THE SERPENTINE WALL: JUDICIAL DECISION-MAKING IN SUPREME COURT CASES INVOLVING AID TO SECTARIAN SCHOOLS

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THE SERPENTINE WALL:
JUDICIAL DECISION MAKING IN SUPREME COURT CASES
INVOLVING AID TO SECTARIAN SCHOOLS

BY

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Mount Holyoke College (A.B.), 1971
University of New Hampshire (M.A.), 1975

DISSERTATION

Submitted to the University of New Hampshire
in Partial Fulfillment of
the Requirements for the Degree of

Doctor of Philosophy

in

History

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2 December 1986
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My interest in church-state issues is long-standing; it developed out of a seminar I took while an undergraduate at Mount Holyoke College. Taught by my advisor, Donald G. Morgan, this course introduced me to the principal cases and the foremost figures on the Supreme Court, but, more importantly, it gave me an appreciation for the difficulty of deciding cases involving the Establishment and Free Exercise Clauses of the First Amendment.

While my own strong commitment to the ideal of religious freedom gave meaning to this project beyond the simple requirements for completing my degree, the assistance and encouragement of others did make a difference. The reference librarians at the University of New Hampshire, the Harvard Law School Archives, the Manuscript Division of the Library of Congress, and the Seeley Mudd Manuscript Library of Princeton University gave generously of their time and professional expertise; I am especially grateful to Deborah Watson and Erika Chadbourn for their help.

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ABSTRACT

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by

Christine L. Compston
University of New Hampshire, December, 1986

This dissertation uses the cases involving aid to sectarian schools, decided between 1945 and 1985, as a vehicle for examining decision making by the Supreme Court justices. The discussion of Everson v. Board of Education (1947) relies heavily on the private papers of individual justices, autobiographies, and biographies to determine the importance of personal religious beliefs, the history of the First Amendment, political and judicial philosophies, as well as the efforts of specific individuals to persuade others to their positions. Board of Education v. Allen (1968) is analyzed within the context of the political environment, taking into consideration the government's commitment to equalizing opportunities and the challenge to high-quality education posed by inflation. Transcripts from oral argument provide evidence for the conclusion that the Court was strongly influenced by the political temper of the times. The third major section, focusing on Lemon v. Kurtzman/Robinson v.Dicenso (1971), deals with the justices'
reliance on lower court decisions. The papers of Judge William Henry Hastie and the transcript from the Rhode Island hearing along with the judges' opinions provide the basis for the analysis. Covering nearly a dozen cases decided by the Court in the period from 1972 through 1985, the final section of the paper examines the way in which the justices refined and redefined their positions in response to legislation that followed from earlier decisions.
INTRODUCTION

The serpentine wall at the University of Virginia - one brick wide and winding its way through the campus - seems an especially appropriate metaphor for describing the wall of separation between church and state. Thomas Jefferson, principal architect of the University, was also the first to describe the First Amendment in terms of a wall dividing secular and religious spheres. Furthermore, an examination of Supreme Court decisions in cases involving aid to sectarian schools reveals that the wall of separation is neither wide nor straight. Carrying the metaphor one step further, several of the justices would find a certain irony in the use of "serpentine" as an adjective to describe the wall, for they perceive the efforts to secure aid for church-related schools in terms of a conspiracy to circumvent the constitutional prohibition of laws respecting an establishment of religion.

Looking more carefully at the concept of a serpentine wall, one finds that Jefferson's choice of this structure derived from considerations of economy and strength. The curving design is the only one strong enough for a wall that is just one brick wide. Relying on the same criteria of economy and strength, justices who endorse aid to sectarian schools argue that the Constitution cannot be read in an absolute, rigid manner that prevents the government from responding to the needs of succeeding generations; the
strength of the document, they contend, lies in its flexibility. Similarly, they point to the rising costs of education and explain that assistance to church-related schools reduces the long term burden on taxpayers since sectarian schools assume a responsibility that would otherwise fall entirely on the public.

Viewing the wall from a different perspective, justices who find aid unconstitutional might observe that the serpentine design, though curving, is nevertheless perfectly regular in its undulations. Any irregularity or break in the structure would undermine its strength. So, too, with the First Amendment. While some accommodation must be made to assure protection of free exercise as well as prevention of any establishment of religion, a breach or too great a concession to community interests might endanger individual rights. Furthermore, they maintain that the aid given to sectarian schools is not any economy measure, for the government pays for programs that would normally be paid for by the school itself or by the parents who choose to send their children to church-related schools.

In the period since 1945 the Supreme Court has decided over a dozen cases involving aid to sectarian schools. The nature of this aid has varied from reimbursing parents for costs of transportation to paying the salaries of teachers in parochial schools. The justices have been sharply divided in their decisions; where some have viewed aid programs as a means to assure equal educational opportunities for children
in nonpublic schools, others have perceived the assistance as support for religious institutions. The efforts to define terms and set guidelines, rather than clarifying the issue, have encouraged legislators to find ways to avoid constitutional pitfalls through legal technicalities and government supervision. These attempts to side-step the major stumbling blocks have, in turn, deepened the divisions on the Court and further complicated the issue.

This study of decision making by Supreme Court justices focuses on cases involving aid to sectarian schools, in part, because the markedly different positions taken by the justices can be both identified and accounted for. Several factors have come into play. First, the religious aspect of the issue has tended to elicit strong feelings either for or against the aid. In some instances, personal prejudices have influenced a justice's decision; in others, the teachings of a particular denomination or a history of religious persecution determined an individual's interpretation of the First Amendment.

Second, since World War II, with the incorporation of the Bill of Rights into the Fourteenth Amendment and the pronouncement of the doctrine of preferred freedoms, cases involving church and state became a means by which the justices could demonstrate a commitment to individual rights, but at a cost. Cases involving aid to sectarian schools forced the justices to weigh the First Amendment's prohibition of laws respecting an establishment of religion.
against the attractive notion that such aid would improve the quality of education and equalize opportunities.

Indeed, the pressures on the justices to uphold government aid programs were formidable. Influenced by the Cold War and the space race, government embarked on a major campaign to improve the quality of education in America. Greater awareness of the debilitating effects of poverty and ignorance gave added impulse to the movement. In addition, parochial schools faced a number of problems—declining enrollments and fewer members of the religious orders to serve as teachers, compounded by inflation—that forced many of them to close during the sixties. This decline made it seem likely that public schools would have to take up the slack. Yet public schools were also dealing with inflation, a rising school-age population, and the expenses of upgrading textbooks, equipment, and facilities. This situation led to renewed interest in the idea of federal aid to education. Initially, however, resistance to such aid was strong among the Southerners who feared that federal aid would mean federal interference with their policy of segregation. With the passage of civil rights legislation, aid for nonpublic education acquired a new group of supporters: those who opted not to send their children to integrated public schools.

The decisions made by the justices in the parochial aid cases reflect all of these factors. They also reveal the justices' philosophical preferences for restraint or
activism, their appreciation for precedents, and their ability to foresee the implications of their decisions.

The purpose of this study is to examine the decision-making process of Supreme Court justices rather than to evaluate the merits of the opinions. The cases are simply the vehicle for determining the nature of that process. The justification for such a study is based on the simple fact that the Supreme Court plays a critical role in establishing law and policy. Because of this, an understanding of how decisions are made contributes to a better understanding of the American political system.

What emerges from this examination of Supreme Court decisions is confirmation of the political character of the judicial process. On the one hand, the individual decisions of the justices often reflect their own partisan persuasions. Conservatives weigh economic considerations more heavily, while liberals show greater concern for individual rights and freedoms. In the cases involving aid to parochial schools, however, broad categories such as "conservative" and "liberal" lose some of their meaning. For example, William Brennan and Byron White—both Democrats and liberals—have consistently taken opposing positions. Brennan has emphasized the need to protect specific constitutional rights, and White has favored an enlarged role for government in bringing about tangible reforms to benefit the disadvantaged. In making their decisions, both men have acted on the basis of strongly held political ideals that are
generally categorized as liberal, yet they represent distinct branches of the liberal tradition.

In another and perhaps more important sense, the decisions of the Court may be classified as political, for they are expressions of general political trends. This is especially evident in the cases involving aid to sectarian schools because the legislation itself has been passed in response to particular social and economic needs. In dealing with these cases, the justices have been forced to confront the question of whether various forms of aid should be seen as general welfare legislation. Although Congress was originally empowered to provide for the general welfare (Article 1, Section 8 of the Constitution), the economic depression of the 1930s ushered in a greatly expanded perception of what that could or should include. The programs, both state and federal, to assist nonpublic schools were a natural by-product of the enlarged concept of general welfare legislation.

The concept of general welfare is, however, not only broad but also vague. Lacking guidelines as well as concrete definitions, the justices have struggled to determine the boundary between community and private interests. Individual opinions reflect conflicting interpretations and suggest the difficulty in locating that fine line. Not surprisingly, some of the sharpest disagreements among the justices have resulted from their differing ideas of what constitutes legitimate general welfare legislation.
The commitment of the Kennedy and Johnson administrations to improve the quality of life for all Americans led to expanded government responsibility and power. Programs to aid sectarian schools were defined in terms of helping the disadvantaged, equalizing opportunities, and improving the quality of education. In short, the legislation was defended as having a public purpose and one that was consistent with the broad goals of American society. Board of Education v. Allen (1968), the application of this principle to allow for some aid to sectarian schools, was based on an acceptance of the value of an expanded welfare state.

That 1968 decision has since come under considerable criticism, in some cases by those who agreed with the original judgment. Growing evidence of lobbying by church officials, subsequent legislation that extended the amount of aid given and created new forms of aid, as well as genuine concern about the ability to preserve separate spheres for church and state led to the creation of a small but increasingly stalwart faction of justices who have opposed virtually any form of assistance to sectarian schools.

Coincidentally, another faction has formed, made up of justices who are committed to upholding aid precisely because they see it fulfilling a public purpose. Persuaded by the argument that the religious and secular aspects of education in a sectarian school can be separated, these justices maintain that public funding of secular programs is both
valid and desirable. Without government support, the quality of sectarian education would decline and children would be the innocent victims.

Political considerations in and of themselves are not, however, adequate to explain judicial decisions. In fact, Supreme Court justices are influenced by a variety of factors in formulating their opinions. Individual religious beliefs, personal philosophies regarding the role of the judiciary and evolving interpretations of the Constitution, reliance on lower-court opinions, desire to follow precedent or the need to clarify earlier rulings - all of these have contributed to judicial decision making in cases involving aid to sectarian schools. The process is complex and the weight given to any one factor varies from case to case and from justice to justice.

The approach taken in this study has been determined, in part, by the availability of sources. The private papers of Justices Black, Burton, Douglas, Frankfurter, and Rutledge, who participated in the first case, *Everson v. Board of Education* (1947), are open to scholars. These collections provide valuable background information on the justices and their handling of the case. Similarly, the papers of Circuit Judge William Henry Hastie contain his files on *Lemon v. Kurtzman* (1971) and suggested a comparison of the District Court and Supreme Court rulings.

Of primary importance, however, has been the decision-making process itself. Using a case study approach, this paper examines four major aspects of decision making. The
chapter on Everson focuses on the individual backgrounds, philosophies, and concerns of the justices. It draws from manuscript materials and biographical works in an effort to explain why individual justices cast their votes as they did. Given the lack of precedents for this case, it seems reasonable to assume that personal attitudes and beliefs played a greater role in this case than would otherwise have been true. The next two chapters discuss the political context of the 1960s and its effect on the Supreme Court's 1968 decision in Board of Education v. Allen. A short chapter on Flast v. Cohen (1968) discusses the landmark decision that granted standing to federal taxpayers. The third major section of the paper analyzes the Supreme Court's dependence on lower court opinions; the companion cases of Lemon v. Kurtzman and Robinson v. DiCenso, provide the basis for this analysis. The final section looks at the several cases decided between 1972 and 1985 to evaluate how the court built on earlier decisions, especially when reconsidered in light of subsequent legislation.

The dissertation begins with a brief history of the First Amendment and its effect upon church-state relations since 1789. This history was used by the justices in their efforts to understand the meaning and intent of the Amendment. For the student, it serves the additional purpose of illustrating the selective nature of judicial reliance on history.
THE TRADITION OF CHURCH-STATE RELATIONS

The First Amendment to the Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." In an effort to determine the original intent and meaning of that provision, the justices of the United States Supreme Court have repeatedly turned to the history of the Amendment for guidance. They have examined the records of the First Congress and the papers of those instrumental in its drafting and passage in an effort to discover the purpose of the religion clauses. In addition, they have studied the relationship between church and state from colonial times to the present, focusing on the difficulties that resulted when the interests of the church and those of the state came into conflict. In dealing with cases involving aid to sectarian schools, they have also considered the history of education in America and the establishment of parochial school systems in the nineteenth century. Resulting from this research has been an appreciation on the part of most justices of the need to weigh the individual's right to free exercise against the community's interests and well being. In short, they have recognized the difficulty of upholding both First Amendment provisions for religious freedom: the prohibition of anything respecting an establishment and the guarantee of free exercise.
This reliance on history by the justices makes doubly imperative an examination of the evolution of the religion clauses of the First Amendment and of the social and political developments surrounding sectarian schools in the United States. The historical background for the cases involving aid to sectarian schools provides an appreciation for the differing positions taken by the justices; some have emphasized the need to guard against establishment, while others have warned that barriers against establishment may themselves undermine the free exercise of religion. For the most part, those who have relied heavily on history to substantiate their positions have been the justices who have favored a strict separation of church and state, and, indeed, constitutional history supports their belief that the Founding Fathers intended to establish a wall between the religious and secular spheres. Yet those justices who have adopted a policy of accommodation have also defended their position with historical evidence, citing actual practice rather than abstract theory or political ideals. Thus, while history is important in appreciating the cases themselves, it has also been a crucial element in the decision-making process.

Of particular relevance to this study of judicial decision making are, first, the adoption of the First Amendment, second, the establishment by the Catholic Church of an extensive parochial school system during the first half of the nineteenth century and the subsequent adoption by
most states of constitutional amendments to prohibit allocation of public funds to sectarian schools, and, third, the reasoning used by Supreme Court justices in early cases involving establishment and free exercise. Before turning to the specific cases involving aid to sectarian schools, a brief examination of these points is in order.
I.

The First Amendment provisions for religious freedom were originally intended to guard against infringement of individual liberties by the federal government. It was, however, generally understood that the national Congress lacked the power to legislate in this area regardless of whether a Bill of Rights were passed, and both Madison and Hamilton objected initially to the inclusion of a Bill of Rights for fear that it would imply that Congress did have authority to pass laws affecting basic rights of individuals.3 Madison agreed, however, to propose a series of amendments to the recently ratified Constitution. He was persuaded by Thomas Jefferson and by the Virginia Baptists, whose support he needed to be elected to Congress. In addition, he wanted to counter the movement of the antifederalists for a new constitutional convention. Included among the proposed amendments was the provision: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner or on any pretext, infringed."4

The brief debates conducted in the House dealt primarily with the wording of the amendment. The central issue was whether the word "national" should be included to assure the states that their powers to establish or support religion would not be eliminated. A revised version, "that
Congress shall make no laws touching religion, or infringing the rights of conscience," passed the House by a vote of 31-20. The proposal was again reworded, "Congress shall make no law establishing religion, or to prevent the free exercise thereof, nor shall the rights of conscience be infringed," before being submitted to the Senate.

The Senate records, though limited to the motions themselves, suggest that the members wanted to broaden the meaning beyond merely a ban on preference to one sect. Dissatisfied with the wording of the Senate's proposal, the House established a joint conference committee and appointed Madison to chair the committee. The compromise version reflected the strong feeling by both representatives and senators that a ban on preference of one sect or religion over others was not sufficient. Drawn up by the joint committee, the draft, which later became part of the First Amendment, received approval from the House on 24 September 1789 and from the Senate on the following day.

Leonard Levy concludes that the history of the drafting of the no-establishment clause provides convincing evidence that the intent of the framers was to preclude an illegitimate expansion of the powers of Congress.

To argue . . . that the amendment permits Congressional aid and support to religion in general or to all churches without discrimination leads to the impossible conclusion that the First Amendment added to Congress' power. Nothing supports such a conclusion. Every bit of evidence goes to prove that the First Amendment, like the others, was intended to restrict Congress to its enumerated powers. Since the Constitutional Convention gave Congress no power to legislate on
matters concerning religion, Congress had no such power even in the absence of the First Amendment. Based on an examination of the colonial provisions for support of religion and the newly written state constitutions, Levy further contends that the meaning of "establishment" at the time the First Amendment was written did not mean simply the creation of a single state church. Rather, it meant "government aid and sponsorship of religion, principally by impartial tax support of the institutions of religion, the churches." In short, the prohibition against establishment was specifically worded so as to have far-reaching implications.

Not all historians agree with Levy's conclusions. A. James Reichley points out that the same Congress that proposed the First Amendment also readopted the Northwest Ordinance of 1787, including the provision: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of learning shall forever be encouraged." Conceding that "[s]ome ambiguity was no doubt present in the meaning of the establishment clause from the start," Reichley insists, "there is nothing in it inconsistent with the virtually unanimous view among the founders that functional separation between church and state should be maintained without threatening the support and guidance received by republican government from religion."9

The evidence, at least so far as Madison and Jefferson are concerned, does not support Reichley's contention.
Author of the Virginia "Bill for Establishing Religious Freedom," Jefferson stated 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 in his body or goods, or shall otherwise suffer, on account of his religious opinions or beliefs." In his Notes on Virginia (originally published in Paris in 1784), he explained the logical basis for his position:

But his own rulers can have no authority over such natural rights, only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to God.... Reason and free inquiry are the only effectual agents against error. Give a loose to them, they will support the true religion by bringing every false one to their tribunal, to the test of their investigation. They are the natural enemies of error, and of error only. .... It is error alone which needs the support of government. Truth can stand by itself.... What has been the effect of coercion? To make one half the world fools, and the other half hypocrites. To support roguery and error all over the earth.11

And in 1802, in his letter to the Baptists of Danbury, Connecticut, Jefferson referred to the Establishment Clause of the First Amendment as "building a wall of separation between Church and State."12 Clearly, Jefferson's position on this issue did not even lean toward accommodation. Quite the opposite. He strongly opposed any legislation that suggested government support for religion, whether that support took the form of a formal sanction or the allocating of public funds.

