AN ANALYSIS OF THE CURRENT STATUS OF ESTABLISHMENT CLAUSE

JURISPRUDENCE CONCERNING PUBLIC FUNDING OF

SCHOOL VOUCHERS

by

DAN WESTBROOK WHITMIRE, JR.

(Under the Direction of John Dayton)

ABSTRACT

One of the most critical issues in education reform is the issue of school vouchers. The concept of school vouchers was originally introduced in the 1950s, but it was in the 1990s when vouchers moved to the forefront of the school choice debate. Several states have experimented with school vouchers, but until 2002, the Supreme Court had never heard a case dealing specifically with a voucher program. The purpose of this study was to (1) examine the legal history of Establishment Clause jurisprudence relevant to the public funding of school vouchers; and (2) determine the current status of Establishment Clause jurisprudence concerning public funding of school vouchers.

Key findings of the study include the following:

(1) The Religion Clauses of the First Amendment provide guarantees of the rights of individuals, not groups, relative to religious freedom and the proper relationship between government and religion.
(2) Little federal case law regarding public funding of religious institutions exists prior to the twentieth century. Federal courts generally deferred to the states in matters concerning the Bill of Rights for over 150 years following the ratification of the Constitution.
(3) The Supreme Court's decision in *Zelman v. Simmons-Harris* (2002), which upheld an Ohio voucher initiative, provided a constitutional framework for school voucher programs. Key elements of a constitutionally sound voucher program include a secular purpose for the legislation, indirect rather than direct aid to religious institutions, a broad class of beneficiaries of the program, governmental impartiality toward religious and secular options, and genuine choice for parents among religious and nonreligious educational options.
(4) After *Zelman* (2002), the voucher debate shifted to the states. Litigation over state constitutional provisions restricting public funding to religious

institutions appears to comprise the legal battleground for school voucher programs in the early twenty-first century.

INDEX WORDS: First Amendment, Establishment Clause, Free Exercise Clause, Fourteenth Amendment, Blaine Amendment, child benefit test, Lemon test, school vouchers

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DEDICATION

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CHAPTER I

INTRODUCTION

Problem Statement

At the dawn of the twenty-first century, many critical issues face public education. One such issue is school choice, and among its most contentious elements is the concept of school vouchers. Across the country, the voucher issue has been debated in school districts, state legislatures, courtrooms and in the public square (White, 2001). Despite the increasing intensity of debate concerning vouchers in recent years, the concept is not new. Asserting a need for competition among public and private schools, economist Milton Friedman first proposed a voucher system in the 1950s (Friedman & Friedman, 1962). Furthermore, a number of states have considered or experimented with various forms of voucher initiatives over the past 30 years (White, 2001).

Vouchers redirect the flow of education funding from school districts to individual families, with the intent of providing parents options as to which schools their children attend. Under a typical voucher plan, the government grants a sum of money in the form of a scholarship to the parents of a child enrolled in a public school, and those parents select another school in which to enroll their child (Kemerer, 2002). Depending on the details of the law, parents may choose a public school or a private school. If a private school is chosen, funds from the voucher are applied toward the cost of tuition. Advocates of vouchers believe that parental choice spurs competition among public and private schools, ultimately improving education for all children. In support of this

assertion, Friedman (1995) noted: "We know how the telephone industry [was] revolutionized by opening it to competition … how UPS, Federal Express and many other private enterprises have transformed package and message delivery and … how competition from Japan has transformed the domestic automobile industry." Friedman and others (Gryphon, 2003) argue that through competition vouchers will have similar positive effects on public education. Opponents argue that vouchers unnecessarily drain badly needed funds from financially strapped public schools (White, 2001).

During the 1990s, Wisconsin, Florida, and Ohio came to the forefront of the voucher debate. The legislatures in each of these states passed school voucher programs that created the opportunity for public dollars to fund private schools, many of which were parochial schools. The First Amendment to the Constitution of the United States (1791) dictates in relevant part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." If tax dollars originally earmarked for government ultimately arrive in the coffers of a religious school, does this violate the Establishment Clause? This question became the epicenter of the debate over vouchers in the late 1900s (White, 2001). As discussed below, the Supreme Court addressed the question a number of times in various cases during the twentieth century. However, before 2002, the Court had not considered the question in the specific context of a school voucher program (Zelman v. Simmons-Harris, 2002).

This dissertation examined the current status of Establishment Clause law as it applies to the public funding of school vouchers. Implications for educational administrators, legislators, and voucher advocates and opponents were analyzed.

Research Questions

(1) What is the legal history of Establishment Clause jurisprudence relevant to the public funding of school vouchers?
(2) What is the current status of Establishment Clause jurisprudence concerning public funding of school vouchers?

Procedures

The data for this study were obtained from library and Internet sources, including United States Supreme Court opinions, federal appellate court opinions and state supreme court opinions in the area of Establishment Clause jurisprudence. Legal research methodology and descriptive legal analysis were employed. Data include information from historical documents and pertinent scholarly works. Research for this study concentrated on analyses of case law, legal commentary, and historical documents in an effort to determine the current status of Establishment Clause law as it pertains to the public funding of school voucher programs. Relevant court opinions and law and education journal articles were identified through a search of the University of Georgia library, as well as "LexisNexis" and "Findlaw" databases.

The review of the literature in Chapter 2 includes a review of the historical development of Establishment Clause jurisprudence, as well as an overview of relevant U.S. Supreme Court opinions regarding government educational aid programs that include religious institutions, and the application of the Establishment Clause to determine the constitutionality of such programs. Chapter 2 also includes a review of a significant federal appellate court decision dealing specifically with the constitutionality of a school voucher initiative. Data in Chapter 2 are arranged chronologically to exhibit the development of Establishment Clause jurisprudence concerning public funding of

religious institutions in the eighteenth, nineteenth, and twentieth centuries. Chapter 3 analyzes the leading case of *Zelman v. Simmons-Harris* (2002) as well as current Establishment Clause jurisprudence at the state and federal appellate levels. Based on this analysis – and on the legal and historical precedent examined in Chapter 2 – the study ascertains the current status of the law relevant to the public funding of school vouchers.

Limitations of the Study

The findings of this study are limited to the constitutionality of school vouchers under the Establishment Clause, as revealed by the U.S. Supreme Court, federal appellate courts, and state supreme courts. This study did not attempt to determine the efficacy or current status of various voucher programs, but rather the constitutionality of such programs as determined by the current status of Establishment Clause jurisprudence.

CHAPTER II

REVIEW OF THE LITERATURE

Historical Development of Establishment Clause Jurisprudence

Eighteenth Century

On June 15, 1790, Congress adopted the First Amendment to the Constitution of the United States. The first ten amendments, known collectively as the Bill of Rights, were ratified by the states in 1791 and serve as the foremost defense of individual liberties for American citizens. The First Amendment mandates in relevant part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" (Bill of Rights, 1791). These 16 words comprise the two clauses of the First Amendment that govern the relationship between religion and government in America. These clauses are known as the Establishment Clause and the Free Exercise Clause, and their joint meaning and its effect on government funding of education continues to be a source of tremendous debate across America (Zelman v. Simmons-Harris, 2002).

In the latter half of the twentieth century, the First Amendment was widely interpreted by courts of law and citizens as creating an overt line of separation between religion and government, or church and state (Barton, 1996). It is interesting to consider this line of thinking in light of the fact that on the same day the House of Representatives approved the First Amendment, it adopted a resolution asking President George Washington to recommend to the American public a day of giving thanks to God, which he did with the creation of Thanksgiving Day (Epstein, 1996). It is also interesting to

consider this line of thinking in light of some of the various proposals for the language of the First Amendment. For example, in 1789 James Madison proposed: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established" (Debates and Proceedings of Congress, 1834, p. 451). Also in 1789, George Mason, a member of the Constitutional Convention and "The Father of the Bill of Rights," suggested: "[A]ll men have an equal, natural and unalienable right to the free exercise of religion, according to the dictates of conscience; and [that] no particular sect or society of Christians ought to be favored or established by law in preference to others" (Rowland, 1892, p. 244).

The official records of the proceedings in Congress on August 15, 1789 also provide interesting insight into the discussions of those drafting the First Amendment:

> Mr. [Peter] Sylvester [of New York] had some doubts. … He feared it [the First Amendment] might be thought to have a tendency to abolish religion altogether. … Mr. [Elbridge] Gerry [of Massachusetts] said it would read better if it was that "no religious doctrine shall be established by law."… Mr. [James] Madison [of Virginia] said he apprehended the meaning of the words to be, that "Congress should not establish a religion, and enforce the legal observation of it by law."… [T]he States seemed to entertain an opinion that under the clause of the Constitution … it enabled them [Congress] to make laws of such a nature as might … establish a national religion; to prevent these effects he presumed the amendment was intended … Mr. Madison thought if the word "national" was inserted before religion, it would satisfy the minds of honorable gentlemen. … He thought

> if the word “national” was introduced, it would point the amendment directly to the object it was intended to prevent (Debates and Proceedings of Congress, 1834, pp. 757-759).

Some scholars interpret such discussion as evidence that in writing the Establishment Clause, the founding fathers did not intend to restrain public religious expressions, but rather to prevent the establishment of a single national denomination (Barton, 1996). In terms of its original intent, the Establishment Clause “might have extended no further” than a prohibition against the recognition of an official church by the government (Bork, 1990, p. 95).

Early nineteenth century writings seem to suggest that the intent of the framers of the First Amendment was to restrain only the federal government, and not states, in the area of religion (Barton, 1996). In fact, state support for religious institutions was quite common, and “disestablishment was not synonymous with separation” (Viteritti, 1998, p. 662). Justice Joseph Story, the founder of Harvard Law School and a Supreme Court appointment by President James Madison, wrote, “the whole power over the subject of religion is left exclusively to the State governments to be acted upon according to their own sense of justice and the State constitutions” (Story, 1833, p. 383). Thomas Jefferson stated:

> I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment or free exercise of religion [the First Amendment], but from that also which reserves to the States

> the powers not delegated to the United States [the Tenth Amendment]. Certainly, no power to prescribe any religious exercise or to assume authority in any religious discipline has been delegated to the General [Federal] Government. It must then rest with the States (Randolph, 1830, pp. 103-104).

Over 100 years later, in *Everson v. Board of Education* (1947), the U.S. Supreme Court interpreted the Fourteenth Amendment to the U.S. Constitution as applying the First Amendment to the states (Everson v. Board of Education, 1947). As discussed below, the Court's opinion in *Everson* represented a dramatic shift in Establishment Clause jurisprudence.

Though the power to legislatively effect establishment or free exercise of religion apparently rested with the states, none of the original thirteen states chose to set up an official state religion. A survey of early state constitutions shows an apparent willingness on the parts of many states to provide equal protection (Barton, 1996). For example, the New Jersey Constitution (1776) stated, "there shall be no establishment of one religious sect … in preference to another." The framers of the North Carolina Constitution (1776) decreed, "there shall be no establishment of any one religious church or denomination in this State in preference to any other." North Carolina's ratification debate included this statement from Governor Samuel Johnston:

> I know but two or three States where there is the least chance of establishing any particular religion. The people of Massachusetts and Connecticut are mostly Presbyterians. In every other state, the people are divided into a great number of sects. In Rhode Island, the tenets

> of the Baptists, I believe, prevail. In New York, they are divided very much: the most numerous are the Episcopalians and the Baptists. In New Jersey, they are as much divided as we are. In Pennsylvania, if any sect prevails more than others, it is that of the Quakers. In Maryland, the Episcopalians are most numerous, though there are other sects. In Virginia, there are many sects … [s]o in all the Southern states they differ; as also in New Hampshire. I hope, therefore, that gentlemen will see there is no cause of fear that any one religion shall be exclusively established (Elliot, 1836, p. 199).

Governor Johnston's statements and other state constitutions from the era seem to suggest that the intent of the framers of the First Amendment was to prohibit the preference of a single Christian denomination, rather than one general religion, over another. For example, the New Hampshire Constitution (1783) contained a provision that stated: "And every denomination of Christians … shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law." Similarly the Connecticut Constitution (1818) stated: "And each and every society or denomination of Christians in this State shall have and enjoy the same and equal powers, rights, and privileges." In discussing the construction of the Massachusetts Constitution, John Adams wrote that "the debates were managed by persons of various denominations" and that the "delegates did not conceive themselves to be vested with power to set up one denomination of Christians above another" (Adams & Bowdoin, 1780, p. 17). Justice Story also seemed to agree with this line of reasoning and interpretation. He wrote:

> We are not to attribute this [First Amendment] prohibition of a national religious establishment to an indifference to religion in general, and especially to Christianity (which none could hold in more reverence, than the framers of the Constitution). … Probably, at the time of the adoption of the Constitution, and of the Amendment to it now under consideration, the general, if not the universal, sentiment in America was that Christianity ought to receive encouragement from the State. … An attempt to level all religions and to make it a matter of state policy to hold all in utter indifference would have created universal disapprobation if not universal indignation (Story, 1854, pp. 259-261).

Story also wrote that "[t]he real object of the First Amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects" (Story, 1833, p. 728). Notably, the Massachusetts Constitution also stated, "the worship of God [is] … a right of all men, as well as a duty" (McCullough, 2001, p. 224).

Additional historical evidence exists which supports the notion that the intent of the framers of the First Amendment was to prevent the establishment of a national church or denomination. Zephaniah Swift, who is considered to be the author of the first law textbook in America (Barton, 1996), wrote in 1793: "Christians of different denominations ought to consider that the law knows no distinction among them … and that no sect has power to injure or oppress another. … No denomination can pride themselves in the enjoyment of superior and exclusive powers and immunities" (Swift,

1793, p. 138). Charles Carroll, a Roman Catholic and a signer of the Declaration of Independence, wrote:

> To obtain religious as well as civil liberty I entered jealously into the Revolution, and observing the Christian religion divided into many sects, I founded the hope that no one would be so predominant as to become the religion of the State. That hope was thus early entertained, because all of them joined in the same cause, with few exceptions of individuals (Rowland, 1898, pp. 357-358).

The state of Virginia provided some of the key debates concerning the relationship between government and religion, especially after the American Revolution (Barton, 1996). In 1779, Thomas Jefferson proposed "A Bill for Establishing Religious Freedom." The Church of England was the only established denomination in Virginia, even though members of other denominations outnumbered the Anglicans. Jefferson's bill sought to "place all groups on equal footing" (Barton, 1996, p. 202). The bill failed to pass in several successive Virginia legislatures, and Jefferson departed for Europe as an ambassador in 1784 (Randall, 1993). Also in 1784, Virginian Patrick Henry proposed "A Bill for Establishing Provisions for Teachers of the Christian Religion." The proposed bill, commonly called the "Assessment Bill," would have allowed Virginians to earmark tax dollars for the denomination of their choosing. Henry's grandson and biographer, William Wirt Henry (1891), described the proposed tax as "a tax for the support of secular education, with the privilege to each taxpayer of devoting his tax to the support of the religious teachers of his own denomination." Others, however, considered the bill "nothing more or less than a taxing measure for the support of religion" (Everson v.

Board of Education, 1947, p. 36). This practice of the payment of tithes had been suspended since 1777 (Barton, 1996).

Numerous distinguished Virginians, including George Washington, John Marshall, and Richard Henry Lee, supported the bill (Barton, 1996). James Madison was a chief opponent of the bill and fought vigorously against Henry. There was tremendous debate on both sides of the issues, and many people wrote memorials for and against the tax. The most widely discussed response is Madison's Memorial and Remonstrance Against Religious Assessments, written in 1785 (Barton, 1996). Madison wrote:

> During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution. … Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever? … It is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence, and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are to [*sic*] conscious of its fallacies, to trust it to its own merits. … Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot

> deny an equal freedom to those whose minds have not yet yielded to the evidence which has convicted us (Madison, 1786, § 7, 3, 6, 4).

The political tide turned in Madison's favor when Henry left the legislature to begin serving as governor that same year (Everson v. Board of Education, 1947), and ultimately the bill was defeated shortly before Christmas in 1785. Madison's *Remonstrance* played a key role in defeating the bill, but opposition to it was also "bolstered by the fact that the general state of postwar poverty … in all the states did not welcome new taxes of any kind" (Barton, 1996, p. 210). Some scholars point to Shays' Rebellion and the Whiskey Rebellion as evidence of the opposition to new taxes (Barton, 1996).

The defeat of the bill cleared the way for passage of Jefferson's "Bill for Establishing Religious Freedom" in 1786, seven years after its original proposal. This bill is commonly called the "Virginia Statute" (Barton, 1996). The statute (1786) decreed, "that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall … otherwise suffer on account of his religious opinions or belief." As discussed below, the Supreme Court relied heavily on selected views of Madison and Jefferson in some of its most critical Establishment Clause opinions in the twentieth century, particularly in *Everson v. Board of Education* (1947).

In 1787, Congress established a new set of procedures by which new states would be created out of western territories and admitted to the union. This set of procedures became known as the Northwest Ordinance, and it replaced the previous Ordinance of 1784, which had provided for self-government for the territories (Middlekauff, 1982). Article III of the Northwest Ordinance (1787) addresses religion

and public education. The article states: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

Though this requirement originally applied to the Northwest Territory – including Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota – Congress applied the Ordinance to new territory that was gradually ceded to the United States (Barton, 1996). For example, when Mississippi applied for statehood in 1817, Congress required that its government be constructed in a manner "not repugnant to the principles of the Ordinance" (Debates and Proceedings, 1854, p. 1283). Therefore, the Mississippi Constitution (1817) stated: "Religion, morality, and knowledge, being necessary to good government, the preservation of liberty and the happiness of mankind, schools and the means of education shall be forever encouraged in this State." This provision, which seemed to join religion and public education, continued to appear in other state constitutions for several decades (Barton, 1996). The Kansas Constitution (1858) required: "Religion, morality, and knowledge … being essential to good government, it shall be the duty of the legislature to make suitable provisions … for the encouragement of schools and the means of instruction." The Nebraska Constitution (1875) stated: "Religion, morality, and knowledge … being essential to good government, it shall be the duty of the legislature to pass suitable laws … to encourage schools and the means of instruction." It seems clear that the founding fathers and subsequently the framers of many state constitutions had no trouble joining religion, morality, and public education (Barton, 1996).

Historical Development of Establishment Clause Jurisprudence

Nineteenth Century

Beginning with the *Everson* decision (1947), and continuing to the present day, many jurists and citizens discussing government funding of religious institutions have described the First Amendment as establishing the separation of church and state (Barton, 1996). Interestingly, the words "separation of church and state" appear nowhere in the Constitution or the First Amendment, but are rather derived from a letter written by President Thomas Jefferson in 1801 (Barton, 1996). On October 7 of that year, members of the Baptist Association of Danbury, Connecticut, wrote President Jefferson, wishing him well in office and expressing concern over the First Amendment. The Danbury Baptists wrote:

> Our sentiments are uniformly on the side of religious liberty: that religion is at all times and places a matter between God and individuals, that no man ought to suffer in name, person, or effects on account of his religious opinions, [and] that the legitimate power of civil government extends no further than to punish the man who works ill to his neighbor. But sir, our constitution of government is not specific. … [T]herefore what religious privileges we enjoy (as a minor part of the State) we enjoy as favors granted, and not as inalienable rights (Letter from Danbury Baptist Association to Thomas Jefferson, 1801).

The Danbury Baptists seemed to be concerned that the First Amendment stipulated the free exercise of religion as government-given rather than God-given, thus making it an alienable rather than an inalienable right (Barton, 1996). In a letter the

previous year to Benjamin Rush, a fellow signer of the Declaration of Independence, Jefferson wrote:

> [T]he clause of the Constitution which, while it secured the freedom of the press, covered also the freedom of religion, had given to the clergy a very favorite hope of obtaining an establishment of a particular form of Christianity through the United States; and as every sect believes its own form the true one, every one perhaps hoped for his own … [t]he returning good sense of our country threatens abortion to their hopes and they believe that any portion of power confided to me will be exerted in opposition to their schemes. And they believe rightly (Randolph, 1830, p. 441).

In his second inaugural address in 1805, Jefferson stated: "In matters of religion I have considered that its free exercise is placed by the Constitution independent of the powers of the general [federal] government" (Annals of Congress. 1852, p. 78).

In his reply to the Danbury Baptists, Jefferson seemed to attempt to allay their fears of the government interfering with the free exercise of religion (Barton, 1996). He wrote:

> Believing with you 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 legislative 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 would "make no law respecting an establishment of religion or prohibiting the free

> exercise thereof," thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights (Bergh, 1904, pp. 281-282).

