A History of Establishment Clause Jurisprudence With Respect to Parochial School Funding

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Abstract

Since the drafting of the Establishment Clause, a pronouncement contained within the First Amendment of the United States Constitution. The United States Supreme Court has debated how to interpret the meaning of, "*Congress shall make no law respecting an establishment of religion.*" In *Everson v. Board of Education* (1947), the Court took its first action in an Establishment Clause case concerning funding for parochial school students that set a course that has been marked by confusion in the Court, inconsistent decision-making, and ultimately the creation of a policy of accommodation that provides opportunities for parochial school students to receive public financial assistance, including tuition reimbursement for their attendance at parochial schools.

This study tracks the history of Establishment Clause jurisprudence with a research emphasis from *Everson v. Board of Education* (1947) to *Zelman v. Simmons-Harris* (2002) and illustrates how the philosophy of the United States Supreme Court has changed over time. Further context of the shift is provided with a discussion of the *Lemon v. Kurtzman* (1971) decision that served as an effective court-interpreted barrier to the use of public resources and funds for parochial schools for several years. Subsequent U.S. Supreme Court decisions have eroded gradually the barrier, coined the *Wall of Separation between Church and State* by Thomas Jefferson, culminating currently with *Zelman v. Simmons-Harris* (2002).

The purpose of the study is to analyze the aforementioned shift in the context of public funding flowing for private church schools.

It became clear through this study that the decision in *Everson v. Board of Education* was the decision which led to a history of conflict and confusion in the Court which set off a chain of events that ultimately led to public funding for parochial schools where allowable by State Constitution. The U.S. Supreme Court has determined that public funding for a sectarian school is allowable so long as the funding is neutral and at the personal discretion of the parents receiving it as opposed to directly supporting a sectarian school.

Key Words: Establishment Clause, Lemon Test, Separation of Church and State

Dedication

This dissertation is dedicated to Emily and Brylan. I trust you will always love learning as much as I do and push yourselves to continue finding new and exciting ways to use your new knowledge to change the world. I am counting on you and I love you always. And Sara, thank you for supporting me in so many ways, forcing me to analyze and think deeply about this topic and life.

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Thanks Mom and Dad.

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CHAPTER 1

Introduction

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.* [1]

The first two clauses of the First Amendment define the relationship between the government and religion. The Establishment Clause (*Congress shall make no law respecting an establishment of religion)* prohibits government from providing aid to religious institutions, formally establishing a religion, and preferring one religion over another. The Free Exercise Clause (*prohibiting the free exercise thereof*) is intended to support individual freedom to engage in religious activities as one deems appropriate. Because each clause is meant to provide distinctly different protections (government establishment of religion versus exercising freedom of religion) there has historically been tension between them.

For more than a quarter century, of review and refinement, beginning around the middle of the 20th Century, Establishment Clause jurisprudence remained firmly rooted in a separation between church and state. In 1947, the United States Supreme Court articulated language which would be the cornerstone upon which it would build its Establishment Clause jurisprudence: "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 Thomas Jefferson, the

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1 U.S. Const. amend. I .

clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'"[2]

Twenty five years later, in *Lemon v. Kurtzman*,[3] Chief Justice Burger, writing for the majority, articulated a three-part test now known as "the *Lemon* Test." In order to withstand a challenge of the Establishment Clause, a government act must 1) have a secular legislative purpose; 2) its principal or primary effect must be one that neither advances nor inhibits religion; and, 3) the act must not further "an excessive entanglement with religion."[4]

However, subsequent to the decision in *Lemon* there was concern regarding the perceived inconsistency with which the Lemon Test has been applied by the Court. Conservative members of the Court launched attacks on *Lemon*. In a strong concurrence in *Lamb's Chapel v. Moriches*, Justice Scalia, with whom Justice Thomas joined, outlined previous attempts to "kill and bury" *Lemon*. Citing opinions in which five of the sitting Justices had "personally driven pencils through the creature's heart" and a sixth who had "joined an opinion doing so,"[5] Scalia vented his frustration that *Lemon* remained alive:

> "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our

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[2] *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 9 (1947) (quoting *Reynolds v. U.S*, 98 U.S. 145, at 164 (1878)).

[3] 403 U.S. 602 (1971).

[4] *Id.* at 612, 613 (quoting *Walz v. Tax Commission*, 397 U.S. 664 at 674 (1970)).

[5] 508 U.S. 384, 398-99.

> Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District." [6]

In the spring of 2009 when questioned on a graduation stage in Fairfax County, Virginia about the Establishment Clause, Justice Scalia answered, "the Establishment Clause is one of the most disreputable pieces of our American history and if you are trying to make sense of it…good luck." [7] This statement by Scalia, along with his inflammatory language in *Lamb's Chapel,* offers a foundational backdrop that clearly illustrates the often emotional beliefs held by Supreme Court Justices in reference to Establishment Clause jurisprudence.

Statement of Problem

The shift in Establishment Clause jurisprudence, and the Court's lack of consistency in applying *Lemon,* is clearly evident in the battle over the issue of public funding for parochial schools. Some argue that funding should be impermissible because the co-mingling of public funds with sectarian institutions violates the Establishment Clause. However, a countervailing argument asserts that withholding funds places an undue burden on parents who wish to send

[6] *Id.*

[7] Justice Antonin Scalia, Personal Comment to the Author prior to a Commencement Address at Woodson High School (June 16, 2009).

their children to parochial schools and thus prohibits them from practicing their faith while attempting to comply with compulsory attendance laws.[8]

In post *Lemon* cases, such as *Zelman v. Simmons-Harris*[9] and *Locke v. Davey,*[10] the Court further complicated the issue and arrived at outcomes that appear to support public funding for sectarian schools but do not require states to take action.[11] In *Zelman* the Court ruled that public funding can be used for private parochial instruction while in *Locke* the decision was made that the state cannot be forced to provide funding for religious education. These two rulings, along with others since *Lemon,* have complicated and confused the legal landscape since the metaphorical "wall of separation" Jefferson wrote about in his 1802 letter to the Danbury Baptists to the point where there appears to be no formulaic approach to decision making with respect to the Establishment Clause.

The Lemon Test can be considered a high water mark in Establishment Clause jurisprudence and, in rulings since, the balance has been tipped to the side of greater discretion with respect to parochial schools when using publicly allocated funds. The timing of *Lemon*, and subsequent move away from its algorithm for decision-making, may be further explained by the ideological shift brought about by several judicial appointees.

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[8] Sarah M. Lavigne, *Education Funding in Maine in Light of Zelman and Locke: Too Much Play in the Joints?,* 59 Me. L. Rev. 511 (2007).

[9] 536 U.S. 639 (2002).

[10] 540 U.S. 712 (2004).

[11] *Lemon v. Kurtzman* and *Zelman v. Simmons-Harris* were U.S. Supreme Court cases dealing with issues associated with, and potential violations of, the Federal Constitution.

Purpose of Study

The purpose of this study is to analyze the history of Establishment Clause jurisprudence as it relates to parochial school funding. The time frame for this study is 1947-2002 with a historical framework dating back to the adoption of the Constitution to provide context. Establishment Clause cases in which the Court established the foundation for a jurisprudence based on the wall of separation are examined beginning in 1947 with *Everson*. This review is done in an effort to provide a clear understanding of how the court shifted over the course of nearly a century away from maintaining a wall of separation to allowing public funding for parochial education.

It is important to note that this study reviews only questions of the Federal Constitution. As a consequence, there were cases reviewed that allowed for certain action at the federal level, such as providing funding for parochial school tuition vouchers, that is prohibited by many State Constitutions. State Constitutions may be more restrictive than the Federal Constitution with regard to the establishment of religion.

The study also investigates the judicial analysis of Establishment Clause cases leading up to *Lemon* in 1971. Further, this study investigates *Lemon* and how the Lemon Test, an outgrowth of this case, was applied in subsequent cases. Moreover, this study explores the shift in interpretation and move away from *Lemon* through *Simmons-Harris* in 2002 with respect to cases involving public funding for parochial schools. The final portion of this study will review how the current law as established by the Court impacts operational and policy decisions school leaders in America make daily and recommends future research.

Research Questions

This study seeks to address the following questions:

1) How has the Supreme Court's interpretation and application of the Establishment Clause changed since its drafting with respect to parochial school financing?

    a. How did the Supreme Court evaluate public funding of sectarian schools under the Establishment Clause of the First Amendment prior to *Lemon v. Kurtzman*?

    b. How did the Supreme Court evaluate public funding of sectarian schools under the Establishment Clause of the First Amendment in *Lemon v. Kurtzman*?

    c. How did the Supreme Court evaluate public funding of sectarian schools under the Establishment Clause of the First Amendment after *Lemon v. Kurtzman*?

Definition of Terms

Common understanding of key terms in the law and this study is vital to support the comprehension of cases settled by the Supreme Court. The following terms are defined to help the reader understand better this study. Those used include:

ACT – An act is an alternative name for a statutory law enacted by a legislature.[12]

AUTHORITY – Authority refers to the precedential value accorded to a legislative, judicial or administrative body. The court's opinion is binding to other courts directly below in the judicial hierarchy. Authority also refers to the legal power to act and require public obedience to action.[13]

CASE LAW - The aggregate of any number of cases that form a body of jurisprudence. Case law can also be a law associated with a particular subject that is formed by adjudicated cases distinguished by statutes and other sources of law.[14]

ESTABLISHMENT CLAUSE – The provision of the First Amendment to the U.S. Constitution that states: "Congress shall make no law respecting an establishment of religion..."[15] "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion."[16]

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[12] BLACK'S LAW DICTIONARY 25 (6th ed. 1990)

[13] *Id.* at 133.

[14] *Id.* at 215.

[15] *Id* at 546.

[16] *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504.

FREE EXERCISE CLAUSE – A portion of a clause in the First Amendment to the U.S. Constitution that, in combination with the Establishment Clause, makes up the religious clauses. The Free Exercise Clause states: "Congress shall make no law … prohibiting the free exercise thereof." This portion of the religious clause is intended to ensure the right to exercise religious freedoms.[17]

HOLDING – Holding is the legal principle that is derived from the opinion, or decision, of the court.[18]

INCORPORATION - Incorporation is the process that courts use to apply portions of the Bill of Rights to the states. Initially, the Bill of Rights only applied to the federal government. Under the incorporation doctrine, certain provisions of the Bill of Rights apply to the states, by virtue of the Due Process clause of the Fourteenth Amendment.[19]

JUDICIAL REVIEW – This term refers to the power of the Supreme Court to review any decision. This can serve as an appeal process from a lower court should the Supreme Court grant certiorari.[20]

JURISPRUDENCE -The study of the general or fundamental elements of a particular legal system as opposed to the practical and concrete details.[21]

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[17] *Black's supra note 11 at* 665.

[18] *Id* at 731.

[19] John Nowak, Ronald Rotunda, and J. Nelson Young, *Constitutional Law* (St. Paul, Minn.: 2nd Edition, 1981), 412-414.

[20] *Black's supra note 11 at* 849.

OPINION - A court's written statement explaining its decision in a given case.[22] Typically includes a summary of the facts of the case, the course of the litigation, the court's holding, and its reasoning.

PLURALITY – A plurality is an opinion of the court which is joined by more Justices than any other concurring opinion (not a majority of the court). It applies to the opinion getting the most votes on the side that won when the number of votes is less than the number needed for a majority.[23]

SECTARIAN EDUCATION – Educational services, materials, and finance provided to schools whose attention to devotion is particular to the promotion and interest of a religious sect or sects.[24]

SECULAR EDUCATION – Educational services, materials, and finance provided in a non-spiritual, non-ecclesiastical, and related to the present world.[25]

STATUTE – A Statute is a formal written enactment of a legislative body. This can include Federal, State, City or County legislative bodies.[26]

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[21] Id at 854.

[22] *Id* at 1092.

[23] *Id* at 1154.

[24] *Id* at 1353.

[25] *Id* at 1353.

[26] *Id* at 1410.

VOUCHER – School vouchers are government grants provided to parents of children of low-income families that can be used to provide school tuition at a public or private school.[27]

WALL OF SEPARATION – A metaphor suggesting that a wall should be erected in the law that is meant to separate church from state. The metaphorical wall is referenced in Thomas Jefferson's letter to the Danbury Baptist Association in 1802.

Theoretical Framework and Methodology

This study utilized the historical method of research which includes the review of primary source documents and other relevant evidence that further supported the understanding of the research questions outlined previously. This method of research supported and expanded the scope of knowledge and understanding of the judicial review done by the Supreme Court in reference to the Establishment Clause and specific to decisions related to parochial school funding from public sources.

Further, the research for this study employed a five-step process. (1) Gather cases in which the United States Supreme Court has ruled with respect to parochial school funding and questions about the Establishment Clause[28] (*Appendix 1*); (2) analyze those cases and judicial rulings; (3) identify and explore areas for which legal issues have continued to be in flux for the

[27] *Zelman v. Simmons*-Harris, 536 U.S. 639 (2002).

[28] Not all cases reviewed were included in this narrative. However, an appendix (appendix 1) of all cases read is included.

past three decades; (4) analyze and seek trends or patterns that will dictate the Court's decisions with respect to the Establishment Clause and 5) organize all of the research in a logical order. [29]

This study begins with a historical retrospective of the Establishment Clause and the multiple views of how religion interacts with government. Next, Supreme Court cases were analyzed along with law review articles, books, and other journal articles. These documents were then evaluated for relevance and accuracy.

To ensure accuracy and relevancy of the law review articles, a ranking index was employed to determine the relative importance of each article in comparison to other law journals. Washington and Lee University recently developed a ranking tool called the "Law Journals" web page which is designed to allow authors and researchers a method to find law journals by subject, country, and journal rank when available. This ranking tool was initially designed to support and facilitate the author's article submission.[30]

A combined score was determined by impact factors that included the annual number of journal citations, a "currency factor" which indicates how rapidly the articles are being cited by

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[29] Christopher Wren and Jill Wren, *The Legal Research Manual* (Madison, Wisc.: A-R Editions, 1986), 29.

[30] Washington and Lee University Law School, http://lawlib.wlu.edu/LJ/index.aspx (last visited May 31, 2010) (follow links to ranking methodology).

other publications, and a "cites per cost" ranking which is the average number of cites annually to the journal divided by the annual dollar cost to the academic libraries in the United States.[31]

For the purposes of this study only the combined rank score, the impact factor, and the currency factor were used to determine a relevancy factor. Those articles that have a combined rank score resulting in placement in the top 50% of those ranked in the index were considered as accurate and relevant.

Data Collection

Legal research involves the use of a variety of resources, some created by lawmaking bodies such as courts and legislatures, and others by scholars and practicing lawyers.[32] The case law and legal research collected for this study consists primarily of that associated with Establishment Clause jurisprudence. Litigation from the United States Supreme Court, specific to Establishment Clause jurisprudence in sectarian schools, was examined with an emphasis on those that involve school finance. The cases reviewed revealed a variety of viewpoints in the law. Executive orders, legislative enactments, law review and journal articles, and other appropriate materials supplemented the primary source documents (court cases). With this broad look at both primary and secondary sources, a complete view of the judicial landscape can be

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[31] *Id.*

[32] Morris L. Cohen & Kent C. Olson, *Legal Research in a Nutshell*, (West, 9th ed. 2007).

seen. Additionally, a variety of factors and decisions can be interwoven to support and answer the research questions posed.

Primary sources included were the law documented in constitutions, statutes, and court decisions. Documents, with respect to legal cases, were selected based on their applicability to public funding for sectarian schools and whether a particular case had been referenced as part of an analysis in decisions by Justices prior to, and post, *Lemon v. Kurtzman*.

Lemon v. Kurtzman was the first case retrieved from the Westlaw database and information gleaned from that case was traced backwards to inform the search process. **Westlaw** was the database used for identification of **court cases**.

Secondary sources, writings, and commentaries about the law were also reviewed.[33] Following the tracing of the *Lemon* case back to *Everson*, secondary sources such as **law review** articles were pulled from **Lexis Nexis** for commentary. *Zelman v. Simmons-Harris* was also retrieved as a primary source (from Westlaw) to work backward from to get to *Lemon*. The commentary in the law review articles and cases referenced in *Simmons-Harris* informed the search for Establishment Clause cases which followed *Lemon.* Cases mentioned were then retrieved from Westlaw as primary source documents for review and analysis. Those dealing with finance were identified and used.

Cases identified and retrieved from Westlaw were then analyzed to determine the approach the majority opinion took in the Court with respect to separation or accommodation for

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[33] *Id*. at 41.

funding in parochial schools. These themes were explored not only among the majority opinions but the dissenting opinions. The dissents were reviewed to further determine, Justice by Justice, how their respective analysis would influence cases later heard by the Court. Not all Establishment Clause cases were reviewed as part of this study.

Secondary source documents such as law review articles were analyzed to provide context for the cases retrieved. The cases, while they stood on their own merit, needed a broader perspective to support the overall review of this study as the research questions posed are about change over time. The value added by these documents included the perspective of other authors which supported a balanced approach to the study. To ensure the best possible balance and fairness, triangulation of resources was applied.

Limitations of the Study

The primary focus of this study was to provide clarity around Supreme Court decisions with respect to the Establishment Clause, the Lemon Test, and school finance cases. The Free Exercise Clause states that the government cannot engage in "…prohibiting the free exercise thereof"[34] in reference to religious activities. This portion of the religious clause denotes how people or groups may exercise their religious freedoms in public. This concept has been tested in the Court and there are a number of cases about the free exercise of religion. However, this study did not look at free exercise cases unless they specifically indicate, or influence, the review and

[34] U.S. Const. amend. I.

subsequent outcome of school finance cases. Therefore, this study limited the case review to Federal Establishment Clause decisions with respect to school finance when possible.

Organization of Study

The overarching question addressed in this study is how the Supreme Court's interpretation and application of the Establishment Clause changed over time with respect to parochial school financing. The study has been organized into three main sections to provide a structure that allows for deeper understanding of the history and cases leading up to *Lemon*, the case of *Lemon v. Kurtzman*, and a review of cases following Lemon that involve the Establishment Clause and school finance. Additionally, the organization of this study is meant to support the notion that *Lemon* is the fulcrum point in school finance cases with respect to Establishment Clause jurisprudence.

The following outline further delineates how this study was developed:

Chapter 2: The Road to Lemon – A look back

Chapter Two provides a historical perspective beginning with the drafting of the Constitution with an interest in how some of the Constitutional framers interpreted the separation of religious activities and the government. Throughout this chapter a number of interpretations of the Establishment Clause are examined and there is an exploration of several cases that led to the

development of the *Lemon* test as well. The cases reviewed in Chapter Two include, but are not limited to:

Everson v. Board of Education,[35] *McCollum v. Board of Education,*[36] *Zorach v. Clausen ,*[37] *Engel v. Vitale,*[38] *Abington Township v. Schempp,* [39]*Board of Education v. Allen,*[40] and *Walz v. Tax Commission*[41]

For each case a brief overview will be presented as well as information related to their significance in the establishment of the Lemon Test.

Chapter 3: *Lemon v. Kurtzman*

Chapter Three will provide an exploration and analysis of *Lemon.* This chapter will also reinforce the decision-making and rationale of the Supreme Court Justices leading up to and in *Lemon.*

Chapter 4: An Attack on Lemon

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[35] 330 U.S. 1 (1947).

[36] 333 U.S. 203 (1948).

[37] 343 U.S. 306 (1952).

[38] 370 U.S. 421 (1962).

[39] 374 U.S. 203 (1963).

[40] 392 U.S. 236 (1968).

[41] 397 US 664 (1970).

Chapter Four will review cases following *Lemon* that initially threatened, and those that ultimately supported the abandonment of, the tripartite Lemon Test. The cases reviewed include, but are not limited to:

Religious Liberty v. Nyquist,[42] *Mueller v. Allen,*[43] *Grand Rapids Sch. Dist. v. Ball,*[44] *Agostini v. Felton,*[45] *Mitchell v. Helms,* and *Zelman v. Simmons-Harris,*[46]

Chapter 5: Lemon and the Consequences for School Leaders

Chapter Five ties together the findings in the previous chapters and comments on public funding for sectarian schools in reference to the Establishment Clause. This chapter discusses a set of understandings school leaders must have to ensure that appropriate decisions are made to support compliance with Federal regulations and policies. Moreover, depending on how long a leader has been in their current position the Court's interpretation of the Establishment Clause may be very from when they (the leader) assumed their respective role. Recommendations for future research are also posed.

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[42] 413 U.S. 756 (1973).

[43] 463 U.S. 388 (1983).

[44] 473 U.S. 373 (1985).

[45] 521 U.S. 203 (1997).

[46] 536 U.S. 639 (2002).

Summary

While there is sufficient research outlining how the Establishment Clause has been interpreted by the Supreme Court through the decades, there appears to be a lack of research with respect to the Lemon Test serving as a critical midpoint in finance cases. At the end of this study a line can be drawn from the drafting of the Bill of Rights, to *Lemon,* to the present, in Establishment Clause jurisprudence regarding school funding with a broader understanding of the changes before and after *Lemon*.

Public school leaders must be aware of the changes and evolution of Establishment Clause jurisprudence and the potential impact it has on the operational structures in place in a school system. For example, the Federal Grant Title II requires an allocation of resources to parochial schools that includes financial and human resources to provide professional development. Further, in *Zelman* the Court opened the door for parochial school vouchers paid for out of public funds.