Madison's commitment to a policy of strict separation had greater opportunity to find expression in practice as well as in prose, for Madison remained in Virginia and played...
an active role in the legislative battle to separate church and state. His most important contribution lay in his opposition to a bill proposed by Patrick Henry in 1784 for "Establishing a Provision for Teachers of the Christian Religion." This measure, had it passed, would have required all persons "to pay a moderate tax or contribution annually for the support of the Christian religion, or of some Christian church, denomination or communion of Christians, or for some form of Christian worship." Madison obtained a postponement of consideration of the bill from December 1784 to November 1785, and in the meantime, Henry became governor. While defeat of the bill probably was due in part to Henry's absence from the Assembly and the resulting lack of effective legislative leadership, the more important factor was Madison's "A Memorial and Remonstrance." Written and widely distributed in the autumn of 1785, before the legislature reconvened, this document systematically put forth the reasons for opposing the assessment bill.

Madison began with the "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.'" He continued:

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.\textsuperscript{15}

In addition to this defense of the rights of conscience, Madison argued that religion cannot be legislated and any attempt to do so violates not only the natural rights of the individual but also the basic tenets of Christianity, "for every page of it disavows a dependence on the powers of this world."\textsuperscript{16} Civil authority cannot be empowered with authority to impose religious belief nor to enforce compliance with religious practices.

Henry's assessment bill met overwhelming opposition. Both Baptists and Presbyterians had voiced strong objections when it was first proposed. And, as a result of Madison's "Memorial," forty-seven counties registered their opposition.\textsuperscript{17} The defeat of the assessment bill convinced Madison to push for the passage of Jefferson's Bill for Establishing Religious Freedom, and the legislature gave its approval in January 1786.\textsuperscript{18}

The strength of Madison's commitment to the separation of secular and religious spheres surfaced again during his Presidency. In 1811 Congress passed a land-grant bill that provided five acres to a Baptist church that had, as a result of a surveying error, been built on public land. The purpose of the grant was simply to rectify the error, yet Madison vetoed the bill on the ground that it "compromises a principle and precedent, for the appropriation of funds of the United States for the use and support of religious
societies; contrary to the article of the Constitution which declares that Congress shall make no law respecting a religious establishment." He also vetoed a bill that would have incorporated a church in the District of Columbia.

After retiring from the Presidency, Madison stated his disapproval of Presidential proclamations of days of thanksgiving and of tax-supported chaplains for the armed services and for Congress. Referring to these as "establishments" or "the establishment of a national religion," he wrote: "If religion consists in voluntary acts of individuals, singly, or voluntarily associated, and it be proper that public functionaries, as well as their Constituents should discharge their religious duties, let them like their Constituents, do so at their own expense." This evidence makes clear that Madison "remained constant on this subject all his life."
II.

Government-mandated religious education was common throughout the colonies. Since the First Amendment applied only to Congress, most of the states, including those that did not have an established church, continued to support religious education into the nineteenth century. Most Americans believed that moral training was needed to insure a responsible and virtuous citizenry, but, unlike Madison, they supported the practice of teaching religion in the public schools in order to provide the requisite moral instruction. They also endorsed public subsidies for private schools maintained by the Protestant churches. The turning point came after 1830. The influx of large numbers of Roman Catholics was accompanied by applications from church officials for government money to fund parochial schools. These requests met strong resistance from Protestant-controlled governments. Although some compromises were worked out initially, constitutional amendments were eventually adopted in thirty-three states to prohibit public funding of church-related schools.

In both New England and the Southern colonies, laws required that children be provided with a religious education. Massachusetts set the precedent in 1647; Connecticut followed suit in 1650, and New Hampshire in 1680. The legislature of South Carolina in 1710 approved a statute calling for "a free school . . . for the instruction of the youth of this province in Grammar, and other arts and
sciences and useful learning and also in the principles of the Christian religion." And, on the eve of the Revolution, in 1776, North Carolina adopted a new constitution that acknowledged "the great necessity of having a proper school of learning established whereby the rising generation may be brought up and instructed in the principles of the Christian religion." 23

Support for religious education continued long after the Declaration of Independence. Massachusetts mandated in its constitution of 1780 "support and maintenance of public Protestant teachers of piety, religion, and morality, in all cases where such provisions shall not be made voluntarily." 24 Not until the 1830s, when Horace Mann attempted to purge the public schools of sectarianism, did Massachusetts retreat from its aggressive support of Protestant religious education. And even then the retreat was not total, for the State retained the practice of Bible reading in its schools. 25

New York, which had no established church, subsidized church-operated schools from 1795 to 1825. Although some communities gave financial support to religious schools of different denominations, including Catholic, the Public School Society in New York City blocked distribution of public funds to any sectarian school after 1824. Both Protestant and Catholic schools appealed to the State legislature, but the committee appointed to consider the grievances ruled that "the school fund of the state [\textit{etc.}] purely of a civil character, and that the entrusting of it to

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religious or ecclesiastical bodies was a violation of an
elementary principle in the politics of the state and
country." The decision was deemed unfair by Catholics,
who charged that the public schools, evaluated on the basis
of teaching staffs, textbooks, Bible instruction, and general
classroom atmosphere, were in fact Protestant.

Bishop John Hughes, supported by increasing numbers and
the growing political influence of Irish immigrants in New
York, led the campaign to secure a share of the education
budget for Catholic schools. He suggested that the
City's Catholic schools be given state aid proportionate to
their percentage of the population. Despite the
endorsement by Republican Governor William H. Seward, the
legislature balked at the proposal. Hughes, therefore,
brought his case to the city board of aldermen, who voted 15
to 1 to reject the request. He then petitioned the state
superintendent of schools. The superintendent's report
recommended that the legislature allow the appropriations to
Catholic schools and urged them to curb the powers of the
Public School Society, but the lawmakers adjourned without
taking action.

The Bishop then played his trump card. During the
elections for state legislators held the following year,
1841, Hughes put together a slate of candidates who supported
his proposal; in addition to Democratic incumbents, it
included a number of Catholic independents to challenge the
recalcitrants. Although few independent candidates won
seats, those who had opposed the Bishop's scheme were defeated by Whigs.²⁰

More important, the use of political power by the Catholic leadership forced the state legislature to act. On the one hand, it turned down Seward's request that public funds be granted to parochial schools. However, it did deny the Public School Society further responsibility for distributing tax money for school purposes and established instead a board of education to which was granted the sole right to use tax funds for educational purposes. In 1844 it enacted a law that essentially ended the Protestant domination of the public schools. The law stipulated that

no school shall be entitled to a portion of the school moneys in which the religious sectarian doctrine or tenet of any particular Christian or other religious sect shall be taught, inculcated or practiced, or in which any book or books containing compositions favorable or prejudicial to the particular doctrines or tenets of any Christian sect shall be used, or which shall teach the doctrine or tenets of any other religious sect, or which shall refuse to permit the visits and examinations provided for in this act.²¹

Bible reading continued, but the local residents were allowed to choose by majority vote whether the King James version or the Catholic-approved Douay edition should be used.²²

The confrontation in New York was not unique. In Philadelphia, the Roman Catholic Bishop Francis Kendrick petitioned the city's school board to allow Catholic children to use the Douay version when Bible reading was required. The board's decision is unclear - it either granted the request or directed that a child whose parents objected to Bible reading could be excused from the religious
exercise. What is clear is that the concession made to the Catholics enraged the Nativists, or Know-Nothings, who established their party for the purpose of protecting Protestant influence and political power. Emotions smoldered for several months during 1844 then burst into flame, both figuratively and literally. Rioters burned two Catholic churches, destroyed a convent, and set fire to a numerous houses in the Irish section of the city.

By the 1850s the Know-Nothing Party had a national following. It was strongest in Massachusetts where, in 1855, Know-Nothings won the governorship and all state offices, every seat in the senate, and all but two of the 378 seats in the house of representatives. Twenty-four of the newly-elected legislators were Protestant ministers. Once in office, Nativists passed laws restricting office-holding to native-born citizens, requiring twenty-one years' residence for the right to vote, and establishing a "Nunnery Committee" to investigate conditions in convents, parochial schools, and seminaries. With the exception of a statute that required Bible reading in the public schools, the anti-immigrant/anti-Catholic legislation was repealed when the Nativists lost control of the State legislature in 1856.

The strength of the Native American party was not limited to urban areas experiencing large growth in immigrant population. In addition to winning political control in Delaware and, through a liaison with the Whigs, Pennsylvania, the party also carried Connecticut, Rhode Island, New Hampshire, Maryland, and Kentucky during the mid-fifties and
put in a strong showing in Virginia, Tennessee, Georgia, Alabama, Mississippi, Louisiana, and parts of Texas. During the 1856 campaign, the New York Herald predicted that a Know-Nothing would win the presidency, and the Boston Pilot, a Catholic newspaper, conceded that election of a Know-Nothing was almost inevitable. But the Party's candidate, former President Millard Fillmore, carried only Maryland and won just twenty-five percent of the popular vote. Perceived by Northerners as a pro-slavery candidate, Fillmore was unable to develop a strong following, and the election went to Buchanan. By 1860 the movement to abolish slavery monopolized public attention, and nativism faded into the background.37

Nativism surfaced again after the Civil War as Catholics resumed their campaign to secure state funds for parochial schools. The battle was waged largely at the state level. A few cities, notably New York, had come under the control of the Irish-dominated political machines. Opponents of aid, therefore, appealed to state legislatures in an effort to block public funding of Catholic schools. Defeat of a federal amendment to prohibit government monies from aiding sectarian education made reliance on state constitutional amendments imperative.

President Grant made the first critical move when he recommended, in his annual message for 1876, an amendment to the Constitution forbidding the teaching of religious doctrine in any public schools and prohibiting "the granting of any school funds, or school taxes, or any part thereof,
either by legislative, municipal, or other authority, for the benefit or in aid, directly or indirectly, of any religious sect or denomination."38 One week later James G. Blaine introduced an amendment:

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 therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect or denomination nor shall any money so raised or lands so devoted be divided between religious sects or denominations.39

The House approved the measure by an overwhelming margin, but the Senate vote was two short of the necessary two-thirds. Though defeated, the proposal was not forgotten. From 1876 to 1892 every Republican platform contained a plank promising an amendment to forbid "application of any public funds or property for the benefit of any school or institution under sectarian control."40 Furthermore, every state admitted to the union since 1876 has been compelled by Congress to write into its constitution a requirement that it maintain a school system "free from sectarian control."41 At the state level, opponents of public funding of sectarian schools successfully amended the constitutions of thirty-three states during the period 1877 to 1913.42

Catholic Church officials managed to salvage a few concessions. New York, for example, continued to provide subsidies to noneducational Catholic charitable institutions. In addition, the school district for Poughkeepsie for twenty-five years paid nominal rent for parochial school buildings

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as well as the salaries of nuns serving as teachers until the plan was declared unconstitutional in 1899, five years after the "Blaine" Amendment was adopted. Similar plans were implemented in Minnesota, Illinois, and Iowa until they, too, were declared invalid.43
III.

Despite all of the controversy over public funding of sectarian schools, the question of establishment did not come before the Supreme Court until 1899, and, ironically, the first case involved not parochial schools but a hospital operated by a sisterhood of the Roman Catholic Church. A resurgence of nativist sentiment at the time of the First World War, however, resulted in legislation hostile to parochial schools, and the Supreme Court reviewed the issue in the 1920s. The Oregon law would have effectively shut down all the nonpublic schools including those having a religious affiliation. The constitutional issue in that case involved free exercise, but the decision nevertheless became an important precedent for cases involving aid to sectarian schools. Similarly, several cases involving the Jehovah's Witnesses in the 1930s and 1940s focused on the individual's right to free exercise but also established a basis for deciding the constitutionality of programs to aid church-related schools.

The 1899 case of Bradfield v. Roberts was initiated by a taxpayer against a federal contract in which the government agreed to erect a building on the property of a hospital in Washington, D.C., operated by an order of the Roman Catholic Church. The government had also agreed to pay a specified sum for each poor patient sent to the hospital by the Commissioners of the District of Columbia. In a unanimous opinion, the justices found the contract to be
constitutional. Although the hospital was owned by a corporation consisting exclusively of nuns, the corporation was an entity separate and distinct from its stockholders and was, therefore, a secular institution. Justice Peckham explained:

Whether the individuals who compose the corporation under its charter happen to be all Roman Catholic, or all Methodists, or Presbyterians, or Unitarians, or members of any other religious organization, or of no organization at all, is of not the slightest consequence with reference to the law of its incorporation, nor can individual beliefs upon religious matters of the various incorporators be inquired into.... That the influence of any particular church may be powerful over the members of a nonsectarian or secular corporation, incorporated for a certain defined purpose or with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body.45

The basis for the judgment was essentially one of secular means and ends: "government may pursue only secular ends and in doing so may use only secular means."46 This test would become a measure for determining constitutionality in cases involving aid to sectarian schools.

The Court again dealt with the question of establishment in the 1908 case Quick Bear v. Leupp.47 Plaintiff contested payments to Catholic mission schools from trusts established by the federal government for the education of Sioux Indians. Chief Justice Fuller, speaking for a unanimous Court, declared that such payments did not violate the Establishment Clause since the money belonged to the Indians and was merely held in trust by the government.48

The Supreme Court handed down its first important decision relating to sectarian schools in 1925. The case of
Pierce v. Society of Sisters was significant for several reasons. First, it resulted from legislation specifically intended to undermine Catholic parochial schools, and the Court, knowing that the judgment ran contrary to widespread popular opinion, ruled that the law was unconstitutional. Second, the justices based their decision, in part, on the Fourteenth Amendment and the rights of parents to direct the education of their children. While this application of the Fourteenth Amendment to state legislation represented a broadening of the Court's understanding of its meaning, the emphasis on parental rights enabled the justices to side-step the First Amendment issue of free exercise of religion. Third, the Court's ruling that parents have the right to send their children to church-related schools and that parochial schools have a constitutional right to exist has served as a fundamental argument of proponents of aid to sectarian schools: If church-related schools fulfill the state's requirement for compulsory education and if, for reasons of conscience, parents choose a denominational school for their children, then the state has an obligation to assure that the option to choose a religiously-oriented education remains viable.

The Compulsory Education Act for the State of Oregon contested in Pierce v. Society of Sisters was proposed by initiative petition and approved by voter referendum in November 1922 by a margin of 115,506 to 103,685. The act, which was to have gone into effect on 1 September 1926, required children between the ages of eight and sixteen to
The principal proponents of the compulsory public education law were Oregon Klansmen. Threatened by the influx of Southern and Eastern European immigrants and by the post-war developments associated with the Red Scare, the Klan directed its attentions during the 1920s against alien races, creeds, and radical social ideas. Most of the Klansmen in Oregon were not the rural, violent night riders of the popular stereotype. Over half of the Oregon Klansmen lived in Portland; most of them were probably blue-collar fundamentalists, arrested in their careers at a menial level amid the contemporary ideology of success, troubled by assaults on the familiar certainties, looking for dignity and significance.

Convinced of the need to preserve and protect traditional American values, the Klan decided that the public school was "the cornerstone of good government." "[T]hose who are seeking to destroy it," they claimed, "are enemies of our Republic and are unworthy of citizenship." According to the
Klan's way of thinking, "[o]nly bluebloods or men who placed church above state could oppose compulsory public schooling; in either case they were traitors to American institutions."\(^{52}\)

Klan propaganda circulated in support of the compulsory public education bill, while raising questions about other religious sects, singled out Roman Catholicism as the most serious threat to American values and traditions. David Tyack cites letters written by Oregon citizens to local newspapers as evidence of the anti-Catholic sentiment behind the law:

A citizen of Glendale put the matter with classic candor: the bill "is not a question of Catholic's [sic] having the right to follow the teachings of their Dago pope, but the right of protestants to educate their children by the best school system in the world. . . ." The majority has a right to rule, he said; after all, if the papists had a majority they would destroy our institutions. A Silverton man bought a half-page advertisement to warn that "our country is in danger. We need Americans, not mental surfs [sic] and one-man worshipers [sic]." Aiming at "the Roman Monopoly," he went on to say that thousands of children "are now being fitted to promote un-American ideals, and many of them will become subjects of a foreign prince, consciously or unconsciously, as his American agents - spies and traitors to the best interests of the United States."\(^{53}\)

Without question, religious freedom was a central - if not the central issue - in the Oregonian referendum. Both those who supported the bill and those who opposed it recognized the church-state implications. Lutherans, Seventh-day Adventists, Presbyterians, Unitarians, and Congregationalists protested against the curtailment of free exercise and voiced concerns that the rights of all religious
minorities might be threatened. "The government that turns its citizens into subjects and makes them mere cogs in a wheel, without any rights of their own," a spokesman for the Adventists proclaimed, "is a government that is transforming itself into a tyranny."\(^5\)

Despite the fact that the referendum had turned on the issue of religious freedom, the Supreme Court based its decision on the rights of property and the more general rights of parents. Several factors help to explain the nature of the Court's opinion: the arguments presented by the lawyers, persistent questions regarding state regulation of education, and the conservative leanings of most of the justices.

