AN ANALYSIS OF U.S. LAW CONCERNING THE FIRST AMENDMENT, SCHOOLS, AND TUITION VOUCHERS

by

RUSSELL HILL BROCK

(Under the direction of Dr. John Dayton)

ABSTRACT

The question of how much government and religion should be entwined has historically been a volatile issue. Each day in the United States millions of students with unique religious beliefs enter hallways of American schools. Because schools are a government entity and are charged with educationally molding religiously diverse clients, the educational arena has evolved into the main judicial battleground for church-state issues.

This study of the evolution of church-state separation and its subsequent infusion into the American educational system begins in biblical times and continues to Zelman v. Simmons-Harris (2002). This analysis was conducted to clarify and consolidate United States Supreme Court case law on church-state conflicts borne in education. The analysis was conducted through a variety of resources. United States Supreme Court briefs and opinions made up the bulk of reviewed literature. Also reviewed were historical documents and literature on the framing of the United States Constitution and other major historical documents relating to church-state separation.

This study found the issue of educational church-state conflict to be more prevalent in the Eastern Seaboard states. Thirty percent of all educational church-state cases originated in the 2nd Circuit Court. The study found the United States Supreme Court has shown to be more apt to tolerate church-state entanglement if caused by free parental choice or if the entanglement has a purpose designed to help people, or groups of people of any religion, and not designed to directly aid religious institutions. Governments cannot gerrymander school districts in order to aid a specific religious group or religious private school. An examination of Zelman (2002) found public funding of private religious school tuition with vouchers is legal if the aid reaches the school through parental choice, and the program is set up with the primary purpose of aiding school children in a poorly performing school district.

INDEX WORDS: First Amendment, Education, Church-state separation, Supreme Court, Zelman v. Simmons-Harris, Educational history, School law, Tuition vouchers
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A Dissertation Submitted to the Graduate Faculty of The University of Georgia in Partial Fulfillment of the Requirements for the Degree

DOCTOR OF EDUCATION

ATHENS, GEORGIA

2003
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August 2003
DEDICATION

I would like to thank my wife Ellen, daughter Zoey for their constant patience, toleration, and love throughout the doctoral process. I would like to thank my mother and father, both retired educators, for setting positive examples on both a professional and personal level. The encouragement I received from my grandparents throughout my life is immeasurable. My deceased grandfather Raymond M. Hill always insisted I continue my education as far as possible. This I have done. Lastly, GO DAWGS!
ACKNOWLEDGEMENTS

I would like to express the sincerest appreciation to my dissertation committee of Dr. Catherine Sielke and Dr. Ken Tanner for their suggestions and encouragement. In particular, I would like to thank my major professor Dr. John Dayton. Without his guidance and patience throughout this process, completion would not have been possible. I would also like to recognize the hard work, patience, and professionalism of program specialist Mrs. Linda Edwards. She was instrumental in getting me to this point.
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CHAPTER 1

OVERVIEW OF THE STUDY

From the beginning, the American public education system has been fraught with controversy over how much or how little religion should play a part in American schools. The controversy has most recently reappeared as a movement to allow public monies to fund private schools, a high percentage of which are religious institutions. The significance of the controversy surrounding religious school use of public funds in the form of tuition vouchers was cast further into the spotlight in 2002 with the United States Supreme Court’s ruling in *Zelman v. Simmons-Harris (2002)*. The case questioned the constitutionality of using public funds in the form of tuition vouchers to fund attendance at religious private schools.

As America turns 226 years old, Americans are still debating one of the same issues debated at her birth in 1776. To what extent government should interact with religion is once again being argued, with education as the forum of choice. United States Supreme Court Justice Roberts stated that:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy. (Cantwell v. State of Connecticut, 1940, p. 302)
This study will address the current status of the law concerning the Establishment, Free Exercise, and Free Speech Clauses of the First Amendment in regards to private and public education. In 2002 the United States Supreme Court ruled that public funding to aid religious schools was legally justified according to the Court’s current interpretation of the First Amendment (Zelman v. Simmons-Harris, 2002). The Court’s decision in *Zelman v. Simmons-Harris (2002)* was the latest in a long line of educational church-state conflicts and will undoubtedly not be the last. The U.S. Supreme Court had the choice to either raise the wall of separation by declaring vouchers a violation of the First Amendment, or lower the wall and allow public funds to be used by religious institutions.

The historical roots of American laws concerning church-state separation are thousands of years old. Jesus of Nazareth is quoted in the King James Version of the Bible in the book of Mark stating “render to Caesar the things that are Caesar’s, and to God the things that are God’s.” Nearly 300 years later the Roman emperor Constantine Augustus issued the Edict of Milan in which he expounded on the necessity of the separation of church-state as well as the freedom to worship openly without governmental interference (Rives, 1995). In 1297 A.D. the English monarch Edward I confronted the church-state issue in the Magna Carta. The very first item addressed in the Magna Carta concerned the freedom of religion and the separation of church-state (Holt, 1992).

As colonial delegates to the American constitutional convention convened in the summer of 1787, church-state concerns weighed heavily on the minds of the country’s founding fathers. The delegates were keenly aware that religious
discord was among the most volatile and historically the most insoluble issues threatening civil peace in any era. Attending delegates knew of the dangers of religious fanaticism when combined with the religious diversity of the American colonies. Religious sentiments ran so deeply among many citizens that the majority of delegates were hesitant to address the church-state issue at all. The delegate John Adams expressed the hope that “congress will never meddle with religion further than to say their own prayers, and to fast and to give thanks once a year” (Koch & Peden (Eds.), 1946, p. 212). Founding father James Madison declared: “The civil rights of none shall be abridged on the account of religious belief or worship, nor shall the full and equal rights of conscience be in any manner, or in any pretext infringed” (Sheldon, 2001, p. 173).

Careful examination of the writings and subsequent interpretations of the ideals of James Madison, Thomas Jefferson, and John Adams present a mixture of principled and political concerns that led to the adoption of the Bill of Rights. This tension between principles and politics continues in the church-state conflicts that schools face today.

Ratified in 1791, the First Amendment specifically addressed the issue of separation of religious enterprises and government entities. The First Amendment states that:

Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people to peacefully assemble, and to petition the government for a redress of grievances. (U.S. Constitution, Amendment 1)
What is now known as the First Amendment was actually proposed as the Third Amendment. The two amendments that originally preceded it were never ratified.

Since the ratification of the First Amendment there have been dozens of court cases challenging both Jefferson’s “wall of separation,” as well as the constitutionality of aid to religious institutions. The first major challenge to church-state separation in the United States arose 100 years after the drafting of the Constitution. In *Reynolds v. United States* (1878) the Supreme Court first cited Thomas Jefferson’s “wall of separation” philosophy. A little over a century later and after dozens of cases at the state and federal level, the church-state argument was firmly embedded in the American educational setting.

The most recent United States Supreme Court case regarding education and the First Amendment was *Zelman v. Simmons-Harris* decided June 27th, 2002. Zelman decided whether or not the voucher system used in the state of Ohio to fund private school attendance was constitutional. The Ohio program allowed private schools to accept public funds to pay tuition for enrolled students. Ninety-six percent of the students participating in the Ohio voucher program attended religious schools. The schools were allowed to use the money for any purpose they deemed necessary. The Ohio voucher program was challenged successfully before the Sixth Circuit Court of appeals in 1999 and then in 2000 was appealed to the United States Supreme Court by the state of Ohio. The case was granted certiorari in September 2001. In a 5-4 ruling the Supreme Court held that vouchers used by religious institutions did not constitute government sponsored religion and therefore did not violate the First Amendment.
**Problem Statement**

Educators must be cognizant of the law, and must make an effort to stay within the legal bounds of current law concerning the separation of church-state. Religious strife has historically been a volatile issue. Educational leaders are now faced with many of the same issues that have faced political leaders for hundreds of years when attempting to balance church-state concerns. With over 27,400 private schools in the United States, 78% of which are religious in nature, the issue is likely to remain prominent (Zelman v. Simmons-Harris, 2002). The way in which educators choose to handle the issue will be paramount to political and educational success (Broughman and Colaciello, 1997).

Considering the fervor with which Americans defend both their religious and constitutional freedoms, it is doubtful the issue will be put to rest with a single Supreme Court decision. A thorough understanding of the continuing evolution of church-state law will enable leaders to make sound decisions on this issue in the future.

**Research Questions**

This study investigated the following research questions:

1. What is the historical evolution of the law concerning the separation of church-state in American schools?

2. What is the current status of the law concerning public funding of religious schools in the form of tuition vouchers?

**Research Procedures**

Research for this study focused on analyzing federal statutes, regulations, case law, legal commentary, and historical documents in order to track the historical
development of church-state law and to identify the current status of the law concerning the American educational system. The primary data for this study were derived from the United States Constitution, federal legislation, United States Department of Education regulations, United States Supreme Court opinions, and state statutes concerning the separation of church-state. Cases were summarized with a brief statement of the issue in dispute followed by an examination and summary of majority and dissenting opinions. The data also includes information gleaned from law and education journals as well as colonial era historical documents. Documents obtained from counsel in the Zelman v. Simmons-Harris (2002) case were also incorporated into this research.

Court opinions were identified utilizing “Lexis-Nexis,” “Findlaw,” and “Eric” databases. Historical documents and accounts were identified through research in the University of Georgia Library and the Alexander Campbell King Law Library.

Chapter One includes an introduction to church-state law issues, research procedures and limitations, research questions, and definitions of legal terms.

Chapter Two will provide a review of the literature concerning the evolution of church-state law. This will include a review of historical documents and case law. The materials presented in Chapter Two will be presented chronologically to demonstrate the historical development of church-state law. A brief summary of each Supreme Court decision will contain pertinent statements from written opinions.

Chapter Three is an analysis of the current status of the law pertaining to educational church-state separation. It includes a detailed analysis of the Zelman majority opinion, concurring opinions, and dissenting opinions. Analysis of the Zelman case
combined with an examination of past Supreme Court decisions will form a current composite picture of church-state law concerning American schools.

Chapter Four consists of findings and conclusions relevant to educational leaders concerned with compliance to church-state law. The findings and conclusions offer insight into the reasons the Court ruled as they did. Compliance with church-state law by educational leaders is dependent on an understanding of what the law actually permits.

Limitations of the Study

This study was designed to provide current, accurate information concerning church-state law in American schools. The findings are limited to a review of published documents and cases related to church-state law concerning American schools. No findings regarding the policies of individual states were made. Due to the fluid nature of constitutional law interpretation, this study is only current as of the completion date of the dissertation and is not intended as legal advice.

Definitions

For the purpose of this study the following definitions will apply:

1. Adjudication – to settle either finally or temporarily on the merits of the issues raised.

2. Appeal – to take a lower court decision to a higher court for review.

3. Appellant – a person who appeals to a higher court.


5. Case Law – the body of law created by judicial decisions, as distinguished from law derived from statutory and other sources.
6. Certiorari – the right of a superior court to obtain the records of an inferior court to aid in the decision making process.

7. Defendants – the party against whom a civil or criminal action is brought.

8. Emolument – to gain from employment or position.

9. Non-Secular – sacred or religious in nature.

10. Parens patriae – government as the parent.

11. Per curiam – law by the court: said of a judicial opinion presented as that of the entire court rather than that of any one judge.

12. Secular – not sacred or religious in nature.

13. Stare decisis – a policy of law that requires courts to abide by previous decisions.

14. Writ of mandamus – a writ to cease from a higher court to a lower court or government agency.
CHAPTER 2

REVIEW OF THE LITERATURE

This chapter presents a chronological account of the development of legally mandated separation of church-state in the United States. It also examines how the mandated wall of separation affects current educational policy pertaining to the legality of school vouchers, equipment loans, school prayer, and special services to private schools.

Part one will trace the idea of church-state separation from the time of Jesus of Nazareth up to the ratification of the Bill of Rights in 1791. A clear understanding of what Bill of Rights framers such as James Madison and Thomas Jefferson intended in the First Amendment is necessary for effective examination of the church-state educational issue. Documents that record the intentions, concerns, and practical legal requirements of original Bill of Rights authors will be presented to the reader.

Part two continues with early legal challenges concerning the church-state issue. It will introduce U.S. Supreme Court rulings from the 19th Century. Part Two also includes an examination of the Philadelphia Bible Riots that resulted from an out of control educational church-state controversy.

Part three summarizes relevant court cases from 1900 to 1940. Numerous constitutional challenges to the legal policies on separation occurred during this 40-year period. Rulings in cases went both for and against separation and led to some of the controversy on the issue seen today.
Part Four will review developments in First Amendment law since 1940. The landmark 1985 case of *Augilar v. Felton* and its subsequent reversal in 1997 with the *Agostini v. Felton* case, the *Lee v. Weisman (1992)* school prayer case, as well as the recent Supreme Court ruling in the *Zelman v. Simmons-Harris (2002)* case, are included in this section.

**Historical Development of the Separation of Church-State 32-1800 A.D.**

The first recorded opinion of a religious or political figure on the issue of church-state separation is found in the King James Version of the Bible in the book of Mark. On the verge of being arrested and just prior to his execution, Jesus of Nazareth was in Jerusalem being questioned by local Pharisees and Herodians. The Herodians were Jews who supported the dynasty of Herod and, therefore, the rule of Rome. Considered political opponents of Jesus, the Pharisees appeared to have a political working relationship with King Herod and the Romans. The goal of the questioning was to trap Jesus of Nazareth into making illegal statements about the Roman Empire and subsequently have him arrested. The questions asked of Jesus were directed solely toward exposing his opinions on the issue of church-state separation. Mark, Chapter 12: Verses 12-17 read:

> Then the Pharisees went and counseled together how they might trap him in what He said. And they sent their disciples to Him, along with the Herodians, saying, “Teacher, we know that You are truthful and teach the way of God in truth, and defer to no one; for You are not partial to any. Tell us therefore, what doYou think? Is it lawful to give a poll tax to Caesar or not?” But Jesus perceived their malice, and said, “Why are you testing Me, you hypocrites? Show me the coin used for the poll tax.” And they brought Him a denarius. And He said to them, “Whose likeness and inscription is this?” They said to Him, “Caesars.” Then He said to them: “Then render to Caesar the things that are Caesar’s; and to God the things
that are God’s.” And hearing this, they marveled, and leaving Him they went away. (Bible, King James Version, Mark 12:12-17)

In 313 A.D., rival Roman emperors Falvius Valerius Constantinus (Constantine I) and Valerius Licinianus Licinius legally defined a wall of church-state separation when they jointly issued the Edict of Milan (Rives, 1995). The Edict of Milan stated government persecution of Christians would be illegal. The Edict also stated that:

> We have also conceded to other religions the right of open and free observance of their worship for the sake of the peace of our times, that each one may have the free opportunity to worship as he pleases; this regulation is made that we may not seem to detract from any dignity or any religion. (Rives, 1995, p. 78).

Seven years later, Licinius began to ignore the newly erected wall of separation and began to persecute Christians in the Eastern Roman Empire in an attempt to incite civil war with Constantine.

In the centuries of Roman rule following Constantine, the Christian Church gained power and authority to the point that it reigned supreme over heads of state. Pope Gelasius I proclaimed to the Roman Emperor Anistasius that:

> There are two things, most august emperor, by which this world is chiefly ruled: the sacred authority of the priesthood and the royal power. Of these two the priests carry the greater weight, because they will have to render account in the divine judgment even for the kings of men. (Alexander K. & Alexander M., 1998, p. 112)

As Christianity and formal government evolved in 13th century Europe, English monarchs were eager to mandate church-state separation in written frameworks of government. The Magna Carta composed in 1215 by King John addressed the issue in the first paragraph. It stated that:

> First that we have granted to God, and by this present charter have confirmed for us and our heirs in perpetuity, that the English Church shall be free, and shall have its rights undiminished, and its
liberties unimpaired. That we wish this so to be observed, appears from the fact that of our own free will, before the outbreak of the present dispute between us and our barons, we granted and confirmed by charter the freedom of the Church's elections - a right reckoned to be of the greatest necessity and importance to it - and caused this to be confirmed by Pope Innocent III. This freedom we shall observe ourselves, and desire to be observed in good faith by our heirs in perpetuity. (Sandoz (Ed.), 1993, p. 14)

The Magna Carta was reaffirmed by King Edward I in 1297 as the law of all English lands and so became the official framework for the English government that exists today.

The Mayflower Compact of 1620 dedicated the mission of new world colonists to “the glory of God, and the advancement of the Christian Faith, and honor of our King and country” (Sandoz (Ed.), 1993, p. 70). English colonies moved away from official establishment of the Anglican Church toward religious tolerance. Some colonies would legally prohibit established religions.

The colony of Rhode Island practiced religious tolerance under the leadership of Roger Williams. Williams insisted on the separation of civil and ecclesiastical aspects of society while in Massachusetts prior to founding Rhode Island. Because of his separation philosophy, he was banished from Massachusetts and in 1636 Williams established the Rhode Island territory.

Williams’ ideas on the separation of church-state evolved from four basic themes. He elaborated on these ideas in his “Bloudy [sic] Tenet of Persecution” in 1644. Williams wrote that:

Attempts by the state to enforce religious orthodoxy produce persecution and religious wars and pervert God’s plan for the regeneration of souls; God has not blessed a particular form of government, and governments will vary with the nature of the people governed; political and religious diversity cannot be avoided; the human conscience must be totally free, through
religious freedom and the separation of church and state. (James, 1975, p. 17)

In 1649 the Agreement of the Free People of England offered significant proposals about the removal of governmental power to restrict or encourage religion. It stated that the government should not:

make any laws, oaths, or covenants, whereby to compel by penalties or otherwise any person to anything in or about matters of faith, religion or God’s worship or to restrain any person from the profession of his faith, or exercise of religion according to his conscience, nothing having caused more distractions, and heart burnings in all ages, than persecution and molestation for matters of conscience in and about religion. (Lilburn, Walwynn, Prince, & Overton, 1649)

William Penn’s “Frame of Government” mandated the colony of Pennsylvania follow a policy of religious freedom and toleration (Roland, 1995). As Delaware split from Pennsylvania in 1702, Penn’s policy of religious freedom and the prohibition of the use of public funds for church usage was replicated in the newly formed colony.

The English philosopher John Locke is generally accepted as the originator of the ideals that form the foundations of American government (Wolterstorff, 1996). In his “Letter Concerning Toleration” of 1690 Locke strictly addressed church-state separation. Locke maintained “the care of souls cannot belong to the civil magistrate because his power consists only in outward force, but true and saving religion consists in the inward persuasion of the mind” (Wolterstorff, 1996, p. 93).

French philosopher Jean Jaques Rousseau examined church-state relations in 1763 with “The Social Contract.” Rousseau contended organized civil religion buttressed the state, but could become dangerous if religion was separated from the state and developed divergent goals. Rousseau wrote “there is always the danger that the decree of religion
will fail to match those of the state, and instead positively mandate disobedience” (Dunn (Ed.), 2002, p. 38).

