid was provided by a neutral, secular criteria available to beneficiaries in a nondiscriminatory manner.

As for the divertibility rule advanced by the separationist litigants, O'Connor argued that the potential of diversion for religious uses does not have a "constitutionally determinative status." Except for a footnote in *Wolman*, she stated, she could not find a Court precedent that would elevate this argument to a constitutional standard. O'Connor also argued that such a divertibility rule would have no limitations in its usage, for example, a government supplied lunch could be diverted to religious purposes by simply offering a blessing prior to the meal. She conceded that actual diversion was unconstitutional, but that litigants "must present evidence that the government aid in question has resulted in religious indoctrination" (858).

Justice O'Connor dismissed the separationist litigants' arguments that she should accept that the secular use restrictions were irrelevant in pervasively sectarian schools based on her decisions to uphold the Community Education portion of *Ball* in her *Agostini* opinion, and from her concurring opinion in *Ball* which stated in part "religion pervades the curriculum and the teachers are accustomed to bring religion to play in everything they teach" (*ibid.*). Her response was that the teachers employed by sectarian schools could be trusted to follow secular use restrictions,

When a religious school receives textbooks or instructional materials and equipment lent with secular restrictions, the school's teachers need not refrain from teaching religion altogether. Rather, the instructors need only ensure that any such religious teaching is done without the instructional aids provided by the government. We have always been willing to assume that religious-school instructors can abide by such restrictions when the aid consists of textbooks... (859).

She defended her prior opinions by stating,

There [*Ball's* Community Education program], the government paid for religious-school instructors to teach classes supplemental to those offered during the normal school day. In that context, I was willing to presume that the religious-school teacher who works throughout the day to advance the schools religious mission would also do so, at least to some extent, during the supplemental classes provided at the end of the day. Because the government financed the entirety of such classes, any religious indoctrination taking place therein would be directly attributable to the government (859-60).

Although the separationist litigants did present evidence that the Chapter 2 aid was used to support religious indoctrination and some of the aid provided did violate the secular content restrictions, O'Connor did not believe it reached a level to declare the program unconstitutional. However, she did disagree with the plurality decision that such violations could never reach a level to determine a statute unconstitutional. She also disagreed with the dissent that pervasive monitoring was necessary to create a "failsafe mechanism capable of detecting *any* instance of diversion" (861).

In his dissent Justice Souter, joined by Justices Stevens and Ginsburg, reviewed the objectives of the Establishment Clause with regard to elementary and secondary sectarian school aid in the hope that "their recollection may help to explain the misunderstandings that underlie the majority's result in this case" (870). Souter stated

that there are three main concerns regarding Establishment Clause jurisprudence: Madison and Jefferson's "freedom from coercion to support religion" (*ibid.*, including Madison's opposition to even a three pence taxation to support religion); "government aid corrupts religion" (871); and, "government establishment of religion is inextricably linked with conflict" (872). Souter claimed these concerns were reflected in the Court's *Everson* decision prohibiting government aid of one religion over another, to support religious activities or institutions, or to teach religion. However, according to Souter, to ensure that the no-aid principle did not violate the Free Exercise Clause the Court developed a neutrality principle that allowed "public benefits provided pervasively throughout society that would be of some value to organized religion" (873) but that did not violate the Establishment Clause. The Court provided specific examples such as sidewalks, police and fire protection, and connection to public utilities. This neutrality principle, Souter argued, was not comparable to the plurality's current interpretation of neutrality as "synonymous with evenhandedness in conferring benefit on the secular as well as the religious" (877).

Souter explained that the Court had used the term 'neutrality' in three ways since *Everson*. In *Everson* the term meant "for government in its required median position between aiding and handicapping religion" (879). The second use of the term, involved the provision of non-monetary aid that was neutral – or secular in its function – such as *Allen's* textbooks and *Zobrest's* translator. Thirdly, the Court used the term to describe the criteria and evenhandedness of who was eligible for the aid, such as the tax credits in *Mueller*, which were available to all parents. Souter argued that the original use of neutrality, the sense of equipoise, was "tantamount to constitutionality" (883); however, the third use of evenhandedness, "is not alone sufficient to qualify the aid as constitutional" (884). Additionally, he said, the Court must look at such other factors as: the overriding religious mission of the sectarian school and the educational level of the students; whether the aid was direct or indirect; the religious content of the aid; the form of the aid (cash, material loan, etc.); the ability to divert the aid to support the religious mission of the school; whether the aid supplants or supplements a traditional expense of the school; and how substantial was the amount of aid provided.

Souter declared, “As a break with consistent doctrine the plurality’s new criterion is unequaled in the history of Establishment Clause interpretation. Simple on its face, it appears to take evenhandedness neutrality and in practical terms promote it to a single and sufficient test for the establishment constitutionality of school aid” (900). He concluded that the plurality’s use of neutrality “eliminates the effect enquiry directed by *Allen* and *Lemon*, and other cases” (901).

For the case at hand, Souter focused almost exclusively on the fact that aid was actually diverted for religious indoctrination and could easily be diverted in the future because of the lack of safeguards needed to ensure that these pervasively sectarian schools only used the aid for secular purposes. The fact that the justices writing the plurality and concurring opinions all admit that diversion had taken place and that the potential for further diversion existed, led Souter to conclude the “Court has no choice but to hold that the program as applied violated the Establishment Clause” (910). Additionally, he found that the “government did not even have a policy on the consequences of noncompliance” (907). Nevertheless, Souter wrote, the Court upheld the program, but he chastised them by stating that the “plurality would break with the law. The majority misapplies it. That misapplication is, however, the only consolation in the case, which reaches an erroneous result but does not stage a doctrinal coup. But there is no mistaking the abandonment of doctrine that would occur if the plurality were to become a majority” (911).

Implications for Future Cases

Regardless of the avowed use of O’Connor’s *Agostini* test, the plurality, supported by Rehnquist, Thomas, Scalia and Kennedy, promoted the neutrality principle (as advanced by Rehnquist in *Wallace*) as a constitutional standard to evaluate elementary and secondary sectarian school aid programs. Justices O’Connor and Breyer embraced the test developed in *Agostini* and disagreed with the plurality over: the supremacy of the neutrality principle, the distinctions between direct and indirect aid, and the criteria for true private choice. Justice O’Connor felt the need to also reconcile her opinion in *Ball* with the present case. Only three justices, Souter, Ginsburg, and Stevens, continued to support the arguments traditionally used by the separationist coalition.

The litigants worked very hard to craft their argument into the framework provided by O'Connor in *Agostini*. They attempted to demonstrate that the public aid subsidized religious indoctrination, that it would inhibit religion because of the secularization of the sectarian schools supported, and that it supplanted private funds with government aid. They also provided actual evidence, as required by O'Connor in *Agostini*, that the aid was diverted for religious use. However, their arguments did not reach a high enough threshold to convince O'Connor to side with the separationist coalition. The ACLU *et al.* attempted to challenge the breadth of O'Connor's requirement for evidence of indoctrination as put forward in *Agostini*, by stating that such evidence had never been required by the Court for the purposes of diversion. O'Connor in her opinion in this case clarified that indeed actual evidence was necessary rather than simply the potential for diversion. O'Connor and Breyer weakened the pervasively sectarian argument by continuing to distinguish between secular and sectarian functions and stating that religious school employees would abide by secular use only restrictions. However, O'Connor and Breyer did accept the argument that direct aid to pervasively sectarian schools continued to be impermissible if the program supplanted substantial private funds with government aid.

Chapter 20: *Zelman v. Simmons-Harris* (2002)

Case Overview

The Ohio Pilot Project Scholarship Program provided tuition aid for parents of students in the Cleveland City School District to attend nonpublic schools of their choice. Parents of students who decided to remain in the public schools were eligible to obtain tutorial aid. The statute required that an equal number of students receive vouchers for nonpublic schools as those obtaining tutorial grants. The statute also allowed Cleveland school district children to apply to public charter and magnet schools, and public schools in adjacent school districts. However, none of the adjacent public school districts agreed to participate in the program. Aid was provided to parents based on financial need. In the 1999-2000 school year, 82% of the participating nonpublic schools were religious institutions and 96% of the students participating in the voucher program attended sectarian schools.

A group of Ohio taxpayers filed a complaint that the program violated the Establishment Clause. Both the Federal District Court and the Sixth Circuit ruled that the program had the primary effect of advancing religion and was therefore in violation of the Establishment Clause. The rulings were appealed. The Supreme Court granted certiorari, consolidated three cases regarding the program into one, held oral argument on February 20, 2002, and delivered its opinion on June 27, 2002.

Litigants	
Separationists	Accommodationists
Doris Simmons-Harris, Marla Franklin, Rev. Steven Behr, and Mary Murphy ⁶⁰ (66) Sue Gatton, Rev. Michael DeBose, Cheryl DeBose, Glenn Atlschuld, Diedra Peterson ⁶¹ (67)	Dr. Susan Tave Zelman, Superintendent for Public Instruction for the State of Ohio; State of Ohio; and, Sandra Berry, Director of the Cleveland Scholarship and Tutoring Program. Senel Taylor, Johnnietta McGrady, Christine Suma, Arkela Winston, and Amy Hudock Hanna Perkins School; Ivy Chambers; Carol Lambert; Our Lady of Peace School; Westpark Lutheran School Association, Inc.; Lutheran Memorial Association of Cleveland; and, Delories Jones.

⁶⁰ *Simmons-Harris et al.*, were represented by Ohio Education Association, American Civil Liberties Union Foundation, American Civil Liberties Union of Ohio, People For the American Way, and Americans United for Separation of Church and State.

⁶¹ David J. Strom and Marc D. Stern, represented Gatton *et al.* Strom was affiliated with the American Federation of Teachers and Stern with the American Jewish Congress.

Separationist Arguments

In this case there are two separationist litigants who brought separate actions that were consolidated: Simmons-Harris *et al.* and Gatton *et al.* These litigants filed separate briefs for this case.

Rather than utilizing a specific test, the Simmons-Harris litigants urged the Court to use *Nyquist*, *Sloan*, and *Witters* as the guiding precedents for this case. *Witters* held that if unrestricted aid from a third party to a religious institution was “properly attributed to the State” the aid program was impermissible (12). The litigants argued that the program was structured and operated in a manner that ensured that the vast majority of the funds would go towards religious schools. With 82% of participating schools being sectarian, the structure did not provide a true private choice for parents because it was “so heavily ‘skewed towards religion’” (24, quoting *Witters*) and there were no

Amici	
Separationists	Accommodationists
<ul style="list-style-type: none"> • American Jewish Committee; Baptist Joint Committee on Public Affairs; Hadassah, Inc.; Jewish Council for Public Affairs; National Council of Churches of Christ in the USA; National Council of Jewish Women, Inc.; Union of American Hebrew Congregations; Central Conference of American Rabbis; and, United Christ of Christ’s Justice and Witness Ministries (68) • Anti-Defamation League (69) • California Alliance for Public Schools (70) • Council on Religious Freedom, Northwest Religious Liberty Association, Seventh-day Adventist Church State Council, and Interfaith Religious Liberty Foundation (71) • NAACP Legal Defense and Education Fund, Inc and National Association for the Advancement of Colored People (72) • National Committee for Public Education and Religious Liberty (PEARL)⁶² (73) • National School Boards Association, California School Boards Association, Colorado School Boards Association, Michigan School Boards Association, Ohio School Boards Association, Washington State School Directors’ Association (pre-cert) (74) 	<ul style="list-style-type: none"> • American Center for Law and Justice and Focus on the Family • American Civil Rights Union • American Education Reform Council • Association of Christian Schools International, California Catholic School Superintendents, Connecticut Association of Independent Schools, Connecticut Council on American Private Education, Florida Association of Academic Nonpublic Schools, Florida Council of Independent Schools, Indiana Private Education Association, Kentucky Non-Public Schools Commission, Lutheran Education Association, Michigan Association of Nonpublic Schools, National Catholic Educational Association, New Jersey Council for American Private Education, New York Association of Independent Schools, Oregon Federation of Independent Schools, South Dakota Christian School Association, Southern Baptist Association of Christian Schools, Virginia Council for Private Education, and Washington Federation of Independent Schools • Becket Fund for Religious Liberty • Black Alliance for Educational Options
(continued below)	(continued below)

⁶² National PEARL members include: A. Philip Randolph Institute; American Federation of Teachers; Americans for Religious Liberty; American Humanist Association; Central Conference of American Rabbis; Community Church of New York; Council of Supervisors and Administrators; Hadassah; Jewish Labor Committee; Jewish Reconstructionist Federation; Minnesota Civil Liberties Union; Monroe County PEARL; National Council of Jewish Women; National Education Association; National Center for Science Education; New York State United Teachers; Ohio PEARL; United Community Centers; United Federation of Teachers; United Synagogues of Conservative Judaism; Washington Area Secular Humanists; Woman’s ORT; and Workmen’s Circle. The last of Sorauf’s Big Three left PEARL (American Jewish Congress), and a few new organizations (some from the former CPEARL) joined (see underlined).

restrictions on the aid for only secular use. Using O'Connor's argument in *Mitchell*

stating that the ultimate result of the neutrality principle would be impermissible per capita funding, the litigants described the result of the voucher program as a direct government per capita payment program to subsidize religious indoctrination. This unrestricted aid to sectarian schools could be directly attributed to the state because,

... in structuring the program and setting its terms, it is the government that effectively has determined that the program moneys will be used for the purpose of financing religious education, and that a parent participating in the program has no free 'spending authority' to use the tuition grant money for any other purpose (18).

This case, as in *Nyquist*, was facially neutral as to how the voucher funds could be spent; however, "the program criteria so narrowly constrained their available program options as in effect to create 'an incentive [for] parents to send their children to sectarian schools'" (36). This incentive impermissibly had the effect of

advancing religion. In addition to advancing religion, the litigants cited O'Connor's endorsement test and stated that the voucher program was impermissible because of the

Amici	
Separationists	Accommodationists
<ul style="list-style-type: none"> • National School Boards Association; National Parent Teachers Association; National Association of Secondary School Principals; American Association of University Women; American Association of School Administrators; National Association of Elementary School Principles; National Association of Federally Impacted Schools; National Association for Bilingual Education; Horace Mann League; National Alliance of Black School Educators; Public Education Network; James J. Blanchard, past Governor of the State of Michigan; Thomas D. Watkins, Jr., Superintendent for Public Education, Michigan; Kathleen N. Strauss, President Michigan Board of Education; Lawrence J. O'Neill, President Board of Directors of Milwaukee Public Schools; and, Jennifer Morales and Peter Blewett, both school board directors, Milwaukee Public Schools (post-cert) (75) • Ohio Association for Public Education and Religious Liberty (76) • Ohio School Boards Association, Ohio Association of School Business Officials, Buckeye Association of School Administrators, Ohio Coalition for Equity and Adequacy of School Funding, Coalition of Rural and Appalachian Schools, and Ohio Association of Secondary School Administrators (77) 	<ul style="list-style-type: none"> • Hugh Calkins • Catholic League for Religious and Civil Rights • Center for Educational Reform, American Legislative Exchange Council, Arizona School Choice Trust, California Parents for Educational Choice, Coalition for Parental Choice in Education, Education Excellence Coalition, Floridians for School Choice, Illinois Coalition for Parental Choice, Maine School Choice Coalition, United New Yorkers for Choice in Education, Center for Equal Opportunity, Center for Public Justice, Children First: CEO Kansas, Citizens for Educational Freedom, Commonwealth Foundation of Pennsylvania, Excellent Education for Everyone, "I Have a Dream" Foundation of Washington D.C., Hispanic Council for Reform and Educational Options, Minnesota Business Partnership, Nevada Manufactures Association, Texas Justice Foundation, Toussaint Institute Fund, Urban League of Miami, Beatrice D. Fowler, and Kyle Persinger • Center for Individual Freedom, Cato Institute, Milton and Rose D. Friedman Foundation, and Goldwater Institute <p style="text-align: center;">(continued below)</p>

“inevitable public perception that the State is endorsing religious practices and beliefs” (37).

The Simmons-Harris litigants felt compelled to revisit the interpretation of ‘primary’ in the primary effect prong of *Lemon*. The accommodationist litigants had argued that the primary effect of the program was to expand educational opportunities for disadvantaged children so other effects of the program were not constitutionally relevant. The Simmons-Harris litigants cited precedents which “squarely foreclosed” these discussions (38). The litigants also chastised the accommodationist litigants and *amici* for using their briefs to make arguments regarding educational policy stating, “this is not the appropriate forum for an educational policy debate. This case is about the Establishment Clause – and, specifically, what the Clause has to say about government financing of religious education and indoctrination” (41).

The Simmons-Harris litigants concluded that the *Nyquist*, *Sloan*, and *Witters* precedents provided a sound doctrine to decide this case. Any departure from the doctrine in these decisions would violate *stare decisis*. Quoting the Court in *Dickerson v. United States* (2000), they stated “while *stare decisis* is not an inexorable command, particularly when [the Court is] interpreting the Constitution ... the doctrine carries such persuasive force that [the Court has] always required a departure from precedent to be supported by some special justification” (43). They argued that there were no Court decisions that warranted a break with the *Nyquist*, *Sloan*, and *Witters* precedents and no “special justification” to depart from this jurisprudence.

