THE SUPREME COURT, RELIGIOUS LIBERTY, AND PAROCHIAL SCHOOL

AID: FROM BUS TRANSPORTATION TO SCHOOL VOUCHERS

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In principle, the commitment to respecting religious autonomy and diversity is a fundamental hallmark of the United States. The First Amendment of the Constitution announces that “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.” It contains two clauses: one protecting the right to exercise religious faith and the other prohibiting the state establishment of religious faith. They are designed to work in tandem to protect freedom of religion, and by implication, freedom from religion. The right to make spiritual choices was a central concern of early Americans and is an expected right of contemporary Americans. But for the past sixty years, the Supreme Court has struggled to explain how the First Amendment protects religious liberty. One difficult area has been the extent to which the state may provide benefits to religious schools without violating the establishment clause. Not until the 1940s was the Court willing to interpret the First Amendment as erecting a wall of separation between church and state. The Vinson Court and later the Warren Court adopted the no-aid theory of the establishment clause, despite allowing bus transportation and textbook loans for sectarian schools under the child-benefit theory. In the 1970s, the Burger Court accepted the separationist principle, striking down most forms of state assistance for parochial schools but allowing state assistance for religious colleges. But since the 1980s, the Burger and Rehnquist Courts have become increasingly deferential toward government efforts to accommodate the needs of religious schools. A conservative group of justices has construed the establishment clause as allowing state assistance for sectarian schools when part of a secular law of general application. Today, the constitutional right to be free from government funded religious education and government intrusion into religious schools is being turned into a political privilege, one to be taken away by politically powerful groups who can control the passage of generally applicable laws with beneficial effects for religion.

The Supreme Court and Religious Liberty

The American story of the relationship between religion and government has been to a large degree told by the Supreme Court. With increasing frequency, the justices have been asked to discern the balance between the power of the majority and the rights of the minority. What was once largely an early American Protestant culture has become a melting pot for many different and competing sectarian groups. Such
spiritual diversity led Justice Brennan to realize “that practices that may have been objectionable to no one in the time of Jefferson and Madison, may today be highly offensive to the deeply devout and the non-believer alike.” Yet on many occasions the public square has attempted to tap the spiritual wells of the people for purposes of regulating their choices about the good life. Such situations have become particularly acute during the twentieth century because of the dramatic growth of the state. At every level, the government has increased the services provided to and regulations placed on the general public. The modern welfare state imposes benefits and burdens on individual activities like never before. Taxation charged to pay for public services has mushroomed, too. As a result of the greater religious diversity, coupled with the ubiquitous growth of the public sector, the cases of political hostility toward spiritual choices have become much more pervasive. Such government actions have generated protracted controversies about the relationship between church and state. Problems arise because democratic government is expected to reconcile the collective interests of the majority with the constitutional rights of individuals. Determining under what conditions the welfare of society justifies government assistance to parochial schools has been the subject of an enduring constitutional debate for the Supreme Court.

A. The Theory of Church-State Neutrality

Since the adoption of the First Amendment, the Supreme Court has considered the merits of about sixty establishment clause cases. About thirty-five of these cases have involved state aid, support, or funds for parochial schools. Throughout these cases the justices have stressed that the Constitution requires government to maintain a position of neutrality toward religion. This general principle requires state action to be tailored to achieving secular objectives in a religiously autonomous, impartial, and evenhanded manner. It intuitively appeals to the democratic commitment to protecting the theory of negative liberty (freedom from religion) and positive liberty (freedom to practice religion). Chief Justice Burger captured the importance of this conception of neutrality. He wrote that “[a]dherence to the policy of neutrality, which derives from an accommodation of the Establishment and Free Exercise Clauses, has prevented the
kind of involvement that would tip the balance toward governmental control of churches and governmental restraint on religious practice. He further reasoned that:

The course of neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by this Court is that we will not tolerate either governmentally established religion or governmental interference with religion. Each value judgment under the Religion Clauses must therefore turn on whether the particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so.

In the abstract, the First Amendment has been interpreted as prohibiting state action with the purpose or effect of favoring or disfavoring religious choices. But the justices have disagreed over the extent to which government can provide benefits to or place burdens on religion without violating the principle of neutrality. Justices on opposing sides of the same establishment clause case have appealed to the general notion of neutrality. Indeed the principle of neutrality has turned out to be a complex concept with competing judicial conceptions. Determining the scope of neutrality has involved a classic constitutional struggle, pitting the general welfare interest of the state against the spiritual freedom of the individual. The main question has been how much latitude should be accorded to state regulation and how much protection should be provided to religious liberty. In searching for answers, the justices have had to determine when government may benefit or burden religious choices for the general welfare of society.

Like most constitutional provisions, the establishment clause contains elusive language susceptible to different interpretations. Judicial efforts to determine what early Americans intended by the phrase “Congress shall make no law respecting an establishment of religion” have tended to produce more questions than answers. The justices have agreed that the core concern of the establishment clause is to protect religious liberty. At a minimum, the establishment clause has been interpreted as prohibiting government to purposefully single out religion for beneficial treatment by establishing a state church or showing preference for a religious practice. The justices have widely recognized that one of the greatest dangers to religious liberty is when the state deliberately targets religious believers for favorable treatment. But government action with secular motivations and the incidental effect of benefiting religious
practices is another matter. Such public policies apply on their face to every member of society rather than target religious groups for beneficial treatment. Some examples are where buses, health services, instructional materials, teachers, or buildings are provided by the state for all school students, including ones attending parochial schools. Some justices have interpreted the Constitution as prohibiting such facially neutral laws because their primary effect is to benefit religious education. Others have construed the First Amendment as allowing such benignly-motivated policies because their general purpose is to merely promote secular education. As a result, the justices have often been divided over whether the establishment clause prevents church-related institutions from receiving the incidental benefits of generally-applicable laws.

Even judicial reliance on the same legal criteria to interpret the establishment clause has failed to produce a consensus about the constitutional line between church and state. The justices have regularly appealed to the text, intent, and precedent of the establishment clause. Their written opinions attempt to justify their decisions through reasoning based upon textual, historical, and doctrinal analysis. But far from neatly disposing of establishment clause cases, these guidelines have proven to be flexible enough to enable the justices to embrace different interpretations and reach opposite conclusions. The underlying theory of the legal model that assumes the justices have little discretion, rarely make law, but simply declare the law is a myth. According to Lawrence Friedman, “only the naïve think that the Court merely interprets the words of the Constitution. In fact, the Court makes new law boldly, continually, sometimes with only a cursory nod at the text, or no nod at all.” As Justice White has observed:

No one contends that he can discern from the sparse language of the Establishment Clause that a state is forbidden to aid religion in any manner or, if it does not mean that, what kind of or how much aid is permissible. And one cannot seriously believe that the history of the First Amendment somehow offers unequivocal answers to many of the fundamental issues of church-state relations today. In the end, the courts have had to fashion answers to these questions as best they can with the language of the Constitution and its history having left them a range of choice among alternatives. But decision has been unavoidable; and in choosing the courts necessarily have carved out what they deemed to be the most desirable national policy governing various aspects of the relationship between religion and government.

Judicial interpretation is not a science, but applied legal and political theory because the terms of the Constitution have an open texture with a certain incompleteness for
dictating future applications. As such, the justices cannot be expected to magically set aside their life experiences and political values when they don the robes of justice. As Chief Justice Charles E. Hughes said more than half a century ago, “We are under a Constitution, but the Constitution is what the Court says it is.” Indeed, the text and intent of the establishment clause have remained the same. Yet the meaning attributed to them has changed as the Supreme Court has adjusted to the ideological attitudes of new justices and the evolving standards of the American people. Plus, the justices have rendered decisions that distinguish, erode, and sometimes overrule earlier cases. Not surprisingly, the justices have interpreted the establishment clause to perpetuate their attitudes about the role of democratic government within a religiously diverse society.

### B. Judicial Attitudes and Neutrality Theories

At the level of the Supreme Court, the decision-making process is a complex and subtle one. The mechanics of legal reasoning are certainly important, but they are inevitably colored by extra-legal factors. On a regular basis, two justices equally well trained reach different conclusions about how to resolve constitutional issues within a given case. Such fluidity of judicial choice is apparent when the Court has been called on to construe the notoriously opaque terms of the establishment clause. The extent of judicial discretion is illustrated by the fact that since the 1940s, the justices have cast dissenting votes in 89% of the parochial school cases. Their decisions were rendered within a legal context, but they cannot be fully explained by legalistic analysis. The text, intent, spirit, and precedent of constitutional provisions operate to confine but not to control judicial choices. Political scientists studying the Court have amassed extensive evidence that judicial behavior is influenced by the background experiences and political attitudes of the justices. This is inferred from the regularities in judicial decision-making, particularly the common tendency of certain justices to agree on the interpretation of the Constitution and form voting blocs. Judicial decisions and voting patterns are often characterized in liberal-conservative terms; but judicial behavior can include more than merely political attitudes on specific issues. It may also embrace philosophies regarding the proper role of the Court in a democratic society. Judicial role is how the justices orient themselves toward the work of judging. This orientation
is concerned with what the justices perceive to be a proper exercise of the power of judicial review. Considerations of judicial activism and restraint in striking down laws weigh as heavily as policy preferences in determining how some justices tend to vote.

Though important, the impact of political attitudes and judicial roles should not be overstated. It would be incorrect to assume that the Supreme Court is nothing more than a miniature legislature and that the justices are nothing more than politicians. “It would be a mistake,” warns Lawrence Baum, “to dismiss the law altogether as a factor in Supreme Court decisions because those decisions are made in a legal context. The justices are trained in a tradition that emphasizes the law as the basis for judicial decisions. They are judged by a legal audience largely in terms of their adherence to what are regarded as black-letter principles. Perhaps most important, the justices work in the language of the law and this language channels their thinking and constrains their choices.” The Court is a legal and political institution, a unique branch with a complex decision-making process. Still, a strong association has been demonstrated between judicial attitudes and case results. The justices who place great weight on the protection of personal freedom have tended to interpret the establishment clause as requiring government to remain separate from religion. The justices who prefer to give the state substantial discretion tend to interpret the establishment clause as permitting government to accommodate religion. In establishment cases, Leonard Levy explains that “the justices are more adept at manipulating precedents and arguments in order to reach preconceived opinions than they are at fair, open-minded and carefully reasoned judgments. Too many judicial opinions read as if they could have been written by legislators deciding how to make the policy preferences of their constituents look as if they really served the national interest. Too few judicial opinions conflict with the personal views of the justices as private citizens.” For some, the influence of judicial attitudes simply goes to prove that the “law is an ass,” as Mr. Bumble put it in Charles Dickens’s novel Oliver Twist. But constitutional law is a relatively subtle instrument capable of reflecting diverse perspectives of the relationship between church and state.

As a political institution, the Supreme Court has adopted competing theories of the establishment clause and decided cases largely along the lines of judicial attitudes about the proper role of democratic government. Some justices have taken a position
of strict or impact neutrality, interpreting the First Amendment as erecting a wall of
separation between religion and government. What violates the establishment clause is
state action with either the deliberate purpose or primary effect of providing benefits
to religious practices. The establishment clause is viewed as prohibiting preferential
laws that have purposefully targeted religion for beneficial treatment and generally
applicable laws that have the incidental effect of benefiting religion. Government may
neither single out Christians for special consideration nor provide secular benefits of
general application to all sectarian groups, unless the assistance is narrowly tailored to
carrying out a compelling public interest. Under this strict theory of neutrality, the
Court has upheld a narrow range of state benefits with a genuine secular purpose and
primary effect of keeping separate the interests of religion and government. Justices
Black, Douglas, Brennan, Marshall, Stevens, Blackmun, Souter, Ginsburg, and others
have voted to invalidate most forms of public assistance to church-related schools (see
table 1). In parochial school cases, these justices have treated freedom from religion as
a preferred position, combining to cast 108 (85%) unconstitutional votes supporting
individual liberty and only 19 (15%) constitutional votes favoring state assistance.
Other justices have adopted a position of *benign or facial neutrality*, construing the establishment clause as forming a zone of accommodation between religion and government. What violates the First Amendment is state action with the deliberate purpose, but not the general effect of providing benefits to religious practices. The establishment clause is viewed as prohibiting preferential laws that have purposefully targeted religion for beneficial treatment, but permitting generally-applicable laws that have only the incidental effect of benefitting religion. Government may not single out Presbyterians for special consideration, but may provide secular benefits of general application to all sectarian groups, even when the assistance is remotely tailored to carrying out a general public interest. Under this benign theory of neutrality, the Court has upheld a broad range of state benefits with some trace of a secular purpose and incidental effect of accommodating the interests of government and religion. Justices White, Burger, Rehnquist, Kennedy, Thomas, Scalia and others have voted to sustain most forms of public assistance to church-related schools (see table 1). In parochial school cases, these justices have tended to treat freedom from state supported religion
as a deferred position, combining to cast 87 (90%) constitutional votes supporting state assistance and only 9 (10%) unconstitutional votes favoring individual liberty.