In the late 1700’s the English colonies began to politically evolve and the church-state issue began to appear in politics. Prior to the ratification of the American Bill of Rights, Virginia ratified the Virginia Declaration of Rights. This is the first written record of colonists specifically addressing the church-state issue. The main author of the Virginia Declaration of Rights was James Madison. The sixteenth article stated that:

Religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise [sic] Christian forbearance, love, and charity toward each other. (Sheldon, 2001, p. 147)

In the midst of the American Revolution Thomas Jefferson introduced a bill to the Virginia legislature designed to legally establish religious freedom in the Virginia colony. Titling the bill “An Act for Establishing Religious Freedom,” Jefferson wrote:

Well aware that Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy Author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do; that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world, and through all time; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make
his pattern, and whose powers he feels most persuasive to righteousness, and is withdrawing from the ministry those temporal rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labors for the instruction of mankind; that our civil rights have no dependence on our religious opinions, more than our opinions in physics or geometry; that, therefore, the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to the offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens he has a natural right; that it tends also to corrupt the principles of that very religion it is meant to encourage, by bribing, with a monopoly of worldly honors and emoluments, those who will externally profess and conform to it; that though indeed these are criminal who do not withstand such temptation, yet neither are those innocent who lay the bait in their way; that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles, on the supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail if left to herself, that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate, errors ceasing to be dangerous when it is permitted freely to contradict them. Be it therefore enacted by the General Assembly, That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in nowise diminish, enlarge, or affect their civil capacities. And though we well know this Assembly, elected by the people for the ordinary purposes of legislation only, have no powers equal to our own and that therefore to declare this act irrevocable would be of no effect in law, yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow
its operation, such act will be an infringement of natural right.  
(Washington, 1853, pp. 420-424)

As the American Revolution ended and the newly united colonies began framing the Constitution, a major point of contention among constitutional delegates was how much religion should be separated from government. The constitutional delegates did not deny colonies were founded on Christian principles, but most delegates were aware of the dangers of state sponsored religion. Established religion and resulting persecutions were reasons many Europeans fled to the colonies. As Thomas Jefferson helped compose the Constitution in 1787, the need to ensure government and religion did not mix was apparent. Jefferson stated:

Because religious belief, or non-belief, is such an important part of every person's life, freedom of religion affects every individual. Religious institutions that use government power in support of themselves and force their views on persons of other faiths, or of no faith, undermine all our civil rights. Moreover, state support of an established religion tends to make the clergy unresponsive to their own people, and leads to corruption within religion itself. Erecting the "wall of separation between church and state," therefore, is absolutely essential in a free society. (Washington, 1853, p. 455)

In 1788 the United States Constitution was ratified with only one mention of religion’s role in government. Article six, section three states that: “No religious test shall ever be required as a qualification to any office or public trust under the United States.” While ratification of the original Constitution was being debated among various statesmen and state legislatures in 1787-1788, the push for amendments addressing certain specific rights of citizens was already beginning. Many of the newly formed states were calling for a bill of rights, and many “founding fathers” were publishing essays on the issue.
The Federalist Papers was a series of essays anonymously authored by James Madison, Alexander Hamilton, and John Jay in 1787 under the pen name Publius. The essays were published in New York newspapers at the height of constitutional debate in 1788. Their purpose was to urge New York voters to ratify the newly proposed Constitution and to extol the virtues of a large republic. The Federalist No. 10, written by James Madison stated that:

The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State. (Rossiter (Ed.), 1999. p. 14)

This statement from Madison foreshadowed the battle over church-state that loomed with the introduction of a bill of rights. Madison’s fears that religion could “degenerate into a political faction” indicate he was aware of the possible danger of church-state entanglement before the Constitution was ratified or the drafting of a bill of rights had begun.

President George Washington explained the reason for only one reference to religion in the Constitution. He wrote that:

I am persuaded, you will permit me to observe that the path of true piety is so plain as to require but little political direction. To this consideration we ought to ascribe credit the absence of any regulation, respecting religion, from the Constitution of our country. (Buckner E., and Buckner M., 2002, p. 1)
As constitutional framers left the convention of 1787 most were fearful that the new Constitution would not secure individuals against encroachment upon their rights. The tyranny of British rule was still fresh upon the minds of most Americans. James Madison was voicing concerns that “majorities were enacting laws adverse to the rights of other citizens” (Sheldon, 2001, p. 143). Madison’s attitude would seem to suggest he would have welcomed the addition of a bill of rights to the Constitution. Indeed, Madison is considered a principal framer of the Bill of Rights and was already credited with authoring the Virginia Declaration of Rights in 1776.

History shows Madison was not originally in favor of the Bill of Rights. Madison dismissed the Bill of Rights as “so many parchment barriers whose inefficacy will be repeatedly demonstrated on those occasions when their control is most needed” (Sheldon, 2001, p. 145). By examining James Madison’s thoughts on the virtues and defects of the Bill of Rights, historians have exposed political and principled concerns that led to its adoption.

Thomas Jefferson exerted tremendous influence on James Madison and other Bill of Rights authors. The framers of the First Amendment were aware of thousands of years of religious persecution, and the danger of corruption when religion and government are mixed. Thomas Jefferson was a vocal advocate for a bill of rights that specifically addressed the separation of church-state. Jefferson was not anti-religion, nor was he a religious zealot with anti-government ideals. He foresaw the dangers of entanglement from both a religious and governmental point of view. The following two quotes from Jefferson illustrate his dual points of view. Jefferson stated that:
Whenever... preachers, instead of a lesson in religion, put [their congregation] off with a discourse on the Copernican system, on chemical affinities, on the construction of government, or the characters or conduct of those administering it, it is a breach of contract, depriving their audience of the kind of service for which they are salaried, and giving them, instead of it, what they did not want, or, if wanted, would rather seek from better sources in that particular art of science. (Washington, 1853, p. 354)

Believing that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their Legislature should “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building a wall of separation between Church and State. (Washington, 1853, pp. 356-357)

A bill of rights that would address specific individual liberties was debated at the Constitutional Convention of 1777 and 1778. In September of 1789 Congress presented 12 proposed changes to the Constitution for state approval. The first two changes Congress presented were not approved. The third amendment proposed would be the initial amendment ratified by the states. Now known as the First Amendment, it directly addressed the disentanglement of government and religion in what are known as the Separation, Establishment, and Free Exercise Clauses.

Amendment One begins “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...” and goes on to protect free speech, the press, peaceful assembly, and the right to petition the government. The First Amendment and the nine that followed were ratified on December 15th, 1791. Debate over the exact meaning of the First Amendment would soon follow, with the educational arena becoming one of the main battlegrounds.
Church-State Conflict 1800-1899

The American public education system is founded on three fundamental assumptions that relate to the issue of church-state. First, education is a benefit to the entire society, and the legislature has the power to universally tax for its support. Essential to this tenet is that general taxation is used and not levied merely on the patrons of public schools. The childless and those that choose to send their children to private schools must all pay their fair share. Second, public education must be secular while not inhibiting individual religious beliefs. Third, the government can compel all parents to provide their children with a minimum secular education. Every government has the goal of self-preservation, and in a republic, an educated electorate is vital (Alexander K. and Alexander M., 1998).

Whether or not the Constitution requires discrimination against religious schools, or allows public aid to flow to them, is at the heart of the Establishment Clause debate over school choice. Either the government treats public schools, religious schools, and secular private schools equally in regards to funding, or it excludes religious schools from benefits generally available to public schools (Breger M., & Gordis, D., 1998).

Supreme Court level challenges to church-state separation began with Terrett v. Taylor (1815). In Terrett the Episcopal Church attempted to recover Church of England lands seized by the state of Virginia after the American Revolution. The holding in the case was based on general principles of law that protected corporations, not constitutional law or the Bill of Rights. Justice Joseph Story rendered in his opinion the Virginia statute presented an “extraordinary diversity of legislative opinion as to the nature and property of aid in the temporal concerns of religion” (Terrett v. Taylor (1815, p. 47). This was the
first mention of the church-state issue in a United States Supreme Court opinion. The Supreme Court ruled in favor of the Church of England and allowed the church to sell land it had owned prior to the American Revolution. Justice Story stated that:

Consistent with the constitution of Virginia the legislature could not create or continue a religious establishment which should have exclusive rights and prerogatives, or compel the citizens to worship under a stipulated form or discipline, or to pay taxes to those whose creed they could not conscientiously believe. But the free exercise of religion cannot be justly deemed to be restrained by aiding with equal attention the votaries of every sect to perform their own religious duties, or by establishing funds for the support of ministers, for public charities, for the endowment of churches, or for the sepulture of the dead. And that these purposes could be better secured and cherished by corporate powers, cannot be doubted by any person who has attended to the difficulties which surround all voluntary associations. While, therefore, the legislature might exempt the citizens from a compulsive attendance and payment of taxes in support of any particular sect, it is not perceived that either public or constitutional principles required the abolition of all religious corporations. (Terrett v. Taylor, 1815, p. 47)

Thaddeus Stevens, the famous abolitionist politician from Pennsylvania, got his start in politics in the 1830’s as a staunch defender of public schools. While loudly defending universal taxation to support public education in 1835, he stated the following:

It is for their own benefit, inasmuch as it perpetuates the government and ensures the due administration of the laws under which they live, and by which their lives and property are protected. Why do they not urge the same objection against all other taxes? The industrious, thrifty, rich farmer pays a heavy county tax to support criminal courts, build jails, and pay sheriffs and jail keepers, and yet probably he never has had and probably never will have any direct personal use for them… He cheerfully pays burdensome taxes which are necessarily levied to support and punish convicts, but loudly complains of that which goes to prevent his fellowbeing [sic] from becoming a criminal and to obviate the necessity of those humiliating institutions. (Thayer, 1951, pp. 213-214)
Stevens believed public education was essential to the development of civic intelligence and would promote better government. He espoused that those who did not benefit directly from public education did so indirectly by association with an enlightened citizenry (Thayer, 1951).

As Horace Mann began the push for a free public education system in Massachusetts in the 1840’s, he proclaimed religion only had one reason to ever surface in a school. Mann believed his common schools should only convey the idea of, and respect for religious liberty. Mann stated this in spite of the fact he was a vocal and devout Protestant. Mann said the child should be able to:

…judge for himself according to the dictates of his own reason and conscience, what his religious obligations are and whither they lead. But if a man is taxed to support a school where religious doctrines are inculcated which he believes to be false, and which he believes that God condemns, then he is excluded from the school by the divine law, at the same time that he is compelled to support it by the human law. This is a double wrong. (Alexander K. and Alexander M., 1998, p. 189)

The Philadelphia Bible Riots of 1844 serve as an example of how heated church-state issues can become. The riots began as a fight between Catholics and Protestants over which Bible to use in Philadelphia Public Schools. The typical 1844 public school in Philadelphia reflected generic American Protestantism. Each school day began with a recitation of the Lord’s Prayer, readings from the King James Version of the Bible, and the singing of Protestant hymns. In addition, the King James Bible was frequently used as a textbook in secular classes such as spelling.

As the Catholic population of Philadelphia grew, the Catholic clergy asked the local school board to remove blatantly anti-Catholic textbooks from the schools, and that Catholic students be allowed to use their own Douay Version of the Bible.
Initially the school board ignored the Catholic requests, but later passed a resolution that declared “no child be required to attend or unite in the reading of the Bible in the public schools whose parents are conscientiously opposed thereto” (Boston, 1997, p. 3).

The local Protestant population reacted angrily to the declaration and a rumor was started that there was a Vatican plot to take over the school system. A series of Protestant rallies were held with thousands in attendance. In response the Catholic community composed mainly of Irish immigrants began counter rallies. At one of these rallies a brawl began that quickly erupted into gunfire.

After a summer of rioting and gunfire was ended by the insertion of militia, 17 people were dead and over 40 wounded. Adjusting for 160 years of inflation, there was a little over $5,000,000 in property damage, including the destruction of several churches. An entirely Protestant grand jury was convened that declared the entire episode the fault of radical Catholics who wanted to exclude the Bible from public schools. The fact that this particular fight began in the public schools seemed to magnify tension and inflame seemingly normal citizens to unbelievable levels of violence.

In 1872 the Ohio State Supreme Court heard a church-state case over the legality of requiring public schools to hold daily religious exercises. In *Board of Education of Cincinnati v. Minor* (1872) the Ohio State Supreme Court held that “the great bulk of human affairs and human interests is left by any free government to individual enterprise and individual action, religion is imminently one of these interests, lying outside the true and legitimate province of government” (p. 217). The Ohio Court ruled that public schools could not be required by the government to hold daily religious exercises.
In September 1875, President Ulysses S. Grant stated that Americans should “encourage free schools, and resolve that not one dollar, appropriated for their support, shall be appropriated to the support of any sectarian schools” (Green, 1987, p. 64).

President Grant went on to say the matter of religion should be a family affair and that the church, as well as the private school, should be supported by private contributions only (Green, 1987).

In December of 1875 Speaker of the House of Representatives James Blaine proposed what became known as the Blaine School Amendment. It stated that:

No state shall make any law respecting an establishment of religion, or prohibiting free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect: nor shall any money so raised or lands so devoted be divided among religious sects or denominations. (Green, 1987, p. 75)

The Blaine Amendment failed to pass, but as new territories became states Congress required similar such provisions as a condition of statehood. By 1897, 20 states had Blaine Amendment style restrictions in their state constitutions (Green, 1987, p. 78).

*Reynolds v. United States (1878)* was a landmark case in the church-state debate. Chief Justice Waite delivered the opinion in the case of George Reynolds who resided in the territory of Utah and had taken a second wife. Mr. Reynolds was convicted in the District Court of the Third Judicial Circuit of the Territory of Utah of bigamy. The Utah court ruled bigamy was a violation of §5352 of the Revised Congressional Statutes and Reynolds was sentenced to two years hard labor and a $500.00 fine. Reynolds appealed to the Supreme Court of Utah who upheld the conviction thus opening the door for the appeal to reach the United States Supreme Court.
Mr. Reynolds argued that bigamy was an essential part of his religion and failure to engage in multiple marriages would bring “damnation in the life to come” (Reynolds v. United States, 1878, p. 156). Reynolds stated that he had committed an act that he believed to be a religious duty, and that action could not be considered a violation of §5352 that prohibited multiple marriages. Reynolds asserted that the First Amendment Free Exercise Clause allowed him to practice his religion without government interference.

The United States Supreme Court disagreed with Reynolds and set the precedent that civil law would rule over religion in the United States. Justice Waite stated the question was “whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land” (Reynolds v. United States 1878, p. 156). Justice Waite also stated that “although marriage is a sacred obligation, it is also a civil contract regulated by law” (p. 158). He went on to ask:

Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice? (Reynolds v. United States, 1878, p. 158)

The Court also stated that “to allow religious belief to reign supreme over the law of the land would in effect permit every citizen to become a law unto himself” (p. 158) and that “government could exist only in name under such circumstances” (Reynolds v. United States 1878, p. 158).

In Bradfield v. Roberts (1899) the United States Supreme Court held that it was constitutional for Congress to pass an act allowing the United States Surgeon General to
fund two new buildings at a Catholic hospital. The buildings were funded in exchange for indigent treatment for the city of Washington D.C..

The plaintiff argued that applying tax monies directly to a corporation that was under the auspices of the Roman Catholic Church violated the Establishment Clause. In the opinion issued by Justice Peckham, the court stated the hospital was simply a “secular corporation being managed by people who hold to the doctrines of the Roman Catholic Church but who nevertheless are managing the corporation according to the law under which it exists” (Bradfield v. Roberts, 1899, p. 296). The court stated that the hospital treated patients of all denominations without prejudice or imposition of religion, the hospital was not being used for religious purposes, and therefore the funding was not a violation of the Establishment Clause of the First Amendment.

**Educational Church-State Conflict 1900-1940**

In the 20th Century public education began to receive greater political attention. As school attendance slowly became compulsory nationwide, it was only natural for judicial conflict to be woven into the school fabric. The debate over church-state in public schools began to merit more attention in the courts.

The first major church-state education case decided by the Supreme Court in the 20th century was *Pierce v. Society of Sisters* (1925). The Oregon legislature passed the Compulsory Education Act on November 7th, 1922. The Act required all children between eight and 16 years old to attend a public school (Pierce v. Society of Sisters, 1925, p. 512). The Society of Sisters of the Holy Names of Jesus and Mary operated a Catholic school in Oregon and filed a restraint that prevented the state of Oregon from enforcing the Act. The Society of Sisters asked the Act not be enforced on the grounds it
would force the closure of their private school. The law was slated to take effect on September 1st, 1926, and would have required that:

Every parent, guardian, or other person having control or charge or custody of a child between 8 and 16 years to send him ‘to a public school for the period of time a public school shall be held during the current year’ in the district where the child resides; and failure to do so is declared a misdemeanor. (Pierce v. Society of Sisters, 1925, p. 511)

The Society of Sisters incorporated as a private school in 1880 and had since devoted themselves to both secular and religious education and care of children. The Society of Sisters depended on the income generated by their schools and alleged the Compulsory Education Act of 1922 was doing irreparable damage to their ability to stay in business. The Sisters also claimed the act “interfered with the right of parents to choose where their children will receive appropriate mental and religious training” (p. 511), thus interfering with their First Amendment rights to free exercise of religion. The opinion issued by Justice McReynolds stated that:

The manifest purpose is to compel general attendance at public schools by normal children, between 8 and 16, who have not completed the 8th grade. And without doubt enforcement of the statute would seriously impair, perhaps destroy, the profitable features of appellees’ business and greatly diminish the value of their property. (Pierce v. Society of Sisters, 1925, p. 511)

In Pierce Justice McReynolds emphasized “states were responsible to reasonably regulate all schools, to inspect, supervise and examine them, their teachers and pupils” (p. 512), and that there was no evidence to indicate that the Society of Sisters had failed to honor their obligations to parents, students, or the state of Oregon (Pierce v. Society of Sisters, 1925). The Court went on to say that the Act of 1922 unreasonably interfered with the freedom of parents and guardians to direct the
upbringing of their children. In addition, the Court held that:

Rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not a mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations. (Pierce v. Society of Sisters, 1925, p. 512)

_Pierce_ gave firm legal legitimacy to religious and non-religious private schools in the United States. States could no longer pass laws designed to hinder private religious schools.

Five years after _Pierce v. Society of Sisters_ was decided, appellants in Louisiana filed a suit seeking to restrain the state of Louisiana from purchasing textbooks for use in private schools. The appellants claimed using tax funds to purchase books for religious private schools violated the Fourteenth Amendment because it constituted taking private property for public purposes. _Cochran v. Louisiana State Board of Education_ (1930) was a preview of both _Agostini v. Felton_ (1997) and _Zelman v. Simmons-Harris_ (2002).