CHAPTER 2

The Road to Lemon

Introduction

Chapter 2 traces church and state law from the historical perspective beginning with the framers of the Constitution up to *Lemon v. Kurtzman* [47]. Additionally, this chapter discusses the court's philosophical perspective during that same time frame so that it is evident through the next two chapters how church and state law has changed leading up to and following *Lemon*.

Historical Framework

When the American colonists arrived they brought with them centuries of conflict resulting from minority sects' attempts to secure their religious freedom from the Church of England. This struggle for freedom was seen as a threat to the established government in relation to Church and State as there was a strong sentiment among many to establish a separate but national religion.[48] While there was an expectation of establishing independence from persecution, the colonists came to America with a long standing and ingrained culture of a state-established religion, which made it difficult to break away from the Church of England in their

[47] 403 U.S. 602 (1971).

[48] Bill Speck, *Religion's Role in the Glorious Revolution*. 38 History Today 30 (1988).

new land[49]. The original colonists went so far to preserve dominance that they developed a system of taxation imposed to support the dominant sect aligned with the Church of England.

Additionally, the notion of religious tolerance for difference was not part of the vernacular of the day. One example of religious dominance in the colonies was all New Yorkers were required to support the Dutch Reformed Church. This forced support was meant to promote the "established" religion of the Calvinist Congregation Church which mirrors, through tradition, the ideology and public taxes that support the Church of England.[50]

Drafting the First Amendment

The drafting of the religious guarantees in the First Amendment was based on the belief, promoted by John Locke, that religion was a personal matter and should be beyond the reach of the government. Thomas Jefferson and James Madison were integral voices in carrying this message forward. Due to their leadership, Virginia was the first colony to adopt a declaration of rights that addressed personal religious freedoms. From 1776 to 1783 many of the states followed Virginia's lead and adopted declarations of rights. In 1777 the Articles of Confederation were adopted and personal freedoms were not addressed. There was an assumption that the rights of citizens belonged to the states.

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[49] Martha M. McCarthy, *Religion and Public Schools: Emerging Legal Standards and Unresolved Issues*, 55 Harv. Educ. Rev. 278, 279. (1985).

[50] *Id*. at 279.

In 1787 when the Constitutional Convention met to revise the Articles of Confederation in Philadelphia a new constitution was drafted. Some of the authors, but not all, believed that the federal government had no role in touching personal freedoms and individual rights. Consequently, the only mention of religion in the Constitution is the prohibition of religious tests for federal office holders.[51] The absence of language associated with individual liberties created significant conflict during the ratification process which later led to the Bill of Rights. The actions of law makers signified that a clear break from the Church of England was underway.[52]

Interpretations of the Establishment Clause

Historical Interpretation

There were three main views of religion that framers of the Constitution were attempting to impart. These were the *evangelical view* (associated primarily with Roger Williams) that worldly corruptions…might "consume the church if sturdy fences against the wilderness were not maintained;" second, the *Jeffersonian* view that the church should be walled off from the state in order to safeguard secular interests (public and private) against "ecclesiastical depredations and incursions;" and, third, the *Madisonian* view that religious and secular interests

[51] *Id*. at 280.

alike would be "advanced best by diffusing and decentralizing power so as to assure competition among the sects rather than by dominance of one." [53]

The Establishment Clause was written and inserted as a reaction to the Church of England that established itself as the official church in the United States. The framers were attempting to make a case that a break from the Church of England would support religious freedom and believed that such a break was in the nation's best interest.[54]

The following letter was sent by Thomas Jefferson to the Danbury Baptist Association in 1802 which indicates Jefferson's belief that religion is a private matter and is between himself and God. Further, he indicated why he believed there must be a high wall of separation between church and state. The high wall of separation was later used metaphorically to indicate the extent to which religion and government are separated.

> To messers. Nehemiah Dodge, Ephraim Robbins, & Stephen S. Nelson, a committee of the Danbury Baptist association in the state of Connecticut.
>
> Gentlemen,
>
> The affectionate sentiments of esteem and approbation which you are so good as to express towards me, on behalf of the Danbury Baptist association, give me the highest satisfaction. my duties dictate a faithful and zealous pursuit of the interests of my

[53] Greg Sergienko, *Social Contract Neutrality and the Religion Clauses of the Federal Constitution,* 57 Ohio St. L.J. 1263, 1290-1297 (1996).

[54] *Id.*

constituents, & in proportion as they are persuaded of my fidelity to those duties, the discharge of them becomes more and more pleasing.

Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church & State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

I reciprocate your kind prayers for the protection & blessing of the common father and creator of man, and tender you for yourselves & your religious association, assurances of my high respect & esteem.

Th Jefferson
Jan. 1. 1802.

Jefferson's view of separation between church and state was clear and indicated that it is private and a matter between a Man and his God. The metaphorical wall of separation which comes from such a private notion was one for which the Supreme Court and State Legislators debated, concluded, and debated again for the next 200 or more years. This interpretation is often referred to as the "separationist" or the "no aid" interpretation.[55] In the separationist

[55] Michael P. Benway, *The Church-State Relationship: A Historical and Legal Perspective*, 54 Contemporary Education 201, 201-203. (1983)

interpretation, the clause would prohibit Congress from supporting religion in any way even if such support is made without regard to denomination.[56]

The Madisonion view is referred to as the "non-preferentialist" or "accommodationist" interpretation. The accommodationist perspective would prohibit Congress from preferring one religion over another, but would not stop the government's entry into religious realms to make accommodations in order to achieve the ideals of the Free Exercise Clause.

The Establishment Clause has generally been interpreted to prohibit the establishment of a national religion by Congress or to provide preference of one religion over another. Within these general parameters, the Jeffersonian and Madisonian viewpoints have been the two most common interpretations of the Establishment Clause. These interpretations have been differentiated through case law a number of times.

It is difficult to use history to interpret the religious clauses because of the significant changes in our country since the First Amendment was adopted. Religious diversity is far greater today than it was in 1791 as noted by Supreme Court Justice Brennan in the 1990s when he observed that:

[56] Of note, Jefferson concluded his letter to the Danbury Baptists by exercising his own religious freedom and returned the "prayers and blessings bestowed by the creator of man." This ending suggests that while he supported a high wall of separation, he could, as president, also exercise his religious freedom freely.

> [O]ur religious composition makes us a vastly more diverse people than our forefathers. They knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all. [57]

The Supreme Court did not hear a significant Establishment Clause case until 1947. This resulted in large part from the fact that the Court held in *Barron v. Baltimore* (1833)[58] that the Bill of Rights only applied to the federal government. Since the Bill of Rights did not apply to states, any cases heard by the Supreme Court prior to the passing of the Fourteenth Amendment would have been in reaction to actions by the Federal Government.

The 14th Amendment

The Fourteenth Amendment to the United States Constitution, one of the post-Civil War amendments commonly known as Reconstruction Amendments, in part was intended to secure rights for former slaves. It includes, among others, the Due Process and Equal Protection Clauses. Section 1 of the 14th Amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws[59]. (Passed 1868)

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[57] 374 U.S. 203, 240.

[58] 32 U.S. 243 (1833).

[59] U.S. CONST. amend. XIV, §1.

The importance of the Fourteenth Amendment, as it relates to the cases discussed in this study, is that it allows the Supreme Court to review cases involving potential State violations of the Establishment Clause via the incorporation doctrine. Under the incorporation doctrine, certain provisions of the Bill of Rights apply to the states, by virtue of the Due Process clause of the Fourteenth Amendment.[60] By the end of the 19th century the Court began to interpret the Fourteenth Amendment in a fashion that incorporated most portions of the Bill of Rights thus making them applicable to state governments.

Most Establishment Clause cases arise due to the actions of state or local government officials. These cases often involve the restriction of religion in public schools or involve financial support from the state government that promotes sectarian schools. The Fourteenth Amendment as incorporated is meant to inhibit such state action.

The first religious clause case in which the Court held that First Amendment rights were incorporated by the Fourteenth Amendment, as to apply to the states, was *Cantwell v. Connecticut*.[61] Prior to *Cantwell* it was not clear whether or not the Free Exercise Clause applied at the state level. *Cantwell* incorporated the Free Exercise Clause which thus protected free exercise of religion from state intrusion. This case set the backdrop for the next review of an Establishment Clause case.

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[60] JOHN E. NOWAK, RONALD ROTUNDA, AND J. NELSON YOUNG, CONSTITUTIONAL LAW 412-414 (2nd ed. 1981).

[61] 310 U.S. 296 (1940).

The first significant Establishment Clause case in which the Court applied the incorporation doctrine was *Everson v. Board of Education*[62]. In *Everson* the court reviewed the case within the following context:

> The only contention here is that the State statute and the resolution, in so far as they authorized reimbursement to parents of children attending parochial schools, violate the Federal Constitution in these two respects, which to some extent, overlap. First. They authorize the State to take by taxation the private property of some and bestow it upon others, to be used for their own private purposes. This, it is alleged violates the due process clause of the Fourteenth Amendment. Second. The statute and the resolution forced inhabitants to pay taxes to help support and maintain schools which are dedicated to, and which regularly teach, the Catholic Faith. This is alleged to be a use of State power to support church schools contrary to the prohibition of the First Amendment which the Fourteenth Amendment made applicable to the states.[63]

Cases Prior to Lemon

From the drafting of the Constitution and the Bill of Rights until *Lemon,* there were few cases considered significant in relation to the separation of church and state in schools.

The Jay and Ellsworth Courts (1789-1801) heard nothing related to religion and the law. This is of particular note because there were several things that happened in the United States at the time that could have provided for early tests of the establishment and free exercise clauses. For example, sessions of the Supreme Court began with "God save this honorable court" and parcels of land were being set aside by the Federal government to develop and build churches.

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[62] 330 U.S. 1 (1947).

[63] *Id.* at 5.

Most significant in Virginia, there was movement by Jefferson and Madison to disestablish religion which culminated in a state law ending an official position for the Protestant Episcopal Church.

From 1801 until 1941 the high Court remained relatively silent on issues relating to religion and government. The country's time was spent on other pressing economic and social issues such as slavery, the Civil War, reconstruction, the economy, women's suffrage, and electoral reform.[64]

The following cases represent the first significant opportunities for the Court to test their respective ideology and make operational the establishment clause.

Everson v. Board of Education

The seminal case prior to *Lemon* that tested the fundamental thinking of the Court was *Everson v. Board of Education.*[65]

Facts and Ruling. This case concerned a local transportation reimbursement plan for parents who set their children to parochial school.

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[64] PETER CHARLES HOFFER, WILLIAM JAMES HULL HOFFER, & N.E.H. HULL, THE SUPREME COURT; AN ESSENTIAL HISTORY 29-34 (2007).

[65] 330 U.S. 1 (1947).

A New Jersey statute allowed parents to apply for, and receive, direct reimbursement from the state for their transportation costs associated with their children attending parochial school. A taxpayer sued the State alleging that New Jersey did not have the authority to impose such a tax structure and that this practice was in violation of the Establishment Clause. The lower court found in favor of the taxpayer, however on appeal to the State Appeals Court the decision was reversed.

In this 5-4 decision [66] Justice Hugo Black, writing for the majority affirmed that the practice of paying for parochial school transportation from public funds did not violate the intended "wall of separation between church and state" because it was a general measure and available to all of the students in the New Jersey Township. He went on to say that the Establishment Clause only requires the government to be "neutral in its relations with groups of religious believers and nonbelievers; it does not require states to be their adversary."[67]

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

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[66] 5-4 Affirmed, Five affirming (Black, Vinson, Reed, Douglas, Murphy) Four against (Jackson, Frankfurter, Rutledge, Burton).

[67] 330 U.S. 1,18.

> In the words of Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between church and State.[68]

Significance. This was the first definitive statement regarding the meaning and scope of the Establishment Clause by the Supreme Court.[69] Interestingly, the disposition of *Everson* appears, by Black's language, to be in conflict with his reasoning in his opinion. Specifically, he stated in his opinion that he supported the Jeffersonian philosophy of separation, yet ruled that providing public funds for bus transportation to public or private schools was constitutional. Similar to the reasoning of the Court in *Cochran v. Louisiana State Board of Education* (1930),[70] Black believed that the subsidy was legitimate as it was intended for school children's basic welfare. Black made child welfare analogous to fire protection, police services, and even sewer disposal which are all subsidized with public funds. Further, the benefit of the bussing service was only intended for students and the subsidy associated with the decision would never be provided to the school but rather the parent. The lack of direct benefit to parochial schools will become an important component in later cases.

The four dissenters in this case (see note 66), opinion written by Justice Rutledge, agreed that the public aid was intended to further educational purposes. However, they argued that the

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[68] *Id*. at 15-16.

[69] Kenneth F. Mott, *The Supreme Court and the Establishment Clause: From Separation to Accommodation and Beyond*, 14 J.L. & Educ. no.2, 111 at 114-115 (1985).

[70] In *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930), the Court upheld a law financing the purchase of textbooks for use parochial schools. The decision was rooted in the child benefit theory which holds that the beneficiaries of the law made were not the schools but rather the students who attended them. This was also the foundation for Black's child benefit approach in *Everson*.

aid was improper because it provided support and aid to religious schools. Further, the aid was a breach in the wall of separation and a clear violation of the Establishment Clause.

Critique of Everson. It is evident, because this was the first case that looked deeply into Establishment Clause jurisprudence that the Court struggled with the meaning and application of separationist and accommodationist beliefs. Justice Black's argument throughout the opinion was to maintain a high wall of separation. Other Justices (Frankfurter, Jackson, Rutledge, Burton) were also supportive of the separationist stance in the case. However, at the end of the majority decision, Justice Black took a clear accommodationist stance and ruled that bussing of students was Constitutional because of his child benefit theory. Additionally, *Everson* was an accomodationist case in which the Court determined that New Jersey did not prefer one religion over another when it used public funds to pay for parochial school transportation.

Conversely, the dissenting Justices argued that school busses were analogous to pencils and textbooks. It is evident that while this case reached an accommodationist result there was a general consensus for an overarching separationist belief among the Court as it related to the church and state debate.

Justice Frankfurter would make this separationist point with authority in the next major case; *McCollum v Board of Education*[71] which clarified, through an 8-1 vote, that a clearer separationist voice was emerging.

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[71] 333 U.S. 203 (1948).

McCollum v. Board of Education

McCollum, a year after *Everson*, is also an important early case with respect to establishment clause jurisprudence. The *McCollum* case answers the question whether a public school system can, or cannot, set time aside in school for use by students for basic religious education.

While McCollum is not a finance case, it is important to analyze the case because the Justices were sorting out through their decision-making where they would also fall with respect to the separation of church and state. The juxtaposition of the Court's tenor around the Free Exercise clause and financial support for parochial schools (Establishment Clause) will be important in the analysis when all cases are looked at together in Chapter 5.

Facts and Ruling. In 1940, a group of parents united in an effort to lobby the local School Board in Champaign, Illinois to allow students, grades four through nine, time during the school day for voluntary religious classes taught by a member of the local clergy and local lay religious leaders. Following a successful lobbying campaign the School Board granted permission and the weekly classes began.

McCollum, the parent of a student in school, objected to the weekly classes for a variety of reasons. These included, but were not limited to, her particular religious affiliation (atheist) and her son being ridiculed and outcast for not participating in the "voluntary" classes.

McCollum made multiple appeals to the School Board asking them to modify the policy. These complaints, with a request to end classes, were unsuccessful.

In July of 1945 McCollum sued the School Board stating that its institution of a volunteer prayer program violated the Establishment Clause and the Equal Protection Clause of the 14th Amendment. McCollum asked that the Board of Education be ordered to "adopt and enforce rules and regulations prohibiting all instruction in and teaching of all religious education in all public schools in Champaign District Number 71, and in all public school houses and buildings in said district when occupied by public schools." After the case was lost in the Circuit Court of Champaign and in the Illinois Supreme Court, McCollum appealed the case to the U. S. Supreme Court. The Court granted certiorari in December of 1947.

The Court ruled 8-1 in favor of McCollum[72], agreeing that the classes were unconstitutional. Justice Black wrote the majority opinion and held that:

> [The facts] show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes.[73]

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[72] 8-1 Eight for McCollum (Black, Vinson, Murphy, Douglas, Frankfurter, Jackson, Rutledge, Burton) One against (Reed).

[73] *McCollum* at 209- 210.

> To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not ... manifest a governmental hostility to religion or religious teachings.... For the First Amendment 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.[74]

Significance. The Court ruled in favor of McCollum because the majority believed that the public school system and the School Board in particular, were highly involved in supporting classes that offered religious instruction. This case was pivotal for a number of reasons. First, this was the first major decision in which the Supreme Court struck down an existing practice as a violation of the Establishment Clause. Further, this case gave the Court another opportunity to show how the majority saw the importance of keeping the wall between church and state high. This decision created a pathway for future decisions to be made in regard to how, when, and where religious instruction can take place in public schools. However, possibly the most important element of *McCollum* was that it provided a foundational legal principle: Public schools are not the places for the promotion of religion. Objective study of religion is fine in public schools but State promotion of worship is not.[75]

It became clear in Mc*Collum* that the Court's majority was going to apply the separationist principle to this and future cases. Justice Frankfurter wrote a separate, and very strong, concurring opinion, drawing from his dissent in *Everson,* maintaining that, "we dissented

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[74] *Id*. at 211- 212.

[75] 333 U.S. 203, 203-212.

in *Everson v. Board of Education* **…** because, in our view, the Constitutional principle requiring separation of Church and State compelled invalidation of the ordinance sustained by the majority. Illinois has here authorized the commingling of sectarian with secular instruction in the public schools. The Constitution of the United States forbids this"[76] Frankfurter further enumerated in his concurrence that *Everson* did not go far enough. He attacked religious exercise in public schools as "incongruous vestiges of a past which the schools had been creatures of the church."[77]

Frankfurter went on to argue that the American public school movement was meant to end this type of relationship (church and state). Therefore, allowing any religious exercise, no matter how small, serves to undermine the mission of public education[78].

Frankfurter's concurring opinion was joined by Burton, Rutledge, and Jackson. Although Frankfurter agreed with Black in the majority opinion in *McCollum* he called for him to overrule *Everson*.

Critique of McCollum. The Court took a clear separationist stance that there is no place in public schools for "voluntary" religious activities that are supported by creating time in the daily schedule. Three Justices that joined Justice Black in *Everson* also joined his opinion in *McCollum.* It is evident that there appears to be a coalescing of ideals related to the separation of

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[76] *Id.* at 212.

[77] MOTT, *supra* note 69, at 116-117.

[78] *Id.*

Church and State. However, Justice Frankfurter, who wrote a separate concurring opinion made clear in his language that Justice Black had erred in *Everson* and should overrule his majority opinion in that case. It is clear that the Court made a strong statement that religious activities that happen during the school day and in the school building are unconstitutional. In the next case, *Zorach v. Clausen,* the Court indicated that the opportunity exists to accommodate religious activity and free exercise outside of the school building.

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

As in *McCollum*, this case is not a financial assistance case but is important to include in an effort to illustrate and provide the context of the Court's stance on religion within the walls of the public schools. This is an accommodation decision handed down by the court.

Facts and Ruling. Zorach involved a New York City program which permitted its public schools to release students during the school day so that they may go to religious centers for religious instruction and/or devotional exercises. Students were released upon written request by their parents to attend religious instruction. The other students not released stayed behind in their respective classrooms. The churches where students attended made weekly reports to the schools, sending a list of children who had been released but who did not report for religious instruction. [79]

[79] 343 U.S. 306 (1952).

Facts and Ruling. Taxpaying parents brought action against the Board of Education in New York stating that the program providing release time for students to attend religious education violated the Establishment Clause. Parents believed that the time and effort the school put forth to ensure students had access to the release time compromised the integrity of the overall instructional program for the students who did not leave school. On appeal to the New York Court of Appeals the law was sustained.

In a 6-3 decision[80], the Supreme Court affirmed the lower court's ruling indicating that public school students travel time to parochial schools to receive religious education did not violate the Establishment Clause. The decision was in part predicated upon the decision made in *McCollum* although Justice Douglas, writing for the majority, made it clear from the start that the two cases (*McCollum* and *Zorach*) were different because no public funding was expended in *Zorach*. However, in *McCollum*, the Supreme Court ruled it unconstitutional for religious instructors to ***enter*** public schools and to provide religious instruction during school hours. In this case, students in New York City public schools sought to obtain permission to go ***out*** of the building to receive religious education. The distinction of where the religious instruction occurs is important.

Justice Douglas delivered the majority opinion of the Court that held the released time program neither constituted the establishment of religion nor interfered with the free exercise of religion. The Court noted that public facilities were not being used for the purpose of religious

[80] 6-3 Six for (Douglas, Vinson, Reed, Burton, Clark, Minton) Three against (Black, Frankfurter, Jackson).

instruction and that "no student was forced to go to the religious classroom." Justice Douglas argued that there was "no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence"[81]

Significance. The *Zorach* decision presented an opportunity for the Court to articulate their acceptance of an accommodation position, particularly following the separationist decision in *McCollum,* and provided a decision making structure for the Court when distinguishing free exercise activities in and out of school.

Justice Douglas drew a clear distinction between *McCollum* and *Zorach*. In *McCollum*, public school classrooms were used for religious instruction and therefore were providing a clear pathway for the administration of religious instruction. However, in *Zorach* the public schools did no more than accommodate schedules so that students could participate in religious instruction outside of school.[82] The Court followed the *McCollum* logic but stated that release time is constitutional unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. The Court held that it "could not read into the Bill of Rights such a philosophy of hostility to

[81] 343 U.S. 306, 314.