The Gatton litigants opened their brief by stating that the “core protection of the Establishment Clause defends all of us

Amici
<p>Accommodationists</p> <ul style="list-style-type: none"> • Children First America; A Brighter Choice Scholarships; Alliance for Choice in Education; Arizona Scholarship Fund; Arizona School Choice Trust; Children First Central Florida; Children First Columbus, OH; Children First Delaware County, PA; Children First Kansas; Children First Utah; Children First Virginia; Children’s Educational Opportunities Horizon; Children’s Educational Opportunities (Austin, TX); Children’s Educational Opportunities (Oakland, CA); Children’s Scholarship Fund Arkansas; Children’s Scholarship Fund Baltimore, MD; Children’s Scholarship Fund Chattanooga, TN; Children’s Scholarship Fund Kansas City, MO; Children’s Scholarship Fund Maine; Children’s Scholarship Fund Portland, OR; DC Parents for Choice; Educate New Mexico; Education Freedom Fund; Educational CHOICE Charitable Trust; Helping Educate Responsible, Outstanding, and Enlightened Students; Kids First Scholarship Fund; Memphis Opportunities Scholarship Trust; Parents Advancing Choice in Education; Parents Challenge; Parents Advancing Choice in Education; Scholarship Fund for Inner City Children; School CHOICE Scholarships; Star Sponsorship Program; The Guardsman; and, Washington Scholarship Fund <p style="text-align: center;">(continued below)</p>

against compelled support through tax monies of functions or activities of religions of which we are nonadherents or opponents or even supports as voluntary members” (7).

Unrestricted aid to sectarian schools as provided through the voucher program was a violation of this core protection. They provided a historical argument that this core protection had been held by Thomas Jefferson and James Madison and upheld by the Court since *Everson*, including the modern Court when Justice O’Connor stated in *Rosenberger v. Rector* (1995)⁶³ that there was “no precedent for the use of public funds to finance religious activities” (15).

Although they never use the term “pervasively sectarian” they do quote school literature to show that, “Eligible religious schools repeatedly proclaim that they integrate a religious point of view into every aspect of their teaching” (11). Since religion permeates the sectarian schools unrestricted aid has the impermissible effect of advancing religion as described in *Agostini* test. They also reiterated the arguments used by the Simmons-Harris litigants regarding *stare decisis*, the neutrality principle, and true private choice.

The *amicus* brief of the American Jewish Committee *et al.* described themselves as “a broad spectrum of religious and religiously-affiliated organizations” who “stand to benefit from the [voucher] programs” but nonetheless believe that vouchers are unconstitutional and bad public policy (1). They devoted half of their case introduction describing vouchers as bad public policy because of the few students who can benefit from the program and the resulting diversion of needed funds to improve the public schools for the vast majority of students. Later in their brief they argued that the Cleveland public schools were failing because of the disparities in funding between school districts in high

Amici
Accommodationists
<ul style="list-style-type: none"> • Jesse H. Choper, Thomas Baker, William Bassett, Tom Berg, Ashutosh Bhagwat, Teresa Collett, John Coons, Rev. John Coughlin, Brannon Denning, John Dipippa, John Eastman, Allen Ferrell, David Forte, Richard Garnett, Frederick Gedicks, Mary Ann Glendon, Lino Garglia, Michael Heise, Gail Heriot, Roderick Hills, Scott Idleman, Donald Kommers, Grant Nelson, Michael Perry, David Post, Charles Rice, Rosemary Salomone, Bernard Seigan, Gregory Sisk, Steven Smith, Andrew Spiropoulis, Harry Tepker, Eugene Volokh, Richard Wilkins, and John Witte (all law professors - this brief which was partially funded by the American Education Reform Council) • Christian Legal Society; Ethics and Religious Liberty Commission of the Southern Baptist Convention; Family Research Council, Inc.; and, National Association of Evangelicals • Claremont Institute • Center for Constitutional Jurisprudence • Cleveland City Councilwoman Frannie Lewis • Coalition for Local Sovereignty • John E. Coons and Stephen D. Sugarman <p style="text-align: center;">(continued below)</p>

⁶³ Justice O’Connor dissented in this case, which allowed University of Virginia student activity fees to be used to support the activities of a student religious group. Justice Kennedy based his (5-4) majority opinion on the neutrality and individual choice principles as well as freedom of speech.

property value and income areas and those in low income areas, adding that a voucher program simply exacerbates the problem of scarce resources. They also provided examples of how the funding disparities and the limited aid to transfer a student into an adjacent public school district created a financial disincentive for them to participate: “Accordingly, no adjacent [public] school district has chosen, or will ever choose, to shoulder the additional cost of educating voucher students” (20).

They concurred with both litigants that constitutionally the program failed because it: provided unrestricted funds to promote the religious mission of the schools; was skewed toward religious education creating the effect of advancing religion; and, did not provide a true private choice in education creating an impermissible incentive for parents to send their children to sectarian schools. They also used an excessive entanglement argument showing that a natural side effect of government aid was government control. Therefore this program “would usher in a new relationship between government and religion, one that threatens the autonomy of all religious entities” (5). Heeding the call of the *Mitchell* plurality to abstain from using the term “pervasively sectarian” the *amici* consistently used the term “pervasively religious.” They stated that for these “pervasively religious” schools the “lack of a secular content restriction alone should render the Ohio Vouchers Program unconstitutional” (13, citing O’Connor’s concurring opinion in *Mitchell*).

The *amici* also referenced issues regarding the substantiality of the aid, the rule regarding supplementing rather than supplanting, and the impressionable age of children in elementary and secondary schools. They even resurrected Brennan’s means test prohibiting the use of “essentially religious means to serve governmental ends, where secular means would suffice” (26). This test was derived from Madison’s *Memorial and Remonstrance*, which was quoted near the conclusion of the *amici* brief. They ended with a warning that if this program “survives Establishment Clause scrutiny, the

Amici
Accommodationists
<ul style="list-style-type: none"> • Rudolph W. Giuliani and John O. Norquist • Institute for Justice • Ira J. Paul and Robert N. Wright, Florida Public School Teachers; Independent Voice for Better Education; Teachers for Better Education; James Madison Institute; Pacific Research Institute; and, Pacific Legal Foundation • National Association of Independent Schools • National Jewish Commission on Law and Public Affairs • New Mexico Governor Gary E. Johnson • REACH Alliance • Rutherford Institute • Solidarity Center for Law and Justice, P.C. • State of Wisconsin • States of Florida, Alabama, Delaware, Mississippi, Nebraska, Pennsylvania, South Carolina, and Virginia • U.S. Conference of Catholic Bishops • U.S. Solicitor General • Vermonters for Better Education

separation between church and state that is among the founding principles of the country will be all but destroyed” (27).

The brief of National PEARL, who were the primary litigants in the *Nyquist* precedent, restated several of the arguments presented before: the impermissibility of direct and unrestricted aid, the Founders intent to keep the church and state separate, the aid perceived by a rational observer to represent an endorsement of religion, the limitations of the neutrality principle, and the need for a special justification to overturn precedent. However, they added an inventive argument that the restrictions placed on the sectarian schools regarding teaching of hatred and unlawful behavior were done so because the state of Ohio realized that it was funding the speech of the sectarian schools. This government-funded speech therefore carried “the imprimatur of the State” (11). The Free Speech Clause protects the rights of private entities whose viewpoints advocate hatred or violation of the law; however, the “government may place restrictions on speech when it is subsidizing its own message” (14). Therefore,

The State’s regulation of the message advocated by schools that receive voucher funds is grounded on the foundation that the schools’ message will be seen, accurately, as in part the State’s own message. If the message is one of religious indoctrination or the advancement of religion, as it is at many of the schools that receive voucher funds, the program thus violates the Establishment Clause (15-16).

National PEARL was the only national group to used the *Lemon* test to advance its argument, “For thirty years, the ‘general nature’ of this Court’s Establishment Clause analysis has been governed by the three-prong test set for in *Lemon*... Despite incremental adjustments to the Court’s application of the test, *Lemon* remains the touchstone for determining whether the State has run afoul of the Establishment Clause” (18). They described the impermissible political and administrative entanglements associated with the voucher program and urged the Court not to “abandon the examination of excessive entanglement required by *Lemon* and its progeny, including *Nyquist* and *Agostini*” (21). The brief of Ohio PEARL also used the *Lemon* test to argue that the voucher program was unconstitutional. They stated that although the program appears to have a secular purpose it violated the effect prong because of the direct and unrestricted aid provided. It also violated the third prong because of the “excessive

government entanglement with religion relative to the enactment and administration” of the program (11). Ohio PEARL used the majority of their brief to examine correspondence between Ohio Governor George Voinovich and Catholic Archbishop Daniel E. Pilarczyk and Bishop Anthony Pilla in crafting the legislation, lobbying for its enactment, and administering the program to provide evidence, as O’Connor required in *Agostini* and *Mitchell*, of this excessive entanglement.

The brief of the Anti-Defamation League reiterated issues of: the direct and unrestricted nature of the aid; the “inseparably entwined” rather than “pervasively sectarian” nature of the religious-secular education provided; the structure of the program precluding a true independent choice; and, the harm that comes to both religion and government when they become impermissibly entangled. The brief from the Council of Religious Freedom, also representing the Seventh-day Adventist Church, invoked Jefferson’s prohibition against forcing an individual to support a religion in which s/he does not believe, the advancement of religion through direct and unrestricted aid, how their schools taught all subjects “in a pervasively Christian context” as was true in religious schools of all denominations (14), and the aid “providing a reason and need for government to intrude into the affairs of religious organizations” threatening religious autonomy (3).

The brief of the California Alliance for Public Schools, a coalition of interest groups formed in 2000 following a failed voucher initiative in that state, repeated arguments used above: effect was to advance religion through direct and unrestricted aid used for indoctrination of impressionable youth and the structure of the program failed to provide parents with a true private choice. However, they also reviewed Court stances on public education demonstrating that elementary and secondary education was a function readily identified with the state, which served the state in preparing students to become good citizens. Therefore, using O’Connor’s endorsement test, they argued:

...the identification of the state with the educational function and its interest in the values that are communicated through the schools makes it far more likely that government payments for religious instruction will appear to any rational observer to be government endorsement of religion (10). ... Whether the average observer approves or disapproves of government endorsement is not the issue. It is the existence of the endorsement, here coupled with religious indoctrination at state expense,

that violates the Constitution. That endorsement is clear when a program deliberately directs schoolchildren into an educational market that is overwhelmingly religious (30).

National School Boards Association *et al.* filed briefs at both pre- and post-certiorari stages of the case. The pre-cert. filing recognized the changed litigation environment since *Nyquist* by stating that the voucher program “is a transgression of both historic and contemporary legal standards” (4). The brief focused on reasons why vouchers were “bad public policy” (7) and why the Court should let the lower court ruling stand. Their post cert. brief also reiterated arguments made regarding: the prohibition of direct and unrestricted aid, the structure of the program favoring sectarian schools, and the lack of a true private choice. However, the vast majority of the brief argued that vouchers were bad public policy because they were incompatible with the principles of public education in “furthering our common values and democratic processes” (8). Vouchers harm public education and society in that they “purport to benefit the few, but at the expense of the many; they represent the abdication by the states of their responsibility to provide for all students and to make accountable use of taxpayer funds; and they withdraw children from the democratic, diverse environment of the public schools” (2).

The brief of the NAACP and NAACP Legal Defense Fund was submitted solely to counter a claim made by the Taylor *et al.* accommodationist litigants that vouchers would fulfill the “sacred promise of equal educational opportunities for all American schoolchildren” (4) that the Court proposed in *Brown v. Board of Education* (1954). The *amici* stated that vouchers were simply a “device to open the doors for public support of pervasively sectarian pre-college educational institutions while ignoring the desperate educational plight of the mass of African-American and other minority students for whose benefit *Brown v. Board of Education* was brought and litigated” (12). They were the only separationist coalition member to use the term “pervasively sectarian.”

The Ohio School Boards Association *et al.* in their brief offered a unique argument to the debate. Although other briefs stated that the program violated the constitution because it coerced taxpayers to support religious education, these *amici* argued that the program violated the Free Exercise Clause of the students and parents

who were coerced to send their children to religious schools. They called this the “doctrine of unconstitutional conditions” in which the government “may not grant a benefit on the condition that the beneficiary surrender a constitutional right” (12, quoting from a Harvard Law Review article). This doctrine was derived from the Court’s decisions in school prayer cases decisions most recently *Santa Fe Independent School District v. Doe* (2000). In that case, the Court ruled that although attendance at the high school football game was voluntary the school could not have a prayer before the game because it forced religious conformity on all those attending. Using the evidence directive of O’Connor, the *amici* provided testimony from parents stating that the parents had no choice but to remove their children from the unsafe and inadequate public schools and put their children into sectarian schools. The religious schools were chosen because of the structure of the voucher program (tuition caps described above) even when the religious schools did not match the religious beliefs of the parents. Therefore by allowing the public schools to become physically unsafe and educationally inadequate the government forced parents to forgo their free exercise rights to protect their children. Based on the Court’s school prayer jurisprudence, they stated, the voucher program should be ruled unconstitutional. The *amici* also resurrected Brennan’s religious means test citing *Karen B. v. Treen* (1981) that the “state cannot employ a religious means to serve otherwise legitimate secular interests” (16). *Karen B.* was a school prayer case in which the Court of Appeals found the practice impermissible and used Brennan’s religious means as one of the reasons for overturning it. The Supreme Court affirmed the appeals court decision without opposition.

Decision of the Court

The Supreme Court decided (5-4) that the voucher program did not violate the Establishment Clause. Chief Justice William H. Rehnquist wrote the majority opinion joined by Justices Sandra Day O’Connor, Antonin Scalia, Anthony M. Kennedy, and Clarence Thomas. Justices O’Connor and Thomas each filed separate concurring opinions. Justice John Paul Stevens filed a dissenting opinion. Justice David Souter also filed a dissent joined by Justices Stevens, Ruth Bader Ginsburg, and Stephen Breyer. Justice Breyer filed a dissenting opinion that Justices Stevens and Souter joined.

Rehnquist's majority opinion found that the Establishment Clause "prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion" (*Zelman* 648-9). He noted that there was no dispute that the program had a valid secular purpose in providing educational assistance to poor children from a failing public school district. With regard to effect, Rehnquist maintained, that based on the Court's decisions in *Mueller*, *Witters*, and *Zobrest*, the program was constitutionally viable because it was neutral with respect to religion since it provided assistance directly to individuals who made independent decisions with regard on how to use that assistance.

He stated that the Court's ruling in *Nyquist* (see above) does not apply to this case because the assistance was made to individuals without regard to religion. As for the appearance of government endorsement of religion, Rehnquist contended, "we have repeatedly recognized 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 government endorsement" (654-5). According to Rehnquist, the fact that a vast majority of nonpublic schools participating were sectarian schools and the vast majority of students participating in the program attended sectarian schools was not constitutionally relevant. He argued, the "constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school" (658).

Rehnquist rejected the separationist litigants' claim that *Nyquist* was the controlling precedent stressing that the *Nyquist* program was limited to participation by sectarian schools whereas the Ohio program was open to a variety of schools. By including all possible school choices in his examination, he greatly expanded the Court's concept of the private choice principle. Prior Court decisions would simply focus on the program in question to determine the range of choices. Rehnquist stated that the private choice options were broader than the voucher program and included all schools both public and private:

There also is no evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options for their school-age children. Cleveland schoolchildren enjoy a range of

educational choices: They may remain in public schools as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school. That 46 of 56 private schools now participating in the program are religious schools does not condemn it as a violation of the Establishment Clause. The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school (655-6).

This expansion of the private choice principle would make practically any kind of tuition aid program constitutional. In a footnote Rehnquist also criticized Justice Breyer for his use of the argument that the program may produce religious divisiveness and strife. Rehnquist stated that such “speculative potential” had been long disregarded by the Court (662).

In her concurring opinion, Justice O’Connor agreed with the majority that this decision was not a dramatic break with past decisions of the Court; however, the case was “different from prior indirect aid cases in part because a significant portion of the funds appropriated for the voucher program reach religious schools without restrictions on the use of these funds” (663). She estimated that about \$8.2 million from the program went to sectarian schools in the 1999-2000 school year. O’Connor rationalized that although this “is no small sum, it pales in comparison to the amount of funds that federal, state, and local governments already provide religious institutions” (665). She described the various tax exemptions and deductions provided to religious institutions and the vast funds involved in these tax policies; as well as through programs such as Medicare, Medicaid, and Pell Grants that also provide substantial monetary sums to religious institutions. O’Connor admitted that, “While this observation is not intended to justify the Cleveland voucher program under the Establishment Clause, it places in broader perspective alarmist claims about implications of the Cleveland program and the Court’s decision in these cases” (668).

O’Connor also stated that the current decision was in accord with the principles of both *Everson* and *Lemon I*, finding that the *Lemon* test had only been slightly modified by incorporating the entanglement prong into the effect prong. Additionally, the decision

was in accord with *Everson* because Justice Black held that the Establishment Clause “requires the state to be a neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary” (669). A key determinate in O’Connor’s support for the Cleveland voucher program was the ability of parents to chose between a variety of schools: religious, private, charter, and magnet.

Justice O’Connor believed these options allowed the parents to make a true private choice of where to send their children. She observed, “The best evidence of this is that many parents with vouchers selected nonreligious private schools over religious alternatives and an even larger number of parents send their children to community [charter] and magnet schools rather than seeking vouchers at all” (671). Because of the variety of options available to parents, O’Connor argued, “the Cleveland program does not establish financial incentives to undertake a religious education” (672). After elaborating on the educational alternatives offered to parents to strengthen the individual choice argument presented in the majority opinion, O’Connor concluded, “I am persuaded that the Cleveland voucher program affords parents of eligible children genuine nonreligious options and is consistent with the Establishment Clause” (676).