The lawyers who appeared before the Supreme Court in March 1925, as had been true at the lower court hearing, centered their arguments on the threat to property rights and the due process clause of the Fourteenth Amendment. William D. Guthrie, who represented the Society of Sisters, insisted:

This bill establishes a case of irreparable injury imminent to the appellee's business and property.

\[\ldots\] The true purpose of the act, as well as its plain and intended practical effect, was the destruction of private primary, preparatory and parochial schools; for they certainly could not survive the denial of the right of parents to have their children thus educated in the primary grades.\(^5\)

The threat to the schools and to the teachers, he continued, though serious, was not so foreboding as the threat to "a far more important group of individual rights, namely, the rights of parents and guardians... and the rights of the children
themselves. "56 While not ignoring the religious issue, Guthrie subordinated it to rights of parents: "It is not seriously debatable that the parental right to guide one's child intellectually and religiously is a most substantial part of the liberty and freedom of the parent."57

The right of the nonpublic schools to exist and the right of parents to send their children to these schools, Guthrie argued, are protected by the Fourteenth Amendment. The social interests menaced by the suppression of private educational institutions and the denial of liberty to pursue long rooted habits and traditions among our people are peculiarly of the character that the Fourteenth Amendment was the most immediately designed to protect from state police action. The Fourteenth Amendment had for its primary object the prevention of state legislation calculated to keep one class in subjection to another in respect of opportunities for economic and social advancement, the pursuit of happiness, and the exercise of fundamental rights comprehended in an essential individual liberty, among men fit for freedom.58

The attorney for Governor Pierce, George E. Chamberlain, responded that the threat to social harmony associated with the continued existence of private and parochial schools justified the use of the state's police power, regardless of the effect on the schools themselves. Employing a conspicuously nativist line of reasoning, he alluded to "the evil effects upon a State of the immigration of ignorant foreigners, unacquainted with, and lacking sympathy with, American institutions and ideals." In addition, he suggested that nonpublic schools encouraged harmful social divisions and even contributed to the increase in juvenile delinquency.59
Chamberlain flatly rejected the contention that the Fourteenth Amendment was intended to protect individual freedoms from State intrusion: "It is now definitely settled that the Fourteenth Amendment did not radically alter the relations between the federal and state governments, or make the provisions of the Bill of Rights in the United States Constitution binding upon the state governments."60

The nativists' extraordinary efforts to control education, which found expression in the passage of the Compulsory Public Education Act and the brief of the appellants, may have influenced the Supreme Court's opinion, for Pierce was not an isolated case. Just two years earlier, in Meyer v. Nebraska (1923) the Supreme Court had ruled unconstitutional a Nebraska law, also inspired by nativist sentiments, that prohibited the teaching of any language other than English to children who had not yet passed the eighth grade.61 The Meyer ruling provided a convenient precedent for the Pierce decision, but the fact that a second case involving unreasonable regulations on education had come to the Court also pointed to the need for strengthening of the Court's position.

By focusing on parental rights, which included free exercise of religion, the Court was able to address the larger issue in its Pierce decision. Justice James McReynolds, speaking for the entire Court, declared the Oregon statute an unconstitutional extension of the State's police power. The Compulsory Education Act, he argued, "unreasonably interferes with the liberty of the parents and

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guardians to direct the upbringing of the children," and in that respect violated the Fourteenth Amendment. The State does not have the power "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."

Because of the strong conservative persuasion of most of the justices, the contention that rights of property were threatened by the law also found a sympathetic audience. The Court explained that the corporations operating the schools could not claim the liberty guaranteed to individuals by the Fourteenth Amendment but, instead, held that "where corporations... are threatened with destruction of their business and property through the improper and unconstitutional compulsion exercises... upon parents and guardians, their interest is direct and immediate and entitles them to protection by injunction." Furthermore, because their businesses were already being harmed even though the statute had not yet gone into effect, the suit was not premature.

In Cochran v. Louisiana (1930), the next significant church-state case, the Supreme Court upheld an appeal from Louisiana in a case involving the use of tax funds for the purchase of textbooks used in nonpublic schools. The Louisiana law provided for the allocation of public monies for "supplying school books to the school children of the
State," without excluding those who attended private and religious schools. Plaintiffs, citizens and taxpayers in the State of Louisiana, did not base their case on the First Amendment but, rather, maintained that the law violated the Fourteenth Amendment by taking public property for private purposes.

The furnishing of text-books free by the State to school children attending private schools which charge tuition and require children to furnish their school books, is an aid to such private institutions by furnishing a part of their equipment. . . .

If the furnishing of school books to children attending private schools is not to be considered an aid to such private schools but an aid only to the children attending such schools, then the tax levied for such purpose is equally obnoxious to the Federal Constitution because it constitutes a diversion of public property to private individuals. . . .

Chief Justice Hughes, writing for the Court, rejected the contention of the plaintiffs and endorsed, instead, the reasoning of the Louisiana Supreme Court. The State Court had approved the loaning of textbooks to students in private schools on the basis of what would become known as the child-benefit theory: "The appropriations were made for the specific purpose of purchasing schools books for use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made." The judge specifically noted that the books provided to children in sectarian schools were the same as those used in public schools and would presumably not be adapted to religious instruction.
Because the appellants did not raise a First Amendment question, the Cochran decision does not deal with the issue of whether the First Amendment applies to the states by virtue of the Fourteenth Amendment. The opinion does, however, suggest a moving away from the automatic application of the Fourteenth Amendment in favor of property rights to a greater willingness to consider the public welfare. Hughes concluded his opinion: "Individual interests are aided only as the common interest is safeguarded."71

After 1937 the focus for Supreme Court decisions involving religious freedom shifted from educational issues to free exercise. However, the opinions of the justices in these cases laid the groundwork for later decisions dealing specifically with aid to sectarian schools.

In a series of cases brought by the Jehovah's Witnesses, the justices established the principle of incorporation of the religion clauses of the First Amendment by the Fourteenth. Endeavoring to grasp the meaning of the First Amendment, they debated whether the authors had intended it to be an absolute mandate, but, for the most part, settled instead on the "preferred freedoms" doctrine, first suggested by Justice Cardozo in Palko v. Connecticut (1937).72 The strongest resistance to "preferred freedoms" came from those who held most tenaciously to the philosophy of judicial restraint. As would be true in the later establishment cases, the justices expressed considerable concern regarding the broader interests of the
community and often weighed these interests against the rights of individuals to free exercise of religion.

Beginning in 1938, the Supreme Court decided a series of cases involving the Jehovah's Witnesses and the right to free exercise of religion. Most of the cases resulted from the aggressive and often abrasive proselytizing by members of this denomination. Their disregard for local ordinances regulating such activities along with their vitriolic attacks on Roman Catholicism forced the justices to weigh their rights of free expression and free exercise against those of the community at large. The other cases centered on the refusal of school children to salute the American flag because they equated that practice with idolatry.

Justice Roberts declared the incorporation of the religion clauses by the Fourteenth Amendment in his majority opinion in Cantwell v. Connecticut (1940), a case involving the proselytizing activities of the Jehovah's Witnesses. While proclaiming the application of the First Amendment to the states, he nevertheless qualified the protection afforded by the Amendment on the grounds that certain regulations must be imposed by government for the protection of society.

The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts, -- freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. The freedom to act must have

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Roberts admitted that a state has a general right to regulate solicitation, even for religious purposes. However, because the Connecticut law empowered a government official to determine whether the solicitation of money for a religious purpose was legitimate, he concluded that it was invalid.

Justice Stanley Reed in *Jones v. City of Opelika* (1942), upheld restrictive ordinances on the basis of the secular regulation doctrine. "[T]he mind and spirit of man remain forever free," he explained, "while his actions rest subject to necessary accommodation to the competing needs of his fellows."76

*Opelika* was overturned the following year in a series of cases in which the rights of Witnesses to proselytize were weighed against those of the community at large. Jackson, dissenting in one of these cases, *Douglas v. City of Jeannette*, grounded his objections on the secular regulations doctrine and the responsibility of the local government to protect those rights of the majority not respected by the Witnesses.77 He explained:

The First Amendment grew out of an experience which taught that society cannot trust the conscience of a majority to keep its religious zeal within the limits that a free society can tolerate. I do not think it any more intended to leave the conscience of a minority to fix its limits. Civil government cannot let any group ride rough-shod over others simply because their "consciences" tell them to do so.78

The Court returned to the secular regulations doctrine in *Prince v. Commonwealth of Massachusetts* (1944),
distinguished from the earlier proselytizing cases because it involved the participation of a child.\textsuperscript{79} A state child labor law prohibited children from selling newspapers, magazines, or other periodicals in the street or in any other public place. Rutledge, despite his professed support for the preferred freedoms doctrine, wrote the majority opinion in which he upheld the State's regulation. The family itself, he asserted,

is not beyond regulation in the public interests, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as \textit{pares patriae} may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience.\textsuperscript{80}

Acceptance of the secular regulation doctrine implied rejection of an absolutist interpretation of the First Amendment. Justices with as widely differing philosophies as Stanley Reed and Frank Murphy agreed that the Amendment could not be taken as an absolute. Reed, dissenting in the second \textit{Opelika} decision (1943), declared:

None of the provisions of our Constitutions is more venerated by the people or respected by legislatures and the courts than those which proclaim for our country freedom of religion and expression. While the interpreters of the Constitution find the purpose was to allow the widest practical scope for the exercise of religion and the dissemination of information, no jurist has ever conceived that the prohibition of interference is absolute.\textsuperscript{81}

Douglas, representing the majority in \textit{Murdock v. Commonwealth of Pennsylvania}, a case decided at the same time as the
second *Opelika*, concurred that "the rights with which we are dealing are not absolutes," but are nevertheless "in a preferred position."^{82} Murphy came the closest of any of the justices to declaring the religion clauses of the First Amendment absolutes. In his dissent from the original ruling in *Opelika*, he observed, "[T]he right to worship their Maker according to their needs and the dictates of their souls and to carry their message or their gospel to every living creature," is a right even more dear to many individuals than other freedoms secured by our Constitution.^{83} Two years later, Murphy dissented in the *Prince* decision. Disturbed by the distinction made by the majority between the rights of adults and those of children and, even more so, by their willingness to subordinate the religious rights of children to secular concerns, Murphy again approached an absolutist position. "[T]he human freedoms enumerated in the First Amendment and carried over into the Fourteenth are to be presumed to be invulnerable," he explained, "and any attempt to sweep away those freedoms is *prima facie* invalid."^{84} But Murphy did not step beyond the fine line separating the "preferred position" from an "absolute" interpretation. Placing the burden on the state "to prove the reasonableness and necessity of prohibiting children from engaging in religious activity of the type involved in this case," the Justice tacitly conceded that some restrictive regulations might be justified.^{85}
While a majority of the justices — Stone, Black, Douglas, Murphy, Rutledge, and even Roberts — embraced the "preferred position" doctrine and conceded to varying amounts of secular regulation, other justices approached the question of free exercise from a very different perspective: judicial restraint. Felix Frankfurter had long been an advocate of the restraint philosophy. He had adopted this position at a time when the Supreme Court persisted in overturning general welfare legislation passed in response to changing social and economic conditions. During the 1930s, repeated pronouncements against New Deal legislation confirmed his commitment to a philosophy of judicial restraint. After his appointment to the Court, Frankfurter continued to adhere to his belief that the judicial branch should defer to the democratic branches whenever possible despite the fact that the issues then involved civil rights and civil liberties rather than laissez-faire economics. Reed and Jackson tended to support Frankfurter in his use of this doctrine.

Minersville School District v. Gobitis (1939), an 8-1 decision written by Frankfurter, illustrates his commitment to judicial restraint. The Court upheld a local school board requirement that all children salute the national flag as part of a daily school exercise. Two children of Jehovah's Witnesses refused since they had been brought up to believe that such a gesture of respect for the flag was forbidden by the Scriptures. While referring to the policy of secular regulation in his opinion and pointing to the national security concerns that probably led to the flag

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salute requirement, Frankfurter rested his position on the need for restraint.

The precise issue ... for us to decide is whether the legislatures of the various states and the authorities in a thousand counties and school districts of this country are barred from determining the appropriateness of various means to evoke that unifying sentiment without which there can ultimately be no liberties, civil or religious. ... [T]he courtroom is not the arena for debating issues of educational policy. It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncrasies among a people so diversified in racial origins and religious allegiances. So to hold would in effect make us the school board for the country. That authority has not been given to the Court, nor should we assume it.

In a subsequent flag salute case, West Virginia State Board of Education v. Barnette (1942), the Court reversed the earlier ruling and only Frankfurter dissented. Jackson, writing for the majority, explained that the real strength of the country lay in its protection of individual freedoms, and he concluded that restrictions on basic rights are legitimate "only to prevent grave and immediate danger" to the interests of the state. In a concurring opinion, Black and Douglas confessed that on reconsideration of the earlier case, the value of the flag salute ceremony to national strength and security was insufficient to justify an infringement of the free exercise of religion. Murphy, too, concurred. "Reflection," he said, "has convinced me that as a judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its furthest reaches."
But Frankfurter stood firm. He conceded that the actions "which to the majority may seem essential for the welfare of the state may offend the consciences of a minority," but he did not waver from his earlier assertion that the decisions of the elected branches must be allowed to stand unless "forbidden by some explicit restrictions upon political authority in the Constitution." Although Frankfurter defended his decision as upholding patriotism during a time of war, his casual dismissal of the rights of the minority appears, in retrospect, to have undermined his credibility as a judicial statesman. For most Americans, United States participation in World War II symbolized a commitment to basic rights and against authoritarian rule.
IV.

Lawmakers and judges have imposed their own interpretations for nearly two hundred years, and those interpretations have varied widely depending on the broader context of social, economic, and political change as well as personal beliefs and values of the decision makers.

The wording of the Establishment Clause points to the difficulty of the problem. Madison and his Congressional colleagues recognized the need to provide a broad principle that could be applied to changing conditions and circumstances. They also perceived, as indicated in Madison's own writings, that an establishment of religion could assume numerous expressions without necessarily involving a state church per se, and the original intention of the Amendment was clearly to preclude the use of public funds for the advancement of religion, not merely to forbid the establishment of a particular church. The legislators who wrote the Amendment did so with these goals in mind.

Confusion over the meaning of the Establishment Clause grew during the nineteenth century. This was due, in part, to the fact that the Amendment did not apply to the states. The persistence of established churches and of policies that respected an establishment encouraged a popular attitude that certain denominations could be singled out for government preference while others would suffer from intentionally discriminatory programs.
These ideas gained new justification with the influx of large numbers of Catholic immigrants. The fears of the white, Anglo-Saxon, Protestant community derived from the increased competition for jobs, and from the long-standing belief that the Catholic Church had a goal of worldwide political domination. Faced with the growing political potential of the immigrants, "native" Americans passed laws intended to curb the Catholic influence, but resistance to these laws made compromise necessary. One result was withholding of public monies from all sectarian schools while, at the same time, assuring that the public schools would inculcate Protestant religion through daily Bible reading. The contradiction, insofar as the Establishment Clause is concerned, is apparent.

The problems of defining establishment and determining the bounds of free exercise became more complex in the twentieth century. The incorporation of the First Amendment by the Fourteenth extended the Court's jurisdiction and gave to the justices the responsibility for reviewing state as well as federal legislation. Also important was the growing realization that the individual's civil rights should be given greater weight in the judicial equation. The difficulty in balancing individual rights and community interests would persist as the justices tackled the new issue of aid to sectarian schools.

William G. McLoughlin argues that the position taken by Isaac Backus and the Separate Baptists to secure religious toleration in New England during the eighteenth and early nineteenth centuries deserves serious consideration. Their position leaned toward accommodation of Protestant religion by the civil authorities and essentially defined the relations between church and state during the nineteenth century. While justices favoring accommodation have found historical evidence for their position in nineteenth-century policies, they have not recognized that the seed was planted by the Baptists during the American Revolution. "Isaac Backus and the Separation of Church and State in America," *American Historical Review* 73(1968): 1392-1413.


*Ibid.*, p. 161. "Nowhere in America after 1776 did an establishment of religion restrict itself to a state church or to a system of public support of one sect alone; instead, an establishment of religion meant public support of several or all churches, with preference to none. The six states that continued to provide for public support of religion were careful to make concessions to the spirit of the times by extending their establishments to embrace many different sects." *Ibid.*, p. 157.


14 Pfeffer, Church, State, and Freedom, p. 111.


16 Ibid., p. 343.

17 Pfeffer, Church, State, and Freedom, pp. 110 and 113.

18 Ibid., p. 113. In final form, the Bill for Establishing Religious Freedom provided: "Be it therefore enacted by the General Assembly of Virginia that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or beliefs, 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 no wise diminish, enlarge or affect their civil capacities." Ibid., p. 114.


20 Levy, Constitutional Opinions, p. 144.


22 Levy, Constitutional Opinions, p. 145.


25 Pfeffer, Church, State, and Freedom, p. 436. In 1825 Massachusetts passed a law mandating Bible reading in the public schools. Mann supported this "as a means for
instilling moral values and introducing the student to great literature rather than as a devotional exercise." Reichley, Religion in American Public Life, p. 137.