Some legal scholars consider Jefferson's reference to natural rights a confirmation of his belief that religious liberties were inalienable rights, and that the "wall of separation" was to serve to protect religion from the intrusion of the federal government (Barton, 1996). In a letter to Noah Webster in 1790, Jefferson used the word "fences" rather than "wall" to describe the necessary protection of the free exercise of religion. He wrote:

> It had become an universal and almost uncontroverted position in the several States that the purposes of society do not require a surrender of all our rights to our ordinary governors … and which experience has nevertheless proved they will be constantly encroaching on if submitted to them; that there are also certain fences which experience has proved peculiarly efficacious against wrong and rarely obstructive of right, which yet the governing powers have ever shown a disposition to weaken and remove. Of the first kind, for instance, is freedom of religion (Bergh, 1904, pp. 112-113).

Jefferson also said, "And can the liberties of a nation be thought secure if we have lost the only firm basis, a conviction in the minds of the people that these liberties are the gift of God" (Jefferson, 1794, p. 237)?

Only once prior to *Everson* (1947) was Jefferson's letter to the Danbury Baptists invoked in a Supreme Court opinion, and that was in the case of *Reynolds v. United States* (1878). In that opinion, the Court published Jefferson's full letter, and also stated:

> [T]he rightful purposes of civil government are for its officers to interfere when principles break out into overt acts against peace and good order. In this … is found the true distinction between what properly belongs to the church and what to the State … [c]oming as this does from an acknowledged leader of the advocates of the measure, it [Jefferson's letter] may be accepted almost as an authoritative declaration of the scope and effect of the Amendment thus secured. Congress was deprived of all legislative power over mere [religious] opinion, but was left free to reach actions which were in violation of social duties or subversive of good order (Reynolds v. United States, 1878, pp. 163-164).

Until the mid-nineteenth century, it was not uncommon for religious schools to be supported with public funds in many states (Kaestle, 1983). Though the American common school was created based on the notion that religion and public education would remain separate, the reality was that proponents of the common school were interested in preventing Roman Catholics from gaining public support (Glenn, 1998). "Protestant ministers and lay people were in the forefront of the public-school crusade and took a proprietary interest in the institution they had helped to build. They assumed a congruence of purpose between the common school and the Protestant churches" (Tyack,

Benavot, James, & Benavot, 1987, p. 162). The common school curriculum was based on the ideas of mainstream Protestantism and was intolerant of sectarian teachings (Glenn, 1988). "To the policymakers in the mid-nineteenth century, 'sectarian' did not mean the same thing as 'religious.' It was instead an epithet applied to those who did not share the 'common' religion taught in the publicly funded 'common' schools" (Brief of Amicus Curiae Becket Fund for Religious Liberty, 2000, pp. 2-3).

In *Vidal v. Girard's Executors* (1844), responding to the suggestion that Christianity could not be taught by laymen in a college, Justice Story wrote:

> Christianity … is not to be maliciously and openly reviled and blasphemed against to the annoyance of believers or the injury of the public. … It is unnecessary for us, however, to consider … the establishment of a school or college for the propagation of Judaism or Deism or any other form of infidelity. Such a case is not to be presumed to exist in a Christian country. … Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college --- its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, not sectarian, upon the general evidence of Christianity, from being read and taught in the college by lay-teachers? … Where can the purest principles of morality be learned so clearly or so perfectly as from the New Testament (Vidal v. Girard's Executors, 1884, pp. 198, 200)?

Thus, in the eyes of the Court in 1844, it was understood that the "common religion" was not sectarian, but other religions were (Brief of Amicus Curiae Becket Fund for Religious Liberty, 2000, p. 8).

During the mid-1800s, the growth of the public school movement coincided with a surge of Irish, German, and other European Catholic immigration (Glenn, 1988). The backlash against the immigrants fueled anti-Roman Catholic bigotry that led to the creation of the *nativist* movement, a Protestant reaction against Catholic participation in society, particularly in education (Brief of Amicus Curiae Becket Fund for Religious Liberty, 2000, p. 9). One of the foremost nativist groups was the Know-Nothing Party, and when it gained control of the Massachusetts legislature in 1854, it drafted one of the first state laws prohibiting aid to sectarian schools (Jorgenson, 1987). The same legislature instituted a Nunnery Investigating Committee, passed a law requiring the reading of the King James Bible in common schools, and also tried to pass legislation that would limit the right to hold office to native-born people (Jorgenson, 1987). Abraham Lincoln wrote of the Know-Nothings:

> As a nation we began by declaring that 'all men are created equal.' We now practically read it, 'all men are created equal, except Negroes.' When the Know-Nothings get control, it will read 'all men are created equal except Negroes and foreigners and Catholics.' When it comes to this, I shall prefer emigrating to some country where they make no pretense of loving liberty (Basler, 1953, p. 320).

The Protestant-driven practice of reading the Bible in common schools was met with increasing resistance from Catholics in Massachusetts and several other states. In

1872, local school boards in Chicago, Cincinnati, and New York responded to protests by Catholics by voting to prohibit Bible readings and other religious exercises in their public schools (Green, 1992). This action fueled the already intense political battle between Protestants and Catholics over the direction of public schools in America (Green, 1992). In the fall of 1875, President Ulysses S. Grant responded to pressure from Protestant groups by publicly vowing to "encourage free schools, and resolve that not one dollar be appropriated to support any sectarian [Catholic] schools" (Green, 1992, p. 47). Aligning himself and the Republican party with the anti-Catholic side of the public school debate, Grant followed this pledge by proposing a constitutional amendment that would ban public financial support from going to religious institutions (Klinkhamer, 1957).

Grant needed a Congressional sponsor for the proposed amendment, and that role was filled by Congressman James G. Blaine of Maine, a opportunistic politician who made no secret of his desire to obtain the nomination of the Republican party to succeed Grant as president (Jorgenson, 1987). Blaine's proposed amendment read as follows:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor [*sic*], 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 between religious sects or denominations (cited in Jorgenson, 1987, pp. 138-139).

The Blaine Amendment received strong support in both houses of Congress, but fell four votes short of the required two-thirds majority in the Senate to pass (Viteritti, 1998).

"The Blaine [A]mendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing Catholic menace" (Kotterman v. Killian, 1999, p. 624). To proponents of the Blaine Amendment, the word *sectarian* was understood as a code word for Roman Catholic (Gryphon, 2002). The word *Catholic* appeared 59 times in the debates surrounding the proposed amendment, along with 23 specific references to the pope (Heytens, 2000).

It is interesting to note that at the time of Blaine's proposed amendment, the Fourteenth Amendment (1868) had been ratified, yet not incorporated to apply the First Amendment against the states (Viteritti, 1998). As discussed above, this did not happen until the *Everson* Court issued its ruling in 1947. Some scholars point to this fact as evidence that President Grant, Congressman Blaine, and other lawmakers and justices saw no link between the First and Fourteenth Amendments. This line of thinking suggests that if such a link existed, these nineteenth century figures would not have attempted to amend the Constitution to place within it something that was already there (Kirkpatrick, 2000). Even though the Blaine Amendment failed, its influence continues to reverberate. As discussed below in Chapter 3, 37 states adopted Blaine-like language into their constitutions, and many observers believe that such state language represents the legal battle lines for debate over school voucher programs in the twenty-first century (Viteritti, 1998).

For over 150 years following the ratification of the Constitution, states were considered the highest authority on disputes concerning the Bill of Rights (Barton, 1996). To that end, in 1892 the Supreme Court noted that federal courts rarely ruled on

controversies involving religion (Church of the Holy Trinity v. United States, 1892). Federal courts frequently cited state supreme court decisions as their authority, and it wasn't until the mid-twentieth century that state supreme courts were viewed as subordinate to federal courts (Barton, 1996). Almost a century after *Holy Trinity*, Justice Brennan addressed the evolving relationship between federal and state jurisprudence when he wrote:

> State courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit independent protective force of state law – for without it, the full realization of our liberties cannot be guaranteed (Brennan, 1977, p. 491).

Historical Development of Establishment Clause Jurisprudence

Twentieth Century

The first significant Supreme Court case in the twentieth century with respect to public funding of religious institutions was *Quick Bear v. Leupp* (1908). In this case, Sioux Indians sued U.S. officials acting as trustees on their behalf who disbursed money from treaty and trust funds to a Catholic Indian Mission for the purpose of providing schools. In considering whether this arrangement violated the Establishment Clause, a unanimous Court ruled that the money belonged to the Indians, who could use it as they saw fit to educate their children (Quick Bear v. Leupp, 1908). The Court did not take

issue with the fact that Congress could appropriate funds without prior consent from the Indians.

In 1922, the voters of Oregon approved a measure requiring all children between the ages of 8 and 16 to attend public schools (Viteritti, 1998). The initiative was a culmination of efforts organized by the Ku Klux Klan and the Scottish Rite Masons, and it effectively made private schools unlawful (Jorgenson, 1987). "For some reason, the Klan – whose members believed in the superiority of white Protestants and the inferiority of blacks, Jews, Catholics, and immigrants – had come to the conclusion that forcing all of these groups to attend school together under the supervision of public authority would fortify American democracy" (Viteritti, 1998, p. 676). Threatened by private schools and private ideas, supporters of this law sought to eliminate the influence of Catholics and members of other denominations who sought to apply their own religious convictions to the education of their children (Viteritti, 1998).

The Oregon law was eventually challenged by the Sisters of the Holy Names of Jesus and Mary, a group that oversaw a number of parochial schools, and the directors of the Hill Military Academy, a non-religious private school (Viteritti, 1998). The plaintiffs succeeded in obtaining an injunction in a federal district court that prevented Oregon from enforcing the law (Jorgenson, 1987). The attorney general of Oregon appealed to the U.S. Supreme Court, and in a unanimous ruling the Court affirmed the right of parents to educate their children according to their own consciences and preferences (Pierce v. Society of Sisters, 1925). Writing for the Court, Justice McReynolds declared:

> The fundamental theory 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 the 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. 535).

The *Pierce* decision was based upon the liberty and due process principles of the Fourteenth Amendment (Viteritti, 1998).

In *Cochran v. Louisiana State Board of Education* (1930) the Supreme Court upheld a Louisiana law that allowed public funds to be used to make textbooks available to children, regardless of whether they attended public, private, or parochial schools. The *Cochran* decision represented the advent of the child benefit test. The Court used this test to draw a distinction between government aid that benefits children and aid that benefits the institutions those children attend (Cochran v. Board of Education, 1930). The child benefit theory became a key tool for school voucher proponents in response to "a confounding set of judicial precedents" established by the Supreme Court in the 1970s (Viteritti, 1998, p. 679).

In 1947 the Court issued an opinion in *Everson v. Board of Education,* a case from New Jersey that would prove to be a turning point in Establishment Clause jurisprudence (Meese & Eastman, 2002). The New Jersey legislature passed a statute that allowed local school boards to reimburse parents for the cost of transporting children to and from school on buses operated by local transportation systems. Parents of children attending public schools as well as those attending Catholic schools were eligible for reimbursement. It is noteworthy that Catholic schools were the only religious schools

allowed to participate in the program. A lawsuit was filed contending that the law and the local policy pursuant to it violated the New Jersey and the federal constitutions. The case made its way to the Supreme Court, resulting in a 5-4 ruling upholding the plan to reimburse parents under the child benefit theory (Everson v. Board of Education, 1947).

Opponents of the statute and the local policy claimed that both violated the due process clause of the Fourteenth Amendment. This claim was based on the fact that "children [were] sent to … church schools to satisfy the personal desires of their parents, rather than the public's interest in the general education of all children" (Everson v. Board of Education, 1947, p. 6). Writing for the majority, Justice Black stated:

> [T]he New Jersey legislature has decided that a public purpose will be served by using tax-raised funds to pay the bus fares of all school children, including those who attend parochial schools. … The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need. … It is true that this Court has, in rare instances, struck down statutes on the ground that the purpose for which tax-raised funds were to be expended was not a public one. But the Court has also pointed out that this far-reaching authority must be exercised with the most extreme caution. Otherwise, a state's power to legislate for the public welfare might be seriously curtailed, a power which is a primary reason for the existence of states. … The Fourteenth Amendment did not strip the states of their power to

> meet problems previously left for individual solution (Everson v. Board of Education, 1947, pp. 6-7).

The statute was also challenged as a "law respecting an establishment of religion" (Everson v. Board of Education, 1947, p. 8). In denying this claim, the Court made extensive reference to Virginia history and the contributions to it by James Madison and Thomas Jefferson as discussed above. The Court noted that "the provisions of the First Amendment, in the drafting of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia Bill [for Religious Liberty] (Everson v. Board of Education, 1947, p. 13). Justice Black wrote of "the difficulty in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion" (Everson v. Board of Education, 1947, p. 14).

Justice Black further stated:

> The "establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. … We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the state's constitutional power even though it approaches the verge of that power. … [W]e cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as part of a general program under which it pays the fares of pupils attending public and other schools. …

> The [First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. … The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here (Everson v. Board of Education, 1947, pp. 15-18).

In his dissent, Justice Jackson stated the majority's opinion, "advocating complete and uncompromising separation of Church from State, [seems] utterly discordant with its conclusion yielding support to their commingling in educational matters" (Everson v. Board of Education, 1947, p. 19). Justice Jackson disputed the majority's claim that the program was justifiable under the child benefit test. He stated:

> Whether the taxpayer constitutionally can be made to contribute aid to parents of students because of their attendance at parochial schools depends upon the nature of those schools and their relation to the Church. … It is of no importance in this situation whether the beneficiary of this expenditure of tax-raised funds is primarily the parochial school and incidentally the pupil, or whether the aid is directly bestowed on the pupil with indirect benefit to the school. The state cannot maintain a Church and it can no more tax its citizens to furnish free carriage to those who attend a Church. The prohibition against establishment of religion cannot be circumvented by a subsidy, bonus, or reimbursement of expense to individuals for receiving religious instruction and indoctrination (Everson v. Board of Education, 1947, pp. 21, 24).

Justice Jackson also took issue with the fact that Catholic schools were the only religious schools allowed to participate in the program. He wrote:

> Is it constitutional to tax this complainant to pay the cost of carrying pupils to Church schools of one specified denomination? … It seems to me that the basic fallacy in the Court's reasoning … is in ignoring the essentially religious test by which beneficiaries of this expenditure are selected. … Could we sustain an Act that said police shall protect pupils on the way to or from public schools or Catholic schools but not while going to and coming from other schools, and firemen shall extinguish a blaze in public or Catholic school buildings but shall not put out a blaze in Protestant Church schools or private schools operated for profit (Everson v. Board of Education, 1947, pp. 21, 25-26)?

Justice Jackson concluded his dissent by writing that the Court "cannot have it both ways. Religious teaching cannot be a private affair when the state seeks to impose regulations which infringe on it directly, and a public affair when it comes to taxing citizens of one faith or another, or those of no faith to aid all" (Everson v. Board of Education, 1947, p. 27).

The most significant legacy of the Court's opinion in *Everson* was its assertion that the First Amendment was made applicable to the states by the Fourteenth Amendment (Barton, 1996). This coupling of the two amendments, done "without any constitutional analysis," represented a critical paradigm shift in Establishment Clause jurisprudence (Meese & Eastman, 2002, p. 1). As discussed below, many of the Court's most significant Establishment Clause opinions in the latter twentieth century were

impacted by this action. The reinterpretation of the Fourteenth Amendment "created a mechanism for the Court whereby, for the first time, it could intervene in virtually all practices of State and local communities, including religion" (Barton, 1996, p. 197).

It is interesting to consider the application of the First Amendment to the states by the Fourteenth Amendment in light of the histories of these critical amendments to the Constitution. After the Thirteenth Amendment (1865) abolished slavery, leaders in many former slave states attempted to withhold from former slaves the rights belonging to other citizens in their states (Barton, 1996). The Fourteenth Amendment (1868) guaranteed in relevant part that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" (U.S. Constitution, amend. XIV, §1). It was followed by the Fifteenth Amendment (1870), which secured for freed slaves the right to vote (U.S. Constitution, amend. XV). It seems clear that the Fourteenth Amendment was a guarantee of racial civil rights, and it was essentially enforced as such for several decades following its passage (Barton, 1996).

In *Church of the Holy Trinity v. United States* (1892), the Court asserted that a primary responsibility of all courts when reviewing laws is to determine "the evil which was intended to be remedied … [and] the intent of Congress" (Church of the Holy Trinity v. U.S., 1892, p. 465). When the Court used the Fourteenth Amendment to apply the First Amendment to the states in the *Everson* decision, some scholars believe that the Court separated the words of the Fourteenth Amendment from its intent (Barton, 1996). The application of the First Amendment to the states by *Everson* "required the federal courts to do the very thing that the First Amendment expressly forbade, namely, interfere

with state support of religion. And not only interfere with it, but actually prohibit any state support of religion whatsoever" (Meese & Eastman, 2002, p. 1).

The paradigm shift in Establishment Clause jurisprudence was discussed in several subsequent cases. For example, in *Abington School District v. Schempp* (1963), the Court stated that:

> [T]his Court has decisively settled that the First Amendment's mandate that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" has been made wholly applicable to the States by the Fourteenth Amendment. … The Fourteenth Amendment has rendered the legislatures of the States as incompetent as Congress to enact such laws (Abington School District v. Schempp, 1963, pp. 215-216).

In his dissent in *Walz v. Tax Commission* (1970), Justice Douglas characterized the "reversing [of] the historic position that the foundations of those liberties rested largely in state law" as a "revolution" (Walz v. Tax Commission, 1970, pp. 701-702).

The *Everson* Court's application of the First Amendment to the states is also noteworthy when reviewing the history of that amendment as well as statements made by leading historical figures. Thomas Jefferson warned that "taking from the States the moral rule of their citizens, and subordinating it to the general authority [federal government] … would … break up the foundations of the Union" (Randolph, 1830, p. 374). As discussed above, when speaking specifically of the First Amendment, Jefferson wrote that "no power to prescribe any religious exercise or to assume authority in religious discipline has been delegated to the General [Federal] Government. It must

then rest with the States" (Randolph, 1830, pp. 103-104). In *Barron v. Baltimore* (1833), Chief Justice Marshall wrote:

> In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general [federal] government – not against those of the local [State] governments. … These amendments contain no expression indicating an intention to apply them to the State governments. This Court cannot so apply them (Barron v. Baltimore, 1833, pp. 249-250).

As discussed above, the proposed Blaine Amendment was rejected by the Congress in 1875. This amendment would have done essentially the same as what the *Everson* Court did when it reinterpreted the Fourteenth Amendment to apply the First Amendment to the states. As discussed below, Justice Thomas raised questions with respect to the correctness of the coupling of the Fourteenth Amendment and First Amendment in his concurring opinion in *Zelman v. Simmons-Harris* (2002).

As mentioned above, the *Everson* Court relied heavily on selected views of Jefferson and Madison in constructing its opinion in the case. Some scholars believe that the influence of these two founding fathers on the First Amendment was "dramatically overstated" in the opinion (Barton, 1996, p. 203). Historical evidence indicates that Madison originally opposed the addition of a Bill of Rights to the Constitution (Gilpin, 1840). During the ratification debate in Virginia, Patrick Henry, George Mason, and Edmund Randolph led those favoring passage of the Bill of Rights over the opposition of Madison (Elliot, 1836). Jefferson was out of the country during the debate, and later

wrote that he "was in Europe when the Constitution was planned, and never saw it until after it was established" (Bergh, 1904, p. 325). In a letter to John Adams following the signing of the Constitution, Jefferson "said nothing about a bill of rights" (McCullough, 2001, p. 379).

Another controversial component of the *Everson* opinion was the suggested link between events in Virginia's history and the formation of the First Amendment. The Court stated:

> This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute. …All the great instruments of the Virginia struggle for religious liberty thus became warp and woof of our constitutional tradition, not simply by the course of history, but by the common unifying force of Madison's life, thought and sponsorship. He epitomized the whole of that tradition in the Amendment's … phrasing (Everson v. Board of Education, 1947, pp. 13, 39).

The accuracy of the Court's description and interpretation of historical events is not without some question. Almost 40 years later, in *Wallace v. Jaffree* (1985), Chief Justice Rehnquist wrote:

> [T]he Court's opinion in *Everson* – while correct in bracketing Madison and Jefferson together in their exertions in their home State leading to the enactment of the Virginia Statute of Religious Liberty – is totally incorrect

> in suggesting that Madison carried these views onto the floor of the United States House of Representatives when he proposed the language which would ultimately become the Bill of Rights. The repetition of this error [in subsequent opinions] does not make it any sounder historically. … [T]he Court made the truly remarkable statement that 'the views of Madison and Jefferson … came to be incorporated not only in the Federal Constitution but likewise in those of most of our States.' …[T]his statement is demonstrably incorrect as a matter of history. And its repetition in varying forms in succeeding opinions of the Court can give it no more authority than it possesses as a matter of fact; *stare decisis* may bind courts as to matters of law, but it cannot bind them as to matters of history (Wallace v. Jaffree, 1985, pp. 98-99, quoting Abington School District v. Schempp, 1963, p. 214).