In a concurring opinion, Thomas proposed, “that Ohio’s program easily passes muster under our stringent test, but, as a matter of first principles, I question whether this test should be applied to the States” (677). By disconnecting the Establishment Clause from the Fourteenth Amendment, he believed the states could be given more latitude in advancing religion as long as it is done in a neutral fashion, and as “long as these laws do not impede free exercise rights or any other individual religious liberty interest” (679). Thomas further expanded on the appropriateness of the neutrality principle in determining the constitutionality of cases, promoted the virtues of sectarian schools, and decried the failure of public schools in properly educating minority students.

In his dissent Justice Stevens argued that the condition of the Cleveland public schools should not be a factor in this constitutional question, especially considering that this program provided relief to less than five percent of the students in the school district. He further explained that, regardless of the options available to students, the creation a program within the public school system that provides state support of religious teaching and indoctrination was unconstitutional. Justice Stevens did not support the majority’s

reliance on the individual choice argument because the effect of the program was to provide religious teaching and indoctrination at state expense. Stevens also provided a historical argument and the civil strife argument to support the need for maintaining a strict separation of church and state.

Justice Souter's dissent, joined by Stevens, Ginsburg, and Breyer, stated that even in difficult situations, like the condition of the Cleveland public schools, constitutional lines had to be drawn. He argued that since the *Everson* decision, it had been clear that Establishment Clause jurisprudence meant that no public funds could be used to support religious institutions or activities. He stated that the majority decision was clearly at odds with the Court's precedents starting with *Everson's* imperative that "No tax in any amount, large or small, can be levied to support any religious activities or institutions" (687). According to Souter, the majority attempted to justify their decision by placing too much emphasis on, and distorting the Court's criteria for, the neutrality test and on individual choice. He asserted that the majority erred in this decision by failing to abide by well-established precedents regarding: divertibility of aid, substantial versus insubstantial aid, and supplemental versus supplanting of aid.

Justice Souter argued that the Ohio Pilot Project Scholarship Program was crafted to favor sectarian schools over nonreligious private schools, resulting in the bulk of the aid going to sectarian schools. Citing a General Accounting Office (GAO) report, the voucher cap of \$2,500 would cover the tuition expenses at Catholic schools and other religious schools whose tuitions averaged \$1,572 and \$2,213, respectively; however, private nonsectarian school tuitions averaged \$3,773. Therefore, low-income parents did not have a true choice in selecting nonsectarian private schools, and that was why over 96% of the voucher participants chose religious schools. Only with an increase in the voucher cap, Souter claimed would the program attain the majority's criterion of "true private choice" (706).

Souter sharply criticized Rehnquist's expansion of the private choice principle:

The majority's view that all educational choices are comparable for purposes of choice thus ignores the whole point of the choice test: it is a criterion for deciding whether indirect aid to a religious school is legitimate because it passes through private hands that can spend or use the aid in a secular school. The question is whether the private hand is genuinely free to send the money in either a secular direction or a religious

one. The majority now has transformed this question about private choice in channeling aid into a question about selecting from examples of state spending (on education) including direct spending on magnet and community public schools that goes through no private hands and could never reach a religious school under any circumstance. When the choice test is transformed from where to spend the money to where to go to school, it is cut loose from its very purpose.

Defining choice as choice in spending the money or channeling the aid is, moreover, necessary if the choice criterion is to function as a limiting principle at all. If “choice” is present whenever there is any educational alternative to the religious school to which vouchers can be endorsed, then there will always be a choice and the voucher can always be constitutional, even in a system in which there is not a single private secular school as an alternative to the religious school (699-700).

Souter argued that simply attaining the level of a true individual choice would still not save this program from being unconstitutional because of the vast amount of aid going to the pervasively sectarian institutions. He stated, “the majority makes no pretense that substantial amounts of tax money” from the program were “underwriting religious practices and indoctrination” (711).

Justice Souter expressed his fear that this decision would corrupt the mission of the sectarian schools and bring additional litigation to the Court. To be eligible to participate in the program the sectarian schools had agreed to not discriminate based on religion in admissions and employment and could not teach hatred of any person or groups. He believed these restrictions would corrupt the principles on which these schools were founded – having church members provide a religious based education to their parishioners by teaching basic tenets of their religion. The regulations would require non-church members be employed as teachers or the sectarian school could be sued for violating employment practices. Equally troubling would be that parishioners have to compete with non-adherents on an equal basis for the limited slots to attend the school. The teaching hatred restriction could be construed as preventing the teaching of prohibited practices and other articles of a particular faith. As government aid flows into sectarian schools tied by government regulations, Souter contended, “the only thing likely to go down is independence” (715). He was also concerned that government funding comes with the potential for “struggle of sect against sect for the larger share or

for any” (*ibid.*). He concluded, “I hope that a future Court will reconsider today’s dramatic departure from basic Establishment Clause principle” (717).

According to Justice Breyer’s dissent, joined by Stevens and Souter, the “concern for protecting the Nation’s social fabric from religious conflict poses an overriding obstacle to the implementation of this well-intentioned school voucher program” (*ibid.*) and that the argument of individual choice did not excuse a constitutional violation.

Breyer provided a short history of public education and the religious strife that occurred over determining which sectarian prayers were appropriate and whether or not to fund Catholic schools. The Court in *Everson* and subsequent cases, Breyer argued, worked to avoid “religious strife, *not* by providing every religion with an *equal opportunity* (say, to secure state funding or to pray in public schools), but by drawing fairly clear lines of *separation* between church and state” (722-3). He argued that with the great diversity of religious beliefs held by Americans “how is the ‘equal opportunity’ principle to work – without risking the ‘struggle of sect against sect’ against which Justice Rutledge warned [in *Everson*]” (723).

With regard to the Ohio voucher program, Breyer cited the PEARL brief which explained that the regulations that required participating schools not to “advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion” puts the government in the untenable position of a referee “to determine whether a particular religious doctrine ‘teaches hatred or advocates lawlessness’” (724). He provided examples of the need to adjudicate claims regarding the illegality of promoting civil disobedience in response to unjust laws, and whether or not a sectarian school teaches hate in its history class when it “casts members of other religions in the worst possible light” (*ibid.*).

Breyer argued that the individual choice argument used by the majority was flawed, particularly because it did not protect minority concerns. He stated that this argument “cannot help the taxpayer who does not want to finance the religious education of children” (728), the parent who sees no choice between a failing public school and sectarian schools “whose religious teachings are contrary to his own...religious minorities unable to participate because they are too few in number to support the creation of their own private schools” (*ibid.*), and those whose religion precludes them

from “participating in a government-sponsored program, and who may well feel ignored as government funds primarily support the education of children in the doctrines of the dominant religions” (*ibid.*). Breyer concluded, “The Court, in effect, turns the clock back. It adopts, under the name of ‘neutrality,’ an interpretation of the Establishment Clause that this Court rejected more than half a century ago. In its view, the parental choice that offers each religious group a kind of equal opportunity to secular government funding overcomes the Establishment Clause concern for social concord” (*ibid.*).

Implications for Future Cases

Although the separationist litigants and *amici* agreed that *Nyquist* was the controlling precedent for this case, only two of them used the *Lemon* test that provided the structure for the Court to arrive at their decision in *Nyquist*. Instead the separationist coalition used a variety of arguments that had been reinforced in recent opinion by members of the Court, especially Justice O’Connor, which fit into their goal of having the voucher program held to be impermissible. Only one brief introduced a truly new argument in this debate – the doctrine of unconstitutional conditions; however, none of the justices adopted this argument in their opinions.

In attempting to sway the swing justices of the *Mitchell* decision, the separationist coalition only found success with Breyer, although O’Connor did feel compelled to write a separate opinion to explain her decision to join the accommodationist majority. This decision fulfills Justice Souter’s fear from *Mitchell* that the Court would elevate the neutrality principle and individual choice as the determinate factors for deciding the constitutionality of a public-aid-to-sectarian schools statute. Justice Thomas foreshadows the potential of additional changes to Establishment Clause jurisprudence by promoting the idea that the Court ought to reconsider whether the Fourteenth Amendment applies the Establishment Clause to the states.

Section IV: Summary

These cases show a divided, but fairly consistent Court. During these cases only two members of the Court changed. Justice Stephen Breyer, who supported Justice O'Connor's modified *Lemon* test as presented in *Agostini*, replaced Justice Harry Blackmun, who supported the use of the *Lemon* test. Justice Ruth Bader Ginsburg, who consistently supported the separationist position, replaced Justice Byron White, who consistently opposed the separationist position. A block of four justices (Chief Justice William H. Rehnquist and Justices Anthony M. Kennedy, Antonin Scalia, and Clarence Thomas) was united in their accommodationist stance; and a block of three justices (John Paul Stevens, David Souter, and Ruth Bader Ginsburg) was united in their separationist stance. This left Justices Sandra Day O'Connor and Stephen Breyer as the swing votes on these cases. Justice O'Connor joined the separationist outcome only in *Zobrest*; whereas, Breyer joined in both *Agostini* and *Zelman*. Unfortunately, for the separationist advocacy coalition they needed to attract both of these justices to obtain a victory. As shown in the profiles of the last four cases this separationist coupling did not occur.

Uncertain of the Court's stance on aid to sectarian schools following its seven-year hiatus the members of the separationist coalition used a variety of arguments to promote their policy goals: *Lemon*, endorsement, coercion, and tradition. The endorsement, coercion, and tradition arguments were borrowed from other Court fora: school prayer, public display of religious symbols, and legislative prayers. When Justice Kennedy did not respond to the use of his coercion test in this fora, the coalition quickly dropped the use of his test. Justice O'Connor in *Agostini* greatly modified the *Lemon* test, but refused to embrace Rehnquist's neutrality principle as recommended by the accommodationist justices and litigants. In the next two cases (*Mitchell* and *Zelman*), the separationist coalition attempted to appeal to Justice O'Connor by building their arguments around elements of precedents that they believed O'Connor accepted as guiding the Court's decision-making: public aid that could be, and was, diverted for religious indoctrination was impermissible; public aid that was direct, unrestricted, and substantial that advanced the religious mission of the schools; among others. However, their arguments did not reach a high enough threshold to convince Justice O'Connor to

side with the separationist coalition. Although in each of her opinions she seeks to justify her shifting rationales in an endeavor to create a middle ground between the accommodationist and separationist positions, O'Connor consistently joined the accommodationist majorities in each case.

The changes in the separationist coalition's arguments were best demonstrated by the litigant briefs in *Aguilar v. Felton* (1985) and *Agostini v. Felton* (1997). These cases were simply a continuation of each other. They had the same litigants, presented the same questions before the Court, and the separationist litigants even used the same attorney, Stanley Geller. In 1985, the litigants used the *Lemon* test and focused on the effect and entanglement prongs. The effect prong revealed that the program both inhibited religion (through removal of religious symbols in the classroom) and advanced religion because the provision of teachers and equipment inevitably furthered the religious mission of the pervasively sectarian schools. The entanglement prong required that administrative contacts be monitored, but that because there were so many interactions between secular and sectarian staff the monitoring systems would be too oppressive to sustain the program and the program would lead to political entanglement creating religious strife. Conversely, in 1997, the litigants ignored the *Lemon* test and focused on three elements from precedent to argue that the program was unconstitutional: symbolic union conveying a message of government endorsement of the religious message; aid advanced religion by supplanting, not supplementing, educational programs; and the pervasively sectarian nature of the schools creates an environment untenable for public instructors to teach secular subjects. The 1997 litigants dropped the entanglement prong in favor of a variation of O'Connor's endorsement test and retained the two elements from the effect prong that they believed maintained favor with the Court: pervasively sectarian and supplanting versus supplementing.

In addition to being responsive to the perceived swing vote (Justice O'Connor) the separationist litigants also appeared to be surprisingly responsive to Justice Thomas, even though they knew he would not side with them. In *Mitchell*, Thomas railed against the argument that religious schools were too pervasively sectarian to receive aid. He said that the Court no longer considered this criterion in determining the constitutionality of a program. In the following case, *Zelman*, the separationist coalition, with the exception

of the NAACP, abandoned the term “pervasively sectarian” and replaced it with a host of other similar terms; however, none of them abandoned the concept behind the term. Although they retained the concept, they deferred to Thomas and refrained from using the actual term. The interview subjects for this project categorically denied deferring to Thomas on this issue. They stated that their motivation to drop the term was motivated by other factors (Green, Stern, Underwood, and Walker)

The only truly new arguments in this series of cases, both used in *Zelman*, were the state sponsored speech used by National PEARL and the doctrine of unconstitutional conditions used by the Ohio School Boards Association. However, neither argument found favor with any member of the Court (or with other members of the separationist advocacy coalition). In *Zelman* only National and Ohio PEARL used *Lemon* test. The remainder of the separationist coalition used elements from precedent that they felt were good law or hoped to retain as good law. PEARL’s use of the *Lemon* test was ironic because they were the last separationist interest group to embrace the test in *Regan* and then dropped it after *Aguilar*. The Council on Religious Freedom, American Federation of Teachers, and People For the American Way joined the coalition during this period; however, they did not bring new ideas to the separationist debate. In *Agostini*, the separationist litigants raised the issue of political ideology rather than law in promoting *stare decisis*. This was followed by two *Zelman* separationist *amici* briefs (one by the American Jewish Committee, Baptist Joint Committee and National Council of Churches and the other by the National School Boards Association) incorporating policy arguments, in addition to law arguments, into their briefs. Surprisingly this was the first time, even by other educational groups, that policy arguments were made. In the same case, the Simmons-Harris litigants, represented by the ACLU, People For the American Way, and AU, chastised the accommodationist litigants and *amici* for using their briefs to make arguments regarding educational policy. Lastly, the Court’s new requirements of evidence to prove indoctrination, diversion, and impermissible entanglement dates back to demands made by the accommodationist coalition in *Aguilar*, and the separationist coalition members quickly incorporated evidence into their briefs; however, the American Jewish Committee, American Jewish Congress, ACLU, AU, Anti-Defamation League, and People For the American Way tested the extent of the Court’s request for

evidence. Like Section II, the briefs of the separationist coalition contained extensive discussions attempting to counter the legal arguments presented by the accommodationist litigants and *amicus* filers.

Tables 9 and 10 provide a summary of the legal arguments used by the members of the separationist advocacy coalition in this section. Table 11 provides a summary of the justices' support for the separationist coalition.

Table 9

Legal Arguments Used to Support the Separationist Stance 1993-2002

Brief* /Argument	A	B	C	D	E	F	G	H	I	J	K	L	M	N
<i>Zobrest</i>														
48	X	X	X					X	X	X	X	X		T
49	X	X	X		X							X		
50		X	X		X						X			
51		X	X								X			
52														
53	X	X	X							X		X		T
<i>Agostini</i>														
54		X	X		X								X	
55	X	X	X					X	X					
56		X	X		X				X				X	
57		X	X						X					
58														
<i>Mitchell</i>														
59	X	X			X			X	X					
60		X	X		X									
61								X						
62	X	X						X		X				
63		X		X										
64		X		X	X									
65		X			X									
<i>Zelman</i>														
66		X	X	X						X			X	
67	X	X		X				X					X	
68		X		X	X	X		X						
69	X	X			X			X	X					
70		X		X						X				
71		X		X				X						
72														
73		X	X					X		X			X	
74		X												
75		X												
76			X											
77		X		X		X								U

*Brief numbers are listed next to the litigant and amici names listed at the beginning of each chapter.

Explanation for coding is below.

Legal Argument Codes:	Other:
<p>A = <i>Everson</i> Tests B = <i>Everson</i> Progeny C = <i>Lemon</i> Test D = Purpose/Effect and Legislative Intent Tests E = Prohibited Relationships F = Religious Means/Nature of Institution Test G = Brennan Test H = Original Intent – Founders I = Original Intent – Fratricide/Diversion/Corruption J = Endorsement/Entanglement Test K = Stricter State Standards L = Coercion Test M = <i>Stare Decisis</i> N = Other</p>	<p>T = Tradition – breaks traditional practices U = Doctrine of Unconstitutional Conditions</p>

Table 10

Arguments Used to Counter Accommodationist Stances 1993-2002

Brief* /Argument	AA	BB	CC	DD	EE
Zobrest					
48					X
49	X	X	X		
50					
51	X	X	X		X
52					
53				X	X
Agostini					
54	X		X		
55	X				
56	X		X		
57	X				
58					
Mitchell					
59	X				
60	X				
61	X				
62	X				
63					
64	X				
65					X
Zelman					
66	X		X	X	
67	X		X	X	X
68	X			X	
69			X	X	
70				X	
71	X			X	
72					
73	X				
74					
75	X			X	
76					
77					

*Brief numbers are listed next to the litigant and *amici* names listed at the beginning of each chapter.

Explanation for coding is below.

Legal Argument Codes:
AA = Neutrality Tests
BB = Discrimination
CC = Parent/Child Benefit
DD = Individual Choice
EE = Free Exercise Trumps Establishment Clause

Table 11

Court and Justices Voting Patterns 1993-2002

Case/J	CJ	J1	J2	J3	J4	J5	J6	J7	J8	Court
<i>Zobrest</i>	-	-	+	-	+	+	-	-	+	4-5
<i>Agostini</i>	-	-	+	-	+	-	+	-	+	4-5
<i>Mitchell</i>	-	-	+	-	+	-	+	-	-	3-6
<i>Zelman</i>	-	-	+	-	+	-	+	-	+	4-5
% pro	0%	0%	100%	0%	100%	25%	75%	0%	75%	0%

Voting Codes:

- + voted with the separationist coalition
- voted against the separationist coalition

Justices Codes:

- CJ** = Chief Justice William H. Rehnquist (1972-86; CJ 1986-2005)
- J1** = Anthony M. Kennedy (1988-present)
- J2** = John Paul Stevens (1975-present)
- J3** = Antonin Scalia (1986-present)
- J4** = David Souter (1990-present)
- J5** = Sandra Day O'Connor (1981-present)
- J6** = Byron White (1962-93) and Ruth Bader Ginsburg (1993-present)
- J7** = Clarence Thomas (1991-present)
- J8** = Harry Blackmun (1970-94) and Stephen Breyer (1994-present)

Justices Codes by Case:

Zobrest: Chief Justice William H. Rehnquist (**CJ**), Justices Anthony M. Kennedy (**J1**), John Paul Stevens (**J2**), Antonin Scalia (**J3**), David Souter (**J4**), Sandra Day O'Connor (**J5**), Byron White (**J6**), Clarence Thomas (**J7**) and Harry Blackmun (**J8**).