26 Pfeffer, Church, State and Freedom, p. 530.
28 Reichley, Religion in American Public Life, p. 137.
29 Pfeffer, Church, State and Freedom, p. 532.
31 Pfeffer, Church, State, and Freedom, p. 532.
33 Pfeffer, Church, State, and Freedom, p. 436.
35 Reichley, Religion in American Public Life, p. 188.
36 Pfeffer, Church, State, and Freedom, pp. 437-38.
37 Reichley, Religion in American Public Life, p. 188; Billington, Protestant Crusade, Ch. 16.
38 4 Congressional Record (44th Cong.), p.175 (1875), quoted in Pfeffer, p. 146.
39 4 Congressional Record (44th Cong.), p.5580 (1876), quoted in Pfeffer, pp. 146-47.
40 Reichley, Religion in American Public Life, p. 139.
41 Pfeffer, Church, State, and Freedom, p. 534.
Reichley points out that the Catholic periodical America christened the New York amendment enacted in 1894 the "Blaine Amendment" even though Blaine, who had died in 1893, had nothing to do with its passage. "Campaigning for repeal of the amendment, America clearly found it expedient to punch the nerve attached to 'rum, Romanism, and rebellion,'" the campaign slogan attributed to Blaine and used against the Democrats in the election of 1884.

Bradfield and Roberts, 175 U.S. 291 (1899). Leo Pfeffer cites this case as an instance where the justices disregarded a technical defect (the fact that federal taxpayers were not accorded standing) and chose, instead, to decide the case on its merits. Pfeffer, Church, State, and Freedom, pp. 195-96. The Supreme Court overruled the earlier prohibition against federal taxpayer standing in a 1968 case, Flast v. Cohen, 392 U.S. 83, that involved aid to parochial schools.

Bradfield v. Roberts, 175 U.S. at 298.
Pfeffer, Church, State, and Freedom, p. 200.
Reuben Quick Bear v. Leupp, Commissioner of Indian Affairs, 210 U.S. 50 (1908).
Id. at 81.
Id. at 530-31.


Ibid., pp.84-85.
Ibid., p. 90.
Id. at 518.
Id.
Id. at 520.
Justice McReynolds spoke for the majority, which included Brandeis. The law violated the Fourteenth Amendment, he explained, because it infringed on the liberty of language teachers to earn a living and the right of parents to control the education of their children. *Meyer v. Nebraska* at 401. Holmes, joined by Sutherland, dissented. *Bartels v. Iowa*, 262 U.S. 404, at 412. Samuel J. Konefsky defends Holmes' reasoning: "For Holmes the attack on the Nebraska law was just one more instance of the resort to judicial review to check legitimate legislative discretion. Though he appreciated the objection to it, he felt that it dealt with a matter concerning which 'men reasonably might differ' and therefore did not think the Constitution barred the State from trying the experiment. . . . The only debatable point was the lawlessness of the means adopted toward that end, and as to that the Justice felt that the Court should defer to those better acquainted with local conditions." The Legacy of Holmes and Brandeis (New York: Macmillan, 1956), pp. 260-61. Fred Rodell, in contrast, describes Holmes' reliance on judicial restraint in *Meyer* as his "most illiberal view and vote." Nine Men (New York: Random House, 1955), p. 205.


Id. at 535.

Id. at 510.

Id. at 536.


Id. at 374.

Id. at 371-72.

Id. at 374-75.

Id. at 375.

Id.

Palko v. Connecticut (302 U.S. 319, 1937) involved the question of whether the Fourteenth Amendment embraced the guarantee against double jeopardy in the Fifth Amendment.
Cardozo ruled that it did not. Paul L. Murphy explains: "This enabled him to make clear that the Fourteenth did not automatically protect all rights extended by the first eight amendments. The question then was: which ones did it encompass? Here Cardozo's own values emerged clearly. To him only those rights 'implicit in the concept of ordered liberty,' and those principles of justice 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' should be nationalized by the Court. There was no doubt that these would include the First Amendment guarantees, particularly those of thought and speech. These were sufficiently basic, and of such 'social and moral value' that they constituted the 'matrix, the indispensable condition, of nearly every other form of freedom.'" The Constitution in Crisis Times, 1918-1969 (New York: Harper & Row, 1972, p. 179).

74 Id. at 303-304.
75 Jones v. City of Opelika, 316 U.S. 584 (1942).
76 Id. at 594.
78 Id. at 179.
80 Id. at 166.
81 Jones v. City of Opelika, 319 U.S. 103, 121 (1943).
83 Jones v. Opelika, 316 U.S. at 621.
84 Prince v. Massachusetts, 321 U.S. at 173.
85 Id.
86 Michael E. Parrish argues: "Above all, [Frankfurter] wished to promote the ideal of judicial restraint in the tradition of Thayer and Holmes. Judges, he believed, should not substitute their own policy choices for those of the popular branches of government in the mistaken idea that they possessed infallible insight into the Constitution. Or, as Holmes reminded him, 'A law should be called good if it reflects the will of the dominant forces of the community even if it will take us to hell.'" Felix Frankfurter and His Times: The Reform Years (New York: Free Press, 1982), p. 65.
88 Id. at 597-98.
90 Id. at 639. The rationale of Jackson in the second flag-salute case downplayed the religious factor, stressing the broader right not to be compelled (psychologically) to profess a belief (not necessarily religious) that one does not hold.
91 Id. at 644.
92 Id. at 645.
93 Id. at 662 and 666.
On 20 November 1946 the case of Everson v. Board of Education was argued before the United States Supreme Court.1 Initiated by a district taxpayer, the suit challenged the validity under the Federal Constitution of a state statute authorizing local school boards to reimburse parents of children attending public and non-profit private schools for the costs of transportation by a public carrier. More specifically, the appellant charged that the law violated the First Amendment prohibition of any "law respecting an establishment of religion." The five-four decision handed down on 10 February 1947 upheld the statute as a legitimate act in support of the general welfare.

The New Jersey law challenged in Everson v. Board of Education was similar to laws existing in nearly twenty states and the District of Columbia.2 This fact was significant, for the decision made by the Supreme Court in Everson would inevitably have far-reaching implications. In the majority of the states, laws stipulated that transportation could be provided to non-public school students only if it did not result in additional cost to taxpayers. California's Education Code, for example, authorized transportation for "pupils... in attendance at a school other than a public school" upon the same terms over the same route of travel as public school pupils.3 The New Jersey law differed in that respect, for it allowed towns to
reimburse parents for the costs of transportation even when the public and private school routes did not coincide. The particular application of the State law by the Town of Ewing — reimbursement only to parents of children attending public or Catholic schools — drew attention to the church-state issue and the possibility that such services might constitute an establishment of religion.

Unlike the earlier Supreme Court case involving state aid to parochial schools, Cochran v. Louisiana, the issue in Everson was not the misuse of public property but rather the possible infringement of the First Amendment. As such, Everson became the first case in which the Supreme Court justices would consider whether government aid to church-related schools constituted an establishment of religion. It became a landmark case for that reason.

The justices had been grappling with church-state issues in the years immediately preceding Everson. They had endorsed the principle of incorporation of the religion clauses of the First Amendment into the Fourteenth Amendment, and most of them had expressed some support for the doctrine of preferred freedoms. As the Court dealt with the series of cases brought by the Jehovah’s Witnesses, the justices had reconsidered and refined their positions, suggesting that they were gaining a clearer idea, as individuals, of how far they should go in giving precedence to First Amendment freedoms over community interests.

Confronted, however, by a case involving the question of establishment of religion rather than free exercise, the
justices found themselves back at square one. The concerns raised by the free exercise cases seemed to have little relevance to the related but distinct issue of establishment. Perhaps this explains the fact that the principles of decision-making relied on so heavily in the earlier cases by certain of the justices were simply cast aside in deciding Everson: Frankfurter abandoned his strict adherence to judicial restraint, while Murphy compromised on his near absolutist position in favor of larger community interest.

The task for the historian examining Everson is to determine why certain of the justices who had been involved in free exercise cases adopted new rules for dealing with establishment. In part, the answer lies in reliance on the reasoning of the Court in Pierce and Cochran - cases also involving church-related schools. But beyond those two precedents, the explanation seems to rest in the fact that judicial consideration of the establishment question was strongly influenced by traditional attitudes towards the Roman Catholic Church that had been reinforced by fears of its growing influence in American society. For both Frankfurter and Murphy, the Justices whose opinions in Everson appeared most inconsistent with their basic principles, the particular denomination to be aided made a difference.

To single out Frankfurter and Murphy for following personal attitudes and beliefs is, however, misleading. While the particular religion made a difference to Frankfurter, Murphy, and probably Jackson, political
philosophy influenced Hugo Black, and Wiley Rutledge was moved by historical considerations. Religion was also important to Harold Burton, whose strong affiliation with the Unitarian Church may account for his position.

The lack of clear constitutional precedent on which to base an opinion in *Everson* afforded the justices the opportunity to decide for themselves what kind of criteria should be used in the decision-making process. Consequently, *Everson* is important not only because it set a precedent for subsequent parochial cases but also because the opinions and background materials reveal the individualized and personal nature of deciding a Supreme Court case.

The character of the decision was determined by the American Civil Liberties Union, which participated in *Everson* as an *amicus curiae*. According to Kenneth H. Greenawalt, a lawyer for the ACLU:

> [T]he point relative to the Separation of Church and State which was developed only in our [ACLU] brief, was the one point around which the entire oral argument centered. The briefs of the parties had merely mentioned the point incidentally and had placed no emphasis on it. The main point of their written briefs was that involving the use of public funds for a private purpose as relating to the Fourteenth Amendment directly.\(^6\)

The ACLU adopted the position that the reimbursement of costs of transportation to parents of children attending Catholic schools violated the Constitution despite the advice of lawyers who insisted that the New Jersey Statute did not constitute an establishment of religion and that a case challenging the law would create an ugly political situation.\(^7\) Correspondence from the ACLU in 1943 had
conceded, in view of *Cochran v. Louisiana*, that the New Jersey case raised no substantial constitutional question. However, the Committee for Academic Freedom of the ACLU later reconsidered the issue of using public funds for transportation of children to private schools.

The Committee reported to the Board of Directors on 21 December 1944 that eleven of its twenty members believed that no aid, direct or indirect, should be given to private schools. Among those voting with the majority was V. T. Thayer, whose writings on this subject would prove particularly persuasive to Justice Rutledge. Reinhold Neibuhr and Karl Llewellyn joined those who took the view "that public monies may properly be used, when so appropriated, for transportation and such like other health and welfare services as school lunches, school nurses and the like - drawing the line between functions which had no direct relation to education and those which do." Only Alexander Meiklejohn, philosophy professor and former president of Amherst College, supported the position that "state support for denominational schools - assuming that it could be managed fairly and equitably - is not objectionable."

The determination of the ACLU to challenge the New Jersey statute as a law respecting an establishment of religion was, no doubt, strengthened by the attempt in the Senate to pass similar, and more extensive, legislation. In 1945, the organization took a strong stand against a bill sponsored by George Aiken (R - Vermont) to authorize the distribution of federal funds to non-public schools for
construction, transportation, development of library facilities, and purchase of textbooks "and other reading materials," "visual aids and other instructional materials, school health programs and facilities, and other necessary educational projects." Thayer's analysis of the proposed law charged that "[p]ublic funds are thus requested in order to encourage the development of private schools under sectarian auspices." He warned that substantial amounts of money would be diverted from public schools and cited serious problems in administering the funds. In addition, he pointed to the practice of segregation in parochial schools.⁹

The participation of the ACLU in Everson, according to the organization's own records, was a determining factor in the Supreme Court's handling of that case. Although the organization's leaders expressed concern that aid to non-public schools would take funds from public education and might encourage further segregation, the central issue in their minds was the threat to church-state separation. By focusing on that point in their brief, they determined the course of that argument and, ultimately, the nature of the justices' decisions as well.

On the surface, the difficulties encountered by the justices are evident in the number of drafts circulated during the three months after the case was argued until the decision was handed down on 10 February 1947. Hugo Black circulated six drafts of his majority opinion among his colleagues. Wiley Rutledge produced eight drafts of his dissenting opinion, and Robert Jackson offered a separate
dissent. Frankfurter wrote an additional dissent that was never published.10

The fact that the final decision of the Court was so closely split (5-4) also indicates that the problem of government assistance in transporting children to church-related schools was troublesome and complex. The markedly different approaches taken by the three Justices who wrote opinions reinforces the impression that the questions raised by Everson were neither simple nor straightforward. On the contrary, the case involved not only legal and constitutional issues but also political, economic, and social considerations. The justices had to balance the governmental responsibility to provide for the general welfare against the constitutional prohibition of any law respecting an establishment of religion, determining, at the same time, whether the New Jersey statute achieved either or both of these ends. In doing so, they felt compelled to gain a better understanding of the intent and meaning of the Establishment Clause, but they also took into account the popular fears regarding the Roman Catholic Church that had re-emerged in the 1940s. Convinced of the far-reaching implications this decision would have, the justices labored over their opinions and, in the case of Felix Frankfurter, actively lobbied in an effort to challenge the outcome.

The differing opinions reflect not only the problematic nature of the Everson case but also the fact that each justice brought to the case a distinct notion of how judicial decisions should be made as well as a personal set of values.
attitudes, and concerns. The decision he finally reached was determined in large part by this individual system of beliefs. As indicated earlier, the absence of any clear legal precedent for the Court's decision led the justices to rely more heavily on personal values and concerns than might otherwise have been the case. Consequently, a case study of judicial decision-making in *Everson v. Board of Education* reveals the individualized character of that process.
I.

Hugo Black, author of the majority opinion in *Everson*, developed his concept of judicial decision making from a political philosophy rooted in late nineteenth-century populism. This populist approach led Black to support the decisions of the democratic branches whenever possible since the wishes of the majority would presumably come closest to protecting the interests of the common man. At the same time, Black recognized that the guarantees of the First Amendment were critical to the protection of basic rights.

In writing the opinion in *Everson*, Black had to balance these two apparently contradictory concerns against each other. Clearly he wanted to approve the transportation provision passed by the New Jersey legislature, particularly because that law was classified as general welfare legislation. On the other hand, the law raised important questions regarding religious freedom and separation of church and state. Black attempted to solve his problem by arguing that transportation services did not constitute an establishment of religion since they were separate from the educational process; rather they contributed to the free exercise of religion by affording safe transportation for children attending church-related schools. By dealing with the church-state issues in this manner, Black was able to focus on the idea that the contested law was primarily a general welfare measure intended to assure the safety of the community's children.
Although Black never aligned himself formally with the populist movement, he sympathized with the underlying philosophy: that government should be the agent of the people, that laws passed and implemented by the government should improve the conditions of society. Black's biographer and one-time law clerk, John Frank, points out that while the Justice was not a Populist, "the formal distinction obscures the real impact. The anti-monopoly rate regulation philosophies of the Populists and most of the rest of their social outlook on government and business have been a part of Black at least from young manhood." Mark Silverstein, in his recent book, Constitutional Faiths: Felix Frankfurter, Hugo Black and the Process of Judicial Decision Making, ascribes great importance to Black's populism both in his earlier political activities and as a Justice.

[Black's] faith in progress was tempered and shaped by his reading of history and his understanding of human nature and politics. The reality of the American experience, as Hugo Black saw it, was the enduring conflict between the rich and the poor, the few and the many, the followers of Hamilton and the followers of Jefferson. To Black, the historian, this conflict explained the past; to Black, the politician, it described contemporaneous events; to Black, the judge, it shaped his understanding of the role of the Supreme Court. The victory of the many was the ultimate goal of the progressive state.

Put more succinctly, "[i]nterests rather than ideas powered Black's understanding of the workings of society."

The Populist movement had strong roots in Alabama where Black spent his childhood. Relying on Jeffersonian agrarianism, the Southern Populists proclaimed government responsibility for the welfare and prosperity of its
citizens. An editor of the Alabama Alliance had argued that government sponsorship of certain civic projects designed to improve the quality of life were "necessary, advantageous and beneficial, and have not and will not destroy the government; but will make it better, stronger and more advantageous to the people who pay taxes to support it."\(^{16}\) In addition, the Populists fully endorsed Jefferson's commitment to the primacy of individual rights and his preference for democratic government. Indeed, they defended their ideal of a "cooperative commonwealth" as a means by which they could gain control over their own individual lives.\(^{17}\)

These two strands of populist thought - the responsibility of government for general welfare and the primacy of individual rights - characterized Black's attitude toward government throughout his career. As a freshman Senator in the 1920s, he was drawn into the progressive camp, aligning himself with George Norris, William Borah, and Robert LaFollette.\(^{18}\) His strong progressive inclinations found expression during the New Deal when he joined with Norris, LaGuardia, and LaFollette to form the Progressives for Roosevelt Group.\(^{19}\) Like other liberals of the time, Black was forced to recognize, despite his fear of power, that a powerful government was needed "to ensure the conditions in which competitive individualism could flourish." According to Silverstein, Black "reflected this ambiguity for he was basically a Jeffersonian confronted by the reality - and necessity - of the New Deal."\(^{20}\)
As a judge, too, Black had to struggle with the problem of reconciling the idea of majority rule with the responsibility of government in protecting individual freedoms. Frank maintains that Black was "a consistent representative of the economic aspirations of the common man" while, at the same time, standing guard over the rights protected by the Constitution:

Justice Black . . . preached the solving doctrine that the government should at the same time be both all-powerful and all weak: that over the economy it should have all the power needed to cope with the problems of each day, and that over the thought, speech and spirit of the citizen should have no power at all.21

A somewhat more objective observer, Silverstein does not see Black being able to separate the two issues quite so readily. He explains:

Black's democratic vision rested upon a government responsive to majority will, and the Court was symbolic of an elite minority's distrust of that will. Nevertheless, to ensure that government was responsive to majority will required that government be subject to specific and definite limitations; without these limitations - particularly those found in the First Amendment - the opportunity for government to serve the powerful few at the expense of the many dramatically increased . . . . The paradox of Black's jurisprudence was that in finding in the Constitution absolutes that severely narrowed the scope of judicial judgment, the Court became the primary guarantor of the values contained in those absolutes. Black's vision of the Court and Constitution, born of a fear of judicial power, thus produced the anomaly of vastly increasing the impact of the Court in modern American life.22

One way in which Black would eventually attempt to reconcile democratic will and the protection of individual rights was by adhering to a liberal interpretation of the First Amendment. To his way of thinking, the elimination of
judicial subjectivity in cases involving this Amendment would preclude the possible usurpation of power by the justices.  