In 1948 the Supreme Court issued a ruling in a case involving optional religious instruction in a public school system. In the case of *McCollum v. Board of Education* (1948), the Court heard a challenge to an Illinois program that allowed privately employed religious teachers to provide religious instruction to students whose parents opted for their children to attend. The instructors were allowed to come into public school buildings during regular school hours on a weekly basis to deliver religious instruction in lieu of secular education. Children who chose not to attend were reassigned to other classes during the time religious instruction was offered.

The Court struck down the Illinois program on the grounds that, since public schools have compulsory attendance requirements, it created an atmosphere conducive to

students being forced to participate in religious instruction rather than being ostracized by their peers. The Court stated:

> This is not separation. … Separation means separation, not something less. … Religious education so conducted on school time and property is patently woven into the working scheme of the school. The [Illinois] arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects. The fact that this power has not been used to discriminate is beside the point. Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally. That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and nonconformity is not an outstanding characteristic of children (McCollum v. Board of Education, 1948, pp. 212, 231, 227).

In a concurring opinion, Justice Jackson raised an issue that would be addressed years later by Justice Rehnquist in *Stone v. Graham* (1980). He wrote:

> I think it remains to be demonstrated whether it is possible, even if desirable, … to isolate and cast out of secular education all that some people may reasonably regard as religious instruction. … The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences … [o]ne can hardly respect a system of education that would leave the student

> wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared (McCollum v. Board of Education, 1948, pp. 235-236).

In his dissenting opinion, Justice Reed disagreed with the peer pressure argument against the program. He wrote that "[e]ven assuming that certain children who did not elect to take instruction are embarrassed to remain outside of the classes, one can hardly speak of that embarrassment as a prohibition against the free exercise of religion" (McCollum v. Board of Education, 1948, p. 241). Justice Reed also stated:

> The prohibition of enactments respecting the establishment of religion do not bar every friendly gesture between church and state. It is not an absolute prohibition against every conceivable situation where the two may work together any more than the other provisions of the First Amendment – free speech, free press – are absolutes. … Devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people. … The phrase 'an establishment of religion' may have been intended by Congress to be aimed only at a state church. … Passing years, however, have brought about an acceptance of a broader meaning, although never until today, I believe, has this Court widened its interpretation to any such degree as holding that recognition of the interest of our nation in religion, through the granting … of opportunity to present religion as an optional, extracurricular subject during released

> school time … was equivalent to an establishment of religion (McCollum v. Board of Education, 1948, pp. 255-256, 244).

The Court was also asked to "distinguish" its holding in *Everson* (1947) that the Fourteenth Amendment made the Establishment Clause applicable to the states, but declined to do so (McCollum v. Board of Education, 1948, p. 211). Interestingly, the *McCollum* Court also noted that the Blaine Amendment and five similar proposed amendments were rejected by the Congress that passed the Fourteenth Amendment (McCollum v. Board of Education, 1948).

Release time for public school students to receive religious education was also an issue before the Court in 1952. In the case of *Zorach v. Clauson* (1952), the Court upheld a New York plan that allowed students to attend religious classes off school grounds during the school day. The Court distinguished this program from the Illinois program considered in the *McCollum* (1948) case, in which classrooms "were turned over to religious instructors" (Zorach v. Clauson, 1952, p. 309). Since the religious classes in the New York program were held off school campuses, the Court ruled that the plan did not violate the Establishment Clause.

Writing for the majority, Justice Douglas stated that:

> The First Amendment … 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. … We are a religious people whose

> institutions presuppose a Supreme Being. … When the State encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religions influence. … We follow the *McCollum* case. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion (Zorach v. Clauson, 1952, pp. 312-315).

Justice Black wrote a dissenting opinion in which he asserted that the merits of the *McCollum* and *Zorach* cases were essentially the same. He wrote that he could "see no significant difference between the invalid Illinois system and that of New York here sustained. …[T]he *McCollum* decision would have been the same if the religious classes

had not been held in the school buildings" (Zorach v. Clauson, 1952, p. 316). Justice Black further stated, "*McCollum* … held that Illinois could not constitutionally mandate the compelled classroom hours of its compulsory school machinery so as to channel children into sectarian classes. Yet that is exactly what the Court holds New York can do. … This is not separation but combination of Church and State" (Zorach v. Clauson, 1952, pp. 316-318).

The case of *Flast v. Cohen* (1968) concerned a group of taxpayers that filed suit against the Secretary of Health, Education, and Welfare. The group sought to prevent the Department of Health, Education, and Welfare (HEW) from using federal funds to provide textbooks and services to religious schools. The issue before the Court was whether the taxpayers had standing to file a suit challenging the constitutionality of a federal law on the grounds that the law violated the Establishment Clause. The issue of whether federal funds were being spent as the taxpayers alleged was not before the Court (Flast v. Cohen, 1968).

The Court considered whether *Frothingham v. Mellon* (1923) governed the case. The Court ruled in *Frothingham* that federal taxpayers lack standing to challenge the constitutionality of a federal law (Frothingham v. Mellon, 1923). The *Flast* Court was faced with deciding "whether the *Frothingham* barrier should be lowered when a taxpayer attacks a federal statute on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment" (Flast v. Cohen, 1968, p. 85).

Breaking with the *Frothingham* standard, the Court ruled that the taxpayers could sue. The Court's opinion stated, "a taxpayer will have standing … when he alleges … that his tax money is being extracted and spent in violation of specific constitutional

protections" (Flast v. Cohen, 1968, pp. 105-106). The Court noted that "[o]ur history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general" (Flast v. Cohen, 1968, p. 103).

Also in 1968, the Court considered whether a New York law requiring public schools to lend textbooks to public and private school students violated the Establishment Clause. In *Board of Education v. Allen* (1968), a local school board argued that loaning school textbooks to parochial school children, even if the books were secular in nature, served to advance religion.

The Court relied on a test devised in *Abington School District v. Schempp* (1963) "for distinguishing between forbidden involvements of the State with religion and those contacts which the Establishment Clause permits" (Board of Education v. Allen, 1968, p. 243). The *Schempp* Court wrote:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion (Board of Education v. Allen, 1968, p. 243, quoting Abington School District v. Schempp, 1963, p. 222).

Applying the "secular purpose and primary effect" test, the Court ruled that the New York statute did not advance or prohibit the free exercise of religion. The Court found that "the express purpose of the statute was the furtherance of educational opportunities for the young," and that "[since] no funds or books are furnished to parochial schools … the financial benefit is to parents and children, not to schools" (Board of Education v. Allen, 1968, pp. 236, 243-244).

In his dissent, Justice Black stated that the New York law was "a flat, flagrant, open violation of the First and Fourteenth Amendments" (Board of Education v. Allen, 1968, p. 250). Justice Black further stated:

> To authorize a State to tax its residents for such church purposes is to put the State squarely in the religious activities of certain religious groups that happen to be strong enough politically to write their own religious preferences and prejudices into the laws. This links state and churches together in controlling the lives and destinies of our citizenship – a citizenship composed of people of myriad religious faiths, some of them bitterly hostile to and completely intolerant of the others. … The same powerful sectarian religious propagandists who have succeeded in securing passage of the present law to help religious schools carry on their sectarian religious purposes can and doubtless will continue their propaganda, looking toward complete domination and supremacy of their particular brand of religion. … It requires no prophet to foresee that on the argument used to support this law others could be upheld providing for state or federal government funds to buy property on which to erect religious school buildings or to erect the buildings themselves,

> to pay the salaries of the religious school teachers, and finally to have the sectarian religious groups cease to rely on voluntary contributions of members of their sects while waiting for the Government to pick up all the bills for the religious schools. … The Court's [ruling] here bodes nothing but evil to religious peace in this country (Board of Education v. Allen, 1968, pp. 251, 253-254).

In the case of *Walz v. Tax Commission* (1970), the Court considered the question of whether tax exemptions to religious institutions violate the Establishment Clause. The issue in this case concerned a New York taxpayer who claimed that such exemptions in New York indirectly required him to make a contribution to religious bodies, and thus violated the prohibition against establishment of religion (Walz v. Tax Commission, 1970). The Court stated that establishment of religion connotes "sponsorship, financial support, and active involvement of the sovereign in religious activity" (Walz v. Tax Commission, 1970, p. 668).

The Court upheld the tax exemptions for three reasons. The first reason was that the tax exemptions were applied to non-religious as well as religious institutions. Writing for the majority, Chief Justice Burger noted the Court's ruling in the *Everson* (1947) case that buses could be provided to transport school pupils, and that policemen were allowed to protect those pupils. He wrote, "we fail to see how a broader range of police and fire protection given equally to all churches, along with nonprofit hospitals, art galleries, and libraries receiving the same tax exemption, is different for purposes of the Religion Clauses" (Walz v. Tax Commission, 1970, p. 671). Chief Justice Burger further stated that the New York law "has not singled out one particular church or religious group or

even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups" (Walz v. Tax Commission, 1970, p. 673). The Court also noted, "[n]o one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state … [t]here is no genuine nexus between tax exemption and establishment of religion" (Walz v. Tax Commission, 1970, p. 675).

The second reason given by the Court for upholding the exemptions was the Court's assertion that levying taxes on religious institutions would result in unwanted entanglement between government and religion. Chief Justice Burger wrote:

> Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry … [w]e must also be sure that the end result – the effect – is not an excessive government entanglement with religion. The test is inescapably one of degree. Either course, taxation of churches or exemption, occasions some degree of involvement with religion. Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes (Walz v. Tax Commission, 1970, p. 674).

The Court's third reason given for upholding the exemption law was that such exemptions had been in effect in America for over 200 years without the result of establishment of religion. The Court reasoned:

> It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside. … Nothing in this national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of religious belief (Walz v. Tax Commission, 1970, p. 678).

The Court's opinion in *Lemon v. Kurtzman* (1971) had a significant impact on Establishment Clause jurisprudence in the latter twentieth century. This leading case concerned statutes in Rhode Island and Pennsylvania that provided for direct aid to mostly religious private schools with stipulations that the money be earmarked only for secular instruction (Lemon v. Kurtzman, 1971). Rhode Island's 1969 Salary Supplement Act provided a 15 percent salary supplement to teachers in private schools at which the average per-pupil expenditure on secular education was below the average in public schools. The statute also required that eligible teachers teach only courses that were offered in the public schools, use only materials used in public schools, and agree not to teach religion courses (Lemon v. Kurtzman, 1971). The Nonpublic Elementary and Secondary Education Act, passed in Pennsylvania in 1968, authorized the state school superintendent to reimburse private schools for teachers' salaries, textbooks, and

instructional materials. The reimbursement was restricted to secular courses, and payment for religious teaching was strictly prohibited (Lemon v. Kurtzman, 1971).

The Court ruled both statutes unconstitutional under the Religion Clauses of the First Amendment, stating that the "cumulative impact of the entire relationship arising under the statutes [fostered] excessive entanglement between government and religion" (Lemon v. Kurtzman, 1971, p. 603). In so ruling, the Court expanded the purpose and effect test set forth in *Schempp* (1963), and constructed a three-prong test for determining the constitutionality of laws with regard to the Establishment Clause. The so-called *Lemon* test became a fixture in Establishment Clause jurisprudence in the late twentieth century, used in over 30 such cases (Russo & Mawdsley, 2001). The Court stated:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion" (Lemon v. Kurtzman, 1971, pp. 612-613, quoting Walz v. Tax Commission, 1970, p. 674).

In its analysis of the Rhode Island and Pennsylvania laws, the Court ruled that both statutes had a secular legislative purpose, thus passing the first prong of the test. The Court further noted that both states "sought to create statutory restrictions designed to guarantee the separation between secular and religious functions" (Lemon v. Kurtzman, 1971, p. 613). Based on this fact, the Court did not address the second prong of the test, stating that it "need not decide whether these legislative precautions restrict

the principal or primary effect of the programs to the point where they do not offend the Religion Clauses" (Lemon v. Kurtzman, 1971, pp. 613-614). As noted above, the Court struck down both laws on the grounds that "the cumulative impact of the entire relationship arising under the statutes in each State [involved] excessive entanglement between government and religion" (Lemon v. Kurtzman, 1971, p. 614).

The Court recognized the vagueness of the excessive entanglement prong of the test, noting that "[j]udicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship" (Lemon v. Kurtzman, 1971, p. 614). With respect to the Rhode Island statute, the Court focused heavily on the role of teachers in Catholic schools that received reimbursement in building its argument that the statute fostered excessive entanglement. Noting that previous cases such as *Everson* (1947) and *Allen* (1968) upheld programs that permitted states to provide religious schools with "secular, neutral, or non-ideological services, facilities, or materials" (Lemon v. Kurtzman, 1971, p. 616), the Court expressed concern over the potential actions of teachers in religious private schools. The Court reasoned:

> We cannot … refuse here to recognize that teachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of

> pre-college education. The conflict of functions inheres in the situation (Lemon v. Kurtzman, 1971, p. 617).

Acknowledging the restrictions established by the Rhode Island legislature, and asserting its concerns about the potential conduct of teachers in religious schools, the Court opined:

> A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church. … This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with the dangers of excessive government direction of church schools and hence of churches. … The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn (Lemon v. Kurtzman, 1971, pp. 619-620, 625).

The Court struck down the Pennsylvania program based on similar concerns over entanglement between church and state. The Court also noted that the Pennsylvania statute also possessed "the further defect of providing state financial aid directly to the

church-related school" (Lemon v. Kurtzman, 1971, p. 621). This feature of the Pennsylvania law distinguished it from laws in previous cases that were upheld by the Court, such as *Everson* (1947) and *Allen* (1968). In those cases "the Court was careful to point out that state aid was provided to the student and his parents – not to the church-related school" (Lemon v. Kurtzman, 1971, p. 621).

The Court also expressed concern about "the divisive political potential" of the Rhode Island and Pennsylvania programs (Lemon v. Kurtzman, 1971, p. 622), as well as the potential of the debate surrounding the programs to draw attention away from other important issues. The Court stated:

> Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division among religious lines was one of the principal evils against which the First Amendment was intended to protect. … To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues … to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government (Lemon v. Kurtzman, 1971, pp. 622-623).

In his dissent, Justice White wrote that the Court was "quite wrong" in its opinion, and called the reasoning of the Court regarding the potential of the programs to foster excessive entanglement "a curious and mystifying blend" (Lemon v. Kurtzman, 1971, pp.

662, 666). He also took issue with the majority's concerns over the potential conduct of parochial school teachers, as well as its treatment of the efforts of Rhode Island and Pennsylvania to monitor their programs. Further stating that he refused to "substitute presumption for proof" (Lemon v. Kurtzman, 1971, p. 670), Justice White wrote:

> Although stopping short of considering them untrustworthy, the Court concludes that for [parochial school teachers] the difficulties of avoiding teaching religion along with secular subjects would pose intolerable risks and would in any event entail an unacceptable enforcement regime. Thus, the potential for impermissible fostering of religion in secular classrooms – an untested assumption of the Court – paradoxically renders unacceptable the State's efforts at insuring that secular teachers under religious discipline successfully avoid conflicts between the religious mission of the school and the secular purpose of the State's education program. … The Court thus creates an insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught – a promise that the school and its teachers are quite willing and on this record able to give – and enforces it, it is then entangled in the "no entanglement" aspect of the Court's Establishment Clause jurisprudence (Lemon v. Kurtzman, 1971, pp. 666-668).

The Court addressed similar issues in the context of higher education in 1971. In the case of *Tilton v. Richardson* (1971), the Court considered the Higher Education Facilities Act of 1963. This legislation allowed federal loans and grants for the

construction of college and university facilities, including those that were church-related. The law required that the facilities not be used for religious purposes. The federal government retained a 20-year interest in facilities constructed with funds provided by the law, and if any recipient of funds violated the stipulations of the law during this time the United States reserved the right to recover the funds (Tilton v. Richardson, 1971).

The Court upheld the constitutionality of the law, except for the portion requiring that the facilities constructed with federal funds not be used for religious purposes for 20 years. The Court acknowledged that "we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication," but ruled that the "unrestricted use of valuable property after 20 years is in effect a contribution to a religious body" (Tilton v. Richardson, 1971, pp. 678, 673). The Court found several distinctions between *Tilton* and *Lemon*, including the assertion that college students are much less impressionable than children, and that the government aid in *Tilton* is "a one-time, single-purpose construction grant, with only minimal need for inspection" (Tilton v. Richardson, 1971, p. 673).

The third prong of the *Lemon* test was a factor in the Court's decision in the case of *Essex v. Wolman* (1973). This case concerned an Ohio statute that authorized grants to schools. A provision of the law allowed parents of children attending private schools to receive reimbursements for tuition costs. The statute specifically stated a secular purpose (Essex v. Wolman, 1973). The Court held that stating a secular purpose alone was not enough to avoid offending the Establishment Clause. The Court overwhelmingly held that the efforts required of administrators of the grants to monitor the use of the money,

and to ensure that it was not used for religious purposes, constituted an excessive entanglement between government and religion (Essex v. Wolman, 1973).

One of the Court's most significant cases concerning Establishment Clause jurisprudence in the twentieth century was *Committee for Public Education and Religious Liberty v. Nyquist* (1973). In addition to providing a key ruling regarding public funding of private schools, *Nyquist* also heavily influenced funding cases over the subsequent 28 years. The question of whether *Nyquist* governed *Zelman v. Simmons-Harris* (2002) became central to the debate over the constitutionality of the Ohio voucher program discussed below.

In the early 1970s, private schools in New York were confronted with declining enrollments and rising costs. The survival of these schools – and the benefits such private schools afforded public schools – was at stake. The New York state legislature acted, and in May of 1972 several amendments were added to the state's education and tax laws (Committee for Public Education v. Nyquist, 1973). The first five sections of the amendments established three separate financial aid programs for private elementary and secondary schools (Committee for Public Education v. Nyquist, 1973).

The first section of the amendments, entitled "Health and Safety Grants for Nonpublic School Children," provided for direct financial grants from the state to "qualifying" private schools (N.Y. Laws 1972, c. 414, amending N.Y. Educ. Law, Art. 12, pp. 549-553). This aid was to be used for the "maintenance and repair of … school facilities and equipment to ensure the health, welfare, and safety of enrolled pupils" (N.Y. Laws, 1972, c. 414, amending N.Y. Educ. Law, Art. 12, p. 550). To qualify for the aid, the institution had to be a private, nonprofit elementary or secondary school that had

been “designated during the [immediately preceding] year as serving a high concentration of pupils from low-income families” (N.Y. Laws, 1972, c. 414, amending N.Y. Educ. Law, Art. 12, p. 550). The amendment also required the commissioner of education to determine the average per-pupil cost for equivalent maintenance and repair services in the public schools, and under no circumstances could the grant to nonpublic qualifying schools exceed 50 percent of that cost (Committee for Public Education v. Nyquist, 1973).

The legislature stated that the “fiscal crisis in nonpublic education … has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children,” and that “the state has the right to make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature” (N.Y. Laws, 1972, c. 414, amending N.Y. Educ. Law, Art. 12, p. 549). The fact that the aid would directly benefit religious schools became the crux of a challenge to the amendments.

The remaining four sections of the amendments were packaged together and called the “Elementary and Secondary Education Opportunity Program” (N.Y. Laws, 1972, c. 414, amending N.Y. Educ. Law, Art. 12, pp. 559-563). The program was comprised of two parts, a tuition grant component and a tax benefit plan. Section 2 of the legislation established a plan for poor parents of children attending private schools to receive tuition reimbursements. To qualify for reimbursement a parent had to have an annual taxable income of less than $5,000, and the amount of state reimbursement could not exceed 50 percent of the actual tuition bill (N.Y. Laws, 1972, c. 414, amending N.Y. Educ. Law, Art. 12, p. 559). The rest of the program, in sections 3, 4, and 5 of the

amendments, was designed to provide tax relief to parents of private school children who did not qualify for reimbursement of tuition.

After the amendments were signed into law, a complaint was filed in the United States District Court for the Southern District of New York challenging the law on Establishment Clause grounds (Committee for Public Education v. Nyquist, 1973). The plaintiffs included several individuals who were residents and taxpayers of New York, along with an unincorporated association known as the Committee for Public Education and Religious Liberty (PEARL). Some of the plaintiffs had children attending public schools at the time. The district court struck down the first two sections of the amendments, the maintenance and repair grants and the tuition reimbursements grants, ruling them to be in violation of the Establishment Clause. The remaining three sections, which provided tax relief to parents of private school children, were upheld (Committee for Public Education v. Nyquist, 1973). The plaintiffs appealed to the Supreme Court in an effort to challenge the district court's ruling concerning the tax relief sections. In a 6-3 decision, the Court affirmed the district court's decision to strike down sections 1 and 2, and reversed its ruling regarding sections 3 through 5. Thus the Court ruled all five sections of the amendments to be in violation of the Establishment Clause (Committee v. Public Education v. Nyquist, 1973).