Agostini, Mitchell, and Zelman: Chief Justice William H. Rehnquist (**CJ**), Justices Anthony M. Kennedy (**J1**), John Paul Stevens (**J2**), Antonin Scalia (**J3**), David Souter (**J4**), Sandra Day O'Connor (**J5**), Ruth Bader Ginsburg (**J6**), Clarence Thomas (**J7**) and Stephen Breyer (**J8**).

Chapter 21: Discussion of Findings

Network, organizational, and policy learning literatures indicate that when interest groups face failure they will seek out alternative ideas and strategies that will enhance their potential for future success. However, constitutional law scholars Epstein and Kobylka found that interest groups faced with failure (on the losing side of legal change) did not modify their legal arguments. Their research showed that interest groups viewed the legal arguments which provided their initial victories as sacrosanct and therefore unchangeable – what Epstein and Kobylka call the “tyranny of absolutes.” This research project was designed to examine the conflicting findings of these literatures. The research expectation was that the separationist advocacy coalition would continue, even following legal change, to seek out and incorporate into their briefs new and innovative legal arguments to promote their policy goals.

The evidence provided in the prior chapters demonstrates that the separationist interest groups, and the advocacy coalition they form, reacted to changes in membership and legal arguments in the Supreme Court as “a problem-facing and problem-solving phenomenon” (Thompson 9). The problem to be faced and solved was the Supreme Court’s shifts in approaches to sectarian elementary and secondary school funding cases, which threatened the separationist interpretation of the Establishment Clause. Learning from their prior experiences, and those of their allies, the separationist interest groups and the coalition attempted to produce stronger legal arguments in subsequent cases. This learning occurred throughout the entire research timeframe – both prior to and following legal change; however, the breadth and focus of the learning narrowed considerably after legal change.

Separationist Interest Groups and their Coalition

Over 90 different organizations participated on the separationist side in the 16 cases presented in this study, but only 15 organizations participated in four or more cases.

The most active organizations were Americans United, PEARL⁶⁴, Anti-Defamation League of B'nai B'rith, American Civil Liberties Union, American Jewish Congress, American Jewish Committee, National Education Association, Baptist Joint Committee, National School Boards Association, Union of American Hebrew Congregations, Horace Mann League, People For the American Way, Council on Religious Freedom, National Council of Jewish Women, and the Central Conference of American Rabbis.

The interview subjects were asked which organizations were the leaders of the separationist coalition. The responses to this question produced a smaller list of nine organizations who initiated meetings and helped developed the strategy of the coalition: Americans United, American Civil Liberties Union, American Jewish Committee, American Jewish Congress, Anti-Defamation League of B'nai B'rith, Baptist Joint Committee, People For the American Way, National Education Association, and PEARL (during Leo Pfeffer's tenure). What distinguished these nine interest groups from the others were that they had specialized in-house legal counsel. The organizations without specialized counsel would generally ask to sign on to the briefs or be recruited to sign on to briefs of these organizations.

Marc Stern, Co-Director of the Commission for Law and Social Action of the American Jewish Congress, stated that there was frequent communication among these interest groups. The communication links were strong he said because the community of people working on the issue was small and everyone knew one another. Stern, who has been the lead attorney on church-state issues for the American Jewish Congress for over 20 years, said that the degree of networking between groups varied from case to case, and the interactions ranged from formal meetings and conference calls to informal one-on-one conversations. He said Leo Pfeffer was able to control what people said in their *amicus* briefs because he was such a dominant force in this issue area. Following Pfeffer's retirement in the mid-1980s the networking between groups became more informal and organizational differences in philosophy and strategy emerged leaving no one group or individual in control of the coalition. However, according to Stern, the changing litigation environment and the resulting losses in the latter cases had recently

⁶⁴ PEARL represents all the organization's iterations: Committee for Public Education & Religious Liberty, National Coalition for Public Education & Religious Liberty, and National Committee for Public Education and Religious Liberty.

forced more coordination and cooperation within the network. August W. Steinhilber, the former General Counsel of the National School Boards Association (NSBA), confirmed the coalition's deference to Pfeffer with regard to strategy and legal arguments used in *amicus* briefs. Steinhilber worked for the NSBA from 1968 to 1998.

Steven Green, the former General Counsel and Director of Policy for Americans United and currently a professor at Willamette University College of Law, agreed that the coalition generally discussed strategy and legal arguments through conference calls and occasional face-to-face meetings. He emphasized the cooperation in the coalition in forming coordinated briefs, with specifically assigned legal arguments for the separationist civil rights, religious, and educational groups. Green also verified PEARL's lessening role in the coalition following Pfeffer's retirement. He stated that it was Leo Pfeffer who had the respect and authority to bring organizations together. With his departure PEARL no longer had the pull to identify itself as the leader of the coalition and build coalitions for cases. Green did not remember that PEARL participated in *Zelman*. He said that he, in organizing coalition discussions regarding *Zelman*, did not work with PEARL, and was unaware that they still existed at the time.⁶⁵

The difficulty which several of the interview subjects had in recalling the legal arguments they used in specific cases suggests that these arguments are simply tools to be employed to obtain their goals, and not goals in and of themselves as suggested in Epstein and Kobylka's "tyranny of absolutes." This tool-focus rather than goal-focus may have been different had the Court embraced a strong no-aid standard early on as promoted by the coalition in the early 1970s; however, the *Lemon* test produced essentially the same results as characterized by Justice White's "insoluble paradox" quandary and Leo Pfeffer's "Scylla" and "Charybdis" description. The Court dropped this interpretation of the *Lemon* test when O'Connor incorporated the entanglement prong into the effect prong of her modified *Lemon* test in *Agostini*.

The learning literature states that organizations learn by doing (repeating successful routines), exploring (seeking alternatives when faced with failure), and

⁶⁵ The decline in PEARL's status can also be seen in its loss of organizational members. In *Grand Rapids* (1985) PEARL had 33 members and in *Zelman* (2002) only 23. The losses included many of the core members of the separationist coalition: ACLU, AU, American Jewish Congress, Anti-Defamation League, and Baptist Joint Committee.

imitating (borrowing from other successful organizations). The separationist advocacy coalition used all these learning techniques in presenting legal arguments to the Supreme Court.

Learning by Doing and Imitating

The national Jewish organizations (American Jewish Committee, American Jewish Congress, and Anti-Defamation League), the national educational groups (American Association of School Administrators, National Education Association, National School Boards Association, and the Horace Mann League), and the ACLU quickly embraced the *Lemon* test as it became clear that the Court was using this test as its legal standard to decide cases. A few groups were slow to embrace the *Lemon* test. Americans United did not embrace it until *Grand Rapids* and *Aguilar* (1985). United Americans for Public Schools never embraced the *Lemon* test; however, they did not participate in any cases following *Mueller* (1983). PEARL, under the direction of Leo Pfeffer, tried to get the Court to adopt a stronger test than *Lemon* to decide Establishment Clause cases. This was reflected in PEARL's attempts to combine the elements of the *Lemon* test with absolute prohibitions on funding (a no-aid test) derived from *Everson*. However, PEARL saw, as stated in its *Nyquist* (1973) litigant brief, that the effect and entanglement tests/prongs produced a no-aid result because government funding of sectarian schools would create the irresolvable quandary of attempting "to avoid the Scylla of advancement" to only be "engulfed in the Charybdis of entanglement" (37). PEARL, and Leo Pfeffer, finally embraced the *Lemon* test in *Regan* (1980).

Regardless of the speed and degree to which the members of the coalition embraced the *Lemon* test, once it was fully accepted they attempted to strengthen the test to better promote their policy goals. For example, they sought to have the Court more broadly interpret the secular purpose prong to go beyond the stated legislative purpose of the challenged legislation, and argued that the term "primary" in the effect prong did not mean the most important effect but simply a substantial effect. The coalition was unsuccessful in convincing the Court of the first issue, but was successful in the latter.

The members of the coalition would also swap legal arguments. After having consistently but unsuccessfully promoted the no-aid principle from *Lemon I* through

Regan, PEARL abandoned the no-aid argument in *Mueller* (1983). The National School Boards Association (NSBA) picked up PEARL's abandoned no-aid argument using it in their *Mueller amicus* brief. NSBA strongly urged the Court to adopt a no-aid principle to end the confusion over what kind of aid was, and was not, permissible. Although not used by the majority in *Mueller*, the four-member dissent used the no-aid principle in their opinion.

The coalition also expanded on minor arguments used by the Court in the hopes of developing them into more important arguments to support their cause. The members of the coalition incorporated the legal arguments of "pervasively sectarian nature" and "political entanglement" in attempts to strengthen the *Lemon* test. Both of these arguments met with varying degrees of success before the Court. The Court used the political entanglement arguments in its decisions in *Lemon I* (1971) and *Meek* (1975). This argument had the potential of developing into a major argument against funding; however, following O'Connor's opinion in *Agostini* (1997) the political entanglement argument was no longer relevant and dropped by the coalition.

The use of the pervasively sectarian argument has a much more complicated history. Used by the Court in *Meek* to prohibit funding, in *Wolman* (1977) the Court determined that secular and sectarian functions could be separated. In *Regan*, the Court declared that the pervasively sectarian argument was obsolete; however, it was revived in the majority opinions in *Grand Rapids* and *Aguilar*. In *Agostini* the Court removed the pervasively sectarian prohibition for indirect aid; however, Justice O'Connor supported its use for direct aid. In *Mitchell* (2000) Justice Thomas railed against both the term and concept in his concurring opinion. Being responsive to the bigoted perception of the term, in *Zelman* (2002) all the members of the separationist coalition, with the exception of the NAACP, dropped the term "pervasively sectarian," but continued to use the concept simply applying different language to describe it. Steven Green, formerly with AU, explained that even prior to Thomas's opinion in *Mitchell* the coalition had many discussions about the perception of the term and by *Zelman* they decided to drop it so as not to offend anyone.

These discussions also determined what legal arguments would be used by the interest groups in the assigned briefs. In coalition discussions the organizations agreed to

take on prescribed roles with corresponding legal arguments to provide the Court with a big picture of the issues brought forward by a case when reviewing the briefs. Julie Underwood, General Counsel for the National School Boards Association, stated that in working with the coalition, organizations also negotiated what legal arguments to use to prevent the filing of “me too briefs.” She said it was important to look at the entire body of briefs in a case, because they were designed to create a broad picture for the Court. Simply looking at changes to briefs in isolation (within each organization) was not relevant, she said, because based on coalition discussions the interest groups would take on different roles and use arguments applicable to those roles in their briefs.

In looking at the negotiations between the members of the coalition there are multiple factors that influence the discussions. There are important differences between filing briefs for litigants or strictly *amicus* that will affect the positions taken by an interest group. As noted by Marc Stern, from the American Jewish Congress, in litigant briefs, the interest groups are also working for the clients and the client’s interests must be predominant. Interest groups filing *amicus* briefs are much freer in determining what legal arguments to use than those filing litigant briefs. Those interest groups filing *amicus* briefs alone have more freedom than those who file with other organizations; however, filing alone is frowned upon by the coalition because a large number of briefs reduces the Court’s time to read and reflect on the issues raised. This balancing act of promoting interest group goals (e.g. visibility) and the coalition’s goals of providing a limited, comprehensive and non-repetitive set of briefs for the Court to review is created through negotiations between members of the coalition.

Learning by Exploring

The interviews confirmed that the members of the coalition looked closely at all First Amendment Establishment Clause cases to cull legal arguments that would assist in sectarian school funding cases. Marc Stern (American Jewish Congress) said that they first draw their arguments from the funding cases but then look at the entire church-state jurisprudence to see what might work for the case at hand. Steven Green (formerly with AU) and August W. Steinhilber (formerly with NSBA) confirmed that they looked across fora in search of viable arguments. Julie Underwood (NSBA) said finding the best legal

arguments is like good detective work. You chart out the voting patterns of the justices, matching votes to precedents used, and then you parse out the legal arguments to determine when and why they were successful. This drive to analyze prior opinions and voting patterns from funding cases and cases in other fora demonstrate the interest groups' desire to better understand the litigation environment in order to further their goals. This analysis of precedent is the chief method of how these interest groups learn. When this learning is shared with the other members of the coalition, the coalition itself learns.

For example, from *Larkin v. Grendel's Den* (1982), regarding churches' influence in the issuance of liquor licenses, the American Jewish Congress along with the ACLU, PEARL, NEA, and the Anti-Defamation League incorporated the "fusion" and "symbolic benefit" arguments from this case into their *Grand Rapids* briefs, and the Anti-Defamation League used these arguments in its *Aguilar* brief; however, only in *Grand Rapids* did the Court use these arguments in an opinion authored by Justice Brennan. Another example of arguments borrowed from other fora came from the coalition's uncertainty of the Court's stance with regard to funding cases following the seven-year hiatus, the coalition in *Zobrest* used a broad array of legal arguments (endorsement, coercion, and tradition) borrowed from other fora, as well as the *Lemon* test to argue the case. The endorsement test came from Justice O'Connor's opinions in *Lynch v. Donnelly* (1984) and *Wallace v. Jaffree* (1985), which involved public display of religious symbols and prayer in the public schools, respectively. Some members of the separationist coalition had already incorporated the endorsement language into their briefs in *Grand Rapids* and *Aguilar* (1985). The coercion argument was borrowed from Justice Kennedy's opinion in *County of Allegheny v. ACLU* (1989) also involving displaying religious symbols on public property. Interestingly, Justice Blackmun, writing for the Court in *County of Allegheny*, used O'Connor's endorsement standard to decide this case. Justice Kennedy used his coercion argument again in the school prayer case *Lee v. Weisman* (1992), this time writing for the Court. The tradition argument was derived from a Court case involving the permissibility of legislative prayers, *Marsh v. Chambers* (1983). The coalition had previously used the tradition argument in *Lemon I* and *Nyquist*.

These changes in legal arguments occurred prior to legal change in funding cases. Epstein and Kobylka's research determined that learning failed to occur following legal change creating their "'tyranny of absolutes,' the notion that legal arguments, once seemingly won, are absolute and defensible only on those grounds" (311). The evidence from the funding cases studied in this research project demonstrates that learning occurred prior to legal change, during legal change, and after legal change.

Learning During Legal Change

In *Agostini v. Felton* (1997) the Court overturned its precedent of *Aguilar v. Felton* (1985). These cases are ideal for examining legal change because they are identical to one another. *Agostini* was simply a rehearing of *Aguilar*. They had the same litigants, presented the same case facts and questions to the Court, and the separationist litigants even used the same attorney, Stanley Geller from National PEARL. The only differences in the cases were 12 intervening years and six new members of the Court.

In 1985, the litigants used the *Lemon* test and focused on the effect and entanglement prongs. The litigants stated that the effect prong revealed that the program both inhibited religion (through removal of religious symbols in the classroom) and advanced religion because the provision of teachers and equipment inevitably furthered the religious mission of the pervasively sectarian schools. The entanglement prong required that administrative contacts be monitored, but because there were so many interactions between public and sectarian staff the monitoring systems would be too oppressive to sustain the program and the program would lead to political entanglement creating religious strife.

Conversely, in 1997, the same separationist litigants and attorney ignored the *Lemon* test and focused on three elements from precedent to declare the program unconstitutional: the program created a symbolic union conveying a message of government endorsement of the religious message; the aid advanced religion by supplanting, not supplementing, educational programs; and the pervasively sectarian nature of the schools created an environment untenable for public instructors to teach secular subjects. In *Agostini* the litigants dropped the entanglement prong in favor of a variation of O'Connor's endorsement test and retained the two elements from the effect

prong that they believed still maintained favor with the Court: pervasively sectarian and supplanting versus supplementing.

In the interview, Stanley Geller said he knew he had to modify his arguments from *Aguilar* to *Agostini* because five members of the Court stated in *Board of Education of Kiryas Joel Village School District v. Grumet* (1994) that the *Aguilar* decision should be reconsidered. He said that he knew if he stuck to the arguments used in *Aguilar* he would lose. He had hoped that his revised arguments would appeal to Justice Kennedy, making him the swing vote to maintain the precedent. Although ultimately an unsuccessful strategy, the change in arguments between the two cases does refute Epstein and Kobylka's "tyranny of absolutes." The desire to win the case overcame any doctrinal hesitation to maintain prior legal arguments. Marc Stern, lead attorney for the American Jewish Congress, stated that writing briefs for litigants is very different than writing *amicus* briefs. He said, in writing for litigants you have real clients who want to win, so your legal arguments are proscribed by your clients needs.⁶⁶

The *amici* briefs supporting the separationist litigants also modified their arguments to respond to the changing litigation environment. The brief of the American Jewish Congress *et al.* provided an extensive argument defending the traditional use, and continuing relevance, of the *Lemon* test especially the entanglement prong. Stern, who wrote the brief, said they focused their argument around the entanglement prong because they saw that it was in danger of being abandoned by the Court. He said he also dropped the use of the fusion argument in this brief because the Court ignored it in *Zobrest*. The brief of Americans United *et al.* focused on countering the accommodationist's reinterpretation of the neutrality principle, and worked to minimize the damage caused by the coalition's defeat in *Zobrest*. They argued that there was a clear distinction between the "attenuated" aid allowed in *Witters* and *Zobrest*, and "massive" aid prohibited in *Meek*, *Grand Rapids*, and *Aguilar*. They also introduced the argument into the funding forum that *stare decisis* required the Court to provide a "special justification" to overturn precedent.