Further complicating the case outcomes are the varying levels of support for the different positions of neutrality. There are many subtle nuances to the actual positions adopted by the justices. Some of them have over time become more or less committed to their initial perception of neutrality. The voting of Justice Brennan has evolved into a close attachment to the strict theory, while the voting of Justice White has developed into a stronger alignment with the benign theory. Other justices have often given lip service to the principle that the state may not target religious practices for beneficial treatment. Justices White, Burger, Rehnquist, Thomas and Scalia have voted to uphold public funding for religious schools, even though such assistance singled out sectarian education for special treatment. Equally important, a few justices have embraced a centrist position. The swing voting of Justice Powell suggests that he has been more sensitive to judicial compromise, case facts, precedent, and other factors. He has sided with the majority in 96% of the cases during his tenure. Justice O’Connor has allowed government assistance for sectarian schools where there is merely a potential for rather than a probability of beneficial treatment. She has also been more willing to vote for state assistance when the Solicitor General was a party to the case or filed an amicus curiae brief urging such a position. The combined nuances of these views have generated some variance among the two positions of neutrality. At some risk of oversimplification, the justices have often been divided into two or three groups with many parochial school cases being decided by narrow margins and hair-splitting logic.

Reflecting the makeup of the majority, the Supreme Court has wavered between competing theories of neutrality and left little guidance for policy makers. The justices have been sharply divided despite their reliance on the text, intent, and precedent of the establishment clause. The primary reason is that case outcomes have been driven by what the justices think about the meaning of democratic government and judicial review within the context of the case facts and legal doctrines. Indeed the competing views of neutrality can be placed on an ideological continuum, depending on whether they provide greater discretion to government assistance (a conservative attitude) or greater protection for individual freedom (a liberal attitude). On the one hand, the
justices favoring benign neutrality have taken a narrow theory of the establishment clause and allowed more accommodation between church and state. They emphasize that deference should be accorded to state assistance out of concern for the political process and common assumptions about how religion has beneficial consequences for society. Sometimes this deferential posture is simply a judicial euphemism for the popular belief that the Judeo-Christian tradition serves as a transcendent moral basis for dictating human behavior. Its moralizing tendencies are thought to spill over into the political system, providing a “sacred canopy” that minimizes political conflict and guides public affairs. The justices also stress that each person is guaranteed the right to participate in the political process, which determines the moral character of public policy. Persons who fall outside of the cultural consensus are allowed to pursue their religious faith as long as their choices are consistent with the policy preferences of the majority. The justices assume that the positive effects of religion, coupled with the process-oriented rights of democracy, require them to defer to the collective judgment of public officials to support religious schools under generally-applicable laws. Only the most egregious situations of government coercion and preferential assistance to sectarian institutions violate the First Amendment under this more conservative view.

On the other hand, the justices embracing strict neutrality have adopted a broad theory of the establishment clause and required more separation between church and state. They emphasize that protection should be accorded to individual choices out of concern for substantive rights and the dangerous consequences of mixing religion and government within a spiritually diverse society. The Judeo-Christian tradition is often described as falling short of providing a “cultural consensus” or transcendent moral basis given the heterogeneous nature of sectarian groups. Such religious diversity is thought to be a potential source of bitter social conflict, rather than social cohesion because believers often resort to absolutist moral judgments with little concern about political compromise. Plus the integrity of “authentic religious faith” is seen as being threatened by politicizing religion because sectarian groups compete for the symbolic attention and financial resources of the state. The justices also stress that each person is guaranteed the constitutional right to exercise religious beliefs and to be free from the “moral preferences” of political majorities. Persons enjoy a free market place for religion to flourish with sufficient protection for the autonomy, diversity, and morality
of their choices, especially for unconventional believers and non-believers who cannot count on the institutional support of the political process. The justices assume that the potential negative effects of religion, along with the substantive-oriented rights of democracy, require them to overturn the collective decisions of public officials to support religious schools even under guise of generally-applicable laws. Situations of government coercion and preferential assistance to sectarian institutions are sufficient but not necessary to violate the First Amendment under this more liberal view.

During different periods of the Supreme Court, the justices have promoted their theories of neutrality and charted a more liberal or conservative path. The Court has vacillated between a broad and narrow theory of religious liberty during the tenure of different chief justices (see table 2). Few establishment clause cases were decided until the early part of the twentieth century. Not until the 1940s was the Court willing to construe the First Amendment as providing any meaningful protection against the official support of religion. Gradually, the justices began to interpret the establishment clause as requiring a wall of separation between church and state. The Warren Court (1953-1969) was particularly supportive of religious liberty claimants, ruling against government assistance at a rate of 69% in establishment cases. But the Warren Court heard only one parochial school case in which a majority of the justices supported the wall of separation, but allowed state assistance with a secular purpose and primary effect of benefiting children. More establishment clause cases were decided during the tenure of the Burger Court (1970-86). It ruled in favor of religious liberty claimants in 53% of all establishment cases and 52% of parochial school cases. But reflecting the Nixon, Reagan, and Bush appointments, the Supreme Court since the early 1980s has accorded greater latitude to governmental efforts to accommodate the funding needs of sectarian schools. The Rehnquist Court (1986-2002) has been considerably less supportive of religious liberty, ruling in favor of state assistance at a rate of 67% in all establishment cases and 80% in parochial school cases. A conservative majority of justices has interpreted the establishment clause as forbidding government action with the deliberate purpose, but not the incidental effect of providing generally-applicable benefits to parochial schools. Such a revisionist jurisprudence conflicts with prior decisions providing protection for the constitutional right to be free from government funded religious education and government intrusion into private religious schools.
The Constitution and Parochial Schools

Throughout the history of the United States, the relationship between religion and government has been a source of constant tension. Americans from across the ideological spectrum have widely challenged and vigorously debated the domains of church and state. There has been a growing sentiment that the common good ought to be defined according to mainstream religious values; yet there has been a widespread fear that the religious fervor of the politically powerful may interfere with the freedom of the politically powerless. The challenge for American democracy has been to figure out how to reconcile the competing needs of a society devoted to accommodating and separating the interests of church and state. The politics of when, where, why and how government should place benefits and burdens on religious choices has often produced widespread divisiveness. Citizens have often appealed to different spiritual beliefs and experiences to evaluate their political candidates and public policies. Special interest groups have repeatedly lobbied for and against the ability of churches to obtain scarce public resources and influence the public sector. State legislatures and Congress have frequently struggled with proposals attempting to alter the boundary between church and state. Presidential politics have regularly been confronted with such controversial
issues as public school prayer and parochial school assistance. Even the United States Supreme Court has been inundated by religion cases and plagued by closely divided votes of the justices. Each year the question of the proper boundary between church and state reverberates throughout the American political system. One difficult area for the Court has involved whether government may provide secular benefits to sectarian institutions without circumventing the constitutional boundary between the political and spiritual domains of an autonomous, pluralistic, and democratic society.

Not until the late nineteenth century was the Supreme Court willing to address the meaning of the establishment clause. Its early cases were decided on very narrow grounds and allowed government to accommodate the needs of religion. In *Bradfield v. Roberts* (1899), the Fuller Court upheld a congressional law setting aside money to construct two medical wards for a Catholic Hospital in the District of Columbia. The unanimous opinion of Justice Peckham held that the statute was permissible under the establishment clause because the hospital was not a sectarian institution, but rather “a secular corporation” chartered to care for the sick and “managed by people who hold to the doctrines of the Roman Catholic Church.”¹³ Other than deciding to sustain the construction grant, the Fuller Court avoided defining the content of the establishment clause. Several years later the justices rejected another constitutional challenge to the channeling of federal tax dollars to sectarian institutions. *Quick Bear v. Leupp* (1908) resulted from the policy of the Commissioner of Indian Affairs to pay the Bureau of Catholic Missions to educate members of the Sioux Tribe. The appropriations were deemed to be compensation for lands taken from the Indians and held by the federal government under the assumption that the Indians were not capable of taking care of their own money. In a unanimous opinion, Chief Justice Fuller upheld “the discretion of the Commissioner of Indian Affairs” to disperse “private treaty and trust funds” for the benefit of the Sioux.¹⁴ Again the Fuller Court sidestepped the larger question of whether federal tax dollars flowing to religious institutions violated the establishment clause. Neither *Bradfield* nor *Quick Bear* provided any substantive definition of the constitutional limits on the relationship between the federal government and religion.

During the first part of the twentieth century, a number of state courts began to consider how their constitutions affected the public support of religious values. These provisions usually contained language similar to the establishment clause of the First
Many state charters placed additional express prohibitions on using tax dollars for an array of sectarian purposes. Early cases arising under these provisions generated conflicting decisions. The state courts divided over the constitutionality of religious classes for public school students, public school prayer, bus services for parochial school students, textbook loans to parochial schools, tax exemptions on church-related property, and appropriations for hospitals, colleges, and orphanages operated by sectarian groups. The first of these cases to reach the Supreme Court was *Cochran v. Louisiana* (1930). It involved a law authorizing the use of state funds to pay for secular textbooks loaned to children attending religious schools. Cochran claimed that the statute deprived taxpayers of their property without due process of law by using tax funds for a nonpublic purpose of financing private schools. Writing for a unanimous Court, Chief Justice Hughes held that the government expenditures were for a public purpose because the texts were for the educational benefit of school children. He pointed out that “the appropriations were made for the specific purpose of purchasing school books for the use of the school children. It was for their benefit and the resulting benefit to the state that the appropriations were made.” The private schools “are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved on a single obligation because of them.” Using the child benefit theory, the Hughes Court rejected the due process claim and set what would become an important precedent for state assistance to parochial schools. The justices were able to avoid applying the establishment clause to the textbook loans since the case was decided before the First Amendment was construed as applying to the states.

### A. Separation in Theory, Accommodation in Result

By the late 1940s, however, the Supreme Court was eager to broadly interpret the establishment clause as applying to the states through the due process clause of the Fourteenth Amendment. The landmark case was *Everson v. Board of Education* (1947). It involved a public school board policy that reimbursed parents for the costs of transporting their children to and from parochial schools on buses operated by the local transit system. The bus fares were authorized by a New Jersey law under which all parents with children attending public or nonprofit private schools were entitled to subsidies. The Court upheld the law by a narrow vote, but the justices unanimously
read the establishment clause as imposing strict limits on public officials. Writing for Justices Murphy, Reed, Douglas, and Vinson, Justice Black held that government aid to religion even without preference to any single faith violates the Constitution. After surveying the relevant writings of Madison and Jefferson, the majority contended that:

The establishment clause 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 any one to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing any religious beliefs or disbeliefs, for church attendance or for non-attendance. No taxes 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 organization or group and vice versa. In the words of Jefferson, the clause...by law was intended to erect a wall of separation between Church and State.  

Despite insisting that “the wall must be kept high and impregnable,” the Court held that the purpose of the bus fares was to provide a safe means for getting children to and from school during the period required by attendance laws. To deny bus services only to parents of parochial school children, argued Justice Black, would be like cutting churches off from police or fire protection which is provided for the public safety of everyone. The bus fares were described as a borderline case, providing only incidental aid to religious groups since the primary effect of the statute was to safely transport all children, not to pay for the operations of sectarian schools. After setting forth the child-benefit theory, the Court concluded that the First Amendment “requires the state to be a neutral” towards “religious believers and non-believers; it does not require the state to be their adversary” and deny the benefits of public welfare laws.

The four dissenters criticized the majority for failing to follow through on the no-aid principle. Making one of his typical literary allusions, Justice Robert Jackson compared the majority’s opinion to Byron's Julia who, “whispering ‘I will ne'er consent,’--consented.” He argued that the First Amendment was intended to separate government from religion and “to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse.” Justice Jackson pointed out that the reimbursements for using the
local transit system fail to add any special protection against traffic hazards. Instead the bus fares were seen as designed to defray the costs of sectarian instruction and deposit children at the doors of Catholic schools. In another dissenting opinion, joined by Justices Burton, Jackson, and Frankfurter, Justice Rutledge argued that the First Amendment was designed not merely to forbid the official establishment of a single church or creed. “It was to create a complete and permanent separation of the spheres of religious activity and civil authority, forbidding every form of public aid or support for religion. The constitutional prohibition broadly forbids state support, financial or otherwise, of religion in any guise, form, or degree.” He rejected the validity of the child-benefit theory. When the state finances bus fares for parochial schools, wrote Justice Rutledge, students are helped to “get the very thing which they are sent to the particular school to secure, namely religious training and teaching.” He conceded that churches could not be denied fire and police protection “which are matters of common right, part of the general need for safety.” But the dissent viewed bus transportation as an essential part of sectarian education and as leading down a slippery slope to more state support for religion. “The test of Jefferson and Madison remains undiluted,” concluded Justice Rutledge, “money taken by taxation from one is not to be used or given to support another's religious training or belief, or indeed one's own.”