In striking down the New York law, the Court relied heavily on the *Lemon* test discussed above. The Court conceded that the New York law possessed a clearly secular purpose, but also ruled that "the propriety of a legislature's purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between Church and State" (Committee for Public

Education v. Nyquist, 1973, p. 774). The Court "[c]ompletely reject[ed] the child-benefit concept which it had accepted in prior rulings" (Viteritti, 1998, p. 708).

According to the Court's decision, the maintenance and repair provisions of section 1 of the New York amendments violated the Establishment Clause because no guarantee was made that the payments made by the state to private schools would be used for strictly secular aims. Writing for the majority, Justice Powell stated:

> Nothing in the statute, for instance, bars a qualifying school from paying out of state funds the salaries of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities. Absent appropriate restrictions on expenditures for these and similar purposes, it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools (Committee for Public Education v. Nyquist, 1973, p. 774).

Officials from New York argued that the expenditures for maintenance and repair were similar to other expenditures approved by the Supreme Court in prior cases [*Everson v. Board of Education* (1947); *Board of Education v. Allen* (1968)]. Justice Powell responded by suggesting that these cases were not germane. He stated that:

> These cases simply recognize that sectarian schools perform secular, educational functions as well as religious functions, and that some forms of aid may be channeled to the secular without providing direct aid to the sectarian. But the channel is a narrow one, as the … cases illustrate. Of course, it is true in each case that the provision of such

> neutral, nonideological aid, assisting only the secular functions of sectarian schools, served indirectly and incidentally to promote the religious function by rendering it more likely that children would attend sectarian schools and by freeing the budgets of those schools for use in nonsecular areas. But an indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law (Committee for Public Education v. Nyquist, 1973, p. 775).

The *Nyquist* Court also struck down the tuition reimbursement portion of the remaining four sections of the amendments, ruling that the grants violated the "primary effect" component of the *Lemon* test. In addition, the Court reversed the decision of the lower court with respect to the remaining amendments, which provided tax relief to parents of private school children who did not qualify for reimbursement of tuition. New York based most of its argument in favor of this portion of the legislation on *Walz v. Tax Commission of New York* (1970), discussed above, which upheld another New York law providing property tax exemptions for religious organizations. The Court concluded that, while tax exemptions for places of worship were deeply rooted in American history, "tax benefits for parents whose children attend parochial schools [were] a recent innovation, occasioned by the growing financial plight of such nonpublic institutions and designed, albeit unsuccessfully, to tailor state aid in a manner not incompatible with the recent decisions of this Court" (Committee for Public Education v. Nyquist, 1973, p. 792).

Chief Justice Burger, Justice White, and Justice Rehnquist joined in the Court's decision to hold the maintenance and repair amendment unconstitutional, but dissented as to the rest of the opinion. In so doing, the three justices raised a key question: Does the

fact that the financial aid in question is distributed to the parents of the children involved, rather than directly to the parochial institutions, make any substantive difference for the purpose of Establishment Clause analysis? Taking the Court's previous decisions into account, Chief Justice Burger wrote:

> While there is no straight line running through our decisions interpreting the Establishment and Free Exercise Clauses of the First Amendment, our cases do … lay down one solid, basic principle: that the Establishment Clause does not forbid governments, state or federal, to enact a program of general welfare under which benefits are distributed to private individuals, even though many of those individuals may elect to use those benefits in ways that "aid" religious instruction or worship. … The essence of all these decisions … is that government aid to individuals generally stands on an entirely different footing from direct aid to religious institutions (Committee for Public Education v. Nyquist, 1973, pp. 799, 801).

Chief Justice Burger further stated:

> This fundamental principle which I see running through our prior decisions in this difficult and sensitive field of law, and which I believe governs the present cases, is premised more on experience and history than on logic. It is admittedly difficult to articulate the reasons why a State should be permitted to reimburse parents of private school children – partially at least – to take into account the State's enormous savings in not having to provide schools for those children, when a State is not allowed to pay the

> same benefit directly to sectarian schools on a per-pupil basis. In either case, the private individual makes the ultimate decision that may indirectly benefit church-sponsored schools; to the extent the state involvement with religion is substantially attenuated. The answer … lies in the experienced judgment of various members of this Court over the years that the balance between the policies of free exercise and establishment of religion tips in favor of the former when the legislation moves away from direct aid to religious institutions and takes on the character of general aid to individual families (Committee for Public Education v. Nyquist, 1973, p. 802).

With respect to the tuition reimbursement and tax relief portions of the legislation, Chief Justice Burger, Justice Rehnquist and Justice White dissented, referring to those programs as "indistinguishable in principle, purpose, and effect from the statutes in *Everson* and *Allen*" (Committee for Public Education v. Nyquist, 1973, p. 803). The dissenting justices also took issue with the Court's contention that the opinions expressed in the *Walz* decision were at odds with the tax relief offered in the New York amendments. Justice Rehnquist stated:

> The opinions in *Walz* … make it clear that tax deductions and exemptions, even when directed to religious institutions, occupy quite a different constitutional status under the Religious Clauses of the First Amendment than do outright grants to such institutions. Mr. Chief Justice Burger, speaking for the Court in *Walz*, said "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has

> ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees 'on the public payroll.' There is no genuine nexus between tax exemption and establishment of religion" (Committee for Public Education v. Nyquist, 1973, p. 806, quoting Walz v. Tax Commission, 1970, p. 675).

Justice Rehnquist also referred to a concurring statement made by Justice Brennan in the *Walz* decision. Justice Brennan was part of the majority opinion in *Nyquist*, but his words in *Walz* seem to be inconsistent with his opinion in *Nyquist*:

> Mr. Justice Brennan in his concurring opinion [in *Walz*] [said]: "Tax exemptions and general subsidies, however, are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer. … Tax exemptions, accordingly, constitute mere passive state involvement with religion and not the affirmative involvement characteristic of outright governmental subsidy" (Committee for Public Education v. Nyquist, 1973, pp. 806-807, quoting Walz v. Tax Commission, 1970, pp. 690-691).

The Court also issued an Establishment Clause ruling concerning public funding of religious institutions in the higher education context in 1973. In *Hunt v. McNair* (1973), the Court reviewed a South Carolina program that loaned proceeds from a state

bond issue to a Baptist college. The college used the money to fund a building project, and the facilities constructed were conveyed to governmental authorities until the college could repay the loan (Hunt v. McNair, 1973). The Court ruled that the law had a secular purpose since all colleges in South Carolina could receive grants. It also ruled that the law neither advanced nor prohibited religion since the plan required that the funds could not be used for religious purposes. Finally, the Court stated that, despite the fact that the government could foreclose if the Baptist college defaulted on the loan, the law did not foster excessive entanglement between government and religion (Hunt v. McNair, 1973).

In 1974, the Court issued a ruling in the case of *Marburger and Griggs v. Public Funds for Public Schools* (1974). This case involved a New Jersey Plan that reimbursed parents of private school students for textbook purchases. The plan also provided direct aid to parochial schools for equipment, services, and supplies. The Court upheld a lower court's ruling that the direct aid violated the Establishment Clause.

In the case of *Meek v. Pittenger* (1975), the Court considered the constitutionality of a Pennsylvania program that provided textbooks, instructional materials, and the services of publicly funded teachers to parochial schools. Based on the precedent set in the *Allen* (1968) case, the Court upheld the portion of the law that provided for the lending of textbooks to students, since "the financial benefit of [the textbook program] … is to parents and children, not to the nonpublic schools" (Meek v. Pittenger, 1975, p. 361). The Court also noted that the record of the textbook program contained "no suggestion that religious textbooks will be lent or that the books provided will be used for anything other than purely secular purposes" (Meek v. Pittenger, 1975, p. 363).

In applying the *Lemon* test to the portion of the law providing the loan of instructional materials, the Court found that the program possessed a secular legislative purpose. The Court struck down this portion of the program, however, finding that it had "the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefiting" from it (Meek v. Pittenger, 1975, p. 363). Writing for the Court, Justice Stewart noted that more than 75 percent of the private schools eligible for participation in Pennsylvania's program were religiously affiliated institutions (Meek v. Pittenger, 1975).

The Court further found that offering the services of publicly funded teachers and other educational staff such as counselors fostered excessive entanglement between government and religion. As in *Lemon v. Kurtzman* (1971), the Court cited the potential actions of teachers participating in the Pennsylvania program. Justice Stewart stated that, regardless of the subject, "a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists" (Meek v. Pittenger, 1975, p. 370).

In his dissent, Justice Rehnquist took issue with the majority's finding that the law had "the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefiting" from it (Meek v. Pittenger, 1975, p. 363). Justice Rehnquist wrote that the Court appeared "to follow 'the unsupportable approach of measuring the effect of a law by the percentage of' sectarian schools benefited" (Meek v. Pittenger, 1975, p. 389, quoting Committee for Public Education v. Nyquist, 1973, p. 804). As discussed below, this approach of measuring the effect of a law was again discussed and considered by the Court in *Mueller v. Allen*

(1983) and *Simmons-Harris v. Zelman* (2002). Justice Rehnquist also contested the Court's ruling that the potential actions of teachers warranted striking down the law on the basis of excessive entanglement between government and religion. He characterized the Court's reasoning as an "unsubstantiated factual proposition" (Meek v. Pittenger, 1975, p. 394).

Justice Rehnquist further wrote:

> I am disturbed as much by the overtones of the Court's opinion as by its actual holding. The Court apparently believes that the Establishment Clause of the First Amendment not only mandates religious neutrality on the part of government but also requires that this Court go further and throw its weight on the side of those who believe that our society as a whole should be a purely secular one (Meek v. Pittenger, 1975, p. 395).

In response to the Court's ruling in *Meek* (1975), the Ohio state legislature passed a law providing a variety of services to private schools, most of which were sectarian. The law provided funding for (1) purchasing secular textbooks for loan to children attending private schools; (2) providing standardized tests and scoring services to private schools; (3) providing diagnostic health services on private schools campuses, with non-physician services performed by local board of education employees; (4) loaning instructional materials to private school pupils or their parents; and (5) private school field trips (Ohio Rev. Code, 1976, 3317.06). Arguments over the constitutionality of the law were presented to the Court in the case of *Wolman v. Walter* (1977).

The Court upheld all portions of the law with the exception of the loaning of instructional materials and the funding of field trips. With respect to the loans, the Court

noted that, in spite of the fact that the program "is ostensibly limited to neutral and secular instructional material and equipment, it inescapably has the primary effect of providing a direct and substantial advancement of sectarian education" (Wolman v. Walter, 1977, p. 230). Since private schools were the recipients of the field trip funding rather than the children, and since the private schools controlled the logistics of the field trips, the Court ruled that this portion of the program created "an impermissible direct aid to sectarian education, and [that] the close supervision of [the program] would involve excessive entanglement" (Wolman v. Walter, 1977, p. 231).

Justice Powell wrote an opinion concurring in part, concurring in the judgment in part, and dissenting in part. He stated that:

> Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools. The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them. … At this point in the twentieth century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. The risk of significant religious or denominational control over our democratic processes – or even of deep political division along religious lines – is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems

> entirely tolerable in light of the continuing oversight of this Court (Wolman v. Walter, 1977, pp. 262-263).

Also in 1977, the Court affirmed a lower court's ruling that a New Jersey tax plan benefiting parents of parochial school children violated the Establishment Clause. In the case of *Byrne v. Public Funds for Public Schools* (1977), the Court considered the program, which provided a $1,000 personal deduction against gross income to reimburse parents for costs associated with the private education of their children. In finding the law unconstitutional, the Court held that the precedent set by *Committee for Public Education v. Nyquist* (1973) governed. The Court found that since only parents of parochial school children benefited from the law, and that since the parents of public school children were excluded, the program had the primary effect of advancing religion (Byrne v. Public Funds for Public Schools, 1977).

In the case of Committee for Public Education v. Regan (1980), the Court considered a New York statute that provided public funds for secular and parochial private schools for the administration of state-mandated testing of students. The statute also provided funds to compensate private school personnel for grading the tests (Committee for Public Education v. Regan, 1980). Applying the *Lemon* test, the Court upheld the constitutionality of the program.

The Court found that the statute had the secular purpose of "providing educational opportunity [to] prepare New York citizens for the challenges of American life" (Committee for Public Education v. Regan, 1980, p. 646). The Court also found that the grading of the tests by private school personnel provided "no substantial risk" that the tests could be used for religious purposes (Committee for Public Education v. Regan,

1980, p. 647). With respect to the second prong of the *Lemon* test, the Court characterized the grading of tests as a function "that has a secular purpose and primarily a secular effect" (Committee for Public Education v. Regan, 1980, p. 647). The Court was also satisfied that the law provided sufficient protections against excessive entanglement between government and religion.

Another leading Establishment Clause case in the latter twentieth century was the case of *Mueller v. Allen* (1983). This case involved a Minnesota statute that allowed taxpayers a deduction on their state income tax for actual expenses incurred in educating their children, specifically expenses for tuition, textbooks, and transportation. Although the deduction was made available to all parents, whether their children attended public or private schools, parents of children attending private, mostly parochial schools were the primary beneficiaries of the law (Mueller v. Allen, 1983). The Court upheld the lower court's ruling that the law was constitutional.

The Court applied the *Lemon* test in reaching its conclusion that the law passed constitutional muster. With respect to the first prong of the test, the Court offered several characteristics of the law that reflected a secular purpose. First, the Court ruled that "a State's efforts to assist parents in meeting the rising cost of educational expenses plainly serves [the] secular purpose of ensuring that the State's citizenry is well educated" (Mueller v. Allen, 1983, p. 395). Secondly, since private schools "relieve public schools of a … great burden – to the benefit of all taxpayers … there is a strong public interest in assuring the continued financial health of private schools, both sectarian and nonsectarian" (Mueller v. Allen, 1983, p. 395). Finally, the Court cited the secular purpose of private schools providing competition for public schools, similar to

competition in the corporate world. Writing for the Court, Justice Rehnquist noted, "private schools may serve as a benchmark for public schools," and referred to Justice Powell's opinion in *Wolman v. Walter* (1977):

> Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools. The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them (Mueller v. Allen, 1983, p. 395, quoting Wolman v. Walter, 1977, p. 262).

Significantly, Justice Powell joined Justice Rehnquist in the majority opinion in *Mueller*.

With respect to the second prong of the *Lemon* test, the Court cited several features of the Minnesota law as evidence that the tax program had a primary effect that neither advanced nor inhibited religion. One of the features was that the deduction for educational expenses was only one of several deductions provided to taxpayers, including those for medical expenses and charitable contributions (Mueller v. Allen, 1983). Another feature the Court found significant was that the deduction was available for all parents, "including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools" (Mueller v. Allen, 1983, p. 397). The Court found that the broad availability of the tax deduction was one of many ways the case was "vitally different" from *Committee for Public Education v. Nyquist* (1973) (Mueller v. Allen, 1983, p. 398). Plaintiffs in the case argued that since

the parents whose children attended parochial schools comprised an overwhelming percentage of the beneficiaries of the program, the law was unconstitutional. The plaintiffs asserted that religious schools ultimately benefited from the program, in spite of its secular purpose. The Court responded to this argument by stating that such a "statistical analysis … does not provide the certainty needed to determine the statute's constitutionality" (Mueller v. Allen, 1983, pp. 388-389). Justice Rehnquist further stated:

> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. …If parents of children in private schools choose to take especial advantage of the relief provided by [the statute], it is no doubt due to the fact that they bear a particularly great financial burden in educating their children. More fundamentally, whatever unequal effect may be attributed to the statutory classification can fairly be regarded as a rough return for the benefits … provided to the State and all taxpayers by parents sending their children to parochial schools. In the light of all of this, we believe it wiser to decline to engage in the type of empirical inquiry into those persons benefited by state law which petitioners urge (Mueller v. Allen, 1983, pp. 401-402).

As discussed below, the question of measuring the constitutionality of a law by examining the percentage of citizens who benefit from it in a particular year was a significant issue in *Zelman v. Simmons-Harris* (2002).

In finding the program as passing the second prong of the *Lemon* test, the Court also noted the significance of the fact that public funds flowed to religious institutions "only as a result of numerous private choices of individual parents of school-age children" (Mueller v. Allen, 1983, p. 399). The Court further noted, "[w]here … aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally" (Mueller v. Allen, 1983, p. 399, quoting Widmar v. Vincent, 1981, p. 274). The Court also found "no difficulty" in ruling that the Minnesota tax statute did not foster an excessive entanglement between government and religion, thus satisfying the third prong of the *Lemon* test (Mueller v. Allen, 1983, p. 403). The *Mueller* decision reintroduced the distinction between direct and indirect aid, from which the Court had moved away beginning with the *Lemon* (1971) and *Nyquist* (1973) cases (Viteritti, 1998). The Court also relaxed its use of the primary effect test, and generally rejected the *Lemon* test "as a rigid formula for judicial review" (Viteritti, 1998, p. 709).

In 1985, the Supreme Court issued rulings in two companion cases that heavily influenced Establishment Clause jurisprudence. The cases of *Grand Rapids v. Ball* (1985) and *Aguilar v. Felton* (1985) concerned special education programs in Michigan and New York, respectively. The child benefit test reached its "nadir" in these cases (Russo & Mawdsley, 2001, p. 238). The closely divided Court struck down both programs, ruling that each violated the Establishment Clause. As discussed below, the

leading case of *Agostini v. Felton* (1997) overturned relevant portions of *Ball* and *Aguilar* in 1997.

The *Ball* case concerned two Michigan programs, entitled "Shared Time" and "Community Education." The Shared Time program offered remedial classes during the regular school day that were intended to supplement required core curriculum classes. The program was offered only at private schools, and the teachers involved were public school employees (Grand Rapids v. Ball, 1985). Of the 41 private schools involved in the program, 40 were religious in nature (Grand Rapids v. Ball, 1985).

The Community Education program offered courses during after-school hours for children as well as adults. The issues before the Court involved Community Education courses that were taught in private schools at the conclusion of the school day. Courses were voluntary and were offered only if 12 or more students enrolled, and teachers of the courses were part-time public school employees (Grand Rapids v. Ball, 1985). The Court noted that since a well-known teacher was needed to attract the necessary number of students for the class to be offered, the public schools accorded "a preference in hiring to instructors already teaching within the [private] school" (Grand Rapids v. Ball, 1985, p. 377). Each classroom used in the program "had to be free of any crucifix, religious symbol, or artifact, although such religious symbols [could] be present in the adjoining hallways, corridors, and other facilities used in connection with the program" (Grand Rapids v. Ball, 1985, p. 378). This is noteworthy since, as noted above, 40 of the 41 private schools that participated in both programs were religious in nature (Grand Rapids v. Ball, 1985).

The Court applied the *Lemon* test in its analysis of the Michigan law, and found that both programs possessed a secular purpose and thus satisfied the first prong of the test. With respect to the second prong, the Court stated:

> We conclude that the challenged programs have the effect of promoting religion in three ways. The state-paid instructors, influenced by the pervasively sectarian nature of the religious schools in which they work, may subtly or overtly indoctrinate the students in particular religious tenets at public expense. The symbolic union of church and state inherent in the provision of secular, state-provided instruction in the religious school buildings threatens to convey a message of state support for religion to students and to the general public. Finally, the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects. For these reasons, the conclusion is inescapable that [both programs] have the primary or principal effect of advancing religion, and therefore violate the dictates of the Establishment Clause of the First Amendment. … [T]he Establishment Clause "rest[s] on the belief that a union of government and religion tends to destroy government and degrade religion" (Grand Rapids v. Ball, 1985, pp. 397-398, quoting Engel v. Vitale, 1962, p. 431).

The Court relied on *Meek v. Pittenger* (1975) as precedent, and expressed concern over the "potential" that teachers employed by public schools would take advantage of the programs to inculcate their religious beliefs (Grand Rapids v. Ball, 1985, p. 386). In response to the statement that the programs had never received a complaint of such

conduct, the Court opined, "the lack of evidence of specific incidents of indoctrination is of little significance" (Grand Rapids v. Ball, 1985, p. 389). The Court further stated that "[s]uch indoctrination, if permitted to occur, would have devastating effects on the right of each individual voluntarily to determine what to believe (and what not to believe) free of any coercive pressures from the State, while at the same time tainting the resulting religious beliefs with a corrosive secularism" (Grand Rapids v. Ball, 1985, p. 385).