⁶⁶ Winning, even with litigants, may not be the highest aim. Stanley Geller stated in the interview regarding *Aguilar* that he was told by several people including staff from the ACLU that he would lose the case; however, he said that they brought the case forward because of the constitutional issue in question, and not based on their chances of winning or losing. However, he did dramatically revise his argument from *Aguilar* to *Agostini* to improve his chances of winning the case.

Justice O'Connor's modification of the *Lemon* test in *Agostini* removed the test's historic Catch-22 (also described as the "insoluble paradox" by Justice White and the "Scylla" and "Charybdis" by Pfeffer) that made the test so useful to the separationist coalition. No longer would the Court accept the argument that pervasive monitoring was necessary to prevent the religious schools from using public aid to advance religion and that this monitoring would inevitably lead to excessive – and impermissible – entanglement.

Network Learning

The changes in the litigant and *amicus* briefs from *Aguilar* to *Agostini* were the product of intense discussions between the members of the separationist coalition. Stanley Geller, who represented the litigants in both *Aguilar* and *Agostini* on behalf of National PEARL, remembered a meeting at the law firm of Paul, Weiss, Rifking, Wharton, & Garrison of about two-dozen lawyers from different organizations to plan for the *Agostini* case. He did not remember the legal arguments discussed, but he did remember that it was a contentious meeting. Steven Green, who at that time was with AU, also remembered the meeting and said that he spent an extremely long time "reading the riot act" on the types of legal arguments needed to bring the litigants and *amici* up-to-date. At the meeting the members of the coalition shared their analysis of the arguments most likely to be successful, negotiated roles and what arguments to use in those roles, and assigned specific arguments to the litigants and religious and civil liberty groups to create complementary briefs viewed to be mostly likely to positively influence the Court.

This meeting at Paul, Weiss is an example of a successful negotiation between a network of organizations. In successful negotiations organizations do not cling to their previously held positions but search for joint interests and explore creative solutions. Termeer and Koppenjan state that only a "confrontation with other perceptions can create the opportunity for change. Confrontation can be seen as the driving force for change" (84). Without confrontation and only acting with organizations holding the same perceptions, organizations are unlikely to learn. The Advocacy Coalition Framework (ACF) holds that advocacy coalitions resist change to important, or core, policy beliefs.

Change is only likely to occur when “very solid empirical evidence is likely to lead them to do so” (Sabatier and Jenkins-Smith 125).

However, learning from confrontations within a coalition may be easily lost once the organization leaves the coalition. In *Zelman*, when PEARL was no longer participating in strategy meetings with the separationist coalition, the PEARL brief, written by Stanley Geller, reverted back to using its old legal arguments. National PEARL and Ohio PEARL filed the only briefs using the pre-*Agostini* version of the *Lemon* test. From this there appears to be the potential that learning in a coalition can be temporary, being lost if the interest group does not continue to interact with core members of the coalition. The existence of temporary learning following an interest group’s exit from the core or strategic network (see below) of interest groups in the separationist advocacy coalition indicate that learning in a coalition may be influenced by power relationships. From this learning can be seen as not resulting from persuasion from other coalition members to respond to a changing environment or new information, but as a result of dominant groups within the coalition exercising power (i.e. Steven Green from Americans United “reading the riot act”). When an interest group, such as PEARL, leaves the strategic network these power relationships are severed and the interest group is free to revert back to familiar – and preferred – legal arguments. This is simply one possible explanation for PEARL’s use of these arguments. Additional research in power relationships within advocacy coalitions is needed to fully explore the veracity of this explanation.

Confrontations are likely to occur in the separationist coalition because it is composed of a diverse group of organizations from the civil liberty, religious, and education communities. Although they are united on preferred outcome of funding cases (with the exception of BJC, American Jewish Congress, and the NCC in *Zobrest*), they hold divergent views on other Establishment/Free Exercise Clause issues. These divergent views affect how they approach and perceive funding cases. For example, the National School Boards Association works with the ACLU in funding cases, but is often sued by the ACLU on issues such as the pledge of allegiance, school prayer, and display of religious symbols. As stated by Julie Underwood of the NSBA both liberal and conservative groups sue us because “we are at ground zero in the culture wars.” As cited

by Souraf the separationist coalition is composed of absolutist groups and groups that hold a strict but not absolutist perspective. The split in the coalition in *Zobrest* demonstrates this subtle, but important difference. These differences in perceptions and stances on Establishment/Free Exercise Clause issues facilitate learning by exposing coalition members to divergent points of view in coalition discussions.

Confrontation also occurs within interest groups because of the diverse constituents forming the organization. These intra-organizational confrontations have the potential of causing dramatic shifts on stances regarding policy issues. During this research period, a major shift occurred in some Protestant religious groups in their position with regard to the Establishment Clause in general and specifically with regard to funding of religious schools.

This change is best demonstrated by the transformation of the Southern Baptist Convention (SBC). The SBC, its state affiliates, and their member churches were strong supporters of a strict separation of church and state and financial supporters of both the Baptist Joint Committee and Americans United. Robert Maddox, former Executive Director of AU and currently Pastor at Briggs Memorial Baptist Church, stated that desegregation and cultural shifts pushed the Southern Baptists away from their historical strict separationist stance. With the implementation of public school desegregation resulting from *Brown v. Board of Education* (1954), Maddox saw Christian elementary and secondary schools established throughout the south and he said that they were purely segregation academies. A movement soon developed to fund these private academies because the earlier segregated public schools had been publicly funded. When working in the Carter Administration, Maddox said one of the first lobbyists he met was from the Christian school movement “whining about funding.” A change in the culture resulting from the public school prayer bans, women’s and abortion rights, and gay rights also contributed to the SBC shift. These cultural changes, Maddox argued, prompted the growth of Christian schools in other regions of the country because of the perception that public schools were “infected with secular humanism.” This growth of Christian schools strengthened the movement for public funding of religious schools and resulted in a dramatic shift in a portion of the Baptist community from a separationist to an

accommodationist stance on church-state relations. The election of Adrian Rogers as President of the SBC in 1979 marked the ascension of the accommodationist perspective.

In the 1980s the Southern Baptist Convention, at the time the largest financial contributor to the Baptist Joint Committee (BJC) attempted to takeover the BJC and change its stance toward Establishment Clause issues. Brent Walker, Executive Director of BJC, said they were unable to do so because they could not convince other conservative Baptist groups such as the Northern American Baptist Conference and Baptist General Conference to shift their stances. In the late 1980s and early 1990s, the Southern Baptist Convention broke all ties with the BJC and set up their own legal organization to promote SBC's new position on the Establishment Clause. This schism continues to affect Baptist institutions. There are efforts by the SBC and their allies to change the stance of the J.M. Dawson Institute of Church-State Studies at Baylor University, which has historically supported a strict separation of church and state. Throughout this period, Walker said the BJC has been able to maintain their core principles; however, it lost a substantial portion of their funding and membership base.

Faced with the same external political and cultural environmental factors, Americans United had a transformation of its core principles, but this transformation simply broadened its separationist church-state activities. Souraf described AU's separationist stance as based on the "conservative, traditionalist, and fundamentalist Protestantism" that has an "underlying, pervasive fear of Roman Catholic social and political power" (33). For most of its history AU's efforts were focused exclusively on issues regarding Catholic institutions. Rather than the dramatic break experienced by the BJC and SBC, the interview subjects simply described the transition in AU as a gradual fading way of the conservative and fundamentalist religious groups that founded and maintained the organization (Doerr, Menendez, and Alley). Albert J. Menendez, a former AU staff member and currently the Associate Director of Americans for Religious Liberty, said that AU was a coalition of right and left leaning groups, with no center, who agreed on the need to restrict public aid to Roman Catholic institutions. He said that the anti-Catholic focus of AU began to change with the Presidency of John F. Kennedy and the ecumenical activities of Vatican II. As school prayer cases, abortion, and gay rights issues arose and were debated in the organization, AU in gradual steps embraced the

liberal rather than conservative positions on these issues resulting in the gradual loss of the conservative and fundamentalist religious members. This did not mean that all the religious groups leaving AU took on the accommodationist stance of the SBC. For example, disagreeing with AU's support of gay rights, the Seventh-day Adventists left AU, but maintained their strict separationist views.

Maddox stated that during his tenure (1984-1992) he saw the funding from state Baptist conventions disappear. To counter decreases in institutional funding, AU began intensive direct mail solicitations using mailing lists purchased from the ACLU and other organizations. Maddox characterized the new members brought into AU from the direct mail campaigns as mainly Unitarian, Humanists, atheist, and non-religious, along with individuals from Methodist, Baptist, and Presbyterian traditions who supported a strict separation of church and state. The conservative and fundamentalist institutional support was replaced by more liberal and secular individual members, which helped AU to move to embrace a more universal prohibition against government involvement in religious activities.

Although beyond the scope of this research project, these changing internal constituencies could also have affected the legal arguments used by the organizational members of the coalition, and by their interaction with other members of the coalition, the legal arguments used by the coalition as a whole. No evidence of this connection was found in this research project; however, these connections could be pursued in future research.

Learning Following Legal Change

Following the legal change that occurred in *Agostini* it was very clear to the members of the coalition that the swing vote on funding cases was Justice O'Connor. Little doubt was left on how the other justices stood on funding cases. Chief Justice Rehnquist and Justices Scalia and Thomas solidly supported the accommodationist perspective and supported funding of sectarian schools. Justices Souter, Ginsburg, and Stevens supported a separationist perspective and opposed funding. This left three justices to persuade: Kennedy, Breyer, and O'Connor. Steven Green stated that Americans United and the separationist advocacy coalition gave up on Justice Kennedy

in *Rosenberger* (1995) when he wrote for the majority in upholding the funding of religious publications. Green said that the coalition realized that it was not worth trying to attract him so the focus was placed on O'Connor. Julie Underwood, from NSBA, explained that the key was to play to O'Connor because she builds majorities; she is such a politician that she carefully drafts her opinions to create majorities to capture either Breyer or Kennedy. Underwood reports that, in funding cases, Breyer, whose father was a school attorney, thinks about the practical issues for the schools – sometimes she disagrees with Breyer's conclusions, but she believes at least he understands the issues.

Prior to the legal change in this forum the separationist coalition was hesitant to promote education policy arguments, preferring to argue the cases strictly based on the law. However, the accommodationist coalition had frequently used policy arguments in their briefs. In *Zelman* the coalition modified its approach. Two briefs, one by the American Jewish Committee, Baptist Joint Committee and National Council of Churches and the other by the National School Boards Association, incorporated policy arguments, in addition to legal arguments, into their briefs. Surprisingly this was the first time, even by other educational groups, that direct policy arguments were made (the NSBA had hinted at policy arguments in *Zobrest*).⁶⁷ However, in the same case, the Simmons-Harris litigants, represented by the ACLU, People For the American Way, and AU, chastised the accommodationist litigants and *amici* for using their briefs to make arguments regarding educational policy, stating that the Court was a legal not a policy forum. This approach allowed the coalition to appeal to the policy issues raised in the cases, yet kept its litigants unsullied by denouncing such arguments.

The pragmatic analysis of the members of the Court used to determine which justices to focus on and the appropriate use of legal arguments tied to the targeted justice(s) reinforces the research of Herrnson *et al.* As described by Green the coalition dropped Justice Kennedy as a potential yes vote for the coalition's cases in 1995 following his opinion in *Rosenberger*. Following this decision the coercion argument, developed by Kennedy, was dropped from all separationist briefs in *Agostini* through *Zelman*.

⁶⁷ This research did not find any differences between ACF's material and purposive interest groups in learning patterns or use of arguments.

Following O'Connor's dramatic modification of the *Lemon* test in *Agostini*, the separationist coalition quickly dropped the *Lemon* legal standard. In the following case, *Mitchell*, only the ACLU *et al.* used O'Connor's modified *Lemon* test in its brief. The other briefs used pieces of precedent that they believed were still good law: the prohibition on direct, non-incidental, support of a school's religious mission; diversion of aid for religious use; the supplanting versus supplementing character of the aid in question, the pervasively sectarian nature of the school allowing direct aid to support indoctrination functions, O'Connor's endorsement test, among others. In *Zelman* the members of the coalition used arguments similar to those used in *Mitchell*: prohibition of direct unrestricted aid, supplanting versus supplementing, pervasively sectarian nature *sans* the term "pervasively sectarian," O'Connor's endorsement test, *stare decisis*, among others. Only National and Ohio PEARL used the *Lemon* test in their briefs, and they used the pre-*Agostini* version.⁶⁸

The arguments used by the coalition following legal change were described by Green as "pirating", "scavenging", or "cannibalizing" relevant parts of precedent that they believed continued to be good law. What was considered good law generally involved pieces of precedent that O'Connor had cited in recent opinions. As Green recalled, the focus was on persuading O'Connor and careful attention was paid to arguments she relied on in her opinions: public aid that could be, and was, diverted for religious indoctrination was impermissible; public aid that was direct, unrestricted, and substantial that advanced the religious mission of the schools was unconstitutional; among others. Reflecting on the cases, Green stated that perhaps, "We may have overdone it."

The Strategic and Wide Networks

This focus on the limited number of arguments tied to Justice O'Connor brought the separationist advocacy coalition close to what March and Olsen described as "failure-induced stress" in which "social systems can produce persistence in behavior rather than change" and even when change occurs in these situations they tend to be minor

⁶⁸ The Simmons-Harris litigants did use the *Lemon* test, but only to counter the accommodationist litigant's argument to reinterpret the term "primary" to be the most important effect.

modifications rather than “major innovative changes” (60). This did not mean that the coalition and its members were not learning. They correctly analyzed that O’Connor was the swing vote and success in the cases required convincing her to accept the separationist arguments in the case. Their strategy was to analyze prior decisions to determine what arguments appealed to O’Connor and tie those arguments to the case facts of *Mitchell* and *Zelman*. The coalition continued to learn, but the focus of its learning revolved around one justice and a limited number of legal arguments she used in her opinions. In addition to the O’Connor focus, the coalition did incorporate the new arguments of *stare decisis* (as used in *Dickerson v. United States* (2000)) and policy arguments following legal change, but none of these could be considered innovative.

Rather than seeking out new legal arguments to develop a strategy of innovation (i.e. taking the initiative and attempting to develop new and innovative legal arguments) the coalition followed a strategy of attrition (i.e. Green’s “pirating”, “scavenging” and “cannibalizing” described above). They dropped arguments that had fallen out of favor with the Court and held on to those they thought were still good law. This attrition strategy was also used to limit losses by attempting to narrow legal decisions that went against them. For example, in *Agostini* Justice O’Connor writing for the Court required actual evidence of indoctrination rather than just the potential for religious advancement to declare a program unconstitutional. In *Mitchell*, the ACLU *et al.* attempted unsuccessfully to have the Court limit this actual evidence requirement solely to indoctrination rather than have the evidence requirement be applied to the issue at-hand, diversion of funds for religious purposes.

The exception to these minor modifications and focus on Justice O’Connor came from two organizations, who introduced two truly innovative legal arguments in *Zelman*; however, these organizations were outside of the core separationist groups in the coalition: National PEARL and the Ohio School Boards Association. Interorganizational learning literature describes two types of networks: strategic and wide. Strategic networks have high levels of cooperative working relationships and wide networks share interests and activity but are less likely to work together (Knight 430-1). As stated earlier, PEARL had by this time fallen from its leadership position and was no longer involved in the coalition’s strategy discussions. From this outsider position,

PEARL produced an innovative argument regarding Free Speech and government endorsement of speech to declare the voucher program unconstitutional. The Ohio School Boards Association's innovative argument of a "doctrine of unconstitutional conditions" was known by the coalition. Steven Green at the time was the General Counsel for Americans United and said he knew of the argument introduced by the Ohio School Boards Association but did not think it was very strong because it did not match well with the facts of the case (voucher students could opt out of religious instruction) and Julie Underwood, General Counsel of the National Schools Boards Association, thought that it was also a reach but did not discourage the Ohio affiliate from using it.

Neither of these innovative arguments were adopted by the Court or even mentioned by any of the justices in their opinions. From the case studies it appears that attempts to sway an institution like the Supreme Court whose decision-making is based on interpretation of the law and precedent is unlikely to embrace entirely new legal arguments. The Court seems to be more likely to accept modified interpretations of established concepts. For example, the separationist coalition was successful in having the Court accept modifications to its interpretation of "primary" from "most important" to "substantial" in the *Lemon* test's effect prong. Unfortunately for the separationists, the accommodationist coalition was much more successful in assisting the Court in modifying its interpretation and use of the neutrality and private choice principles. Justice Souter provided a detailed examination of how the principles of neutrality and private choice had evolved to favor the accommodationist perspective in his dissenting opinion in *Zelman*. The members of the separationist coalition argued against these changes in interpretation, but were unable to convince a majority of the Court to maintain their traditional usage.