In Everson, the Vinson Court seemed to accept the strict neutrality theory of the establishment clause. Each justice held that the First Amendment set up a “wall of separation” forbidding government to support or influence religious choices. Instead of reviewing the complete historical record, the Court relied heavily on the writings of Madison and Jefferson attacking general assessments for religion. The separationist one of the Memorial and Remonstrance and the Virginia Statute for Religious Freedom can hardly be construed as representing the consensus of early America. The government routinely accommodated Christianity by promoting religious values in public policy, employing chaplains to conduct prayers, and offering financial support to churches. But to the members of the Vinson Court, Madison and Jefferson emphasized the widespread movement towards separating church and state to preserve the integrity of religious liberty and democratic government. Still the justices divided over the application of the no-aid principle to the bus services. What the majority
described as a secular benefit designed to protect the general safety of children, the
dissent viewed as a religious appropriation intended to defray part of the costs of
sectarian education.\(^{27}\) The care with which the majority limited the child-benefit
theory was dismissed by the dissenters, who saw the reimbursements as just the sort of
public support forbidden by the establishment clause. \(\text{“It is only by observing the}
prohibition rigidly,” wrote Justice Rutledge, \(\text{“that the state can maintain its neutrality}
and avoid partisanship...inevitable when sect opposes sect over demands for public}
moneys to further religious education, teaching or training in any form or degree,
directly or indirectly.”}\(^{28}\) Ironcally, the hard-line separation theory of Justice Rutledge
would later be supported by Justices Black and Douglas as the only way to keep the
public-safety rationale from becoming the basis for a series of corrosive precedents.

By the 1950s, the separation theory but accommodation result of \textit{Everson}
presented a judicial paradox for the Supreme Court. It was uncertain how the strict
and benign conceptions of neutrality would affect the outcomes of cases—whether the
justices would draw the line at buses or allow other forms of public assistance. With
the resignation of several justices during the 1950s, the relationship between religion
and government stood at a constitutional crossroads. In 1954, the Senate confirmed
President Eisenhower’s nomination of Earl Warren to the position of chief justice. He
was a former California attorney general and governor, who had been regarded as a
moderate-conservative. John Marshall Harlan, William Brennan, Potter Stewart, and
Charles Whittaker were also appointed during the Eisenhower years. Because of the
changing political atmosphere of the 1950s and 1960s, the justices found themselves
under siege by a host of unparalleled challenges to government policies. The Court
brought about what can only be described as a judicial revolution of constitutional
proportions. A number of the justices construed the First, Fourth, Fifth, Sixth, and
Fourteenth Amendments as providing much greater protection to civil liberties and
rights. The Court was severely criticized as an activist civil libertarian body, more
uniformly willing to overturn government regulations and support individual rights
than any other previous Court. Several of the religious freedom decisions led to a
substantial, but eventually unsuccessful attempt to amend the Constitution to allow
government sponsored religious observances. Few decisions of the Warrant Court
engendered as much continuing controversy as the establishment clause cases. In the face of widespread public disapproval, the justices extended the scope of freedom from religion to include areas not historically protected under the First Amendment.

The Warren Court of the 1960s came to champion the strict neutrality principle of freedom from state supported religion. Between 1953 and 1969, the Warren Court ruled in favor of religious liberty claims in 69% (six out of nine) of the establishment cases. In most of the cases, a number of justices added mortar to the wall of separation between religion and government. All the justices voted to strike down laws requiring religious oaths for public service (Torcaso) and forbidding the public school system to teach evolution (Epperson). The justices also boldly interpreted the establishment clause as protecting the autonomy and dignity of young children from the coercive atmosphere of public school sponsored prayer (Engel, Schempp, and Murray). These decisions required the public school to maintain a secular character and called into question government involvement with other religious observances. In addition, the justices also relaxed the standing requirements for jurisdiction by construing the First Amendment as containing a right of federal taxpayers to be free from the spending of money in violation of the establishment clause. In Flast v. Cohen (1968), the Court held that a federal taxpayer has standing to challenge the use of tax dollars allegedly amounting to a law respecting an establishment of religion. The case was particularly significant. Federal taxpayers prior to Flast were unable to challenge the spending of federal funds because their injuries were deemed too remote. Flast created a remedial right that opened the doors to litigation and built on the liberal interpretation of the establishment clause. Overall, the legacy of the Warren Court was one of embracing strict neutrality and treating freedom from religion as a preferred constitutional right.

In Board of Education v. Allen (1968), however, the Warren Court opened the door to greater accommodation between religion and government. At issue was a New York statute, authorizing school districts to purchase and loan textbooks to seventh through twelfth grade students, including those attending sectarian schools. The textbooks had to be either used by a public school or approved by a public education authority. Speaking for Justices Brennan, Harlan, Marshall, Warren, and Stewart, Justice White upheld the textbook assistance to parochial school children on the basis
of the general-welfare rationale.\textsuperscript{29} He reaffirmed the no-aid principle, but observed that Everson and later cases show “that the line between state neutrality to religion and state support of religion is not easy to locate.” After emphasizing the child-benefit theory, the majority held that the purpose and primary effect of the law is to improve educational opportunity by loaning secular literature to all students. The express purpose of the legislation, wrote Justice White, is to make available to “children the benefits of a general program to lend school books free of charge. [B]ooks are given at the request of the pupil and ownership remains in the State. Thus no funds or books are furnished to parochial schools and the financial benefit is to parents and children, not to schools.” Loaning these texts was seen as promoting the secular educational opportunities of all students rather than advancing religion. The majority also stressed the statutory requirement of loaning only secular materials and the significant role of education played by private schools. Absent some proof of these textbooks being used for religious education, Justice White was unwilling to envision parochial schools as so permeated with religion that even secular subjects are used to advance religion.

But the three dissenters criticized the majority for failing to recognize the constitutional difference between bus fares and textbook loans. As the author of \textit{Everson}, Justice Black objected to the use of tax funds to directly finance instructional materials for teaching religion. He believed that “books are the most essential tool of education since they contain the resources of knowledge which the educational process is designed to exploit. It is not very difficult to distinguish books, which are the heart of any school, from bus fares, which provide a convenient and helpful general public transportation service.” Using the logic of Madison, Justice Black reasoned that the First Amendment protects taxpayers from being forced to support any aspect of religious education “even to the extent of a penny.”\textsuperscript{30} In a separate dissenting opinion, Justice Douglas argued that “there is nothing ideological about a school bus. There is nothing ideological about a school lunch, a public nurse, or even a scholarship.” But the textbook, continued Justice Douglas, “goes to the very heart of education in a parochial school. It is the chief, although not solitary, instrumentality for propagating a particular religious creed.”\textsuperscript{31} Justice Fortas contended that the law called for “furnishing special, separate, and particular books, specially, separately, and
particularly chosen by religious sects” for teaching sectarian tenets. Unlike the majority, the dissenters thought that the there was no way to prevent the teachers from presenting the secular contents of the texts to students from a religious perspective.

Allen opened the door to justify government support for religious schools considerably more extensive than a mere financing of transportation or loaning of textbooks. That this extension was intended by Justice White, who wrote the majority opinion, is evident because he thereafter voted to sustain assistance to church-related schools in all cases. The majority defended the textbook aid on the basis of the child benefit rationale of Everson, yet Justice Black (the author of Everson) dissented along with Justices Douglas and Fortas. They were concerned about the obvious dangers of government involvement with church-related schools. Justice Black objected to the application of his Everson test, arguing that textbook loans provide direct assistance to religion because books are more central than buses to the educational mission of sectarian schools. He now saw how his child-benefit theory could lead down a slippery slope. “It requires no prophet to foresee that on the argument used to support this law, others could be upheld providing state or federal government funds to buy property on which to erect religious school buildings, to erect the buildings themselves, to pay the salary of the religious school teachers, and finally to have the religious groups cease to rely on voluntary contributions of members...while waiting for government to pick up all the bills for the religious schools.” The fears of the dissenters soon became a reality as state and federal legislators across the country rushed to pass legislation providing other forms of assistance to parochial students under the guise of the secular dimensions of the institutions of sectarian education.

B. Fine Distinctions and the Lemon Test:

With the retirement of Chief Justice Earl Warren, the Nixon administration was anxious to return the Supreme Court to a position of showing greater deference to the political majority. The school prayer decisions were criticized by conservatives as undermining Christian traditions which serve to cultivate public morality. During the presidential campaign of 1968, Republican Party candidate Richard Nixon attacked Earl Warren and his colleagues for being judicial activists. He promised to fill their
vacancies with “strict constructionists,” who would follow the literal language and original intent of the Constitution. Nixon was convinced that the Founders expected long-standing cultural values to determine the direction of American politics. He even campaigned for the adoption of a tuition tax-credit for parents whose children were attending parochial schools. At the same time, the political supporters of parochial aid were attempting to expand the public-welfare rationale beyond buses and books to include relief for other operational expenses of sectarian schools. Congress and many state legislatures enacted laws granting subsidies to church-related institutions for the secular use of educational materials, teachers, facilities, and services. After being elected into office, President Nixon got the opportunity to make good on his campaign promises by appointing four new justices. Warren Burger became Chief Justice and William Rehnquist, Lewis Powell, and Harry Blackmun replaced retiring Justices Fortas, Black, and Harlan. Throughout the confirmation hearings, Rehnquist reassured the Senate of his fidelity to following the original intent of the Founders rather than reading his values into the Constitution. “I subscribe unreservedly to the philosophy, that when you put on the robe, you are not there to enforce your notions as to what is desirable public policy.”

The appointment of four strict constructionists supposedly like Rehnquist, coupled with state efforts to accommodate religious interests, seemed to foreshadow an imminent counterrevolution of First Amendment proportions.

Beginning with *Walz v. New York City Tax Commission* (1970), the new Chief Justice showed his discontent with the strict neutrality principle. The case involved a New York statute that provided tax exemptions to real property owned and used by sectarian organizations, including parochial schools. Seven justices (Black, Brennan, Burger, Harlan, Marshall, Stewart, and White) upheld the law because church-based property was free from taxation as part of a general scheme of exemptions granted to all nonprofit organizations. Writing for the majority, Chief Justice Burger observed that Congress and the states have granted property tax exemptions to churches since the revolutionary period. He read the First Amendment as containing “room to play in the joints productive of a benevolent neutrality that will permit religious exercise to exist without sponsorship or without interference. Few concepts are more deeply embedded within the fabric of our national life than for government to exercise...this
kind of benevolent neutrality toward churches or religious exercise generally so long as none was favored over others and none suffered interference.” He blamed “the internal inconsistency” of earlier judicial decisions on what may have been “too sweeping of utterances” that “seemed clear in relation to the particular cases but have limited meaning as general principles.” He further suggested that government support of religion was permissible so long as “the end result--the effect--is not an excessive government entanglement with religion.” He recognized “that the test is inescapably one of degree. Either course, taxation of churches or exemptions, occasions some degree of involvement with religion.” Relying on an unbroken historic tradition, the majority concluded that neither the purpose nor the effect of such tax exemptions is to advance religion since they do not transfer public funds to sectarian bodies and create far less entanglement than would exist through taxation. The only dissenting opinion was written by Justice Douglas, who attacked the majority for abandoning the no-aid principle for a more flexible prohibition against merely state sponsorship of religion.

Just one year after Walz, however, the Burger Court attempted to restrict the flow of financial assistance to sectarian schools. In the companion cases of Lemon v. Kurtzman and Earley v. DiCenzo (1971), the justices struck down two state statutes that reimbursed church-related elementary and secondary schools for a part of their education costs. Pennsylvania provided public funds to private schools ranging from first to twelfth grade for teachers' salaries, textbooks, and instructional materials in secular subjects. Rhode Island allocated annual salary supplements of up to fifteen percent for teachers of secular courses in private elementary schools. Delivering the majority opinion, the Chief Justice articulated a three part framework emerging from earlier decisions relating to supposed violations of the establishment clause: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.” The majority was willing to accept that the basic purpose for the reimbursements was to further secular education. It was the excessive entanglement prong which doomed these statutes because teachers could not be monitored to ensure that they refrained from injecting religious beliefs in their secular subjects without “government becoming excessively
entangled” with the curriculum of religious schools. Only Justice White found the reimbursements to be constitutional. “It is enough for me that the States and Federal Government are financing a separable secular function of overriding importance. That religion and private interests other than education may substantially benefit does not convert these laws into impermissible establishments of religion.” 37 Not surprisingly, the benign neutrality of Justice White would later be fully embraced by the Chief Justice as a way to allow government to accommodate the needs to sectarian schools.