The essential question before the Supreme Court in _Cochran_ was the legality of using public funds to aid religious private schools. Mr. Chief Justice Hughes delivered the pointed opinion of the United States Supreme Court in a one-page affirmation of the Louisiana State Supreme Court ruling. The opinion stated that:

The appropriations were made for the specific purpose of purchasing school books for the use of the children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter sectarian or nonsectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend…the school children and
the state alone are the beneficiaries. It is also true that the sectarian schools, which some of the children attend, instruct their pupils in religion, and books are used for that purpose, but one may search diligently the acts, though without result, in an effort to find anything to the effect that it is the purpose of the state to furnish religious books for the use of such children. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method comprehensive. Individual interests are aided only as the common interest is safeguarded. (Cochran et al. v. Louisiana State Board of Education et al., 1930, p. 371)

The judgment of the State Supreme Court was affirmed and Louisiana was able to purchase textbooks for both public and religious private schools. The Court ruled that monetary aid for books was to benefit the state and all its children regardless of religious affiliation.

The first of two major church-state cases to go before the Supreme Court in 1940 was Cantwell v. State of Connecticut. In Cantwell three members of the Cantwell family were arrested for going house-to-house distributing religious books and pamphlets while playing phonograph records for those willing to listen. The appellants asked people to buy religious books and solicited contributions towards the publishing cost of pamphlets. The Cantwells were in a neighborhood made up of 90% Roman Catholics. One of the phonograph records “included an attack on the Catholic religion” (Cantwell v. State of Connecticut, 1940, p. 297).

The appellants were charged with religious solicitation without an appropriate permit and inciting others to breach the peace. The Connecticut Supreme Court stated “that it was the solicitation that brought the appellants within the sweep of the Act and not their other activities in the dissemination of literature” (Cantwell v. State of Connecticut, 1940, p. 297).
The United States Supreme Court held that the Cantwell’s were deprived of their First Amendment right to free exercise of religion. The Court applied the First Amendment to Connecticut through the Fourteenth Amendment as it “rendered the legislatures of the states as incompetent as Congress to enact such laws” (p. 298) that deprived citizens of guaranteed liberties.

Since the Cantwell’s were required to have a state issued certificate to solicit, and the certificate required governmental approval that their cause was indeed religious in nature, the Cantwell’s First Amendment rights were violated. This ruling hindered government interference with religion and raised the wall of separation. The same nine Supreme Court Justices would lower that wall less than two weeks later in the *Minersville v. Gobitis* case.

In *Minersville School District v. Gobitis* (1940) the Supreme Court decided on the legality of forcing public school children to pledge allegiance to the American flag. The Gobitis family was of the Jehovah’s Witness faith and had suffered the expulsion from school of two children aged ten and 12. The children refused to participate in the Pledge of Allegiance because they believed such a gesture was “forbidden by command of scripture” (*Minersville School District v. Gobitis*, 1940, p. 587). Since the children were of the age that school attendance was compulsory, they were denied a free education because their parents were forced to enroll them in private schools.

Initially the district court ruled in favor of the Gobitis family and “granted relief on the basis of thoughtful opinion” (*Minersville School District v. Gobitis*, 1940, p. 587). That ruling was then affirmed by the United States Third Circuit Court of Appeals.
Because the Third Circuit decision countered several per curiam dispositions of the United States Supreme Court, certiorari was granted to give full reconsideration.

The Supreme Court grounded the *Minersville* decision on the question of whether state required participation in such ceremonies against sincere religious beliefs infringed upon the Gobitis’ Fourteenth Amendment rights of due process. Justice Frankfurter stated in the opinion that:

> Centuries of strife over the erection of particular dogmas as exclusive or all-comprehending faiths led to the inclusion of a guarantee for religious freedom in the Bill of Rights. The First Amendment, and the Fourteenth through its absorption of the First, sought to guard against repetition of those bitter religious struggles by prohibiting the establishment of a state religion and by securing to every sect the free exercise of its faith. So pervasive is the acceptance of this precious right that its scope is brought into question, as here only when the conscience of individuals collides with the felt necessities of society. (Minersville School District v. Gobitis, 1940, p. 587)

Only two weeks prior the court had ruled in *Cantwell v. State of Connecticut* (1940) that the Constitution assured “generous immunity to the individual from imposition of penalties for offending, in the course of his own religious activities, the religious views of others” (p. 298). The question the Court faced in *Minersville v. Gobitis* was whether a citizen’s religious duty is allowed to conflict with secular interests of fellow Americans. Justice Frankfurter stated: “The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects” (Minersville School District v. Gobitis, 1940, p. 588). He went on to state that: “The mere possession of religious convictions which contradict the relevant concerns of a political society
does not relieve the citizen from the discharge of political responsibilities” (p. 588).

The Court held that students could be required to recite the pledge.

In 1940 World War II was in full swing in Europe, Asia, and the Pacific. Although the United States was not yet officially in the war, preparations were underway in military and civilian sectors. Nationalism was sweeping the country and the promotion of “national cohesion” was foremost in the minds of government. The Court stated in the Minersville opinion “national unity is the basis for national security,” and “to deny the legislature the right appropriate means for its attainment presents a totally different order of problem than the possible ugliness of littered streets” (Minersville v. Gobitis, 1940, p. 591). The Court acknowledged a paradox that without governmental authority to indoctrinate a unifying national sentiment, there can be no liberties, civil or religious. The appeal was reversed, and the expulsion of the Gobitis children was upheld.

In the dissenting opinion, Justice Stone points out the children were expelled due to religious convictions and their family had done nothing to demonstrate disloyalty to the United States. Justice Stone stated that:

Government has a right to survive and powers conferred upon it are not necessarily set at naught by the express prohibitions of the Bill of Rights. It may make war and raise armies. To that end it may compel citizens to give military service and subject them to military training despite their religious objections. It may suppress religious practices dangerous to morals, and presumably those also which are inimical to public safety, health and good order. But it is a long step, and one which I am unable to take, to the position that government may, as a supposed educational measure and as a means of disciplining the young, compel public affirmations which violate their religious conscience… this seems to me no more than the surrender of the constitutional protection of the liberties of small minorities to the popular will. (Minersville School District v. Gobitis, 1940, p. 591)
Educational Church-State Conflict Since 1941

In reaction to *Minersville School District v. Gobitis* (1940), and in the midst of World War II, the West Virginia legislature would once again push the church-state controversy before the United States Supreme Court. *West Virginia State Board of Education v. Barnette* (1943) was brought about after the state legislature in West Virginia amended its statutes to require that:

All schools therein to conduct courses of instruction in history, civics, and in the Constitutions of the United States and of the State for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government. (West Virginia State Board of Education v. Barnette, 1943, pp. 624-625)

The Law required the State Board of Education and State Superintendent of Schools to prescribe appropriate courses of study for all public schools. It also required private religious schools to prescribe courses of study equivalent to those required in public schools.

In 1942 the West Virginia State Board of Education adopted a resolution based on their interpretation of *Minersville School District v. Gobitis* (1940). The resolution ordered that the “salute to the flag become a regular part of the program of activities in the public schools and that all teachers and pupils shall be required to participate in the salute” (West Virginia State Board of Education v. Barnette, 1943, p. 625).

The resolution originally required the “commonly accepted salute to the flag,” (p. 625) but some concessions in the law were made to appease the Parent Teacher Association, the Boy Scouts, and the Red Cross who objected that the salute was “too much like Hitler’s” (p. 625). Failure to conform to the statute was labeled insubordination and punishable by expulsion. Readmission was allowed only upon compliance with the
resolution. Parents of children who did not conform were subject to fines and jail terms of up to 30 days.

Appellees filed suit in United States District Court because Jehovah’s Witness children refused to salute the flag based on their belief that:

Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them. (Bible, King James Version, Exodus 20, verses 4 & 5)

The State Board of Education dismissed the complaints and the case was then pled before a three-judge panel in United States District Court. The three-judge panel restrained enforcement of the resolution upon the plaintiffs and all others “of that class” (West Virginia State Board of Education v. Barnette, 1943, p. 625). The West Virginia State Board of Education brought the case to the United States Supreme Court by direct appeal. In the opinion Justice Jackson wrote that:

Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction. If it is to impose any ideological discipline, however, each party or denomination must seek to control, or failing that, to weaken the influence of the educational system. The Fourteenth Amendment, as now applied to the States, protects the citizens against the State itself and all of its creatures, Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes. (West Virginia State Board of Education v. Barnette, 1943, p. 629)

In this case the Supreme Court noted that a test of legislation that conflicts with the Fourteenth Amendment due to its relationship with the First Amendment is
more easily defined than a test of autonomous Fourteenth Amendment principles. The court also acknowledged that changing times had deprived precedents of reliability and forced the Court to rely upon their own judgment more than they wished (West Virginia State Board of Education v. Barnette, 1943, p. 6).

Justice Jackson stated further the dangers of forced nationalism and the possible division of America that could result. Jackson mentioned Roman attempts to “stamp out Christianity” (p. 629), the Inquisition as a means to achieve religious unity, and the “fast failing efforts of our present totalitarian enemies” (p. 629). “Compulsory unification of opinion”, Justice Jackson stated, “achieves only the unanimity of the graveyard” (West Virginia State Board of Education v. Barnette, 1943, pp. 629-630).

In the majority opinion Justice Jackson stated:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein… We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control. The decision of this Court in Minersville School District v. Gobitis and the holdings of those few per curiam decisions which preceded and foreshadowed it are overruled, and the judgment enjoining enforcement of the West Virginia Regulation is affirmed. (West Virginia State Board of Education v. Barnette, 1943, p. 630)

In their concurring opinions Justice Black and Justice Douglas stated “neither our domestic tranquility in peace nor our martial effort in war depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation” (p. 631).
In a strongly worded dissent, Justice Frankfurter registered his reservations with allowing the personal opinions of the Justices to determine Constitutional policy. Frankfurter stated: “It can never be emphasized too much that one’s own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one’s duty on the bench” (p. 632). Frankfurter went on to warn of the dangers of insubordination in the military and a possible reduction in enlistments. To comply with the ruling, West Virginia amended the law to state there were no penalties for non-conformity but that “civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress” (p. 624).

*Everson v. Board of Education of the Township of Ewing (1947)* concerned the constitutionality of public monies being used to pay transportation costs for children to attend Catholic schools. The New Jersey statute authorized district boards of education to pay for “the transportation of children to and from schools other than private schools operated for profit” (*Everson v. Board of Education of the Township of Ewing, 1947*, p. 1). The only private schools in the area that were non-profit in nature were Catholic parochial schools. The superintendent of the Catholic schools was a Catholic priest, and the schools all gave religious instruction in the Catholic faith.

A district taxpayer challenged the validity of the law on First Amendment Establishment Clause grounds. The original state court decision agreed with the appellant that “the state legislature was without power to authorize such payments under the New Jersey State Constitution” (p. 2). The New Jersey Court of Errors and Appeals reversed the state court decision stating that neither the statute nor the resolution violated either the state or federal constitutions.
The case was argued before the Supreme Court on two different points. First, that through taxation the state was taking the private property of some and bestowing it upon others for private purposes, thus violating the Due Process Clause of the Fourteenth Amendment. Secondly, that the state was using tax money to financially support parochial schools violated the First Amendment Establishment Clause which is applied to the states through the Fourteenth Amendment.

Justice Black addressed the Fourteenth Amendment issue by agreeing with the New Jersey Court of Errors and Appeals that the transportation of children to school, whether it be a parochial or public school, was in the best interest of the state of New Jersey. The Court stated that simply because the public need of school transportation happened to coincide with the desires of Catholic school parents was an “inadequate reason for us to say that a legislature has erroneously appraised the public need” (Everson v. Board of Education of the Township of Ewing, 1947, p. 2). Justice Black then turned his attention to the First Amendment Establishment Clause issue by stating that:

New Jersey cannot consistently with the “establishment of religion” clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation. Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending taxraised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to
a public school would have been paid for by the State… The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools. (Everson v. Board of Education of the Township of Ewing, 1947, pp. 5-6)

In closing Justice Black stated the wall of separation between church and state “must be kept high and impregnable” (p. 7). He further wrote “We could not approve the slightest breach” and “New Jersey has not breached it here” (p. 7).

In 1948, the Supreme Court would once again rule on public schools and religion. In McCollum v. Board of Education appellant Vashti McCollum filed suit against the Champaign, Illinois Board of Education. As a resident public school parent and taxpayer of Champaign, Mrs. McCollum sued to stop the practice of religious instruction in public schools.

School attendance was mandatory in Illinois from age seven to sixteen. Parents that violated that law were guilty of a misdemeanor punishable by fine. The Champaign, Illinois Board of Education passed a policy that allowed private religious groups to come into the public schools during regular school hours and teach religion for a period of thirty minutes. Mrs. McCollum asserted that the policy violated the First and Fourteenth Amendments to the United States Constitution, and the “prayer of her petition was that the Board of Education be ordered to ‘adopt and enforce rules and regulations prohibiting all instruction in and teaching of all religious education in all public schools in Champaign District Number 71, and in all public school houses and buildings in said district when occupied by schools’” (McCollum v. Board of Education, 1948, p. 204).
The school board attempted to get the case dismissed on the grounds the program was voluntary for school children and that Mrs. McCollum lacked the standing to maintain such a suit. The Supreme Court denied the motion to dismiss the case and once again focused its attention on educational church-state law.

In 1940 a group of Jewish, Roman Catholic, and Protestant leaders formed a voluntary association called the Champaign Council on Religious Education. The group convinced the local Board of Education to allow classes in religious instruction to public school pupils in grades four through nine with written parental permission. Classes were instructed in the Jewish, Protestant, and Catholic religion in the regular classrooms of the building. Students not wishing to participate were sent from their classroom to other parts of the building to continue their regular instruction. Students not released were required to be present in religious classes with their attendance reported to public school authorities.

The Board of Education felt that barring such a program would violate the Free Exercise Clause of the First Amendment. The Court held that the program clearly demonstrated the use of tax-supported property for the purpose of religious instruction. It also demonstrated close cooperation of school and religious authorities. The school board argued unsuccessfully that the First Amendment was only meant to forbid government preference over one religion or another, not impartial government assistance of all religions. The Supreme Court disagreed. Justice Black wrote that:

To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a government hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in
the First Amendment’s guaranty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the Everson case, the First Amendment had erected a wall between Church and State which must be kept high and impregnable. (McCollum v. Board of Education, 1948, pp. 205-206)

Justice Black went on to write that the state was providing invaluable aid to religion because it provided a captive audience of pupils for the religious classes using compulsory attendance laws. The lower court decision was reversed and the case was remanded back to the Illinois State Supreme Court.

In the concurring opinion Justices Frankfurter, Jackson, Rutledge, and Burton wrote on the evolution of American education and its foundations in church education. They quoted from a 1648 document titled “The Laws and Liberties of Massachusetts” and summed up the reason for the beginnings of the public schools. “The object was the defeat of ‘one chief project of that old deluder, Satan, to keep men from the knowledge of the Scriptures’” (McCollum v. Board of Education, 1948, p. 206). The Justices further stated how the original system of religious education had evolved into a modern public school system with an entirely different purpose. A purpose designed to serve a democratic society while respecting the philosophy of freedom found in the First Amendment.

Horace Mann’s fight to keep religion out of Massachusetts’ common schools in order to avoid religious conflict was mentioned as a pivotal moment in the infancy of American public education. Despite the fact Mann was a devout Christian, he maintained religion had no place in the public school. The Justices stated the American public school
is “a symbol of our secular unity” and that this unity “was not a sudden achievement nor attained without violent conflict” (McCollum v. Board of Education, 1948, p. 207).

The next time the Supreme Court would grant certiorari to an educational church-state case would be Zorach v. Clauson (1952). In Zorach New York City was once again challenged on First Amendment grounds.

New York had a policy of allowing public schools to release students with written parental permission to leave campus and attend religious instruction or devotional exercises. The same code section also made school attendance compulsory. Students not released to attend religious instruction were forced to stay in the regular secular classroom. The churches reported attendance to the schools for accountability purposes. The Supreme Court held that New York City was not in violation of the First Amendment for two reasons. First, the court stated that New York had neither established nor prohibited the free exercise of religion. Secondly, the Court ruled the system had not used coercion to get the public school students into religious classrooms (Zorach v. Clauson, 1952). In the majority opinion Justice Douglas wrote the case differed from McCollum v. Board of Education (1948) because there was no religious instruction taking place in public classrooms, nor were any public funds being expended to support the program.

Justice Douglas went on to state that:

There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the ‘free exercise’ of religion and an ‘establishment’ of religion are concerned, the separation must be complete and unequivocal. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each
other-hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who help parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls... “So help me God” in our courtroom oaths... would all be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which this court opens each session: “God save the United States and this Honorable Court.” We would have to press the concept of separation of Church and State to these extremes to condemn the present law on constitutional grounds. (Zorach v. Clauson, 1952, p. 308)

The Zorach case saw the court lean away from separation and more toward tolerance of religious activity during the public school day by public school children. It would be a decade before the Court would re-examine the issue.

In 1962 school prayer reappeared in court in Engel v. Vitale. Again, the case originated in New York when the Hyde Park, New York Board of Education composed an official prayer to be recited by students on a daily basis in public schools. The local district adopted the policy on the recommendation of the New York State Board of Regents. The parents of ten pupils brought action in a New York State Court insisting this law violated the Establishment Clause of the First Amendment. Twenty-two states, including Georgia, filed a brief of amici curiae urging the Court to rule in favor of the New York Board of Regents.

Justice Black delivered the opinion of the Court that stated “we think that by using its public school system to encourage recitation of the Regent’s prayer, the state of New York has adopted a practice wholly inconsistent with the Establishment Clause” (Engel v. Vitale, 1962, p. 423). Justice Black went on to expound on the history of government established religion and the problems such practices have created. He stated that:
It is a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America. The Book of Common Prayer, which was created under governmental direction and which was approved by Acts of Parliament in 1548 and 1549, set out in minute detail the accepted form and content of prayer and other religious ceremonies to be used in the established, tax-supported Church of England. It is an unfortunate fact of history that when some of the very groups which had most strenuously opposed the established Church of England found themselves sufficiently in control of colonial governments in this country to write their own prayers into law, they passed laws making their own religion the official religion of their respective colonies. By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. Under that Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity. (Engel v. Vitale, 1962, p. 423)

Supreme Court Justices Frankfurter and White took no part in the decision of the case and hence there was not a recorded dissenting opinion.

Less than a year after Engel v. Vitale another church-state religion case was before the Supreme Court. Abington School District v. Schempp (1963) resulted from two similar cases that were combined to form one.