Black had not, however, arrived at his absolutist position when the Everson case came before the Supreme Court in 1946.  

As a result, he had to resort to weighing the merits of the New Jersey statute against possible infringement of the religious clauses of the First Amendment. His opinion takes into account both the general welfare character of the transportation services and the constitutional provisions for free exercise of religion and prohibiting its establishment; both were important to him as a populist.

For Black, as for his colleagues on the bench, the critical issue was whether the reimbursement of costs of transportation constituted an establishment of religion. Barring that, the statute would be constitutional and, for Black, even desirable. Because Black so heartily supported the idea of general welfare legislation, he was able to view the law in question as a safety measure, only incidentally benefitting the parochial schools the children attended. His opinion, with its repeated references to the general welfare nature of the statute and subsequent town ordinances, reveals Black's populist bent. The fact that he pointed to the need for government not to infringe on free exercise by creating unnecessary barriers suggests that Black had, in his own mind, reconciled the two elements of populist thought:
democratic rule and protection of the fundamental rights of individuals.

In the process of drafting and revising his opinion, Black actually broadened his definition of "establishment." He originally had stated that neither federal nor state government could prefer one religion over another. Apparently due to Wiley Rutledge's insistence that "establishment" was not merely the giving of preferential treatment, Black altered his statement to read: "neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." In this case, the earlier version would have been sufficient for a holding of establishment since only parents of children attending public or Catholic schools were reimbursed by the Town of Ewing. By conceding to Rutledge on the definition of terms, Black was, in fact, making more forceful his declaration that the contested law was valid.

Black made a further revision related to the establishment issue. Initially, he had conceded that parochial schools derived an "indirect benefit" from the reimbursement. In the final draft he argued, instead, that the children received the benefit of the aid. "The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." This amendment was certainly intended to strengthen the majority argument that the New
Jersey law did not respect an establishment of religion. By abandoning the "indirect benefit" position, Black avoided the problem of degrees of establishment and directed virtually all of his attention to defending the constitutionality of the law.

The essence of Black's opinion was that the law served a public purpose: the safety of the children in the community.

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.

While acknowledging that the Court had "in rare instances" disallowed the use of tax-raised funds for private purposes, he cautioned against using this authority in such a way as to curtail "a state's power to legislate for the public welfare . . ., a power which is a primary reason for the existence of states."

Despite the fact that individuals were the direct recipients of public funds, Black insisted that the New Jersey law met the criteria for general welfare legislation. "Subsidies and loans to individuals such as farmers and homeowners, and to privately owned transportation systems, as well as many other kinds of businesses," he pointed out, "have been commonplace practices in our state and national history." It did not automatically follow, according to Black, "that a law has a private rather than a public purpose because it provides that tax-raised funds will be paid to
reimburse individuals on account of money spent by them in a way which furthers a public program."^{33}

Because he viewed the reimbursement to parents of Catholic school children as part of a general welfare program, Black concluded that the provision did not constitute an establishment of religion. On the contrary, he cautioned that exclusion of parents of parochial school students might be unjust:

> While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting... against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all citizens without regard to their religious belief.^{34}

The implication of Black's position was that the New Jersey law did not establish religion and also that it was a measure ensuring state neutrality toward religion and, therefore, compatible with the free exercise clause of the First Amendment.

The idea of government neutrality toward religion was central to Black's thinking in this case. The First Amendment, he insisted, "required 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."^{35} The logical outcome of Black's reasoning would lead to the conclusion that general welfare legislation, by its very nature, must be upheld as supporting free exercise of religion. Other members of the Court,
notably Wiley Rutledge, considered this reasoning fallacious and dangerous.

Black's adoption of the general welfare argument, including use of the child benefit theory, had not emerged *sui generis* from a desire to indulge his populist inclinations. This argument had been used by Judge Hehr in his dissenting opinion to the New Jersey Supreme Court's decision. He had written:

> Such transportation is a service to the children and their parents rather than to the schools, for otherwise the parents would be obliged to provide the conveyance and incur the traffic hazards incident to the journey, for which children are generally so ill-equipped. It is in no real sense a contribution to "the use" or the maintenance of the institutions which the children attend.36

The argument had also appeared in the brief for the appellees. Using language and reasoning remarkably similar to those employed by Black, the brief stated:

> It would be inconsistent with the principles of our democracy to say that the facility (transport) must be denied to some, and that they must suffer a relative hardship in the exercise of their constitutional right to send their children to an accredited school of their own choosing. The State's function is to encourage and promote education - all legitimate education.37

Appellees attempted to side-step the religious issue. Citing *Pierce v. Society of Sisters*, they insisted that the individual who chooses to send a child to nonpublic school is exercising his parental rather than his religious right.38 In a further effort to prove the secular character of the law, appellees' lawyers cited the Court's opinion in *Cochran v. Louisiana* as the basis for its contention "that the education of all children is a public purpose, that the
protection of all children from the dangers of the highway is likewise a public purpose, that aiding all children to get to school is therefore a public purpose."39

The appellees made an additional point, especially appealing to the populist frame of mind, by asserting that the New Jersey law had been passed "in accordance with enlightened present-day ideas of the duties of the state." It was not an isolated piece of legislation but, rather, represented a widespread trend among the states to provide various forms of assistance to parents of children attending nonpublic, including church-related, schools. Such legislation, the brief explained, represented "a deliberate attempt to deal with a local need and to solve a local problem."40

The amicus curiae brief of the National Councils of Catholic Men and Women repeated some of the same points as had been made on behalf of the appellees. In particular, this brief argued that the parochial school system "exists not for profit but for the public welfare." The schools were open to all, it continued, and were free to those unable to pay. Consequently,

[t]he State has an interest in such schools not only strong enough to support its regulatory activities but strong enough, correlative, to sustain such reasonable contributions to the well-being of the system as will serve to protect and enhance the public benefits arising from and justifying its existence.41

While the documents cited above - the dissenting opinion of Judge Hehr and the briefs supporting the position of the appellees - would not have been sufficient in and of
themselves to determine Black's vote in *Everson*, they were nevertheless close enough to populist attitudes to have reinforced Black's natural inclinations. The arguments they presented, especially with regard to the public purpose of the New Jersey law, appeared in Black's opinion, differing only in the choice and arrangement of words.

Black's philosophy was determined not only by his experiences growing up in Alabama but also by his reading of history. Biographers of the Justice invariably point out his careful reading of the classics that began when he entered the Senate in 1927. This disciplined program continued throughout his life and included the works of Plato, Herodotus, Aristotle, Livy, Aquinas, Rousseau, Adam Smith, Shakespeare, Hamilton, Jefferson, Franklin, John Adams, and, from the more recent scholars, Charles Beard, Vernon Parrington, and Frederick Jackson Turner.42

Writing near the end of his career, Black explained that his "constitutional faith" had "in many ways been fashioned and shaped by [his] reading of historical events bearing on our Constitution."43 It was the intent of the Founding Fathers, not the development in interpretation, that Black valued.44 "I strongly believe," he wrote,

that this history shows that the basic purpose and plan of the Constitution is that the federal government should have no powers except those expressly and impliedly granted, and that no department of government ... has authority to add and take from the powers granted it and the powers denied it by the Constitution .... [I]t is language and history that are the crucial factors which influence me in interpreting the Constitution - not reasonableness and desirability as determined by justices of the Supreme Court.45
Black's tendency to use history in his decision making was perhaps reinforced by contemporary events. With the rise of totalitarian governments in Europe, culminating in World War II, many Americans began to place greater value on the freedoms and rights protected by the Constitution and to appreciate written law above personal interpretation. This change had a particular effect on the judicial decision-making process. On this point, G. Edward White concluded:

As the value of national solidarity increased in importance during World War II and the Cold War, the distinctive features and shared beliefs of American society were reaffirmed. As part of this reaffirmation, rationality, democratic ideals, and the law interfused. Judging came to be seen not only as an exercise in reason but also as a means of implementing the historic values of a democratic society, a society in which law was more than the fiats of government officials.

Black attempted to discern why the First Amendment had been adopted and what its authors intended it to mean. He saw the growth of religious toleration as ultimately related to immigration and the treatment of minority sects. Although he saw emigration deriving from the presence and power of established churches, he stressed the positive aspect of religious liberty - the search by groups and individuals for freedom to believe and to worship. While recognizing that religious liberty was sought and achieved in every colony, Black contended that Virginia had provided "a great stimulus and able leadership for the movement." He explained:

The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support or otherwise to assist any or all religions, or to
interfere with the beliefs of any religious individual or group.48

Black consulted not only the writings of Jefferson and Madison in his examination of religious toleration, but, in addition, referred to Thomas Babington Macauley's History of England, Charles and Mary Beards' Rise of American Civilization, William Warren Sweet's religious histories of America, and Benjamin Perley Poore's work on constitutions.49

Thus Black viewed an understanding of history as an essential element in the decision-making process. His reliance on the writings of Jefferson and Madison in Everson was, however, doubly appropriate. Not only had these men been responsible for securing passage of the Virginia Bill for Establishing Religious Freedom. In addition, their political writings, especially those of Jefferson, served as the basis for populist thought.

The importance of Jefferson's political philosophy to Black was shown in a number of his opinions before Everson. Although he dissented from Harlan Stone's famous Carolene Products footnote declaring the first eight amendments incorporated and made applicable to the states by the Fourteenth Amendment, Black soon abandoned that position and moved toward the idea that the Fourteenth Amendment was intended to protect individual rights from state infringement.50 As early as 1941, Black referred to the First Amendment guarantees as "the foundation upon which our governmental structure rests and without which it could not
continue to endure as conceived and planned." Elaborating on that idea a few years later, he explained:

The first of the ten Amendments erected a Constitutional shelter for the people's liberties of religion, speech, press, and assembly. This amendment reflects the faith that a good society is not static but advancing, and that the fullest possible interchange of ideas and beliefs is essential to attainment of this goal.

In 1945, Black again stated his belief that a "preferred place [had been] given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment."

Black's own religious affiliation may also have shaped his views. Although he had left the Baptist Church when he moved to Washington, the fact that the Baptists had played a major role in securing greater religious toleration in the New England states is worth noting. They originally sought greater freedom for those who were not members of the established church but later joined in the movement toward a separation of church and state. It was in correspondence with the Baptist Association in Danbury, Connecticut, that Jefferson penned the phrase "a wall of separation between church and state."

Deeply committed to protecting First Amendment freedoms, for whatever reasons, Black upheld the rights of the Jehovah's Witnesses in nearly every case that came before the Supreme Court in the years immediately preceding Everson. The right to free exercise of religion, he repeatedly maintained, took precedence even in cases where the right to privacy of other citizens might be violated.
Black's own reputation for religious toleration is, however, somewhat tainted. The revelation, shortly after his appointment to the Supreme Court, of Black's earlier Klan membership raised serious concerns having to do with both racial and religious intolerance. The Justice spoke to these concerns:

An effort is being made [he charged] to convince the people of America that I am intolerant and that I am prejudiced against people of the Jewish and Catholic faiths, and against members of the Negro race. . . . I believe that my record as a Senator refutes every implication of racial or religious intolerance. It shows that I was of that group of liberal Senators who have consistently fought for the civil, economic and religious rights of all Americans, without regard to race or creed. . . . I have no sympathy with any group which, anywhere or at any time, arrogates to itself the un-American power to interfere in the slightest with complete religious freedom.

In an effort to clear Black of the charges of intolerance, President Roosevelt arranged a luncheon to which he invited Justice Black and George William Cardinal Mundelein of Chicago. Gerald Dunne reports that the Cardinal, "speaking with either the innocence of a dove or the guile of a serpent, asserted that on matters of race, religion, or parochial schools, there was no judge he would rather face than Black."

Black's outward professions of tolerance belied a strong dislike of the Catholic Church as an institution. "He suspected the Catholic Church," Hugo Black, Jr., wrote in his biography of the Justice.

He used to read of all Paul Blanshard's books exposing the power abuse in the Catholic church. He thought the Pope and bishops had too much power and property. He resented the fact that rental
property owned by the Church was not taxed; he felt they got most of their revenue from the poor and did not return enough of it.57

Again Black's democratic preferences came to the fore, for his objections to Catholicism centered on the hierarchial structure rather than beliefs \textit{per se}.

On another occasion, democratic ideals had actually led Black to set aside religious prejudices and to support a Roman Catholic candidate for the presidency. Disturbed not only by Al Smith's Catholicism but also by his Irish immigrant background, his stand on prohibition, and his urban orientation, Black nevertheless remained loyal to the Democratic ticket in 1928. To support Hoover was unthinkable, for he represented rule by the few over the many and Black was irrevocably committed to rule by the common man.58

In \textit{Everson} democratic ideals similarly determined the Justice's position. Direct aid to Catholic schools would have been intolerable to Black not only as a violation of the establishment clause but also because it would have contributed to an institution already too rich and too powerful. In contrast, the assistance afforded the parents and children in the form of transportation was undoubtedly seen by Black as a way of easing the financial burden on parishioners.

What comes through clearly from this analysis of Black's decision-making process in \textit{Everson} is the overriding importance he attached to populist ideals. The various threads - his support of general welfare legislation, his
reliance on history, his concern for protecting individual rights, and even his objections to the Catholic Church - are all part of one cloth: the desire to protect the common man from the arbitrary use of power. Black's whole-hearted support for democratic processes and laws for the common good found expression in his majority opinion in this case.
II.

While Black's opinion in Everson was largely determined by his populism, the dissenting opinion of Robert Jackson reflected both Jackson's political persuasion and his extensive experience as a lawyer. Jackson's political and judicial philosophy derived from nineteenth-century Jacksonian Democracy and was characterized by a high regard for the democratic institutions of government and a concern for the welfare, including the basic rights, of individuals. In terms of decision making, this meant that Jackson generally favored judicial restraint, but in cases involving the First Amendment, he felt that responsibility for protecting basic freedoms fell squarely on the shoulders of the justices.

The similarities between Jackson's political attitudes and those of Black had apparently led him initially to favor the New Jersey statute. But Jackson's training and long experience as a practicing lawyer convinced him that the contested law was, indeed, a law respecting an establishment of religion.

Jackson's political philosophy was based on the ideals of Jacksonian Democracy, which he believed characterized society in his hometown of Jamestown, New York. Jackson's biographer described Jamestown as having an "atmosphere of rugged independence, free discussion, and keen solicitude for the rights and welfare of the individual." Along with a profound respect for individual rights, Jackson strongly
believed in public education as an essential element of the democratic state, in large part, because it enabled the common man the opportunity to rise to positions of leadership. He once commented:

If you believe, as I believe, that democracy is the form of government best adapted to our people, then you must regard the public school as the most fundamental concern of our society. Leaders of a free people, sometimes, but not often, may be those who have inherited wealth and position and who have obtained education from private sources. Democracy will always call most of its leaders from the ranks of humble men, and to equip them it must provide free educational opportunity to the sons and daughters of disadvantaged homes.

Convinced of the strengths of democratic rule, Jackson was an outspoken proponent of judicial restraint. He denounced the "cult of libertarian judicial activists" who, by his way of thinking, would undermine democracy and the ideal of majority rule by imposing their own interpretations on laws so as to implement their own notions of justice.

Jackson's objections to activism went beyond his democratic ideals and were based upon his years at the bar, which had taught him the limitations of personalized justice. Louis Jaffe explains:

[Jackson did not] become one of that group, of which Justices Black and Douglas were to the core, which advanced the most unqualified interpretations of the Bill of Rights. Here, as in other matters, his attitudes reflected his experience as a practitioner, his satisfaction with the role of arbiter, his appreciation of the community as an operation in the balancing of diverse elements. He would keep alive and reinforce the traditional role of civil liberties rather than give them a new and increased eminence.

In other words, Jackson had seen through practical experience that the democratic institutions were adequate, without the
mediating of the judiciary, to preserve the rights guaranteed in the Constitution; whereas, the efforts of individual judges to tamper with the law — regardless of their intent — might prove detrimental.

Jackson's own statement of his judicial philosophy clearly establishes his faith in the democratic process and his concerns regarding judicial activism:

Judicial power to nullify a law duly passed by the representative process is a restriction upon the power of the majority to govern the country. Unrestricted majority rule leaves the individual in the minority unprotected. This is the dilemma and you have to take your choice. The Constitution-makers made their choice in favor of a limited majority rule.

... My philosophy has been and continues to be that such an institution [as the Court] ... cannot and should not try to seize the initiative in shaping the policy of the law, either by constitutional interpretation or by statutory construction.

... [A]ny court which undertakes by its legal processes to enforce civil liberties needs the support of an enlightened and vigorous public opinion which will be intelligent and discriminating as to what cases really are civil liberties cases and what questions really are involved in those cases.64

But Jackson was also aware that in certain circumstances the majority might disregard or intentionally deprive others of those rights protected by the First Amendment. In that case, Jackson acknowledged, the Court might need to take a more assertive role. He explained:

When the channels of opinion and of peaceful persuasion are corrupted and clogged, these political correctives can no longer be relied on, and the democratic system is threatened at its most vital point. In that event the Court, by intervening, restores the processes of democratic government; it does not disrupt them.65
Jackson saw a specific application of this principle in an earlier case involving religious freedom. "The very purpose of a Bill of Rights," he wrote in *West Virginia v. Barnette*, "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."66

In *Everson*, the responsibility to protect fundamental freedoms took precedence over a policy of restraint. Religion, Jackson contended,

was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and, above all, to keep religious controversy out of the public life by denying to every denomination any advantage from getting control of public policy and the public purse.67

Jackson's application of this amendment to the states is worth noting, for, as he indicated in his opinion, he believed strongly in state's rights, and since his decision to oppose the New Jersey statute involved interfering with state affairs as well as violating the policy of restraint, the importance Jackson placed on religion becomes clear. "I agree," he wrote, "that this Court has left, and always should leave to each state, great latitude in deciding for itself, in the light of its own conditions, what shall be public purpose in its scheme of things . . . [but] it cannot make public business of religious worship and
instruction, and attendance at religious institutions of any character.⁶⁸

Jackson's lawyer-like approach to judging distinguished his decision-making process from that of Hugo Black and ultimately led him to consider the New Jersey law a violation of the establishment clause. Jackson himself admitted this tendency.