On the same day of deciding Lemon and Earley, the Burger Court showed how easily the three pronged test could be used to allow government to accommodate some religious needs. In Tilton v. Richardson (1971) a bare majority upheld a federal statute allocating construction grants for church-affiliated colleges and universities. Title I of the Higher Education Facilities Act (1963) authorized federal appropriations for new buildings used only for secular education. Speaking for Justices Harlan, Stewart, White, and newcomer Blackmun, the Chief Justice held that the purpose and effect of the statute reflected a legitimate objective of providing secular learning facilities for higher education. The majority found that the need for government surveillance was minimal since religious training was not the primary goal of sectarian colleges and universities. Chief Justice Burger reasoned that students of higher education are “less impressionable and less susceptible to religious indoctrination” than their primary and secondary counterparts. 38 The majority was willing to vote against a section of the law allowing the religious schools to use the buildings for sectarian purposes after twenty years. The four dissenters strongly objected to using Title I to offer federal dollars to institutions that provide a secular and religious education. Joined by Justices Marshall and Black, Justice Douglas viewed the distinction between elementary and secondary schools versus colleges and universities as a radical departure from the no-aid principle. He argued that “the million-dollar grants sustained today put Madison’s miserable three pence to shame.” 39 In a separate dissent, Justice Brennan argued that “a sectarian university is the equivalent in the realm of higher education of those Catholic elementary schools in Rhode Island; it is an educational institution where the propagation and advancement of a particular religion are a primary function.” 40 Far
The Burger Court continued to draw a sharp distinction between state benefits for sectarian schools grades first through twelfth and institutions of higher learning. In Committee for Public Education and Religious Liberty v. Nyquist (1973), a unanimous Court struck down a New York law allocating grants to church-related primary and secondary schools for the maintenance and repair of instructional buildings. Because the funds could easily be used to maintain the school chapel or the cost of renovating classrooms where religion is taught, the justices could not deny that the primary effect of the grants was to subsidize religious activities. By a six-to-three vote, the Court struck down another section of the law that allocated tuition tax credits to parents of children attending sectarian elementary and secondary schools. The majority opinion was assigned to new arrival Justice Powell, who was joined by Justices Blackmun, Brennan, Douglas, Marshall, and Stewart. Rejecting the child-benefit rationale given for the provision of tax credits to parents, Justice Powell held that the purpose and effect of the law was to “advance activities of sectarian elementary and secondary schools.” He wrote that despite our “sympathy for the burdens of people who must pay public school taxes” and “support other schools because of the constraints of ‘conscience and discipline,’ and notwithstanding the ‘strong social importance’ of the state’s purposes, neither may justify an eroding of the limitations of the Establishment Clause.” Justices Rehnquist and White joined Chief Justice Burger in his dissenting opinion, accepting the secular purpose and general welfare effect of the tuition tax credits. He argued that Everson and Allen allowed such state efforts to equalize the costs incurred by parents who send their children to private sectarian schools. Nyquist marked the beginning of a Burger Court trend involving closely divided decisions made more complex by different justices concurring in part and dissenting in part.

In Meek v. Pittenger (1975), the Supreme Court upheld textbooks loans for parochial school students but struck down state loaned instructional materials and auxiliary support services for parochial schools. A Pennsylvania law permitted the loaning of public school textbooks, maps, charts, tapes, films, recorders, projectors, and lab equipment. Another section of the law directed public school employees to
provide auxiliary services on private school grounds, including hearing and speech therapy, remedial and accelerated instruction, guidance testing and counseling. Six justices (Blackmun, Burger, Powell, Rehnquist, Stewart, and White) voted to uphold the provision of secular textbooks.\(^{43}\) Only Justices Douglas, Brennan, and Marshall thought the textbook loans to parochial schools violated the establishment clause. Despite earlier voting with the majority in *Allen*, Justices Brennan and Marshall now accepted the logic of Justice Douglas that textbook loans “create a serious potential for political divisiveness and serve to advance the indoctrination mission of church-related schools.” Six of the justices (Blackmun, Brennan, Douglas, Marshall, Powell, and Stewart) voted to invalidate the auxiliary services and instructional materials. The majority refused to extend the child-benefit theory of *Allen* to loans for instructional materials since these items were provided to parochial schools which integrate secular and religious education. In terms of the auxiliary services, the Court held that the only way to keep public school employees from advancing religion is to maintain constant supervision creating too much entanglement. Along with the Chief Justice, Justices Rehnquist and White saw no difference between loaning textbooks and the provisions for instructional materials and auxiliary services. Chief Justice Burger charged the majority with penalizing “the children because of their parents’ choice” of religion and siding with people “who believe that our society as a whole should be a purely secular one.”\(^{44}\) Sharply divided over the question of parochial school aid, *Meek* and *Nyquist* reflect the judicial struggle to make distinctions about government assistance.

In *Roemer v. Board of Public Works* (1976), the Burger Court narrowly upheld a Maryland statute providing annual grants to private colleges and universities for secular education.\(^{45}\) The law earmarked fifteen percent of the per-pupil amount spent for higher public education to private universities and colleges, including religiously affiliated institutions not awarding “only seminarian or theological degrees.” Justice Blackmun wrote a plurality opinion which was joined by Justice Powell and the Chief Justice. He first emphasized that the state screened grant applications to make sure the institutions were not “pervasively religious.” Justice Blackmun then concluded that the law passed the *Lemon* test because the recipient institutions primarily provided a secular education to diverse and less impressionable students. Justices White and
Rehnquist agreed that the grants satisfied the purpose and effect prongs, but they criticized the entanglement analysis as “insolubly paradoxical and—as the Court has conceded from the outset—a ‘blurred, indistinct and variable barrier’. “46 But the dissenters (Brennan, Marshall, and Stevens) argued that the First Amendment bans any public assistance for sectarian universities. The reason, wrote Justice Brennan, is not that religion permeates the education of the recipient college but that the secular instruction takes place within “an environment of religion; the institution is dedicated to two goals, secular education and religious instruction. When aid flows directly to such an institution, both functions benefit.”47 Even Justice Stewart (who had joined the Tilton majority) voted to invalidate the grants for secular education. He lamented that the compulsory theology courses of the colleges were designed to deepen spiritual belief in a single faith rather than teach religion. The dissenting voices fell on deaf ears because the Court was using a benign theory of neutrality and was willing, under the guise of a secular learning atmosphere with less pressure of indoctrination, to permit government to accommodate the funding needs of church-affiliated colleges.

One year after Roemer, the Burger Court seemed even more confused about the application of the Lemon test to a comprehensive program of parochial school aid. In Wolman v. Walter (1977) the fragmented voting record of the justices reflected a growing uneasiness with establishment clause doctrine.48 An Ohio law allowed public school personnel to offer diagnostic speech, hearing, and psychological services on private school grounds as well as offered therapeutic and remedial services away from the private schools. The statute also set aside textbooks, instructional materials, field trip transportation, and standardized testing services for private school students. The Burger Court overturned the loaning of instructional materials by a six-to-three vote and field trip transportation by a five-to-four vote, but upheld the textbook and testing provisions by a six-to-three vote, off-campus therapeutic services by a seven-to-two vote, and on-campus diagnostic services by an eight-to-one vote. Only Justices Blackmun, Powell, and Stewart joined the majority on almost every issue and seemed to be guided by precedent. Chief Justice Burger and Justices Rehnquist and White saw the law as an accommodation of the secular education needs of parochial school children. Justices Brennan, Marshall, and newcomer John Paul Stevens dissented on
the basis that most of the statute created excessive entanglement. Justice Marshall actually called for the overruling of *Allen* and Justice Brennan even voted against the provision of diagnostic services. Justice Stevens took over where retiring Justice Douglas left off, arguing that he preferred the no-aid test of *Everson* where “a state subsidy of sectarian schools is invalid, regardless of the form it takes. Corrosive precedents,” explained the dissent, “have left us without firm principles on which to decide these cases.” Concerned about the slippery slope created by the Court, Justice Stevens insisted that *Wolman* demonstrates the “states have been encouraged to search for new ways of achieving forbidden ends. What should be a high and impregnable wall between church and state has been reduced to a ‘blurred, indistinct and variable barrier.’”

49 *Wolman* reflected the tortuous journey of the Burger Court. It had become easy for the justices to veer in one direction and then another, allowing some forms of government assistance to flow to church-affiliated schools while striking down others.

During the 1970s, the Burger Court slowly began to shift away from the strict neutrality position taken under the leadership of separationist justices. Table 3 shows a scale of the voting patterns for the thirteen establishment cases decided between 1969 and 1980. The presence of separationist precedent and the absence of a clear conservative majority prevented the Court from swiftly coming to bring about a closer relationship between church and state. At first, the *Lemon* standards appeared to be an
insurmountable barrier to government assistance for primary and secondary parochial schools (Earley, Nyquist, Levitt, Sloan and Meek). But the fluid nature of the Lemon prongs, coupled with a climate of conservative politics, enabled the Burger Court to reach decisions allowing greater state accommodation of sectarian interests. The new majority shifted focus away from the earlier emphasis on general safety and welfare to the secular functions and needs of religious schools. A narrow judicial distinction was made between the specific purpose of the assistance and the educational level of the recipient institution. Grants for constructing secular education facilities and teaching secular education at sectarian universities (Tilton, McNair, and Roemer) were deemed constitutional. But teacher salary supplements (Lemon), building maintenance and repair grants (Nyquist A), instructional materials and equipment (Meek/Wolman A), unaudited reimbursements to administer state mandated tests (Levitt/Cathedral Academy), and field trip transportation services (Wolman B) for parochial schools
were considered unconstitutional. A majority of the justices were willing to allow audited reimbursements to private school personnel to administer state-mandated tests (*Regan*), loans for secular textbooks (*Meek/Wolman C*), and on-campus diagnostic and off-campus therapeutic services for parochial students (*Wolman D/E*). On the whole, the Burger Court ruled in favor of 52% of the establishment claims, drawing fine lines between the nature of the assistance and the atmosphere of the institution.

Perhaps distinctions between the purpose of the assistance (secular or sectarian education) and the type of institutions (parochial schools or sectarian colleges) were the bases for the different case outcomes. The effect of state benefits is softer when designed to further only secular education. Plus the emphasis on secular education and maturity of students at institutions of higher education makes indoctrination less likely than when they are younger and more impressionable. But whether assistance passed muster under the establishment clause, explains Walfred Peterson, depended on which justices actually constituted the majority. His study found the Burger Court to “be deeply divided into three relatively fixed blocs—the accommodationists, the moderate separationists, and the super separationists.”

Table 4 shows that three voting blocs affected the cases outcomes. The strict neutrality bloc of Justices Douglas, Brennan, and Marshall voted together at a rate of ninety-two percent. Justice Stevens replaced Douglas and joined the “super separationists” (Marshall and Brennan) seventy-eight percent of the time. These four justices combined to cast fifty-two unconstitutional votes and five constitutional ones in nonunanimous cases. The benign neutrality bloc of Justices Rehnquist, Justice White, and the Chief Justice voted together at a rate of ninety-five percent. These justices combined to cast fifty-one constitutional votes and three unconstitutional ones in nonunanimous cases. Justice Stewart drifted some from his accommodationist colleagues. He still approved of school prayer and now favored construction grants for church-related colleges. But Stewart voted against many forms of assistance to parochial schools out of his concern over the advancement of religion as opposed to general education. Justice Blackmun made similar distinctions, but his vote with the dissenters in *Regan* signaled a moderate attachment to separation. Only Justice Powell joined the majority on nearly every occasion. He provided the swing vote taking the Court down a path of separation at times and one of accommodation at
Table 4: Scale of Judicial Agreement

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other times. Overall, the Burger Court of the 1970s was badly fragmented but the principle of benign neutrality was fully supported by Burger, Rehnquist, and White.51

C. Chipping Away At the Wall of Separation

During the 1980 presidential campaign, the Republican Party candidate Ronald Reagan attacked the Warren and Burger Courts for creating an atmosphere hostile to religion. He characterized strict neutrality as a source of transition from an era where common religious values cultivated social mores to one where secular norms had come to dominate American life. Reagan was supported by an energetic movement of fundamentalist Christian groups, including the Moral Majority. He shared the political platform with Reverend Jerry Falwell and even actively campaigned as “a born-again Christian.”52 He declared that “it is an incontrovertible fact that all complex and horrendous questions confronting us at home and worldwide have their answer in that
single book— the Holy Bible.” Reagan doubted the validity of evolution and wanted the biblical version of creation to become part of the public school curriculum. He put forward a “pro-religion” program, which would offer more financial assistance for religious schools and mobilize support for religious exercises and student group access on public school property. Reagan further promised to pack the federal courts in his own image with justices who would construe the Constitution according to a more conservative understanding of original intent. In terms of the First Amendment, Reagan believed that the generation to adopt the religion clauses expected the courts to permit elected representatives to encourage the values of the Christian majority. He hoped to avoid the mistakes made by Republican President Eisenhower, whose appointments of Earl Warren and William Brennan had been criticized for being soft on crime and too protective of minorities. Unlike a long line of candidates seeking the White House, Reagan was willing to make the ambitions of religious groups a matter of national policy for the sake of halting what he called the rise of secular humanism.