[82] MOTT, *supra* note 69, at 120-121.

religion."[83] However, the position of the dissenters (Justices Black, Frankfurter, and Jackson) all reference the prior *McCollum* case and argue, similarly to Justice Black in his dissent that:

> *McCollum*… held that Illinois could not constitutionally manipulate the compelled classroom hours of its compulsory school machinery so as to channel children into sectarian classes. Yet that is exactly what the Court holds New York can do.
>
> I am aware that our *McCollum* decision on separation of Church and State has been subjected to a most searching examination throughout the country. Probably few opinions from this Court in recent years have attracted more attention or stirred wider debate. Our insistence on "a wall between Church and State which must be kept high and impregnable" has seemed to some a correct exposition of the philosophy and a true interpretation of the language of the First Amendment to which we should strictly adhere. With equal conviction and sincerity, others have thought the *McCollum* decision fundamentally wrong, and have pledged continuous warfare against it. The opinions in the court below and the briefs here reflect these diverse viewpoints. In dissenting today, I mean to do more than give routine approval to our *McCollum* decision. I mean also to reaffirm my faith in the fundamental philosophy expressed in *McCollum* and *Everson v. Board of Education*…" [84]

Critique of Zorach. Following *Zorach* the court did not rule on another case regarding church and state for almost 10 years until *Engle v. Vitale* (1962). This period of silence created for some a sense of uncertainty that kept the "door open" for many accommodationists to believe there was still a chance of weaving religious education into the public schools. "*Zorach* boosted the spirits of accommodationists who had been uneasy after *Everson* and positively depressed after *McCollum*. Now it seemed that the Supreme Court might not take a tough, consistently separationist line. The outlook for extensive public support for religious institutions might be bleak, but at least there seemed to be hope for preserving the public religion in the schools and

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[83] *Zorach* at 315.

[84] *Id.* at 317-318.

elsewhere."[85] *Zorach* represented, to many, a "foot in the door" for future exploration and leverage.

The outcome of *Zorach* illustrates that the Court was to a great extent settled in their thinking about the separation of Church and State. The rulings in *McCollum* and *Zorach* meant that religious education, and support thereof, is acceptable so long as it is takes place outside of school with accommodation of time for students also being acceptable. The case that caused some confusion among the court for decades to come was *Everson*. This case, while interpreted by many as a separationist decision, contains language that later Justices were able to exploit when looking at the use of textbooks, materials, and even financial aid for parochial schools. The reasoning the Court took to develop the *Everson* decision (i.e. the aid flows to the parents not to the schools, buses are analogous to fire services in the community, and the services are available to all students) are all arguments that would be used in the future to support the notion of neutrality and personal choice. If *Everson* had been overturned in *McCollum* as Frankfurter desired, it is questionable if the path to accommodation in the 1990s and 2000s would have been as easily achievable for the Court.

[85] RICHARD MORGAN, THE SUPREME COURT AND RELIGION 131 (1972).

The Warren Court

October of 1953 began what many consider to be the most stunning period in the long history of the Supreme Court. During this time period there were many rulings that changed American law and also served to modify the fabric of society such as *Brown v. Board of Education.*[86] The Warren Court is considered to have begun via legal rulings the "civil rights revolution."[87]

Much of the reason that the Warren Court was engaged in decisions that created such controversy is because the time frame which the Court spanned included the 1950s characterized as an era of conformity and the era of counterculture in the 1960s. Additionally, there were significant political issues involving foreign relations that weighed heavily on the minds of Americans such as "The Cold War" and the "Red Scare."[88] This is particularly significant as there was a strong and fervent desire by Justices on the Warren Court to protect civil freedoms in every aspect of society.

To this end, the Warren Court, in their rulings in *Engle v. Vitale* (1962) and *Abingdon Township v. Schempp* (1963), affirmed the court's majority belief that the "wall of separation" should remain high and religious liberty should also be protected.

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[86] 347 U.S. 483

[87] HOFFER, *supra* note 64, at 333.

[88] *Id.* at 334-343.

Engel v. Vitale, 370 U.S. 421 (1962)

In this case, high school students along with others in the community, filed suit against the local school division for requiring the recitation of a school-wide prayer at the start of each day. The Supreme Court held, in a 6-1 vote,[89] that opening of the school day with prayer was unconstitutional and violated the Establishment Clause.

Facts of the Case. In *Engle* a small group of parents and students objected to New York State's model prayer that all students were required to recite at the start of each day. Consequently, they sued the head of the school board rather than conform to the demands and succumb to peer pressure from the community.

Black, writing for the majority, held that even a nondenominational, voluntary prayer ("Almighty God, we acknowledge our dependence on Thee, and we beg Thy blessings upon us, our parents, our teachers and our country") imposed a state religion [90] and that this case constituted a violation of the Establishment Clause as incorporated by the Fourteenth Amendment. The New York Regents defended the activity arguing that students could be excused from the prayer and were not compelled to participate. Justice Black responded to this defense by stating that "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct government compulsion and is violated by the enactment of

[89] 6-1 Six (Black, Warren, Douglas, Clark, Harlan, Brennan), One (Stewart), Frankfurter and White did not participate.

[90] HOFFER, *supra* note 64, at 323.

laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." [91]

Significance. This ruling affirmed the Court's strong belief in *McCollum* that there was a separationist stance with respect to the interpretation of the Establishment Clause. The optimism felt by those who believed in the accommodation of religion within a public school following *Zorach* were disappointed as the hope was all but gone following this ruling.

As a further result of the decision in *Engle* a public outcry by clergy to keep religion in America's public schools came about. Despite the fact that Justice Black's opinion, by all accounts, attempted to preserve religion by not confusing it with government, many high profile religious leaders denounced the ruling as "irreligious, godless, and radical." Billy Graham, religious advisor for many presidents and Francis Cardinal Spellman (arguably the most influential and important Catholic leader at the time) joined to publicly lament the Court's decision.[92]

The separationist decision in *Engle* will be fortified in the next case, *Schempp*, where the Court further defines that there is no place for publicly supported religious activities in public schools.

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[91] 370 U.S. 421 (1962).

[92] HOFFER, *supra* note 64, at 340.

Abington Township v. Schempp, 374 U.S. 203 (1963)

In this case the Supreme Court ruled 8-1[93] that asking students to read as many as ten Bible passages and the Lord's Prayer to start the school day required significant state surveillance, necessitating excessive governmental entanglement in religious exercise and was unconstitutional. *Schempp* was consolidated with a State of Maryland case, *Murray v. Curlett,*[94]which was also a Bible reading and Lord's Prayer case.

Facts of the Case. The Commonwealth of Pennsylvania passed a law requiring that at least ten verses from the Bible be read at the opening of school each day. Each morning during the homeroom or advisory period schools in Pennsylvania opened with a live broadcast under the supervision of teachers which included students reading ten verses from the Bible. Following the broadcast students were asked to recite the Lord's Prayer in unison across the school. Participation in the opening activities at the school, by State statute, was voluntary and a student could elect to leave the room with a written request from a parent.

The Schempp family filed suit declaring that this statute was unconstitutional and violated the Establishment Clause.

Significance. Justice Clark's majority decision in *Schempp* cited a brief history of decisions regarding the separation of church and state. The opinion held, like in *Engle*, that even providing special provisions like allowing students to be excused from the religious activity was

[93] 8-1 Eight against (Warren, Black, Douglas, Clark, Harlan, Brennan, White, Goldberg) One dissent (Stewart).

[94] 228 Md. 239 (1962).

irrelevant legally. This practice violated the Establishment Clause because the religious activity was prescribed by the State and happened in the school, which was expressly unconstitutional as in *McCollum*. This case helped lay the ground work for a three-pronged test later in *Lemon v Kurtzman* by developing the first two prongs that were designed to test the constitutionality of establishment cases.

> "The test may be stated as follows: what are the purpose and the primary effect on the enactment? If either is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that, to withstand the strictures of the Establishment Clause, there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." [95]

This case furthered the Court's separationist (8-1 decision with Justice Stewart dissenting) approach to church and state cases.

The components of the three part test in *Lemon* had been building through decisions made in previous cases as discussed for decades. Not only did the historical perspective of *Everson, McCollum, Zorach, Vitale,* and *Abingdon* play a significant role in the development of the three-part test for the Justices but two cases in particular, *Board of Education v. Allen*[96] and *Walz v. Tax Commission*[97] solidified the language and further supported the framework developed in *Lemon*.

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[95] *McCollum* at 222.

[96] 392 U.S. 236 (1968).

[97] 397 U.S. 664 (1970).

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

In *Allen* a New York statute was in place that required local public school divisions to lend textbooks at no cost to all students in public and parochial school. Local school boards sought relief stating that the statutory requirement was in violation of the Establishment Clause. Additionally, local boards sought an injunction to prevent the purchase of textbooks with public funds for use in parochial schools.

The lower court found the law to be unconstitutional and entered a summary judgment for the school boards. However, on appeal the Appellate Division reversed the lower court's judgment stating that the school boards did not have standing to bring the suit because there was no evidence of damage done to the school divisions as a result of the statute. Further, the appeals court ruled that the requirement did not offend the Establishment Clause because the law provided benefit to all children without regard to the type of school they attended. Moreover, the only textbooks loaned were those that were neutral in content and approved with school board authorities. This meant that the statute was neutral with respect to religion.

In a 6-3 decision[98], the Court held that the statute in question was not a violation of the Constitution and did not respect the establishment of religion. Justice White, writing for the majority, determined that there were several areas requiring review to determine whether there was a violation of the Establishment Clause. In his analysis he articulated the first two prongs of

[98] 6-3 Six votes for Allen (Warren, White, Steward, Brennan, Harlan, Marshall) Three votes against (Black, Douglas, Fortas).

the Lemon Test by synthesizing language used previously in *Everson* and *Schempp*. He recasts the Court's prior language in a "test."

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a *secular legislative purpose* and a *primary effect that neither advances nor inhibits religion*.[99]

The court determined that the express purpose of the New York statute was to simply further opportunities for all the youth of the community. This law would benefit all children who were participating in the general curriculum program regardless of where the instruction took place. Additionally, because the benefit was directly to children and parents rather than the school, like in *Everson*, it was allowable.

In the court's analysis of the facts, there was no evidence that books specific to religious ideology had been loaned to students. The Court also indicated that the local school boards must be trusted to discharge their duties as assigned and provide books that are not religious in nature. It was assumed by the Court that school boards could tell the difference between nonsectarian and sectarian literature.

Further, the Court could not agree with the arguments that all teaching in a sectarian school is religious or that the intertwining of secular and religious curriculum was undeniable. Additionally, agreement could not be reached about how textbooks, regardless of content, could

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[99] 292 U.S.236, 292.

be utilized by teachers from a religious slant. The majority felt that there are opportunities for parochial students to learn content that is nonsectarian without religious overtones and that in these cases the students and parents should be supported with textbook loans.[100] This notion would be challenged vehemently by Justice Douglas who believed that there was no way to separate out religious indoctrination in a parochial school and textbooks that students were using. Douglas would later innumerate this belief in his concurrence in *Lemon.*

Finally, the court indicated that in the absence of concrete evidence of the damage done to students it is inappropriate to make a judgment.[101] This reflected the lower court's opinion as well.

In Justice Black's dissent in *Allen* he stated that the statute violated the Establishment Clause. Black's argument was that textbooks represent the core of a school's curricular program and one cannot assume that there will be an absence of religious indoctrination through the books students read and the instruction students are receiving. He continued to make his point by stating:

> I still subscribe to the belief that tax-raised funds cannot constitutionally be used to support religious schools, buy their school books, erect their buildings, pay their teachers, or pay any other of their maintenance expenses, even to the extent of one penny. The First Amendment's prohibition against governmental establishment of religion was written on the assumption that state aid to religion and religious schools generates discord, disharmony, hatred, and strife among our people, and that any government that supplies such aids is to that extent a tyranny. And I still believe that the only way to

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[100] 392 U.S. 236, 245-248.

[101] *Id.* at 248.

> protect minority religious groups from majority groups in this country is to keep the wall of separation between church and state high and impregnable as the First and Fourteenth Amendments provide. The Court's affirmance here bodes nothing but evil to religious peace in this country.[102]

Justice Douglas also dissented in this case. Douglas' primary argument in his dissent was that there is the likelihood that battle lines will be drawn between church and state as a consequence of this law. He stated that so long as the state was approving the textbooks for parochial schools the tension will mount as soon as a parochial school principal selects a text that supports the nonsectarian curriculum but can be taught with a sectarian bias. When the school board says no for the first time to the parochial school's selection the conflict will begin. He strengthened his argument by citing multiple examples of how nonsectarian topics may conflict with sectarian ideals. Examples include such topics as mammal life with respect to where life begins and ends, the Crusades, and comparative economics to include capitalism and socialism. Each of these nonsectarian topics are laden with moral and ethical questions and when viewed through the lens of Christianity the local school board is put in a position to decide what is or is not acceptable.[103] This is not appropriate according to Douglas.

Allen represents an accommodation case that created further confusion among the Court about where a clear line can be drawn with respect to publicly funding parochial education. In the next case, *Walz*, the Court continues to struggle with consensus and provides another accommodation decision.

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[102] *Id.* at 253-254.

[103] 292 U.S. 236 , 255-269.

Walz v. Tax Commission of the City of New York, 397 U.S. 644 (1970)

In *Walz* an owner of property in Richmond County, New York sought to stop the New York City Tax Commission from granting a property tax exemption for properties associated with religious organizations used solely for religious worship. Such exemptions were allowable by the State Constitution of New York. In this case the appellant believed that granting this exemption to houses of worship required that he in effect was making a contribution to religious organizations. This, in the appellant's opinion was a violation of the Establishment Clause.

The lower court ruled in favor of the State of New York and granted summary judgment to the State of New York.

In a 7-1 decision[104] the Supreme Court held that the property tax exemption given to religious organizations in New York, so long as they were used for the sole purpose of religious worship, was allowable and not a violation of the Establishment Clause. The exemption according to the Court did not single out one religion over another and was not given as a direct subsidy to the religious organization, rather as a tax exemption. Because it was a tax exemption it created "minimal and remote involvement between church and state" which could *entangle* the state with religion. Language from the majority opinion articulates clearly the third prong of what will be the Lemon Test. Burger states that:

[104] 7-1 ruling Seven for the Tax Commission of New York City (Burger, Black, Harlan, Brennan, Stewart, White, Marshall) One against (Douglas).

> Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result-the effect-is not an excessive government entanglement with religion. The test is inescapably one of degree. Either course, taxation of churches or exemption, occasions some degree of involvement with religion.[105]

The Court also noted that their "benevolent neutrality" toward religion and churches was "deeply embedded in the fabric of our national life." [106]

Summary

Establishment Clause jurisprudence has a relatively short history with few constitutional challenges prior to *Lemon*. It wasn't until *Everson* that the Court was forced to wrestle with decisions regarding the separation of church and state. When the Court took a first pass in *Everson* they made a decision that would later create questions, confusion, and leverage among future Supreme Court Justices thus creating opportunities for new decision making patterns to evolve.

However, with the upcoming decision in *Lemon* a clear and well articulated path to decision making in reference to the governmental establishment of religion was created. In chapter three, the reader will see the three prongs of the Lemon Test and how the Justices

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[105] 397 U.S. 664, 674.

[106] 397 U.S. 664, 676.

approached cases with this “clean” and singular approach. However, in a relatively short time the Lemon Test will be aggressively challenged.

CHAPTER 3

Lemon v. Kurtzman

…to be the policy of the Government of the United States to make no appropriation of money or property for the purpose of founding, maintaining, or aiding by payment for service, expenses, or otherwise, any church or religious denomination, or any institution or society which is under sectarian or ecclesiastical control.[107]

Justice William Brennan

Introduction

With the separationist ruling, and tripartite test in *Lemon,* the Supreme Court appeared to hit the "high water mark" for separation between Church and State. Never before, in the history of Establishment Clause jurisprudence, had there been such consensus around how the "wall of separation" would be kept high. This pervasive thought among the Justices manifested itself in a single set of standards called the "Lemon Test." This test, according to Justice Burger in his majority opinion, is simply "cumulative criteria developed by the Court over many years."[108] It was considered by many as Establishment Clause "gospel."[109]

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[107] 403 U.S. 602, 648.

[108] *Id.* at 612.

[109] Julian R. Kossow & Rachel Bauchman,, *Preaching to the Public School Choir: The Establishment Clause, and the Search for the Elusive Bright Line*, 24 Fla. St. U.L. Rev. 79, 103 (1996).

This chapter will outline the *Lemon* case, provide clarity with respect to the prongs of the Lemon Test, and then will focus on each Justice's opinion in *Lemon.* This review will provide a sense for the overall tenor of the court with a Justice by Justice look at *Lemon*.

Lemon v. Kurtzman

In 1971 the Court ruled 8-0[110] that it is unconstitutional to provide state aid for supplemental support to parochial schools. This outcome of this case would provide the three-pronged test that cases into the future would be scrutinized against for their constitutionality.

Lemon was a consolidated case (like *Murray* and *Schempp*) that included *Earley v. DiCenso* and *Robinson v. DiCenso* that were heard concurrently. These cases all involved similar concerns over public aid for parochial school statutes in the states of Pennsylvania and Rhode Island.

The 1969 Salary Supplement Act of Rhode Island was designed to provide a 15% salary supplement to nonpublic[111] school teachers in schools where the average per pupil expenditure was less than the average of the public schools. Teachers were eligible for the supplement if they taught only courses and used materials offered in the public school and agreed not to teach courses in religion. The trial court found that the parochial school system's primary mission was

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[110] 8-0 For (Burger, Black, Douglas, Harlan, Stewart, Blackmun, Brennan, White) Marshall took no part in case No. 89 (*Lemon*) but joined Burger's opinion for cases Nos. 569 (*Early v. DiCenso*) and 570 (*Robinson v. DiCenso*) due to his concern with respect to the continued vitality of *Everson* as outlined in the *Lemon* majority opinion.

[111] A three-judge court found that about 25% of Rhode Island's elementary students attended nonpublic schools, about 95% of whom attended Roman Catholic affiliated schools, and that to date about 250 teachers at Roman Catholic schools were the sole beneficiaries under the Act.

the indoctrination of religion and that the Act itself constituted excessive entanglement between government and religion. Therefore, it was deemed to be a violation of the Establishment Clause.

The Nonpublic Elementary and Secondary Education Act of Pennsylvania (1968) authorized the state Superintendent of Public Instruction the capacity to provide, for sectarian schools, direct reimbursement for teacher's salaries, textbooks, and instructional materials. However, reimbursement was restricted to subjects and materials that were considered secular and could not be made if there was teaching of religious matters, morals, or any form of worship. The complainant alleged that the Act had the purpose of promoting religion and was in violation of the Establishment Clause. The trial court dismissed the complaint because the appellant failed to provide a remedy. Additionally, it found no violation of the Establishment Clause.

The Supreme Court found that both statutes were unconstitutional and, because of the cumulative relationship between church and state, excessive entanglement existed.

The entanglement in the Rhode Island case was present because the religious nature of the general activities in parochial school, given the impressionable age of the students attending parochial schools, are virtually inseparable from the content being taught. Because of this intertwining the monitoring and surveillance required of the state to ensure separation was far too great. Further, as part of the Act, the State must review the expenditures of each student in a parochial school to differentiate between those activities that are secular and those that are not.

The entanglement in the Pennsylvania case was due also to the surveillance needed to ensure that teachers engage with their students in a nonidealogical fashion. This would require

extensive supervision in an effort to differentiate between activities that were sectarian and nonsectarian. Additionally, the Pennsylvania statute provided for direct financial aid to parochial schools. "Historically governmental control and surveillance measures tend to follow cash grant programs, and here the government's post-audit power to inspect the financial records of church-related schools creates an intimate and continuing relationship between church and state."[112] This is excessive entanglement.

Further, the Court believed that the ongoing appropriations to religiously affiliated schools with so few religions represented created a possibility for divisiveness both socially and politically.[113]

The Court believed that the tax exemptions as in *Walz* were distinguishable in *Lemon* because programs such as the parochial school programs were expanding all the time and were self-perpetuating. They were not rooted in 200 years of existing practice like the tax exemption for religious institutions. This, the Court believed, was another opportunity for the likelihood of entanglement between government and religion to occur.

The Lemon Test

Chief Justice Burger, writing for the majority, articulated a three-part test for use when reviewing statues with respect to the establishment of religion. He indicated that for an Act or statute to be constitutional, it must have a secular legislative purpose, it must have principal

[112] 403 U.S. 602, 602.

[113] 403 U.S. 602, 604.

effects which neither advance nor inhibit religion, and it must not foster an excessive government entanglement with religion.[114]

The Prongs of the Test

The government's action must have a secular legislative purpose and must not have the primary effect of either advancing or inhibiting religion. Justice Burger, in his majority opinion in *Lemon,* outlined for the Court that every analysis dealing with the Establishment Clause must begin with a consideration of the criteria developed cumulatively over the past decades. Burger drew closely on the language used in *Allen* stating that the "statute must have a secular legislative purpose."[115] He goes on in his opinion to say that, as stated in *Allen*, the "principal or primary effect must be one that neither advances nor inhibits religion." It is evident that this *Allen* analysis along with previous Establishment Clause cases is directly linked to the language of the first two prongs of the Lemon Test.

For example, as part of the analysis in the *Allen* case, the Court acknowledged that the secular and religious curriculum and teaching were not intertwined to the point where the State would in fact be supporting the teaching of religion. The State legislatures in Rhode Island and Pennsylvania, in their earlier decision, indicated that the secular and religious teaching and curriculum were identifiable enough to determine that they were not in violation. This analysis also supported the first two prongs of the Lemon Test which state 1) the government's action

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[114] KERN A. ALEXANDER & M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 190 (7th ed., 2009),

[115] 392 U.S. 236, 244.

must have a secular legislative purpose and 2) the government's action must not have the primary effect of either advancing or inhibiting religion.