The problem of anyone who had led the kind of life I've had coming to the court is to shift his mental gears from advocacy to a position that may quickly impress him to a careful judicial inquiry into which position he will take before he becomes an advocate. My own weakness as a judge, I feel, is that I'm perhaps too quick to make up my mind which way I'll go.... Sometimes maybe it's too much of an emotional reaction. I think my greatest difficulty is to get over being an advocate.⁶⁹

Jackson's experience as a lawyer found expression in his process of decision making as well as in his tendency to respond initially to a case as though he were defending it. Careful consideration of the facts and the evidence characterized his handling of a case and determined his vote.

Everson provides a clear example of Jackson as lawyer-judge. His initial inclination was to uphold the New Jersey statute, but he had serious concerns regarding the First Amendment. Rutledge, in his notes of the conference following oral argument, recorded Jackson's position:

[He indicated] that he could not maintain that the states are required to provide a system of public education, and that if they should decide not to do so, they could not provide assistance to privately conducted education. Apparently agreeing with the idea that one could not sustain a little support but deny the validity of a large amount of it, he nevertheless felt that in the absence of showing a preference to one denomination over others in the operation of the statute or resolution he would be
called upon to vote to sustain the statute and the resolution here. He did indicate a question whether or not this conclusion might not possibly be changed. He further expressed question as to whether or not it was ever intended that the federal government or this Court through the operation of the first amendment should control such actions by the states; in other words, whether or not the federal Constitution contains a guaranty so far as the states are concerned enforceable by this court for the separation of church and state.70

Rutledge countered in conference by pointing to the repeated applications of the First Amendment to the states by the Supreme Court in cases involving religious freedom. He contended further that the incorporation of one part of the First Amendment by the Fourteenth required incorporation of the other provisions of that same amendment.71 But Jackson was, according to Rutledge, not entirely convinced; for,

[while] he agreed with the logic of those [Rutledge's] conclusions, . . . he wasn't sure this Court had gone too far in carrying over the First Amendment through the Fourteenth to application to the states and that he himself had not already gone too far in that respect.72

Jackson put aside these doubts with regard to incorporation as he came to see the contested law as a violation of the Establishment Clause. Once he was convinced that the law showed "preference to one denomination over others," he did not hesitate to apply the First Amendment to the State of New Jersey. In making his case, he charged that Black had deviated from the facts. The majority opinion, Jackson stated, "assumes a state of facts the record does not support and . . . it refuses to consider facts which are inescapable on the record."73
The evidence, Jackson contended, proved that the New Jersey law was discriminatory and that the discrimination was based on religion, leading to the inevitable conclusion that the law respected an establishment of religion. Reimbursement for the costs of transportation, the Justice argued, was not a form of public assistance. "This expenditure of tax funds has no possible effect on the child's safety or expedition in transit. As passengers on the public busses they travel as fast and no faster, and are as safe and no safer, since their parents are reimbursed as before." Furthermore - and this is central to his argument, "The New Jersey Act in question makes the character of the school, not the needs of the children, determine the eligibility of parents to reimbursement . . . . Refusal to reimburse those who attend [private, profit-making] schools is understandable only in light of a purpose to aid the schools." On the basis of this reasoning, Jackson posed the question to be decided: "Is it constitutiona l to tax this complainant to pay the cost of carrying pupils to church schools of one specified denomination?"

Because the legitimacy of the aid was dependent on "the nature of those schools and their relation to the Church," Jackson consulted the canons of the Roman Catholic Church to determine the purpose and policies of its parochial schools. The evidence revealed that parochial education "does not leave the individual to pick up religion by chance. It relies on early and indelible indoctrination in the faith and order of the Church by the word and example of
persons consecrated to the task." 78 Jackson concluded that "the parochial school is a vital, if not the most vital, part of the Roman Catholic Church . . . . Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school is indistinguishable to me from the same aid to the Church itself." 79

Where Black saw government neutrality toward religion in terms of a non-hostile policy, Jackson contended that neutrality found expression best in the public school system. He conceded that the public school, "if not a product of Protestantism, is at least more consistent with it than with the Catholic culture and scheme of values." 80 He added:

It is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion. 81

Since this was the first Supreme Court case to deal with aid to church-related schools in the context of the First Amendment, the concept of government neutrality was yet undefined, leaving the Justices to determine how to assure free exercise of religion while, at the same time, guarding against its establishment. The different perceptions of neutrality held by Black and Jackson suggest the difficulty of balancing these two responsibilities. In the same way that Black's position was influenced by his overriding desire to uphold general welfare legislation, Jackson's was a natural outcome of his commitment to public education. 82
Like Black, Robert Jackson came to the *Everson* case with strongly-held democratic ideals that included assuring equal opportunities and protecting individual rights. But Jackson's approach — resulting from his years at the bar — enabled him to look beyond the general welfare label given to the law by the New Jersey legislature. This closer examination of the facts and evidence made apparent to Jackson that the law was not intended to benefit all members of the community but, rather, discriminated on the basis of religion.

Although his conclusion differed from that of Justice Black, Jackson did not abandon his political ideals. Based on his reading of the case, Jackson concluded that the reimbursement of costs of transportation as provided for by the Township of Ewing, New Jersey, afforded services to some while excluding others. As such, it was not consistent with the Constitutional prohibition against establishment nor with the principles of democracy.
III.

Wiley Rutledge's dissent differed from Jackson's in terms of tone and content, reflecting a fundamentally different approach to the decision-making process. Where Jackson had been influenced by his experience as an advocate, Rutledge's experience first as a law professor and later as dean found expression in his scholarly method of deciding cases. However, Rutledge's treatment of First Amendment cases went beyond the careful research into constitutional history and law review articles. It was firmly rooted in his acceptance of the idea of natural rights and his commitment to ensure those rights. Unlike Black, who accorded a "preferred position" to the freedoms protected by the First Amendment, or Jackson, who made an exception to his policies of judicial restraint and states' right when dealing with these basic freedoms, Rutledge believed that the individual's natural right to freedom of conscience, which was protected by the guarantees of the First Amendment, was inviolate. This natural law philosophy led Rutledge to "place [his] dissent on the broad ground..., though strictly speaking the case might be decided on narrower issues," in other words, on the principles involved rather than the particular features of the New Jersey law that he considered unconstitutional.83

As a justice, Wiley Rutledge was identified as a liberal.84 "He had the tolerance of change and the concern for the most common interests of men that are called liberal and democratic," wrote one biographer. "The institutions of
citizenship, fair trial, and free expression that protect those interests were close to his heart and high on his scale of interests." Landon G. Rockwell described Rutledge as a twentieth-century Jacksonian.

For him [Rockwell stated] the premises of democracy logically required the growth of the welfare state. He understood and accepted big government, yet he had a profound respect for the dignity of the individual man. The two were not incompatible in his mind. He saw nothing in the Constitution to preclude the use of extensive public power. But to him the Constitution also spoke with an implacable voice against government intrusions into the private domains of thought and personal rights.

He was, in short, a follower of the same democratic tradition as Hugo Black.

The difference between Black and Rutledge lay in the latter's espousal of natural rights philosophy. Rutledge presented his ideas of law and justice in a speech entitled "A Declaration of Legal Faith" delivered at the University of Kansas on 2 December 1946, less than two weeks after the oral argument for Everson. To impose an abstract ideal of justice on a given society, he argued, would destroy the basic freedom "to think and to believe as one's lights and conscience give him direction." However, he continued, this abstract ideal may serve as a standard upon which a community should base its laws.

From abstract justice, through concrete justice, to justice according to law is the continuous cycle by which the legal institution evolves and must maintain itself, if social accommodation is to be found in an orderly way.

... Only the legislator or the judge who can catch the vision of what has come or will come and sense the moment of its common acceptance, from out the realm of abstract justice into the area of
realizable application, is worthy to give his people their laws or judgments.

... [H]e is not without instruments for objective measurement. He has great and concrete traditions to guide him. He has the experience of his fathers. And so far as the circumstances of his time may differ from theirs, calling for different action, he has the prevailing sense of his community to go by. This is a thing not always easy, but neither is it impossible to measure. Not his own will or desire, therefore, but his measurement made to the best of his whole ability of the balance between long-accepted tradition and prevailing demand, must determine his course. ...

... Law, freedom, and justice - this trinity is the object of my faith.87

Rutledge acknowledged the need for the law to accommodate society's changing conditions but not without first taking into account those freedoms essential to the individual and, ultimately, to the success of the community as well. The importance of these freedoms, he implied, had been learned through long experience and it was thus to history that the justice must look for an appreciation of fundamental freedoms.

Indeed, the basic approach taken by Rutledge to the decision-making process apparently began with the conscious effort to determine what fundamental freedoms were at stake. Irving Brant, constitutional historian and long-time friend of the Justice, explained:

The law seldom presented a single clearly marked and unmistakable channel. When the opposing briefs of litigants came before him, he studied them to determine if possible on which side justice lay. If that was clear, he searched the law for a legitimate means of rendering justice. It was usually possible, he said, to find a route that satisfied both the requirements of the case and sound principles of law. A route that never failed was the Bill of Rights, faithfully upheld.88
This was, in fact, the course followed by Rutledge in deciding Everson.

The memo Rutledge wrote following the Everson conference reveals the initial line of reasoning he employed. The final opinion incorporates the basic ideas stated in the memo, developing them with the use of legal precedents and related scholarship. The major difference between the conference memo and the published opinion is the Justice's extensive discussion in the latter of the history surrounding the Virginia Bill for Establishing Religious Freedom and the First Amendment.

Rutledge began by considering the facts of the case, specifically the designation in the town's resolution that limited reimbursement to parents of children attending public or Catholic schools. To avoid violating the First Amendment, he reasoned, the law must either be limited to public school children or be given to all children regardless of the school they attend. Rutledge noted that the resolution passed by the town of Ewing authorizes transportation to be paid by pupils attending only public and Catholic schools. It does not appear in the record whether there are other private or religious schools in the jurisdiction of this board. Nevertheless, in order to sustain the resolution adopted here, I think the burden is on the state and its officials to show that no other religious schools existed within that jurisdiction and also perhaps that there were no other private schools, not operated for profit, within it. . . . [I]t seems to me that this statute . . . picks out Catholic Schools for special and preferred treatment and gives it to the pupils attending those schools. I do not think that a state legislature can select out of religious groups any particular one for preference; nor can it do this by selecting the schools of a single or
several denominations to the exclusion of others."§9

The second alternative would eliminate the problem of discrimination based on religion, but it would not, he concluded, avoid the larger issue of establishment "insofar as the appropriation of public funds should be made for pupils attending religious schools." 90 Paying for transportation so that students might receive religious instruction

would mean of course taking money from the taxpayers of one faith to pay the expenses of children of another. It would mean taking the money by taxation of nonbelievers to support the religious instruction of believers[.] It would in effect involve in my judgment the very evils against which Thomas Jefferson inveighed when he did so against the established church in Virginia. 91

At this point, Rutledge addressed the broader question of what is meant by the term "establishment" as used in the First Amendment. The "essence of the established church," he determined, "was its support by the state through funds raised from taxation." 92 He continued:

I agree fully with the view of Justice Frankfurter, stated at the conference, to the effect that the First Amendment, of course also the clauses in state constitutions providing specifically for separation of church and state, was intended to guarantee the taxpayers and citizens of the country and the state from the payment of tithes and taxes to support an admixture of church and state. This means to me as it does to him an admixture of religious with secular education.

I agree with him that the legislation cannot be justified upon the servant girl's excuse of just a little pregnancy. The fact that this only involves a comparatively small portion of educational expense, which is involved in the transportation element, does to me not keep it from...
being a support of religious education wherever
that is given in the schools.[Emphasis Rutledge's]93

Following the logic of this position, Rutledge then
expressed serious doubts with regard to the Supreme Court's
decision in *Cochran v. Louisiana* and the validity of the
child-benefit theory. Rutledge saw less harm in furnishing
"identical nonreligious textbooks to all students in all
schools" than in reimbursing parents for the costs of
transportation to church-related schools. But he was not
entirely convinced that providing textbooks could pass the
test of non-establishment.

Although it is true that the small amount of
support involved in the giving of textbooks,
transportation and free lunches to the children
aids and benefits the individual and aids and
benefits the general cause of education, it is
likewise true that the giving of that even small
amount of support aids and benefits and encourages
the institution itself.94

Rutledge's rejection of the child-benefit argument
resulted from his belief that the various proposals for
indirect assistance or aid for non-religious activities in
parochial schools was merely a ruse to obtain public monies
for religious purposes. He made this point clear in his
memo.

We all know, as Justice Frankfurter stated, that
this is really a fight by the Catholic schools to
secure this money from the public treasury. It is
aggressive and on a wide scale. There is probably
or apparently no other group which is either
persistent in efforts to secure this type of
legislation or insistent upon it. The fact cannot
be ignored that one of the effects, and I think one
of the intended effects, of the legislation is to
encourage pupils to attend the religious schools
where they will secure religious education rather
than to go to the public and nonreligious
schools.[Emphasis Rutledge's]95
This belief strongly reinforced the Justice's opinion that
the contested law was unconstitutional. The reimbursement of
transportation costs did not afford incidental benefits to
the Catholic schools; they were part of a carefully worked
out scheme to establish the Catholic Church in the sense of
providing public funds for its religious activities.

Convinced that transportation "has a direct
relationship" [emphasis Rutledge's] to attendance and,
therefore, to education itself, Rutledge found Black's
position untenable. Rutledge wrote in his conference memo:

> It seems to me that on principle, if the state can
supply these smaller items of educational necessity
[transportation, lunches and textbooks] it can also
supply the larger one [teachers]. If one class is
justified on the ground that it supports the
general cause of education or the benefit to the
individual, so would be the other. . . . I cannot
myself rationally draw these lines, although
Justice Black stated at the conference that he
would draw them, notwithstanding the logical
contrary conclusion. He said that, although he
would vote to sustain this legislation, that is,
transportation to schools, he would not go further.
I wonder what he might do about school lunches.96

Where Black was able to view transportation in the context of
public safety, Rutledge could not; consequently, he
considered Black's distinction as one of degree rather than
definition.97

Regarding incorporation of the First Amendment by the
Fourteenth, Rutledge had no doubts. He made his view clear
in discussing Jackson's concerns on this issue:

> I think that when we took the step of saying that
freedom of religion was imposed upon the states by
the First Amendment through the effect of the
Fourteenth, we necessarily took at the same time
the step of saying that the establishment of
religion was prohibited so far as the states are concerned by the same process.98

Rutledge concluded by considering the possible consequences should the New Jersey legislation be upheld. The inevitable result, in his mind, would be the politicizing of the churches. In his words, "It would mean that each religious group would become zealous to present to the legislature its competing demands with other groups for support." As religious lobbyists pressed their demands, there could be "no other consequence than to embroil the legislatures, their committees, candidates for office and others in religious fights and to drag the whole process into the political arena," thus destroying "the process of separating church and state."99

This record of the Everson conference confirms Brant's general description of the approach taken by Rutledge. Rutledge's central concern lay in upholding the First Amendment, and, therefore, he began by defining the meaning of "establishment" and the purpose of the constitutional prohibition. He then measured both the facts of the case at hand and the precedent set in Cochran against the intent of the authors of the Amendment and speculated also on the long-term effects the law might have if it were upheld. Convinced that the New Jersey statute violated the Establishment Clause and that failure to nullify it would lead to increased political activity by the churches, Rutledge concluded that the law was unconstitutional. The
Bill of Rights took unquestioned precedence in his decision-making process.

The memo also reveals the outspoken and influential role played by Felix Frankfurter during the conference. Rutledge agreed with, perhaps even was swayed by, several of Frankfurter's arguments, including his allegations of the Catholic Church's efforts to secure public funds to support the parochial school system.

Despite Rutledge's conviction that Frankfurter was correct in his charges against the Catholic Church, he did not believe that Church should be singled out by the Court in the Everson opinion. He explained:

My own effort ... was to keep the problem entirely free from sectarianism of any sort. It was for that reason that I did not write in the view of Jackson's opinion. I wanted my treatment and the expression of my views to be applicable to all sects alike. I am fully convinced, not only as a result of the work we did on the opinion but also from the voluminous mail which we have received concerning it since it went down, that the less intervention we have in religion by the state and by the church in political affairs, the better off we will be. That includes my friends in the Catholic as well as all other churches.100

In other correspondence, the Justice linked his use of history to his desire to appear neutral. "I feel pretty strongly about the Everson case," he admitted, "but tried to keep the tone of what I had to say moderate and also to avoid pointing what I had to say in the direction of any specific sect. The Virginia history was admirable for the latter purpose."101

A major portion of Rutledge's decision is devoted to the historical background of the First Amendment, beginning with
the passage of the Virginia Bill for Establishing Religious Freedom. Where Black had focused more on the role played by Thomas Jefferson in achieving a separation of church and state in Virginia, Rutledge concentrated on that of Madison. As Rutledge pointed out, "Madison's life, thought, and sponsorship" was the central link between the Virginia struggle for religious liberty and the adoption of a federal amendment. It should also be noted, however, that the Justice's long-time friend, Irving Brant, had just completed the volume of Madison's biography that dealt with his role in securing passage of the Virginia bill. Rutledge's appreciation for Madison may well have been heightened due to his friendship with Irving Brant, but his knowledge of the Virginia struggle and the subsequent adoption of the First Amendment was not solely dependent on Brant's work.