Only interest groups with a specialized in-house counsel or resources to hire outside counsel with specialized expertise can produce briefs with modified legal arguments designed to sway the Court. This specialized expertise includes a thorough understanding of the Court, its members, and the nuances of the law, to promote legal arguments to be applied to the issue at-hand that modify or adapt interpretations of established principles in order to expand legal doctrine. This expertise is likely to be

housed with strategic, rather than wide, network members within an advocacy coalition whose organizations have the resources to employ the specialized counsel.

Core and Outer Policy Beliefs

With one exception, no members of the separationist coalition changed their “deep core” beliefs as described by Sabatier (*Policy Sciences* 139).⁶⁹ The shifts found were in the interest groups’ outer policy beliefs that do not affect the core beliefs, which define the interest groups’ identities. The National Council of Churches (NCC) did deviate from its core beliefs in one case. In *Zobrest* the NCC supported the Zobrest family in the litigation and signed on to an *amicus* brief by the Christian Legal Society (CLS). The CLS brief called for the adoption by the Court of Rehnquist’s non-preferentialism. The Baptist Joint Committee and the American Jewish Congress also supported the Zobrests; however, their brief argued to maintain the *Lemon* test to preserve the precedents supporting a strict separation of church and state. Marc Stern, who wrote the American Jewish Congress brief, did not remember why the NCC did not sign on to his brief rather than the CLS brief; however, he thought that maybe the Protestant mainstream and evangelical churches were attempting to provide a unified stance to show that they could work together. In *Zelman* the NCC returned to the separationist coalition joining with a brief that did not support Rehnquist’s non-preferentialism, demonstrating that their activity in *Zobrest* was an aberration.

Stern stated that it was probably a mistake to think that there is a clear evolution of legal arguments from case to case. There are idiosyncratic effects, such as the NCC stance described above, that may not be clear from the records of the briefs – there are issues with individual choices of the lawyers, incompetent counsel, and tactical decisions that will affect the legal arguments used in an organization’s brief. Also, he said, it is important to remember that organizations are controlled by “lay people” and that the lawyers, who know the law, do not make all the decisions of what goes into a brief or

⁶⁹ The State Convention of Baptists in Ohio filed a brief in *Wolman* (1977) supporting a strict separation of church and state. This organization is a member of the SBC and has subsequently changed its position on funding cases. This change of perspective was confirmed with a short communication by the author with the organization. The SBC, although it too changed its core beliefs, did not file any briefs with the Court in the cases studied.

how an organization approaches a case and brief. He said some legal arguments are used to make the organizational leaders happy and some legal arguments are used because the organizational leaders demand them. As described by Stern, organizations are balancing the interests of many stakeholders so there will be idiosyncrasies in the evolution of legal arguments. The stakeholders include the internal constituencies that form the organization, potential internal constituencies the organization wants to recruit, and allied organizations. These influences must be weighted in determining what position an organization takes with regard to a case. Although Stern does not use the term he is describing the micropolitics⁷⁰ within an organization that influences its actions.

Shifting Fora

As Herrnson *et al.* discuss, interest groups are pragmatic and will shift alliances and fora to best promote their policy goals. Steven Green stated that it was important to remember that interest groups use a variety of strategies to fulfill their roles. For example, he stated that Americans United participated in the 1993 *Lamb's Chapel* case, regarding equal access to school facilities, and sided with the equal access advocates. He said this alignment surprised many people, but it was done for “damage control.” In its brief AU attempted to direct the Court to not modify its interpretation of Establishment Clause precedents in deciding the *Lamb's Chapel* case. This fulfilled AU goal of maintaining an interpretation of the Establishment Clause that preserved its previous victories by curtailing an expansive reinterpretation of the law. As previously described the Baptist Joint Committee and American Jewish Congress found themselves on the opposite side of the other members of the separationist coalition in *Zobrest*. They took this stance as a result of their differing interpretation of the Establishment and Free Exercise Clauses from other members of the separationist coalition. Yet in their brief they promoted legal arguments designed to maintain the previous separationist precedents.

In addition to arguing in other church-state fora to maintain the legal standards to preserve precedents in the funding arena, following *Zelman* the separationist coalition has

⁷⁰ Yeager defines micropolitics as an “interaction situation in which there is an exchange of power and resources, and in which communication lines between the individuals involved are constantly being drawn and redrawn” (83).

moved the funding fight from the federal to state fora.⁷¹ In those states that have stronger funding restrictions in their constitutions, the coalition has been bringing forward funding cases (Barkey and Underwood).

Regardless of what court the case is in or the issue before the court, the approach to the legal arguments used by the coalition is pragmatic in its strategy and focused on supporting their policy goals. As described by David Barkey, Associate Director of National Legal Affairs for the Anti-Defamation League, their legal arguments will vary by what court, and even judge, they are facing. He also said their legal arguments will vary by their role in the coalition (*amicus* or litigant) and by the assignment of legal arguments decided in the conversations with other coalition members. This ability to modify legal arguments based on which courts and judges the interest groups appear before and their role in the coalition counters the Epstein and Kobylka’s “tyranny of absolutes” findings “that legal arguments, once seemingly won, are absolute and defensible only on those grounds” (311).

⁷¹ Shifting fora is part of “venue shopping” a term coined by Baumgartner and Jones (1993). In venue shopping, advocacy coalitions shop among different executive agencies, legislatures and their committees, and courts to find the venue most receptive to their policy goals. Sabatier and Jenkins-Smith state the “conclusion is that coalitions should (and do) spend an enormous amount of time” on this activity and that “there is considerable evidence that coalitions pursue multiple venues at multiple levels, often simultaneously, in a constant effort for find some that will bear fruit” (143).

Chapter 22: Conclusion

Bringing cases and filing briefs in cases are the only acceptable mechanism to directly lobby the Supreme Court. The briefs communicate the filer's preferred outcome of the case and the reasons to arrive at that outcome. Repeat filers, as seen in this study, maintained a continuing courtship with the justices through their briefs with the aim of molding the Court's jurisprudence into the constitutional philosophy of the filers. This courtship had to adapt to the changing litigation environment and membership of the Supreme Court. What this dissertation has demonstrated is that the separationist advocacy coalition adopted, modified, and dropped legal arguments based on the changing reactions of the Court to these arguments. Demonstrating their responsiveness to the litigation environment was their ability to build on and complement each other's arguments. The coalition learned from each other as well as from the Court on how to modify their legal arguments to put forward what the members of the coalition believed were the best arguments possible.

The drive to analyze prior opinions and voting patterns from prior funding cases and cases in other fora demonstrate the interest groups' desire to better understand the litigation environment. The analysis conducted is how interest groups learn and when this analysis is shared with the other members of the coalition the coalition in turn learns. This learning was reflected in how the coalition, following discussions and negotiation, modified its legal arguments in response to the changing litigation environment. The fact that analysis is done on an on-going basis regardless of success or failure in the case, and that legal arguments are modified based on this analysis refute Epstein and Kobylka's findings that interest groups are bound by a "tyranny of absolutes."

Epstein and Kobylka's findings indicate that interest groups on the losing side of legal change do not modify their legal arguments in reaction to changes made by the Court. They report,

In both cases [capital punishment and abortion], initial 'liberal' victories were forged and then lost, in significant part, because their defenders doggedly clung to their understanding of the Court's logic. This fatally constrained their ability to shift argumentational grounds when those victories came under threat. This we have called the 'tyranny of absolutes,' the notion that legal arguments, once seemingly won, are

absolute and defensible only on those grounds. Without the argumentational flexibility to adapt to new conditions, the tyranny of absolutes led abolitionists and pro-choice advocates to dig their own doctrinal graves by ignoring alternative arguments that might have saved the underlying goals their initial victories were intended to achieve and protect (311).

The evidence provided in this research project demonstrates that the separationist advocacy coalition did indeed have the flexibility to adapt to new conditions. Under Epstein and Kobylka's findings, the separationist advocacy coalition should have "doggedly" clung to the legal arguments that produced their initial victories. The coalition's early victories were based in part on the Court's use of the three-part *Lemon* test, which prohibited the funding of religious schools because pervasive monitoring was necessary to prevent the religious schools from using public aid to advance religion and that this monitoring would inevitably lead to excessive, and impermissible, entanglement. In *Agostini v. Felton* (1997) the Court determined that this legal argument was no longer sufficient to declare a religious school-funding program unconstitutional. Counter to the expectation of Epstein and Kobylka, the members of the separationist advocacy coalition quickly dropped the *Lemon* test in favor of other legal arguments that seemed to still hold favor with the Court, and especially those arguments used by Justice O'Connor who was the swing vote in these cases.

The members of the separationist advocacy coalition changed their legal arguments as described by Stanley Geller, the attorney for the litigants in *Agostini*, because he knew that if he did not change his arguments he would lose the case. The desire to win overcame any doctrinal hesitation to maintain prior legal arguments. The examination of legal briefs from the entire research period showed that the coalition was constantly modifying their legal arguments. The interviews with separationist interest group attorneys provide clear evidence that they were continually seeking the best legal arguments that would work for the case at-hand. Julie Underwood, General Counsel of the National School Boards Association, said finding the best legal arguments is like good detective work. You chart out the voting patterns of the justices, matching votes to precedent used, and then you parse out the legal arguments to determine when and why they were successful. This suggests that legal arguments are viewed as tools to be used

to obtain policy goals rather than doctrinal goals in and of themselves as suggested by Epstein and Kobyłka.

Future research examining the evolution of legal arguments used before the Court would be well served to use the Advocacy Coalition Framework (ACF) and the learning literatures employed by this research project. Using the principles of the ACF to look at an extended timeframe covering many cases (representing multiple policy cycles) is an appropriate method to examine the evolution of legal arguments and interest group and advocacy coalition learning in cases before the Supreme Court. The limited number of Supreme Court cases examined by Epstein and Kobyłka (three for capital punishment and two abortion cases) may have contributed to their flawed research results. Additional research including subsequent cases from each forum could determine if, when, and how learning occurred in these fora and the effect of this learning on the legal arguments used. Instead of focusing on doctrinal aspects of the legal arguments used, the researchers would be better served to use the network, organizational, and policy learning literatures used in this research project to examine the willingness and ability of members of an advocacy coalition to change behavior, the availability of alternative solutions, and the processes used for encountering alternative solutions to understand the presence or absence of change.

This research project demonstrated that prior to legal change interest groups did seek out and incorporate new and innovative legal arguments borrowed from other fora and sought to expand or reinterpret established legal arguments to better aid their policy goals. The borrowed legal arguments from other fora include: coercion (from a case regarding the display of religious symbols on public grounds), endorsement (also from a religious symbol display case and a case regarding prayer in public schools), and tradition (from a legislative prayers case). The members of the separationist advocacy coalition also sought to expand on arguments introduced by the Court such as the “pervasively sectarian” nature of the schools (from *Wolfman*) and “political entanglement” (from *Lemon I* and *Meek*) to add to and strengthen the *Lemon* test. The new legal arguments that appeared to have the potential for adoption by the Court were incorporated into the briefs of the other members of the advocacy coalition. Those new legal arguments that

were tried and failed to receive favorable recognition by members of the Court were dropped from future coalition briefs.

Following the legal change that occurred in *Agostini*, interest groups continued to analyze the decisions of the Court in order to seek out, from their perspective, the best possible legal arguments to use in their briefs. However, rather than seeking new and innovative arguments, the coalition employed a strategy of attrition. The main focus of legal arguments examined and used by the coalition narrowed to those cited by Justice O'Connor, who was considered to be the swing vote in the funding cases. Steven Green, former General Counsel and Director of Policy for Americans United, characterized this process as "pirating", "scavenging", or "cannibalizing" relevant parts of precedent that they believed continued to be good law. What was considered good law generally involved pieces of precedent that O'Connor had cited in recent opinions.

Two innovative arguments were developed, following legal change, by members of the advocacy coalition in *Zelman*, but were either ignored or considered unsuitable, and were not used by the other members of the coalition or by any member of the Court. National PEARL introduced an argument regarding Free Speech and government endorsement of speech, and Ohio School Boards Association (OSBA) introduced a legal argument based on a "doctrine of unconstitutional conditions." Both of these coalition members were not involved in the coalition's strategy discussions and independently developed these arguments for their briefs. Green stated that he was unaware of the PEARL legal argument and, although aware of the new OSBA legal argument, did not think it matched well with the facts of the case. Had any member of the Court used either of these arguments in their opinions in *Zelman* the coalition would most likely have reconsidered their stance on using these legal arguments.

Counter to this project's research expectations new and innovative legal arguments were not adopted by the coalition. The coalition did add arguments on *stare decisis* and education policy following legal change, but these could not be declared innovative. Also unexpected was the role of politics and power relationships within the advocacy coalition and its effect on learning. Based on evidence from National PEARL briefs and the interview with Green and Stanley Geller, who represented the separationist litigants in *Aguilar* and *Agostini* and was the President of National PEARL, learning from

confrontations within a coalition appear to be easily lost once an organization leaves the coalition. In *Zelman*, when PEARL was no longer participating in strategy meetings with the separationist coalition, the PEARL brief, written by Geller, reverted back to using its pre-*Agostini* legal arguments. During the interview with Green, he stated that he was “reading the riot act” to various organizations, including PEARL, to update them on appropriate arguments to use in *Agostini*. One possible explanation is that learning in an advocacy coalition can be temporary, being lost if the interest group does not continue to interact with the core members of the coalition. This temporary learning may be influenced by power relationships. Learning influenced by power relationships can be seen as not resulting from persuasion of the ideas and information presented by other advocacy coalition members, but as a result of dominant groups within the advocacy coalition exercising power. Power relationships within coalitions should be considered in any future research in advocacy coalition learning. Marc Stern, Co-Director of the Commission for Law and Social Action of the American Jewish Congress, also introduced the idea that “lay people” who control organizations are influential in what legal arguments are used by interest groups. Stern suggests that their decisions, as opposed to the lawyers who know the law, can produce idiosyncratic effects as to what legal arguments are employed by an interest group. This describes the effect of micropolitics in decision-making within an organization and should also be considered in future research. To explore the political influence on learning for future research, the control of communication, information, and other resources within an advocacy coalition needs to be examined.

Regardless of the motivation for the learning, this research project has provided evidence that learning occurred within the separationist advocacy coalition both prior to and after legal change. These research results refute Epstein and Kobylka’s “tyranny of absolutes” and provide a framework to be used for future research on this issue.

Appendix A

State Aid to Sectarian Elementary and Secondary School Cases Analyzed

- *Lemon v. Kurtzman*, 403 U.S. 602 (1971) – established the three-prong test; prohibited state funding of nonpublic school teacher salaries, textbooks, and instructional materials in sectarian schools.
- *Lemon v. Kurtzman II*, 411 U.S. 192 (1973) – allowed state funding of program expenses incurred by sectarian schools prior to the decision in *Lemon I*.
- *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) – prohibited tuition reimbursements-tax credits and state grants for repair and maintenance of sectarian schools.
- *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973) – prohibited use of public funds to compensate sectarian schools for expenses associated with the administration of tests and reporting requirements that were both state mandated and prepared and those that were prepared by teachers in the sectarian schools.
- *Sloan v. Lemon*, 413 U.S. 825 (1973) – prohibited state aid in the form of partial tuition reimbursement to parents whose children attend sectarian schools.
- *Meek v. Pittenger*, 421 U.S. 349 (1975) – allowed state purchase of secular textbooks for sectarian school students, but prohibited purchase of instructional materials and funding of special needs instructors. This ruling also prohibited public school employees from providing services to students in sectarian schools.
- *Wolman v. Walter*, 433 U.S. 229 (1977) – allowed state provision of standardized tests and scoring services; secular textbooks; and, speech, hearing, and psychological services in sectarian schools. Therapeutic, guidance, and remedial services administered by public employees outside of the sectarian school setting were also permitted; however, the Court prohibited state funding of educational materials, equipment, and field trips.
- *New York v. Cathedral Academy*, 434 U.S. 125 (1977) – prohibited state funding of program expenses incurred by sectarian schools prior to a decision ruling the funding program unconstitutional.
- *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646 (1980) – allowed state reimbursement to sectarian schools for costs incurred in administering state-mandated tests, record-keeping, and reporting.
- *Mueller v. Allen*, 463 U.S. 388 (1983) – allowed a deduction from gross income for state taxes of educational expenses such as tuition, textbooks, and transportation.
- *Aguilar v. Felton*, 473 U.S. 402 (1985) – prohibited public school employees from providing secular instruction in sectarian schools.
- *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985) – prohibited public school employees from providing secular instruction in sectarian schools, and public funding of sectarian school teachers providing voluntary after school secular enrichment instruction.
- *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993) – the Court overturned the Court of Appeals decision based on *Lemon* and used a neutrality

argument to allow for a state funded sign-language interpreter to be provided to a sectarian school.

- *Agostini v. Felton*, 521 U.S. 203 (1997) – overturned *Aguilar v. Felton* (1985) and parts of *Grand Rapids v. Ball* (1985) and *Meeke v. Pittenger* (1975); allowed state paid secular instruction in sectarian schools.
- *Mitchell v. Helms*, 530 U.S. 793 (2000) – overturned parts of *Meeke v. Pittenger* (1975) and *Wolman v. Walter* (1977); allows for state supply of equipment and instructional materials to sectarian schools.
- *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) – allowed state funding of sectarian schools through vouchers.

Appendix B

Code Book

Introduction

Thank you for participating in this research project to examine the use of legal arguments by interest groups advocating a separationist interpretation of the Establishment Clause. The legal arguments to be examined are contained in litigant and *amicus* briefs filed in cases involving state aid to elementary and secondary religious schools. These cases cover a time period of over thirty years (1971 to 2002).