The first case arose from a Pennsylvania statute that required “at least ten verses from the Holy Bible shall be read without comment at the opening of each public school, on each school day, and any child shall be excused from such Bible reading, or attending
such Bible reading, upon the written request of his parent or guardian” (p. 204). Religious readings were broadcast throughout the school over the intercom and television system. Students and a teacher in the school radio and television workshop were responsible for broadcasts. In schools with no intercom, the verses were read by either the homeroom teacher or a student volunteer. The readings were usually followed with a standing recitation of the Lord’s Prayer and the Pledge of Allegiance to the United States flag. The Schempp family was of the Unitarian faith and filed suit stating the readings were contrary to their sincere religious beliefs and a violation of the First Amendment Establishment Clause.

The second of the two cases that formed *Abington* examined a Maryland statute that required Bible readings in the morning followed by the Lord’s Prayer. In the Maryland case an atheist family objected to the practice on First Amendment Establishment Clause grounds.

In the majority opinion Justice Clark mentioned that at the time of the decision there were 83 separate religions in the United States composed of memberships in excess of 50,000 people, many of whom did not read the Bible. Again the Court referred to the history of church-state conflict in America. Justice Clark wrote of chaplains in the military, court proceedings that mentioned God, and the fact that in 1963, 64% of Americans were members of an organized church. Justice Clark quoted Justices Rutledge, Frankfurter, Jackson, and Burton from *Everson* where they wrote that:

The [First] Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation

The Court again upheld the wall of separation by ruling the Pennsylvania and Maryland statutes were each in violation of both the First Amendment Establishment Clause and the Fourteenth Amendment.

Two church-state cases would be granted certiorari in 1968. The first decided was *Board of Education v. Allen*. The case originated from a controversial New York education statute. The statute required public school authorities to lend textbooks free of charge to all students in grades seven through twelve, including those in private schools (*Board of Education v. Allen*, 1968). Several New York school boards filed suit on the grounds the law was violating both State and Federal Constitutions. The local boards also requested an order barring the New York State Commissioner of Education from removing appellant members from office for non compliance. In addition, the appellants asked for an order preventing the use of state funds to provide textbooks to parochial schools.

The New York trial court held the law unconstitutional under the First and Fourteenth Amendments. The Appellate Court reversed the decision and ordered the complaint dismissed on the grounds the appellees had no standing to attack the statute. The New York State Court of Appeals held the appellants did have standing to file suit, but that the statute did not violate either the Federal or State Constitution (*Board of Education v. Allen*, 1968). The Court of Appeals went on to state “that the law was designed to benefit all school children, without regard to the type of school attended, and that only textbooks approved by school authorities could be loaned, and
therefore the statute was completely neutral with respect to religion” (Board of Education v. Allen, 1968, p. 236).

In the opinion delivered by Justice White, the United States Supreme Court sided with the New York State Court of Appeals. The Court held that the statute did not violate the First or Fourteenth Amendment. Justice White pointed out that *Everson v. Board of Education* (1947) was very similar to *Board of Education v. Allen* (1968). The opinion quoted from *Everson* states that the Establishment Clause bars a State from passing “laws which aid one religion, aid all religions, or prefer one religion over another” (p. 238), and also bans “tax in any amount, large or small levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion” (p. 238). Justice White then explained that the Court held the New York law not in violation of the Constitution because the law benefited all school children with no regard for religious affiliation. The Court concluded that the loaning of books to religious schools only offered financial benefits to parents and students, not the school itself. Acknowledged was the fact that perhaps some children would choose to attend a parochial school because of the free book benefit, but that fact alone did not demonstrate an unconstitutional degree of support for a religious institution (Board of Education v. Allen, 1968). The Court also stated that books were different from the buses in the *Everson* case, and since the books were selected by public school authorities, only secular books were loaned.

In *Board of Education v. Allen*, the Court also alluded to *Pierce v. Society of Sisters* (1925) to refute that free textbooks used by religious schools would be used
for religious purposes. Justice White wrote “this Court has long recognized that religious schools pursue two goals, religious instruction and secular education” (p. 257). The textbooks loaned were purely secular in nature, not addressing religious instruction, only basic secular education. Justice White also expounded on the value of private schools in the United States as well as the importance of Americans getting a basic secular education, whether it be private or public. Justice White wrote that “private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience” (Board of Education v. Allen, p. 257).

The second case in 1968 to appear before the Supreme Court was *Epperson v. Arkansas*. In Epperson, an Arkansas public school teacher brought action for injunctive relief challenging Arkansas’ “anti-evolution” statute (Epperson v. Arkansas, 1968, p. 97). The statute made it illegal for a teacher in any public school or university to teach or use a textbook that taught “mankind ascended or descended from a lower order of animals” (p. 97). Arkansas State Chancery Court held that the statute violated the Free Speech Clause of the First Amendment. The State Supreme Court reversed and stated the statute was “within the State’s power to specify the public school curriculum” (Epperson v. Arkansas, 1968, p. 97).

The United States Supreme Court held the statute a violation of the Fourteenth Amendment and the First Amendment Establishment Clause. The Supreme Court opinion listed five reasons why the statute violated the Establishment Clause. The opinion written by Justice Fortas read that:

(a) The Court does not decide whether the statute is unconstitutionally vague, since, whether it is construed to prohibit
explaining the Darwinian theory or teaching that it is true, the law conflicts with the Establishment Clause. 
(b) The sole reason for the Arkansas law is that a particular religious group considers the evolution theory to conflict with the account of the origin of man set forth in the Book of Genesis. 
(c) The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion. 
(d) A State's right to prescribe the public school curriculum does not include the right to prohibit teaching a scientific theory or doctrine for reasons that run counter to the principles of the First Amendment. 
(e) The Arkansas law is not a manifestation of religious neutrality. 
(Epperson v. Arkansas, 1968, p. 98)

Justice Fortas went on to write in the *Epperson* opinion that:

> The antecedents of today's decision are many and unmistakable. They are rooted in the foundation soil of our Nation. They are fundamental to freedom. Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion. As early as 1872, this Court said: "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." This has been the interpretation of the great First Amendment which this Court has applied in the many and subtle problems which the ferment of our national life has presented for decision within the Amendment's broad command. 
(Epperson v. Arkansas, 1968, p. 99)

*Lemon v. Kurtzman (1971)* was fought over the constitutionality of statutes in Rhode Island and Pennsylvania that supplemented salaries of teachers in religious private schools that taught secular subjects. The teachers receiving the supplement could only use public school materials and only teach public school curriculum. A lower court found that all 250 teachers that received the supplements were teaching in Roman Catholic parochial schools.
The Supreme Court held that both programs were in violation of the First Amendment Establishment Clause. The Court held that there was entanglement due to necessary supervision of the program. The Court also held there were Establishment Clause violations because public money was being used to fund programs in religious schools.

The three part test Justice Burger and the Court used to reach a decision in *Lemon v. Kurtzman* case would have an effect on church-state cases in the decades to come. Laws that involved church-state would henceforth have to pass three different parts of what has now become known as the *Lemon* Test. The *Lemon* Test asks three basic questions of a law. Does the statute have a secular legislative purpose? Does the primary effect of questioned law advance or inhibit religion? Does the statute foster excessive entanglement of state and religion? If a law is judged to fail any of the three parts of the test, it is ruled unconstitutional. If a law passes muster on all three parts, it is ruled constitutional.

*Wisconsin v. Yoder (1972)* began with an Amish group in Wisconsin who had members convicted of violating the compulsory attendance law requiring school attendance until age 16. The Amish declined to send their children to school beyond the eighth grade, opting for an informal vocational education that would prepare them for life in the rural Amish community (*Wisconsin v. Yoder, 1972*). The Amish also sincerely believed that high school attendance was contrary to their religious way of life and could endanger their salvation.

The Wisconsin State Supreme Court agreed that the compulsory attendance law violated Amish rights under the Free Exercise Clause made applicable to the
States under the Fourteenth Amendment (Wisconsin v. Yoder, 1972). The United States Supreme Court affirmed the ruling of the Wisconsin State Supreme Court in June of 1972.

The Court held that the compulsory attendance law did prohibit free exercise of religion. In addition, the opinion stated that the Amish had demonstrated a long history of self-sufficiency and sincere religious beliefs. Wisconsin had also claimed in the suit it was empowered as parens patriae to extend secondary education to the Amish children regardless of parental preference. The Court also rejected this argument after the Amish presented evidence that:

Forgoing one or two additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society. (Wisconsin v. Yoder, 1972, p. 206)

Two New York State cases concerning public aid to private religious schools for administrative costs were decided on June 25, 1973. The first was Levitt v. Committee for Public Education. Levitt was an Establishment Clause fight over the appropriation of $28,000,000 to pay private schools, including religious private schools, for test administrations, enrollment record maintenance, health record maintenance, recording of personnel qualifications, and various other state level reports. Testing funds made up the majority of the $28,000,000 total, and included both state mandated tests and traditional classroom level teacher prepared tests. The Act gave private schools $27 annually per pupil for grades one through six, and $45 annually for the secondary grades. The schools were not required by the New York Act to account for how the funds were spent. The Act
stated that money “shall not be construed to authorize payments for religious worship or instruction” (p. 472), but church-sponsored schools were eligible to receive funds.

The Supreme Court ruled 8-1 the statute was in violation of the Establishment Clause and impermissible aid to religion (p. 473). The court noted no attempt was made to assure internally prepared tests were free of religious instruction. The opinion written by Chief Justice Burger also stated that the challenged state aid advanced religion and led to excessive entanglement of the state into the affairs of religious institutions (Levitt v. Committee for Public Education, 1973, p. 473).

*Committee for Public Education v. Nyquist (1973)* also originated in New York and was decided the same day as *Levitt*. The case addressed a law that provided public tax dollars for private school building maintenance, tuition reimbursement for low to middle income private school parents, and tax deductions for wealthy private school parents. New York legislative findings from 1973 stated that 20%, or 700,000 to 800,000 students, attended private schools with 85% of those schools being religious in nature. The New York legislature contended that due to poor fiscal conditions, private schools were falling into disrepair and were dangerous to the health and well being of students. Roman Catholic parochial schools made up the bulk of private schools in the state. Federal District Court had previously held the maintenance and repair grants and tuition reimbursement grants were invalid, but that the income tax provisions did not violate the Establishment Clause.

In the opinion issued by Justice Powell, the United States Supreme Court agreed with the Federal District Court that the “maintenance and repair provisions of the New York statute violate the Establishment Clause because their inevitable effect is to
subsidize and advance the religious mission of sectarian schools” (Committee for Public Education v. Nyquist, 1973, p. 764). The Supreme Court also validated a District Court holding that the tuition reimbursement grants were illegal. Justice Powell wrote that the tuition reimbursement grants would also violate the Establishment Clause whether they were delivered to the parents or directly to the school, and the effect of the aid was “unmistakably to provide financial support for nonpublic, sectarian institutions” (p. 765). Private school parents that earned over $5,000 a year received a tax deduction. The Court differed with the District Court on this issue and found this part of the law also in violation of the Establishment Clause.

Justice Powell stated that since the case was so clearly a violation of the Establishment Clause, it was unnecessary to formally examine whether or not the law was also an example of excessive entanglement. Justice White did state that “assistance of the sort involved here carries grave potential for entanglement” (pp.769-770). The Nyquist case would serve as a precursor to the school voucher movement of the late 20th and early 21st Centuries.

*Meek v. Pittenger, Secretary of Education, (1975)* grew out of opposition to Pennsylvania statutes that authorized auxiliary services, instructional materials, instructional equipment, and textbook loans to private schools. Pennsylvania Act 194 authorized auxiliary services such as “counseling, testing, psychological services, speech and hearing therapy, and related services for exceptional, remedial, or educationally disadvantaged students” (Meek v. Pittenger, Secretary of Education, 1975, p. 349). The loaning of textbooks, instructional materials, and instructional equipment were included in Act 195. Instructional materials included items such as periodicals, photographs, maps,
charts, recordings, and films. Approved instructional equipment included projectors, recorders, and laboratory paraphernalia.

Appellants filed a suit in District Court that challenged the First Amendment constitutionality of both Act 194 and 195. The Supreme Court held that Act 194 and all but the textbook loan provisions of Act 195 violated the Establishment Clause (Meek v. Pittenger, Secretary of Education, 1975).

The opinion delivered by Justice Stewart addressed Acts 194 and 195 individually. The direct loan of instructional materials to religious private schools authorized by Act 195 was deemed an unconstitutional establishment of religion because over 75% of Pennsylvania private schools that received aid were religious. This was deemed “direct and substantial advancement of religious activity” (Meek v. Pittenger, Secretary of education, 1975, p. 350).

Act 194 was also ruled unconstitutional as a violation of the First Amendment Establishment Clause because the auxiliary services were provided primarily at religious schools. The Court went on to say that even though the services may be secular and neutral on the face, excessive entanglement would be required to insure “public school staff members who provide the services did not advance the religious mission of the church-related schools in which they serve” (p. 350).

The lone victory for Pennsylvania in Meek was the legality of textbook loans. The Court held that the textbook loan program was legal and “indistinguishable from the New York textbook loan program upheld in Board of Education v. Allen, (1968)” (Meek v. Pittenger, Secretary of Education, 1975, p. 351).
Wolman v. Walter (1977) would originate in Ohio and offer a preview of Zelman v. Simmons-Harris (2002). Appellant citizens of Ohio brought the action challenging the constitutionality of all but one provision of an Ohio code authorizing various forms of aid to private schools, the majority of which were religious. There were six parts of Ohio Code 3317.06 that authorized public aid to non public school children. Code 3317.06 mandated the public schools provide the following materials and services:

1) Textbook loans from the public school system to private schools.  
2) Standardized tests and scoring services that were used in public schools had to be made available to the private sector.  
3) Provide speech, hearing and diagnostic psychological services as used in the public school systems.  
4) Provide specialized therapeutic services, guidance, and remedial services to qualified private school students on public school grounds.  
5) The purchase and loaning to private school pupils or parents instructional equipment that was “incapable of diversion to religious use.”  
6) Public schools were forced to provide field trip transportation and related services to private schools.  (Wolman v. Walter, 1977, pp. 229-230)

A three judge District Court panel held the statute constitutional in every aspect. The United States Supreme Court would agree in part with the District Court but would also overturn part of the District Court decision.

Justice Blackmun delivered the opinion of the Supreme Court and wrote that providing diagnostic services on the grounds of private schools did not constitute excessive entanglement of state and religion because there was no need for excessive surveillance of such a program (Wolman v. Walter, 1977). Also allowed were therapeutic, guidance, and remedial services. Because these services were offered on sites not physically or educationally identified with the private school, the programs did not have the effect of advancing religion (Wolman v. Walter, 1977).
The two parts of the Ohio statute that were ruled unconstitutional by the Court included transportation for field trips and the loaning of instructional equipment to private school students or parents. In addressing equipment loans, Justice Blackmun wrote: “It is impossible to separate the secular education function from the sectarian, and hence the state aid in part inevitably supports the religious role of the schools” (Wolman v. Walter, 1977, p. 230). The Court concluded field trip transportation was unconstitutional. The Court stated that since private schools controlled the timing and frequency of the trips, the school was the primary beneficiary, not the children. Such a program was also held to be excessive entanglement of church-state (Wolman v. Walter, 1977).

In 1983 the Court would again rule on an educational church-state case in \textit{Mueller v. Allen (1983)}. In \textit{Mueller} a Minnesota statute allowed state taxpayers to deduct expenses incurred for tuition, textbooks, and transportation to elementary or secondary schools. The law was challenged because it legalized deductions for parochial school expenses. The District Court held the statute was neutral on its face and did not have the primary effect of either advancing or inhibiting religion. The Minnesota Court of Appeals affirmed the decision and the United States Supreme Court granted certiorari.

In the decision delivered by Justice Renquist in June of 1983, the Supreme Court affirmed the lower court decision because the statute satisfied all elements of the three part Lemon Test. Justice Renquist wrote “the tax deduction in question has the secular purpose of ensuring that the State’s citizenry is well educated, as well as of assuring the continued financial health of private schools, both sectarian and
nonsectarian” (Mueller v. Allen, 1983, p. 392). Renquist further stated that:

The deduction does not have the primary effect of advancing the sectarian aims of nonpublic schools. It is only one of many deductions…is available for educational expenses incurred by all parents, whether their children attend public schools or private sectarian or nonsectarian private schools…and provides aid to parochial schools only as a result of decisions of individual parents rather than directly from the State to the schools themselves. (Mueller v. Allen, 1983, p. 392)

The opinion also stated that although state officials determined which textbooks qualified for the tax deduction and disallowed textbooks that were used to teach religious doctrine, there was not excessive entanglement of the State in religion.

Justice Renquist pointed out in the opinion how difficult decisions on the Establishment Clause can be. In the opinion he wrote that:

It is not at all easy, however, to apply this Court's various decisions construing the Clause to governmental programs of financial assistance to sectarian schools and the parents of children attending those schools. Indeed, in many of these decisions we have expressly or implicitly acknowledged that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law. (Mueller v. Allen, 1983, p. 390)

Justice Renquist went on to write that the Lemon Test is “no more than a helpful signpost in dealing with Establishment Clause challenges” (p. 394). He also stated that simply because a program aids a religious institution does not automatically make the program unconstitutional (Mueller v. Allen, 1983).

July 1, 1985 would witness decisions in two separate Supreme Court cases involving church-state educational issues. The first of the two cases was Grand Rapids School District v. Ball. In Ball, the school district of Grand Rapids Michigan adopted two controversial programs called Shared Time and Community Education. The Shared Time Program provided classes to private school students at public expense in classrooms
located on private school property. Shared Time teachers were full time employees of the public school system. The Community Education Program offered classes at the private schools after the regular school day in voluntary courses. The Community Education teachers were part-time public school employees and full-time private school employees at the private school where the Community Education classes were held. Of the 41 schools involved in the program, 40 of them were religious schools.

Respondent taxpayers filed suit in Federal District Court against the school district and certain state government officials. The suit alleged both programs violated the Establishment Clause of the First Amendment, made applicable to the States through the Fourteenth Amendment (Grand Rapids School District v. Ball, 1985). The Federal District Court entered a judgment for the respondents and stopped the programs. The Court of appeals affirmed, and in late 1984 the United States Supreme Court granted certiorari in the case. The United States Supreme Court held that both the Shared Time and Community Education program violated the Establishment Clause of the First Amendment. Justice Brennan wrote in the opinion that:

Even the praiseworthy, secular purpose of providing for the education of schoolchildren cannot validate government aid to parochial schools when the aid has the effect of promoting a single religion or religion generally or when the aid unduly tangles the government in matters religious. (Grand Rapids School District v. Ball, 1985, p. 374)

The National Jewish Commission on Law and Public Affairs and the United States Catholic Conference filed briefs before the Court urging reversal. Briefs urging affirmance were filed by the American Jewish Congress, Americans United for Separation of Church and State, and the Baptist Committee on Public Affairs. The fact that some religious groups supported the Grand Rapids programs while
others fought to end them highlight the controversy church-state cases can create.