The government's action must not result in an excessive government entanglement with religion. Prong three of the Lemon Test comes directly from language in *McCollum* and *Walz*.

In the *McCollum* opinion, Black writing for the majority used the language of the third prong of the Lemon Test by stating, enough has been said to indicate that we are dealing not with a full-blown principle, nor one having the definiteness of a surveyor's metes and bounds. But, by 1875, the separation of public education from Church *entanglements*, of the State from the teaching of religion, was firmly established in the consciousness of the nation.[116]

Later, in the *Walz* opinion, Burger, writing for the majority, attempted to develop a standard that would ensure close scrutiny of the degree to which entanglement might be present between the church and state. The objective was to avoid intrusion of the government to the greatest extent possible. "Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result-the effect-is not an excessive government entanglement with religion."[117]

The Court recognized in *Allen* and *Walz* that the line of separation is often blurred, dictating scrutiny around entanglement. The language used in *Lemon* indicated that the Court

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[116] 333 U. S. 203, 333.

[117] 397 U.S. 664, 674.

recognized that the notion of total separation and neutrality in the most absolute sense, or finding the line between acceptable and not, was often very difficult and sometimes virtually impossible.

These cumulative criteria (prongs) became known as the *Lemon Test*. The prongs of the Lemon Test were developed and refined over several decades starting with *Everson* and represent a logical algorithm by which the Court would review cases dealing with Establishment Clause questions.

The *Lemon* case and the subsequent Lemon Test would become a "lightning rod" for future Courts to attack as an inadequate method to determine constitutionality of challenged cases. It will come under closer and vehement attack not too long after this decision is written.[118]

The Justices

The following section is a synopsis of the Justices' analysis in *Allen, Walz and Lemon* as appropriate. At the end of each Justice's summary is a voting history (see associated Figure) with respect to cases **leading up to, and following,** *Lemon* specific to Establishment Clause jurisprudence. The cases for which the Justices were rated are *Cantwell, Everson, McCollum, Zorach, Engle, Allen, Walz,* and *Abingdon, Lemon, Nyquist and Mueller* (see Figure 1). The cases beyond *Lemon* are included in an effort to give a fuller picture of the preference of the Justice. Following *Mueller* none of the Justices who ruled in *Lemon* remained. Based on the

[118] T.C. Marks Jr., *Lemon is a Lemon; Toward a Rational Interpretation of the Establishment Clause*, 12 BYU Journal of Public Law 1 (1998).

voting record there is also an indication whether the Justice was considered an accommodationist or separationist (See Definitions in Chapter 1). Further, there is an indication as to how each Justice ruled in *Lemon* and how their decision was informed by prior cases.[119]

[119] On June 28, 1971, the same day as *Lemon v. Kurtzman*, the court handed down a 5-4 decision in *Tilton v. Richardson* (403 U.S. 672) (For: Burger, Harlan, Stewart, White, Blackmun; Against: Black, Douglas, Brennan, Marshall) that immediately began eroding of the newly minted Lemon Test. In *Richardson* the court ruled that the Higher Education Facilities Act of 1963, which provided construction grants for colleges and universities, can receive governmental funding as it was determined that there was no risk that religion is associated with buildings (facilities are inherently neutral) and these were one-time construction grants. This decision invalidated a previous decision that indicated this practice did violate the Establishment Clause.

Figure 1 – Decisions by Justice of Those Who Participated in *Lemon v. Kurtzman*

Justice	Burger	Black	Douglas	Harlan	Brennan	Stewart	White	Marshall	Blackmun
Case									
Cantwell *9/0 (A)*		A/M	A/M						
Everson *5/4 (A)*		A/M	A/M						
McCollum *8/1 (S)*		S/M	S/M						
Zorach *6/3 (A)*		S/D	A/M						
Engle *6/1 (S)*		S/M	S/M	S/M	S/M	A/D	DNP		
Abingdon *8/1 (S)*		S/M	S/M	S/M	S/M	A/M	S/M		
Allen *6/3 (A)*		S/D	S/D	A/M	A/M	A/M	A/M	A/M	
Walz *7/1 (A)*	A/M	A/M	S/D	A/M	A/M	A/M	A/M	A/M	
Lemon *8/0 (S)*	S/M	S/M	S/M	S/M	S/M	S/M	S/M	S/M	S/M
Nyquist *6/3 (S)*	A/D		S/M		S/M	S/M	A/D	S/M	S/M
Mueller *5/4 (A)*	A/M				S/D		A/M	S/D	S/D
Total	3-1 ***(A)***	6-3 ***(S)***	7-3 ***(S)***	3-2 ***(S)***	5-2 ***(S)***	4-2 ***(A)***	4-2 ***(A)***	3-2 ***(S)***	3-0 ***(S)***

(S) – Separation (A) – Accommodation (M)-Majority Opinion (D)-Dissenting Opinion

Justice Black

In *Allen* Justice Black wrote a dissenting opinion arguing that the decision is a "flat, flagrant, open violation of the First and Fourteenth Amendments which together forbid Congress or state legislatures to enact any law 'respecting an establishment of religion.'"[120] Black drew on language from decisions the Court made in *Everson* and *McCollum* suggesting that the First and Fourteenth amendment protect the populous from having a tax levied that would support private religious agencies. **"**To authorize a State to tax its residents for such church purposes is to put the State squarely in the religious activities of certain religious groups that happen to be strong enough politically to write their own religious preferences and prejudices into the laws."[121] By doing this, Black contended, church and state are linked so closely together that it is inevitable that the destiny of the populous would be controlled by the government. Further, he suggests, that this is the first step in New York State's quest to establish a singular religion.

[120] 392 U.S. 236, 248.

[121] *Id.* at 251.

Judicial History. 6-3 Separationist

Figure 2 – Justice Black's Voting History in Selected Establishment Clause Cases

Case	*Cantwell*	*Everson*	*McCollum*	*Zorach*	*Engle*	*Abingdon*	*Allen*	*Walz*	*Lemon*
Holding	*A*	*A*	*S*	*S*	*S*	*S*	*S*	*A*	*S*

(S) – Separation (A) – Accommodation

Justice Douglas

Judicial History.7-3 Separationist

Figure 3 – Justice Douglas' Voting History in Selected Establishment Clause Cases

Case	*Cantwell*	*Everson*	*McCollum*	*Zorach*	*Engle*	*Abingdon*	*Allen*	*Walz*	*Lemon*	*Nyquist*
Holding	*A*	*A*	*S*	*A*	*S*	*S*	*S*	*S*	*S*	*S*

(S) – Separation (A) – Accommodation

In *Allen*, Douglas wrote an extensive dissenting opinion that drew upon *Everson, McCollum,* and *Vitale* as his historical foundation. He stated that in *Everson* a divided court (5-4) made a decision about buses not textbooks and a problem arises when curriculum is involved. In his opinion, "there is nothing ideological about a bus"[122] and the argument about aid to public schools should not turn on those considerations when discussing a textbook. He believes that it is inevitable, because of the way the New York State Act is written, that parochial schools will request books that support a religious creed. And this, in the end, will constitute state aid to

[122] *Id*. at 257 (Douglas, J, dissenting).

religion and offend the Establishment Clause. Douglas went on to say that the line between where the secular and non-secular begin and end with this decision will be even further blurred and confusing.[123] He ends his dissent with a quote from Madison's Memorial and Remonstrance against Religious Assessments:

> Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment may force him to conform to any other establishment in all cases whatsoever? [124]

Walz. In *Walz,* Douglas wrote a dissenting opinion as well**.** In his dissent, Douglas cites both *Zorach* and *McCollum* but for different purposes. Douglas believes that in *Zorach* there is a distinction that the State, in its actions, is *encouraging* religious activities but in McCollum the State is *promoting* religious activities. He indicates that while the lines are often unclear that in *Walz* the principles of *McCollum* apply more closely and that the affirming of the decision is in fact *promoting* religious activities.

Lemon. In *Lemon,* Justice Douglas wrote a concurring opinion in an effort to distinguish further his belief that the majority opinion did not go far enough to delineate the issues of excessive entanglement. He began his concurrence with some history of the tension and backlash among the Catholic Church toward the Protestant majority. Douglas went on to indicate that the growing volume of parochial schools at the time of *Lemon* puts the State and parochial schools

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[123] *Id.*

[124] *Id.* at 266 n.17 (citing Writings of James Madison 1785 (Hunt ed. 1901)).

"under disabilities with which they were not previously burdened." [125] This comment is specific to ensure there is no entanglement by the use of certain programs and books. He continued his point by indicating that teachers in parochial schools are attracted to them because of their religious affiliation and the fact that they can provide religious education to the attending students. Consequently, monitoring of curriculum and instruction is very difficult because no matter the content area (Shakespeare or Mathematics) there is always an opportunity for teachers, particularly "zealous ones," [126] to indoctrinate students. Douglas attempted to make his point by discussing a handbook that the Rhode Island Diocese provided to teachers outlining a portion of their job duties. Language in the handbook included items such as:

> A. Systematic religious instructions must be provided in all schools of the diocese.
>
> B. Modern catechetics requires a teacher with unusual aptitudes, specialized training, and such unction of the spirit that his words possess the force of a personal call. He should be so filled with his subject that he can freely improvise in discussion, dramatization, drawing, song, and prayer. A teacher so gifted and so permeated by the message of the Gospel is rare. Perhaps no teacher in a given school attains that ideal. But some teachers come nearer it than others. If our pupils are to hear the Good News so that their minds are enlightened and their hearts respond to the love of God and His Christ, if they are to be formed into vital, twentieth-century Christians, they should receive their religious instructions only from the very best teachers.[127]

While the above represent only a few requirements of teachers, Douglas believed that they are indicative of the pervasive nature of the religious control over the parochial school. This

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[125] 403 U.S. 602, 632.

[126] 403 U.S. 602, 635.

[127] *Id.* at 639.

control makes it impossible to separate out secular from non-secular teaching regardless of the content area. Moreover, it would be unconstitutional to provide public funding that would perpetuate so pervasively religious education.

Douglas ended his concurrence with the statement: "If the government closed its eyes to the manner in which these grants are actually used it would be allowing public funds to promote sectarian education. If it did not close its eyes but undertook the surveillance needed, it would, I fear, intermeddle in parochial affairs in a way that would breed only rancor and dissension."[128]

Justice Harlan

Judicial History. 3-2 Separationist

Figure 4 – Justice Harlan's Voting History in Selected Establishment Clause Cases

Case	*Engle*	*Abingdon*	*Allen*	*Walz*	*Lemon*
Holding	*S*	*S*	*A*	*A*	*S*

(S) – Separation (A) – Accommodation

Allen. Harlan wrote a concurring opinion in *Allen* which was meant to emphasize elements of the decision that supported the analysis and decision-making process by Justice White. Harlan also drew on *Abingdon* in his concurrence indicating that the posture of the court must remain neutral. Quoting Harlan, "the fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among

[128] 403 U.S. 602, 640.

sects or between religion and nonreligion, and that it work deterrence of no religious belief."[129] He believes that this decision in *Allen* remained neutral and showed no favoritism. This neutrality is expressed again in his analysis of *Walz*.

Walz. Harlan wrote a concurring opinion in *Walz* and again drew upon the language in *Abingdon*; "neutrality" and "voluntarism"[130] He states that these terms are related and reinforce the notion that government should not engage in practices that favor a religion, support a particular sect or religion, or encourage participation in religion. Harlan illuminates this further by citing, "the fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief."[131] Further, Harlan comments on *Torcaso v. Watkins* which states that the state cannot "constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can (it) aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."[132] Neutrality and voluntarism in Harlan's opinion are the buffers that guard against decisions that engage the State in religious matters that can result in a violation of the Establishment Clause. [133]

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[129] 374 U.S. 203, 305.

[130] 397 U.S. 664, 695.

[131] 374 U.S. 203, 305.

[132] 367 U.S. 488, 495.

[133] *Id*.

The principal of neutrality and voluntarism (later to be referred to as personal choice) will become a foundational argument of Justices in favor of accommodation in cases immediately following *Lemon*.

Justice Brennan

Judicial History. 5-2 Separationist

Figure 5 – Justice Brennan's Voting History in Selected Establishment Clause Cases

Case	*Engle*	*Abingdon*	*Allen*	*Walz*	*Lemon*	*Nyquist*	*Mueller*
Holding	*S*	*S*	*A*	*A*	*S*	*S*	*S*

(S) – Separation (A) – Accommodation

Walz. Brennan wrote a concurring opinion in *Walz* and drew upon his own opinion in *Abingdon* as his foundation. In his *Abingdon* opinion, Brennan enumerates his ideals for what the Establishment Clause should prohibit. He believes that the religious involvement with secular institutions which "(a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice" should be found in violation of the Establishment Clause as they would, in his opinion, "subvert religious

liberty and the strength of a system of secular government." [134] However, he is a strong proponent of a case-by-case review and in *Walz* he believes there is not a violation.

Lemon. Justice Brennan wrote a concurring opinion in an effort to distinguish his thoughts. Brennan did not feel that the language of *Lemon* was clear enough to indicate, in his opinion, that *Everson* and *Allen* did not control the outcome of this case. Brennan believed that *Lemon* should not be controlled by those particular previous cases because of the nature of the funding. In *Everson* and in *Allen,* it was clear that the financial support did not flow directly to the parochial school. Rather, there was a payment and passive tax that benefitted the parent directly. However, in both the Rhode Island and Pennsylvania portions in *Lemon,* the money goes directly to the parochial school as a subsidy for teacher salary, materials, and supplies. This, in his opinion was in direct conflict with the Establishment Clause. Brennan clearly stated this in his opinion by saying:

> Tax exemptions and general subsidies, however, are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes. In other words, '(i)n the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches,' while '(i)n the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions.' Thus, 'the symbolism of tax exemption is significant as a manifestation that organized religion is not expected to support the state; by the same token the state is not expected to support the church. [135]

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[134] 374 U.S. 203, 294-295.

[135] 397 U.S. 664, 690-691.

Additionally, Brennan felt the need to draw particular attention to the impact that entanglement has in this case.

> [A]…Rhode Island statute requires Roman Catholic teachers to surrender their right to teach religion courses and to promise not to 'inject' religious teaching into their secular courses. This has led at least one teacher to stop praying with his classes, a concrete testimonial to the self-censorship that inevitably accompanies state regulation of delicate First Amendment freedoms.[136]

Further, Brennan described the extreme policing and oversight needed to ensure that in both Rhode Island and Pennsylvania the curriculum and teaching materials in secular courses be standardized was too great. He believed that the length officials would need to go to in an effort to ensure separation makes the laws inappropriate. "The picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction surely raises more than an imagined specter of governmental 'secularization' of a creed."[137]

As a consequence, Brennan proposed that the decision in the Pennsylvania case should be reversed outright.

Justice Stewart

Judicial History. 4-2 Accommodationist – Voted in all cases but never wrote an opinion.

Figure 6 – Justice Stewart's Voting History in Selected Establishment Clause Cases

Case	*Engle*	*Abingdon*	*Allen*	*Walz*	*Lemon*	*Nyquist*
Holding	*A*	*A*	*A*	*A*	*S*	*S*

[136] 403 U.S. 602, 650.

[137] *Id.*

(S) – Separation (A) – Accommodation

Justice White

Judicial History. 4-2 Accommodationist

Figure 7 - Justice White's Voting History in Selected Establishment Clause Cases

Case	*Abingdon*	*Allen*	*Walz*	*Lemon*	*Nyquist*	*Mueller*
Holding	*S*	*A*	*A*	*S*	*A*	*A*

(S) – Separation (A) – Accommodation

Allen. White wrote the majority opinion in *Allen* and drew upon three previous cases for his analysis: *Everson, Zorach,* and *Abingdon*. He held that the law requiring the loan or purchase of textbooks for students in parochial schools is constitutional. White agreed that in *Everson,* and later cases, the line between state neutrality to religion and state support of religion is not easy to locate but is one of degrees.[138] However, the test should be:

> …what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[139]

[138] 343 U.S. 306, 314.

[139] 392 U.S. 236, 242.

White went on to say that this is a difficult test to apply but with *Everson* and *Abingdon* the standard is clear. In *Everson*, the determination would be based on a law having "a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[140] White came to the same conclusion believing that there was not a primary effect of advancing or inhibiting religion as the main purpose of the legislation in New York State and that it was simply to further educational opportunities for all students. The books are merely made available and only at the student or parent's request. Moreover, there are no funds or books given to the parochial schools directly and the benefit is solely to the parent and student.

Lemon. Justice White wrote an opinion that concurred in part and dissented in part. White begins by stating that throughout *Lemon* there is little mention of the State requirement of parents to educate their children either through public or parochial schools. This, in his opinion, should be considered as part of this case because in the end parents are doing their best to comply with compulsory education laws whether in parochial or public schools. Further, he contends that there is no evidence in the Rhode Island case that there was any intertwining of the curriculum in secular classes of religion and content. Therefore, there may indeed be a mechanism to provide some funding to parochial schools without excessive entanglement.[141] Moreover, White believes that the Court has created an "insoluble paradox for the State and the parochial schools."[142] The paradox is created because:

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[140] 392 U.S. 236, 244.

[141] 403 U.S. 602, 667.

[142] *Id.* at 668.

> …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.[143]

As a consequence of White's intent in *Lemon*, he concurred with the Pennsylvania portion but dissented in Rhode Island.

Justice Marshall

Judicial History. 3-2 Separationist

Figure 8 – Justice Marshall's Voting History in Selected Establishment Clause Cases

Case	*Allen*	*Walz*	*Lemon*	*Nyquist*	*Mueller*
Holding	*A*	*A*	*S*	*S*	*S*

(S) – Separation (A) – Accommodation

Lemon. Did not participate in entire case but joined Douglas's concurring opinion with respect to the Rhode Island portion. Separation

[143] *Id.*

Chief Justice Burger

Judicial History. 3-1 Accommodationist

Figure 9 – Justice Burger's Voting History in Selected Establishment Clause Cases

Case	*Walz*	*Lemon*	*Nyquist*	*Mueller*
Holding	*A*	*S*	*A*	*A*

(S) – Separation (A) – Accommodation

Walz. Burger delivered the opinion of the Court in *Walz*. In his opinion, Burger cited *Everson* and *Vitale* as those cases for which he drew upon as his background in reference to the Establishment Clause. Financial support to religious organizations would be considered sponsorship of religion but the lines of distinction in the Constitution are not clear or "precisely drawn'[144] supporting a case-by-case review. This, in his opinion, is in great part due to the Religious Clauses that are written in absolute terms but when practiced are in conflict.[145] This continues to foster a sense of confusion in cases that deal with the Establishment Clause.

Lemon. Chief Justice Burger wrote the majority opinion holding that the Rhode Island and Pennsylvania statutes were unconstitutional under the religion clauses of the First Amendment. He indicated that the majority believed that the states were promoting secular ideals by such statues and there was also excessive entanglement between the church and state. The Rhode Island case involved salary supplements that were paid to teachers of secular subjects in

[144] 397 U.S. 664, 668.

[145] *Id*. at 668-669.

parochial schools. While there was a benefit to the parochial school, and the teaching of secular subjects supports the mission of educating all children, there remained the question about the fact that the parochial school remained under the direction of the religious church for which it was founded.[146] To ensure that there was strict adherence to the separation of church and state the materials and curriculum would require ongoing and significant "state surveillance to insure obedience to restrictions as to the courses which could be taught and the materials which could be used."[147]

Additionally, the Pennsylvania case involved reimbursing parochial schools for teacher salaries, materials and textbook for times that the teachers discharged their respective duties in secular subjects. In this portion of *Lemon*, Burger determined that there was an "intimate and continuing relationship arising from state's postaudit power to inspect and evaluate schools' financial records and to determine which expenditures were religious and which were secular."[148] Burger believed that both cases created opportunities for political dividedness and the chance for "progression" that could lead to later establishment issues in relation to church and state.

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[146] 95% of parochial elementary schools at the time of *Lemon* were Catholic.

[147] 403 U.S. 602, 602.

[148] *Id*.

Justice Blackmun

Judicial History. 3-0 Separationist

Figure 10 – Justice Blackmun's Voting History in Selected Establishment Clause Cases

Case	*Lemon*	*Nyquist*	*Mueller*
Holding	*S*	*S*	*S*

(S) – Separation (A) – Accommodation

It is evident in the case-by-case review of the Justice's decisions that a pattern of decision-making is emerging specific to their respective beliefs about the separation of religion and schools. The following section will indicate how *Lemon* can be seen as the peak, or "high water mark" of separation, at least in a decision-making process (The Lemon Test), by the Court.