Legal arguments are defined as a course of reasoning using the science of law to establish the constitutionality of an issue. Conducting content analysis on the briefs will identify these legal arguments. Content analysis can be used on individual words, a combination of words (a theme), or an item (the entire communication or document). Using themes is the best method for tracking the use of legal arguments in this project. However, simply finding the theme is not enough because themes can be used in different ways. For the purpose of this study, themes are divided into two groups - those legal arguments that are supported and opposed by the separationist interest groups. Pages 3-11 contain the list of themes to be tracked and examples of how these themes are used in cases. The content analysis of each brief will produce a coding sheet that lists each argument used by the sponsor(s) of the brief. A blank coding sheet is provided on pages 12-14.

What to code:

- -legal arguments as they relate case facts to the constitutionality of the act or program being presented in the case. Legal arguments range from a sentence to a paragraph or more. Legal arguments can also be used to structure the entire document (see pages 3-11).

What *not* to code:

- statements that simply compare the case being presented with prior cases. These are not legal arguments to be coded, but they usually lay the groundwork for such arguments later in the document.
- policy arguments. Statements supporting or opposing the act or program based on their effectiveness, efficiency, or other non-legal criteria are not legal arguments and should not be coded.

The examples provided under “Content Analysis Coding” are not exhaustive. Please use the descriptions of each theme and the examples to determine if a legal argument should be coded under a theme. The list of legal argument themes also may not be all-inclusive. Based on your training feel free to add a theme if you feel it is necessary and not covered under the other themes. In both these instances, please provide explanations and/or descriptions in creating a new theme or of using an argument not listed in the examples. This will allow me to create a master list of all arguments and their uses at the end of this project.

If you have any questions please contact Ron Millar at rmillar@vt.edu or 703-524-9655.

Coding Sheet Instructions

The first items to be completed by the coder simply provide the necessary identification information for the brief: the name of the case, the parties filing brief, the date filed, and the counsel for the brief. As a coder you will put your initials next to the “Coded by:” section.

For example,

Case – Parties (Year): ***Zobrest v. Catalina (1993)***

Advocacy Group(s) Filing, Date filed, Counsel: **Brief *Amicus Curiae* of the American Civil Liberties Union, Arizona Civil Liberties Union, American Jewish Committee, Americans United for Separation of Church and State, and Anti-Defamation League, in Support of Respondent**, December 21, 1992, by Steven K. Green for AU, Steven M. Freeman for Anti-Defamation League, Samuel Rabinove for American Jewish Committee, Bradley S. Phillips (Counsel of Record) of Munger, Tolles & Olsen, and Steven R. Shapiro for the ACLU Foundation.

Coded by: rm

The remaining items are used to track the legal arguments/themes discovered in the brief. Once a theme is found in the brief, place an “X” next to the appropriate theme and provide the citation reference under the theme. If no reference to a theme is found then the theme should be left blank. Each theme can only be recorded in one category – see instructions in each category for examples and instructions.

For example,

X *Everson* Progeny
(record page number and case/justice cited)
-page 5, cites Chief Justice Burger in *Lemon*
-page 6, cites *Wolman v. Walter*
-page 7, cites *PEARL v. Nyquist*
-page 8, cites *Meek v. Pittenger*
-page 8, cites *Aguilar v. Felton*

— Purpose/Effect and Legislative Intent Tests
Note: Only code this section if it is used independently of the *Lemon* test.
(record page number, specific test cited, and case/justice cited)

X Endorsement/Disapproval Test
(record page number, and case/justice cited)
-page 13, Justice O’Connor in *Wallace v. Jaffree*

Content Analysis Coding

The content analysis of the legal briefs will code two types of arguments: those used to promote the separationist advocacy group policy goals and those used to counter the arguments of the accommodationist advocacy coalition.

Legal Tests and Arguments Used by Separationist Advocacy Groups

The following are thirteen (13) legal arguments that can be used to promote separationist policy goals. To maintain a manageable number of items for analysis, similar arguments have been combined into a single category. Each legal argument listed below represents a theme to be counted in the content analysis coding. The examples listed under each theme are by no means a complete list of the arguments used to promote the various themes.

1) *Everson* Tests

Under the *Everson* tests, from *Everson v. Board of Education*, 330 U.S. 1 (1947), the Establishment Clause forbids the following:

- (a) to establish a national church;
- (b) aid one particular religion;
- (c) aid all religions or religion in general;
- (d) prefer one religion over another;
- (e) require a person to go to church;
- (f) require a person to stay away from church;
- (g) force a person to profess a belief or disbelief in any religion;
- (h) punish a person for entertaining or professing religious beliefs or disbeliefs;
- (i) punish a person for church attendance or non-attendance;
- (j) use tax funds to support religious activities;
- (k) use tax funds to support religious institutions which practice or teach religion;
- (l) become involved or participate in the affairs of religious groups;
- (m) permit churches to participate in state affairs, as churches.

2) *Everson* Progeny

Everson's prohibitions of using tax funds to support religious institutions and religious activities (items j and k above) evolved in subsequent Court decisions to allow some funding of religious institutions as long as the public funding could not be used to support religious activities. For example:

- In schools where religious doctrine pervades all activities (“pervasively sectarian”) any aid provided to a school will support the religion’s indoctrination efforts and is therefore impermissible.

- *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). State grants for maintenance and repair of sectarian school buildings are unconstitutional because “[n]othing in the statute ... bars a qualifying school from paying out of state funds the salaries of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities.” at 744, and because there was no “effective means for guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes.” at 780.
- *Committee for Public Education & Religious Liberty v. Nyquist* (1973) at 780. “In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from [this Court’s] cases that direct aid in whatever form is invalid.”
- *Meek v. Pittenger*, 421 U.S. 349 (1975). Justice Stewart stated public funding of sectarian schools can only provide “secular and nonideological services unrelated to the primary, religion-oriented education function of the sectarian school.” at 364. “The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion.” at 370-71 quoting *Lemon*, 403 U.S. at 619.
- *Wolman v. Walter*, 433 U.S. 229, 244 (1977) Court ruled diagnostic and therapeutic services could be funded by the state because these services “have little or no educational content and are not closely associated with the educational mission of the nonpublic school.”
- *Wolman*, 433 U.S. at 250-251 also held that public funding of field trips were prohibited because of the “unacceptable risk” that the trips would be used to promote the school’s religious mission.
- *Mueller v. Allen*, 463 U.S. 388, 403 (1983) prohibited tax deductions for “instructional books and materials used in the teaching of religious tenets, doctrines or worship.”
- *Grand Rapids School District v. Ball*, 402 U.S. 373 (1985) and *Aguilar v. Felton*, 473 U.S. 402 (1985) determined that publicly funded teachers are prohibited from working in sectarian schools because the teachers “may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs.” *Grand Rapids*, 402 U.S. at 385; *Aguilar*, 473 U.S. at 408-09.
- *Grand Rapids* at 385 reiterates prohibition of “government-financed ... indoctrination into the beliefs of a particular faith.”
- *Witters v. Washington Department of Services*, 474 U.S. 481, 489 (1986). “Aid to a religious institution unrestricted in its potential uses, if properly attributed to the State, is clearly prohibited under the Establishment Clause.”
- Justice Rehnquist writing for the Court in *Bowen v. Kendrick*, 487 U.S. 589 (1988) reiterated that the Establishment Clause “prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith.” at 611 quoting *Grand Rapids School District v. Ball*, 402 U.S. 373 (1985) at 385.
- Justice O’Connor’s concurring opinion in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 846-847 and 852 (1995) states, “Our decisions provide no precedent for the use of public funds to finance religious activities” ...

“public funds may not be used to endorse the religious message” nor create a “sponsorship” or “active involvement of the sovereign in religious activity.”

- Justice O’Connor in her concurring opinion in *Mitchell v. Helms* 530 U.S. 793 (2000) concludes that aid to sectarian schools is impermissible if the aid can be diverted for use in religious indoctrination or for the advancement of religion. This is also called divertibility of public funds and diversion of secular aid.

3) *Lemon* Test

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court, drawing on previous decisions, developed the three-prong criteria in determining the constitutionality of public activities. The *Lemon* test requires that a government act or action: 1) must be secular in purpose (see Purpose and Effect below), 2) not lead to excessive entanglement with religion (see Prohibited Relationships below); and, 3) its primary effect neither promotes nor inhibits religion (see Purpose and Effect below).

4) Purpose and Effect Test/Legislative Intent

In this test a government act or action must have a secular purpose and a secular effect, and the secular purpose of the act can be determined in part from the intent of the members of the legislature. This section will only be coded if it is used independently of the *Lemon* test (see above). Key examples of these tests are:

- In *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963) the Court stated “there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion” for a public action to be constitutional.
- Chief Justice Warren writing for the Court in *McGowan v. State of Maryland*, 366 U.S. 420, 453 (1961) concluded that legislation violates the Establishment Clause “if it can be demonstrated that its purpose-evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect-is to use the State’s coercive power to aid religion.”
- Justice Powell writing for the Court in *Hunt v. McNair* 413 U.S. 734, 743 (1973) stated that “aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission.”
- *Grand Rapids School District v. Ball*, 402 U.S. 373, 399-40 (1985) Justice O’Connor concurring, “When full-time parochial school teachers receive public funds to teach secular courses to their parochial school students under parochial school supervision, I agree that the program has the perceived and actual effect of advancing the religious aims of the church-related schools.”
- *Agostini v. Felton* 521 U.S. 203 (1997) reasserted the secular-use only limitation of aid to sectarian schools.

5) Prohibited Relationships

This section contains the legal arguments stating the Establishment Clause prohibits the state and religion from becoming too interconnected. Legal arguments in this section include: dependency/fusion, entanglement/impermissible involvement, and symbolic link/union. This section will only be coded if it is used independently of the *Lemon* test (see above). Examples of prohibited relationship arguments include:

- *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963) forbids “a fusion of government and religious functions or a concert or dependency of one upon the other.”
- Chief Justice Burger in *Walz v. Tax Commission*, 397 U.S. 664 (1970), wrote “We must also be sure that the end result – the effect – is not an excessive government entanglement with religion.” at 674. “Obviously a direct money subsidy would be a relationship pregnant with involvement ...” at 675.
- *Grand Rapids School District v. Ball*, 402 U.S. 373, 385 (1985). The Court declared state-paid instructors could not teach in sectarian schools because of the “crucial symbolic link between government and religion” that might appear “in the eyes of impressionable youngsters.”
- U.S. Court of Appeals decision in *Zobrest v. Catalina*, 963 F.2d 1190 (9th Cir. 1992), where the use of a public financed interpreter in a sectarian school would create a “symbolic union” between church and state, thereby excessively entangling government and religion and endorsing religious activities.
- *Agostini v. Felton* 521 U.S. 203 (1997) reasserted that the excessive entanglement doctrine when the action or act requires “pervasive monitoring.”

6) Justice Brennan’s 3-part Test

Justice Brennan stated that laws and government actions are unconstitutional if: “(a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice.” Brennan used this test in his concurring opinions in *Abington School District v. Schempp*, 374 U.S. 203, 295 (1963), *Walz v. Tax Commission*, 397 U.S. 665, 680 (1970), and *Lemon v. Kurtzman*, 403 U.S. 602, 643 (1971)

7) Endorsement/Entanglement Test

Justice O’Connor developed the following variation on the *Lemon*’s test:

- Concurring in *Lynch v. Donnelly*, 465 US 668, 688 (1984), Justice O’Connor wrote, “The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers

not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines... The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.”

- Justice O’Connor concurring in *Wallace v. Jaffree*, 472 US 38, 69 (1985). “Direct government action endorsing religion or a particular religious practice is invalid under this approach because it ‘sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.’ ...Under this view, *Lemon’s* inquiry as to the purpose and effect of a statute requires courts to examine whether government’s purpose is to endorse religion and whether the statute actually conveys a message of endorsement.”

8) Coercion Test

Justice Kennedy has developed an alternative to the *Lemon’s* test:

- Writing for the Court in *Lee v. Weisman*, 505 U.S. 577, 589 and 587 (1992), Justice Kennedy stated, “The First Amendment’s Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere” and “It is beyond dispute that, at a minimum, the Constitution guarantees that government not coerce anyone to support or participate in religion or its exercise.”
- Justice Kennedy, both concurring and dissenting in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), argued “Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to a religion in such a degree that it in fact ‘establishes a religion or religious faith, or tends to do so.’” at 659 quoting *Lynch v. Donnelly* 465 US 668, 678 (1984).

9) Religious Means Test:

In this test, the Establishment Clause prohibits the government from using religious institutions to perform secular tasks. Below are two sources for this argument:

- Justice Brennan concurring in *Abington School District v. Schempp*, 374 U.S. 203, 264-5 (1963) “...government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice.” As noted above, this is the third section of Brennan’s 3-part test.

- James Madison in his *Memorial and Remonstrance Against Religious Assessments*, “We remonstrate against ... 5. Because the Bill implies either that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil Policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: the second an unhallowed perversion of the means of salvation.” (underline added for emphasis; in Alley, 1988, pp. 18 and 20).

10) *Stare Decisis*

This argument is more than just appealing to precedent – this attempts to force the Court to formally declare and justify the overriding of a Court precedent. A source of this argument is:

- *Dickerson v. United States*, 530 U.S. 428, 443 (2000), The Court stated, “while *stare decisis* is not an inexorable command, particularly when [the Court is] interpreting the Constitution, even in constitutional cases, the doctrine carries such persuasive force that [the Court has] always required a departure from precedent to be supported by some special justification.”

11) Stricter State Standards

This argument contends if a state constitution has a stricter separation of church and state provision than the federal Constitution, the stricter state interpretation should be used in deciding the case. For example:

- *Luetkemeyer v. Kaufmann*, 419 U.S. 888, 895 (1974). In this case Missouri was allowed to deny public funded bus transportation for religious school children (which was allowed in *Everson*) because the Court ruled that the state of Missouri had a valid interest in “maintaining a very high wall between church and state.”

12) Original Intent – Founders

Referencing Madison, Jefferson, and other Founding Fathers to provide a historical foundation for the separationist stance. In coding this theme, the legal argument must be presented as how our Constitutional Founders desired the Establishment Clause to be interpreted. For example, using Madison’s *Memorial and Remonstrance* to argue that the *Founders desired* no public funding of religious institutions would be coded as a #12; however, using the same reference to argue that religious institutions should not be hired to conduct secular functions would be coded as #9 (see above).

13) Original Intent – Religious Fratricide and Diversion/Corruption of Churches

Some scholars argue that the Establishment Clause was created to prevent the religious strife and corruption of religious institutions as experienced in Europe.

- Providing public funding to religious institutions for secular activities diverts these institutions from their religious functions and therefore harms religion.
- Public aid to religious institutions and religious schools creates a divided and fractious society because: 1) religious organizations can create segregated private schools by discriminating in admissions and hiring practices, and 2) rivalries and unhealthy competition will develop between religions seeking limited government funds.

Legal Tests and Arguments Countered by Separationist Advocacy Groups

The following are five (5) legal arguments that need to be refuted to promote separationist policy goals. Each legal argument listed below represents a theme to be counted in my content analysis coding.

C1) Neutrality/Non-Preferentialism

A neutral criteria, treating all religious organizations the same as nonreligious organizations, in providing public aid is not sufficient to pass Establishment Clause scrutiny. For example:

- Justice Frankfurter in his concurring opinion in *McCullum v. Board of Education*, 333 U.S. 203, 227 (1948) wrote, “Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally.”
- Harvard Professor Paul A. Freund in *Public Aid to Parochial Schools* (74 Case and Comment 4, 1969) refutes a neutrality stance on sectarian funding of secular programs because once funding began it would be mandatory to fund all sectarian activities.
- *Witters v. Washington Department of Services*, 474 U.S. 481, 488 (1986) the Court determined that there was no indication that “any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education” so this case is not an endorsement of the neutrality test.
- Justice Rehnquist writing for the Court in *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988) “even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion.”
- *Zobrest v. Catalina Foothills Schools District*, 509 U.S. 1, 10-11 (1993). The benefit from this program by sectarian schools was indirect and attenuated, therefore, not an endorsement of the neutrality test.
- Justice O’Connor’s concurring opinion in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 846 and 852 (1995) argued that neutrality “in both form and effect” is one “hallmark” of the Establishment Clause, but does not override the “funding prohibition” of the Clause.
- Justice O’Connor concurring in *Mitchell v. Helms*, 530 U.S. 793, 839 (2000) “We have never held that a government-aid program passes constitutional muster solely because of the neutral criteria it employs as a basis for distributing aid.”

C2) Discrimination Toward Religious Institutions

Treating religious institutions differently from nonreligious institutions does not constitute discrimination towards religious institutions. For example:

- *Norwood v. Harrison*, 413 U.S. 455 (1973). Mississippi purchased textbooks and lent them to students in both public and private schools (including religious schools). The Court ruled that the state is not required by the Equal Protection Clause to provide assistance to private and religious schools equivalent to what it provides to public schools. Chief Justice Burger writing for the majority in *Norwood* stated that *Lemon* negates any absolute right to equal aid, “constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance.” at 462.
- The Court in *Sloan v. Lemon*, 413 U.S. 825, 835 (1973) states, “The Equal Protection Clause has never been regarded as a bludgeon with which to compel a state to violate other provisions of the Constitution.”