The second of two educational church-state cases decided July 1st, 1985 was

*Aguilar v. Felton.* The case reached the Supreme Court on appeal from the United States Court of Appeals for the Second Circuit. New York City was using federal Title I funds authorized by the Elementary and Secondary Education Act of 1965 to pay salaries of public school employees who taught in parochial schools. Title I authorizes federal dollars to be used to help meet the needs of educationally deprived children from low-income families (*Aguilar v. Felton, 1985*). The City of New York assigned teachers and monitored parochial school Title I classes with public school field personnel. Appellee city taxpayers brought action in Federal District Court on the grounds that the program violated the Establishment Clause of the First Amendment. The District Court ruled in favor of New York City, but the Court of Appeals reversed the decision.

The Supreme Court opinion delivered by Justice Brennan held that:

The Title I program administered by New York City, which is similar in a number of respects to that held unconstitutional today in *School District of Grand Rapids v. Ball,* violates the Establishment Clause. Although the program here could be argued to be distinguishable from that in *School District of Grand Rapids* on the ground that New York City has adopted a system for monitoring the religious content of publicly funded Title I classes in the religious schools, the supervision would at best prevent the Title I program from being used, intentionally or unwittingly, to inculcate the religious beliefs of the surrounding parochial school. And the program here would, in any event, inevitably result in the excessive entanglement of church and state. (*Aguilar v. Felton, 1985, pp. 402-403*)

Justices Marshall, Blackmun, Powell, and Stevens filed concurring opinions with Justice Brennan. Justices Renquist, Burger, White, and O’Connor field dissenting
opinions in which they questioned how a program that helped so many children with very few detrimental effects could be construed as a bad program. Justice O’Connor in dissent wrote that:

Today's ruling does not spell the end of the Title I program of remedial education for disadvantaged children. Children attending public schools may still obtain the benefits of the program. Impoverished children who attend parochial schools may also continue to benefit from Title I programs offered off the premises of their schools, possibly in portable classrooms just over the edge of school property. The only disadvantaged children who lose under the Court's holding are those in cities where it is not economically and logistically feasible to provide public facilities for remedial education adjacent to the parochial school. But this subset is significant, for it includes more than 20,000 New York City schoolchildren and uncounted others elsewhere in the country. For these children, the Court's decision is tragic. The Court deprives them of a program that offers a meaningful chance at success in life, and it does so on the untenable theory that public school teachers (most of whom are of different faiths than their students) are likely to start teaching religion merely because they have walked across the threshold of a parochial school. I reject this theory and the analysis in Meek v. Pittenger on which it is based. I cannot close my eyes to the fact that, over almost two decades, New York City's public school teachers have helped thousands of impoverished parochial school children to overcome educational disadvantages without once attempting to inculcate religion. Their praiseworthy efforts have not eroded and do not threaten the religious liberty assured by the Establishment Clause. The contrary judgment of the Court of Appeals should be reversed. I respectfully dissent. (Aguilar v. Felton, 1985, pp. 415-416)

The dissenting opinion of Justice O’Connor would prevail 12 years later in *Agostini v. Felton* when the Supreme Court reversed field and allowed the Title I program to continue in New York. *Auguilar v. Felton (1985)* was labeled “bad law” in *Agostini v. Felton (1997)* and the Court admitted the 1985 ruling needed revision.

*Witters v. Washington Department of Services for the Blind, (1986)* originated when Mr. Larry Witters applied to the Washington Commission for The Blind to
receive vocational rehabilitation assistance (Witters v. Washington Department of Services for the Blind, 1986, p. 482). The assistance was designed to “assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care” (p. 482). Mr. Witters did qualify for aid under the statute and requested funds to help with tuition at a private Christian college where he was studying the Bible, ethics, speech, and church administration in order to prepare to be a pastor, youth director, or missionary (p. 482).

The Washington Commission for The Blind denied Mr. Witters aid based on a commission policy statement that read “the Washington State constitution forbids the use of public funds to assist an individual in the pursuit of a career or degree in theology or related areas” (Witters v. Washington Department of Services for the Blind, 1986, p. 482). Mr. Witters appealed to the State Superior Court who affirmed the Commission ruling based on the state constitution. The Washington State Supreme Court declined to ground its ruling based on the state constitution, and instead used the Lemon test weighed against the Establishment Clause. The Washington State Supreme Court held that “the provision of financial assistance by the state to enable someone to become a pastor, missionary, or church youth director clearly has the primary effect of advancing religion” (Witters v. Washington Department of Services for the Blind, 1986, p. 482).

The United States Supreme Court reversed the decision of the Washington State Supreme Court in an opinion written by Justice Marshall. In reference to the first prong of the Lemon Test, Justice Marshall wrote that “all parties concede the unmistakably secular purpose of the Washington program” (p. 483) and that “no party suggests that the State’s ‘actual purpose’ in creating the program was to endorse religion” (p. 483). The opinion
The answer to the question posed by the second prong of the Lemon test is more difficult. We conclude, however, that extension of aid to petitioner is not barred on that ground either. It is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution. For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary. It is equally well settled, on the other hand, that the State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is ‘that of a direct subsidy to the religious school’ from the State. The question presented is whether, on the facts as they appear in the record before us, extension of aid to petitioner and the use of that aid by petitioner to support his religious education is a permissible transfer similar to the hypothetical salary donation described above, or is an impermissible ‘direct subsidy.’ On the facts we have set out, it does not seem appropriate to view any aid ultimately flowing to the Inland Empire School of the Bible as resulting from a state action sponsoring or subsidizing religion. Nor does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion. Thus, while amici supporting respondent are correct in pointing out that aid to a religious institution unrestricted in its potential uses, if properly attributable to the State, is ‘clearly prohibited under the Establishment Clause,’ because it may subsidize the religious functions of that institution, that observation is not apposite to this case. On the facts present here, we think the Washington program works no state support of religion prohibited by the Establishment Clause. (Witters v. Washington Department of Services for the Blind, 1986, p. 484)

The Witters decision was unanimous with no dissenting opinions filed.

Justices Powell, White, Burger, and Rehnquist, and O’Connor each filed concurring opinions.

Edwards v. Aguillard (1987) would be fought over the Louisiana Balanced Treatment Act, also known as the Creationism Act, which forbade the teaching of evolution in public schools unless the instruction was accompanied by instruction in
the theory of “creation science” (Edwards v. Aguillard, 1987). The Act did not require the teaching of either theory unless the other was taught.

Appellees included Louisiana parents, teachers, and religious leaders who filed suit alleging the Balanced Treatment Act was a violation of the First Amendment Establishment Clause. The District Court ruled against Louisiana Governor Edwards and granted summary judgment to appellees. The District Court held the Act was unconstitutional. That decision was affirmed by the Court of Appeals. The Supreme Court granted certiorari in 1986.

The Supreme Court held in *Edwards v. Aguillard* (1987) that the Balanced Treatment Act violated the Establishment Clause because it lacked a clear secular purpose. In the majority opinion written by Justice Brennan, the Court stated the Act demonstrated “a discriminatory preference for the teaching of creation science and against the teaching of evolution by requiring that curriculum guides be developed and resource services supplied for teaching creationism but not for evolution” (Edwards v. Aguillard, 1987, p. 583). The Act also forbade discrimination against anyone who chose to be a creation scientist while failing to protect those who chose to teach other theories. Justice Brennan went on to say the “Act has the distinctly different purpose of discrediting evolution by counter-balancing its teachings at every turn with the teaching of creationism” (p. 583).

In the dissenting opinion filed by Justice Scalia and joined by Chief Justice Rehnquist, Justice Scalia stated that:

Although the record contains abundant evidence of the sincerity of that [secular] purpose (the only issue pertinent to this case), the Court today holds, essentially on the basis of ‘its visceral
knowledge regarding what must have motivated the legislators,’ that the members of the Louisiana Legislature knowingly violated their oaths and then lied about it. I dissent. Had requirements of the Balanced Treatment Act that are not apparent on its face been clarified by an interpretation of the Louisiana Supreme Court, or by the manner of its implementation, the Act might well be found unconstitutional; but the question of its constitutionality cannot rightly be disposed of on the gallop, by impugning the motives of its supporters. (Edwards v. Aguillard, 1987, p. 607).

Lee v. Weisman (1992) was widely publicized as the graduation prayer case. Mr. Weisman was the father of a student at a Rhode Island middle school who filed for a temporary restraining order to prohibit school officials from including a nonsectarian prayer in the middle school graduation ceremony. District Court denied the motion for a restraining order and a prayer was recited by a rabbi at the ceremony. The rabbi had been given a pamphlet ahead of time by Principal Robert E. Lee that contained guidelines for the composition of public prayers at civic ceremonies. The Weisman family sought a permanent injunction barring Lee and other public school officials from inviting clergy to deliver benedictions and invocations at future graduations. The District Court enjoined the petitioners from continuing the practice on the ground that it violated the Establishment Clause of the First Amendment. The Court of Appeals affirmed the District Court opinion.

The United States Supreme Court held that the practice of offering prayers as part of an official public school graduation ceremony is forbidden by the Establishment Clause. In the opinion written by Justice Kennedy, the Court addressed five main points of contention in the case.

First the Court stated that the Establishment Clause guarantees at a minimum that government may not coerce anyone to support or participate in religion or its exercise, or
otherwise act in a way that establishes a religion (Lee v. Weisman, 1992). Secondly, the Court pointed out that the principal was an agent of the state, and since he chose the type of prayer and person to give the prayer, he represented state sponsored religion. In the third section of the holding the Court ruled that, although the prayer was voluntary, indirect and subtle peer pressure would be put on all people present to participate (Lee v. Weisman, 1992). The fourth section of the holding rejected petitioner arguments that the option of not attending the ceremony excuses any coercion in the ceremony itself. The importance and significance of graduation was noted, as well as the unreasonable position a child would be put in when forced to choose between high school graduation and sincere religious beliefs. Lastly, the Court addressed the fact that school prayer differs from prayer at a state legislature opening ceremony because “adults are free to enter and leave with little comment and for a myriad of reasons” (Lee v. Weisman, 1992, p. 579).

Concurring with the majority opinion were Justices Blackmun, Stevens, O’Connor, and Souter. Dissenting opinions were filed by Justices Scalia, Rehnquist, White, and Thomas. Justice Scalia wrote in the opinion on the importance of history in decisions related to church and state that:

These views, of course, prevent me from joining today's opinion, which is conspicuously bereft of any reference to history. In holding that the Establishment Clause prohibits invocations and benedictions at public school graduation ceremonies, the Court - with nary a mention that it is doing so - lays waste a tradition that is as old as public school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally. As its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion, which promises to do for the Establishment Clause what the Durham rule did for the insanity defense… Today's opinion shows more forcefully than volumes of argumentation why our Nation's protection, that fortress which is our Constitution,
cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people. (Lee v. Weisman, 1992, pp. 605-606)

_Lamb’s Chapel v. Center Moriches School District (1993)_ would be the next educational church-state case to be granted certiorari by the United States Supreme Court. Once again a New York law was constitutionally challenged. New York law allowed local school boards to adopt regulations for after hours use of school property for ten reasons that did not include meetings for religious purposes (Lamb’s Chapel v. Center Moriches School District, 1993).

The Center Moriches school board passed a policy that prohibited the use of school property for religious purposes. After the school district refused two requests by an evangelical church to use school facilities to show a religious oriented film series on family values and child rearing, the church filed suit in district court claiming the school board had violated the First Amendment Free Speech Clause (Lamb’s Chapel v. Center Moriches School District, 1993). The district court and court of appeals both ruled in favor of the school district and reasoned that the school property was a “limited public forum” (p. 385) and open only for designated purposes.

In a unanimous vote, the Supreme Court reversed the lower court decision and stated the exclusion of the church was a violation of the Free Speech Clause of the First Amendment. The Court stated that, although the District may legally preserve the property under its control and need not have permitted any outside use of its facilities, it could not exclude all religious content simply because it was religious.

The Court ruled that government cannot deny access to a speaker simply to suppress their point of view (Lamb’s Chapel v. Center Moriches School District, 1993).
The opinion went on to state that allowing the property to be used after school hours to show the film series would not have been a violation of the Establishment Clause because the showing was open to the public, not sponsored by the school, and any benefit to the church would have been incidental.

Less than two weeks would pass after the *Lamb’s Chapel* decision before the church-state issue would again be ruled on by the nation’s highest court. In *Zobrest v. Catalina Foothills School District, 1993*, the parents of a deaf child in Arizona filed suit after respondent school district refused to provide a sign language interpreter to accompany the child to class at a Roman Catholic high school (*Zobrest v. Catalina Foothills School District, 1993*, p. 1). The petitioners claimed “that the Individuals with Disabilities Act (IDEA) and the Free Exercise Clause of the First Amendment required respondent to provide an interpreter and that the Establishment Clause did not bar such relief” (*Zobrest v. Catalina Foothills School District, 1993*, p. 1). The child had attended a school for deaf children grades one through five, and in grades six, seven and eight he attended public school and was provided the services of a sign language interpreter by the respondent school district. The District Court ruled in favor of respondents on the grounds that by providing an interpreter the government would act as a conduit for the child’s religious education, promoting his religious development at government expense in violation of the Establishment Clause (*Zobrest v. Catalina Foothills School District, 1993*, p. 1). The Court of appeals affirmed the District Court ruling.

The United States Supreme Court reversed the Court of Appeals decision and ruled the sign language interpreter did not violate the Establishment Clause. The opinion
issued by Chief Justice Rehnquist that was joined by Justices White, Scalia, Kennedy, and Thomas asserted that:

Government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit...here, the child is the primary beneficiary, and the school receives only an incidental benefit. (Zobrest v. Catalina Foothills School District, 1993) p. 1).

In the Zobrest dissenting opinion Justice Backmun was joined by Justices Souter, Stevens, and O'Connor when he wrote that:

Until now, the Court never has authorized a public employee to participate directly in religious indoctrination. Yet that is the consequence of today's decision. Let us be clear about exactly what is going on here. The parties have stipulated to the following facts. James Zobrest requested the State to supply him with a sign-language interpreter at Salpointe High School, a private Roman Catholic school operated by the Carmelite Order of the Catholic Church. Salpointe is a 'pervasively religious' institution where '[t]he two functions of secular education and advancement of religious values or beliefs are inextricably intertwined.' Salpointe's overriding 'objective' is to 'instill a sense of Christian values.' Its 'distinguishing purpose' is 'the inculcation in its students of the faith and morals of the Roman Catholic Church.' Religion is a required subject at Salpointe, and Catholic students are 'strongly encouraged' to attend daily Mass each morning. Salpointe's teachers must sign a Faculty Employment Agreement which requires them to promote the relationship among the religious, the academic, and the extracurricular. They are encouraged to do so by 'assist[ing] students in experiencing how the presence of God is manifest in nature, human history, in the struggles for economic and political justice, and other secular areas of the curriculum.' The agreement also sets forth detailed rules of conduct teachers must follow in order to advance the school's Christian mission. At Salpointe, where the secular and the sectarian are 'inextricably intertwined,' governmental assistance to the educational function of the school necessarily entails governmental participation in the school's inculcation of religion. A state-employed sign-language interpreter would be required to communicate the material covered in religion class, the nominally secular subjects that are taught from a religious perspective, and the daily Masses at which Salpointe
encourages attendance for Catholic students. In an environment so pervaded by discussions of the divine, the interpreter's every gesture would be infused with religious significance. Indeed, petitioners willingly concede this point: ‘That the interpreter conveys religious messages is a given in the case.’ By this concession, petitioners would seem to surrender their constitutional claim. (Zobrest v. Catalina Foothills School District, 1993, pp. 8-9)

A New York statute again appeared before the Supreme Court in Board of Education of Kiryas Joel v. Grumet (1994). “The New York village of Kiryas Joel was a religious enclave of Satmar Hasidim, practitioners of a strict form of Judaism” (Board of Education of Kiryas Joel v. Grumet, 1994, p. 687). The village was incorporated to ensure religious purity. Until 1989 the village was part of the Monroe-Woodbury Central Public School District. The Court wrote that the residents of Kiryas Joel were:

…vigorously religious people who make few concessions to the modern world and go to great lengths to avoid assimilation into it. They interpret the Torah strictly; segregate the sexes outside the home; speak Yiddish as their primary language; eschew television, radio, and English language publications; and dress in distinctive ways that include head coverings and special garments for boys and modest dresses for girls. (Board of Education of Kiryas Joel v. Grumet, 1994, p. 689)

In 1989, New York passed Chapter 748, which was a statute creating a special separate school district along the lines of the exclusively Jewish community. Chapter 748 gave the local school board plenary authority over primary and secondary education in the village. The school board of Kiryas Joel ran only a special education program for handicapped children, while all other village children attended private religious schools which did not offer special education services. The district had been created to receive federal funding to serve special education students that resided in the Kiryas Joel village. The school district was essentially solely special education oriented.
Prior to 1984 the Monroe-Woodbury Central School District had provided special education services for Kiryas Joel students at an annex to a Jewish religious school in the area. That service was ended as New York was forced to comply with the rulings in *Aguilar v. Felton (1985)* and *School District of Grand Rapids v. Ball (1985)*. Children of Kiryas Joel that required special education services were then required to attend public schools outside the village. Parents of these children were not satisfied with this service and withdrew them from school “citing panic, fear and trauma suffered in leaving their own community and being with people whose ways were so different” (*Kiryas Joel v. Grumet*, 1994, p. 690). New York’s position was that Chapter 748 was passed to ensure an education for special education children in Kiryas Joel that were at the time going without any services.

Respondents filed a suit in state trial court on the grounds that Chapter 748 violated the Establishment Clause of the First Amendment. The state trial court granted summary judgment for the respondents that the statute did indeed violate the First Amendment Establishment Clause. Both the intermediate appellate court and the New York Court of Appeals agreed that the primary effect of Chapter 748 was to illegally advance religion.

As New York Governor Cuomo signed the statute into law, he acknowledged that residents of the district were all members of the same religious sect. Mr. Cuomo stated that the law was a good faith effort to solve the unique problem associated with educating special education students in the district (*Kiryas Joel v. Grumet*, 1994, p. 693). The Kiryas Joel School District served 40 special education students full time and over 100 parochial school students on a part time basis.
In the United States Supreme Court affirmation of the lower court ruling, Justice Souter wrote that:

A state may not delegate its civic authority to a group chosen according to a religious criterion. Authority over public schools belongs to the State, and cannot be delegated to a local school district defined by the State in order to grant political control to a religious group. (Board of Education of Kiryas Joel v. Grumet, 1994, p. 692)

Justice Souter further stated that: “by delegating the states discretionary authority over public schools to a group defined by its common religion, Chapter 748 brings about an impermissible ‘fusion’ of governmental and religious functions” (p. 688).