After being elected into office, President Reagan lobbied the political process to allow government to accommodate religious traditions. He called for an immediate return to “the old time Constitution” which existed before the First Amendment had been misconstrued to “the point that freedom of religion is in danger of becoming freedom from religion.” Initially, the Reagan administration enlisted Congress to propose a constitutional amendment aimed at overturning the public school prayer decisions of Engel and Schempp. Neither the House nor the Senate was able to produce the two-thirds vote needed to send a proposed amendment to the states for ratification. In addition, President Reagan pushed for legislative initiatives providing federal block grants and tax relief to religious schools and colleges. A Reagan backed tuition tax-credit bill similar to the statutory program overturned in Nyquist was considered by the 98th Congress. The measure targeted lower and middle income families with a tax deduction of five hundred dollars per child for the tuition costs at private schools. But after a number of amendments, the proposal was killed in the Republican controlled Senate and a similar bill was later defeated in the House Ways and Means Committee. Yet the Reagan administration remained committed to shaping the judicial branch to reflect the conservative political atmosphere. Reagan's initial
opportunity to fill a vacancy on the Supreme Court came with the 1981 retirement of Justice Potter Stewart. His replacement was crucial for the Reagan agenda because Stewart had taken a benign neutrality posture on school prayer but had started to waffle on parochial school assistance. The President chose Sandra Day O'Connor whose record as a judge on the Arizona Court of Appeals was much less conservative than her predecessor. With the appointment of Justice O'Connor, the second Burger Court confronted a political thicket of strong popular support for bringing God back into the public schools and providing greater assistance to church-affiliated schools.

In *Mueller v. Allen* (1983), the Burger Court seemed eager to adopt a benign neutrality stance and to depart from earlier decisions forbidding financial assistance for the education of parochial school children. The case involved a Minnesota statute that provided state income tax deductions to parents for tuition, textbook, and bus transportation expenses related to sending their children to either public or private elementary and secondary schools. The case appeared to mirror *Sloan* and *Nyquist* where the Burger Court had struck down laws giving tuition tax credits to parents of children attending private schools. However the three dissenters in *Nyquist* and *Sloan* (Burger, Rehnquist, and White), along with Justices O'Connor and Powell, voted to uphold the Minnesota law. Attempting to distinguish prior cases, Justice Rehnquist held that the secular purpose and principal effect of the tax credits were to improve secular education for all school children. He casually dismissed the risk of political divisiveness, suggesting that the entanglement prong only applied when subsidies are paid to parochial schools. The majority reasoned that “the historic purposes of the Establishment clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled from the private choices of individual parents, which eventually flows to parochial schools.”

But to Justices Blackmun, Brennan, Marshall, and Stevens, the First Amendment prohibits government to provide any form of financial benefit for religious schooling. Justice Marshall attacked the law for “masquerading as a subsidy for general education expenses” because the overwhelming amount of tax deductions went to tuition for religious schools. In *Mueller*, the landscape of parochial school assistance was tempered due to the addition of Justice O'Connor and the switch of Justice Powell who had written the majority opinions in *Nyquist* and *Sloan*. 
Soon after deciding *Mueller*, the Burger Court barely reaffirmed the *Lemon* restrictions on the direct flow of financial assistance to parochial schools. In *Aguilar v. Felton (1985)* a narrow majority voted to overturn a New York city policy of using federal funds to compensate public school personnel who provided remedial and guidance counseling services on private school grounds. Justices Brennan, Stevens, Blackmun, Marshall, and Powell ruled that federal support of secular education for religious school children created excessive entanglement because the aid was provided in a pervasively sectarian atmosphere and ongoing inspection was required to prevent conveyance of a religious message. Another case involved a Minnesota program which paid private school personnel to teach community education courses during the evenings and public school personnel to teach remedial classes to students within private school classrooms. In *Grand Rapids v. Ball (1985)*, the Court struck down by a five-to-four vote the remedial classes provision and by a seven-to-two vote the community education provision of the Minnesota plan. Again speaking for Justices Blackmun, Marshall, Powell, and Stevens, Justice Brennan held that the program failed the effects prong of *Lemon*. It not only conveyed a message of government endorsement of a religion, but also posed “a serious danger” of subsidizing religious education and inviting opportunities for religious indoctrination. The dissenters were disturbed by the refusal of the majority to inquire into whether the public and private school teachers “actually proselytized” within the religious schools. Chief Justice Burger saw federal programs “designed to prevent a generation of children from growing up without being able to read effectively” as far removed from creating any state church. Justice White argued that the majority opinion, “like its decisions in *Lemon* and *Nyquist*, are not required by the First Amendment and are contrary to the long-range interests of the country.” *Felton* and *Grand Rapids* reflected an enduring judicial commitment to keeping state assistance separated from the parochial schools where the students are younger and more susceptible to religious indoctrination.

By the middle of the 1980s, the Supreme Court had drawn a more permissive boundary between religion and government. Table 5 presents a scale of the voting patterns for the six parochial school cases decided between 1981 and 1986. The justices were deeply fragmented and lacked a coherent philosophy, ruling in favor of
establishment claimants 50% of the time. The Court remained somewhat independent from the Reagan administration, occasionally following the separationist logic of earlier cases. State assistance for private school personnel to teach enrichment classes (*Grand Rapids A*) and public school personnel offering remedial services on parochial school premises (*Grand Rapids B/Felton*), not to mention moments of silent prayer in the public schools (*Jaffree*) were considered unconstitutional. Still, the Burger Court accorded government greater leeway to accommodate the needs of church-affiliated schools. Tuition tax credits for parochial school students (*Mueller*), disability support for sectarian college students (*Witters*), and a transfer of government property to a religious college (*Valley Forge Christian College*), not to mention a city Christmas nativity display (*Lynch*) and chaplain led prayers for state legislatures (*Marsh*) were deemed constitutional. Most of these decisions were justified by more conservative efforts to appeal to long standing historical practices and distinguish precedent with strict neutrality overtones. Chief Justice Burger worked very hard to move the law toward a more accommodationist posture. A study by Joseph Kobylka has found that Chief Justice Burger wrote some type of opinion in about seventy-one percent of the establishment cases—as compared to his overall writing rate of twenty percent—and assigned himself the majority opinion sixty-seven percent of the time. But again, the weight of strict neutrality precedent and the constancy of the separationists prevented the Chief Justice from bringing about dramatic changes, settling instead for piecemeal decisions allowing certain instances of cooperation between church and state leaders.

<table>
<thead>
<tr>
<th>Table 5: Scale of Parochial School Cases for the Burger Court (1981-1986)</th>
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<tbody>
<tr>
<td><strong>Case</strong></td>
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<tr>
<td>Grand Rapids v. Ball A (85)</td>
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<tr>
<td>Aguillard v. Felton (85)</td>
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<tr>
<td>Grand Rapids v. Ball B (85)</td>
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<td>Mueller v. Allen (83)</td>
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The often perplexing application of the *Lemon* test underscored the high levels of disagreement with four of the six cases being decided by narrow margins. Two judicial coalitions competed to control the outcome of cases. The strict neutrality bloc of Justices Blackmun, Brennan, Marshall, and Stevens voted together at a remarkable rate of one hundred percent. These justices cast twenty unconstitutional votes and no constitutional votes in nonunanimous cases. The growing support of Justice Blackmun allowed the separationists to reassert their position of strict neutrality with four solid members. The benign neutrality bloc of Justices Rehnquist, White, and Burger voted together eighty percent of the time. These justices cast seventeen constitutional votes and one unconstitutional vote in nonunanimous cases. Newcomer Justice O'Connor sided with the accommodationists most of the time. She upheld government assistance where there was merely a potential for rather than actual proof of official endorsement of religious schools. But Justice O’Connor refused to commit herself to the theory of benign neutrality, choosing instead to rely on her endorsement test as an alternative to *Lemon*. Again, the swing voting role was played by Justice Powell, who sided with the majority in every case. He was often enlisted by the accommodationists to draw narrow factual distinctions among the cases rather than trying to overrule them. “One can only speculate,” writes Leo Pfeffer, “why Burger Court II contented itself with this compromise. Perhaps compromise was the price that had to be paid for Powell’s conversion from absolutist to accommodationist. It is even possible (but to political scientists, not likely) that the majority really believed that the Burger Court I cases
were correctly decided and so too were those of Burger Court II.”\textsuperscript{59} The veering of Justice Powell in one direction and then another was symptomatic of the work of the first and second Burger Court. On the whole, the Burger Court was inclined to apply the separationist principles of \textit{Lemon}, but often with an accommodationist twist.\textsuperscript{60}

\textbf{D. Accommodation and the Demise of Lemon}

The retirement of Chief Justice Burger provided the Reagan administration with another opportunity to move the Supreme Court towards a more conservative agenda. President Reagan continued to encourage the justices to be sympathetic to government efforts to promote religion. With Edwin Meese III serving as the United States Attorney General, the administration spoke critically about the principle of strict government neutrality toward religion. In 1985 the Attorney General said “that the First Amendment only forbade the establishment of a particular religion or a particular church. It also precluded the federal government from favoring one church, or one church group over another. That is what the First Amendment did, but it did not go further. It did not, for example, preclude federal aid to religious groups so long as the assistance furthered a public purpose and did not discriminate in favor of one religious group against another.”\textsuperscript{61} This separationist approach to the relationship between church and state had been justified throughout the opinions of many justices. It was no surprise when Reagan nominated Justice Rehnquist to replace retiring Chief Justice Burger. The Senate confirmed his appointment after an exhaustive hearing process where the issue of judicial philosophy appeared to be what was at stake. Reagan then replaced Rehnquist with Antonin Scalia, who was known for his conservatism on the District of Columbia Court of Appeals. The Senate rather easily confirmed Justice Scalia. The Reagan and Bush administrations also capitalized on the influence of the Solicitor General whose \textit{amicus} briefs the justices read with extra care. In a series of cases, the United States Department of Justice called for either the modification or elimination of the \textit{Lemon} standards. Eventually the efforts of the Solicitor General and political attitudes of the new appointees produced a conservative jurisprudence. But during the first few terms, the relationship between religion and government remained largely unchanged because Burger was simply replaced by a younger conservative.
In *Bowen v. Kendrick* (1988), the Rehnquist Court took its first bold step toward greater accommodation between religion and government. The case arose out of a challenge to the Adolescent Family Life Act, which provided federal financial assistance to religious and secular groups for counseling services relating to teenage sexuality. Over nine million tax dollars had been spent under this law and most of those funds went to religious groups, including Roman Catholic and Lutheran organizations that stress abstinence as the primary weapon to combat teenage pregnancy because of the dictates of their beliefs. By a five-to-four vote, the Court upheld the AFLA grants as consistent with the establishment clause. Chief Justice Rehnquist wrote the majority opinion which was joined by Justices White, Scalia, O'Connor, and new arrival Anthony Kennedy who had replaced Lewis Powell. Giving lip service to the *Lemon* test, the majority held that the statute “has a valid secular purpose” and “neither advances sectarian tenets nor creates an excessive government entanglement with religion.” Only Justice O'Connor was willing to concede in her concurring opinion that any use of tax funds to promote religious tenets offends the establishment clause. But to the four dissenters (Stevens, Brennan, Marshall, and Blackmun), the statute permitted the state to directly fund the beliefs of religious groups. Justice Blackmun claimed that AFLA authorized direct transfers of tax dollars to counselors and teachers for the purpose of educating “impressionable young minds about issues of religious moment.”

*Kendrick* marked a transition in the parochial aid jurisprudence of the Rehnquist Court. Absent was Justice Powell who had voted against many statutory programs providing direct cash grants or reimbursements to spread religious values. In his place was Justice Kennedy, whose concurring opinion simply concluded that AFLA was consistent with governmental neutrality toward religion because the legislation did not require grantees to have religious tenets.

At the onset of the 1990s, the departure of Justices Brennan and Marshall seemed to pose an immediate threat to the principle of strict neutrality. Both of these justices were veterans of about three decades and had become the most influential members of the separationist alliance. Their retirement was likely to have a profound impact on constitutional law and to further consolidate the conservative majority on a variety of issues. In addition, the Republican Bush administration was committed to
continue the effort to use political leverage to promote religious values. Throughout his presidential campaign, George Bush promised to appoint strict constructionists who would take a more conservative approach to construing the Constitution. Once elected to office President Bush lobbied for private school vouchers as part of his national crusade to improve the quality of primary and secondary schools. To fill the 1990 retirement of Justice Brennan the Bush administration chose David Souter, who had served for seven years on the New Hampshire Supreme Court and for two months on the First Circuit Court of Appeals. Just one year later Bush picked Clarence Thomas, who had served under the Reagan administration and shortly on the Court of Appeals for the District of Columbia. The Senate Judiciary Committee directly asked the nominees about their viewpoints on constitutional theory and the appropriate role of the courts. Souter and Thomas refused to answer questions about cases that might come before them. Both nominees were rather quickly confirmed and because of their more conservative record seemed likely to adopt the position of benign neutrality.