In the Court's opinion in *Aguilar v. Felton* (1985), Justice Brennan wrote for the majority and noted the likeness between the two cases. He stated:

> The New York City programs challenged in this case are very similar to the programs we examined in *Ball*. In both cases, publicly funded instructors teach classes composed exclusively of private school students in private school buildings. In both cases, an overwhelming number of the participating private schools are religiously affiliated. In both cases, the publicly funded programs provide not only professional personnel, but all materials and supplies necessary for the operation of the programs. Finally, the instructors in both cases are told that they are public school employees under the sole control of the public school system (Aguilar v. Felton, 1985, p. 409).

The Court struck down the New York law on the basis that it violated the third prong of the *Lemon* test by fostering excessive entanglement between government and religion. The Court ruled, "[e]ven where state aid to parochial institutions does not have the primary effect of advancing religion, the provision of such aid may nonetheless violate the Establishment Clause owing to the nature of the interaction of church and state in the administration of that aid" (Aguilar v. Felton, 1985, p. 409). In the Court's

opinion, the supervision of the programs would result in “a permanent and pervasive state presence in the sectarian schools receiving aid” (Aguilar v. Felton, 1985, p. 403).

Several justices wrote dissenting opinions in the two cases. Justice White wrote that he was “firmly of the belief that the Court’s decisions in these cases, like its decisions in *Lemon* and *Nyquist*, [were] ‘not required by the First Amendment and [were] contrary to the long-range interests of the country’” (Grand Rapids v. Ball, 1985, p. 400, quoting Committee for Public Education v. Nyquist, 1973, p. 820). Bemoaning the Court’s “obsession” with the *Lemon* test, Justice Burger wrote that the decisions in the two cases would “deny countless schoolchildren … the special training they need, simply because their parents desire that they attend religiously affiliated schools” (Aguilar v. Felton, 1985, p. 419). Justice Burger further stated:

> The notion that denying these services to students in religious schools is a neutral act to protect us from an Established Church has no support in logic, experience, or history. Rather than showing the neutrality the Court boasts of, it exhibits nothing less than hostility toward religion and the children who attend church-sponsored schools. … It borders on paranoia to perceive the Archbishop of Canterbury or the Bishop of Rome lurking behind programs that are just as vital to the Nation’s schoolchildren as textbooks (Aguilar v. Felton, 1985, pp. 421, 419-420).

Justice Rehnquist asserted that the Court’s decisions “impugn[ed] the integrity of public school teachers,” since “[n]ot one instance of attempted religious inculcation” existed in the records of the two cases (Grand Rapids v. Ball, 1985, p. 401). Justice Rehnquist also questioned the validity of the third prong of the *Lemon* test. He stated,

"the Court takes advantage of the 'Catch-22' paradox of its own creation, whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement" (Aguilar v. Felton, 1985, pp. 420-421). Justice Rehnquist also wrote, "we have indeed traveled far afield from the concerns which prompted the adoption of the First Amendment when we rely on gossamer abstractions to invalidate a law which obviously meets an entirely secular need" (Aguilar v. Felton, 1985, p. 421).

Justice O'Connor characterized the Court's decision in *Aguilar* as "tragic," and also wrote of "the flaws of a test that condemns benign cooperation between church and state" (Aguilar v. Felton, 1985, pp. 431, 421). Further calling into doubt the integrity of the *Lemon* test, and foreshadowing the Court's action in *Agostini v. Felton* (1997) discussed below, Justice O'Connor questioned "the utility of entanglement as a separate Establishment Clause standard in most cases" (Aguilar v. Felton, 1985, p. 422). She also asserted, "[p]ervasive institutional involvement of church and state may remain relevant in deciding the effect of a statute which is alleged to violate the Establishment Clause, but state efforts to ensure that public resources are used only for nonsectarian ends should not in themselves serve to invalidate an otherwise valid statute" (Aguilar v. Felton, 1985, p. 430).

In *Witters v. Washington Department of Services for the Blind* (1986), the Supreme Court heard arguments in a case appealed from a ruling issued by the Washington Supreme Court. The case involved a statute that authorized the Washington Commission for the Blind to provide aid for special education or training to visually handicapped citizens (Witters v. Washington, 1986). Larry Witters applied for such aid and was rejected on the grounds that the aid would violate Washington's constitution,

because at the time he was attending a private Christian college seeking to become a clergyman. The administrative action was upheld in state superior court, and the case made its way to the Washington Supreme Court (Witters v. Commission for the Blind, 1984).

The Washington Supreme Court upheld the superior court's ruling, but declined to base its ruling on the state constitution. Instead, the court based its decision on the federal Establishment Clause (Witters v. Commission for the Blind, 1984). The Washington court applied the *Lemon* test, and ruled, "[t]he 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. Commission for the Blind, 1984, p. 56). The court found that the statute did not violate the first prong of the test, and declined to consider the third prong after deciding that the second prong was violated.

The Supreme Court granted certiorari and in a unanimous ruling reversed the Washington Supreme Court decision. The Court noted that all parties involved recognized the secular purpose of the statute. With respect to the second prong of the *Lemon* test, the Court found that the statute passed constitutional muster. Writing for the Court, Justice Marshall stated:

> 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. … Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely private choices of aid recipients (Witters v. Washington, 1986, pp. 486-487).

Justice Marshall further wrote that the law was "in no way skewed toward religion," that "recipients have full opportunity to expend vocational rehabilitation aid on wholly secular education," and that "the decision to support religious education is made by the individual, not by the State" (Witters v. Washington, 1986, p. 488). However, the Court stated that the Washington Supreme Court was free to consider the "far stricter" dictates of the Washington Constitution, and, as discussed below, the Washington Supreme Court struck down the program on remand (Witters v. Washington, 1986, p. 489; Kemerer, 2002).

The Individuals with Disabilities Education Act (IDEA) was at the center of the case of *Zobrest v. Catalina Foothills School District* (1993). This case involved a deaf child and his parents who filed suit after a school district in Arizona refused to provide a sign-language interpreter to accompany the child to his classes at a Catholic high school. The Ninth Circuit Court of Appeals upheld a lower court's decision that to provide an interpreter to the child promoted the child's religious development at public expense and therefore violated the Establishment Clause (Zobrest v. Catalina, 1992). The Ninth Circuit reasoned, "[b]y placing its employee in the sectarian school, the government would create the appearance that it was a joint sponsor of the school's activities" (Zobrest v. Catalina, 1992, pp. 1194-1195). The Supreme Court agreed to hear the case and reversed the decision. The Court's decision "marked the beginning of the resurgence" of the child benefit test (Russo & Mawdsley, 2001, p. 240).

The Court found that providing an interpreter for the child did not serve to impermissibly advance religion because the decision for the child to attend a religious school was made by the child's parents, and thus "an interpreter's presence there cannot

be attributed to state decision making" (Zobrest v. Catalina, 1993, p. 2). Like its earlier decisions in *Mueller* (1983) and *Witters* (1986), the Court ruled that the program in question passed constitutional muster because its benefits were distributed "neutrally," and "without regard to the sectarian-nonsectarian" nature of the school involved (Zobrest v. Catalina, 1993, p. 2). Writing for the majority, Chief Justice Rehnquist noted that the Court has "consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit" (Zobrest v. Catalina, 1993, p. 8). Chief Justice Rehnquist further noted, "the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school" (Zobrest v. Catalina, 1993, p. 13).

The Court issued a significant First Amendment ruling in the higher education context in 1995. The case of *Rosenberger v. Rectors and Visitors of the University of Virginia* (1995) concerned the refusal by the University of Virginia to allow a student organization to publish a newspaper with a religious viewpoint using college activity fees. The university allowed such fees to be used by non-religious student groups. The Court found that the students denied access to funds by the university were victims of viewpoint discrimination (Viteritti, 1998). Writing for the majority, Justice Kennedy noted that governmental neutrality toward religious and nonreligious groups at the university respected "the critical difference 'between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect'" (Rosenberger v. University of Virginia, 1995, p. 841, quoting Board of Education v. Mergens, 1990, p. 250).

Establishment Clause jurisprudence in the latter twentieth century was greatly impacted by the Supreme Court's decision in *Agostini v. Felton* (1997). With this ruling, the Court overturned relevant portions of its previous decisions in *Grand Rapids v. Ball* (1985) and *Aguilar v. Felton* (1985). As discussed above, the *Ball* opinion presumed that public employees placed in private school settings would inevitably promote religion, and that their presence created a symbolic union between government and religion (Grand Rapids v. Ball, 1985). The Court ruled that the decision in *Zobrest v. Catalina* (1993) discussed above rendered this portion of the *Ball* ruling moot. The *Ball* Court also established that any and all government aid that directly benefits the educational function of religious schools is invalid (Grand Rapids v. Ball, 1985). The *Agostini* Court cited the decision in *Witters v. Washington* (1986) as rendering this portion of the *Ball* opinion moot.

The Court also ruled that the *Aguilar* Court had erred in concluding that the New York program discussed above fostered excessive entanglement between government and religion (Agostini v. Felton, 1997). In so doing, the Court essentially refashioned the *Lemon* test by incorporating the third prong of the test, dealing with excessive entanglement, into the second prong that inquires into the primary effect of a statute (Agostini v. Felton, 1997). The *Agostini* Court mandated that three questions must be answered in determining if a law has a primary effect that advances or inhibits religion:

(1) Does the aid program result in government indoctrination?

(2) Does the aid program define its recipients by reference to religion?

(3) Does the aid program create an excessive entanglement between government and religion? (Agostini v. Felton, 1997)

The Court ruled that the question of whether a statute results in government indoctrination can be answered by determining if any religious indoctrination that actually occurs could reasonably be attributed to action taken by the government (Agostini v. Felton, 1997). As discussed below, the recent Establishment Clause cases decided by the Rehnquist Court have looked to the principle of neutrality when investigating this question (Mitchell v. Helms, 2000, Zelman v. Simmons-Harris, 2002). In seeking to determine whether an aid program "define[s] its recipients by reference to religion," the *Agostini* Court asserted that for this question to be answered, the principle of neutrality must be applied to determine whether the criteria for receiving the aid "creates a financial incentive to undertake religious indoctrination" (Agostini v. Felton, 1997, pp. 234, 231). Justice O'Connor wrote:

> This incentive is not present … where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. Under such circumstance, the aid is less likely to have the effect of advancing religion (Agostini v. Felton, 1997, p. 231).

In spite of its restructuring by the *Agostini* Court, the "seemingly ubiquitous" *Lemon* test remained a key component of Establishment Clause jurisprudence as the twentieth century came to a close (Russo & Mawdsley, 2001, p. 249). The validity of the test, however, is not without question. No fewer than five of the currently sitting Supreme Court justices have expressed concerns about *Lemon* (Russo & Mawdsley, 2001). For example, in her concurring opinion in *Wallace v. Jaffree* (1985), Justice O'Connor noted, "in spite of its initial promise, the *Lemon* test has proved problematic"

(Wallace v. Jaffree, 1985, p. 68). Justice Scalia was more pointed when he remarked, "like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence" (Lamb's Chapel v. Center Moriches Union Free School District, 1993, p. 398). Despite its critics, "the *Lemon* test has demonstrated a remarkable resiliency, often coming back from the edge of oblivion" (Russo & Mawdsley, 2001, p. 260).

The Court applied the restructured *Lemon* test fashioned by the *Agostini* Court in the case of *Mitchell v. Helms* (2000). This case involved a group of private school parents that challenged a ruling by the Fifth Circuit Court of Appeals that chapter 2 of the Elementary and Secondary Education Act of 1965 violated the Establishment Clause (Helms v. Picard, 1999). This portion of the law allowed state education agencies to loan educational equipment and materials to public and private schools. The Court issued a plurality opinion and overturned the Fifth Circuit ruling. Justice Thomas, joined by Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy, wrote the opinion, while Justice O'Connor, joined by Justice Breyer, offered a concurring opinion (Mitchell v. Helms, 2000).

The Court ruled that the government action in question does not result in government indoctrination of religion, and that the aid program does not define its recipients by reference to religion (Mitchell v. Helms, 2000). The Court overruled *Meek v. Pittenger* (1975) and *Wolman v. Walter* (1977) in reaching its conclusion. A major issue addressed by the Court was that the equipment and materials provided by the program were divertible for religious use. Justice Thomas wrote:

> So long as the governmental aid is not itself "unsuitable for use in the public schools because of religious content," and eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern. … The issue is not divertibility of aid but rather whether the aid itself has an impermissible content. Where the aid would be suitable for use in a public school, it is also suitable for use in any private school. Similarly, the prohibition against the government providing impermissible content resolves the Establishment Clause concerns that exist if aid is actually diverted to religious uses. … A concern for divertibility, as opposed to improper content, is misplaced not only because it fails to explain why the sort of aid we have allowed is permissible, but also because it is boundless – enveloping all aid, no matter how trivial – and thus has only the most attenuated (if any) link to any realistic concern for preventing an establishment of religion (Mitchell v. Helms, 2000, pp. 809, 811-812, quoting Mueller v. Allen, 1983, p. 245).

The Court also placed a significant emphasis on neutrality in crafting its opinion. Justice Thomas wrote:

> In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and areligous are all alike eligible for governmental aid, no one would conclude that any

> indoctrination that any particular recipient conducts has been done at the behest of the government. … To put the point differently, if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose (Mitchell v. Helms, 2000, p. 803).

Justice Thomas further stated, "[T]he religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose. … [H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow" (Mitchell v. Helms, 2000, p. 828). "In short," Justice Thomas concluded, "nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now" (Mitchell v. Helms, 2000, p. 829). Without specifically naming it, the opinion written by Justice Thomas "expanded the parameters" of the child benefit test (Russo & Mawdsley, 2001, p. 249).

In her concurring opinion, Justice O'Connor expressed concern over the Court's decisions regarding neutrality and diversion of aid. She stated:

> Reduced to its essentials, the plurality's rule states that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content. The plurality also rejects the distinction between direct and indirect aid, and

> holds that the actual diversion of secular aid by a religious school to the advancement of its religious mission is permissible. … [T]he plurality's treatment of neutrality comes close to assigning that factor singular importance in the future adjudication of Establishment Clause challenges to government school-aid programs. … I do not quarrel with the plurality's recognition that neutrality is an important reason for upholding government aid programs against Establishment Clause challenges. … Nevertheless, we have never held that a government aid program passes constitutional muster solely because of the neutral criteria it employs as a basis for distributing aid (Mitchell v. Helms, 2000, pp. 837-838).

The most significant case dealing specifically with a school voucher program originated in Ohio. The Sixth Circuit Court of Appeals heard the case of *Simmons-Harris v. Zelman* (2000) and issued a decision that would ultimately be appealed to the Supreme Court. In 1995, the city of Cleveland found itself in a severe educational crisis. An audit of the Cleveland School District revealed that the district had met zero of 18 state performance standards, and that only 1 out of 10 ninth graders could pass a basic proficiency examination (Zelman v. Simmons-Harris, 2002). Due to mismanagement by the local school board, the district was placed under the direct management and supervision of the Ohio state school superintendent by a federal district court order (Reed v. Rhodes, 1995). In response to the crisis, Ohio's general assembly adopted the Ohio Pilot Project Scholarship Program. This program was designed to cover any school district in Ohio that was deemed by the federal court order as "requiring supervision and

operational management of the district by the state superintendent" (Ohio Rev. Code, 1995, 3313.975(A)).

Under the program, parents of children enrolled in the failing school districts are entitled to receive a scholarship, or voucher, to be used toward tuition at participating private schools, public schools adjacent to Cleveland, or participation in a tutoring program (Ohio Rev. Code, 1995, 3313.975 (C)(1)). Recipients may also redeem the vouchers at community schools or magnet schools in Cleveland, which are funded under state law but run by their own school boards and not by the Cleveland School District (Ohio Rev. Code, 1995, 3314.01 (B), 3314.04). At the time the Sixth Circuit heard the case, no suburban public school had chosen to participate (Simmons-Harris v. Zelman, 2000). Scholarships are paid according to family income, and the program gives preference to low-income families, defining them as those with annual incomes less than 200% of the poverty line (Ohio Rev. Code, 1995, 3313.978). Participating private schools are required to cap tuition at $2,500 per student per year, and the program pays 90% of whatever the school actually charges for low-income families. For all other families, the program pays 75% of the tuition up to $1,875 (Ohio Rev. Code, 1995, 3313.976 (A) (8), 3313.978 (A)). Once a family chooses a school, a scholarship check is mailed to that school, where the parents are required to endorse the check to pay tuition for their child(ren).

At the time the Sixth Circuit heard the case, 3,761 students were enrolled in the program. Sixty percent of the enrollees were from families at or below the poverty level, and, in what became a major point of debate in the issue, 96% of the students (3,632) were enrolled in sectarian schools (Simmons-Harris v. Zelman, 2000). Of the 56 schools

registered to participate in the program during the 1999-2000 school year, 46 were church-related. It is significant to note that earlier in the program's history as many as 22% of the students involved were enrolled in nonreligious schools (Simmons-Harris v. Zelman, 2000). The Cleveland voucher program places no restrictions on the use of funds made available to the schools through the choice of the parents involved, and no guarantee is made that the students will not receive religious instruction if they choose to attend a sectarian school (Simmons-Harris v. Zelman, 2000).

It is noteworthy that one of the plaintiffs in the case, Doris Simmons-Harris, the parent of a child enrolled in the Cleveland City School District for the 1999-2000 school year, previously brought a lawsuit in state court challenging the program under several provisions of the Ohio Constitution, as well as under the Establishment Clause. The Ohio Supreme Court ruled that the program had violated a procedural rule of the state constitution, but rejected the claim that the program violated the Establishment Clause (Simmons-Harris v. Goff, 1999). The state legislature corrected the procedural error, and re-enacted the voucher program in 1999 in a way that is essentially the same "in all relevant aspects" as the 1995 law (Simmons-Harris v. Zelman, 2000, p. 949).

On July 20, 1999, Simmons-Harris filed suit against Dr. Susan T. Zelman in her capacity as Superintendent of Public Instruction for the Ohio Department of Education, on the grounds that the Cleveland voucher program violated the Establishment Clause (Simmons-Harris v. Zelman, 2000). On December 20, 1999, the district court granted the plaintiffs' motion for summary judgment, and found that the voucher program violated the Establishment Clause. The court enjoined the defendants from administering the program (Simmons-Harris v. Zelman, 2000). On January 12, 2000, the defendants

appealed the case to the Sixth Circuit. Arguments were heard on June 20 of that year, and on December 11, 2000, in a 2-1 decision, the Sixth Circuit affirmed the district court's ruling.

As discussed below, the opinion issued by Judge Clay, who was joined by Judge Siler, and the dissent written by Judge Ryan revealed an unusually vociferous debate among the three judges. In addition to providing a significant ruling, the judges also illustrated the growing intensity enveloping the larger issue of school reform in educational and legal circles across the country. Certainly the specific issue of the constitutionality of school voucher programs was already controversial on its own merits, but the three judges hearing the case for the Sixth Circuit seemed to elevate the rancor to an unprecedented level. For example, at the conclusion of his opinion, Judge Clay wrote that "we must pause to briefly address the dissent, not for the purpose of dignifying its hyperbole, but to quash any putatively substantive argument which may have found its way through the gratuitous insults" (Simmons-Harris v. Zelman, 2000, p. 962).

Judge Clay began his opinion with a disclaimer regarding the role of the court:

> We recognize the significance that this issue holds for many members of our society. The issue of school vouchers has been the subject of intense political and public commentary, discussion, and attention in recent years, and we would be remiss if we failed to acknowledge the seriousness of the concerns this case has raised. We do not, however, have the luxury of responding to advents in educational policy with academic discourse on practical solutions to the problem of failing schools; nor may we entertain a discussion on what might be legally

> acceptable in a hypothetical school district. We may only apply the controlling law to the case and statute before us. The courts do not make educational policy; we do not sit in omnipotent judgment as to the efficacy of one scheme or program versus another. The design or specifics of a program intended to remedy the problem of failing schools and to rectify educational inequality must be reserved to the states and the school boards within them, with one caveat: the proposed program may not run afoul of the freedoms guaranteed to all citizens in the Constitution. In other words, the determinations of states and school boards cannot infringe upon the necessary separation between church and state (Simmons-Harris v. Zelman, 2000, p. 951).

Under the umbrella of the *Lemon* test, and in light of several cases that followed *Lemon* (1971), the court asserted that the "most persuasive" case in terms of its governing relevance to the matter at hand was *Committee for Public Education v. Nyquist* (1973) (Simmons-Harris v. Zelman, 2000, p. 953). As stated above, the question of whether *Nyquist* governs *Simmons-Harris* became central to the debate over the constitutionality of the Ohio program, in the Sixth Circuit as well as in the ruling of the Supreme Court in 2002 discussed below (Zelman v. Simmons-Harris, 2002).