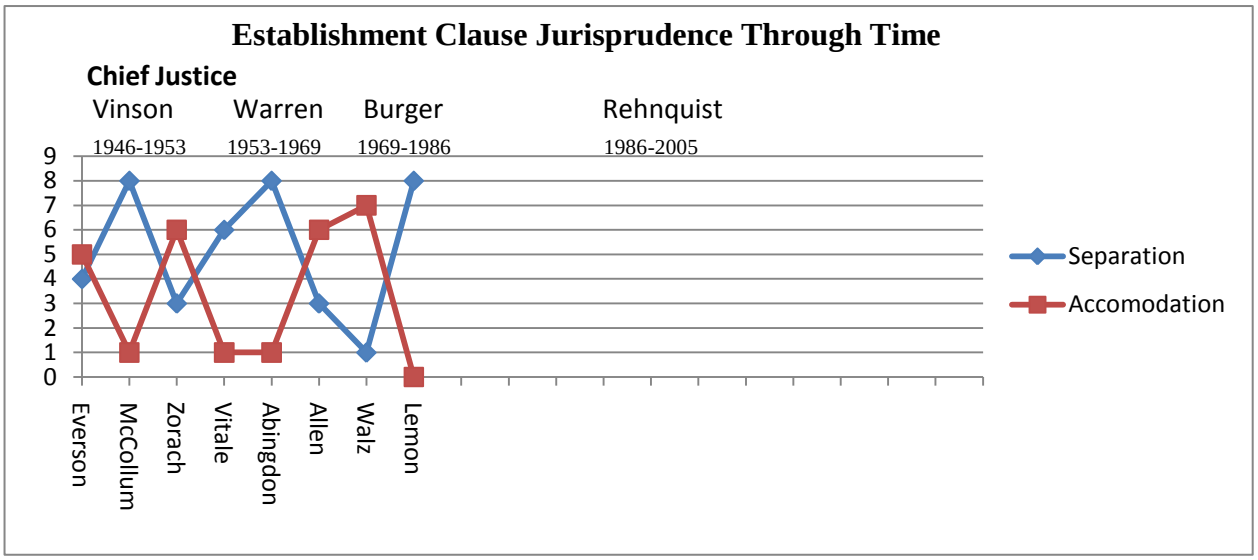
The High Water Mark

The following (Figure 11) indicates the decisions, with respect to the Establishment Clause, that were made prior to and in *Lemon*. It is evident that in early cases, through *Lemon,* the Judicial intent and tenor of the court indicated a strong preference for the separation of religious exercise from public schools (e.g. no school-wide prayers). It is also clear that there was some confusion with respect to public funding for parochial school children (e.g. purchasing of materials). Following *Lemon,* there was continued confusion among the court as Justices

continued to find their individual line of tolerance for separation of church and state particularly in the realm of parochial school funding.

Figure 11 – Selected Establishment Clause Cases, Vote, and Holding

Case	***Separation***	***Accommodation***	***Holding***
Everson	4	5	Accommodation
McCollum	8	1	Separation
Zorach	3	6	Accommodation
Vitale	6	1	Separation
Abingdon	8	1	Separation
Allen	3	6	Accommodation
Walz	1	7	Accommodation
Lemon	**8**	**0**	**Separation**



The graphic above indicates that up to *Lemon* the court was relatively clear with respect to decisions about accomodation and separation of religion particularly when defined by in school and out of school practice and financial support.

Chapter 4 will explore how the Court initially attempted to show fidelity to the Lemon Test, later used pieces of the test as needed to make their respective arguments, and then made a clear departure with a move to an accommodationist perspective.

CHAPTER 4

An Attack on Lemon

"The Establishment Clause is one of the most disreputable pieces of our American history and if you are trying to make sense of it…good luck."[149]

Marginalizing Lemon

If *Lemon* was the high water mark for Establishment Clause jurisprudence, the decades following must be considered a historical lowering of the metaphorical wall of separation between church and state that the Court had built up from *Everson* to *Lemon.* The Court, toward the end of Chief Justice Burger's era (1969-1986), was in full retreat from the strict adherence it had developed in terms of this separation.[150]

The tripartite *Lemon* test was used in all Establishment Clause cases following its inception through the 1980s. However, the Supreme Court, through their language in subsequent decisions, minimized the importance of the test. For example, in *Committee for Public Education and Religious Liberty v. Nyquist* [151] and *Mueller v. Allen*[152] the Court referred to *Lemon* as no

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[149] *Supra* note 7.

[150] KOSSOW, supra note 109, at 103

[151] 413 U.S. 756 (1973).

[152] 463 U.S. 388 (1983).

more than a useful "guideline." Later in *Lynch v. Donnelly*[153] the Court indicated that *Lemon* had never been binding. When *Lee vs. Weisman*[154] was heard before the Court there was speculation that *Lemon* would be overturned. However, the majority opinion delivered by Justice Kennedy indicated that *Lemon* would not be overturned,[155] though the tripartite test was not used as the standard in *Weisman*. Kennedy instead established a new test called the coercion test.[156]

One of the most outspoken critics of *Lemon* was Justice Rehnquist. In his dissenting opinion during *Wallace v. Jaffree (1985)*[157] he stated:

> [W]e soon began describing the test as only a "guideline," and lately we have described it as "no more than [a] useful signpost". . . . We have noted that the *Lemon* test is "not easily applied," under the *Lemon* test we have "sacrificed clarity and predictability for flexibility" . . . [and] the *Lemon* test has never been binding on the Court. . . . I see little use for it. [158]

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[153] 465 U.S. 668 (1984).

[154] 505 U.S. 577 (1992)

[155] "Thus we do not accept the invitation … to reconsider our decision in *Lemon v.* Kurtzman, supra." *Id*. at 587

[156] The coercion test indicated that the government is not in violation of the Establishment Clause unless it (1) provides direct aid to religion in a way that would establish a state church, or (2) coerces people to support or participate in religion against their will.

[157] 472 U.S. 38 (1985).

[158] *Id.* at 112.

Clearly Rehnquist advocated overturning or abandoning *Lemon.* Following *Mueller,* the Court for all intents and purposes, marginalized *Lemon* to the point that Rehnquist's voice in *Wallace* was reflected in subsequent decisions.[159]

The following chapter will provide a chronology of cases with respect to Establishment Clause jurisprudence that indicate the erosion of *Lemon*. The first portion of the chapter will provide information about cases that used *Lemon* as a guide but began to undercut and marginalize its reasoning. The next group of cases will indicate a clear move away from *Lemon* as an algorithm for decision-making with substitutions of tests coming to the fore. Although *Lemon* was not overturned, the cases reviewed in the final section show that the tripartite test was effectively dismantled and is no longer part of the analysis of Establishment Clause cases.

Maintaining Lemon

In parochial school aid cases immediately subsequent to *Lemon,* the Court generally followed the reasoning and tripartite test in *Lemon.* However, within a few years the separationist posture of the court would change and the accommodationist preference would become the will of the majority. This growing accommodationist stance became more evident in dissenting opinions and analysis with *Lemon* serving as a guideline, but it was not until cases such as *Zobrest* and *Mitchell* (cases explored later in the chapter) that *Lemon* was marginalized with the test becoming irrelevant to any further analysis.

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[159] ALEXANDER, *supra* note 114, at 199-202.

In the 1973 case *Committee for Public Ed. and Religious Liberty v. Nyquist,* New York State, through Education and Tax Law changes, established three financial aid programs designed to meet the needs of parochial elementary and secondary school children. The first of the aid programs provided for direct grants to parochial schools for maintenance and repair of facilities and equipment. The purpose of this program was to ensure the "health, welfare, and safety" of the students in "qualifying schools."[160] The New York Legislature believed that it had responsibility for all students in the state and that the declining population in parochial schools created a financial crisis that would create hardship for schools to provide general maintenance.

The second financial aid program provided a tuition reimbursement plan for students who attended parochial schools. A parent was eligible for financial assistance if their annual taxable income was less than $5,000.00 per year and the reimbursement was $50.00 per elementary student and $100.00 per high school student so long as the reimbursement did not exceed more than 50% of the actual tuition paid.[161] New York's rationale for this program was that all students had a right to an education within a pluralistic community.

The third financial aid program was designed to provide tax relief for parents of parochial students who did not qualify for the tuition reimbursement program. This program would provide for a stipulated amount of money based on the taxpayer's adjusted gross income for each child

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[160] A "qualifying" school is a nonpublic, nonprofit elementary or secondary school serving a high concentration of pupils from low income families. The annual grant is $30 per pupil, or $40 if the facilities are more than 25 years old, which may not exceed 50% of the average per-pupil cost for equivalent services in the public schools.

[161] Adjusting for inflation these figures would be $23,876, $239.00, and $478.00 respectively.

attending parochial school. The amount each person was eligible for was not dependent on the amount of tuition paid and would increase or decrease based on the amount of income earned annually.

At the time New York State made these changes, approximately 20% of the students (nearly 800,000) attended non-public schools. Of this population, approximately 85% of the students attended parochial schools with nearly all being Roman Catholic.

The lower court ruled that the maintenance and repair grants along with the tuition reimbursement grants were in violation of the Establishment Clause. However, they ruled that the portions of the case that dealt with the income tax provision were not in violation.

In the majority opinion,[162] Justice Powell applied the Lemon Test and determined that all programs had the primary effect of advancing religion and were in violation of the Establishment Clause. 1) The maintenance and repair program was found in violation of the Establishment Clause because it was determined that the subsidy from the state would advance the religious mission of the sectarian schools. While there was a provision limiting the state aid to 50% of the comparable aid to public schools, there was no indication of an adequate safeguard in place that would assure that the money used would not be for religious activities. 2) The tuition reimbursement program was also found in violation even though it was given directly to the parent for the same reason as stated earlier. This program does not have any safeguard that

[162] 6-3 Six votes for the Committee for Public Education (Douglas, Brennan, Stewart, Marshall, Blackmun, Powell) three against (Burger, White, Rehnquist).

indicates the money given to parents and subsequently given to schools would not advance the religious mission of the school. Therefore, it has the effect of aid to parochial education. 3) The provision of income tax benefits to parents of parochial school students is also in violation as the program is not restrictive enough to ensure the impermissible effect of advancing sectarian activities in religious schools.

While the Lemon Test was utilized, the prong regarding entanglement was not reviewed since the prong with respect to the impermissible effect of advancement of religion was the portion challenged. However, the majority opinion did caution that programs such as the New York financial aid program would likely result in excessive entanglement

Powell strengthened his opinion by further stating that, "like the tuition reimbursement program it (the maintenance and repair section) is not sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools."[163] Further, Justice Powell indicated that tuition reimbursement grants, regardless of who receives them (parents or school), effectively aid sectarian institutions.[164]

Justices White and Rehnquist wrote dissenting opinions. White's dissent was joined by Chief Justice Burger and Justice Rehnquist. Rehnquist's dissent was joined by Chief Justice Burger and Justice White.

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[163] 413 U.S. 756, 758.

[164] *Id.*

White's dissent drew upon arguments from *Everson* and *Allen* stating that in those cases the court agreed that paying for bussing and textbooks respectively benefitted all students. However, in *Nyquist* the benefit was only for those students who were attending non-public schools which White argued was applying a proportional approach to law making meaning that if a small portion of students are affected that the likelihood of impacting significant change (e.g. growth in enrollment at parochial schools) is diminished. In his opinion, the decision to use the money for parochial schools is at the discretion of the parent and it shouldn't matter if 5% or 90% of the schools were supporting religious education.[165]

Rehnquist's dissent took a different approach by indicating that there should be no distinguishable difference in how parents get money to support their child's education whether from a tax credit or a tax deduction. He believes that the *neutrality* of the reimbursement and tax benefit plan in *Nyquist* is no different than the plans in *Everson* and *Allen*. He further indicates that since the benefit is to parents and not directly to schools that the impact to the schools in *Nyquist* is negligible. Similarly, as it is in earlier cases, there was no question about advancing religion because the aid was considered neutral.[166]

The dissenting opinions by White and Rehnquist begin building the foundation for creating a new perspective and decision-making route with a focus on neutrality and choice[167] as

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[165] *Id*. at 804-805.

[166] *Id*. at 811-813.

[167] Neutrality is determined by who receives the governmental aid. If the money does not flow directly to the parochial institution, but rather directly to the parent the funding, in Rehnquist's opinion, is neutral.

the overarching themes. Additionally, by expressly reserving judgment in *Nyquist* about *all* tax structures the Court left room for different schemes that would unfold in *Mueller*. Further, with a focus on choice and neutrality the Court will ultimately make the use of the third prong of Lemon (excessive entanglement) needless.

In *Meek v. Pittenger,*[168] (later overruled by *Mitchell v. Helms*) the Court had separate decisions to make in a Commonwealth of Pennsylvania case. The first question the Court had to determine was the constitutionality of the State loaning *textbooks* to parochial school students. This was a straight forward issue as it (textbooks) was previously settled in *Allen*. The second question was whether the State could loan *materials and supplies* to students in parochial schools.

The Commonwealth of Pennsylvania authorized that elementary and secondary schools must provide for all children meeting the mandatory compulsory attendance laws "auxiliary services" and that the loan of textbooks would be considered acceptable for use in the public schools. Additional to the loan of textbook act (Act 195) was language that provided loans of instructional materials and equipment directly to nonpublic schools.

Auxiliary services, as defined in Pennsylvania's Act 194, include such services as counseling, psychological services, and speech & hearing testing. Further, "neutral and non-ideological" services would be provided to disabled and educationally disadvantaged students in parochial schools in the same way as in public schools. Instructional materials include items such

[168] 421 U.S. 349, (1975)

as maps, charts, films and photographs and instructional equipment includes projectors, recorders, and science lab materials such as beakers and test tubes.

Suit was filed challenging the constitutionality of both Pennsylvania Acts. The court upheld the textbook and instructional material loan programs as well as the auxiliary services program. However, the Court invalidated the instructional equipment portion of Act 195 stating that if upheld there was not a guarantee that the equipment would not be later diverted for use to promote religious activities.

In the majority opinion[169] Justice Stewart found it to be allowable for the State to, based on *Allen*, provide textbooks to students at parochial schools. The court believed that textbooks themselves are neutral and do not promote or advance religion. Further, the textbooks go directly to the parents and benefit the general secular educational program.[170] However, with respect to the second question in the case, the court agreed that directly loaned materials and supplies to parochial schools by the public schools did offend the Establishment Clause and was not allowable. Later, in *Mitchell v. Helm*, this conceptual understanding of the majority of the Court will be challenged again and governmental entitlement funds from Chapter II of the Education Consolidation and Improvement Act of 1981 will be allowable for purchase of equipment.

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[169] 6-3 Six votes for Meek (Stewart, Brennan, Douglas, Marshall, Blackmun, Powell) Three votes against (White, Rehnquist, Burger).

[170] 392 U.S. 236, 243-244.

Stewart's analysis turned on the belief that providing such materials and supplies would have the primary effect of establishing a religion because 75% of the schools eligible for financial assistance are parochial schools and would qualify for money as they comply with compulsory attendance laws. This, in his opinion, is not an insignificant percentage and potential number of students. Further, because the percentage of parochial schools and number of students impacted by the alternative ruling, there was a chance that this would create a direct link to subsidizing parochial education. This reasoning, however, does subtly suggest that if a smaller percentage of schools and students were impacted that the outcome would be different which Justice Rehnquist develops in his dissenting opinion. Additionally, in the second part of this case the Court held that the auxiliary services such as speech therapy and psychology services would require significant surveillance that would cause excessive entanglement as the state would need to impose limitations and monitor the work. The Court would later reaffirm this decision in the companion cases of *Grand Rapids School District v. Ball* (1985) and *Aguilar v Felton* (1985) but ultimately overturn it in *Agostini*.[171]

Primary to the overall analysis, Stewart used the Lemon Test because it constitutes "a convenient, accurate distillation of this Court's efforts over the past decades to evaluate a wide range of governmental action challenged as violative of the constitutional prohibition against

[171] 521 U.S. 203 (1997)

laws 'respecting an establishment of religion,' and thus provide the proper framework of analysis for the issues presented in the case before us."[172]

This was not the feeling of all Justices on the Court. In fact, Justice Rehnquist said of the Lemon Test in *Wallace v. Jaffree* (1985) when speaking specifically of the difficulty with respect to the entanglement prong:

> "These difficulties arise because the Lemon test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests. The three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service. The three-part test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize. Even worse, the Lemon test has caused this Court to fracture into unworkable plurality opinions, depending upon how each of the three factors applies to a certain state action. The results from our school services cases show the difficulty we have encountered in making the Lemon test yield principled results."[173]

Justice Rehnquist wrote a dissenting opinion which was specific to the second question about the constitutionality of providing materials and supplies to parochial students via pubic financial aid. Rehnquist believed that loaning materials and supplies was indistinguishable from textbooks and that Stewart's decision to state that they were different was arbitrary.[174] Further, Rehnquist states that the argument Stewart used based on the percentage of schools that are non-public that require compulsory education and potentially receive revenue was also flawed. He indicated that he could not determine where the percentages Stewart used came from and that if

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[172] 421 U.S. 349, 358.

[173] 472 U.S. 38,110.

[174] 421 U.S. 349, 388.

"the number of sectarian schools were measured as a percentage of all schools, public and private, then no doubt the majority would conclude that the primary effect of the instructional materials and equipment program is not to advance religion."[175] Further, Rehnquist indicated that in Stewart's analysis there is a tolerable degree to which loaning materials would be appropriate and that by using such an argument "eschews the primary-effect analysis."[176] This, according to Rehnquist, is deficient as a legal argument.

Rehnquist's dissenting opinion regarding the difference between textbooks and materials is one that the Court itself struggled with and later the reasoning of Stewart and the majority will be overturned in *Mitchell*.

Following *Meek*, a group brought action challenging the constitutionality of an Ohio Code that authorized funding for nonpublic schools with the majority being sectarian in *Wolman v. Walter* (1977) (later overruled by *Mitchell v. Helms*). The purposes which the funding could be used in this case were 1) purchasing secular textbooks that were approved by the Superintendent for Public Instruction for loan to children in nonpublic schools 2) providing standardized testing scoring and protocols so long as they are the same in the public school as the parochial school 3) providing speech, hearing, and psychological services to both public and nonpublic school children via contract services with services occurring at the nonpublic site 4) providing therapy, guidance, and remedial support to students on public school campuses or other areas that are not

[175] *Id*.

[176] *Id.* at 391.

on the nonpublic school site, 5) purchasing and loaning instructional materials and equipment that is "incapable of diversion to religious use,"[177] and 6) providing equivalent field trip transportation to parochial school students through special contracts if public school division busses are unavailable.

The Court ruled that portions of the Ohio plan specific to providing books, standardized testing support, diagnostic, remedial and therapeutic support were constitutional. However, those portions of the Ohio plan that relate to providing instructional materials, equipment, and field trip provisions were found to be unconstitutional.

In the Court's majority opinion,[178] delivered by Justice Blackmun, he wrote specifically about diagnostic services, therapeutic, guidance and remedial services, instructional materials, and field trip funding. In the Court's opinion, there is no risk of promoting religious views if services are provided to students on a nonpublic school premises much like the decision dating back to *Zorach*. As a consequence of this, there is no need for surveillance and no entanglement issue. Additionally, providing health services to parochial students, like public school students, does not have the primary effect of promoting religion. The Court then extrapolates that decision to diagnostic speech, hearing, and psychological services finding that they too are constitutional so long as they are administered away from a nonpublic school site. A portion of the rationale is

[177] 433 U. S. 229, 249. (1977)

[178] 7-2 Seven votes for Wolman (Burger, Stewart, White, Blackmun, Powell, Rehnquist, Stevens) Two against (Marshall, Brennan).

that the services themselves have little if any educational content and unlike a teacher the diagnostician has significantly less contact with students reducing the opportunity to proselytize.

However, loaning of materials and equipment to nonpublic schools continued to be unconstitutional in the opinion of the Court. The reasoning in *Wolman* follows the same logic as in *Meek* in that the materials and equipment, while limited to neutral and secular in nature will, without surveillance, have the primary effect of advancing religious education.

Finally, with respect to the transportation question, the Court held that since the funding for field trips constituted direct aid to parochial schools it violated the Establishment Clause. The reasoning behind this opinion is that the parochial school is in control of the frequency and timing of trips and would be the direct recipient of the funding rather than the student or parent. This not only provides direct aid to the sectarian school but also, if allowed, would require significant surveillance to ensure that the trips were secular in nature causing excessive entanglement.

The decision in *Wolman* distinguished *Meek* by affirming that the therapeutic services would be allowable if they were held at a "neutral site off the premises."[179] Additionally, the Court held again that the use of public funds for materials and some transportation in parochial schools was unconstitutional. This decision, however, distinguished *Everson* based on the parochial school's control over the request of the money and how closely it was tied to the timing and curricular program.

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[179] 433 U.S. 229, 248.

Justices Burger and Rehnquist wrote dissenting opinions in portions of *Wolman* which were specific to the acceptability of materials and equipment. Both argued that the plurality decision was flawed in that differentiating the equipment from textbook loaning, which was allowable, was inconsistent.

This confusion, and lack of reliance on the established Lemon Test as illustrated in the differentiated quotes from Stewart and Rehnquist earlier in the chapter, would be a foreshadowing of the new order developing on the court that became clear in *Mueller*.[180]

The Eroding of Lemon

Few cases speak more strongly to changed judicial preference in finance and State aid to parochial schools cases with respect to Establishment Clause jurisprudence than *Mueller v. Allen* (1983), *Grand Rapids Sch. Dist. v. Ball* (1985)[181], *Witters v. Washington Department of Services for Blind* (1986), and *Zobrest v. Catalina* (1993). These four cases, when taken together, indicated accommodation to religion more than any others heard previously. The principles of *neutrality* and *choice,* and the particular way the second and third prong of the Lemon Test (advancement of religion and excessive entanglement respectively) are interpreted in these cases, will be transformed and a previously separationist court will move to one that is accommodationist.[182]

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[180] *Id.* at 255-265.

[181] 473 U.S. 373 (1985).

[182] David McKenzie, *Separation and Accommodation*, Educational Horizons 29 (Fall, 2003) .