The Rehnquist Court wasted little time. In Zobrest v. Catalina Foothills School District (1993), a majority of five justices permitted the state to become directly involved in the process of religious education through the funding of a sign language interpreter to assist a parochial school student. James Zobrest was a deaf child who attended grades sixth through eighth in an Arizona public school, which provided him a sign language interpreter under the Individuals With Disability Education Act (IDEA). In the ninth grade James was enrolled by his parents at Salpointe Roman Catholic High School but the Catalina Foothills School District refused to continue the IDEA services because of establishment clause concerns. Speaking for Justices Kennedy, Scalia, Thomas, and White, the Chief Justice held that the First Amendment allows the state to provide a sign language interpreter to accompany a disabled student to classes at a sectarian high school. He cited Mueller and Witters to emphasize the long-standing trend to sustain government programs that provide generally-applicable benefits to a broad class of citizens without reference to religion. The majority further distinguished the role of teachers and guidance counselors from that of a language interpreter. Unlike a school teacher “who may inadvertently foster religion,” insisted the Chief Justice, “a sign language interpreter is constrained by professional standards
to transmit everything that is said in exactly the same way it is intended.” From a perspective of benign neutrality, the majority concluded that any attenuated financial benefit flowing to parochial schools from IDEA is “attributed to the private choices of individual parents under a neutral government program of general application.”

Four justices cast dissenting votes. Justices Stevens and O’Connor refused to address the constitutional issues because the case should have been remanded for consideration of whether IDEA required a deaf student to be given such disability assistance at a private school. In a separate opinion joined by Justice Souter, Justice Blackmun ridiculed the majority for overlooking the startling effects of Zobrest. By allowing a public employee to relay what is taught within parochial schools, the government was “participating directly in religious education.” He was shocked how far the Court strayed from “the course of nearly five decades of Establishment Clause jurisprudence” which proscribed state aid to sectarian schools when a mere possibility of state involvement is apparent. Meek and Wolman were cited to show that even neutral public assistance had been struck down because of uncertainty over whether government would be providing parochial schools with a means to pursue religious ends. He further rejected the distinction between an interpreter and a teacher since both are used to relay a religious message. Once again, the majority and dissent framed the constitutional question as a choice between the competing lines of establishment clause precedent. But Zobrest was really about the underlying judicial positions of neutrality. On the one hand, Justice Blackmun argued that government can extend only benefits which are exclusively designed to further the welfare of society. Public assistance rising to the level of a religious subsidy or promotion of religious traditions is unconstitutional. On the other hand, Chief Justice Rehnquist claimed that the state may extend the same benefits to religious groups that are offered to secular ones. Such public assistance allowing people to pursue sectarian interests or accommodating religious traditions is constitutional. Under the conservative posture of benign neutrality, the majority used Zobrest to open the accommodationist door for allowing more public assistance to flow to students attending parochial schools.

A year after Zobrest, the Rehnquist Court demonstrated some commitment to keeping separate the functions of government and religion. Board of Education of
Kiryas Joel v. Grumet (1994) involved a New York law which created a public school district for members of the Satmar Hasidic Jewish faith. The governing board was made up of Satmar Hasidic Jews who operated a single school designed to provide a special education for disabled children. Justice Souter wrote the majority opinion which was joined by Justices Blackmun, Stevens, O'Connor, and Ruth Bader Ginsberg, a recent appointee of President Clinton. From a theory of strict neutrality, Justice Souter held that the law violated the establishment clause by extending a special franchise and delegating a governmental power to an electorate defined solely by religious faith. The Court thought that the law “was substantially equivalent to defining a political subdivision by a religious test” resulting in a “forbidden fusion of government and religious functions.” Justices O'Connor and Kennedy concurred in the result, stressing that government cannot draw school district lines for a religious group but may accommodate the needs of Satmar children under generally applicable laws. The Chief Justice and Justices Scalia and Thomas dissented. Justice Scalia pointed out that the statute neither furnished financial support for religious schools nor made any reference to religion. He insisted that the law was a permissible and admirable accommodation of the “religious practices (or more precisely the cultural peculiarities) of a tiny sect.” Even where a school district is set up for a sectarian group, the dissenters maintained that such accommodation is far removed from a state established church. The replacement of White with Ginsberg, along with the votes of O'Connor and Kennedy, enabled the separationists (Souter, Stevens, and Blackmun) to draw a line at the creation of school districts for a particular religious denomination.

In Agostini v. Felton (1997), however, the Rehnquist Court reversed a long standing precedent forbidding state employees to provide supplemental instruction at parochial schools. The case involved the use of federal funds to provide remedial education and guidance counseling for public and private school students under Title I of the Elementary and Secondary Education Act. Twelve years earlier, the justices struck down the spending of such money by New York City because the services were provided in a sectarian atmosphere and ongoing inspection was needed to prevent the conveyance of a religious message. The Burger Court remanded the case for the issuance of an injunction, banning the use of Title I funds for teaching or counseling
on sectarian school grounds. In 1995, the New York City Board of Education and the parents of parochial school children sought to lift the injunction under a Federal Rule of Civil Procedure. They argued that the high costs of offering remedial and guidance services away from the parochial schools had created a new factual situation and the precedent of Aguilar had been undermined by subsequent decisions. By a five-to-four vote, the Rehnquist Court reversed Aguilar and further diluted the prohibition against state support for religion. The majority opinion was written by Justice O’Connor, who was joined by Justices Scalia, Kennedy, Thomas, and Rehnquist. She described Witters and Zobrest as allowing government assistance for the educational function of religious schools as long as the benefits are supplemental to instruction and funded on a neutral basis. The Court, wrote Justice O’Connor, has “abandoned the presumption erected in Meek and Ball that the placement of public employees on parochial school grounds inevitably results in state-sponsored indoctrination or constitutes a symbolic union between government and religion.” She rejected the notion that sending public school teachers into parochial schools to offer supplemental instruction would lead to indoctrination or link the state with religion. The majority concluded that the need for administrative cooperation was no longer seen as creating excessive entanglement because these factors are present regardless of where the state offers Title I services.

The four dissenters (Souter, Stevens, Ginsburg, and Breyer) strongly criticized the majority for its unprincipled reversal of a twelve-year-old precedent. Speaking for his colleagues, Justice Souter argued that Aguilar and Ball emphasized two principles of the establishment clause: “the state is forbidden to subsidize religion directly and is just as surely forbidden to act in any way that could reasonably be viewed as religious endorsement.” He explained that public funding of remedial education and guidance counseling at parochial schools contradicted both principles and “assumed a teaching responsibility indistinguishable from the responsibility of the schools themselves.” He was shocked by the majority’s rejection of “Ball’s assertion that a publicly employed teacher working in a sectarian school is apt to reinforce the pervasive inculcation of religious beliefs.” Justice Souter also argued that the limited context of the Witters and Zobrest decisions were consistent with Aguilar and Ball. He explained that upholding vocational rehabilitation assistance for a handicap person to attend a religious college
was the sole choice of the recipient (Witters); while allowing general welfare benefits for a deaf student attending a parochial school rested on the circumscribed role of the sign language interpreter (Zobrest). In contrast, Justice Souter explained that the Title I program served many students in “core subjects” and “relieved a religious school of an expense that it otherwise would have assumed, and freed its funds for other, and sectarian uses.” The dissent was convinced that the constitutional line should be drawn at the parochial schoolhouse gate, leaving intact the on versus off campus rule of Aguilar and Ball. But unlike the dissenters, the majority saw no difference between a sign language interpreter and millions of federal dollars being spent on supplemental remedial instruction for parochial school students. Agostini reflected the continued descent down the slippery slope of a de facto establishment, allowing facially-neutral forms of government assistance with the effect of benefiting religious education.

The judicial activism of the Rehnquist Court to overturn precedent continued with Mitchell v. Helms (2000). It involved a tax payer challenge to Chapter 2 of the Education Consolidation and Improvement Act of 1981, which allocates federal funds to state agencies to loan educational materials and equipment (library books and computer software and hardware) to public and private elementary and secondary schools. One of the requirements for the loan was that the items had to implement “a secular, neutral, and nonideological programs.” On average about thirty percent of the funds spent in Jefferson Parish, Louisiana, were allocated per year for private schools, most of which were sectarian schools. Justice Thomas wrote the plurality opinion and was joined by Justices Kennedy, Rehnquist, and Scalia. He pointed out that Lemon had been modified into a two-prong secular purpose and primary effect test in which three relevant criteria are used to determine whether state assistance has the primary effect of impermissibly advancing religious faith. The criteria asks whether the public benefits to parochial schools (1) results in governmental indoctrination, (2) defines its recipients by reference to religion, or (3) creates an excessive entanglement between church and state. Justice Thomas then held that “direct and incidental state assistance for parochial school is permissible when made available to secular and religious recipients on a nondiscriminatory basis.” He also held that actual diversion of state assistance to religious indoctrination does not violate the establishment clause unless
indoctrination could be reasonably attributable to government action, which is not the case where the aid is itself suitable for use in the public schools because of religious content. The plurality concluded that the instructional materials and equipment loans were permissible because the state assistance was neutrally made available to religious and secular beneficiaries and was itself suitable for use within the public schools.

Separate concurring and dissenting opinions were written by the remaining five justices. Justice O’Connor wrote a concurrence and was joined by Justice Bryer. She argued that neutrality, generality, or evenhandedness among recipients of government assistance is relevant but not alone sufficient to qualify as constitutional. She also contended that actual proof of diversion of state assistance to religious indoctrination is impermissible under the establishment clause. Justice O’Connor suggested that the Court should use the evidentiary rule applied in the textbook loan cases, requiring plaintiffs to prove that government assistance actually is or has been used to advance religion. Her concurrence then concluded that actual diversion of the challenged instructional materials and equipment for religious purposes was de minimis. But the three dissenters (Souter, Stevens, and Ginsburg) disagreed. Justice Souter argued that once again the majority mistakes the significance of the meaning of the establishment clause and ignores case facts that have led to conclusions of unconstitutionality in earlier cases. He pointed out that the “substantive principle of no aid to the religious mission remains the governing understanding of the establishment clause as applied to public benefits inuring to religious schools. The governing opinions on the subject of 35 years since Allen have not challenged this principle.” The no aid principle, wrote the dissent, forbids government assistance that carries the risk of being diverted to the religious education of parochial schools. Focusing on the case itself, Justice Souter found that the record goes beyond risk to actual instances of diversion. Church-related schools requested and state officials bought at least 191 religious books; loaned computers were connected to a network of other school computers; and audiovisual equipment purchased with public funds were used for religious indoctrination over a period of seven years. The dissent was shocked by the willingness of the majority to overrule Meek and Wolmen and create the novel standard that actual diversion of state assistance solely by religious schools is permissible under the establishment clause.
Perhaps the most remarkable parochial school case decided by the Rehnquist Court was *Zelman v. Simmon-Harris* (2002). At issue was an Ohio Pilot Scholarship Project in which students between kindergarten and eighth grade could use vouchers of up to $2,250 to pay tuition at participating public or private schools. The program gave priority to low-income students and approximately 60 percent of the children who used the vouchers came from families at or below the poverty line. None of the public schools so far elected to participate in the program. Forty-six of the fifty-six private schools that participated during the 1999-2000 academic school year were church-affiliated. Almost 3,800 students used vouchers that year and 96 percent of them elected to attend parochial schools. Writing for the majority (Scalia, Thomas, Kennedy, and O’Connor), Chief Justice Rehnquist held that the Cleveland program was created for the “the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system.” He argued that under the criteria of *Agostini* the sole question was whether the effect of the vouchers was to advance religious education. The majority argued that precedence “makes clear that government assistance is not readily subject to challenge under the establishment clause if it is neutral with respect to religion and provides assistance directly to a broad range of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice.” The Court then concluded that no reasonable observer would think that such a neutral private choice program carries with it the imprimatur of government endorsement. The Ohio program was perceived as neutral because the vouchers confer educational assistance directly to a broad class of children defined without any reference to their religious affiliation.

The four dissenters (Justices Souter, Ginsburg, Stevens, and Breyer) criticized the majority for its benign neutrality interpretation of the establishment clause. Justice Stevens believed that the use of public funds to pay for the religious indoctrination of thousands of young impressionable school children constitutes a law respecting an establishment of religion. It was completely irrelevant to him whether Cleveland was confronting a severe educational crisis or parents were simply being given the choice to use public funds for religious education. What mattered was that “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.” Justice Stevens warned that “whenever we remove a brick from the wall that was designed to separate church and state, we increase the risk of religious strife and weaken the foundation of our democracy.”

Justice Bryer voiced similar concerns:

The Court, in effect, turns the clock back. It adopts, under the name of “neutrality,” and interpretation of the Establishment Clause that this Court rejected more than half a century ago. In its view, the parental choice that offers each religious group a kind of equal opportunity principle to secure government funds overcomes the Establishment Clause concern for social concord. An earlier Court found that “equal opportunity” principle insufficient; it read the Clause as insisting upon greater separation of church and state, at least in respect to primary education. In a society composed of many different religious creeds, I fear that this present departure from the Court’s earlier understanding risks creating a form of religiously based conflict potentially harmful to the Nation’s social fabric and in violation of the Establishment Clause.