The Justice's files include numerous notations from reference works as well as correspondence that indicate the depth and breadth of his research. In addition to Brant's multi-volume biography of Madison, Rutledge consulted Madison's own writings, Saul K. Padover's biography of Jefferson, Paul Leicester Ford's collection of Jefferson's writings, Washington's papers, Benjamin Perley Poore's Constitutions, H. J. Eckenrode's classic study of Separation of Church and State in Virginia, as well as V. T. Thayer's Religion in Public Education. The relative value of these sources is discussed in a letter he wrote to Irving Dilliard:

99
We discovered Thayer only a day or two before the conference at which it was decided to send the case down. I wanted to go back and insert citations to the book in several of the footnotes but decided against this, since it would have required another week on account of printing difficulties. Had I known about the book at the start it would have saved me lots of trouble. This little volume and Eckenrode, about the same size but much more detailed on this history, were the two most valuable things I ran into.  

While Rutledge's reliance on history is important in understanding his approach to the decision-making process, the substance of his discussion of the history is even more significant. The wording of the state and federal documents, Rutledge contended, as well as the debates surrounding their adoption made clear the intent "to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."  

Insisting that "Madison could not have confused 'church and 'religion,' or 'an established church' and 'an establishment of religion,'" he concluded: "the Amendment's purpose was not to strike merely at an official establishment of a single sect, creed or religion, outlawing only a formal relation... [I]t was to uproot all such relationships."  

The writings of both Madison and Jefferson, he stated, provided "irrefutable confirmation of the Amendment's sweeping content."  

The efforts to separate church and state in colonial Virginia came to a climax, significantly, in the struggle to pass the Assessment Bill. Supported by Patrick Henry, this law gave each taxpayer the privilege of either designating which church should receive his share of the tax or allowing...
it to be applied to pious uses. "But what is of utmost significance here," Rutledge observed, "in its final form the bill left the taxpayer the option of giving his tax to education."109

Rutledge drew a direct parallel between the early struggle in Virginia and the case before the Court. The objections raised by Madison in his "Memorial and Remonstrance" were precisely the objections Rutledge believed should be raised against the New Jersey statute.

As the Remonstrance disclosed throughout, Madison opposed every form and degree of official relation between religion and civil authority. For him religion was a wholly private matter beyond the scope of civil power either to restrain or to support. Denial or abridgement of religious freedom was a violation of the rights both of conscience and of natural equality.110

The reference to rights of conscience and natural equality reminds us again of Rutledge's belief in natural rights and his commitment to protect them, a fact which explains the strong philosophic appeal of Madison.

Making specific references to the "Remonstrance," Rutledge continued:

In no phase was he [Madison] more unrelentingly absolute than in opposing state support or aid by taxation. Not even "three pence" contribution was thus to be exacted from any citizen for such a purpose. . . . Not the amount but "the principle of assessment was wrong." And the principle was as much to prevent "the interference of law in religion" as to restrain religious intervention in political matters.111

Again, the parallels between the Virginia situation and that presented in Everson made clear to Rutledge the need for a
similar refusal to allow even a modest gesture of assistance to church-related schools.

Addressing the case at hand, Rutledge based his opinion on the principles laid down by Jefferson and Madison.

Under the test they framed it cannot be said that the cost of transportation is no part of the cost of education or of the religious instruction given. That it is a substantial and necessary element is shown most plainly by the continuing and increasing demand for the state to assume it. . . . [T]he very purpose of the state's contribution is to defray the cost of conveying the pupil to the place where he will receive not simply secular, but also and primarily religious, teaching and guidance.112

Having considered the public welfare argument used by the majority, he reiterated the position he held from the start: "By no declaration that a gift of public money to religious uses will promote the general or individual welfare, or the cause of education generally, can legislative bodies overcome the Amendment's bar."113

As he had done in his conference memo, Rutledge warned of the dangers of public money being used for religious purposes.114 The only way to preserve religious liberty, he believed, was for church and state to remain separate. While this may place added burdens on those who wished to exercise their religious freedom, notably those who chose to send their children to sectarian schools, "religious liberty with a great price must be bought."115 The fact that parents of parochial students pay taxes for public schools as well as the costs of religious education, he emphasized, is not "discrimination in the legal sense."116 Responding to Black's position on government neutrality, Rutledge added:
It does not make the state unneutral to withhold what the Constitution forbids it to give. On the contrary it is only by observing the prohibition rigidly that the state can maintain its neutrality and avoid partisanship in the dissensions inevitable when sect opposes sect over demands for public moneys to further religious education, teaching or training in any form or degree, directly or indirectly. . . . If the present statute and its application were shown to apply equally to all religious schools of whatever faith, yet in the light of our tradition it could not stand. . . . The Constitution requires, not comprehensive identification of the state with religion, but complete separation.117

Committed to the preservation of natural rights and convinced that maintaining an absolute separation of church and state was essential to assuring those rights, Rutledge constructed his dissenting opinion around the ideas of Madison and Jefferson and their efforts to secure religious liberty in the eighteenth century. Like the Founding Fathers, Rutledge believed in natural rights and, like them, he perceived the threat to individual freedom if measures were not taken to separate the religious and political spheres. The parallels in thought and in circumstance justified Rutledge's reliance on history in his Everson opinion. But the use of history, as he himself admitted, was also valuable in that it allowed him to express deeply-felt concerns without pointing a finger at the Catholic Church. The result was an opinion that did, in fact, deal with broad principles, and it is for this reason that his dissent, and not that of Jackson, became a precedent for those who later wished to overturn the Everson ruling.
IV.

Felix Frankfurter once observed that Supreme Court opinions were not the "obvious map to the mind of the Justices" because opinions are the writings of the Court as a whole - "symphonies, not solos." In the three Everson opinions written by Black, Jackson, and Rutledge, we have an excellent picture of the individual views and interchanges of the Justices. Rutledge's opinion, for example, addresses specific points and arguments made in the majority opinion.

The influence of other viewpoints becomes even more apparent when one examines early drafts and notes the changes made in response to the challenges of dissenting brethren. Conference memos and private correspondence provide further and frequently more concrete evidence of the cooperative nature of the decision-making process. Recognizing, therefore, that the Supreme Court's decision in Everson was the responsibility of nine men and not just of the three who ultimately published opinions, we must now consider the roles of the remaining Justices.

As indicated in Rutledge's conference memo, Justice Frankfurter was outspoken and influential in opposing the New Jersey statute. He pronounced his ideas on the meaning and intent of the Establishment Clause, insisting that no amount of aid could be allowed without violating the First Amendment. In addition he accused the Catholic Church of pursuing a widespread and "aggressive" program to secure public monies for its religious schools.
An indefatigable proselytizer, Frankfurter endeavored both during and after the conference to convince his colleagues of the serious consequences were the New Jersey statute upheld. 120 His arguments during the conference "won over both Jackson and Burton, who originally had been with Black," and they met with unqualified approval from Rutledge himself.121 His most insistent and persistent efforts were, however, directed against Frank Murphy, even though Murphy, the only Catholic on the Court, was probably the least likely member to be persuaded by Frankfurter's warnings of a Catholic Church scheme to obtain public monies. The intensity of Frankfurter's campaign, if it had any effect, probably strengthened Murphy's initial decision, for he had come to regard the former's professional habits, notably his lecturing on the merits and virtues of a particular position, as tiresome and tangential.122

Yet Murphy was a strong liberal who, like Rutledge, espoused a natural rights philosophy, and Murphy's opinions in earlier church-state cases pointed in the direction of overturning the New Jersey law. Dissenting in Jones v. Opelika, (1942) he wrote:

Liberty of conscience is too full of meaning for the individuals in this Nation to permit taxation to prohibit or substantially impair the spread of religious ideas, even though they are controversial and run counter to the established notions of a community. If this Court is to err in evaluating claims that freedom of speech, freedom of the press, and freedom of religion have been invaded, far better that it err in being over protective of these precious rights.123

105
A year later in *West Virginia v. Barnette*, a case in which Frankfurter was the sole dissenter, Murphy again expressed his opinion that the Court has an overriding responsibility to protect natural rights.

...[T]here is before us the right of freedom to believe, freedom to worship one's Maker according to the dictates of one's conscience, a right which the Constitution specifically shelters. Reflection has convinced me that as a judge I have no loftier duty and responsibility than to uphold that spiritual freedom to its farthest reaches.124

Frankfurter aimed to convince Murphy by implying that defeat of the reimbursement law would be in the best interests of the Catholic Church. Approval of the measure would, Frankfurter warned, result in short-term gains and would inevitably be viewed, in so far as Murphy was concerned, as a partisan vote.

You have some false friends — those who flatter you and play on you for their purposes, not for your good. What follows is written by one who cares for your place in history, not in tomorrow's columns, as lasting as yesterday's snow... .

The short of it is that you, above all men, should write along the lines — I do not say with the phrasing — of Bob's [Jackson's] opinion in *Everson*. I know what you think of the great American doctrine of Church and State — I also know what the wisest men of the Church, like Cardinal Gibbons thought about it. You have a chance to do for your country and your Church such as never come to you before — and may never again. The things we most regret — at least such is my experience — are the opportunities missed. For the sake of history, for the sake of your inner peace, don't miss. No one knows better than you what *Everson* is about. Tell the world — and shame the devil.

Anyhow — this comes to you from one who writes because the truth within him is insistent.125

Murphy was not persuaded, yet his vote to uphold the transportation statute was not, according to other observers, taken from a personal desire to support the Catholic Church.
Murphy was acutely aware that his actions on the Court would be judged to determine the influence of his religion. Murphy's biographer, J. Woodford Howard, Jr. concluded:

The very prominence of religion in his philosophical universe added significance to Murphy's performance. It goes too far to assert that his judicial behavior was unaffected by religious faith. Highly self-conscious about religion, for one thing, he leaned over backwards to avoid any implication of "representing" his church. This trait, though common among Catholic officials in a predominantly Protestant country, was probably easier for him because of anticlericalism in his upbringing. . . . Because of his ardently Jeffersonian political philosophy, which was reinforced by practical perceptions of what sectarian diversity required in the United States, he also espoused the separation principle as "essential" for the health of the polity and of American Catholicism itself.126

In cases involving the First Amendment, Howard contends, "Justice Murphy adhered to the view that establishment as well as abridgment guarantees should be interpreted according to the practical effects on the primary interest - freedom of conscience."127

This was the explanation Murphy himself gave for his vote in Everson. Despite his deep-seated concerns about the growing influence of the Catholic Church and his tacit recognition that the fears associated with establishment were not unfounded, Murphy felt compelled to vote with the majority. His opinion was not, however, divorced from his Catholic roots. As he indicated in a letter written shortly after Everson came down, his commitment to free exercise was directly influenced by the persecution aimed against Catholics.
Today my religion is powerful and I am afraid too rich in this country. I know of the day in American history when convents were burned and churches leveled to the ground, not alone because of Romanism but because the bigots believed and still do that many of the beliefs of the church are frauds. It's a very delicate subject and for my own part I will struggle to be right. If I err I want to err on the side of freedom of religion.128

Relying on selected documents, Howard drew the reasonable conclusion that Murphy made his Everson decision independent of his personal religious affiliation.

More recent scholarship challenges this earlier interpretation and asserts that Murphy's motive in his Everson vote went beyond simply desiring to protect the principle of religious freedom. Sidney Fine, author of a three-volume biography of the Justice, states that Everson "may have been one of those rare instances when his Catholicism tipped the scales" in his deciding a case.129

The evidence certainly points in that direction. For example, on 1 March 1947, Marguerite Murphy, the Justice's sister, sent a letter to the principal of the Catholic school her daughter attended. The letter complained about the school's inability to find a place on the school bus for the girl, and although it was signed by the mother, Fine concluded it was "almost certainly typed in Justice Murphy's office, and it is more than likely that he was its author."130

Directing the attention of the Reverend Mother to the recent Supreme Court ruling, the letter stated, "unless I am mistaken, it [Everson] is a great step forward for those in the faith who desire moral training along with education in Catholic
This document indicates that Murphy recognized that upholding of the busing law would not merely assure government neutrality, as Black had argued, but would afford a direct benefit to the parochial schools run by the Catholic Church.

Frankfurter had no doubts that this was the case. Convinced that Murphy had ignored his responsibilities as a Justice, he wrote in a note to his colleague:

[Your] biographers will have to face this question: which is the more courageous character — a sensitive humanitarian who has taken the oath as a judge with the resulting confined freedom of a judge to give expression to his own compassionate [nature] and therefore does not yield to his compassion [Frankfurter], or the same person who thinks his compassion is the measure of LAW [Murphy]."132

Frankfurter continued his accusation in a separate note, warning that the hypothetical biographer would inevitably conclude that Murphy had "failed to keep in mind the vital doctrine of Separation of Church and State, more particularly in that he exercised the compassionate privileges of a priest when in fact he was only a judge."133

The interchange between Frankfurter and Murphy is critical to our understanding of the decision-making process in Everson. On the one hand, it provides important evidence that Murphy voted to uphold the law knowing that it would be advantageous to Catholic schools, in short, that he cast a vote for privilege rather than neutrality. On the other hand, it also affords concrete proof of Frankfurter's reputation for lobbying while on the Court.
Frankfurter's efforts raise the question of why he devoted so much energy and attention to this particular case. The answer lies largely in the Justice's understanding of the First Amendment as a provision for assuring a secular state.\textsuperscript{134} This particular element in Frankfurter's thinking is the key to reconciling his adamant opposition to anything approaching establishment with his earlier opinions in the flag salute cases in which he subordinated free exercise of religion to patriotic practices and to the state's interest.

In \textit{Minersville v. Gobitis}, (1940) the Jehovah's Witnesses contested a state law requiring public school children to pledge allegiance to the flag and the country. Frankfurter's majority opinion, speaking for all but Justice Stone, contended that "[c]onscious religious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs." Consequently, said Frankfurter, "the mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."\textsuperscript{135}

Frankfurter defended his opinion in this case and in \textit{West Virginia v. Barnette} (1943) on the grounds of judicial restraint.\textsuperscript{136} In \textit{Barnette} Frankfurter stood alone, yet his lengthy dissent reiterated the two points that had been fundamental to his earlier opinion: judicial restraint and the primacy of secular interests. "That which to the majority may seem essential for the welfare of the state may
offend the conscience of the minority," he conceded.

However, he reasoned,

so long as no inroads are made upon the actual exercise of religion by the minority, to deny the political power of the majority to enact laws concerned with a civil matter, simply because they may offend the consciences of a minority, really means that the consciences of the minority are more sacred and more enshrined in the Constitution than the consciences of a majority."\(^{137}\)

Elsewhere in the opinion Frankfurter offered his interpretation of the First Amendment:

The essence of the religious freedom guaranteed by our Constitution is ... this: no religion shall either receive the state's support or incur its hostility. Religion is outside the sphere of political government. This does not mean that all matters on which religious organizations or beliefs may pronounce are outside the sphere of government. Were this so, instead of the separation of the church and state, there would be subordination of the state on any matter deemed within the sovereignty of the religious conscience. . . . The validity of secular laws cannot be measured by their conformity to religious doctrines. It is only in a theocratic state that ecclesiastical doctrines measure legal right or wrong.\(^{138}\)

For Frankfurter, the statute had a valid secular intent—encouraging patriotism and protecting the state from the intrusion of religion—and this was clearly the governing factor in his opinion.

The fact that Frankfurter abandoned his philosophy of judicial restraint in the *Everson* case and adopted a near-absolute position with regard to establishment would indicate that his principal concern in this and the earlier cases was indeed the preservation of the secular state. In sharp contrast to his opinions in *Gobitis* and *Barnette*, Frankfurter's determination in *Everson* to prohibit any law
respecting an establishment of religion precluded a yielding to the decisions of a state legislature. Yet his opinions in the three cases are consistent in insisting that laws need not take into account the particular needs of church or religious groups.

Observing legislative trends, particularly the tendency to provide indirect assistance to sectarian schools in the form of transportation, Frankfurter predicted that church-state decisions would soon take on greater importance. Throughout the 1940's he repeatedly warned that the number of church-state cases would grow and that the issues would become increasingly complex. Also he reminded his colleagues that their opinions would have considerable impact in deciding future cases. His strongest statement of prophecy appeared in his dissenting opinion in West Virginia v. Barnette. After reviewing the various services provided to children who attended public schools, he asked:

What of the claims for equality of treatment of those parents who, because of religious scruples, cannot send their children to public schools? What of the claim that if the right to send children to privately maintained schools is partly an exercise of religious conviction, to render effective this right it should be accompanied by equality of treatment by the state in supplying free textbooks, free lunch, and free transportation to children who go to private schools? What of the claim that such grants are offensive to the cardinal constitutional doctrine of separation of church and state?

These questions assume increasing importance in view of the steady growth of parochial schools both in number and in population . . . .

. . . . We must decide this case with due regard for what went before and no less regard for what may come after.139
In light of Frankfurter's outspoken concern that church-related schools would step-up their demands for a share of public funds, the intensity of his efforts to combat such assistance during the October Term of 1946 is not surprising.