The laws represented in the *Nyquist* case were subjected to each of the three prongs of the *Lemon* test. As discussed above, the *Nyquist* Court found that the New York statute failed the meet the mandates of the second prong of the test, that the law in question neither advance nor inhibit religion, and the third prong, that the law not cause excessive government entanglement with religion (Committee for Public Education v.

Nyquist, 1973). However, the Court found that the statute had a secular purpose, meeting the requirement of the first prong. The tuition reimbursement program in question in *Nyquist* "promoted pluralism and diversity among New York's public and private schools, and alleviated concern that the State's overburdened public schools would be harmed if a large number of children who had previously been attending private schools decided to return to the public schools" (Simmons-Harris v. Zelman, 2000, p. 953).

Having stipulated that *Nyquist* demonstrated a clearly secular purpose, the Sixth Circuit turned its attention to the financial features of the New York statute and the question of how those features compared with those of the Cleveland voucher plan. Judge Clay wrote:

> We find that *Nyquist* governs our result. Factually, the program at hand is a tuition grant program for low-income parents whose children attend private school parallel to the tuition reimbursement program found impermissible in *Nyquist*. Under both the New York statute in *Nyquist*, as well as the Ohio statute at issue, parents receive government funds, either in direct payment for private school tuition or as a reimbursement for the same, and in both cases, the great majority of schools benefited by these tuition dollars are sectarian. The *Nyquist* Court itself found there to be no distinction between "a reimbursement, a reward, or a subsidy, [as in all three], the substantive impact is still the same." As in *Nyquist*, the Ohio program contains no "effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular,

> neutral, and nonideological purposes." Here, there is clearly "no endeavor to guarantee the separation between secular and religious functions and to ensure that State financial aid supports only the former." In both *Nyquist* and this case, there are no restrictions on the religious schools as to their use of the tuition funds – the funds may be used for religious instruction or materials as easily for erasers and playground equipment (Simmons-Harris v. Zelman, 2000, pp. 958-959 quoting Committee for Public Education v. Nyquist, 1973, pp. 786, 780, 783).

The court also addressed the key issue of neutrality. The importance of this issue was evident in *Mitchell v. Helms* (2000), when the Supreme Court ruled, "if aid to schools, even direct aid, is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any support of religion" (Mitchell v. Helms, 2000, p. 795). Neutrality was no less a point of contention in the Sixth Circuit's ruling in *Simmons-Harris*:

> Despite the language of the statute, there is no evidence that the tuition vouchers serve as a neutral form of state assistance which would excuse the direct funding of religious institutions by the state, despite the statute's language. Admittedly, the voucher program does not restrict entry into the program to religious or sectarian schools, but facial neutrality alone does not bring state action into compliance with the First Amendment. The school voucher program is not neutral in that it discourages the participation by schools not funded by religious

> institutions, and the Cleveland program limits the schools to which a parent can apply the voucher funds to those within the program. … [T]he program clearly has the impermissible effect of promoting sectarian schools (Simmons-Harris v. Zelman, 2000, p. 959).

The court also stated, "the alleged choice afforded both public and private school participants in this program is illusory in that the program's design does not result in the participation of the adjacent public schools from outside the Cleveland school district" (Simmons-Harris v. Zelman, 2000, p. 959). The court seemed less concerned with the number of choices offered to parents than with the percentage of students enrolled in religious schools. "The evidence illustrates … that 82% of participating schools are sectarian, just as in *Nyquist* where 85% of the participating schools were sectarian. Beyond that, we note that the number of available places for students in sectarian schools is higher than 82%, as many of the sectarian schools are larger and provide a greater number of places for children in the voucher program. Moreover, close to 96% of the students enrolled in the program for the 1999-2000 school year attended sectarian institutions" (Simmons-Harris v. Zelman, 2000, p. 959). Referring to the *Mueller* Court, Judge Clay noted that the Court ruled "that it would not base the constitutionality of a statute on the consideration of yearly statistical evidence concerning which nonsectarian schools – religious or otherwise – benefited" from the program at hand (Simmons-Harris v. Zelman, 2000, p. 955).

Judge Clay summarized the opinion of the court by attempting to differentiate the Cleveland voucher program from recent Supreme Court decisions:

> We conclude that unlike *Mitchell*, *Agostini*, *Witters* and *Mueller*, the Ohio scholarship program is designed in a manner calculated to attract religious institutions and chooses the beneficiaries of aid by non-neutral criteria. The effect of the voucher program is in direct contravention to these Supreme Court cases which mandate that the state aid be neutrally available to all students who qualify, that the parents receiving the state aid have the option of applying the funds to secular organizations or causes as well as to religious institutions, and that the state aid does not provide an incentive to choose a religious institution over a secular institution. Accordingly, we hold that … the voucher program has the primary effect of advancing religion, and that it constitutes an endorsement of religion and sectarian education in violation of the Establishment Clause (Simmons-Harris v. Zelman, 2000, p. 961).

In his dissent, Judge Ryan contested the majority's notion that *Nyquist* governed, and suggested that the majority simply ignored Establishment Clause rulings that came after 1973. "The Ohio voucher program … could not be more unlike the New York statute both in its purpose and in the manner of its application. … In my judgment, the majority is mistaken as a matter of *fact* (the two statutes are totally different) and as a matter of *law* (the relevant Establishment Clause jurisprudence has changed since *Nyquist*)" (Simmons-Harris v. Zelman, 2000, pp. 964, 963). Judge Ryan continued by suggesting that "the majority has simply signed onto the familiar anti-voucher mantra that voucher programs are no more than a scheme to funnel public funds into religious schools" (Simmons-Harris v. Zelman, 2000, p. 963).

Judge Ryan went on to methodically enumerate what he believed to be the factual differences between *Nyquist* and the Cleveland voucher program:

> First, the purpose of the New York statute was to provide financial help to New York's financially troubled *private schools* because their closing would force New York's public schools to absorb the private school students, resulting in massive increased costs … [t]he purpose of the Ohio statute … is to provide financial help to poverty-level students attending the *public schools* in Cleveland in order to enable them, if they wish, to attend nonreligious private schools, religious private schools, public schools in neighboring districts that wish to participate in the voucher program, or to obtain special tutoring while remaining in the Cleveland public schools. Second, the New York program involved *direct* financial grants to New York's *private* schools, religious and nonreligious, primarily for maintenance and repair. … Under the Ohio voucher program … there is no provision for any financial grants in any form to any private schools. A voucher recipient receives a scholarship check, and the funds therefrom reach a private religious school only after a child's parents have considered a variety of options available to them and have chosen the religious private school as the best option for their child. Third, the New York statute permitted government aid to schools that discriminated against children on the basis of religion and, in fact, several qualifying schools imposed religious restrictions on admissions. The Ohio voucher program … contains a provision explicitly forbidding participating schools from discriminating

> against prospective students on the basis of religion. It is clear that the New York statute struck down in *Nyquist* and the Ohio statute before us are dissimilar laws both in their purposes and the methodologies for carrying out their purposes (Simmons-Harris v. Zelman, 2000, pp. 964-965).

Judge Ryan also asserted that the rule of law has changed substantially since *Nyquist*. He wrote:

> The *Nyquist* Court ruled that the New York statute violated the *Lemon* test because it had the "impermissible effect of advancing religion." It did so, the Court said, by providing direct financial assistance to religious schools without any restrictions as to the schools' use of the funds, therefore "advancing the religious mission of sectarian schools." But three years ago in *Agostini v. Felton*, the Supreme Court declared unmistakably that "we have departed from the rule … that all government aid that directly assists the educational function of religious schools is invalid." The *Agostini* Court then proceeded to redefine and narrow the criteria for determining when government aid that finds its way to a religious school has the primary effect of advancing religion. … I do not question for a moment the correctness of the Supreme Court's decision in *Nyquist*. I accept it both analytically and precedentially as a faithful 1973 application of the "primary effect" test of *Lemon*. However, *Nyquist* was not analyzed and decided under what the *Agostini* Court called its "changed understanding of the criteria used to assess whether aid to religion has an impermissible effect." Since this appeal is also an "impermissible effect" case, our decision cannot be controlled by *Nyquist* (Simmons-Harris v. Zelman, 2000,

pp. 965-966, quoting Committee for Public Education v. Nyquist, 1973, pp. 794, 779-780; Agostini v. Felton, 1997, pp. 225, 223).

Judge Ryan based his dissent on his determination that *Agostini* (1997), rather than *Nyquist* (1973), is the proper governing precedent for the Cleveland voucher program. He made reference to several post-*Nyquist* cases [*Mueller v. Allen* (1983), *Witters v. Washington Department of Services for the Blind* (1986), *and Zobrest v. Catalina Foothills School District* (1993)] and their implications, and concluded that "[t]his line of cases culminated in the *Agostini* decision in 1997, in which the Supreme Court declared that its understanding of the criteria for determining whether … government aid has the primary effect of advancing religion had 'changed'" (Simmons-Harris v. Zelman, 2000, p. 966, quoting Agostini v. Felton, 1997, p. 232).

As discussed above, the *Agostini* Court refashioned the excessive entanglement question as a component of the primary effect prong of the *Lemon* test. The restructuring can be summarized as follows:

PRE-*AGOSTINI* LEMON TEST

1. Does the law in question reflect a clearly secular legislative purpose?
2. Does the law in question have a primary effect that neither advances nor inhibits religion?
3. Does the law in question avoid excessive government entanglement? (Lemon v. Kurtzman, 1971)

POST-*AGOSTINI* LEMON TEST

1. Does the law in question reflect a clearly secular legislative purpose?
2. Does the law in question have a primary effect that neither advances nor inhibits religion? (To be determined by answering the following about the aid program created by the law under consideration):

(a) Does the aid program result in government indoctrination?
(b) Does the aid program define its recipients by reference to religion?
(c) Does the aid program create an excessive entanglement between government and religion?
(Agostini v. Felton, 1997)

Judge Ryan tested the constitutionality of the Cleveland program against the backdrop of the post-*Agostini Lemon* test. He stated that all the parties involved agree that the voucher program does in fact have a clearly secular purpose, and that there is no claim of excessive entanglement. "Rather," Ryan wrote, "the only issue in this case is whether the voucher program has the forbidden 'primary effect' of advancing religion. This court's first duty, therefore, after recognizing that *Nyquist*'s factually and legally outdated decision is of no help, is to proceed to examine the first two criteria from *Agostini*'s 'impermissible effect' test to determine whether the effect of Ohio's voucher program is to advance religion, either because (1) the aid it provides results in governmental indoctrination, or (2) the program defines its recipients by reference to religion. These are the *only* two issues properly before us" (Simmons-Harris v. Zelman, 2000, p. 968, quoting Agostini v. Felton, 1997, p. 234).

In Ryan's judgment, the Cleveland voucher program "does not have the remotest effect of providing governmental indoctrination in any religion, to say nothing of having such a primary effect" (Simmons-Harris v. Zelman, 2000, p. 968). He based his sentiment on the grounds that the key question in determining whether a government aid program is tantamount to government indoctrination is if the recipients of the aid make a "genuinely independent and private choice" (Agostini v. Felton, 1997, p. 226) to use the funds to attend a religious school (Simmons-Harris v. Zelman, 2000). Ryan wrote:

> If the recipients have such an independent and private choice, then the government's decision to provide the money to fund that choice does not have the effect of advancing religion. The government is, of necessity, neutral in the matter. Implicit in that constitutional rule of law, as it applies in this case, is that there must be a *genuine* choice from among a range of alternatives that indicate complete neutrality on the part of the government as to where the recipient parents may choose to spend the government aid funds. The voucher program does not offend the Establishment Clause because the statute allows parents to make a *genuine* choice for their children who are currently in Cleveland public schools (Simmons-Harris v. Zelman, 2000, p. 968).

The state legislature of Ohio seemed to ensure that Cleveland parents would have such choice when it constructed the voucher program in 1995. Under the guidelines of the programs, parents of children enrolled in Cleveland's public schools can: (1) permit their children to remain in Cleveland public schools; (2) accept a tuition voucher for them to attend a nonreligious private school in the Cleveland area; (3) accept a tuition voucher for them to attend a religious private school in the Cleveland area; (4) accept a voucher for them to obtain special tutorial help under the direction of the Cleveland public school system; (5) accept a voucher for them to attend a community school or magnet school; or (6) accept a voucher for them to attend a suburban public school, though, as noted earlier, at the time this case was heard none of the suburban Cleveland school districts had chosen to participate in the program (Simmons-Harris v. Zelman, 2000). Based on these choices provided by the Ohio legislature, Judge Ryan stated that:

> It is difficult to imagine a statue that could afford its voucher recipients a broader spectrum of educational choice. It is true … that the public school districts adjacent to Cleveland have declined to participate in the voucher program, but there is not the slightest hint in the record that when the Ohio statute was enacted either the legislators or the governor had any idea that the public school districts adjacent to Cleveland would not participate. What we measure today is not whether the children in Cleveland have the fullest conceivable range of options available to them that a panel of federal judges might think to be ideal, but rather, whether the statue, as enacted, has the primary effect of advancing religion by involving the state in governmental indoctrination under *Agostini*'s first criterion. To my knowledge, no federal court has *ever* held that a school-choice voucher program is unconstitutional because the range of choices does not include a public school option; certainly the majority does not cite such a case (Simmons-Harris v. Zelman, 2000, p. 968).

As to the second question, whether the program defines its recipients by reference to religion, Judge Ryan stated that the Cleveland program passes constitutional muster in this respect as well. Rather than defining recipients by reference to religion, he argued that the program defines the students receiving vouchers by reference to (1) their enrollment in one of Cleveland's public schools; and (2) a family income that is no more than 200 percent of the federally defined poverty level (Simmons-Harris v. Zelman, 2000). Ryan also stated that "the statute explicitly forbids a religious test for admission to a participating school, including religious schools," and that it "expresses no preference, explicitly or implicitly, either as to the religion of the voucher recipients, or if

the recipient chooses a private school, whether the voucher is applied to a religious or nonreligious school" (Simmons-Harris v. Zelman, 2000, p. 969).

Judge Ryan discussed the stipulation made by the *Agostini* Court that the eligibility requirements of a government aid program could "have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination" (Simmons-Harris v. Zelman, 2000, p. 969, quoting Agostini v. Felton, 1997, p. 231). He stated that the *Agostini* Court "noted that a financial incentive to choose a religious school over a nonreligious school is not present 'where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis'" (Simmons-Harris v. Zelman, 2000, p. 969, quoting Agostini v. Felton, 1997, p. 231). Reflecting the acrimony on the court, Ryan further stated that:

> Despite the plain evidence that the aid to the parents of the Cleveland school children is indeed 'allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis,' the majority continues to insist that the voucher program is not neutral because it creates a forbidden "incentive" for parents in Cleveland to choose a religious school. As best I can understand it, they rest this conclusion – unsupported though it is by any evidence in the record – on two further conclusions. The first is that because the vast majority – 82 percent – of the private schools participating in the Ohio program are religious, the people of Cleveland are denied a

> "genuine" choice. This absurd argument is made despite the indisputable fact that of *all* the nonreligious private schools participating in the program, not one has ever turned away a voucher applicant for any reason. This not thinly veiled antipathy the majority has shown toward religious schools – its argument that there are too many religious schools in the program – is meritless for another reason – the Supreme Court has flatly rejected the argument that a high percentage of religious schools participating in a government-aid program is an indicator that the government is engaging in governmental indoctrination of religion. Second, the majority then attempts to arouse support for its view that … this statute should be struck down because the religious schools in the program are too religious. … [I]magine, religious schools that are truly religious! … One would have thought that the nail was long ago driven into the coffin bearing the discredited arguments that if a voucher program involved too many religious schools, or if those involved are honestly, genuinely, and essentially religious, the statute is therefore invalid as "advancing religion" (Simmons-Harris v. Zelman, 2000, pp. 969-970, quoting Agostini v. Felton, 1997, p. 231).

Judge Ryan also took issue with the majority's argument that the Cleveland program created a financial disincentive for the neighboring suburban public school districts to participate. He wrote, "There is not a scintilla of evidence in this case that any school, public or private, has been discouraged from participating in the school voucher program because it cannot 'afford' to do so." He further stated, "it is of no small importance that there is absolutely no evidence in the record that any Cleveland public

school parent has declined to enroll his or her child in a nonreligious, private school in Cleveland because there was a differential cost that was prohibitive" (Simmons-Harris v. Zelman, 2000, pp. 970-971).

The battle lines for the Supreme Court decision of 2002 were clearly drawn in *Simmons-Harris v. Zelman*. The key questions concerned the issues of governmental neutrality in the construction and implementation of a school voucher program, and the "genuinely independent and private choices" (Agostini v. Felton, 1997, p. 226) of where and how to apply school vouchers that must be made by parents rather than the government. Judge Ryan concluded his dissent with a rebuttal of the majority's conclusions. He wrote:

> In striking down this statute today, the majority perpetuates the long history of lower federal court hostility to educational choice. It does so by reaching back to a 1973 Supreme Court decision, *Nyquist*, that construes a statute that is light years away from the voucher program before us and that rests upon law that has been altered in an important respect by subsequent Supreme Court decisions. My colleagues refuse to acknowledge that the program in *Nyquist* is factually distinguishable in essential ways from the Ohio voucher program and that the Supreme Court has explicitly declared that the criteria for determining whether a statute authorizing government aid to schools violates the Establishment Clause have changed. And then, almost as if recognizing that its *Nyquist*-is-directly-on-point argument cannot withstand close scrutiny, the majority resorts to the lamentable tactic of attempting to arouse

> support for its view by making the familiar but unworthy arguments that the voucher program has too many religious schools and that they are too religious. This tactic should fail, first, because it is rooted in nativist bigotry, and, second, because it has been explicitly rejected by the Supreme Court as a legitimate determinant of whether a government is engaging in religious indoctrination (Simmons-Harris v. Zelman, 2000, pp. 973-974).

If what Judge Ryan suggested was in fact the "tactic" of the Sixth Circuit majority, it did fail in the final analysis – the Supreme Court's ruling on this case in 2002. As discussed in below in Chapter 3, Judge Ryan ultimately succeeded in his efforts to properly frame the questions to be asked by the High Court when it considered this case.

CHAPTER III

AN ANALYSIS OF THE CURRENT STATUS OF ESTABLISHMENT CLAUSE JURISPRUDENCE CONCERNING PUBLIC FUNDING OF SCHOOL VOUCHERS

On June 27, 2002, the Supreme Court issued an opinion in *Zelman v. Simmons-Harris*, ruling that the Ohio Pilot Scholarship Program does not violate the Establishment Clause. This decision, viewed by some as the most significant Supreme Court ruling concerning public education since *Brown v. Board of Education* (1954), set federal constitutional parameters for state legislatures that choose to create publicly funded voucher programs.

In addition to setting a significant precedent, the Court's ruling in *Zelman* was viewed as vindication by voucher proponents who had long held that the channeling of public funds to religious private schools could in fact be constitutional – as long as certain requirements determined by the Court in a long line of Establishment Clause cases were met (Agostini v. Felton, 1997, Russo & Mawdsley, 2001). Writing for the majority, Chief Justice Rehnquist addressed the key issues and questions deemed significant by Judge Ryan of the Sixth Circuit.

The linchpin of the Sixth Circuit's ruling in *Simmons-Harris* was that the *Nyquist* decision should govern the question of constitutionality with respect to Cleveland's voucher program. Judge Ryan disagreed in his dissent, and so did the Supreme Court. Responding to the claim that *Nyquist* should govern, Chief Justice Rehnquist wrote:

> We disagree for two reasons. First, the program in *Nyquist* was quite different from the program challenged here. *Nyquist* involved a New York program that gave a package of benefits exclusively to private schools and the parents of private school enrollees. Although the program was enacted for ostensibly secular purposes, we found that its function was *unmistakably* to provide desired financial support for nonpublic, sectarian institutions. … The program thus provided direct money grants to religious schools. … Indeed, the program flatly prohibited the participation of any public school, or parent of any public school enrollee. Ohio's program shares none of these features (Zelman v. Simmons-Harris, 2002, p. 2472).

Having established the fundamental differences between the program challenged in *Nyquist* and the Cleveland voucher program, Chief Justice Rehnquist continued:

> Second, were there any doubt that the program challenged in *Nyquist* is far removed from the program challenged here, we expressly reserved judgment with respect to a case involving some form of public assistance (*e.g.* scholarships) made available generally without regard to the sectarian-nonsectarian, or public-non-public nature of the institution benefited. That, of course, is the very question now before us, and it has since been answered, first in *Mueller*, then in *Witters*, and again in *Zobrest* … [t]o the extent the scope of *Nyquist* has remained an open question in light of these later decisions, we now hold that *Nyquist* does not govern neutral educational assistance programs that, like the program here,

> offer aid directly to a broad class of individual recipients defined without regard to religion (Zelman v. Simmons-Harris, 2002, p. 2472).