The Court, as noted previously in dissenting opinions, has been systematically chipping away at what advancing religion and excessive entanglement mean with respect to neutrality, choice, and governmental surveillance. The building theme has been if a parent had a choice, and the choice given was neutral and available to all, the consequence was that the aid provided was not advancing or inhibiting religion thus requiring no need for monitoring. This ended the need for the third prong of the Lemon Test. Accommodationist Justices found the "soft spot" in *Lemon* and were exploiting it.

Moreover, the Court as it was composed at the time of *Mueller* remained evenly divided with strong voices supporting both an accommodationist and separationist perspective with a critical swing vote here in Justice O'Connor.[183]

This section provides an analysis of the majority opinions in *Mueller, Witters* and *Zobrest* with additional information regarding the dissenting opinions. In each of these cases, the Lemon Test was abandoned or used in part when it met the analytical needs of the Justice, and the wall of separation between church and state falls.

Mueller. In *Mueller* the Court was faced with determining the constitutionality of a Minnesota statute that allowed the parents to take a deduction on their state tax return for expenses incurred for tuition, textbooks, and transportation for children attending parochial elementary and secondary education. Minnesota taxpayers filed suit against the Minnesota Commissioner of Revenue and respondent parents who filed for a tax deduction for costs

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[183] *Id.*

associated with sending their children to parochial schools. The taxpayers claimed that this deduction was a violation of the Establishment Clause and that it provided financial support directly to sectarian schools. The lower court ruled, via summary judgment, that the state statute is neutral and did not have the primary effect of advancing religion. Following this, the Court of appeals affirmed the decision and the Supreme Court upheld the lower courts decisions.

In a 5-4 decision, [184] with Justice Rehnquist writing for the majority, the Court held that this reimbursement via tax deduction was not a violation of the Establishment Clause and satisfied all of the elements of the Lemon Test.[185] Rehnquist stated that the law at issue in the *Mueller* case met all three elements of the Lemon Test as redefined by the plurality. First (prong one), the Minnesota tax deduction is secular in nature because it merely is meant to ensure that the State has an educated populous and the overall financial wellness of the public and private (sectarian and nonsectarian) was assured. Additionally (prong two), the tax deduction (up to $700.00 for materials and supplies) does not have the effect of advancing religion as it is simply one of many available tax deductions on the State return. Rehnquist goes on to say, distinguishing *Nyquist*, that this deduction is analogous to those like medical expenses and charitable contributions that avail themselves to *all* parents whose children attend public or parochial school. This is a genuine tax deduction not a credit, like in *Nyquist* (available only to parents of parochial school students) that was part of a bigger taxing structure and scheme. He

[184] 5-4 Five votes for Allen (Burger, White, Rehnquist, Powell, O'Connor) Four votes against (Brennan, Marshall, Blackmun, Stevens).

[185] 463 U.S. 388, 388.

also indicated that localities must be shown deference when looking at how to support their respective communities as they know the issues better than the Federal Government or Court. To disallow this taxing authority via a deduction would not show deference. Further, Rehnquist indicated that the tax deduction is a result of the personal choice parents make and that they (the parents) get the deduction directly and not the parochial school. Thus, in his opinion, this tax deduction is completely neutral. "The Establishment Clause's historic purposes do not encompass the sort of attenuated financial benefit that eventually flows to parochial schools from the neutrally available tax benefit at issue."[186] Finally (prong three), the majority opinion indicates that there is not excessive entanglement in State religion with respect to the textbook provision because there is already a provision and system in place that determines whether particular materials qualify for deduction based on their nonsectarian content.

Justice Marshall wrote a dissenting opinion in which Justices Brennan, Blackmun and Stevens joined indicating that *Nyquist* made it clear that the Establishment Clause prohibits the State from subsidizing directly or indirectly the cost of religious education. He also indicated that it is clear in the law that the State purchase of books and materials is prohibited.[187] Noteworthy of his dissent is that it is rooted in the *Nyquist* case as the backdrop and not *Lemon.* Further, the Lemon Test was never referenced in the dissent.

In the majority opinion, Rehnquist distinguishes the differences between the taxing structure in *Mueller* and *Nyquist* paving the way for an accommodationist ruling. Marshall

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[186] *Id.* at 388-389.

[187] *Id.*

believes this analysis is wrong on two fronts. First, he indicated that the tax benefits that are exercised in this tax law are for students attending parochial schools and not public school children. In the Minnesota law, students in a parochial school may write off the cost of tuition as well as materials and supplies up to $700.00. Additionally, public school parents may deduct up to $700.00 for materials and supplies. Marshall argued that while the tax benefit was available to all, most public school parents will not benefit at nearly the level of parochial school parents in this law. He states,

> "Fewer than 100 of more than 900,000 school-age children in Minnesota attend public schools that charge a general tuition. Of the total number of taxpayers who are eligible for the tuition deduction, approximately 96% send their children to religious schools. Parents who send their children to free public schools are simply ineligible to obtain the full benefit of the deduction except in the unlikely event that they buy $700 worth of pencils, notebooks, and bus rides for their school-age children. Yet parents who pay at least $700 in tuition to nonpublic, sectarian schools can claim the full deduction even if they incur no other educational expenses."[188]

Additionally, Marshall indicated that the opinion of the majority is attempting to distinguish *Nyquist* further by saying that the tax benefit available under Minnesota law is a genuine tax deduction while in *Nyquist* the tax benefit was considered a tax credit. In *Mueller*, the amount of tax benefit a person will receive is dependent on the amount they expend on educational expenses. In *Nyquist* the amount was not dependent on the amount paid but rather was a fixed amount, predetermined, that was dependent on the tax payer's respective tax bracket. The deduction in *Nyquist* was designed to provide roughly the same benefit for all parents.[189]

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[188] *Id*. at 408-410.

[189] *Id*. at 411-412.

Marshall believes that this distinction is no different and that in *Nyquist* the benefit was rejected and should be in *Mueller*.[190] However, Rehnquist argued that the economic benefit for both taxing structures in *Nyquist* and *Mueller* are indistinguishable and should be reviewed based on their format which, again, he believed was distinguishable and allowable in *Mueller*.

Grand Rapids. In a 5-4 decision,[191] with Justice Brennan writing for the majority, the Court indicated that the Grand Rapids School Districts plan to rent nonpublic classrooms with public funds to instruct nonpublic school children was a violation of the Establishment Clause.

The "Shared Time" program is one which offered classes during the traditional school day and were intended to supplement the State's curriculum requirements in Michigan. The teachers employed as part of the program were full-time public school employees. Many of those employed had a history teaching in non-public schools. In Grand Rapids there were 41 schools identified as having the Shared Time program and 40 of the 41 sites were religious schools. This was significant because the students attending the Shared Time program were the same students that attend the traditional day program where the Shared Time program was offered. Consequently, the majority of the population attending the program was from parochial schools. Taxpayers in Grand Rapids filed suit indicating that the practice was a violation of the Establishment Clause because the Shared Time program at the parochial school sites was being subsidized by public funds.

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[190] *Id*. at 411.

[191] 5-4 Five votes for Ball (Brennan, Marshall, Blackmun, Powell, Stevens) Four against (Burger, White, Rehnquist, O'Connor).

The Court affirmed the prior ruling of the District Court ruling that there was a violation of the Establishment Clause stating that the Shared Time community education programs had the primary or principal effect of advancing religion.[192]

Justice Brennan indicated in the majority opinion that the program was a violation for a number of reasons. Brennan believed that while providing education to children outside of the school day was a noble cause, nobility alone could not validate governmental aid when there was a chance that aid could promote a single religion or entangle the government. Additionally, because the proportion of teachers working during the school day in parochial schools where the program was offered was high, there was an opportunity and likelihood, that those teachers would subtly or overtly indoctrinate students into a particular religion at the public's expense. Further he indicates, the mere impression that publicly funded instruction occurring within a parochial school would convey a message to the broader community that the state was sponsoring religion. Finally, funding the program was impermissible because the effect would result in the government allowing parochial schools to take over substantial portions of the secular curriculum.

Chief Justice Burger and Justice O'Connor filed opinions concurring with the judgment in part and the dissenting in part. Justice Rehnquist and White filed dissenting opinions.

Burger's dissent in this case is fundamental to the erosion of *Lemon*. He agreed in part of *Grand Rapids* because the rules of *Lemon* make it so. He stated: "I agree with the Court that,

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[192] 473 U.S. 373, 381-398.

under our decisions in *Lemon*, and *Earley v. DiCenso,* decided together with *Lemon*, the Grand Rapids Community Education program violates the Establishment Clause." [193] However, in his very next sentence of the dissent, Burger stated that he dissents for the same reasons as outlined in *Aguilar v. Felton* where he stated in his decision, "I share Justice White's concern that the Court's obsession with the criteria identified in *Lemon*, has led to results that are contrary to the long-range interests of the country." [194]

Justice O'Connor also filed dissenting opinion indicating that there was nothing in the record that suggested the teachers employed by the Shared Time program had ever engaged in proselytizing to the students they were working with. Further, O'Connor questioned, in her dissent, the actual numbers of teachers that had been employed by parochial schools as opposed to those that were currently employed by all of the parochial schools. Here judgment was that because the overall numbers were lower, the risk was not as great for inculcation of religion at the public's expense. However, she did agree that the program was a violation of the Establishment Clause because there was a perceived, or actual, effect of advancing religion when parochial school teachers are teaching secular subjects at a parochial school.[195]

Justice Rehnquist wrote a dissenting opinion indicating that the court had developed a pattern of relying too heavily on *Everson* and *McCollum* and there had been an absence of

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[193] 473 U.S. 373, 398.

[194] 473 U.S. 402, (Burger, dissenting opinion).

[195] 473 U.S. 373, 400-401.

conversation of the "faulty wall premise upon which those rest."[196] He goes on to say that in absence of a review of history, the Court is ultimately bound to the previous 150 years of Establishment Clause jurisprudence.

Rehnquist, later in his dissent, takes a stab a *Lemon* by stating that the "Court today attempts to give content to the "effects" prong of the *Lemon* test by holding that a "symbolic link between government and religion" creates an impermissible effect. But one wonders how the teaching of "Math Topics," "Spanish," and "Gymnastics," which is struck down today, creates a greater "symbolic link" than the municipal crèche upheld in *Lynch v. Donnelly*, or the legislative chaplain upheld in *Marsh v. Chambers*."[197]

Finally, Rehnquist argued (similar to O'Connor) that the decision made is mistrusting of public school teachers' overall judgment. Further, he indicates that there was no evidence that one instance of religious inculcation had occurred. He would reverse the decision that the majority handed down.

Witters. In a 9-0 decision[198] the Court filed another clear accommodation of religion opinion in *Witters v. Washington Commission for the Blind.* In this case a student applied for tuition support from the Commission for the Blind to support his enrollment at a Christian college where his course of studies involved a curriculum which would help him become a

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[196] 473 U.S. 373, 401.

[197] 473 U.S. 373, 402.

[198] Burger, Brennan, White, Marshall, Blackmun, Powell, Rehnquist, Stevens, O'Connor

minister, missionary, or a youth pastor. The State of Washington authorized the Commission for the Blind to provide educational training to those who are handicapped in an effort to become as self-supporting and self reliant as possible. Witters, the petitioner, was eligible to seek vocational assistance and support from the Commission as he suffered from a progressive eye condition. Witters attended the Inland Empire Bible School, a private Christian college, and followed a course of study to prepare for a career in the ministry. The Commission denied his request for aid. The Supreme Court heard the case and held that the extension of aid for the student to attend a Christian college would not be inconsistent with the Establishment Clause.[199]

The unanimous opinion was delivered by Justice Marshall whose opinion enumerated three distinct reasons why this action was not a Constitutional violation. First, Marshall indicated that the record in Washington allowed for the benefit to come directly to the student from the State, who then pays for the educational institution of their choice. Under this scenario, Marshall believes, the program is not skewed to a religious or sectarian education.[200] Additionally, Marshall wrote that there is nothing in the petitioner's arguments that indicated if successful the entire amount of the award would flow to a sectarian educational institution.[201] Finally, Marshall believed that it is inappropriate to perceive that any neutrally available aid flowing to a student from the State, ultimately that follows to a sectarian institution would be the State subsidizing religion.[202]

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[199] 474 U.S. 481, 485-490.
[200] *Id*. at 487, 488.
[201] *Id*. at 488.
[202] *Id*. at 499.

The Marshall decision was joined in parts 1 and 2 by Justice Burger and Justices Brennan, White, Blackmun, Powell, Rehnquist, and Stevens. O'Connor joined Marshall in part 1 and also joined White who wrote a separate concurring opinion. Justice Powell filed a concurring opinion which Burger and Rehnquist joined. Justice O'Connor also filed an opinion which concurred in part.

In Justice White's concurring opinion, he indicated that the Court's decisions that found constitutional violations when a State gives aid to private schools and their respective students, misconstrues the Establishment Clause and is a disservice to the general public.[203] Further, he wrote that the majority opinion missed an opportunity to strengthen the argument by including *Mueller* as part of the analysis. "As the Court states, the central question in this case is whether Washington's provision of aid to handicapped students has the "principal or primary effect" of advancing religion.[204] *Mueller* makes the answer clear: state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of individual beneficiaries."[205]

The *Witters* case created a nuance with respect to the Establishment Clause as this case is not associated with K-12 education but rather postsecondary education which is not free for

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[203] *Id.* at 490.

[204] 403 U.S. 602, 398-399. *See also Nyquist,* 413 U.S. 756 at 783-785.

[205] 474 U. S. 485, 491.

anyone like public school is. If viewed through the lens of the Lemon Test, the first and third prongs would likely not apply because the education provided is a training program for blind students which does not advance religion. There cannot be entanglement as the money flows directly to the student and not the institution via a check that is sent. The only prong that could be violated is prong two which Marshall makes clear in his points is not in question.

A unanimous vote is a strong decision and one that spoke to the overarching themes again of neutrality and choice. It appears through this decision that these questions are becoming clearer for those that have traditionally held the line on separation with respect to Establishment Clause cases. However, future cases will indicate that there may have been different interpretations, via factual context, that will lead Justices to different outcomes.

Zobrest. In *Zobrest v. Catalina Foothills School District* James Zobrest, a student who was deaf since birth attended public school through 8th grade. During his tenure in public school Zobrest was afforded the services of a sign language interpreter. At the end of 8th grade the Zobrest family made a decision to send their son to parochial high school and asked the local school board to continue to provide an interpreter for their son. The school board denied their request and the Zobrests filed suit stating that the IDEA and Free Exercise Clause required this and that providing an interpreter would not offend the Establishment Clause. The lower court granted summary judgment indicating that the interpreter would be acting as a conduit for promoting religious education at the expense of the government. The Court of Appeals affirmed

the lower court's decision. In a 5-4 decision[206] Chief Justice Rehnquist reversed the lower court's decision and delivered the opinion that providing the interpreter did not violate the Establishment Clause and that a deaf student could receive a sign-language interpreter at his Roman Catholic High School.

Justice Rehnquist indicated that the IDEA creates no financial incentive for parents to choose a parochial school and that the mere presence of a sign language interpreter is not linked directly to the State. Therefore, because the decision to place in a parochial school is one that is private and made by the parents, it is not a constitutional violation. Rehnquist went on to say that "the service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as 'handicapped' under the IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends." [207]

Rehnquist drew on several cases in his majority opinion. He began by writing that the Court has never inhibited or "disabled" religious institutions from participating in programs that support the social welfare.[208] He cites *Widmar v. Vincent* (1981) by writing that if the Establishment did keep religious institutions from public aid "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair."[209] In Rehnquist's

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[206] 5-4 Vote Five for *Zobrest* (Rehnquist, Scalia, Thomas, Kennedy, White) Four Against (Blackmun, Stevens, Souter, O'Connor).

[207] 509 U.S. 1, 11.

[208] 487 U.S. 589, 609.

[209] 454 U.S. 263, 274-275.

opinion, any decision that was contrary to supporting the public welfare would yield an "absurd result" and that the Court has always allowed neutral benefits to all citizens.[210] Using *Mueller* and *Witters* as his foundation he states that there should be no question about how governmental programs offer general educational assistance.[211]

Rehnquist went on to revisit *Mueller* indicating that the Court noted in that case that all parents were allowed the Minnesota tax deduction benefit whether the student was enrolled in public or parochial schools. Further, the Court found that in the Minnesota plan funds became available to parents only through making a personal choice. This personal choice provision is what distinguished *Mueller* from previous cases.[212] In *Witters*, like in *Mueller*, the decision to send a child to parochial school is a personal choice and any resulting aid that the State affords a parent is at their own discretion.[213] Moreover, the plan in both *Witters* and *Mueller* does not create a financial incentive for parents to send their children for religious education.

Rehnquist believed that the same reasoning in *Zobrest* applied with "equal force."[214] He writes that the issue revolved around the distribution of resources under the IDEA. IDEA is meant to distribute benefits neutrally to all children whether they attend a public or sectarian school. Therefore, the presence of a government paid interpreter at a sectarian school can only be

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[210] 509 U.S. 1, 9.

[211] *Id.* at 10.

[212] 463 U.S. 388, 399.

[213] 474 U. S. 485, 487.

[214] 509 U.S. 1, 10.

a consequence of a personal decision by parents and thus would not be promoting or advancing a particular religion. As stated in *Witters*, when "the government offers a neutral service on the premises of a sectarian school as part of a general program that is in no way skewed towards religion,"[215] Rehnquist went further to indicate that *Zobrest* is easier to rule on than *Mueller* and *Witters* because:

> no funds traceable to the government ever find their way into sectarian schools' coffers. The only indirect economic benefit a sectarian school might receive by dint of the IDEA is the disabled child's tuition-and that is, of course, assuming that the school makes a profit on each student; that, without an IDEA interpreter, the child would have gone to school elsewhere; and that the school, then, would have been unable to fill that child's spot.[216]

Justice Blackmun dissented in *Zobrest* and filed a separate opinion. Justice Souter joined Blackmun and Stevens and O'Connor joined him in part. Justice O'Connor dissented as well and filed a separate option that was joined by Stevens.

Blackmun began his dissent arguing that the majority had completely disregarded longstanding constitutional principles that have driven decisions historically and as a result is putting a publicly aided employee in a position where their duty includes relaying religious messages to a student.[217]

He further indicates in his dissent that the case turned on a few ideas specific to IDEA. For example, Blackmun argued that the IDEA does not require that a student who has a hearing

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[215] 474 U.S. 481, 488.

[216] 509 U.S. 1, 11.

[217] *Id*. at 14.

loss and needs a sign language interpreter get their services at a parochial school. In fact, the IDEA does not afford this service as an entitlement and it is wholly the parent's choice. Further, Blackmun wrote that there is a regulation in the IDEA which prohibits federal funds use for "religious worship, instruction, or proselytizing."[218] Additionally, he argues that the majority opinion missed the notion that there are applications of their general welfare argument that may be unconstitutional and violate the Establishment Clause. Drawing on *Aguilar v. Felton*, *Grand Rapids v. Ball*, and *Meek v. Pittenger*, all of which were later overturned, he cited as an example a general remediation program that provided financial assistance in the form of teachers to those in public and parochial schools. The parochial school teachers would not be immune to scrutiny simply because the public school also received the same benefit. Moreover, the benefit would not escape scrutiny because the teachers were distributed directly to the parents and not to the parochial school.[219]

Blackmun goes on to restate the majority opinion by saying that it turned on the distinction between a teacher and a sign language interpreter. *Everson, Wolman, Allen* and *Meek* were all part of his analysis and that the Court made it clear in previous rulings that the distinction between a teacher and interpreter is a fine one, but "lines must be drawn."[220] He

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[218] 34 CFR § 76.532(a)(1) (1992).

[219] 474 U.S. 485, 487; *See also, Wolman* 433 U.S. 229 (1977), *Grand Rapids* 473 U.S. 373 (1985)..

[220] 473 U.S. 373, 398.

believes that the State crossed the line by providing a "medium for communication of a religious message."[221]

> Moreover, this distinction between the provision of funds and the provision of a human being is not merely one of form. It goes to the heart of the principles animating the Establishment Clause. As *amicus* Council on Religious Freedom points out, the provision of a state-paid sign-language interpreter may pose serious problems for the church as well as for the state. Many sectarian schools impose religiously based rules of conduct, as Salpointe has in this case. A traditional Hindu school would be likely to instruct its students and staff to dress modestly, avoiding any display of their bodies. And an orthodox Jewish yeshiva might well forbid all but kosher food upon its premises. To require public employees to obey such rules would impermissibly threaten individual liberty, but to fail to do so might endanger religious autonomy. For such reasons, it long has been feared that "a union of government and religion tends to destroy government and to degrade religion…[t]he Establishment Clause was designed to avert exactly this sort of conflict.[222]

In *Zobrest*, the Lemon Test was mentioned only three times and twice as part of the overview Justice Rehnquist gave in the majority opinion. The test was not used by the majority as part of the general analysis and was substituted for with Rehnquist's *primary effect* test. The primary effect language in *Zobrest* came from a general health statement in *Wolman*. Rehnquist states that:

> we made clear that "the provision of health services to all schoolchildren-public and nonpublic-does not have the primary effect of aiding religion," even when those services are provided within sectarian schools. We accordingly rejected a First Amendment challenge to the State's providing diagnostic speech and hearing services on sectarian school premises.[223]

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[221] 509 U.S. 1, 23.

[222] *Id.*

[223] *Id*. at 13.

This decision-making algorithm along with the language of personal choice and neutrality has, for all intents and purposes, eroded the Lemon Test.