In an indictment of Justice Scalia’s hard line stance on Establishment Clause rulings, Justice Souter also wrote that:

Our job, of course would be easier if the dissent's position had prevailed with the Framers and with this Court over the years. An Establishment Clause diminished to the dimensions acceptable to Justice Scalia could be enforced by a few simple rules, and our docket would never see cases requiring the application of a principle like neutrality toward religion as well as among religious sects. But that would be as blind to history as to precedent, and the difference between Justice Scalia and the Court accordingly turns on the Court's recognition that the Establishment Clause does comprehend such a principle and obligates courts to exercise the judgment necessary to apply it. (Kiryas Joel v. Grumet, 1994, p. 697)

In the dissenting opinion by Justice Scalia that was joined by Chief Justice Renquist and Justice Thomas, Scalia wrote that:

The Court today finds that the Powers That Be, up in Albany, have conspired to effect an establishment of the Satmar Hasidim. I do not know who would be more surprised at this discovery: the Founders of our Nation or Grand Rebbe Joel Teitelbaum, founder of the Satmar. The Grand Rebbe would be astounded to learn that, after escaping brutal persecution and coming to America with the modest hope of religious toleration for their ascetic form of Judaism, the Satmar had become so powerful, so closely allied with Mammon,
as to have become an ‘establishment’ of the Empire State. And the Founding Fathers would be astonished to find that the Establishment Clause - which they designed ‘to insulate that no one powerful sect or combination of sects could use political or governmental power to punish dissenters,’ has been employed to prohibit characteristically and admirably American accommodation of the religious practices (or more precisely, cultural peculiarities) of a tiny minority sect. I, however, am not surprised. Once this Court has abandoned text and history as guides, nothing prevents it from calling religious toleration the establishment of religion. (Kiryas Joel v. Grumet, 1994, p. 699)

Scalia went on to write that the school in question was not a private school and taught a secular curriculum. He wrote that American history in general was full of stories about people of like religions and cultural heritage striking out to form their own community. Scalia stated that it was “preposterous to suggest that the civil institutions of these communities, separate from their churches, were constitutionally suspect” (p. 711).

Even though the Supreme Court ruled New York had violated the Establishment Clause by setting up the Kiryas Joel School District, five Justices asserted that Aguilar v. Felton (1985) should be reconsidered. In reaction to the comments of those five Justices in Kiryas Joel, and citing the significant costs of complying with Aguilar v. Felton, petitioners bound by Aguilar filed motions to have the case reconsidered. Petitioners claimed Aguilar was not compatible with the Court’s current Establishment Clause jurisprudence and was no longer considered good law (Agostini v. Felton, 1997, p. 203). The District Court denied the petitioner’s motion stating the demise of Aguilar had not yet occurred. The Second Circuit affirmed the District Court opinion and the United States Supreme Court granted certiorari to re-examine the issue in Agostini et al. v. Felton et al (1997).
In *Agostini* the Supreme Court held that the New York policy of providing Title I supplemental and remedial instruction to disadvantaged children in religious schools on a neutral basis was not a violation of the Establishment Clause as long as the program contained safeguards such as those present in the New York program. The New York Title I program in question had safeguards that included randomly rotating teacher assignments to parochial schools as well as the providing of detailed written and oral instructions emphasizing the secular purpose of Title I. The instructions made it clear that the public school employees only answered to public school administrators. They could only teach children eligible for Title I services, and only use materials and equipment for Title I instruction. Public school employees could not engage in any team teaching or introduce any religious matter into their curriculum, and all religious symbols were removed from their Title I classrooms.

Justice O’Connor delivered the opinion of the Court in *Agostini* and was joined by Justices Scalia, Kennedy, and Thomas and Chief Justice Rehnquist. The Court sought to determine if its later Establishment Clause cases had undermined Aguilar to the point it was no longer good law (p. 203). The Court based their finding that *Aguilar* was no longer valid on several reasons. Justice O’Connor stated that “placing full time government employees on parochial school campuses does not as a matter of law have the impermissible effect of advancing religion through indoctrination” (p. 218).

On the entanglement issue, the Court held that the *Aguilar* Court erred in concluding that New York City’s Title I program resulted in an excessive entanglement between church and state. Justice O’Connor wrote that:

Because the Court in *Zobrest* abandoned the presumption that public employees will inculcate religion simply because they
happen to be in a sectarian environment, there is no longer any need to assume that pervasive monitoring of Title I teachers is required. There is no suggestion in the record that the system New York City has in place to monitor Title I employees is insufficient to prevent or to detect inculcation. Moreover, the Court has failed to find excessive entanglement in cases involving far more onerous burdens on religious institutions. (Agostini v. Felton, 1997, p. 229)

The Court also closely re-examined the New York City Title I program using the three part Lemon Test. The Court stated that:

New York City's Title I program does not run afoul of any of three primary criteria the Court currently uses to evaluate whether government aid has the effect of advancing religion: It does not result in governmental indoctrination, define its recipients by reference to religion, or create an excessive entanglement. Nor can this carefully constrained program reasonably be viewed as an endorsement of religion. (Agostini v. Felton, 1997, p. 231)

Before reversing the lower court decisions and declaring Aguilar bad law, the Supreme Court spoke to the fact they were changing one of their own decisions. Justice O'Connor wrote that:

The stare decisis doctrine does not preclude this Court from recognizing the change in its law and overruling Aguilar and those portions of Ball that are inconsistent with its more recent decisions. Moreover, in light of the Court's conclusion that Aguilar would be decided differently under current Establishment Clause law, adherence to that decision would undoubtedly work a 'manifest injustice,' such that the law of the case doctrine does not apply. (Agostini v. Felton, 1997, p. 232)

Joining Justice Ginsburg in dissent were Justices Stevens, Souter, and Breyer. Justice Ginsburg first questioned the time limit on the rehearing of the case by noting that Supreme Court rule 44 provides for petitions filed within 25 days of the entry of a questioned judgment, and that twelve years was certainly beyond reasonable limits (Agostini v. Felton, 1997). Justice Ginsburg also noted that there had been no significant change in factual conditions and that "Aguilar had not been overruled, but remained the
governing Establishment Clause law until this very day” (p. 229). In closing Justice Ginsburg wrote the major reason for dissenting were concerns about:

The maintenance of integrity in the interpretation of procedural rules, preservation of the responsive, non agenda setting character of this Court, and avoidance of invitations to reconsider old cases based on speculations on chances from changes in the Court’s membership. (Agostini v. Felton, 1997, p. 230)

Mitchell v. Helms, (2000) originated in Louisiana when respondents sought to end the Louisiana Chapter 2 Program that allowed federally funded educational materials and equipment to be distributed to both public schools and private religious schools to implement “secular, neutral, and nonideological” programs (Mitchell v. Helms, 2000, p. 1). About 30% of the federal funds spent in the respondent’s parish were spent in Catholic parochial schools each year. Respondents claimed the Louisiana Chapter 2 Program violated the Establishment Clause of the First Amendment. Citing the Lemon test, the Chief Judge of the District Court held that the program had the primary effect of advancing religion because “the materials and equipment loaned to the Catholic schools were direct aid and the schools were pervasively sectarian” (Mitchell v. Helms, 2000, p. 1). After issuing this ruling, the Chief Judge retired and his successor reversed the order to end the program, citing Zobrest as an example of legalized federally funded aid to religious private schools. As the case was under appeal, the United States Supreme Court ruled in Agostini that public school employees could legally teach remedial classes at religious private schools. The 5th Circuit Court subsequently held that Agostini case law did not apply to Mitchell v. Helms and again invalidated the Louisiana Program as a violation of the Establishment Clause (Mitchell v. Helms, 2000, p. 1).
In an opinion issued by Justice Clarence Thomas, the United States Supreme Court reversed the 5th Circuit Court decision and held the Louisiana program did not violate the Establishment Clause simply because the many of the private schools receiving aid were religious. The opinion stated that:

Under *Agostini*, the Court asks whether the government acted with the purpose of advancing or inhibiting religion and whether the aid has the “effect” of doing so. The specific criteria used to determine an impermissible effect have changed in recent cases, which disclose three primary criteria to guide the determination: (1) whether the aid results in governmental indoctrination, (2) whether the program defines its recipients by reference to religion, and (3) whether the aid creates an excessive entanglement between government and religion. Finally, the same criteria can be reviewed to determine whether a program constitutes endorsement of religion. Respondents neither question the Chapter 2 program’s secular purpose nor contend that it creates an excessive entanglement. Accordingly, the Court need ask only whether Chapter 2, as applied in Jefferson Parish, results in governmental indoctrination or defines its recipients by reference to religion. It is clear that Chapter 2 does not so define aid recipients. Rather, it uses wholly neutral and secular criteria to allocate aid to students enrolled in religious and secular schools alike. As to the indoctrination inquiry, the Chapter 2 program bears the same hallmarks of the program upheld in *Agostini*: Aid is allocated on the basis of neutral, secular criteria; it is supplementary to, and does not supplant, non-federal funds; no Chapter 2 funds reach the coffers of religious schools; the aid is secular; evidence of actual diversion is *de minimis*; and the program includes adequate safeguards. Regardless of whether these factors are constitutional requirements, they are sufficient to find that the program at issue does not have the impermissible effect of advancing religion. For the same reasons, the Chapter 2 program cannot reasonably be viewed as an endorsement of religion. (Mitchell v. Helms, 2000, p. 4)

The lowering of the wall of separation that ended the 20th Century with *Mitchell v. Helms* and *Agostini* would continue into the 21st century. *Zelman*, *Superintendent of Public Instruction of Ohio v. Simmons-Harris*, (2002) arose from an appeal from the 6th Circuit Court. At issue was an Ohio program that awarded
tuition aid for needy students in Cleveland to attend private schools. Eighty two percent of the participating private schools were religious institutions, while 96% of participants in the scholarship program attended religious schools.

The Supreme Court held in a five-four vote that the Cleveland program did not offend the Establishment Clause because the program was enacted for a valid secular purpose. The purpose of the program was to provide educational aid to poor children in a failing public school system. Justice Rehnquist wrote in the majority opinion that the program represented true private choice and was “neutral in all respects towards religion” (Zelman, Superintendent of Public Instruction of Ohio v. Simmons-Harris, 2002, p. 1).

In his dissent Justice Souter wrote that:

If there were an excuse for giving short shrift to the Establishment Clause, it would probably apply here. But there is no excuse. Constitutional limitations are placed on government to preserve constitutional values in hard cases like these. Constitutional lines have to be drawn, and on one side of every one of them is an otherwise sympathetic case that provokes impatience with the Constitution and with the line. But constitutional lines are the price of constitutional government. (Zelman, Superintendent of Public Instruction of Ohio v. Simmons-Harris, 2002, p. 57)

Justice Souter went on to point out the Court had never overruled previous decisions that forbid the transfer of tax money to support any religious program, and that the Ohio program transferred thousands of dollars directly to religious schools (Zelman, Superintendent of Public Instruction of Ohio v. Simmons-Harris, 2002).

A review of the Zelman decision will establish the current status of educational church-state law. Zelman will be analyzed and summarized in Chapter Three of this dissertation. The majority opinion, concurring opinions, and dissenting opinions will each
be addressed in detail in order to give educators a clear picture of what is currently mandated by law.
CHAPTER 3

CURRENT STATUS OF THE LAW CONCERNING SCHOOL VOUCHERS

This chapter will examine *Zelman v. Simmons-Harris* (2002). *Zelman* is the most recent educational church-state case and represents the clearest and most recent statement concerning the current status of the law on school vouchers. In an effort to keep pace with the former Soviet Union during the Cold War, an increased emphasis was placed on the performance of public education in America. This emphasis would culminate with the release of *A Nation at Risk* in 1983. Secretary of Education T.H. Bell commissioned the *Nation at Risk* study to determine the quality of education in America. The results of the study caused Americans to look for ways to improve public education. Schools that performed poorly based on certain success indicators were under a microscope, and one plan for improving them was the advent of school vouchers.

One such school improvement plan was Ohio’s Pilot Project Scholarship Program. This program allows educational choice to families in any Ohio school district under state control due to a federal court order (*Zelman, Superintendent of Public Instruction of Ohio v. Simmons-Harris*, 2002, p. 1). The lone district in Ohio to which the program applied was the Cleveland City School District. Cleveland City Schools were taken over by the state due to poor performance. According to Justice Rehnquist, “only one in ten ninth graders in Cleveland Public Schools could pass a basic proficiency test,” (p. 2) while 66% of Cleveland high school students dropped out or failed out before graduation (p. 2). Only one in four Cleveland City School students who made it to his or her senior year actually
graduated. “Of those students who did graduate, few could read, write, or compute at levels comparable to their counterparts in other cities” (Zelman v. Simmons-Harris, 2002, p. 2). In addition, the school system had failed to meet even one of 18 state standards for minimal performance (p. 2).

The Ohio Pilot Project Scholarship Program began in the 1996-1997 school year and allowed for tuition aid for qualified students to attend public or private schools as well as tutoring for students remaining in public schools (Zelman v. Simmons-Harris, p. 1). Private school tuition was distributed to parents according to financial need and could be used at both secular and religious private schools. Families with incomes below 200% of the poverty line were given priority and were eligible to receive 90% of private school tuition up to $2,250 annually (Zelman v. Simmons Harris, 2002, p. 4). Parents were the sole arbiter of which private school their child attended. Checks were made payable to the parents who then endorsed the checks over to the chosen school (p. 4). The tutorial aid portion of the program provided grants for tutoring to those students that chose to remain in the failing public school system. Parents arranged for registered tutors to assist their children and then submitted the bills to the state for payment. Low-income students were allowed 90% of the amount up to $360 (p. 4). In addition to private schools, adjacent public schools were allowed to participate in the program (p. 1). Cleveland school children also had the option of enrolling in non-religious community schools that were funded under state law at twice the rate of participating private schools. Community schools were run by their own school boards. Magnet schools funded at normal public school rates were another option for qualified Cleveland families. Magnet schools were
operated by the Cleveland City School District but were designed to emphasize a particular subject area, teaching method, or service to students (p. 3).

The Ohio Pilot Scholarship Project required that the total number of tutorial assistance grants equal the number of private school tuition aid scholarships (p. 1). “In the 1999-2000 school year, 82% of the participating private schools had a religious affiliation, none of the adjacent public schools participated, and 96% of the students participating in the scholarship program were enrolled in religiously affiliated schools” (p. 1). Sixty percent of the students were from families at or below the poverty line (p. 1).

In 1996, respondents, a group of Ohio taxpayers, challenged the program in state court on both state grounds and as a violation of the Establishment Clause of the First Amendment. The Ohio Supreme Court rejected the Establishment Clause argument, but held that certain aspects of the program violated certain procedural aspects of the Ohio State Constitution (Simmons-Harris v. Goff, 1999). In reaction to the Ohio Supreme Court ruling, the state legislature immediately corrected procedural problems that violated the state constitution while leaving the basic structure of the program intact. In July of 1999, respondents filed action in United States District Court asserting the program was an Establishment Clause violation. The Federal District Court granted the respondents summary judgment barring further implementation of the program. In December of 2000, a divided panel of the Sixth Circuit Court of appeals affirmed the lower court ruling stating the Ohio program “had the primary effect of advancing religion in violation of the Establishment Clause” (Zelman v. Simmons-Harris, 2002, p. 6). The United States Supreme Court granted certiorari on September 25, 2001.

On February 20, 2002 oral arguments were heard before the United States Supreme Court. Seven appearances during oral arguments were made on behalf of petitioners, including Solicitor General Theodore Olson of the United States Department of Justice. Petitioner’s arguments were based on the principle that the financial aid was neutral and that parents were not limited to religious schools if they opted to accept the tuition vouchers. If a parent chose to accept vouchers and send a child to a religious school, a nondiscrimination clause in the program prevented religious schools from refusing admission based on religious or non-religious beliefs. Parents of children in failing schools also had the choice of accepting tutoring grants that allowed the student to remain in their original school, magnet schools, or public community schools outside the failing school district (Tr. Of Oral Arg. P. 10).

During oral arguments the following exchange began with a question from Chief Justice Renquist to petitioner attorney David R. Young. Justice Rehnquist began:

I will assume no discrimination, and I will assume it is a fine program, but imagine if you came from Europe or Africa, or a different place, and said, what do they do in the United States by way of educating their children, and you are told, well, $60 billion a year, $40 billion, or some very large amount of money is being spent by the government to give children K through 12 what is basically a religiously oriented education taught by a parochial school. Would you then say, in the United States of America, like France or England, the government of the United States endorses a religious education for young children by putting money up, massive amounts? Now I am putting it that way to get your response, and that is the problem that bothers me most about the word, establishment. (Tr. Of Oral Arg. Pp. 22-23)

Mr. Young answered:

There is no governmental endorsement of religion in this program, and there are several reasons why there is not. The first reason,
Your Honor, would be the amount of money that is spent, first of all, on a public school education, which is approximately $8,000, the amount of money paid for a community school secular education, $4,500, and the maximum amount provided to a family that selects a nonpublic school, $2,250. So if the first thing you look at is the amount of money that is spent depending on the choice made by the child, and the preference, in that instance there is clearly a preference for the secular schools. Secondly, Your Honor, if you look at the history, as well as the context of this particular program, this program was adopted because of one of the most serious educational, public school crises in the United States, and I think anyone trying to determine what was the government doing, was it endorsing religion, no. The government was trying to permit low income educationally disadvantaged children who were trapped in a failing system to exercise alternate choice...The state does not direct a dollar to a religiously sponsored school. (Tr. Of Oral Arg. Pp. 23-24).