As discussed above, Establishment Clause jurisprudence regarding government aid programs in the latter part of the twentieth century revolved around two fundamental issues: the government's neutrality in the program in question and the extent of genuine choice offered to participants in the program (Agostini v. Felton, 1997; Simmons-Harris v. Zelman, 2000). Chief Justice Rehnquist characterized the Court's jurisprudence "with respect to true private choice programs" as "consistent and unbroken" (Zelman v. Simmons-Harris, 2002, p. 2466). According to Rehnquist, "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, p. 2466). The three cases Chief Justice Rehnquist referred to are *Mueller* (1983), *Witters* (1986), and *Zobrest* (1993), and he cited all three as precedent setting with regard to the Cleveland voucher program (Zelman v. Simmons-Harris, 2002).

One of the chief arguments made by opponents of the Cleveland program is that, in the 1999-2000 school year, 96 percent of the participants in the program were enrolled in parochial schools. The *Mueller* Court addressed the issue of whether the percentage of aid in government aid programs that is directed to religious institutions by aid recipients is relevant to the question of Establishment Clause conformity (Mueller v. Allen, 1983). Thus the question of whether *Mueller* governed this case was a critical one. In oral

arguments before the Court, Robert H. Chanin, an attorney for the citizens opposing the Cleveland program, discussed this issue. He stated:

> We are saying, if you take a program which is designed to give parents the option to go out of the public schools and educate their children in a private school, and then you say to 99 out of 100 of those parents, if you choose that option, you must send your child to get a religious education … (Tr. of oral arguments in Zelman v. Simmons-Harris, 2002, pp. 40-41).

When confronted with the fact that the percentage of aid going to religious institutions in *Mueller* was 96 percent – the same as in the Cleveland program – Chanin responded, "this case is not controlled by Mueller" (Tr. of oral arguments in Zelman v. Simmons-Harris, 2002, p. 41).

The Supreme Court ultimately disagreed with Chanin and his clients, ruling that *Mueller* does govern the Ohio program and that the percentage of students enrolled in religious schools is irrelevant. Chief Justice Rehnquist stated:

> In *Mueller*, we rejected an Establishment Clause challenge to a Minnesota program authorizing tax deductions for various educational expenses, including private school tuition costs, even though the great majority of the program's beneficiaries (96%) were parents of children in religious schools. We began by focusing on the class of beneficiaries, finding that because the class included *all* parents, including parents with children who attend nonsectarian private schools or sectarian private schools, the program was not readily

> subject to challenge under the Establishment Clause. Then, viewing the program as a whole, we emphasized the principle of private choice, noting that public funds were made available to religious schools only as a result of numerous, private choices of individual parents of school-age children. This, we said, ensured that no imprimatur of state approval can be deemed to have been conferred on any particular religion, or on religion generally. We thus found it irrelevant to the constitutional inquiry that the vast majority of beneficiaries were parents of children in religious schools … [t]hat the program was one of true private choice, with no evidence that the State deliberately skewed incentives toward religious schools, was sufficient for the program to survive scrutiny under the Establishment Clause (Zelman v. Simmons-Harris, 2002, p. 2466).

Rehnquist further stated that the argument that the high percentage of children enrolled in religious schools under the program is of constitutional significance was "flatly rejected in *Mueller*" (Zelman v. Simmons-Harris, 2002, p. 2470).

The Court also looked to *Witters v. Washington Department of Services for the Blind* (1986) as a precedent for this case, finding that the same principles that applied to *Mueller* controlled the ruling in *Witters* as well. Referring to the *Witters* case, Chief Justice Rehnquist noted that, "[l]ooking at the program as a whole, we observed that any aid that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients" (Zelman v. Simmons-Harris, 2002, p. 2466). He further stated that, "[f]ive Members of the Court, in separate opinions,

emphasized the general rule from *Mueller* that the amount of government aid channeled to religious institutions by individual aid recipients was not relevant to the constitutional inquiry. … Our holding thus rested not on whether few or many recipients chose to expend government aid at a religious school, but, rather, on whether recipients generally were empowered to direct the aid to schools or institutions of their own choosing" (Zelman v. Simmons-Harris, 2002, p. 2466).

Finally, the Court recalled its reasoning in *Zobrest v. Catalina Foothills School District* (1993). The themes of government neutrality and the genuine private choices of individuals again resonated. "Reviewing our earlier decisions," Chief Justice Rehnquist wrote, "we stated 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. … Looking once again to the challenged program as a whole … [o]ur focus again was on neutrality and the principle of private choice, not on the number of program beneficiaries attending religious schools" (Zelman v. Simmons-Harris, 2002, p. 2467).

Summarizing the three cases and their collective governance of the Cleveland program, Chief Justice Rehnquist wrote that:

> *Mueller*, *Witters*, and *Zobrest* thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. … [W]hen government aid

> supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, no reasonable observer is likely to draw from the facts an inference that the State itself is endorsing a religious practice or belief. It is precisely for these reasons that we have never found a program of true private choice to offend the Establishment Clause (Zelman v. Simmons-Harris, 2002, p. 2467, quoting Witters v. Washington, 1986, p. 493).

Chief Justice Rehnquist further asserted the constitutionality of the Cleveland voucher program:

> We believe the program challenged here is a program of true private choice, consistent with *Mueller*, *Witters*, and *Zobrest*, and thus constitutional. As was true in those cases, the Ohio program is neutral in all respects toward religion. It 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, *i.e.* any parent of a school-age child who resides in the Cleveland City School District. The program permits the participation of *all* schools within the district, religious or nonreligious. Adjacent public schools also may 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 here in fact creates financial *dis*incentives 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 (Zelman v. Simmons-Harris, 2002, pp. 2467-2468).

Chief Justice Rehnquist responded to one of the central arguments of opponents of the Cleveland voucher program, that the program creates a financial incentive for religious schools, and also drew attention to a critical element of the High Court's reasoning, the "multifaceted" nature of the efforts of the state of Ohio to reform public education in Cleveland. (Zelman v. Simmons-Harris, 2002, p. 2467). Specifically, the Court took into consideration the role of community schools and magnet schools in determining the constitutionality of Ohio's response to the educational crisis in Cleveland – something the Sixth Circuit did not do (Zelman v. Simmons-Harris, 2002; Simmons-Harris v. Zelman, 2000). This represents one of the largest points of contention in the case. The issue came up during oral arguments before the Court, when Justice Kennedy questioned Robert H. Chanin as to why community schools and magnet schools should not be considered "in the universe of choices" (Tr. of oral arguments in Zelman v. Simmons-Harris, 2002, p. 43). Chanin responded:

We do not look at them for two reasons, Your Honor. One is that the Court in *Nyquist* explained why it did not go beyond the program itself. It said this. If you extend the – if you look at the choices that parents have to go to public schools as well as the vouchers in the private schools, you allow, through the tuition grant program, to do precisely what the Establishment Clause prohibits, which is to use tuition grants to pay totally for private, sectarian religious education, the Court said. It's a back-door approach to do precisely what the Establishment Clause prohibits. Secondly … the reasonable observer does not look at public education and the multiple, changing, various programs that are offered. The person looks at this. The State of Ohio has set up a special, well-publicized program which allows a certain number of students to escape from a troubled school district, and appropriates a pot of money into that program, and what the reasonable observer sees is, that program and that pot of money ends up 99.4 percent giving children a religious education (Tr. of oral arguments in Zelman v. Simmons-Harris, 2002, pp. 43-44).

Proponents of the Cleveland program, however, were certainly in favor of considering community schools and magnet schools, and expressed this sentiment in oral arguments. When asked about the Sixth Circuit's refusal to consider such schools as part of the overall Ohio program, David J. Young, an Ohio attorney representing the private petitioners, replied, "I don't feel that the Sixth Circuit really understood how the community school program worked, or how one could

> use the tutorial vouchers to help the children that elected to go to the community schools … why the Sixth Circuit refused to consider the community schools is beyond me" (Tr. of oral arguments in Zelman v. Simmons-Harris, 2002, p. 26).
>
> United States Solicitor General Theodore B. Olson, arguing for the Cleveland voucher program on behalf of the Bush Administration, also weighed in on the issue of community schools and magnet schools. In oral arguments, Justice O'Connor asked if courts must view the case "as having the whole range of options available, public school, magnet, community, and religious schools" (Tr. of oral arguments in Zelman v. Simmons-Harris, 2002, p. 32). General Olson replied, "I believe that is the correct context … I think the [Sixth Circuit] court made a legal error in failing to do so, because this Court has taught over and over again that the context is extremely important" (Tr. of oral arguments in Zelman v. Simmons-Harris, 2002, p. 32).

The Supreme Court agreed with General Olson, and considered community schools and magnet schools in the overall context of Ohio's legislative response to the educational crisis in Cleveland. Chief Justice Rehnquist wrote:

> There is also no evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options for their school-age children. Cleveland schoolchildren enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll

> in a magnet school. That 46 of the 56 private schools now participating in the program are religious schools does not condemn it as a violation of the Establishment Clause. The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school (Zelman v. Simmons-Harris, 2002, p. 2469).

Chief Justice Rehnquist also visited the "96 percent" question again, offering an interpretation of statistics from the Cleveland program in the process:

> The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school. … The point is aptly illustrated here. The 96% figure upon which respondents and Justice Souter rely discounts entirely (1) the more than 1,900 Cleveland children enrolled in alternative community schools, (2) the more than 13,000 children enrolled in alternative magnet schools, and (3) 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%. The 96% figure also represents but a snapshot of one particular school year. In the 1997-1998

> school year, by contrast, only 78% of scholarship recipients attended religious schools. The difference was attributable to two private nonreligious schools that had accepted 15% of all scholarship students electing instead to register as community schools, in light of larger per-pupil funding for community schools and the uncertain future of the scholarship program generated by this litigation. Many of the students enrolled in these schools as scholarship students remained enrolled as community school students, thus demonstrating the arbitrariness of counting one type of school but not the other to assess primary effect. In spite of repeated questioning from the Court at oral argument, respondents offered no convincing justification for their approach, which relies entirely on such arbitrary classifications (Zelman v. Simmons-Harris, 2002, pp. 2470-2471).

Chief Justice Rehnquist summarized the opinion of the Court by stating, "the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals [and][i]t permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of decisions regarding challenges to similar programs, we hold that the program does not offend the Establishment Clause" (Zelman v. Simmons-Harris, 2002, p. 2473).

In his dissent, Justice Souter claimed that the issue of "public funding of benefits to religious schools was settled in *Everson*," and that the majority disregarded the

precedent of this case in reaching its decision on the Ohio program. (Zelman v. Simmons-Harris, 2002, p. 2485). According to Souter, *Everson* (1947) "inaugurated the modern era of establishment doctrine. The Court stated the principle in words from which there was no dissent: '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, pp. 2485-2486, quoting Everson v. Board of Education, 1947, p. 16). Souter further stated:

> 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. 2486).

In her concurring opinion Justice O'Connor repudiated the notion that the Court ignored *Everson*, and wrote that "[t]he test today is basically the same as set forth in School District of Abington Township v. Schempp [1963] over 40 years ago" (Zelman v. Simmons-Harris, 2002, p. 2486). Justice O'Connor wrote:

> Courts are instructed to consider two factors: first, whether the program administers aid in a neutral fashion, without differentiation based on the religious status of beneficiaries of providers of services; second, and more importantly, whether beneficiaries of indirect aid have a genuine choice

> among religious and nonreligious organizations when determining the organization to which they will direct their aid. If the answer to either query is no, the program should be struck down under the Establishment Clause (Zelman v. Simmons-Harris, 2002, p. 2476).

Speaking to the evolving use of the *Lemon* test in latter twentieth century Establishment Clause jurisprudence, Justice O'Connor continued:

> Justice Souter portrays this inquiry as a departure from *Everson*. A fair reading of the holding in that case suggests quite the opposite. Justice Black's opinion for the Court held that the First Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. How else could the Court have upheld a state program to provide students transportation to public and religious schools alike? What the Court clarifies in these cases is that the Establishment Clause also requires that state aid flowing to religious organizations through the hands of beneficiaries must do so only at the direction of those beneficiaries. Such a refinement of the *Lemon* test surely does not betray *Everson*. … Justice Souter rejects the Court's notion of neutrality … but Justice Souter's notion of neutrality is inconsistent with that in our case law (Zelman v. Simmons-Harris, 2002, pp. 2476-2477).

Justice Souter also questioned the majority's definition of choice, and whether parents in Cleveland were essentially driven toward religious schools under the guidelines of the voucher program. He stated that:

> 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. … There is, in any case, no way to interpret the 96.6 percent of current voucher money going to religious schools as reflecting a free and genuine choice by the families that apply for vouchers (Zelman v. Simmons-Harris, 2002, pp. 2492, 2496).

Justice O'Connor concluded her concurring opinion by repeating the majority's argument that all choices available to Cleveland parents must be considered:

> Ultimately, Justice Souter relies on very narrow data to draw rather broad conclusions. … [His] use of statistics confirms the Court's wisdom in refusing to consider them when assessing the Cleveland program's constitutionality. What appears to motivate Justice Souter's analysis is a desire for a limiting principle to rule out certain nonreligious schools as alternatives to religious schools in the voucher program. But the goal of the Court's Establishment Clause jurisprudence is to determine whether, after the Cleveland voucher program was enacted, parents were free to direct state educational aid in either a nonreligious or religious direction. That inquiry requires an evaluation of all reasonable educational options Ohio provides the Cleveland school system, regardless of whether they are

> formally made available in the same section of the Ohio code as the voucher program (Zelman v. Simmons-Harris, 2002, pp. 2479-2480).

Justice Thomas also wrote a concurring opinion in which he raised questions concerning the constitutionality of interpreting the Fourteenth Amendment as applying the First Amendment to the states. He wrote, "I agree with the Court that Ohio's program easily passes muster under our stringent test, but, as a matter of first principles, I question whether this test should be applied to the states" (Zelman v. Simmons-Harris, 2002, pp. 2480-2481). As discussed above, the Establishment Clause did not apply to the states until the *Everson* Court interpreted the Fourteenth Amendment as incorporating the entire First Amendment against the states (Everson v. Board of Education, 1947).

As discussed below in Chapter 4, the incorporation of Blaine Amendment language into the constitutions of 37 states became even more significant following the *Zelman* decision (Kirkpatrick, 2002). By reopening the question of whether the Fourteenth Amendment should be interpreted as applying the First Amendment to the states, Justice Thomas added another element to the constitutionality question surrounding the public funding of religious institutions through school voucher programs. Justice Thomas stated:

> The Establishment Clause of the First Amendment states that Congress shall make no law respecting an establishment of religion. On its face, this provision places no limit on the States with regard to religion. The Establishment Clause originally protected States, and by extension their citizens, from the imposition of an established religion by the Federal Government. Whether and how this Clause should constrain state action

> under the Fourteenth Amendment is a more difficult question. The Fourteenth Amendment fundamentally restructured the relationship between individuals and the States and ensured that States would not deprive citizens without due process of law. … 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 Amendment guarantee of individual liberty into a prohibition on the exercise of educational choice (Zelman v. Simmons-Harris, 2002, pp. 2481-2482).

Justice Thomas asserted that voucher programs such as the one from Cleveland discussed in *Zelman* mostly serve poor families, providing them with "a choice that those with greater means have routinely exercised" (Zelman v. Simmons-Harris, 2002, p. 2482). He stated, "while the romanticized ideal of universal public education resonates with the cognoscenti who oppose vouchers, poor urban families just want the best education for their children" (Zelman v. Simmons-Harris, 2002, p. 2483). Thomas suggested that the incorporation of the Establishment Clause by the Fourteenth Amendment against the states ultimately serves to defeat the very purposes of the amendment. He wrote:

> Respondents advocate using the Fourteenth Amendment to handcuff the States ability to experiment with education. But without education one can hardly exercise the civic, political, and personal freedoms conferred by the Fourteenth Amendment. … [S]chool 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 reform distorts our constitutional values and disserves those in the greatest need (Zelman v. Simmons-Harris, 2002, pp. 2482-2483).

After the Supreme Court's decision in the *Zelman* case set federal constitutional parameters for publicly funded voucher programs, the legal debate shifted focus to state law (Gryphon, 2003). As discussed above, even though the proposed Blaine Amendment failed to be ratified by Congress, many states adopted Blaine-like language into their constitutions. Some were forced to do so as a condition of being admitted to the Union (Viteritti, 1998). Thirty-seven state constitutions have such language that restricts public funding of parochial institutions (Kirkpatrick, 2002). Other potential legal barriers to publicly funded voucher programs exist at the state level. Many state constitutions contain provisions that protect citizens from being compelled to support religious institutions or churches (Gryphon, 2003). Such provisions were originally intended to prevent states from requiring attendance at or financial support of established churches, and are found in 29 state constitutions (Gryphon, 2003). Other various state constitutional restrictions include requiring public funding to be allocated only to public schools, requiring all education to be under the control of the state, and requiring the state legislature to ensure that a public purpose is served by education (Kemerer, 2002).

In spite of Blaine language or compelled-support provisions, some state supreme courts have construed their state constitutions to be in harmony with the First

Amendment (Swanson, 2003). The Wisconsin Supreme Court upheld a voucher program in that state against an Establishment Clause challenge (Jackson v. Benson, 1998). Similarly, the Arizona Supreme Court upheld a tax credit scholarship program (Kotterman v. Killian, 1999). As discussed in Chapter 2, the opinion issued by the court in that case asserted, "The Blaine [A]mendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing Catholic menace" (Kotterman v. Killian, 1999, p. 624). The Supreme Court denied certiorari in both those cases (Swanson, 2003). The Ohio Supreme Court upheld the Cleveland voucher program in *Simmons-Harris v. Goff* (1999). The Ohio Constitution (1851) mandates that "no person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society." It also provides that "no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of the state." In spite of these restrictions, the Ohio Supreme Court reached the same decision as the Supreme Court in finding the voucher program constitutional under the Establishment Clause (Kemerer, 2002). Additional state supreme courts that have ruled religious clauses in their state constitutions to mean the same thing as the First Amendment include Alabama, Illinois, Maine, North Carolina, New Jersey, and Pennsylvania (Kemerer, 2002).

Other state supreme courts have invalidated aid programs that the Supreme Court upheld. As discussed above, the Court ruled in *Witters v. Washington* (1986) that a blind citizen in the state of Washington could use aid provided by the state to further his studies at a seminary. On remand, however, the Washington Supreme Court ruled that such aid

would violate the Blaine language in the Washington Constitution (Witters v. State Commission for the Blind, 1989). The Idaho Supreme Court invalidated bus transportation to private religious schools, despite the Supreme Court's ruling in *Everson v. Board of Education* (1947) discussed above (Epeldi v. Engelking, 1971).

The case of *Board of Education v. Allen* (1968) discussed above provides an interesting example of the various interpretations of state supreme courts. The textbook loan program upheld in this case was originally upheld by the New York Supreme Court in 1967 (Board of Education v. Allen, 1967). The court acted despite state constitutional language that appears restrictive, as well as precedent to the contrary (Kemerer, 2002). Years after the Supreme Court's ruling in *Allen* (1968), however, the California Supreme Court struck down a similar textbook loan program, citing Blaine language in the state constitution (California Teachers Association v. Riles, 1981). Scholarly research has identified 19 state constitutions as having a permissive orientation toward publicly funded voucher programs, 16 as having a restrictive orientation, and 15 as uncertain or with litigation pending (Kemerer, 2002).

Legal action since *Zelman* (2002) provides some clues as to the direction of Establishment Clause jurisprudence in the twenty-first century. Shortly after the Supreme Court's opinion was issued, the Ninth Circuit Court of Appeals ruled a Washington post-secondary aid program unconstitutional because of its exclusion of religious options (Davey v. Locke, 2002). Washington justified the program under the Blaine Amendment language in its constitution (Swanson, 2003). The court found that the Free Exercise Clause of the First Amendment was violated (Davey v. Locke, 2002). The case was appealed to the Supreme Court.

A lawsuit was subsequently filed asking the Washington Supreme Court to declare the state's Blaine provision unconstitutional (Harrison v. Gregoire, 2002). Opponents of state Blaine amendments assert three constitutional arguments against the amendments: (1) The Free Exercise Clause of the First Amendment is violated because the amendments were enacted as a form of discrimination against Roman Catholics; (2) the First Amendment's guarantee to freedom of speech is violated due to viewpoint discrimination because the amendments discriminate against religious schooling; and (3) the amendments distinguish on the basis of religion, thus violating the Equal Protection Clause of the Fourteenth Amendment since religion is a suspect classification under federal law (Gryphon, 2002).