However, in an effort to keep the Lemon Test as a viable decision-making tool, in his dissent, Justice Blackmun did reference the language of *Lemon* while trying to argue that the State must ensure that subsidized teachers not inculcate religion.[224] The overwhelming tide of accommodation using a different analysis technique had taken root in the Court.

Lemon is Squeezed

Following *Mueller, Witters, and Zobrest* came three more ground breaking school finance cases. These cases were *Agostini v. Felton* (1997), *Mitchell v. Helms* (2000), and *Zelman v. Simmons-Harris* (2002). Each case made it clear that the Lemon Test was no longer relevant in funding cases with respect to Establishment Clause jurisprudence.

Agostini. In a 5- 4 decision,[225] Justice O'Connor writing for the majority, the Court overruled the previous decision in *Aguilar v. Felton* [226] holding that there was no evidence that public school teachers entering a parochial school to teach led to indoctrination of religion or constituted a state sponsored religion.

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[224] 403 U.S. 602, 619.

[225] 5-4 Five votes for (Rehnquist, O'Connor, Scalia, Kennedy, Thomas) Four votes against (Stevens, Souter, Ginsburg, Breyer).

[226] 473 U.S. 402 (1985).

In the 1985 case of *Aguilar,* the Court found that a New York City program which sent public school teachers into parochial schools to provide remediation to disadvantaged students, pursuant to Title 1 of the Elementary Secondary Education Act (ESEA) of 1965, was a violation of the Establishment Clause as it constituted excessive entanglement between church and state. Ten years later, the group bound by the Court's previous decision were seeking relief as the costs of complying with the previous decision was too great and that legal decision in *Aguilar*, as a consequence of more recent decisions since the 1985 ruling, was no longer good law.[227]

O'Connor, in her majority opinion, enumerates several reasons how *Agostini* is different than *Aguilar* and should be reversed. 1) Programs that are federally funded, and provide supplemental and remedial instruction in a way that is considered neutral, should not be found in violation of the Establishment Clause simply because of where the services are provided. The Title 1 program provides enough safeguards to ensure there is not indoctrination of religion. 2) Cases since *Aguilar* have placed in question the decision making in that case. For example, in *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet* (1994)[228] the Court specifically stated in their decision that they should be prepared to review the *Aguilar* decision to make certain that there is not hostility toward religion. 3) The Court's most recent decisions have changed the assumptions upon which *Grand Rapids* and *Aguilar* were based. The reasoning of the Court indicated that placing a full time governmental employee on parochial school grounds did not constitute inculcation or the advancement of religion. This is further evidenced in the

[227] 521 U.S. 203, 203.

[228] 512 U.S. 687 (1994).

Zobrest and *Witters* decisions, since the decision in *Aguilar,* where the *Grand Rapids* presumptions have been marginalized. Therefore, *Grand Rapids,* which the Court makes analogous to *Aguilar,* was overruled. 4) The New York City Title 1 program provided no incentive to aid recipients to change their religious beliefs. Therefore, according to the majority, there cannot be advancement of religion and there cannot be excessive entanglement if there is not advancement of religion. 5) Since the New York City program does not result in governmental indoctrination, force recipients to change religious practices, or create excessive entanglement, the *Aguilar* program was overruled making the *Agostini* program acceptable.[229]

These enumerated points later became the basis for the "purpose and effect" test outlined in the next section regarding *Mitchell.*

Mitchell In a 6-3 decision,[230] Justice Thomas writing for the majority held that Federal funding that flows from the Title I portion of the Elementary and Secondary Education Act of 1965 (ESEA) known as Chapter 2 funding can be used for materials and equipment, including library, computer software and hardware in parochial schools in order to implement a neutral and nonidealogical program.[231]

In Thomas' opinion he referenced the prior case of *Agostini v. Felton* and the first two prongs of the Lemon Test within that context. Thomas believed that in *Agostini* the first two

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[229] 521 U.S. 203, 203-207.

[230] 6-3 Six votes for Mitchell (Rehnquist, Scalia, Thomas, Kennedy, O'Connor, Breyer) Three votes against (Stevens, Souter, Ginsburg).

[231] 530 U.S.793, 794-798.

prongs as they relate to *Mitchell* are settled and the only question that remains unanswered in this case is the third prong or excessive entanglement. Thomas, as part of his reflection of *Agostini* gives credit to O'Connor who wrote the majority opinion for looking at *Lemon* through a different lens. As part of Thomas' analysis of the question of entanglement he recasts the question using new criteria he refers to as the "purpose and effect test" as O'Connor did in *Agostini*. The purpose and effect test indicates that the government would have the effect of advancing religion if it 1) results in governmental indoctrination, 2) defines its recipients by reference to religion, or 3) creates an excessive entanglement.[232] The majority opinion only deals with the first two criteria because the prior ruling from the District Court held that there was no challenge to the question of entanglement.

The Thomas opinion continued by articulating further how the purpose and effect criteria were viewed specific to the first two criteria. He began by stating the extent to which indoctrination of students in sectarian ideas is dependent on whether, and to what degree, the indoctrination can be traced back specifically to the governmental action. Further he contended, the indoctrination issue will be resolved when it is determined whether the educational aid in fact subsidizes religion. Neutrality has been the source of determining whether or not there has been aid that disrespects the Establishment Clause. Neutrality has been determined by whether or not the person received the aid as a result of independent and personal choice. Therefore, the two criteria as outlined in *Agostini* that were addressed in the majority opinion are closely linked and require that the facts of the case be taken together to determine the outcome. Consequently, the

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[232] *Id*.

opinion of the court is that there is not an incentive present when aid is given in a neutral way and the beneficiaries are either secular or sectarian.[233]

The Thomas opinion went on to address the distinction between *indirect* and *direct* subsidies for parochial schools. Thomas drew on the *Witters* case first illustrating that when aid flows to parochial schools indirectly and through the hands of parents, so long as it has been neutrally available, the government has not provided any aid to parochial schools.[234] Although Thomas referenced this case in his analysis he goes on to say, however, that there is no such need for this formal transaction to occur. *Meek* and *Wolman*, the foundational cases for the court to rely in such aid cases, in the Court's opinion, are irrelevant and that the label of direct and indirect are arbitrary and do not require further analysis.[235]

The majority opinion goes on to say that there is no basis, based on the criteria outline in *Agostini*, to find that the aid from Chapter 2 advances religion. The aid, according to the Court, is given on the basis of neutral and secular criteria. Consequently, it neither favors nor disfavors religion and there is a benefit to both a wide array of religious and secular entities in a nondiscriminatory way. Further, there is not an incentive given to a parent to enroll because the aid allocated to the parochial school is based on the overall enrollment. Moreover, and for similar reason stated, the court ruled that the allocation of funds does not promote the indoctrination of religion. Although Thomas makes the statement about the lack of incentive for

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[233] 530 U.S.793,795.

[234] 474 U.S. 481, 489.

[235] 530 U.S. 1296, 796.

parents to enroll in parochial school, the conceptual nature of this question will be explored in Chapter 5 as a potential implication of this decision.

Thomas indicated that there has been some evidence of diversion of funds for sectarian equipment which does disrespect the Establishment Clause. However, in his analysis, the amount is so small that is should not rise to the level of the Court. Quoting:

> Although there is evidence that equipment has been, or at least easily could be, diverted for use in religious classes, that evidence is not relevant to the constitutional analysis. Scattered *de minimis* statutory violations of the restrictions on content, discovered and remedied by the relevant authorities themselves before this litigation began almost 15 years ago, should not be elevated to such a level as to convert an otherwise unobjectionable parishwide program into a law that has the effect of advancing religion.[236]

Thomas concludes the majority opinion by overturning *Meek* and *Wolman* as they are in conflict with the analysis of this case.

Justice O'Connor filed a concurring opinion which was joined by Justice Breyer. In O'Connor's concurrence she believed that *Agostini* is the controlling case for *Mitchell* and that the decisions made in reference to Title I funding should apply. Further, in her opinion, she concurred with the majority opinion and stated that *Meek* and *Wolman* should be overturned.[237]

However, O'Connor writes a separate opinion because she believed that the plurality decision's breadth went too far in looking at how governmental aid does or doesn't offend the Establishment Clause. In her opinion she remarked that the plurality opinion states that aid to parochial schools does not have the effect of advancing religion if the content is secular in nature

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[236] *Id*. at 797.

[237] *Id*. at 836-837.

and is neutral. Further, she indicated her distinction by stating that the plurality decision also does not distinguish between direct and indirect aid as it has been in prior cases. Moreover, in her opinion she believed that the plurality decision holds that diversion of secular aid to parochial schools, in an effort to advance their religious mission, is allowable. Because of these two specific areas of concern, O'Connor was compelled to write a separate but concurring opinion.[238]

O'Connor cited the following as evidence from the plurality decision with respect to the absolute nature of neutrality she is writing against:

> 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. For attribution of indoctrination is a relative question. If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination. To put the point differently, if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.[239]

In her final analysis, O'Connor relied heavily on her test known as the "endorsement test" which is different from Thomas' "effect test." The endorsement test is violated if a particular governmental action conveys a "message to non-adherents that they are outsides, not full members of the political community, and an accompanying message to adherents that they

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[238] *Id*. at 837-838.

[239] *Id*. at 809.

are insiders, favored members of the political community."[240] This test effectively subsumes the first two prongs of the *Lemon Test* by pondering the question of whether the governmental action has the purpose and effect of advancing and, more importantly, *endorsing* religion. Given this criteria, O'Connor concluded that the Chapter 2 money was allocated using secular and neutral criteria and the aid is used to supplement rather than supplant services. Further, she indicated in her analysis that the Title 2 funds never reach the religious schools and if it does occur it would be considered "de minimis." Therefore, she wrote, this case is not an endorsement of religion and concurs with the plurality decision.[241]

Justice David Souter filed a dissenting opinion that was joined by Justices Stevens and Ginsburg. As a portion of the preamble to his dissenting opinion, Souter makes a statement that typifies the overall confusion among the court about how best to look at cases that involve the Establishment Clause. Further, it makes it clear that Lemon is no longer the standard which is used by the court in their respective analysis. He states:

> In all the years of its effort, the Court has isolated no single test of constitutional sufficiency, and the question in every case addresses the substantive principle of no aid: what reasons are there to characterize this benefit as aid to the sectarian school in discharging its religious mission? Particular factual circumstances control, and the answer is a matter of judgment.[242]

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[240] 465 U.S. 668 (1984)

[241] 530 U.S. 793, 867.

[242] *Id*. at 869.

In Souter's dissenting opinion, he stated that in the plurality decision, like in O'Connor's opinion, the Court failed to understand and recognize fully the impact of the stance in reference to the notion of divertablity of funds. Further, he indicated that the majority opinion proposes a new concept of neutrality that breaks from past cases and in the end would eliminate any need for the Court to look further into a case to see what the effect of a resource is on the establishment of religion.

However, Souter's dissent is rooted primarily in three concerns that all rely heavily on the historical and doctrinal perspective of the prior Court. First, Souter stated that anyone who is compelled to support religion, as in this case, is subject to a violation of their freedom and conscience. He draws heavily on the words of Jefferson and Madison with specific references to Madison's Memorial and Remonstrance [243] where Madison states that any tax to establish religion is antithetical to the command "that the minds of men always be wholly free" indicating to notion that people ought to be free to express their respective religious beliefs and ought not be led to one via a government that supports one religion over another. Souter's dissent brings together nicely how Jefferson and Madison's philosophy respects individual freedoms but does not support governmental persuasion.

Additionally, Souter believed that any government aid to religion will subsequently corrupt our society. To support this notion, he drew upon language from *Everson* where Justice Rutledge, in his dissent, stated that the Establishment Clause's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government

[243] *Id*. at 870.

and to degrade religion."[244] Again drawing further on Madison's argument, Souter believed that the establishment of religion would ultimately weaken those that the aid was to support and only serve to strengthen their opponents. He further supports this thought by drawing on language from *McCollum* and *Lee vs. Weisman* where the court's arguments were that any governmental favor to a particular religion or sect could result in "corrosive secularism." Alluding to *Schempp*, Souter indicated that both government and religion have different interests that are best served when separated. This belief is not just held by non-believers but also those that are deeply involved in their own religious beliefs.[245]

Finally, Souter argued that the establishment of religion is linked to conflict. To support his opinion, Souter pulled from *Everson*, *Engle*, and *Lemon* to indicate that there has been religious persecution and significant struggle among people who live in countries that have an established religion. This included the historical persecution of our own colonists.[246]

In his final analysis, Souter went so far as to say that the plurality decision would break the law but the majority opinion merely misapplies it (the law). He further indicated that the misapplication of the law by the majority opinion is the only conciliation that keeps the Court from staging a "doctrinal coup."[247] In an element of foreshadowing with the arrival of *Zelman*,

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[244] 330 U.S. 1, 53.

[245] 374 U.S. 203, 259.

[246] 530 U.S. 793, 871-872.

[247] *Id*. at 911.

Souter indicated that if the plurality were to become the majority there would indeed be an abandonment of doctrine. He states,

> It is beyond question that the plurality's notion of evenhandedness neutrality as a practical guarantee of the validity of aid to sectarian schools would be the end of the principle of no aid to the schools' religious mission. And if that were not so obvious it would become so after reflecting on the plurality's thoughts about diversion and about giving attention to the pervasiveness of a school's sectarian teaching.[248]

Zelman vs. Simmons-Harris. This case represents the culmination and confluence of the decision-making factors of neutrality, choice, and the divertability of resources to religious materials that the court has been building toward through their respective opinions and descents in *Mueller, Witters, Zobrest*, and *Mitchell*.

In a 5-4 decision[249] written by Chief Justice William Rehnquist (joined by O'Connor, Scalia, Kennedy, and Thomas), the Court held that a program which provides aid to parents for use at parochial schools of their choice is not a violation of the Establishment Clause.

An Ohio Pilot Project Scholarship program was developed in the Cleveland City School District in an effort to provide tuition assistance to parents who wished to send their children to participating public or parochial schools of their choice due to the failure of many public city schools. The tuition disbursed to parents was based on financial need and parents had the ability to spend the money solely on where they wished for their children to attend. At the time of the

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[248] *Id*. at 911-912.

[249] 5-4 Five for Zelman (Rehnquist, Scalia, Thomas, O'Connor, Kennedy) Four Against (Souter, Ginsburg, Breyer, Stevens).

program's inception 82% of the private schools participating in the tuition assistance program had a religious affiliation and 96% of the students participating in the scholarship program were enrolled in parochial schools. Cleveland City Schools' children had an option of enrolling in their community school and receiving twice the per-student funding as the participating parochial schools or in a magnet school. Ohio taxpayers sued stating that the program violated the Establishment Clause. The Federal District Court granted summary judgment, the Sixth Circuit affirmed the decision, and the Supreme Court reversed the decision holding that the program does not violate the Establishment Clause.

The majority believed that this program is part of Ohio's general undertaking to provide quality education opportunities to all students in Ohio and that through the support of these grants parents made deliberate choices about where their children would attend. Further, any advancement of religious mission or endorsement of religion is the work of the individual and not the government. Rehnquist wrote that:

> "…Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice."[250]

Rehnquist draws on *Agostini*, *Mueller* and *Nyquist* in the development of his analysis. There are two significant areas that he explores; neutrality and choice.

[250] 536 U.S. 639, 639-645.

With respect to neutrality Rehnquist argued that the tuition program was enacted with a valid secular purpose and was designed to provide assistance to students who were poor and attending and failing school system. As in *Agostini*, the Court must consider the question of whether or not, as benevolent as the program appears to be, there has been the effect of advancing or inhibiting religion.[251] In the majority opinion it is clear that the advancement or inhibition of religion is not impacted because the aid does not reach the religious institution itself. Rather, it reaches the individual who is making a choice to attend a parochial school.[252] This, in Rehnquist's opinion means it is neutral.

With respect to choice, Rehnquist believed that this decision is consistent with *Mueller* and a matter of true private choice. He contends that the tuition program is neutral with respect to religion because the program avails itself to a broad class of children in the failing school district and permits them to attend the school of their choice either religious or non-religious. However, he indicated that there is preference given in the admissions and tuition process to students who come from a low-income family. Rehnquist further argued that this program provided a disincentive financially toward religious schools as those students who choose parochial school only receive half of the assistance that they would receive if they attended a community school. Moreover, a student would garner only one-third should a student choose parochial school over a participating public magnet school. If a child were to choose a school in an adjacent school division, they would receive as much as three times that of a student who chooses a parochial

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[251] 521 U.S. 203, 222-223.

[252] 536 U.S. 639, 640.

school.[253] Consequently, he argued, no person would see this neutral choice as advancing a religious mission, or governmental endorsement for religion, because the students still maintain the choice of attending their community school.

Rehnquist argues that the Establishment Clause question can only be reviewed and determined by evaluating all of the options available to parents. He indicated in his opinion that only one of the options in the plan is to offer tuition assistance for parochial school. Analogous to *Mueller*, a singular option among many merely represents a small part in of a bigger system. He continued stating that the proliferation of religious schools in Cleveland is not a consequence of this tuition program but rather a result of the failing public schools which is common in many cities across America.[254] To attribute any constitutional significance to the fact that 82% of the private schools in Ohio are religious, in his opinion, would be "absurd"[255] indicating that this percentage should not matter in the decision-making process and analysis. This argument again rejects the proportionality argument made in *Mueller.* According to Rehnquist, parents are merely given a choice of how to use their tuition. Citing *Nyquist*, he argued in that case the Court ruled that they do not govern the neutrality of the assistance programs in reference to religion so long as it offered to a broad class of students and parents. In essence, if the aid is available to all and goes directly to the participant rather than the institution, it is in inherently neutral.

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[253] *Id.*

[254] *Id.*

[255] *Id.*

Justice O'Connor and Thomas filed concurring opinions while Justices Stevens, Souter (joined by Stevens, Ginsburg, and Breyer), and Breyer (joined by Stevens and Souter) filed dissenting opinions.

Justice O'Connor filed a concurring opinion for two primary reasons. She felt compelled to indicate that the majority opinion, when viewed in light of other longstanding government programs and previous decisions in reference to Establishment Clause jurisprudence, indicated a dramatic break. Additionally, she explained that there should be further elaboration on the notion of true choice because not to look at all alternative choices available would, in her opinion, ignore portions of the Cleveland City School system that work well. [256]

O'Connor wrote that this case is markedly different from prior indirect aid cases because the funding afforded to parents through the voucher program that reaches the parochial school is given without restriction on the use of funds. However, that the amount given for the voucher program (8.2 million) is a large amount but is not nearly what is given to other religious organizations via tax credits and exemptions as outlined in *Mueller* and *Walz.* Consequently, and in her opinion against the backdrop of other support for religious institutions, the support for the voucher program is "neither substantial nor atypical of existing government programs."[257]

O'Connor further clarified the notion of true choice by stating that she finds the decision of the Court persuasive in that students truly have a legitimate choice between religious and non-religious schools. She writes that the Court of Appeals failed to look at the option of the

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[256] *Id*. at 663.

[257] *Id.* at 668.

community and magnet school and that this oversight ignored how the educational system in Cleveland functioned as a whole. In O'Connor's analysis, she cited an example of two non-religious private schools that served 15% of the voucher program students that the City of Cleveland changed to community schools due to concerns of pending litigation. Many of the students who were enrolled in the school continued to stay once it was converted to a community school. She believed that this is strong evidence that both models work and parents have a wide array of choices that also happen to include parochial schools.[258]

Justice Thomas filed a concurring opinion in an effort to further his full support of the majority opinion. Additionally, he wrote about the need to support poor and urban families. Further, he encouraged the dissenters of a voucher system to move away from the "romanticized ideal of universal public education."[259]

Justice Stevens wrote a dissenting opinion. Steven's opinion suggested three reasons why the decision of the majority is wrong. First, he believed that the educational crisis in Cleveland City Schools is so extensive that a program which provides relief to less than 5% of the students is not appropriate. The voucher system is a response to an "emergency" that provided motivation for many to adopt religious education. This should not be a reason to uphold the program and it violates the Establishment Clause.[260]

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[258] *Id*. at 675-676.

[259] *Id*. at 682.

[260] *Id*. at 683, 684.

Additionally, Stevens argued that the range of options (magnet, community, adjacent system schools) within the public school system should have no bearing on whether the State may pay tuition for students who are indoctrinated to religion in parochial schools. By doing so would support a law that respects the establishment of religion.[261]

Finally, and to further support his previous argument, Stevens indicated that the personal choice of public vs. parochial education is one that should be irrelevant when questioning constitutionality. In his estimation that majority opinion decided that a parent who cannot afford a parochial education and wants one, is justification enough for the decision to reverse the lower courts decisions.

Justice Souter also filed a dissenting opinion that was joined by Justices Stevens, Ginsburg, and Breyer. Souter's dissent began by looking at the Court's settled law in *Everson.* He concluded that the case is being abandoned with this decision. Further, the Court has never, in any case, so blatantly ruled in a way inconsistent with the past and, in so many words, has overruled *Everson*. He makes this broad statement based on the quote from *Everson;* "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." [262]

In the end, it is evident from Souter's dissent that he, along with the joining Justices, are arguing against what has become the new standard set by the court when looking at Establishment Clause cases; neutrality and personal choice. Souter is clear in his dissent that he

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[261] *Id*. at 685.