Counsel for respondents Simmons-Harris argued that the Cleveland voucher program would transfer public funds into parochial schools, thus violating the Establishment Clause applied to Ohio through the Fourteenth Amendment. Respondents argued that although other choices were available to students in the failing school districts, the most appealing choice to parents were parochial schools. Of participating students in 1999 and 2000, 82% of the available schools were religious and 96% of students accepting vouchers attended religious private schools (Tr. Of Oral Arg. P. 42). In 2002 the percentage of voucher program participants that attended parochial private schools had risen to 99.4% (Tr. Of Oral Arg. P. 42). Counsel for the respondents Robert H. Chanin argued that:

Under the Cleveland voucher program, millions of dollars of unrestricted public funds are transferred each year from the State Treasury into the general coffers of sectarian private schools and the money is being used by those schools to provide an educational program in which the sectarian and the secular are interwoven. It is a given that, if those funds are properly attributable to the State, the program violates the Establishment Clause. It is a mathematical certainty that almost all of the students will end up going to
religious schools that provide a religious education. (Tr. Of Oral Arg. P. 37)

In response to respondent arguments made by Robert Chanin, Chief Justice Rehnquist pointed out that:

The only up and running schools that happen to be in the inner city are religious schools, educating the poor people in the city at relatively low rates. The State of Ohio adopts a program which allows suburban schools to accept these inner city kids, but the suburban school say, oh, heck no, we do not want the inner city kids coming into our suburban schools. How does one get from here to there? The only schools that happen to be there right now are religious schools. This does not mean that the program will always be that way. The experience in Milwaukee was that as the program continued, there were more and more nonreligious private schools, but right now, to start off with, of course they are mostly religious, and that is going to destroy the entire program? (Tr. Of Oral Arg. P. 58)


Four months after hearing oral arguments the Supreme Court reached a decision in *Zelman v. Simmons-Harris*. Chief Justice Rehnquist delivered the opinion of the Court which stated that:

The State of Ohio has established a pilot program designed to provide educational choices to families with children who reside in the Cleveland City School District. The question presented is whether this program offends the Establishment Clause of the United States Constitution. We hold that it does not. (*Zelman v. Simmons-Harris*, 2002, p. 1)

Chief Justice Rehnquist pointed out in the *Zelman* opinion that Cleveland City Schools faced an unprecedented crisis and were under a federal court order to be managed by the state superintendent (p. 2). Justice Rehnquist went on to state that:

Our decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and
independent choices of private individuals. While our jurisprudence with respect to the constitutionality of direct aid programs has “changed significantly” over the past two decades, our jurisprudence with respect to true private choice programs has remained consistent and unbroken. Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges. (Zelman v. Simmons-Harris, 2002, pp. 6-7)

In *Mueller* the Supreme Court had rejected an Establishment Clause challenge to a Minnesota program that authorized tax deductions for educational expenses that included private school tuition (Zelman v. Simmons-Harris, 2002, pp. 7-8). It was held that even though 96% of the beneficiaries of the tax deduction in *Mueller* attended religious schools, the benefit was extended to all parents of school age children (p. 8). Public funds flowed to religious institutions only due to the private choice of numerous individual parents (p. 8).

In *Witters* the same reasoning had been used to reject an Establishment Clause challenge to a vocational scholarship program that provided funds for a blind student to attend a religious institution to become a pastor. The vocational program as a whole only provided funds to religious schools as a result of independent private choices of aid recipients (Zelman v. Simmons-Harris, 2002, p. 9).

In *Zobrest*, both the *Mueller* and *Witters* cases provided the foundation to reject an Establishment Clause challenge to a federal program that permitted sign language interpreters to assist deaf children enrolled in religious schools (Zelman v. Simmons-Harris, 2002, p. 8). In this case the Court ruled the “program distributes benefits neutrally to any child qualifying as ‘disabled’ and the program’s primary beneficiaries were disabled children, not sectarian schools” (Zelman v. Simmons-Harris, 2002, p. 8). The
Court also held that the interpreter was in a religious school only due to the private choice of individual parents (p. 8).

*Mueller, Witters, and Zobrest* all illustrate a trend in United States Supreme Court opinions. The Court has held repeatedly that when aid is neutral in respect to religion, and provided to a broad class of citizens who by private choice elect to direct aid to religious schools, the aid does not violate the Establishment Clause (*Zelman v. Simmons-Harris*, 2002). “The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits” (*Zelman v. Simmons-Harris*, 2002, p. 10).

In comparing *Zelman* to *Mueller, Witters, and Zobrest*, the Supreme Court opinion listed the following reasons why the Ohio voucher program was ruled to be a program of true private choice and not in violation of the Establishment Clause. The opinion states that:

The Ohio program is neutral in all respects towards religion. It is part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion. The program permits the participation of all schools within the district, religious or nonreligious. Adjacent public schools may also participate and have a financial incentive to do so. Program benefits are available to participating families on neutral terms, with no reference to religion. The only preference stated anywhere in the program is a preference for low-income families, who receive greater assistance and are given priority for admission at participating schools. There are no ‘financial incentives’ that ‘skew’ the program toward religious schools. The program in fact creates financial disincentives for religious schools, with private schools receiving only half the government assistance given to community schools and one third the assistance given to magnet schools. Adjacent public schools, should any choose to accept
program students, are also eligible to receive two to three times the state funding of a private religious school. Families also have a financial disincentive to choose a private religious school over other schools. Parents that choose to participate in the scholarship program and then to enroll their children in a private school (religious or nonreligious) must copay a portion of the school’s tuition. Although such features of the program are not necessary to its constitutionality, they clearly dispel the claim that the program ‘creates financial incentives for parents to choose a sectarian school.’ (Zelman v. Simmons-Harris, 2002, pp. 11-12)

Zelman respondents suggested the Ohio program created a public perception the State endorsed religious practices and beliefs (Zelman v. Simmons-Harris, 2002, p. 13). In response Chief Justice Rehnquist wrote “any objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general” (Zelman v. Simmons-Harris, 2002, p. 13). The opinion goes on to mention that because 46 of the 56 private schools participating in the program were religious does not condemn the program as a violation of the Establishment Clause (p. 14).

In a dissenting opinion, “Justice Souter speculates that because more private schools currently participate in the program, the program itself must somehow discourage the participation of private nonreligious schools” (Zelman v. Simmons-Harris, 2002, p. 14). In the majority opinion Chief Justice Rehnquist disagreed stating that:

Cleveland’s preponderance of religiously affiliated private schools certainly did not arise as a result of the program; it is a phenomenon common to many American cities. It is true that 82% of Cleveland’s participating private schools are religious schools, but it is also true that 81% of private schools in Ohio are religious schools. To attribute constitutional significance to this figure, moreover would lead to the absurd result that a neutral school-choice program might be permissible in some parts of Ohio, such as Columbus, where a lower percentage of private schools are
religious schools, but not in inner-city Cleveland, where Ohio has deemed such programs are sorely needed, but where the preponderance of religious schools happens to be greater. (Zelman v. Simmons-Harris, 2002, pp. 14-16)

In response to claims by respondents and Justice Souter that there was constitutional significance to the fact that 96% of scholarship recipients enrolled in religious schools, the opinion recalled that type of argument had already been “flatly rejected in *Mueller*” (Zelman v. Simmons-Harris, 2002, p. 16). In *Mueller* the Supreme Court had “found it irrelevant that 96% of parents taking deductions for tuition expenses paid tuition at religious schools” (Zelman v. Simmons-Harris, 2002, p. 16). In addition, Justice Rehnquist wrote that:

> The 96% figure upon which the respondents and Justice Souter rely discounts entirely the more than 1,900 Cleveland children enrolled in alternative community schools, the more than 13,000 children enrolled in alternative magnet schools, and the more than 1,400 children enrolled in traditional public schools with tutorial assistance. Including some or all of these children in the denominator of children enrolled in nontraditional schools during the 1999-2000 school year drops the percentage enrolled in religious schools from 96% to under 20%. (Zelman v. Simmons-Harris, 2002, p. 17)

In her concurring opinion Justice O’Connor elaborated on the amount of public funds that were reaching religious schools in comparison with how much money reached alternative public schools. She wrote “the share of public resources that reach religious schools is not, however, as significant as respondents suggest” (Zelman v. Simmons-Harris, 2002, p. 24). Justice O’Connor pointed out that for the 1999-2000 school year only $8.2 million in public funds could have flowed to religious schools (p. 25). That same year the state of Ohio spent $9.4 million on students in community schools and $114.8 million on students in Cleveland magnet schools. Justice O’Connor goes on to
mention that “although $8.2 million is no small sum, it pales in comparison to the amount
of funds that federal, state, and local governments already provide religious institutions”
(p. 25) in the form of tax exemptions and tax breaks. Justice O’Connor cites the fact that
60% of claimed tax deductions for charitable contributions go to religious institutions
each year. These deductions reduce the Federal tax digest by nearly $15 billion annually.
Justice O’Connor wrote “even the relatively minor exemptions lower federal tax receipts
by substantial amounts” (p. 27). “The parsonage exemption, for example, lowers
revenues by about $500 million” (Zelman v. Simmons-Harris, 2002, p. 27). Justice
O’Connor further minimized the significance of the $8.2 million in Cleveland by citing
Medicare and Medicaid statistics that pointed over $45 billion flowed to religious
hospitals in 1998 (p. 28).

Justice O’Connor’s concurring opinion refuted additional respondent claims the
Cleveland voucher system violated the Establishment Clause. O’Connor wrote that:

I do not agree that the nonreligious schools have failed to provide
Cleveland parents reasonable alternatives to religious schools in the
voucher program. For nonreligious schools to qualify as genuine
options for parents they need not be superior to religious schools in
every aspect. They need only be adequate substitutes for religious
schools in the eyes of the parents. The District Court record
demonstrates that nonreligious schools were able to compete
effectively with Catholic and other religious schools in the
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Respondents claimed that students were forced into private religious schools due
to the poor performance of the nonreligious private schools (Zelman v. Simmons-Harris,
2002, p. 36). Justice O’Connor questioned the validity of using only academic
performance as a measure of a school’s success. In her concurring opinion Justice
O’Connor stated that:
A Harvard University study found that the Hope Academy (nonreligious) schools attracted the ‘poorest and most educationally disadvantaged students.’ Moreover, Justice Souter’s evaluation of the Hope Academy school assumes that the only relevant measure of school quality is academic performance. It is reasonable to suppose, however, that parents in the inner city also choose schools that provide discipline and a safe environment for their children. On these dimensions some of the schools that Justice Souter derides have performed quite ably. (Zelman v. Simmons-Harris, 2002, p. 36)

Justice Clarence Thomas began his concurring opinion with the following quote from 19th century abolitionist Frederick Douglass: “Education means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free” (Zelman v. Simmons-Harris, 2002, p. 39). Justice Thomas then quoted from Brown v. Board of Education that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education” (Zelman v. Simmons-Harris, 2002, p. 40). Justice Thomas then began an examination of how the First Amendment Establishment Clause was applied to the states through the Fourteenth Amendment. Justice Thomas wrote the Federal Government is more bound by the First Amendment than the individual 50 States (p. 42). Justice Thomas wrote in his opinion that:

Thus, while the Federal Government may make no law respecting an establishment of religion, the States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest. By considering the particular religious liberty right alleged to be invaded by a State, federal courts can strike a proper balance between the demands of the Fourteenth Amendment on the one hand and the federalism prerogatives of States on the other. Whatever the textual and historical merits of incorporating the Establishment Clause, I can accept that the Fourteenth Amendment protects religious liberty rights. But I cannot accept its use to oppose neutral programs of school choice through the incorporation of the Establishment Clause. There would be a tragic irony in
converting the Fourteenth Amendments guarantee of individual liberty into a prohibition on the exercise of educational choice. (Zelman v. Simmons-Harris, 2002, pp. 42-43)

Justice Thomas contradicted Justice O’Connor’s statement that schools should be measured on more than academic performance. Justice Thomas wrote that students in Cleveland’s Catholic schools scored significantly higher on standardized tests than public school counterparts (Zelman v. Simmons Harris, 2002, p. 44). Justice Thomas further wrote that 95% of Cleveland eighth graders at Catholic schools passed the reading proficiency test while only 57% of public school eighth graders passed (Zelman v. Simmons-Harris, 2002, pp. 44-45). Math statistics were even more skewed, with 75% of Catholic school students passing the math proficiency test while only 22% of public school students passed (p. 45).

Justice Thomas also struck a blow against higher education racial preferences in his opinion when he argued that the Fourteenth Amendment should not be used as an obstacle to educational reform. Justice Thomas wrote that:

Ten States have enacted some form of publicly funded private school choice as one means of raising the quality of education provided to underprivileged urban children. These programs address the root of the problem with failing urban public schools that disproportionately affect minority students. Society’s other solution to these educational failures is often to provide racial preferences in higher education. Such preferences, however, run afoul of the Fourteenth Amendment’s prohibition against distinctions based on race. By contrast, school choice programs that involve religious schools appear unconstitutional only to those who would twist the Fourteenth Amendment against itself by expansively incorporating the Establishment Clause. Converting the Fourteenth Amendment from a guarantee of opportunity to an obstacle against education reform distorts our constitutional values and disserves those in the greatest need. (Zelman v. Simmons-Harris, 2002, p. 47)
In his dissenting opinion, Justice John Stevens argued that his colleagues should have ignored factual matters when analyzing “a law that authorizes the use of public funds to pay for the indoctrination of thousands of grammar school children in particular religious faiths” (Zelman v. Simmons-Harris, 2002, p. 49). First, Justice Stevens stated that the severity of educational crisis that faced the Cleveland City School System should not have played a role in deciding the constitutionality of the voucher program (pp. 49-50). Justice Stevens wrote that:

In the 1999-2000 school year, that program provided relief to less than five percent of the students enrolled in the district’s schools. The solution to the disastrous conditions that prevented over 90 percent of the student body from meeting basic proficiency standards obviously required massive improvements unrelated to the voucher program. Of course, the emergency may have given some families a powerful motivation to leave the public school system and accept religious indoctrination that they would otherwise have avoided, but that is not a valid reason for upholding the program. (Zelman v. Simmons-Harris, 2002, pp. 49-50)

Secondly, Justice Stevens disputed the fact that a wide range of choices within the public school system should legalize state funding of tuition to religious schools (Zelman v. Simmons-Harris, 2002, p. 50). Justice Stevens wrote that “the fact that the vast majority of the voucher recipients who have entirely rejected public education receive religious indoctrination at state expense does, however, support the claim that the law is one ‘respecting an establishment of religion’” (Zelman v. Simmons-Harris, 2002, p. 50).

Thirdly, Justice Stevens stated that whether or not the program was truly voluntary had no bearing on the constitutionality of the “government’s choice to pay for religious indoctrination” (p. 51). He wrote “the Court seems to have decided that the mere fact that a family that cannot afford a private education wants its children educated in a parochial school is a sufficient justification for this use of public funds” (p. 51).
In closing his dissent Justice Stevens wrote that:

I am convinced that the Court’s decision is profoundly misguided. Admittedly, in reaching that conclusion I have been influenced by my understanding of the impact of religious strife on the decisions of our forbears to migrate to this continent, and on the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another. Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy. (Zelman v. Simmons-Harris, 2002, p. 51)

Justice Souter filed a strong dissenting opinion in Zelman in which Justices Stevens, Ginsburg, and Breyer joined. In the opening paragraph Justice Souter wrote that:

The Court’s majority holds that the Establishment Clause is no bar to Ohio’s payment of tuition at private religious elementary and middle schools under a scheme that systematically provides tax money to support the schools’ religious missions. The occasion for the legislation thus upheld is the condition of public education in the city of Cleveland. The record indicates that the schools are failing to serve their objective, and the vouchers in issue here are said to be needed to provide adequate alternatives to them. If there were an excuse for giving short shrift to the Establishment Clause, it would probably apply here. But there is no excuse. Constitutional limitations are placed on government to preserve constitutional values in hard cases, like these. Constitutional lines have to be drawn, and on one side of every one of them is an otherwise sympathetic case that provokes impatience with the Constitution and with the line. But constitutional lines are the price of constitutional government. (Zelman v. Simmons-Harris, 2002, pp. 53-54)

Justice Souter wrote that Establishment Clause applicability to public funding of religious institutions had already been decided in Everson v. Board of Education of Ewing. Justice Souter quoted from Everson “no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion” (Zelman v. Simmons-Harris, 2002, p. 54). Justice Souter stated the Supreme Court had “never in so many words repudiated this
statement, let alone, in so many words, overruled *Everson*” (p. 54). Justice Souter argued that:

Public tax money will pay at a systemic level for teaching the covenant with Israel and Mosaic law in Jewish schools, the primacy of the Apostle Peter and the Papacy in Catholic schools, the truth of reformed Christianity in Protestant schools, and the revelation to the Prophet in Muslim schools, to speak only of major religious groupings in the Republic. How can a Court consistently leave *Everson* on the books and approve the Ohio vouchers? The answer is that it cannot. It is only by ignoring *Everson* that the majority can claim to rest on traditional law in its invocation of neutral aid provisions and private choice to sanction the Ohio law. It is, moreover, only by ignoring the meaning of neutrality and private choice themselves that the majority can even pretend to rest today’s decision on those criteria. (*Zelman* v. *Simmons-Harris*, 2002, p. 55)

Justice Souter then examined the history of Supreme Court Establishment Clause doctrine on government aid to religious education. He divides his argument into three periods. Souter wrote that the period from 1947 to 1968 was a period of unquestioned prohibition of aid to religion through school benefits (*Zelman* v. *Simmons-Harris*, 2002, p. 56). Beginning with the “modern development of Establishment Clause doctrine” (p. 56) Justice Souter wrote that although the Court had ruled in *Everson* public bus transportation to religious schools was legal, “no justice disagreed with the basic doctrinal principle already quoted that ‘no tax in any amount… can be levied to support any religious activities or institutions, whatever form they may adopt to teach religion’” (*Zelman* v. *Simmons-Harris*, 2002, p. 56). Souter argued that *Everson* was upheld under the Free Exercise Clause “which was thought to entitle them (parochial school students) to free public transportation when offered as a ‘general government service’ to all schoolchildren” (p. 57).
Justice Souter then examined the decision from 20 years later in *Board of Education v. Allen, 1968*, which upheld a New York law authorizing local school boards to loan secular textbooks to children attending religious schools. Justice Souter pointed out the Court veered from the theory of allowing the government to provide general services as in *Everson* and wrote that:

> The Court relied instead on the theory that the in-kind aid could only be used for secular educational purposes, and found it relevant that “no funds or books are furnished [directly] to parochial schools, and the financial benefit is to parents and children, not to schools. (Zelman v. Simmons-Harris, 2002, p. 58)

Another point of contention Souter pointed out was the reality recognized by the Court in *Board of Education v. Allen* that “religious schools pursue two goals, religious instruction and secular education” (p. 59) and that if state aid could be restricted to simply the secular purpose it would be permissible. Justice Souter wrote conflicts arise when a program is persistently monitored to insure secular purpose and no establishment of religion, thereby creating excessive entanglement of church-state (p. 59) as in *Lemon v. Kurtzman*. The Supreme Court’s focus in cases since *Board of Education v. Allen* “was on the principle of divertibility” (p. 59). The Court’s philosophy focused on being able to discern whether seemingly secular aid was being possibly diverted to religious uses (p. 59). Justice Souter wrote “the greater the risk of diversion to religion (and the monitoring necessary to avoid it), the less legitimate the aid scheme was under the no-aid principle” (Zelman v. Simmons-Harris, 2002, p. 59). According to Justice Souter this “principle of nondivertibility was enforced strictly, with its violation being presumed in most cases, even when state aid seemed secular on its face” (p. 60).
Justice Souter pointed out the Court’s differing views by comparing *Levitt v. Committee for Public Education and Religious Liberty* which struck down a state program reimbursing private schools for administrative costs, with *Wolman v. Walter* that upheld a program similar to *Levitt* (p. 60). Justice Souter then contrasted *Meek v. Pittenger* with *Wolman v. Walter*. *Meek* had disallowed public funding for services in private schools that included guidance counseling, and speech and hearing services while *Wolman* permitted state aid for diagnostic speech, hearing, and psychological testing services (*Zelman v. Simmons-Harris*, 2002, p. 60). Justice Souter wrote that in *Committee for Public Education v. Nyquist* the Court had struck down a New York program of tuition grants and tax deductions for private school attendance dismissing a “statistical guarantee” of neutrality (*Zelman v. Simmons-Harris*, 2002, p. 60). Justice Souter stated that in *Nyquist* the Court’s “focus remained on what the public money bought when it reached the end point of its disbursement” (p. 61).