Along these same lines, Justice Souter criticized the majority for ignoring the no-aid principle of *Everson* and manipulating the meaning of neutral assistance and private school choice. He argued that the vouchers lacked neutrality among private schools because 82 percent of the participating private schools were religious and “somehow discouraged the participation of nonreligious schools.” The high number of vouchers going to religious schools led the dissent to conclude that the parents had “no free and genuine choice” because the only real alternative to the public schools were religious ones. “When government aid goes up,” warned Justice Souter, “so does the reliance on it; the only thing likely to go down is independence. If Justice Douglas in *Allen* was concerned with state agencies…choosing the textbooks parochial schools would use, how much more is there reason to wonder when dependence will become great enough to give the State of Ohio an effective veto over decisions on the curriculum?”

So far the Rehnquist Court has actively accorded government greater latitude to accommodate religious education. Table 6 presents a scale of the voting patterns for the five parochial school cases decided between 1987 and 2002. The Court ruled in favor of establishment claimants at a comparatively low rate of 20%. Many justices followed the policy initiatives of the Burger Court (*Mueller and Witters*) and accorded legitimacy to government efforts to benefit parochial schools under laws of general
application. Disability support for parochial school students (Zobrest), public school employees teaching remedial classes at church-related schools (Agostini), instructional

| Table 6: Scale of Parochial School Cases for the Rehnquist Court (1987-2002) |
|-------------------------|-------------------|
| Board of Ed. v. Grumet (94) | U U U U - U - C C C C 6/3 0 |
| Agostini v. Felton (97) | U U U - U C - C C C C 4/5 0 |
| Zelman v. Simon-Harris (02) | U U U - U C - C C C C 4/5 0 |
| Zobrest v. Catalina FSD (93) | U ? - U - ? C C C C C 2/5 0 |
| Mitchell v. Helms (00) | U U U C C - C C C C C 3/6 0 |
| Unconstitutional Outcomes = 20% | 5 4 4 2 2 1 0 1 0 0 0 19=44% |
| Constitutional Outcomes = 80% | 0 0 0 0 1 3 1 4 5 5 5 24=56% |

U: vote protecting religious liberty
C: vote upholding government law
*: current nonparticipating justices
?: no opinion about the case merits
C or U: wrote the majority decision
c or u: an inconsistent or errant vote

REPRODUCIBILITY

CR = 1 - --- = 1.00
43

SCALABILITY

CS = 1 - --- = 1.00
16

materials and equipment loans to parochial schools (Mitchell), and tuition vouchers for parochial school students (Zelman) were considered constitutional. Only the state creation of a separate school district for a particular religious sect (Grumet) was deemed unconstitutional. These cases underscore a battle over the proper standard to apply to alleged violations of the establishment clause. All the Reagan appointees have criticized strict neutrality and called for either reforming or abandoning Lemon to permit greater accommodation between church and state. Only Justices Stevens, Souter, and Ginsberg have been willing to defend the continued use of the purpose, effect, and entanglement prongs to keep government separate from religion. But as the
majority has developed a bitter taste for *Lemon*, the Rehnquist Court has tended to broadly construe or substitute the three-prongs for more permissive judicial standards.

The battle over the future of *Lemon* stems from the competing theories of the establishment clause. Two judicial alliances have attempted to control the outcomes of parochial school cases. The strict neutrality bloc of Justices Stevens, Ginsburg, and Souter has voted together at a rate of one hundred percent. These justices have cast thirteen unconstitutional votes and no constitutional ones in nonunanimous cases. In contrast, the benign neutrality bloc (Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas) voted together eighty percent of the time. These justices have cast nineteen constitutional votes and only one unconstitutional vote in nonunanimous cases. The outcome of cases has tended to rest with Justice O'Connor. She took over the swing-voting role of retiring Justice Powell, siding with the majority on every occasion. She continues to demand actual proof rather than a potential of government endorsement of religious education before she finds a violation of the establishment clause. She has also been influenced by the Justice Department, voting for the state in 85% of the cases where the Solicitor General has filed an amicus brief. The Bush appointments of Justices Thomas and Souter suggested that the Court would be ready to embrace benign neutrality. Justice Thomas has joined the accommodationists while Justice Souter has sided with the separationists. The Clinton appointment of Justice Ginsberg strengthened the ranks of strict neutrality with her commitment to a wall of separation. It is unclear how the Clinton appointment of Justice Breyer will affect the Court. He has voted against school vouchers and public school personnel teaching remedial classes in religious schools, but voted for loans of instructional materials and equipment to parochial schools. Overall, the benign neutrality hopes of the Rehnquist right have been tempered by some division among the accommodationists and the separationist efforts of Justices Stevens, Souter, Ginsberg, and seemingly Breyer.

**Facial Neutrality, the Court, and Vouchers**

At an incremental pace, the Supreme Court has become complacent toward government attempts to cooperate with mainstream religious groups and interfere with minority ones. An increasing number of justices have advocated the theory of benign
neutrality because of their commitment to allowing government to accommodate the needs of sectarian groups. The past two decades of establishment clause jurisprudence have nearly destroyed the *Lemon* test. The Rehnquist Court has gone where no other has gone before, overruling separationist precedent and creating accommodationist precedent. Several of the justices have narrowly interpreted the establishment clause as prohibiting state action with the deliberate purpose, but not the incidental effect of benefiting mainstream religious schools. Tax dollars have been permitted to fund religious education regardless of the effects as long as the state assistance was part of a facially neutral law. “The result of the Court’s standards and discourse,” writes Richard Brisbin, “is the message of the domination of private and public exercises of religious thought by the state. Because the justices indicate a preference for popular values and conceptions of Christian institutionalism and because they believe that a law constructed by a majority is neutral, they are not sensitive to the value of religious differences for the entire political community.”

Such a judicial position ignores how historically government benefits flow to the politically powerful and burdens flow to the politically powerless. It also is a step toward taking the First Amendment back to where it began—a time where the freedom to practice religion and be free from state support of religion was a largely subject to the changing passions of the majority.

To be sure, one of the most egregious assaults on religious liberty occurs when the state singles out religious practices for beneficial or burdensome consequences. A real threat to the autonomy, diversity, and moral capacity of persons occurs when the law intentionally favors or disfavors religious choices, even when the regulation falls short of coercing people to compromise or abandon their faith. Jesse Choper observes that individual freedom is threatened “when government deliberately (either explicitly or covertly) selects persons or groups for adverse treatment...because they do or do not hold certain religious beliefs or do or do not engage in certain practices because of their faith.” Clearly, the religion clauses forbid state preference or prejudice toward people because of their spiritual choices. This principle parallels other constitutional prohibitions against invidious discrimination on the basis of race, gender, ideology, or viewpoint. Another justification to prohibit official efforts to show persons less than equal respect because of religion rests with the dangerous political fallout about their
odiousness and inferiority. Such ethnocentric presumptions about differential human worth often invite political stereotyping, stigmatization, and persecution. As such, the state may not single out religion for either beneficial or burdensome treatment unless government can demonstrate that the regulation is based on some compelling interest and that the regulation uses the least beneficial or burdensome means to carry out the interest. All the justices agree that purposeful efforts by the state to benefit or burden religious choices violate the First Amendment. Yet judicial conservatives have voted to allow the transferal of government property to a particular religious college. Such policies on their face deliberately treat people differently due to their religious faith or lack thereof, sending a message of superiority and inferiority to the entire community.

But another threat to religious liberty takes what seems to be the innocuous form of generally-applicable state assistance to or interference with religious practices. But the free exercise of religion and the no establishment of religion are also significantly undermined by facially-neutral laws with the effect of benefiting some and burdening other spiritual choices. Such laws constitute de facto political discrimination against religion in effect, even though not de jure political discrimination by design. The ban against state advantages or disadvantages for one religious faith over another or for religion over nonreligion responds to the strong constitutional commitment to treat the choices of everyone as equal. The incidental side effects of laws may neither favor nor disfavor religious choices, even when public officials are motivated solely by secular concerns. Policies of general application with a burdensome effect require the state to provide an exemption when the regulations adversely affect a person’s exercise of religious beliefs, unless government can demonstrate that the regulation is based on a compelling interest and uses the least burdensome means to carry out the interest. To broadly protect the diversity of faiths, the definition of religion should consist of the one currently used by the Supreme Court. It includes religious beliefs that are “sincere and meaningful and occupy a place in the life of its possessor parallel to that filled by the orthodox belief in God.” Policies of general application with a beneficial effect of influencing, assisting, or endorsing religious choices are forbidden, unless government can demonstrate that the regulation is based on a compelling interest and uses the least beneficial means to carry out the interest. A state providing police and fire services to parochial schools or requiring churches to strictly follow building safety codes would
be examples of permissible public safety regulations. In the absence of the beneficial or burdensome effect principle, the state can favor or disfavor religious choices under the guise of generally-applicable laws with terrible consequences for sectarian groups.

A prime example involves school vouchers. In early times, the American system of education was largely private, church-sponsored, and supported by tax dollars. Sectarian schools were considered “public schools” because their education was providing a “public service.” The controversy over whether state dollars should pay for the expenses of parochial schools to teach general education has raged since the nineteenth century. Proponents of vouchers have maintained that private sectarian schools provide secular education and produce well-educated citizens. The general contribution of private schools to the common good is believed to require government to fund them equally with public schools. It is further argued that the denial of public moneys to private elementary and secondary schools interferes with the free exercise rights of parents. Parents have the freedom to send their children to parochial schools but only at a loss of their educational dollars. Every state has compulsory education laws requiring parents to send their children to school, despite their ability to find and afford a school reflecting their own spiritual values. If parents wish to benefit from tax dollars for education, then they must send their children to public schools even against their own religious faith. To be sure, the free exercise clause guarantees the rights of parents to choose a sectarian education for their own children. The government is also prevented from requiring people to forego public benefits to enjoy their right to the free exercise of religion. The state cannot force parents into the cruel choice of sending their children to public schools or paying extra educational costs for their children to attend parochial schools unless there is a compelling government interest.

In the case of vouchers, however, there are constitutional justifications against providing public subsidies for the education of sectarian institutions. One problem is that the establishment clause prohibits government action with the purpose or effect of favoring or disfavoring religious activities. It forbids the use of tax dollars to support, subsidize, or prefer particular religious practices and even all religious practices over nonreligious ones. The Supreme Court has repeatedly stated that “the establishment clause means at least this: neither the state nor the Federal Government can set up a
church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." Otherwise, the Constitution would allow a double standard of religious liberty where the state could force the politically powerless to support the sectarian practices of the politically powerful. The use of tax dollars for any aspect of sectarian education is contrary to the secular purpose and beneficial treatment principle of the establishment clause. Vouchers for even secular education carry an obvious risk of advancing religious education since at least eighty percent of private school students attend sectarian schools. The dangerous effect is not lessened by routing tax dollars through parents. They merely serve as the conduits of public subsidies, which eventually flow to sectarian schools to educate children within a pervasively religious atmosphere. Indeed the central mission of sectarian elementary and secondary schools is to teach children about religion. The establishment clause is violated where tax dollars exceed the value of secular education provided by sectarian schools since public funds are being used for religious purposes. Such diversion of tax revenues for religious education is inconsistent with the beneficial effect principle.

There are constitutional problems even where government dollars are used only for the secular education services provided by sectarian schools. State money may be channeled to religious instruction even if the slated per capita rate was equal to or less than the sum expended on every child attending public schools. There is no assurance that parochial schools offer the same kind and amount of secular education as public schools or that the amount of secular education provided by parochial schools costs them as much as public schools. How can tax dollars be separated from the teaching of religious beliefs or secular subjects from a religious perspective? It is impossible to guarantee that a biology teacher refrains from embracing creationism and disparaging evolution without carefully scrutinizing every aspect of the course, curriculum, and school. Government efforts to prevent the use of tax dollars for religious education create excessive entanglement between church and state. David Heller explains that:

The Voucher Plan will cause the State to become excessively entangled with religion because the State will have to administer and monitor the Voucher Plan. There are two facets to this involvement—the administration presently required under a voucher
plan and the administration that will inevitably arise from the plan itself. Both may be considered under the authority of the *Lemon* decision. As a first step, the government bureaucracy will be necessary to issue and cash vouchers. As with other entitlement programs, this will involve numerous verification and reporting requirements. Parents and churches will have to comply with a plethora of regulations to receive government benefits—and the government will have to amass information on parents, children and churches to issue and redeem vouchers. This arrangement gives the unmistakable imprimatur of state approval of religion because the government will be organizing, promoting, and funding religious education.\(^8^2\)

Public funding for the secular education of parochial schools would eventually, if not initially, come with governmental strings. Regulating the administration of vouchers would excessively entangle church and state, eroding over two centuries of progress toward protecting religious liberty. Some justices have described this as an insoluble, catch-22 situation. The state cannot support the secular education of parochial schools without regulating them, but regulating the use of public subsidies fosters excessive entanglement between government and religion. But the religion clauses require this double-edge protection. The establishment clause prohibits tax dollars for secular education to flow to church-related institutions without sufficient monitoring because no tax payer can be forced to support religious schools. The establishment and free exercise clauses also prohibit the state to regulate the expenditure of public funds in ways that intrude upon the pervasively religious mission of parochial schools.