In August of 2002, a state court ruled Florida's Opportunity Scholarship program to be in violation of the state constitution because of the constitution's Blaine language (Holmes v. Bush, 2002). The court's decision was appealed to the Florida Supreme Court. Litigation in federal court is also expected concerning programs in Vermont and Maine. Both states have tuition programs that exclude religious schools (Swanson, 2003). The Vermont Supreme Court rejected a previous lawsuit to include religious schools, invoking the compelled-support provision of the state's constitution (Chittenden Town School District v. Department of Education, 1999). The First Circuit Court of Appeals ruled that Maine could exclude religious private schools from its aid program without violating the Free Exercise Clause in the case of *Strout v. Albanese* (1999). This decision is the opposite of that reached in a similar case heard by the Eighth Circuit (Peter v. Wedl, 1998).

As discussed above, the Ninth Circuit provided the first post-*Zelman* (2002) ruling involving a Free Exercise claim, and its decision could prove to be foreshadowing (Gryphon, 2003). Given the standard of neutrality adopted by the Supreme Court in recent Establishment Clause cases, state aid programs that exclude religious schools remain "constitutionally suspect" (Viteritti, 1998, p. 715). If a plaintiff can demonstrate that a law inhibits the free exercise of his religious beliefs, the burden of proof shifts to the government to show that the law is necessary to the accomplishment of a compelling secular objective, and that the law is the "least restrictive means of achieving that objective" (McConnell, 1990, pp. 1416-1417). In states that have provisions limiting public funding strictly to public schools, and thus exclude sectarian and nonsectarian private schools, a Free Exercise challenge will be more difficult (Viteritti, 1998). Some argue that if money may flow to religious uses through donations by government workers or through welfare recipients, this must be because tax money may flow to other religious uses as long as it does so without any government bias toward religion (Volokh, 1999).

In April of 2003, Colorado became the first state to enact a school voucher program following the *Zelman* decision (Archibald, 2003). Other states will likely follow suit. The Supreme Court provided a framework for publicly funded voucher programs that include religious schools to pass constitutional muster (Zelman v. Simmons-Harris, 2002). The interpretations of state constitutions by state supreme courts will likely determine the near future of such programs. For the long term, opponents will continue to fight against vouchers. Proponents will likely seek a Supreme Court precedent establishing that state constitutions that exclude religious options are unconstitutional under the First Amendment (Swanson, 2003).

CHAPTER IV

FINDINGS AND CONCLUSIONS

Findings

Establishment Clause jurisprudence concerning the public funding of government aid programs that include religious options has a long and somewhat complicated history. The tension between the Establishment Clause and the Free Exercise Clause of the First Amendment provides for difficult legislative and judicial decisions. Deciphering the original intent of the founding fathers, and balancing that intent with the need to protect the rights of individuals in an increasingly pluralistic nation, has proved an arduous task for courts in the last 100 years. The review of relevant legal history in Chapter 2, as well as the analysis of the leading case of *Zelman v. Simmons-Harris* (2002) and subsequent legal action in Chapter 3, yielded several findings regarding Establishment Clause jurisprudence concerning public funding of school vouchers. These findings are as follows:

1. The Establishment Clause and the Free Exercise Clause of the First Amendment provide guarantees of the rights of individuals, not groups, relative to religious freedom and the proper relationship between government and religion.
2. The original intent of the framers of the First Amendment seemed to allow for significant intersection of government and religion, though not for an established church or a preference for one religion or denomination over

others. States were originally free from the authority of the Establishment Clause.

3. Little federal case law regarding public funding of religious institutions exists prior to the twentieth century. Federal courts generally deferred to the states in matters concerning the Bill of Rights for over 150 years following the ratification of the Constitution.
4. The Fourteenth Amendment was ratified to guarantee equal protection under the law for all citizens of the United States. For over 70 years after its ratification, the Fourteenth Amendment was not interpreted by the Supreme Court as incorporating the First Amendment and its Religion Clauses against the states.
5. Seven years after ratification of the Fourteenth Amendment, Congress considered the proposed Blaine Amendment. This amendment would have applied the Religion Clauses to the states, and would have prohibited public funds from being directed to sectarian institutions by state legislative action. The amendment was proposed amidst a wave of anti-immigrant and anti-Roman Catholic bias in the United States, and the word *sectarian* was essentially a code word for Roman Catholic during this era. Though the amendment failed to be ratified, many states adopted similar language in their constitutions, often as a condition for admission into the Union. Thirty-seven states have such language in their constitutions.
6. With the exception of a few notable cases, such as *Lemon v. Kurtzman* (1971) and *Committee for Public Education v. Nyquist* (1973), Supreme Court

decisions concerning government aid programs that included religious institutions in the twentieth century were generally accommodating toward such programs. In addition to case law, Pell grants, the G.I. Bill, and similar government aid programs are further evidence of this attitude toward the constitutional relationship between church and state.

7. The leading case of *Everson v. Board of Education* (1947), though it upheld a busing program that involved parochial schools, set a precedent of strict separation in Establishment Clause jurisprudence. The *Everson* Court ruled that the First Amendment was made applicable to the states by the Fourteenth Amendment.
8. The Supreme Court devised a test for interpreting the constitutionality of laws that intersect government and religion in 1963. This test involved determining the purpose and primary effect of such laws. The test was expanded to include a third prong, the determination of whether a challenged law fostered excessive entanglement between government and religion, in the case of *Lemon v. Kurtzman* (1971). The so-called *Lemon* test became a fixture in over 30 subsequent Establishment Clause cases in the latter twentieth century.
9. Following a brief period of jurisprudence favoring strict separation of church and state, the Rehnquist Court ushered in an era reestablishing accommodation beginning with the leading case of *Mueller v. Allen* in 1983. Subsequent rulings paved the way for the Court's landmark decision in *Zelman v. Simmons-Harris* (2002), which upheld an Ohio voucher initiative.

10. The *Zelman* (2002) decision provided a framework for school voucher programs to pass federal constitutional muster. According to the Court's ruling, key elements of a constitutionally sound voucher program include a secular purpose for the legislation, indirect rather than direct aid to religious institutions, a broad class of beneficiaries of the program, governmental impartiality toward religious and secular options, and genuine choice for parents among religious and nonreligious educational options.
11. After the Court's decision in *Zelman* (2002), the legal battle over school voucher programs shifted to the states. Litigation over state constitutional provisions restricting public funding to religious institutions appears to comprise the legal battleground for school voucher programs in the early twenty-first century.

Conclusions

The First Amendment provides in relevant part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These words represent the foremost guidance given by our founding fathers for the protection of the rights of individual citizens with regard to religious freedom as well as the proper relationship between church and state. Establishment Clause jurisprudence relevant to educational aid programs that allow for the possibility of public funding reaching religious institutions recently culminated in the Supreme Court's decision in *Zelman v. Simmons-Harris* (2002). The narrowly divided Court provided a ruling that established a framework for school voucher programs to be constitutionally viable in the twenty-first

century. However, many legal issues surrounding such programs remain unclear or unresolved, especially at the state level.

The most significant legal issues concern Blaine Amendment language present in 37 state constitutions, along with other provisions that restrict public funding of religious institutions at the state level. In response to the *Zelman* decision, the primary legal strategy of major voucher proponents seems to be the goal of establishing a Supreme Court precedent essentially striking down Blaine language in state constitutions. Opponents of vouchers will certainly seek to bolster the viability of such provisions in an effort to curtail the momentum of the voucher reform movement after the victory for voucher proponents in *Zelman*.

APPENDICES

A Bill for Establishing Religious Freedom

by Thomas Jefferson of Virginia

Proposed 1779, Passed 1786

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 of 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, in 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 judgement, 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 offices 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 burthened [*sic*] 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 power to restrain the acts of succeeding assemblies, constituted with 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 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.

A Bill for Establishing Provisions for Teachers of the Christian Religion

by Patrick Henry

1784

Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society; which cannot be effected without a competent provision for learned teachers, who may be thereby enabled to devote their time and attention to the duty of instructing such citizens, as from their circumstances and want of education, cannot otherwise attain such knowledge; and it is judged that such provision may be made by the Legislature, without counteracting the liberal principle heretofore adopted and intended to be preserved by abolishing all distinctions of pre- eminence amongst the different societies or communities of Christians;

Be it therefore enacted by the General Assembly, that for the support of Christian teachers,-per centum on the amount, or-in the pound on the sum payable for tax on the property within this Commonwealth, is hereby assessed, and shall be paid by every person chargeable with the said tax at the time the same shall become due; and the Sheriffs of the several Counties shall have power to levy and collect the same in the same manner and under the like restrictions and limitations, as are or may be prescribed by the laws for raising the Revenues of this State.

And be it enacted, That for every sum so paid, the Sheriff or Collector shall give a receipt, expressing therein to what society of Christians the person from whom he may receive the same shall direct the money to be paid, keeping a distinct account thereof in his books. The Sheriff of every County, shall, on or before the _ _ day of _ _ in every year, return to the Court, upon oath, two alphabetical lists of the payments to him made, distinguishing in columns opposite to the names of the persons who shall have paid the same, the society to which the money so paid was by them appropriated; and one column for the names where no appropriation shall be made. One of which lists, after being recorded in a book to be kept for that purpose, shall be filed by the Clerk in his office; the other shall be the Sheriff be fixed up in the Court-house, there to remain for the inspection of all concerned. And the Sheriff, after deducting five per centum for the collection, shall forthwith pay to such person or persons as shall be appointed to receive the same by the Vestry, Elders, or Directors, however, denominated of each such society, the sum so stated to be due to that society; or in default thereof, upon the motion of such person or persons to the next or any succeeding Court, execution shall be awarded for the same against the Sheriff and his security, his and their executors or administrators; provided that ten days previous notice be given of such motion. An upon every such execution, the Officer serving the same shall proceed to immediate sale of the estate taken, and shall not accept of security for payment at the end of three months, nor to have the goods forthcoming at the day of sale; for his better direction wherein, the Clerk shall endorse upon every such execution that no security of any kind shall be taken. And be it further enacted, That the money to be raised by virtue of this Act, shall be by the Vestres, Elders, or Directors of each religious society, appropriated to a provision for a Minister or

Teacher of the Gospel of their denomination, or the providing place of divine worship, and to none other use whatsoever; except in the denominations of Quakers and Menonists, who may receive what is collected from their members, and place it in their general fund, to be disposed of in a manner which they shall think best calculated to promote their particular mode of worship. DP And be it enacted, That all sums which at the time of payment to the Sheriff or Collector may not be appropriated by the person paying the same, shall be accounted for with the Court in manner as by this Act is directed; and after deducting for his collection, the Sheriff shall pay the amount thereof (upon account certified by the Court to the Auditors of Public Accounts, and by them to the Treasurer) into the public Treasury, to be disposed of under the direction of the General Assembly, for the encouragement of seminaries of learning within the Counties whence such sums shall arise, and to no other use or purpose whatsoever.

THIS Act shall commence, and be in force, from and after the-day of _ _ in the year _ _.

Memorial and Remonstrance Against Religious Assessments

by James Madison

1785

We, the subscribers, citizens of the said Commonwealth, having taken into serious consideration, a Bill printed by order of the last Session of General Assembly, entitled 'A Bill establishing a provision for teachers of the Christian Religion,' and conceiving that the same, if finally armed with the sanctions of a law, will be a dangerous abuse of power, are bound as faithful members of a free State, to remonstrate against it, and to declare the reasons by which we are determined. We remonstrate against the said Bill,

1. Because we hold it for a fundamental and undeniable truth, '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.' The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true, that the majority may trespass on the rights of the minority.

2. Because if religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited: it is limited with regard to the co-ordinate departments, more necessarily is it limited with regard to the constituents. The preservation of a free government requires not merely, that the metes and bounds which separate each department of power may be invariably maintained; but more especially, that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves.

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

4. Because, the bill violates that equality which ought to be the basis of every law, and which is more indispensable, in proportion as the validity or expediency of any law is more liable to be impeached. If 'all men are by nature equally free and independent, all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an 'equal title to the free exercise of Religion according to the dictates of conscience.' Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to men, must an account of it be rendered. As the bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions. Are the Quakers and Menonists the only sects who think a compulsive support of their religions unnecessary and unwarrantable? Can their piety alone be intrusted [*sic*] with the care of public worship? Ought their Religions to be endowed above all others, with extraordinary privileges, by which proselytes may be enticed from all others? We think too favorably of the justice and good sense of these denominations, to believe that they either covet pre-eminencies over their fellow citizens, or that they will be seduced by them, from the common opposition to the measure.

5. Because the bill implies either that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: The second an unhallowed perversion of the means of salvation.

6. Because the establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself; for every page of it disavows a dependence on the powers of this world: it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them; and not only during the period of miraculous aid, but long after it had been left to its own evidence, and the ordinary care of Providence: Nay, it is a contradiction in terms; for a Religion not invented by human policy, must have pre-existed and been supported, before it was

established by human policy. It is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence, and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits.

7. Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution. Enquire of the Teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior to its incorporation with Civil policy. Propose a restoration of this primitive state in which its Teachers depended on the voluntary rewards of their flocks; many of them predict its downfall. On which side ought their testimony to have greatest weight, when for or when against their interest?

8. Because the establishment in question is not necessary for the support of Civil Government. If it be urged as necessary for the support of Civil Government only as it is a means of supporting Religion, and it be not necessary for the latter purpose, it cannot be necessary for the former. If Religion be not within (the) cognizance of Civil Government, how can its legal establishment be said to be necessary to Civil Government? What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberties, may have found an established clergy convenient auxiliaries. A just government, instituted to secure & perpetuate it, needs them not. Such a government will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights by any Sect, nor suffering any Sect to invade those of another.

9. Because the proposed establishment is a departure from that generous policy, which, offering an asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens. What a melancholy mark is the Bill of sudden degeneracy? Instead of holding forth an asylum to the persecuted, it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be, in its present form, from the Inquisition it differs from it only in degree. The one is the first step, the other the last in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthropy in their due extent may offer a more certain repose from his troubles.

10. Because, it will have a like tendency to banish our Citizens. The allurements presented by other situations are every day thinning their number. To super add a fresh

motive to emigration, by revoking the liberty which they now enjoy, would be the same species of folly which has dishonoured and depopulated flourishing kingdoms.

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

12. Because, the policy of the bill is adverse to the diffusion of the light of Christianity. The first wish of those who enjoy this precious gift, ought to be that it may be imparted to the whole race of mankind. Compare the number of those who have as yet received it with the number still remaining under the dominion of false Religions; and how small is the former! Does the policy of the Bill tend to lessen the disproportion? No; it at once discourages those who are strangers to the light of (revelation) from coming into the Region of it; and countenances, by example the nations who continue in darkness, in shutting out those who might convey it to them. Instead of levelling as far as possible, every obstacle to the victorious progress of truth, the Bill with an ignoble and unchristian timidity would circumscribe it, with a wall of defence, against the encroachments of error.

13. Because attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general, and to slacken the bands of Society. If it be difficult to execute any law which is not generally deemed necessary or salutary, what must be the case where it is deemed invalid and dangerous? and what may be the effect of so striking an example of impotency in the Government, on its general authority?

14. Because a measure of such singular magnitude and delicacy ought not to be imposed, without the clearest evidence that it is called for by a majority of citizens: and no satisfactory method is yet proposed by which the voice of the majority in this case may be determined, or its influence secured. 'The people of the respective counties are indeed requested to signify their opinion respecting the adoption of the Bill to the next Session of Assembly.' But the representation must be made equal, before the voice either of the Representatives or of the Counties, will be that of the people. Our hope is that neither of the former will, after due consideration, expouse [*sic*] the dangerous principle of the Bill.

Should the event disappoint us, it will still leave us in full confidence, that a fair appeal to the latter will reverse the sentence against our liberties.

15. Because, finally, 'the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience' is held by the same tenure with all our other rights. If we recur to its origin, it is equally the gift of nature; if we weigh its importance, it cannot be less dear to us; if we consult the Declaration of those rights which pertain to the good people of Virginia, as the 'basis and foundation of Government,'5 it is enumerated with equal solemnity, or rather studied emphasis. Either then, we must say, that the will of the Legislature is the only measure of their authority; and that in the plentitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred: Either we must say, that they may controul the freedom of the press, may abolish the trial by jury, may swallow up the Executive and Judiciary Powers of the State; nay that they may despoil us of our very right of suffrage, and erect themselves into an independent and hereditary assembly: or we must say, that they have no authority to enact into law the Bill under consideration. We the subscribers say, that the General Assembly of this Commonwealth have no such authority: A d that no effort may be omitted on our part against so dangerous an usurpation, we oppose to it, this remonstrance; earnestly praying, as we are in duty bound, that the Supreme Lawgiver of the Universe, by illuminating those to whom it is addressed, may on the one hand, turn their councils from every act which would affront his holy prerogative, or violate the trust committed to them: and on the other, guide them into every measure which may be worthy of his blessing, may redound to their own praise, and may establish more firmly the liberties, the prosperity, and the Happiness of the Commonwealth.

First Amendment to the Constitution of the United States

Ratified 1791

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

Tenth Amendment to the Constitution of the United States

Ratified 1791

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Letter from Danbury Baptist Association to President Thomas Jefferson

1801

Sir,
Among the many millions in America and Europe who rejoice in your election to office, we embrace the first opportunity which we have enjoyed in our collective capacity, since your inauguration, to express our great satisfaction in your appointment to the Chief Magistracy in the United States. And though the mode of expression may be less courtly and pompous than what many others clothe their addresses with, we beg you, sir, to believe, that none is more sincere.

Our sentiments are uniformly on the side of religious liberty: that religion is at all times and places a matter between God and individuals, that no man ought to suffer in name, person, or effects on account of his religious opinions, [and] that the legitimate power of civil government extends no further than to punish the man who works ill to his neighbor. But sir, our constitution of government is not specific. Our ancient charter, together with the laws made coincident therewith, were adapted as the basis of our government at the time of our revolution. And such has been our laws and usages, and such still are, [so] that Religion is considered as the first object of Legislation, and therefore what religious privileges we enjoy (as a minor part of the State) we enjoy as favors granted, and not as inalienable rights. And these favors we receive at the expense of such degrading acknowledgments, as are inconsistent with the rights of freemen. It is not to be wondered at therefore, if those who seek after power and gain, under the pretense of government and Religion, should reproach their fellow men, [or] should reproach their Chief Magistrate, as an enemy of religion, law, and good order, because he will not, dares not, assume the prerogative of Jehovah and make laws to govern the Kingdom of Christ.

Sir, we are sensible that the President of the United States is not the National Legislator and also sensible that the national government cannot destroy the laws of each State, but our hopes are strong that the sentiment of our beloved President, which have had such genial effect already, like the radiant beams of the sun, will shine and prevail through all these States--and all the world--until hierarchy and tyranny be destroyed from the earth. Sir, when we reflect on your past services, and see a glow of philanthropy and goodwill shining forth in a course of more than thirty years, we have reason to believe that America's God has raised you up to fill the Chair of State out of that goodwill which he bears to the millions which you preside over. May God strengthen you for the arduous task which providence and the voice of the people have called you--to sustain and support you and your Administration against all the predetermined opposition of those who wish to rise to wealth and importance on the poverty and subjection of the people.

And may the Lord preserve you safe from every evil and bring you at last to his Heavenly Kingdom through Jesus Christ our Glorious Mediator.

Letter from President Thomas Jefferson to Danbury Baptist Association

1802

Gentlemen,

The affectionate sentiment of esteem and approbation which you are so good as to express towards me, on behalf of the Danbury Baptist Association, give me the highest satisfaction. My duties dictate a faithful and zealous pursuit of the interests of my constituents, and in proportion as they are persuaded of my fidelity to those duties, the discharge of them becomes more and more pleasing.

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative 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 would "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

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

Fourteenth Amendment to the Constitution of the United States

Ratified 1868

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment to the Constitution of the United States Proposed by

Representative James Blaine (R-Maine)

1875

No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor [*sic*], 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 between religious sects or denominations.

Voting in favor of the proposal:	House of Representatives	180 – 7
	Senate	28 – 16

Test for Measuring the Constitutionality of a Law Against the Parameters of the Establishment Clause

Developed by the Supreme Court in the case of

Lemon v. Kurtzman

1971

1. Does the law in question reflect a clearly secular legislative purpose?
2. Does the law in question have a primary effect that neither advances nor inhibits religion?
3. Does the law in question avoid excessive government entanglement?

Modified by the Supreme Court in the case of

Agostini v. Felton

1997

1. Does the law in question reflect a clearly secular legislative purpose?
2. Does the law in question have a primary effect that neither advances nor inhibits religion? (To be determined by answering the following about the aid program created by the law under consideration):
   (a) Does the aid program result in government indoctrination?
   (b) Does the aid program define its recipients by reference to religion?
   (c) Does the aid program create an excessive entanglement between government and religion?

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