Justice Souter revealed that an examination of *Mueller v. Allen, 1983* showed the Court began to move “from realism to formalism” (*Zelman v. Simmons-Harris*, 2002, p. 61). Justice Souter claimed the aid in *Mueller* was indistinguishable from that in *Nyquist* but the Supreme Court upheld Minnesota tax deductions for private schools in *Mueller* “emphasizing their neutral availability for religious and secular educational expenses and the role of private choice in taking them” (pp. 61-62). Justice Souter claimed the majority in *Zelman* has blurred the line on true choice and neutrality in public aid to religious schools when he wrote that:

> The majority has confused choice in spending scholarships with choice from the entire menu of possible educational placements, most of them open to anyone willing to attend a public school. I say confused because the majority’s new use of the choice criterion,
which it frames negatively as whether Ohio is coercing parents into sending their children to religious schools, ignores the reason for having a private choice enquiry in the first place. Cases since *Mueller* have found private choice relevant under a rule that aid to religious schools can be permissible so long as it first passes through the hands of students or parents. The majority’s view that all educational choices are comparable for purposes of choice thus ignores the whole point of the choice test: it is a criterion for deciding whether indirect aid to a religious school is legitimate because it passes through private hands that can spend or use the aid in a secular school. The question is whether the private hand is genuinely free to send the money in either a secular direction or a religious one. The majority now has transformed this question about private choice in channeling aid into a question about selecting from examples of state spending (on education) including direct spending on magnet and community public schools that goes through no private hands and could never reach a religious school under any circumstance. When the choice test is transformed from where to spend the money to where to go to school, it is cut loose from its very purpose. (Zelman v. Simmons-Harris, 2002, pp. 66-67)

Justice Souter also expressed concern that 96.6% of all voucher recipients used their voucher at a religious private school. Souter claimed that “something is influencing choices in a way that aims the money in a religious direction” (Zelman v. Simmons-Harris, 2002, p. 71). He wrote in his dissent that:

Even if all existing nonreligious private schools in Cleveland were willing to accept large numbers of voucher students, only a few more than the 129 currently enrolled in such schools would be able to attend, as the total enrollment at all nonreligious private schools in Cleveland for kindergarten through eighth grade is only 510 children, and there is no indication that these schools have many open seats. Second, the $2,500 cap that the program places on tuition for participating low-income pupils has the effect of curtailing the participation of nonreligious schools: nonreligious schools with higher tuition (about $4,000) stated that they could afford to accommodate just a few voucher students. By comparison, the average tuition at participating Catholic schools in Cleveland in 1999-2000 was $1,592, almost $1,000 below the cap… There is, in any case, no way to interpret the 96.6% of current voucher money going to religious schools as reflecting a free and genuine choice by the families that apply for vouchers. The
96.6% reflects, instead, the fact that too few nonreligious school desks are available and few but religious schools can afford to accept more than a handful of voucher students. And contrary to the majority’s assertion, public schools in adjacent districts hardly have a financial incentive to participate in the Ohio voucher program, and none has. (Zelman v. Simmons-Harris, 2002, pp. 73-75)

The final argument against vouchers presented by Justice Souter in his dissenting opinion was the danger they posed to the religious independence of church schools.

Justice Souter wrote that “the favored religion may be compromised as political figures reshape the religion’s beliefs for their own purposes; it may be reformed as government largesse brings government regulation” (p. 81). The opinion stated that:

The risk is already being realized. In Ohio, for example, a condition of receiving government money under the program is that participating religious schools may not discriminate on the basis of religion, which means the school may not give admission preferences to children who are members of the patron faith; children of a parish are generally consigned to the same admission lotteries as non-believers. This indeed was the exact object of a 1999 amendment repealing the portion of a predecessor statute that had allowed an admission preference for children whose parents are affiliated with any organization that provides financial support to the school, at the discretion of the school. Nor is the States religious antidiscrimination restriction limited to student admission policies: by its terms, a participating religious school may well be forbidden to choose a member of its own clergy to serve as teacher or principal over a layperson of a different religion claiming equal qualification for the job. (Zelman v. Simmons-Harris, 2002, pp. 81-82).

Justice Souter points out that “money has barely begun to flow” (p. 83) and prior examples of aid that have been ruled constitutional were not significant enough to alter the basic fiscal structures of religious schools as vouchers can. Justice Souter wrote that in Milwaukee where a similar voucher program is in place, an increase “in the value of educational vouchers has induced the creation of some 23 new private schools” (Zelman v. Simmons-Harris, 2002, pp. 84-85). Souter claimed these new schools have “pegged
their financial prospects to the government from the start” (p. 84). Souter’s opinion warns of the danger that when government aid goes up, so does reliance on that aid, while independence declines (p. 84).

In closing Justice Souter listed possible issues many religions may have with the teaching of different religious views. For instance, Souter questioned whether American Muslims would acquiesce in paying for the religious Zionism taught in many Jewish schools that combines a nationalistic sentiment in support of Israel with a deeply religious sentiment (p. 85). “Not all taxpaying Protestant citizens, for example, will be content to underwrite the teachings of the Roman Catholic Church condemning the death penalty” (p. 85), nor would many Roman Catholics wish to fund Southern Baptist Convention teachings that a wife has an obligation of obedience to her husband. Souter concluded with the following passage:

Views like these, and innumerable others, have been safe in the sectarian pulpits and classrooms of this Nation not only because the Free Exercise Clause protects them directly, but because the ban on supporting religious establishment has protected free exercise, by keeping it relatively private. With the arrival of vouchers in religious schools, that privacy will go, and along with it will go confidence that religious disagreement will stay moderate… True, the majority has not approved vouchers for religious schools alone, or aid earmarked for religious instruction. But no scheme so clumsy will ever get before us, and in the cases that we may see, like these, the Establishment Clause is largely silenced. I do not have the option to leave it silent, and I hope that a future Court will reconsider today’s dramatic departure from basic Establishment Clause principle. (Zelman v. Simmons-Harris, 2002, pp. 85-86)

Justice Breyer filed a dissenting opinion in Zelman with whom Justice Souter and Justice Stevens joined. Justice Breyer acknowledged the Ohio voucher program to be well intentioned but expressed concern that religious based social conflict could result. Justice Breyer wrote that:
The Courts 20th century Establishment Clause cases both those limiting the practice of religion in public schools and those limiting the public funding of private religious education focused directly upon social conflict, potentially created when government becomes involved in religious education. In Engel v. Vitale, the Court held that the Establishment Clause forbids prayer in public elementary and secondary schools. It did so in part because it recognized the anguish, hardship and bitter strife that could come when zealous religious groups struggle with one another to obtain the Governments stamp of approval. And it added: The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. (Zelman v. Simmons-Harris, 2002. pp. 88-89)

Justice Breyer cited examples from Lee v. Weisman, School District of Abington Township v. Schempp, Committee for Public Education & Religious Liberty v. Nyquist, and Lemon v. Kurtzman where the Court had mentioned the potential for religious divisiveness and harm to the political process that could result from government entanglement or establishment of religion (p. 89). Justice Breyer quoted “Political debate and division 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’s religious clauses were intended to protect” (pp. 89-90).

Justice Breyer then wrote on the history of church-state separation in schools, and admitted that in America’s infancy, public schools were Protestant in nature. Public school “students recited Protestant prayers, read the King James version of the Bible, and learned Protestant religious ideals” (Zelman v. Simmons-Harris, 2002, p. 90). Justice Breyer admits these practices may have discriminated against members of minority religions, but reasoned that since the minority was so small, there was little chance for religious or social conflict (p. 90). Justice Breyer went on to write that immigration and
growth drastically altered the social fabric of America. Religious groups such as Catholics, Jews, and Muslims, once a tiny minority, make up a significant portion of the American population. Diversity present in American society by the 20th Century did not permit the Court to allow equal access in schools to all religions, so the Court relied instead on separation to stay within First Amendment boundaries (pp. 92-93). Justice Breyer’s dissent states that:

As religiously diverse as America had become when the Court decided its major 20th century Establishment Clause cases, we are exponentially more diverse today. America boasts more than 55 different religious groups and subgroups with a significant number of members. Major religions include, among others, Protestants, Catholics, Jews, Muslims, Buddhists, Hindus, and Sikhs. And several of these major religions contain different subsidiary sects with different religious beliefs. Newer Christian immigrant groups are expressing their Christianity in languages, customs, and independent churches that are barely recognizable, and often controversial, for European-ancestry Catholics and Protestants. School voucher programs finance the religious education of the young. And, if widely adopted, they may well provide billions of dollars that will do so. Why will different religions not become concerned about, and seek to influence, the criteria used to channel this money to religious schools? Why will they not want to examine the implementation of the programs that provide this money to determine, for example, whether implementation has biased a program toward or against particular sects, or whether recipient religious schools are adequately fulfilling a program’s criteria? If so, just how is the State to resolve the resulting controversies without provoking legitimate fears of the kinds of religious favoritism that, in so religiously diverse a Nation, threaten social dissension? How are state officials to adjudicate claims that one religion or another is advocating, for example, civil disobedience in response to unjust laws, the use of illegal drugs in a religious ceremony, or resort to force to call attention to what it views as an immoral social practice? What kind of public hearing will there be in response to claims that one religion or another is continuing to teach a view of history that casts members of other religions in the worst possible light? How will the public react to government funding for schools that take controversial religious positions on topics that are of current popular interest say, the conflict in the Middle East or the war on terrorism? Yet any major funding
program for primary religious education will require criteria. And the selection of those criteria, as well as their application, inevitably pose problems that are divisive. Efforts to respond to these problems not only will seriously entangle church and state, but also will promote division among religious groups, as one group or another fears (often legitimately) that it will receive unfair treatment at the hands of the government. (Zelman v. Simmons-Harris, 2002, pp. 93-95)

In closing Justice Breyer refuted the majority opinion that free parental choice to send children to religious schools legalized the Ohio program. He wrote that:

I do not believe that the parental choice aspect of the voucher program sufficiently offsets the concerns I have mentioned. Parental choice cannot help the taxpayer who does not want to finance the religious education of children. It will not always help the parent who may see little real choice between inadequate nonsectarian public education and adequate education at a school whose religious teachings are contrary to his own. It will not satisfy religious minorities unable to participate because they are too few in number to support the creation of their own private schools. It will not satisfy groups whose religious beliefs preclude them from participating in a government-sponsored program, and who may well feel ignored as government funds primarily support the education of children in the doctrines of the dominant religions. And it does little to ameliorate the entanglement problems or the related problems of social division that Part II, supra, describes. Consequently, the fact that the parent may choose which school can cash the governments voucher check does not alleviate the Establishment Clause concerns associated with voucher programs. (Zelman v. Simmons-Harris, 2002, pp. 98-99)

The latest Supreme Court ruling in Zelman v. Simmons-Harris, 2002 is the current status of educational church-state law in the United States. In Zelman, the Supreme Court held it is legal for a state government to provide financial aid to parents for use in private schools, even if the school was religious. The Court ruled that in order for monetary aid programs that aid religious schools to fall within Establishment Clause guidelines, funds must arrive at the religious school at the behest of the parents, not the government. Some public educators think the ruling
will provide a financial windfall to the private school industry while hurting public school systems that may already be struggling.

Although the Court ruled in Zelman that vouchers that indirectly aid religious schools are legal in the state of Ohio, the Court did not issue a blanket ruling that all school vouchers are legal. There are still many obstacles to school vouchers not limited to 37 state constitutions that have language strictly prohibiting any voucher type program. Since 1999, voucher programs that provided aid to religious schools have been defeated in Maine, Vermont, and Pennsylvania. In addition the First Circuit Court of Appeals effectively banned vouchers in Maine, New Hampshire, Massachusetts, Rhode Island, and Puerto Rico (Simpson, 1999). A state-wide voucher program that has been up and running in Florida since 1999 is also faltering.

From August to November of 2002, 25% of voucher recipients in Miami-Dade County have returned to public schools (Grech, 2002). Grech wrote the following about one voucher recipient in Florida:

Sheila Evans returned her son, James, to public school after trying out Heritage Schools of Florida, a first-year Christian school that places students on the basis of ability, not age. James, 11, was a fifth-grader last year at Floral Heights, one of four double-F elementaries in Miami-Dade. “They teach a lot about the Bible, but you can’t get a job based on the Bible,” Evans said. “You need knowledge.” (Grech, 2002)

Escambia County Florida also saw 25% of its voucher recipients return to failing public schools. An Escambia County school spokesman speculated a loss of free lunches and free transportation combined with required parental involvement did not appeal to lower socioeconomic groups as a whole (Grech, 2002). Florida also runs a “corporate scholarship program that allows low-income students to attend private
schools paid for by donating companies. The companies that sponsor students are allowed a dollar-for-dollar tax write off for the donation. The corporate scholarship program has experienced a much lower rate of return to public schools when compared to the Florida voucher program.
CHAPTER 4

FINDINGS AND CONCLUSIONS

Findings

Chapter Four provides a summary of this study’s findings and conclusions. After a thorough review of historical church-state issues form biblical times to the present, and detailed analysis of relevant Supreme Court cases, this study found that:

1. In the latter part of the 19th Century the U.S. Supreme Court began to remove official endorsement of religion from the public school environment [Board of Education of Cincinatti v. Minor (1878), Reynolds v. United States (1878)].

2. The U.S. Supreme Court protected private schools in America, including private religious school, from legislation designed to hinder their operation [Pierce v. Society of Sisters (1925)].

3. The U.S. Supreme Court held that government funding for textbooks and instructional materials for religious school use is legal if materials are used for a secular purpose [Cochran v. Louisiana Board of Education (1930), Board of Education v. Allen (1968), Meek v. Pittenger (1975), Mueller v. Allen (1983)].

4. The U.S. Supreme Court held that students cannot be forced to salute or pledge allegiance to the American flag if the act of doing so violates sincere religious
beliefs [Minersville School District v. Gobitis (1940), West Virginia Board of Education v. Barnette (1943)].

5. The U.S. Supreme Court held that public funds can be used to pay for transportation to private religious schools [Everson v. Board of Education, 1947]].

6. The U.S. Supreme Court held that religious instruction cannot take place in a public school building during the normal school day, but students can be released for off campus religious instruction [McCollum v. Board of Education (1948), Zorach v. Clauson (1952), Lemon v. Kurtzman (1973), Grand Rapids School District v. Ball (1985)].

7. The U.S. Supreme Court held that public funds can be used to pay salaries of public school teachers working in religious private schools as well as publicly provided special services to qualifying religious private school students [Aguilar v. Felton (1985), Agostini v. Felton (1997), Zobrest v. Catalina Hills School District (1993), Witters v. Washington Department of the Services for the Blind (1986)].

8. The U.S. Supreme Court held that school sponsored prayer and Bible readings are illegal in public schools [Engel v. Vitale (1962), Abington v. Schempp (1963), Lee v. Weisman (1992)].

9. The U.S. Supreme Court held that states cannot ban teachers from teaching evolutionary theory or require the theory of creationism to be taught [Epperson v. Arkansas (1968), Edwards v. Aguillard (1987)].
10. The U.S. Supreme Court held that states cannot compel school attendance beyond the eighth grade against sincere religious convictions [Wisconsin v. Yoder (1972)].

11. The U.S. Supreme Court held that although the government cannot use public funds for religious school building maintenance, the government may use public funds for diagnostic, therapeutic, and guidance services. [Levitt v. Committee for Public Education (1973), Committee for Public Education v. Nyquist (1973), Wolman v. Walter (1977)].

12. The U.S. Supreme Court held that Federally funded educational equipment and materials can be loaned to private religious schools [Mitchell v. Helms (2000)].

13. The U.S. Supreme Court held that public schools cannot prohibit after hour usage by religious groups based on religious affiliation [Lamb’s Chapel v. Center Moriches School District (1993)].

14. The U.S. Supreme Court held that states cannot set up school districts solely to appease the needs of a religious group [Board of Education of Kiryas Joel v. Grumet (1994)].

15. The U.S. Supreme Court held that public funds can be legally used to fund religious private school tuition using a voucher program [Zelman v. Simmons-Harris (2002)].

16. 27% of all educational church and state cases originated in New York State. 30% originated in the 2nd Circuit that includes New York State.
Conclusions

This study concluded that:

1. Immigration patterns of religious minorities on the East Coast created a religiously diverse area, and a resulting high percentage of lawsuits originating in the 2\textsuperscript{nd} Circuit. These lawsuits increasingly limited church influence over public schools. [2\textsuperscript{nd} Circuit: Connecticut, New York, Vermont]

2. The loaning of publicly funded materials, transportation services, Title I instruction and various other special services are legal when they serve a secular purpose. Consistent with the “student benefit” theory, the primary benefit of any such aid must be to students and any such program cannot require excessive government monitoring.

3. Flag salutes, school prayer, and compulsory attendance cannot be imposed in public schools by government if doing so infringes on sincerely held religious beliefs.

4. Under the First Amendment, the government must remain neutral, and can neither require only creationism or evolutionary theory to be taught.

5. School officials are not required to allow non-school groups to use school facilities, but if school officials open the door to public use, they cannot discriminate based on the religious views of groups seeking access.

6. Because government must remain neutral regarding religion, any government gerrymandering of a school district designed to aid a specific religious group is unconstitutional.
7. Concerning school vouchers, public funding of private religious school tuition is legal when the primary beneficiary is the student and the money only reaches religious schools based on parental free choice.

8. The following tables illustrate historical trends in decisions of the Supreme Court in church-state cases. Table I chronologically illustrates whether cases lowered or raised the “wall of separation. Table II illustrates prevailing party in relevant church-state Supreme Court cases.

**Table 1**

U.S. Supreme Court Cases and Jefferson’s “Wall of Separation”

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REFERENCES


Board of Education of Cincinatti v. Minor, 23 Ohio St. 211 (1872).


Reynolds v. United States, 98 U.S. 145  (1878).


Simmons-Harris v. Goff, __ Ohio St. 3d __  (1999).