Equally important, the constitutions of the states contain their own protections for freedom of and freedom from religion. All fifty states guarantee religious liberty or liberty of conscience. These provisions are comparable to the establishment and free exercise clauses of the First Amendment, but they frequently include more protective language. The Idaho Constitution is a prime example. Article I, Section 4 protects “the exercise and enjoyment of religious faith and worship.” It also states that “[n]o person shall be required to attend or support any ministry or place of worship, religious sect or denomination, or pay tithes against his consent; nor shall any preference by law be given to any religious denomination or mode of worship.”\(^8^3\) The charters of twenty-six states expressly ban the use of public funds to support parochial schools or religious education. Article IX, Section 5 of the Idaho Constitution states that no public agency “shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or
religious purpose, or to help support or to sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination.”

Idaho and other states broadly protect religious liberty by prohibiting the expenditure of tax dollars to aid, help support, or sustain any religious activities. These constitutional protections are more explicit than the First Amendment and perhaps require greater separation between church and states. Even the United States Supreme Court has ruled that states may construe their constitutions as providing more rigorous protections (not less) than the United States Constitution.

Several state supreme courts have even interpreted their state constitutions to require greater protection for religious liberty. The state supreme courts of California, Delaware, Idaho, Maine, Minnesota, New York, Oklahoma, Vermont, Washington, and Wisconsin have held that their constitutions expressly prohibit using public funds to support religious schools. In *Epeldi v. Engelking (1971)*, the Idaho Supreme Court construed its constitution as going beyond the First Amendment. At issue was whether the state legislature could authorize school districts to provide bus transportation for students attending religious schools. Speaking for the majority, Justice McFadden held that section 5 explicitly bans state appropriations “to aid, support, or sustain” sectarian schools. He reasoned that this phraseology meant “that the framers of our constitution intended to more positively enunciate the separation between church and state than did the framers of the United States Constitution.”

The majority also found that the effect of bus transportation was to aid parochial schools by bringing students to their school house doors. Justice McFadden rejected the claim that denying transportation to parochial school students violated their free exercise of religion. He explained “that there is a fundamental state policy at stake directly relating to one area of freedom of religion which seems to conflict with another area, i.e. the establishment prohibition versus free exercise. The apparent conflict can be resolved; busing benefits are denied to all students who attend religious schools and this is the Idaho Constitution’s price for exercising one’s religious beliefs.”

In a strict neutrality tone, the Idaho Supreme Court interpreted the explicit language of its constitution as erecting a higher wall of separation between church and state. The separationist doctrine of *Epeldi* has emerged from the rulings of many other state supreme courts. These decisions pose a strong
constitutional barrier to school vouchers, despite Supreme Court cases justifying state assistance to parochial schools under the child-benefit and secular-regulation theories.

A final problem with vouchers is the presence of a divisive intersection between religious and government interests. Competition among sectarian groups for scarce state funds invites bitter conflict within a spiritually diverse society. “In a community where such a large number of pupils are served by church-related schools,” warned Chief Justice Burger, “it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ the usual political campaign techniques.” He also recognized that “political debate and division, however vigorous or partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential for divisiveness of such conflict is a threat to the normal political process.” The political reality of vouchers is to create divisiveness along religious lines with politically powerful churches controlling the strings of the public purse. The use of vouchers would tend to advantage mainstream sectarian churches large enough to assemble a sizable student body, but disadvantage smaller religious groups and persons attending nonsectarian private schools. Private school vouchers violate the religious clauses beneficial and burdensome effect principle by failing to accord equal concern and respect to believers and nonbelievers. The religion clauses protect against not only deliberate government support of religious education, but also against facially-neutral policies with the unavoidable effect of benefiting or burdening spiritual matters.

But the Rehnquist Court has significantly dismantled the establishment clause prohibition against generally-applicable laws with beneficial effects for religion. Such a blind fidelity to the paradigm of majority rule ignores how government has accorded favorable treatment to Judeo-Christians compared to unfavorable treatment to several others. On its face the secular regulation rule seems neutral; but its preferential impact on mainstream faiths and its adverse impact on minority ones threatens the equal right
to practice religion and to be free from the state establishment of religion. It is the providence of the Supreme Court to take religious liberty seriously. Indeed the First Amendment singles out and calls for religion to be treated specially by creating a constitutional principle of equal concern and respect for the autonomy, dignity, and diversity of spiritual choices. After all, the language of the First Amendment selects religion for a unique advantage and disadvantage. No other facet of free expression is similarly singled out for special protection under the Constitution. This singularity of treatment reflects a constitutional decision to treat religious liberty differently. It requires the state to accord equal concern and respect to all spiritual conceptions of the good life. Such equality of religious liberty requires government officials to pass laws without the purpose or effect of influencing, benefiting, burdening, favoring, or disfavoring spiritual choices. The only neutral justifications for the state regulation of religion are compelling concerns about the general safety, rights, or welfare of the people. Any less demanding constitutional standard threatens the individual right to be free from government support for religious education and government intrusion into religious institutions. Equality of religious freedom needs to remain a cherished and fixed star within the constellation of constitutional values for every person to enjoy.

1 United States Constitution, First Amendment. Early Americans also provided protection from the imposition of religious test oaths for federal government office. Article VI provides that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”


9 Felix Frankfurter, "The Supreme Court and the Public," 83 Forum 332-4 (1930). In Haley v. Ohio, 332 U.S. 596 (1948), Justice Frankfurter warned "humility means an alert self-scrutiny so as to avoid infusing into the vagueness of a Constitutional command one's merely private notions. Like other mortals, judges though unaware, may be in the grip of prepossessions. The only way to relax such a grip and the only way to avoid finding in the Constitution the personal bias one has placed in it, is to explore influences which have shaped one's unanalyzed views in order to lay bare prepossessions."


14 Quick Bear v. Leupp, 210 U.S. 50, 82, 28 S.Ct. 690, 52 L.Ed. 954 (1908).

15 By 1932 the expenditure of public funds for a variety of religious purposes was prohibited by the language of all but one state constitution. See Notes, "Catholic Schools and Public Moneys," 50 Yale L. J. 917 (1941); "Public Aid to Establishments of Religion," 96 U. Pa. L. Rev. 23 (1947); "Public Funds for Sectarian Schools," 60 Harv. L. Rev. 79 (1947); David Fellman, "Separation of Church and State in the United States: A Summary View," 50 Wis. L. Rev. 427 (1950). Article IX, section 5 of the Idaho Constitution expressly provided that "[n]o person shall be required to attend or support any ministry or place of worship, religious sect or denomination or pay tithes against his consent; nor shall preference be given by law to any religious denomination or mode of worship."


19 Donahoe v. Richards, 61 Am. Dec. 256 (Me. 1854); Spiller v. Woburn, 12 Allen 127 (Mass. 1866); Board of Education v. Minor, 23 Ohio 211 (1872); Moore v. Monroe, 20 N.W. 47 (Iowa 1884); Weiss v. Local District Board, 44 N.W. 967 (Wis. 1890); Pfeiffer v. Board of Education, 77 N.W. 250 (Mich. 1898); Freeman v. Scheve, 91 N.W. 846 (Neb. 1902); Billard v. Board of Education, 76 Pac. 422 (Kans. 1904); Hackett v. Brookville School, 87 S.W. 792 (Ky. 1905); Church v. Bullock, 109 S.W. 11 (Tex. 1908); Ring v. Board of Education, 254 Ill. 334, 92 N.E. 251 (1910); Herold v. Public School Parish, 68 So. 116 (La. 1915); Conway v. District Board, 156 N.W. 477 (Wis. 1916); Dearle v. Frazier, 102 Wash. 369, 173 Pac. 350 (1918); Wilkerson v. City of Rome, 110 S.E. 895 (Ga. 1921); Evans v. Selma Public School, 222 Pac. 801 (Cal. 1924); Vollmar v. Stanley, 255 Pac. 610 (Colo. 1927); Kaplan v. School District, 214 N.W. 180 (Minn. 1927); Finger v. Weedman, 226 N.W. 348 (S.D. 1929); Clithero v. Showalter, 159 Wash. 51, 293 Pac. 1000 (1930); Lewis v. Board of Education, 285 N.Y. Supp. 164 (1935).

20 Donahoe v. Richards, 61 Am. Dec. 256 (Me. 1854); Smith v. Donohue, 195 N.Y. Supp. 715 (1922); Borden v. Louisiana, 123 So. 654 (La. 1929), aff'd, 281 U.S. 370 (1930); Chance v. Mississippi, 190 Miss. 453, 200 So. 706 (1941).

21 Trustees v. Iowa, 46 Iowa 275 (1877); M.E. Church, South v. Hinton, 21 S.W. 321 (Tenn. 1893); YMCA v. Douglas County, 83 N.W. 92 (Neb. 1900); Garrett Biblical Institute v. Elmhurst State Bank, 331 Ill. 308, 163 N.E. 1 (1928).

22 Otken v. Lamkin, 56 Miss. 758 (1879); New Orphan Asylum v. Hallock, 16 Nev. 373 (1882); Millard v. Board of Education, 100 N.E. 697 (Ill. 1887); Dunn v. Chicago Industrial School, 18 N.E. 183 (1888); Synod of Dakota v. State, 50 N.W. 632 (S.D. 1891); Underwood v. Wood, 93 Ky. 177, 19 S.W. 405 (1892); Nance v. Johnson, 19 S.W. 599 (Tex. 1892); Atchison T. & S.F.R. v. Atchison, 8 Pac. 1000 (Kan. 1892); Richter v. Cordes, 58 N.W. 11 (Mich. 1894); Sargent v. Board of Education, 69 N.E. 722 (N.Y. 1904); In re Opinion of the Justices, 214 N.E. 464 (Mass. 1913); Reichwald v. Catholic Bishop, 101 N.E. 266 (Ill. 1913); Dunn v. Chicago Industrial School, 117 N.E. 735 (1917); Williams v. School District of Stanton, 191 S.W. 507 (Ky. 1917); Knowlton v. Baumhover, 166 N.W. 202 (Iowa 1918); St. Hedwig's School v. Cook County, 124 N.E. 629 (Ill. 1919); Atwood v. Johnson, 176 N.W. 224 (Wis. 1920); Collins v. Kephart, 117 Atl. 44, 271 Pa. 428 (1921); Crain v. Walker, 2 S.W.2d 654 (Ky. 1928); Public School District No. 6 v. Taylor, 240 N.W. 573 ( Neb. 1932); Wright v. Public School District, 99 P.2d 737 (Kans. 1940); Johnson v. Boyd, 28 N.E.2d 256 (1940); Harfst v. Hoegen, 163 S.W. 609 (Mo. 1942); New Haven v. Torrington, 43 A.2d 455 (Conn. 1945); Murrow Orphan Home v. Children, 171 P.2d 600 (Okla. 1946); Gubler v. State Board, 192 P.2d 580 (Utah 1948); Thomas v. Daughters of Utah Pioneers, 197 P.2d 477 (Utah 1948); Kentucky Building Commission v. Effron, 220 S.W.2d 836 (Ky. 1949).


26 Ibid., 330 U.S. 63-65.


31 Ibid., 392 U.S. 257, 88 S.Ct. 1933.

32 Ibid., 392 U.S. 271, 88 S.Ct. 1941.

33 Ibid., 392 U.S. 253, 88 S.Ct. 1931.

34 Nominations of William H. Rehnquist and Lewis F. Powell: Hearings Before the Senate Committee on the Judiciary, 92nd Congress, First Session 156 (1971).


37 Ibid., 403 U.S. 664, 29 S.Ct. 785.


39 Ibid., 403 U.S. 696, 29 L.Ed.2d 809.

40 Ibid., 403 U.S. 659, 29 L.Ed.2d 782.


42 Ibid., 413 U.S. 788-89, 37 L.Ed.2d 972.

Ibid., 421 U.S. 387, 29 L.Ed.2d 245.


Ibid., 426 U.S. 768-69, 49 L.Ed.2d 200.

Ibid., 426 U.S. 771-72, 49 L.Ed.2d 202.


Ibid., 433 U.S. 266, 53 L.Ed.2d 744.


57 Ibid., 473 U.S. 400, 87 L.Ed.2d 288.


64 Ibid., 125 L.Ed.2d 20-21.

65 Ibid., 125 L.Ed.2d 14-20.


68 Ibid., 117 S.Ct. 2010.

69 Ibid., 117 S.Ct. 2020 (Justice Souter, dissenting).
Ibid., 117 S.Ct. 2026.


Ibid., 147 L.Ed.2d 703.

Ibid., 147 L.Ed.2d 725.

Zelman v. Simmon-Harris, 00-1751 (2002).

Ibid., 00-1751.

Ibid., 00-1751.


Ibid., 94 Idaho 397.