[262] 330 U.S. 1,16.

would overturn the majority decision but also, through implications, indicates that he would also overturn all Establishment Clause cases from *Mueller* forward.[263]

Continued Analytical Confusion in the Court

A clear statement by Justice Souter was made in his dissenting opinion in *Zelman* that illustrates not only a clear break from the Lemon Test but also the notion that the Court has no systematic way of analyzing Establishment Clause cases. He states:

> Hence it seems fair to say that it was not until today that substantiality of aid has clearly been rejected as irrelevant by a majority of this Court, just as it has not been until today that a majority, not a plurality, has held purely formal criteria to suffice for scrutinizing aid that ends up in the coffers of religious schools. Today's cases are notable for their stark illustration of the inadequacy of the majority's chosen formal analysis.[264]

The following figure (Figure 12) indicates, with respect to the Establishment Clause, the decisions made in *Lemon* and beyond. It is evident that in cases following *Lemon*, the judicial intent and tenor of the court indicated a consistent preference for the separation of religious exercise from public schools (e.g. no school-wide prayers). However, it is equally clear that public funding, with respect to parochial school children, (e.g. vouchers for parochial school families) was shifting to a more accommodationist preference.

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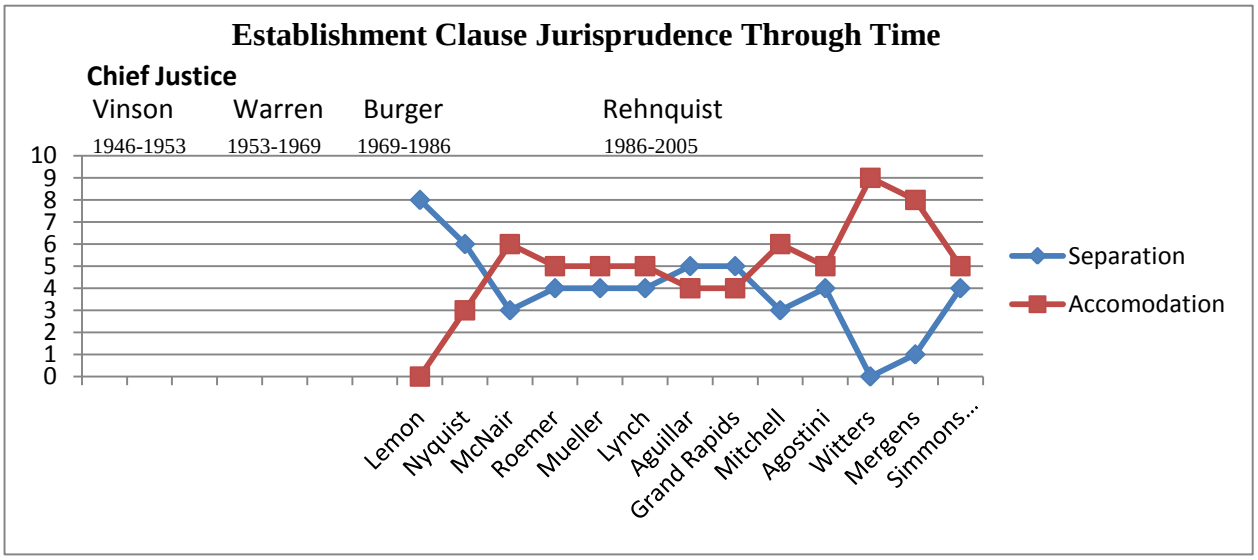
[263] Charles Fried, *Five to Four: Reflections on the School Voucher Case*, 116 Harv. Educ. Rev. 163 (2002).

[264] 536 U.S. 639, 695.

Figure 12 – Selected Establishment Clause Cases, Voting, and Holding

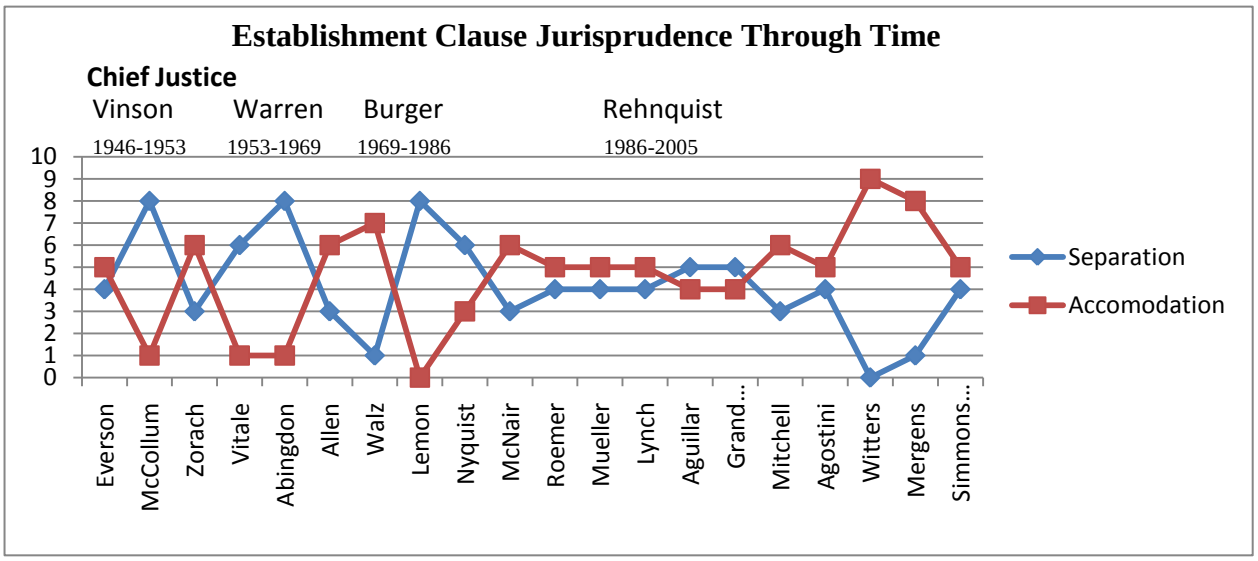
Case	***Separation***	***Accommodation***	***Holding***
Nyquist	6	3	Separation
McNair	3	6	Accommodation
Roemer	4	5	Accommodation
Regan	4	5	Accommodation
Mueller	4	5	Accommodation
Lynch	4	5	Accommodation
Aguillar	5	4	Separation
Grand Rapids	5	4	Separation
Mitchell	3	6	Accommodation
Agostini	4	5	Accommodation

Witters	0	9	Accommodation
Mergens	1	8	Accommodation
Zelman	4	5	Accommodation



The following figure (Figure 13) graphically represents a summation of all cases represented in previous figures 11 and 12. Figure 13 is a visusal representation of select Establishment Clause clause decisions over time.

Figure 13



The cases reviewed and analyzed in chapter's three and four indicate a new landscape respectively for school district administrators. New systems must be developed to ensure compliance with federal law with respect to funding and the interplay of public and parochial school systems. Chapter five will summarize some implications and continued questions based on the Supreme Court's decisions with respect to Establishment Clause cases, with a financial focus, on district administrators.

Chapter 5

Summary, Conclusions and Recommendations

"I'm completely in favor of the separation of Church and State. My idea is that these two institutions screw us up enough on their own, so both of them together is certain death."
Comedian George Carlin

This chapter is divided into three sections. The first section summarizes the study and includes the purpose and methodology that have already been presented. The second section provides conclusions and a discussion of the results for each research question. The final section includes recommendations for further research and actions that school divisions may take to ensure education administrators' knowledge of school law with respect to public funding for parochial schools.

Summary of Study

The purpose of this study was to determine how the Supreme Court's interpretation and application of the Establishment Clause changed over time with respect to parochial school financing. This study included the following research questions:

Research Question 1: How did the Supreme Court evaluate public funding of sectarian schools under the Establishment Clause of the First Amendment prior to *Lemon v. Kurtzman*?

Research Question 2: How did the Supreme Court evaluate public funding of sectarian schools under the Establishment Clause of the First Amendment in *Lemon v. Kurtzman*?

Research Question 3: How did the Supreme Court evaluate public funding of sectarian schools under the Establishment Clause of the First Amendment after *Lemon v. Kurtzman*?

This study utilized the historical method of research which included the review of primary source documents and other relevant evidence that further supported the understanding of the research questions outlined above. This research supported and expanded the scope of knowledge and understanding of the judicial review done by the Supreme Court in reference to the Establishment Clause and specific to decisions related to parochial school funding from public sources.

The methodology used for this study included a five-step process. The process was: (1) gather cases in which the United States Supreme Court has ruled on with respect to parochial school funding and questions about the Establishment Clause; (2) analyze those cases and judicial rulings; (3) identify and explore areas for which legal issues remain unsettled or in flux with respect to the Establishment Clause; (4) analyze and seek trends or patterns that will dictate the Court's decisions with respect to the Establishment Clause; and (5) organize all of the research in a logical order.

Lemon v. Kurtzman was the first case pulled from the Westlaw database. Cases cited in *Lemon* were reviewed and informed the primary source search process. Secondary sources such as writings, law review, and commentaries about the cases prior to and including *Lemon* were also reviewed from Lexis Nexis. Cases reviewed following *Lemon* were determined through a search in Westlaw using the term "establishment clause" and "*Lemon v. Kurtzman*." Each case

found in the search was reviewed for relevance to *Lemon.* A subset of cases particular to public funding for parochial schools were reviewed.

Research Question 1: How did the Supreme Court evaluate public funding of sectarian schools under the Establishment Clause of the First Amendment prior to *Lemon v. Kurtzman*?

Decades passed following Jefferson's letter to the Danbury Baptists where he wrote about the metaphorical wall of separation before the Court was asked to opine on a case with respect to Establishment Clause jurisprudence. When the time to decide inevitably came in *Everson,* Justice Black's narrow majority decision (5-4) inadvertently set the stage for accommodation of religion later in the 20th and into the 21st century. Broad reasoning and language used in *Everson* such as neutrality of busses, equating the use of busses to police protection in the community, meeting the general welfare needs of the community, as well as personal choice of where to send a student to school provided a future foundation for those Justices wishing to accommodate religion using public funding in the future. Listening to the voices of the Justices in *Everson* (Black – Majority and Rutledge – Dissent) it is evident that the philosophical underpinnings of each suggest that there was a strong separationist viewpoint. However, the opinion went another direction (accommodation) and appears to be inconsistent with the overarching philosophy.

In the next several cases, subsequent to *Everson* and prior to *Lemon,* the separationist voice became clearer with elusions and attacks on Black's decision in *Everson.*

In *McCollum,* the court made it clear that the separation between church and state would not allow for students to engage in faculty led religious exercise in school whether it was

voluntary or mandatory. The Court made it clear in *Zorach* that if religious activities were outside of the school there were reasonable accommodations that could be made to support those individual freedoms of students thus making it acceptable. Additionally, there were calls following *McCollum* to overturn the decisions in *Everson* to further clear up any confusion that the court may have created following that decision that go unanswered.

However, in *Allen* the Court presented another challenge, like in *Everson,* to the separationist perspective. The *Allen* decision picked up on language used in the previous cases and again linked it closely back to language and theme in *Everson.* Like the busses in *Everson* the textbooks in *Allen* are viewed as nonsectarian, neutral, and provisions of access to support students who are required by compulsory education laws to attend school. The Court believed that providing textbooks for all students was merely an educational strategy to benefit all children and ultimately the greater community.

The data collected suggest, with respect to the first research question, that the Supreme Court was unclear and confused about how to reasonably rule on public funding for sectarian schools as evidenced by both accommodationist (*Everson, Zorach, Allen* and *Walz*) and separationist (*McCollum* and *Abington*) decisions. Further, because of this lack of clarity and inability to develop a useful and principled formula to make decisions, future Courts would exploit the confusion and leverage previous case language to support a specific perspective and provide for the accommodation of public funding for sectarian education. If the Court had been able to construct a set of clear guidelines that filled the void between no aid and unlimited aid to parochial schools one can presume that many of the later decisions would have followed the

guidelines. If so, there would not be continued confusion and ongoing consternation about cases involving the Establishment Clause.

Research Question 2: How did the Supreme Court evaluate public funding of sectarian schools under the Establishment Clause of the First Amendment in *Lemon v. Kurtzman*?

In *Lemon*, a test, with respect to public funding for sectarian schools, was set forth. Co-locating language from previous cases, specifically *Allen* and *Walz* (ironically two accommodation cases), and reflecting the overall tenor, the Court found a systematic way to deem whether or not there were constitutional challenges when public funding was used for parochial schools. However, the clarity many on the Court were seeking from the *Lemon* case was at best fuzzy. The decision in *Lemon* was separationist but the language in the Lemon Test provided opportunities for accommodationists to attack.

The data with respect to the second research question, specific to the *Lemon* case, indicates that the Supreme Court was very clear about how to rule on public funding for sectarian schools; it should not be allowed and if a question arose a three-pronged criteria was to be used to determine the constitutionality of the funding. To this end the Court developed the *Lemon* criteria that the Justices hoped would survive the test of time and serve as a quality algorithm for decision making into the future. It is important to note, however, that looking at this singular case to determine the overall tenor of the Court is not appropriate.

Research Question 3: How did the Supreme Court evaluate public funding of sectarian

schools under the Establishment Clause of the First Amendment after *Lemon v. Kurtzman*?

Immediately following *Lemon,* the Court remained true to their philosophy as delineated in the Lemon Test handing down separationist rulings in *Nyquist, Meek, Wolman.* These cases were not without their dissenters who attempted to discredit the Lemon Test. Further, over time the language of the Lemon Test began to shift and change as evidenced in the elimination of the third prong and the addition of substitute criteria such as the coercion test. The Lemon Test was also picked apart and used opportunistically by Justices to make their accommodationist arguments and the test would ultimately crumble in *Mueller, Witters, Zobrest, Mitchell,* and *Simmons-Harris.* The outcome of new language with respect to *Lemon,* substitute criteria, and the leveraging of only portions of the language in the Lemon Test supported a new accommodationist belief among a changing Court.

This shift among the Court is a consequential outcome based on language dating back to *Everson* with respect to personal choice and neutrality. Throughout the cases following *Lemon* it became evident that the Justices interested in providing for greater accommodation for parochial school funding from public sources were going to find a way to leverage language from previous cases to support their respective positions.

Compulsory Education: The arguments by the accommodationists began with the premise that all students in the states that brought suit were required, via compulsory education laws, to attend school until a specified age. So long as the state had a statute that required compulsory education the position of the Justices was that any public funding for parochial

schools for materials, services, books, and ultimately tuition was meant to support the greater good of the community and support parents who desire to meet the statutory attendance requirement but simply chose religious education over public education.

Neutrality: With the compulsory education foundation established, the next argument made by accommodationist Justices was that any service or material provided was simply neutral in nature and therefore could not advance religion thus resulting in no need for surveillance. The lack of need for surveillance meant that the issue with entanglement was no longer an issue. An example of this neutrality perspective is the notion that a mathematics book is as neutral to the nonsectarian content of mathematics in parochial schools as it is in a public school. Additionally, a tax benefit via a deduction, like the other myriad of deductions on a tax return, for a parent is neutral as there was no direct benefit to the parochial school; the benefit of the deduction goes to the parent directly.

Personal Choice: With that secondary neutrality foundation in place the final argument made by the new accommodationist majority of the Court was that all of the decision-making as to the placement of a child in either public or parochial school was at the discretion of the parent. Because the decisions reside with parents and not with the state, there is no offense to the Establishment Clause as the funding that parents get is theirs to do with what they please.

These two accommodationist themes (neutrality and personal choice), within the compulsory education context for the greater good of the community, can be traced back to cases prior to *Lemon* where the confusion of the court inhibited their ability to cohesively opine on an Establishment Clause case. If the decision in *Everson* had been different and busses were not

seen as neutral but rather as providing funding for parochial schools, the cases which followed, specifically *Allen* which involved textbooks, would likely have been ruled on differently as the textbooks in *Allen* were determined to be analogous to the busses in *Everson*. If the *Allen* case, predicated on *Everson,* would have been ruled on differently, materials in *Mitchell* would not have been approved for parochial funding by the Court as the line between textbooks and materials became too thin for the Justices to walk any longer in *Mitchell*. Finally, if *Mitchell,* predicated on *Allen,* had been ruled on in the way *Everson* should have the situation today, where students may take publicly provided vouchers for tuition and use them in parochial schools as indicated by *Simmons-Harris* would be remarkably different.

The decision in *Everson* was *the one* which led to conflict and confusion in the Court initially and set off a chain of events that ultimately has ended in public funding for parochial schools.

Therefore, the finding with respect to the third research question is that the Supreme Court, by a slim majority, has determined that that public funding for sectarian schools should be allowed so long as that funding is neutral and is at the personal discretion of those receiving it as not to line the coffers of the sectarian school.

Recommendations for Further Study

As a consequence of this study there are several areas that should be considered for further exploration. The following are those questions which remain unanswered that could be considered:

1. Why did Justice Black rule the way he did in *Everson*?
2. Why wasn't *Lemon v. Kurtzman* eventually overturned?
3. How much of the change following *Lemon* can be attributed to the significant change in the composition of the Court with the addition of Justices (Scalia, Kennedy, O'Connor) during the presidency of Ronald Reagan (1981-1989)?
4. Is there a rhythm of the Court with respect to ideology and balance that indicates whether there will be further and substantive changes in Establishment Clause jurisprudence in the future?

Recommendations for School Divisions

School administrators such as Chief Financial Officers, Chief Academic Officers and Superintendents are faced routinely with making decisions with respect to funding that is impacted by decisions made by the Supreme Court. For example, as a consequence of *Mitchell*, school divisions are required under Title II to set aside a percentage amount of funding for parochial schools to access for materials, equipment, and professional development. Further, school divisions are required to provide staff to professionally develop parochial school staff and allow for the purchase of development and equipment off of negotiated contracts developed by the local educational agency (LEA). These examples require that our school leaders have an additional set of skills to ensure compliance with the law.

Additionally, LEAs can be required by a State, unless prohibited by the State Constitution which is often more restrictive than the Federal Constitution, as a consequence of

Everson to provide transportation to students who attend parochial school. This requirement indicates that policies and regulations must be written and vetted with the community and local School Boards to ensure not only compliance but safety and security of all students.

Finally, with the new national educational agenda proposed by the Secretary of Education Arne Duncan and President Obama indicating a clear break from traditional public schooling, specifically with the proliferation of charter schools, it is vital that school leaders are able to make the connection between decisions as in *Simmons-Harris* and how that voucher plan could potentially find its way into the national debate about public education serving to ultimately fund parochial education. There is a pathway that has been created by the Court that provides opportunities for parents to leave the public school for a publicly funded parochial education. It does not seem unreasonable for someone to suggest that there be the establishment of a Christian Charter School that not only matches the public policy agenda of supporting charter schools but also has support rooted in case law to fund a portion of the tuition for parents.

When taken together, the fact patterns and analysis of the cases reviewed, clearly show a separationist approach when it comes to practicing religious activities within the school day. Further, there is now an algorithm for accommodation for parochial schools with respect to public funding thus allowing parents to receive supplementary tuition if a State's Constitution allows. These two opposing ideas (accommodation of funding v. separation of exercise) create what can be considered a "perfect storm" for parents who are religious and disenfranchised with the public schools because their children cannot practice their respective beliefs freely. Parents who would like to support their child's religious education in a public setting, but cannot due to

current case law, now have a potential pathway, if constitutional within their respective state, to receive a publicly subsidized religious education.

While the United States Department of Education (USDOE) does an adequate job outlining many of the requirements for school divisions in the document *Equitable Services for Eligible Private School Students, Teachers, and Other Educational Personnel*,[265] there remains room for learning and interpretation.

The following represents recommendations that are targeted to the State Education Agency (SEA) and the LEA with respect to the leaders:

1. State Boards of Education and State Superintendents for Public Instruction should require that all Superintendent candidates take an education law course if it was not part of their certification training.
2. SEAs should provide ongoing updates electronically about changes in the law that impact parochial schools with respect to public funding.
3. LEAs should provide school division leaders in-service training about the interactions between public and parochial schools at least annually, or more frequently if needed.
4. LEAs should encourage participation in professional organizations that provide support in the realm of the law.

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[265] United States Department of Education, www2.ed.gov/policy/elsec/guid/equitableserguidance.doc (last visited May 31, 2010).

5. LEAs should provide access to resources such as *Legal Clips* from the National School Boards Association.
6. LEAs should seek to develop partnerships with local colleges and universities in an effort to support and promote courses and in-service trainings for school division leaders.
7. LEAs should identify knowledge gaps in the area of legal implications on public and parochial schools and provide professional development to support the closing of those gaps.
8. LEAs should provide print and online resources such as professional journals that support a broader and deeper understanding of legal issues.

In addition to the above recommendations, it is vital that all agencies (LEAs, SEAs, nongovernmental organizations (NGO), and universities) work closely to support superintendents and other school leaders in accessing timely information so that they may remain informed of evolving Establishment Clause jurisprudence.

Appendix 1

Table of Cases

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

Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930)

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

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

Zorach v. Clausen, 343 U.S. 306 (1952)

Engel v. Vitale, 370 U.S. 421 (1962)

Abington Township v. Schempp, 374 U.S. 203 (1963)

Murray v. Curlett, 228 Md. 239 (1962)

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

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

Lemon v. Kurtzman, 403 U.S. 602 (1971)

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

Roemer v. Board of Public Works of Maryland, 426 U. S. 736 (1971)

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

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

Meek v. Pittenger, 421 U.S. 349 (1975)

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

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

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Zobrest v. Catalina Foothills Sch., 509 U.S. 1 (1993)

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Board of Educ. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687 (1994)

Agostini v. Felton, 521 U.S. 203 (1997)

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Appendix 2

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