C3) Parent/Child Benefit

If public aid benefits the parent and/or child rather than the religious institution, the public aid must still be reviewed under the scrutiny of the Establishment Clause to ensure that the funding is not used for religious purposes. For example:

- *Everson v. Board of Education*, 330 U.S. 1, 18 (1947). Public funding of bus fares are constitutional the Court stated because they were “so separate and so indisputably marked off from the religious function [of the schools].”
- *Board of Education v. Allen*, 392 U.S. 236, 248 (1968) determined that states can provide textbooks to sectarian schools that are not “instrumental in the teaching of religion.”
- *Wolman v. Walter*, 433 U.S. 229 (1977) allowed diagnostic services because they “have little or no educational content and are not closely associated with the educational mission of the nonpublic school.” at 244. Therapeutic services were allowed because there was no danger that a state-paid therapist, in a “religiously neutral location,” would participate in communicating religious beliefs or ideas. at 247.
- *Witters v. Washington Department of Services*, 474 U.S. 481, 487 (1986) “aid may have the effect [of a direct subsidy to sectarian schools] even though it takes the form of aid to students or parents.”
- *Zobrest v. Catalina Foothills Schools District*, 509 U.S. 1, 12 (1993). State aid to parents/children of sectarian schools constitutes an impermissible direct subsidy if the aid “relieve[s the school] of an expense that it otherwise would have assumed in educating its students.”

C4) Individual Choice

If public aid is provided to an individual who then passes this aid to a religious institution, this type of public aid can still violate the Establishment Clause. For example:

- *Mueller v. Allen*, 463 U.S. 388, 403 (1983) the Court concluded, “state officials must disallow deductions taken for ‘instruction books and materials used in the teaching of religious tenets, doctrines or worship...’”
- *Mueller v. Allen*, 463 U.S. at 399 the Court stated that “the fact that aid is disbursed to parents rather than to ... schools” is “only one among many factors to be considered.” quoting *PEARL v. Nyquist*, 413 U.S. 756, 781 (1973)
- *Witters v. Washington Department of Services*, 474 U.S. 481, 487 (1986) the Court determined that “aid may have that [impermissible] effect even though it takes the form of aid to students or parents.”
- *Agostini v. Felton*, 521 U.S. 203, 230 (1997) the Court ruled that “the criteria by which an aid program identifies its beneficiaries ... might themselves have the [impermissible] effect of advancing religion by creating a financial incentive to undertake religious indoctrination.”

C5) Free Exercise Trumps the Establishment Clause

The Free Exercise Clause cannot be used as an argument that government must support the religious activities of individuals. For example:

- *Bowen v. Roy*, 476 U.S. 693, 700 (1986) and Justice Douglas’s concurring in *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) stated “The Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government.”

Coding Sheet

Case – Parties (Year):

Advocacy Group(s) Filing, Date filed, Counsel:

Coded by: _____

Tests/Arguments Used:

___ *Everson* Tests
(record page number and specific test cited)

___ *Everson* Progeny
(record page number, specific test cited, and case/justice cited)

___ *Lemon* Test
Note: If *Lemon* is used do not code the next two tests unless the citations are used independently of *Lemon*.
(record page number)

___ Purpose/Effect and Legislative Intent Tests
Note: Code only if used independently of *Lemon*.
(record page number, specific test cited, and case/justice cited)

___ Prohibited Relationships: include dependency/fusion, entanglement/impermissible involvement, and symbolic link/symbolic union
Note: Code only if used independently of *Lemon*.
(record page number, specific test cited, and case/justice cited)

___ Brennan 3-part test:
(record page number and case cited)

___ Endorsement/Entanglement Test
(record page number, and case/justice cited)

- ___ Coercion Test
(record page number, and case/justice cited)

- ___ Religious Means Test
Note: Code only if used independently of Brennan's 3-part test (see above)
(record page number, specific test cited, and case/justice/reference cited)

- ___ *Stare Decisis*
(record page number and case/justice/reference cited)

- ___ Stricter State Standards
(record page number and case/justice cited)

- ___ Original Intent - Founders
(record page number and reference cited)

- ___ Original Intent – Religious Fratricide and Diversion/Corruption of Churches
(record page number and reference cited)

- ___ Other

Tests/Arguments Countered:

- ___ Neutrality/Non-Preferentialism
(record page number and case/justice/reference cited)

- ___ Discrimination Toward Religious Institutions
(record page number and case/justice/reference cited)

- ___ Parent/Child Benefit
(record page number and case/justice/reference cited)

___ Individual Choice
(record page number and case/justice/reference cited)

___ Free Exercise Trumps Establishment Clause
(record page number and case/justice/reference cited)

___ Other

Appendix C

Interview Subjects

Alley, Robert. Professor of Religion and Humanities, University of Richmond.

Barkey, David. Associate Director of National Legal Affairs, Anti-Defamation League.

Doerr, Edd. President, Americans for Religious Liberty, formerly with Americans United (1966 – 1982).

Geller, Stanley. Retired General Counsel and President of National PEARL.

Goldsmith, Joanne. Executive Director of National PEARL (1974 – 1984).

Green, Steven K. Professor, Willamette University College of Law, formerly General Counsel and Director of Policy for Americans United (1992 – 2001).

Maddox, Robert. Pastor Briggs Memorial Baptist Church and former Executive Director of Americans United (1984 – 1992).

Menendez, Albert J. Associate Director of Americans for Religious Liberty and former Director of Research and Associate Editor of *Church & State* for Americans United (1972 – 1988).

Steinhilber, August W. Reese & Carney LLP and former Associate Executive Director and Legal Counsel and later the General Counsel for the National School Boards Association (1968 – 1998).

Stern, Marc. Co-Director of the Commission for Law and Social Action, American Jewish Congress.

Underwood, Julie. General Counsel, National School Boards Association.

Walker, J. Brent. Executive Director, Baptist Joint Committee.

Appendix D

INFORMED CONSENT FOR PARTICIPANTS OF INVESTIGATIVE PROJECTS

TITLE OF PROJECT: Coalition Networks and Policy Learning: Interest Groups on the Losing Side of Legal Change

INVESTIGATOR: Ronald B. Millar, doctoral student, Virginia Tech, Center for Public Administration and Policy

I. THE PURPOSE OF THIS RESEARCH: You are invited to participate in a study examining interest group participation in Supreme Court cases regarding state aid to sectarian schools from 1971 to 2002, and how the legal arguments of interest groups in litigant and *amicus* briefs have evolved during this period.

II. PROCEDURES: To accomplish the goals of this part of the study, you will be asked a series of questions regarding the legal arguments used in litigant and *amicus* briefs in Supreme Court cases dealing with state aid to sectarian elementary and secondary schools. Participation in this study will require approximately 1 hour of your time.

III. RISKS: There are no apparent risks involved with participation in this study.

IV. BENEFITS OF THIS PROJECT: A general benefit of this project is to gain an understanding of interest group learning patterns following legal change. No guarantee of direct benefits has been made to encourage you to participate.

V. EXTENT OF ANONYMITY AND CONFIDENTIALITY: I would appreciate your agreement to identify you by name and affiliated organization for this research project. If you would like to remain anonymous, confidentiality can be provided in two ways: anonymous by name but identification of interest group affiliation or anonymity for both your name and affiliation. For the latter request, we will discuss the appropriate reference to be used in the dissertation (e.g., counsel of an advocacy organization, spokesperson of an educational group, etc.).

VI. COMPENSATION: No financial compensation will be offered to you for participation in this project.

VII. FREEDOM TO WITHDRAW: You are free to withdraw at any time without penalty.

VIII. APPROVAL OF RESEARCH: This research project has been approved, as required, by the Institutional Review Board (IRB) for Research Involving Human Subjects at Virginia Polytechnic Institute and State University and by Virginia Polytechnic Institute and State University's Center for Public Administration and Policy (IRB# 05-058).

IX. PARTICIPANT'S RESPONSIBILITIES: I voluntarily agree to participate in this study. I understand that I have the responsibility to answer questions to the best of my knowledge.

X. PARTICIPANT'S PERMISSION: I have read and understand the informed consent and conditions of this project. I have had all my questions answered. I hereby acknowledge the above and give my voluntary consent for participation in this project.

If I participate, I may withdraw at any time without penalty. I agree to abide by the rules of this project.

Participant's Signature and Date

Should I have any questions about this research or its conduct, I will contact:
Dr. Philip S. Kronenberg (Dissertation Chair) philkvt@vt.edu, 703-706-8117 or
Dr. David Moore (IRB Chair) moored@vt.edu, 540-231-4991

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Brief of *Amicus Curiae* National School Boards Association. *Mueller v. Allen*, 463 U.S. 388 (1983).

Brief of *Amicus Curiae* National School Boards Association. *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993).

Brief of *Amicus Curiae* New York County Lawyers Association. *Agostini v. Felton*, 521 U.S. 203 (1997).

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- Brief of *Amicus Curiae* United Americans for Public Schools. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).
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CURRICULUM VITAE

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EDUCATION

VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY

Center for Public Administration and Policy 1997 – 2005.

Doctor of Philosophy in Public Administration/Public Affairs, December 2005.

Certificate of Advanced Graduate Study awarded June 2004.

Master of Public Administration conferred August 2001.

Inducted into Pi Alpha Alpha, national honor society for Public Affairs and Administration, 2001.

INDIANA UNIVERSITY OF PENNSYLVANIA

Bachelor of Arts in Political Science conferred December 1982.

Inducted into Pi Gamma Mu, national honor society for the Social Sciences, 1981.

RESEARCH INTERESTS

Public Administration and Policy
Organizational, Network, and Policy Learning
Advocacy Coalitions
Interest Groups
Civil Liberties

PROFESSIONAL PRACTICE

Legislative Assistant, 2005 – present

SECULAR COALITION FOR AMERICA

Provide administrative, research, and development assistance for this new lobbying organization representing the interests of atheists, humanists, agnostics, and other freethinkers.

PROFESSIONAL PRACTICE (continued)

Graduate Assistant, 2000 – 2003

VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY

Provided administrative, research, and teaching assistance for faculty members at the Center for Public Administration and Policy. Served as webmaster for the Center's home page. Arranged internship placements for Blacksburg campus undergraduate students selected to participate in the Washington Semester Program. Awarded Graduate Student of the Month, August 2002 (for substituting for a professor who was recovering from a heart attack, by teaching his two graduate level courses).

Deputy Director, 1995 – 2000

NATIONAL RESEARCH COUNCIL, THE NATIONAL ACADEMIES

Managed the Fellowship Programs Unit, Office of Scientific and Engineering Personnel, with financial oversight of an annual budget of more than \$10 million and a staff of twenty which administered contracts and grants for eight doctoral and postdoctoral fellowship programs sponsored by the Ford Foundation, Howard Hughes Medical Institute, U.S. Department of Energy, U.S. Department of Education, and the National Aeronautics and Space Administration. Awarded for Outstanding Individual Performance in 1996. Selected to participate on a committee to oversee the design of a new corporate facility.

Program Associate, 1991 – 1995

Responsible for all financial aspects of the fellowship programs including: negotiating program funding with sponsors, preparing contract and grant proposals, authorizing and verifying expenditures, and analyzing trends in expenditures. Awarded for Outstanding Individual Performance in 1993. Selected to participate on two teams redesigning the institution's financial and committee systems.

Administrative Assistant, 1989 – 1991

Assisted the Program Associate in the financial management of the fellowship programs.

Owner and Editor, 1990 – 1995

SANSCULOTTE PUBLISHING

Operated a subscription service publishing two monthlies, *The District Council Journal*, a newsletter analyzing the activities of the Council of the District of Columbia, and *The DCJ Legislative Tracking Service*, a legislative tracking service.

Campaign Manager, 1987 – 1988

CHORLTON FOR COUNCIL CAMPAIGN

Coordinated all aspects of a political campaign for an At-Large DC Council seat, including: developed and implemented a campaign plan, supervised staff and volunteers, researched and prepared campaign materials, scheduled events, raised funds, and filed campaign finance reports. The candidate placed fourth in a field of seven with the top two candidates taking seats on the Council.

PROFESSIONAL PRACTICE (continued)

Administrative Assistant, 1986 – 1987

**SCHOOL OF ADVANCED INTERNATIONAL STUDIES (SAIS),
THE JOHNS HOPKINS UNIVERSITY**

Assisted the Associate Director of Development in planning and implementing a fund-raising campaign for the Latin American Studies Department.

Office Manager, 1982 – 1985

CITIZEN ACTION and THE CITIZEN/LABOR ENERGY COALITION

Performed administrative and fund-raising functions for these progressive grassroots lobbying organizations.

INTERNSHIPS

Researcher and Writer, 1982

MULTINATIONAL MONITOR

Performed administrative functions and wrote copy for this monthly Ralph Nader-affiliated magazine. Published articles include: “Caltex: Indonesian Workers Demand Nationalization,” “Nestle Claiming New Reforms,” “Thailand Spars With Foreign Gas Firm,” “Liberian Mine Disaster Kills 200,” “Bechtel Workers Strike in Indonesia,” and “Indonesia Sparks ‘Cold War’ Against Oil Companies.”

Campus Coordinator, 1980

JAY RUBIN CAMPAIGN

Coordinated campus activities of campaign for a Pennsylvania state representative seat.

RESEARCH PROJECTS

DISSERTATION, VIRGINIA TECH

Coalition Networks and Policy Learning: Interest Groups on the Losing Side of Legal Change. This research project analyzed the conflicting findings of learning and legal change literatures by conducting a case study of interest group participation in Supreme Court cases regarding state aid to elementary and secondary sectarian schools from 1971 to 2002. Network, organizational, and policy learning literatures indicate that when interest groups face failure they seek out alternative ideas and strategies that enhance their potential for future success. Research regarding legal change found that interest groups, using arguments once accepted as the legal standard for Supreme Court decisions, were unwilling or unable to alter their arguments when the Court reversed its position on these legal standards.

RESEARCH PROJECTS *(continued)*

OUTCOME STUDY, THE NATIONAL RESEARCH COUNCIL Status of Ford Foundation Predoctoral and Dissertation Fellowship Recipients and Status of Ford Foundation Postdoctoral Fellowship Recipients, prepared by Ron Millar and Lori Thurgood, Fellowship Programs Unit, Office of Scientific and Engineering Personnel, National Research Council, October 1996, as an internal report to the sponsor of these programs, the Ford Foundation. These reports examined results of a survey, modeled after the national Survey of Doctorate Recipients, profiling the educational and career status of recipients of the Ford Foundation Predoctoral (1986-1991), Dissertation (1986-1993), and Postdoctoral (1980-1993) Fellowships for Minorities Program.

TEACHING EXPERIENCE

VIRGINIA TECH

PAPA 6224: **Design, Implementation and Evaluation of Public Policy**, Spring 2004, Dr. Philip Kronenberg. Instructed two class sessions substituting for Dr. Kronenberg – provided feedback on team research projects.

PAPA 6224: **Design, Implementation and Evaluation of Public Policy**, Spring 2003, Dr. Philip Kronenberg. Co-instructed with Dr. James F. Wolf for five class sessions – provided feedback on team research projects.

PAPA 5014: **Concepts and Issues in Public Administration**, Spring 2002, Dr. Orion White. Taught one class session entitled, “Theories of Ethics, Ethical Practices, Case Illustrations.”

PAPA 6514: **Public Administration and Policy Inquiry**, Fall 2001, Dr. Philip Kronenberg. Developed and taught one of the seven class modules, “Geographic Information Systems.” Designed and conducted a voluntary problem-solving session in use of required software packages: NCSS (Number Cruncher Statistical Software), ArcExplorer, and Netscape Composer. Taught the last four class sessions while Dr. Kronenberg was recovering from a heart attack.

PAPA 6294: **Capstone Seminar in Public Policy**, Fall 2001, Dr. Philip Kronenberg. Substituted at the end of the semester as noted above. Provided substantive feedback for students’ individual research projects.

COMMUNITY SERVICE

PAC Chair, 1999 – 2000

VIRGINIA NARAL

Coordinated fund-raising, prepared candidate research, and facilitated endorsement and financial contribution decisions for state candidates dedicated to protecting women's health and reproductive rights.

Political Committee Member, 1997 – 1999

Participated in decision-making for organizing and lobbying efforts.

Board Member, 1997 – 1998

WINTER HILL HOMEOWNERS ASSOCIATION

Assisted with dispute resolution, budgeting, and property management.

Vice Chair of the Central Committee, 1989 – 1990

At-Large Central Committee Member, 1987 – 1989, 1990 – 1991

Election Committee Chair, 1987, 1989 – 1991

Editor, *The New Columbia Voice*, the party's newsletter, 1987 – 1990

DC STATEHOOD PARTY

Held multiple leadership positions for this political organization seeking self-determination for the citizens of the District of Columbia.

Interim Campaign Manager, 1990

HILDA MASON RE-ELECTION CAMPAIGN

Assumed campaign duties while conducting a search for a replacement campaign manager in a successful re-election effort of this at-large member of the Council of the District of Columbia. Took prior campaign management team to arbitration for malfeasance.

President, 1989 – 1990

HIGHTOWERS TENANTS' ASSOCIATION

Founded and organized tenants association in an ultimately unsuccessful attempt to purchase the apartment building.

Board Member, 1987 – 1988

DC/MD/NoVA DEMOCRATIC SOCIALISTS OF AMERICA (DSA)

Participated in organizational and policy decision-making of this advocacy group founded by Michael Harrington.

Production Board, 1986 – 1987

DEMOCRATIC SOCIALIST, the DC/MD/NoVA DSA newsletter.

Contributed artwork, cartoons, and articles to this publication, including: "The Second Death of Lansburgh" about the closing of a downtown arts center; "Counter-Culture at Camp" covering the 15th annual Rainbow Gathering; and "There's A War on Drugs So Why Am I Not A Patriot."