Frankfurter's opposition was rooted firmly in his belief that the Catholic Church was the principal proponent and potential recipient of the aid. Nineteenth-century suspicions of an international conspiracy by the Catholic Church to gain both religious and political domination had re-emerged in the 1940s and may well have influenced the Justice's thinking. The growth of parochial schools referred to in the Barnette dissent was tangible proof of the Church's efforts to extend its power and influence. Beyond the circumstantial evidence was the direct involvement of the Catholic Church in the Everson litigation: Catholic interests had apparently retained the lawyer who became the chief attorney for the school board when the case was heard by the New Jersey Courts; when the case came before the Supreme Court, he was assisted by an attorney retained by the Archdiocese of New York. Such details would not have escaped the wary eye of Frankfurter and, no doubt, led to the accusations levelled against the Church in conference.

Frankfurter based his decision in Everson and probably in other church-state cases not on his established principle of judicial restraint but rather on his understanding of the religion clauses of the First Amendment. Believing that these two provisions were intended as a protection for the state against religious intrusion, Frankfurter's reading of
the religion clauses was, nevertheless, uneven. He tended to qualify the right to free exercise, camouflaging his decisions with judicial restraint rhetoric, but he also vigorously upheld the prohibition against establishment. What determined his position in Everson, therefore, was his commitment to the ideal of a secular state.

Harold Burton, the fourth justice to dissent in Everson, may have been swayed by Frankfurter's efforts to change his vote. He originally cast his vote to affirm the state court's decision, and later changed it to concur with Rutledge. To attribute responsibility for this shift to Frankfurter seems reasonable not only because he was so forthright and persistent in promoting his position but also because he was a "reference individual" for Burton. In other words, Burton, in contrast to Murphy, was impressed by Frankfurter's reputation as a legal scholar and readily accepted his tutoring.

Regardless of Frankfurter's influence, Burton was likely to favor a sharp separation of church and state since he was strongly committed to Unitarian ideals. At the time of his appointment to the Supreme Court, he was the moderator of the American Unitarian Association and, although he resigned this position when he took his seat on the bench, he retained an active interest in the Unitarian Church and its activities. Responding to the Everson decision, the AUA in 1948 considered a resolution in favor of strict separation and called for reversal of Cochran and Everson. Even at the time Everson was heard and decided, Burton could not
have been unaware of his church's strong stand on the issue and, no doubt, took this into account when he revised his conference vote.

Burton's commitment to the principles of religious liberty indicated sympathy with the official Unitarian position. In a speech delivered at All Souls' Unitarian Church, Washington, D.C., in January 1944 Burton maintained that the institutions of American government were designed to assure individual freedom. He explained:

Within our country we have already the essential forms and structures of governmental, business, social and religious freedom based upon our Declaration of Independence. Our need is to apply them with a vigorous renewal of the faith they were created to serve. They exist not for the suppression of the individual but for expression of his will. The genius of American government lies not in dictation and discipline but in freedom and fairness. We need to breathe into our every governmental act full faith in our fellowmen and full faith in ourselves. In concrete terms this calls for: universal educational opportunities for advancement; the greatest possible freedom of religious thought and expression; the greatest possible opportunity for personal initiative and advancement compatible with corresponding opportunities for the rest of the people. It means everlasting faith that all of us are the children of the same God and that any governmental policy that forces the interests of the people as a whole to yield to the special interests of any individual, or of any group or bloc of individuals is a signpost on the road away from freedom and toward denomination. . . . Policies which combine unfair benefits to many personal groups or blocks for their own advantage to the disadvantage of the whole amount in favor of a trusteeship for one or more of the people.147

As is evident from this excerpt, Burton believed in both the protection of free exercise and the prohibition of an establishment of religion. Therefore, Frankfurter probably did not have to apply much pressure to make Burton realize
that his initial vote did not square with his own understanding of church-state separation. Burton's decision to join Rutledge was consistent with his ideals and those of his church. For Burton the decision-making process in this case entailed a recognition of the larger implications of the law in question and a realization that the case revolved around establishment rather than free exercise.

For William Douglas, by contrast, the governing concern was social justice. Defending his initial vote on Everson, Douglas indicated that the reimbursement for costs of transportation was "not like [an] endowment of [a] religious group" but instead "a service indirectly benefitting" a church-related institution.148

Stanley Reed, on the other hand, felt that the need to practice judicial restraint was more important than either a concern with social justice or a desire to assure religious freedom. The cardinal tenet in Reed's judicial philosophy was his belief that the courts should not interfere with Congress or with state and local autonomy unless absolutely necessary. This view had already found expression in dealing with church-state issues. In Jones v. Opelika, (1942) he had declared, "The rights of which our Constitution speaks . . . are not absolutes to be exercised independently of other cherished privileges, protected by the same organic instrument." He continued:

Conflicts in the exercise of rights arise, and the conflicting forces seek adjustment in the courts . . . . claiming on the one side the freedom of religion, speech and the press, guaranteed by the Fourteenth Amendment, and on the other the right to
employ the sovereign power explicitly reserved to the State by the Tenth Amendment to ensure orderly living, without which constitutional guarantees of civil liberties would be a mockery. Courts, no more than Constitutions, can intrude into the consciences of men and compel them to believe contrary to their faith or think contrary to their convictions. . . . So the mind and spirit of man remain forever free, while his actions rest subject to necessary accommodation to the competing needs of his fellows. 149

As evident in the above passage, Reed gave such enormous weight to the principle of restraint that he could acknowledge virtually no role for the judiciary in upholding the First Amendment. The tenacity of Reed's commitment to judicial restraint is also evident in a speech given in 1950 before the Justice Society of Philadelphia:

. . . As courts are in a position to exceed their rightful authority, they must be doubly careful to stay well within their allotted duties. In the United States the courts have been entrusted by the constitutions, legislative bodies, and the people with greater power than other nations have seen fit to grant. . . . in consequence, it is incumbent upon our judiciary to restrain any inclination to exert these powers to achieve particular results merely because they are agreeable to the judges' conception of proper economic and social arrangements.

The duty rests upon lawyers and judges alike to take care that manifestations of uncontrolled judicial wilfulness do not bring about the collapse of our balanced system. . . . The balance among the three arms of government stands as the preserver of our liberties from the absolutism of any branch of government. 150

One must assume that this tendency to subordinate individual rights characterized Reed's consideration of Everson and his vote to uphold the New Jersey Statute.

Chief Justice Vinson's decision in favor of the busing law was typical of his treatment of civil liberties cases. In more than eighty percent of the cases involving state
governments and in more than ninety percent of those involving the federal government, Vinson voted to uphold government power over individual rights.\footnote{During his tenure on the Supreme Court, the Chief Justice developed a reputation for "dodging constitutional questions where statutory interpretation would suffice" and resorting to immediate and pragmatic solutions whenever possible.\footnote{The fact that Black's opinion approaches this attitude toward decision-making probably accounts for Vinson's vote.}} The product of both individual and collective reasoning, Everson \textit{v. Board of Education} exemplifies the complex process by which Supreme Court decisions are made. Each justice brings to a case a unique combination of values, attitudes, and ideals ranging from a carefully reasoned judicial philosophy to specific interpretations of constitutional provisions to personal religious beliefs. Yet the character and development of the case itself — lower court decisions, briefs and oral argument, as well as the interchange among the justices — may determine which elements in an individual justice's scheme of thinking will take precedence. In those instances such as \textit{Everson} where no clear legal precedent exists, the sources of the justices' opinions are more evident than might otherwise be true and, consequently, enable the student of the Court to better appreciate the diversity among the justices and the care with which their decisions are taken.

Lacking precedents itself, \textit{Everson} became an important precedent for subsequent church-state cases. With the
passage of more and different programs for aiding church-related schools, a series of cases were brought to the Supreme Court for review. Those who objected to such assistance charged that Everson had opened a Pandora's box leading ultimately to broad-based support of sectarian schools. In contrast, those who fretted over the growing costs of education, both public and private, saw in Everson the means to shore up a nation-wide system that was beginning to crumble under the strains of educational reform and declining enrollments.


3. Id. at 61.

4. The law provided: "Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including transportation of school children to and from school other than public school, except such school as is operated for profit in whole or in part.

"When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than public school, except such school as is operated for profit in whole or in part." New Jersey Laws, 1941, C. 191, p. 581; N.J.R.S. Cum. Supp., Tit. 18, C. 14 Sec. 8, quoted in Everson v. Board of Education, 330 U.S. 3.

5. Id. at 3-4.


10. Frankfurter prepared a single draft of a dissent but decided against a separate opinion in this case. He believed that his Jewish background would be seen as influencing his


16 Palmer, "Man over Money", p. 41.


20 Silverstein, *Constitutional Faiths*, p. 92


22 Silverstein, *Constitutional Faiths*, p. 130.


24 Perhaps the clearest statement of Black's absolutist position came in an interview by Professor Edmund Cahn of New York University Law School on 14 April 1962. Black stated, "I learned a long time ago that there are affirmative and negative words. The beginning of the First Amendment is that 'Congress shall make no law.' ..." Irving Dilliard, ed., *One Man's Stand for Freedom: Mr. Justice Black and the Bill of Rights* (New York: Alfred A. Knopf, 1963), p. 471.

26. Everson at 4. It should be noted that there were no other church-related schools in the town.


29. Black's decision to abandon the notion that the Catholic Schools derived an "indirect benefit" from the New Jersey law was probably taken in response to Rutledge's contention that there could be no valid criteria to distinguish "direct" from "indirect" assistance since the First Amendment is absolute in its prohibitions. Harper, Justice Rutledge, p. 348. See Everson at 45.

30. Everson at 6.

31. Id.

32. Id. at 7.

33. Id.

34. Id. at 16.

35. Id. at 18.


38. Appellee's Brief at 33.

Although Pierce was decided on the grounds of private property rights and the rights of parents, it has become an important precedent in cases involving free exercise and has also been used as a justification for government support for sectarian schools. As Justice Stewart remarked in his dissent in the 1963 prayer case Abington School District v. Schempp, "It has become accepted that the decision in Pierce . . . was ultimately based upon the recognition of the validity of the free exercise claim involved in that situation. (874 U.S. 312)." See also Board of Education v. Allen, 392 U.S. at 245 (1967); Lemon v. Kurtzman, 403 U.S. at 654-55 (1970); Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. at 802 (1973).

39. Appellee's Brief at 51-52.

40. Id. at 55.

Black provided John Frank a rough list of his reading material from 1926-1937 in a letter dated 20 January 1943 (Hugo L. Black Papers, Box 460, Library of Congress). Daniel Meador, Mr. Justice Black and His Books (Charlottesville: University Press of Virginia, 1974) includes an essay on Black's reading material and an index to his library.


Black, Constitutional Faith, pp. 7-8.

Black's use of history was also linked to his populism. As a populist he had objected strongly to the Court's use of substantive due process to declare invalid state regulations of health and labor conditions that unduly infringed on the rights of private property. The criterion used had been the "reasonableness" of the legislation. Such a measure, Black believed, was arbitrary. His response was, therefore, to seek the original meaning of the Constitution and to determine the intent of contested legislation rather than to rely on judicial interpretations that might be considered precedents. Frank, in The Justices of the U. S. Supreme Court, ed. Friedman and Israel, p. 2329. In Everson Black rejected the contention that the New Jersey statute violated the due process clause and pointed, instead, to the intent of the legislators: to ensure the safety of the students. Pp. 5-6.


Everson at 11. Rutledge made a similar effort in his consideration of the case.


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Gerald T. Dunne in his biography of Black observed:
"Of all Black's solitary disagreements in his first term, the Carolene Products was to be the most misleading. For notwithstanding that, Justice Black was to take incorporation of the Bill of Rights into the Fourteenth Amendment as the polestar of his own judicial philosophy. ..." Dunne, Hugo Black, p. 186. Just one year after Everson, Black—again using historical sources—proclaimed that the Fourteenth Amendment had been intended to incorporate the first eight Amendments. Adamson v. California, 332 U.S. 421 (1948).


Dillard, One Man's Stand for Freedom, p. 20.

Dunne, Hugo Black, p. 76.


Silverstein, Constitutional Faiths, p. 114.

Jackson began his opinion: "I find myself, contrary to first impressions, unable to join in this decision." Everson at 18.

Robert H. Jackson, The Supreme Court in the American System of Government (Cambridge: Harvard University Press, 1958), p. 58. Philip Kurland links Jackson to the liberal, as distinguished from libertarian, tradition. The two differ in that the liberal believes the Constitution affords "protection to individuals and, therefore, to all, rather than to classes and, therefore, only to some." For Jackson, he believes, "constitutional liberties could not derive from or be confined to membership in a group or a class. Such liberties as the Constitution afforded to members of a group or class must be liberties claimable by everyone." Philip B. Kurland, "Justice Robert H. Jackson - Impact on Civil Rights and Civil Liberties," University of Illinois Law Forum, 1977 (1977): 552.


Everson at 26-27.

Id. at 26.

Everson at 19.

Id. at 20.

Id. Black had dismissed the discriminatory nature of the contested law: "Since there has been no attack on the statute on the ground that a part of its language excludes children attending private schools operated for profit from enjoying state payment for their transportation, we need not consider this exclusionary language. . . ." Id. at 4.


Rutledge, Conference Memo, p. 2.

Ibid., p. 3.

Ibid., pp. 3-4.

Ibid., p. 4.

Ibid., pp. 4-5.

Ibid., p. 5.

Ibid.

Ibid., p. 6. Murphy's conference notes report Rutledge as saying: "First it has been books, now buses, next churches and teachers. Every religious institution in [the] country will be reaching into [the] hopper for help if you sustain this. We ought to stop this thing at [the] threshold..."

97 Rutledge, Conference Memo, p. 7.
98 Ibid., pp. 8-9.
99 Ibid., pp. 9-10.
100 Wiley B. Rutledge to Thomas R. Mulroy, 19 March 1947, Rutledge Papers, Box 143.
101 Wiley B. Rutledge to Ernest Kirschten, 20 February 1947, Rutledge Papers, Box 143.
102 Everson at 39.
103 Rutledge's files do not contain relevant correspondence between the Justice and Brant before the Everson decision was handed down. However, Rutledge's discussion in his opinion of the Virginia struggle did result in an exchange of letters. Irving Brant to Wiley B. Rutledge, 11 March 1947 and Wiley B. Rutledge to Irving Brant, 18 March 1947, Rutledge Papers, Box 143.
105 Wiley B. Rutledge to Irving Dilliard, 19 February 1947, Rutledge Papers, Box 143.
106 Everson at 31-32.
107 Id. at 31.
108 Id. at 34.
109 Eckenrode, Separation of Church and State in Virginia, p. 100, quoted in Id. at 36-37.
110 Everson at 39-40.
111 Id. at 40-41.
112 Id. at 46.
113 Id. at 52.

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Rutledge, Conference Memo, pp. 4-5.

A general description of Frankfurter's approach to decision-making given by William O. Douglas appears to be accurate when applied to the Everson case. In his autobiography, The Court Years, Douglas labelled Frankfurter "a proselytizer" who "vigorously promoted the ideas he espoused." According to Douglas, "He never stopped trying to change the votes on a case until the decision came down."

"Frankfurter also indulged in histrionics in Conference. He often came in with piles of books, and on his turn to talk would pound the table, read from his books, throw them around and create a great disurbance. His purpose was never aimless. His act was designed to get a particular Justice's vote or at least create doubt in the mind of a Justice who was thinking the other way." William O. Douglas, The Court Years: 1939-1975 (New York: Random House, 1980), p. 22.

Dunne, Hugo Black, p. 266. Black may also have adopted an inflexible position because of Frankfurter's tactics. Dunne, Hugo Black, p. 265.


Felix Frankfurter to Frank Murphy, undated, Frankfurter Papers, Box 86, Library of Congress.

Archbishop of Baltimore from 1877 until he was appointed Cardinal in 1886, Gibbons was a leading spokesman for the Catholic Church in America until his death in 1921. As Frankfurter implied, Gibbons believed strongly in the First Amendment: "The separation of church and state in this country seems to Catholics the natural, the inevitable, the best conceivable plan, the one that would work best among us,
both for the good of religion and of the state. . . . I can conceive of no combination of circumstances likely to arise which should make a union desirable either to church or to state. . . ." Quoted in John A. O'Brien, "Equal Rights for All Children," The Christian Century, May 19, 1948, p. 473.

126
Howard, Mr. Justice Murphy, pp. 444-45.

127
Ibid., p. 453.

128
Frank Murphy to Judge O'Connor, 25 February 1947, Murphy Papers, Box 121, Michigan Historical Collections, quoted in Ibid., p. 450.

129

130
Marguerite Murphy to Margaret Naulty, 1 March 1947, Murphy Papers, quoted in Ibid.

131
Ibid.

132
Felix Frankfurter to Frank Murphy, undated, Eugene Gressman Papers, Michigan Historical Collections, quoted in Fine, Frank Murphy, pp. 569-70.

133
Ibid., p. 570.

134
Gerald Dunne contends that Frankfurter's Jewishness contributed to "an almost obsessive concern to preserve what he saw as the fundamental underpinning of the First Amendment - the total constitutional inhibition and social tincturing of a resolutely secular state." Dunne, Hugo Black, p. 269.

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136
Frankfurter defended his opinion in Minersville v. Gobitis in a letter to Stone: "[T]he vulgar intrusion of law in the domain of conscience is for me a very sensitive area. . . . [A]ll my bias and predisposition are in favor of giving the fullest elbow room to every variety of religious, political, and economic view.

"But no one has more clearly in his mind than you, that even when it comes to these ultimate civil liberties, insofar as they are protected by the Constitution, we are not in the domain of absolutes. . . . [T]here is for me. . . . a great makeweight for dealing with this problem, namely that we are not the primary resolvers of the clash. We are not exercising an independent judgment; we are sitting in judgment upon the judgment of the legislature. . . .

"What weighs with me strongly in this case is my anxiety that, while we lean in the direction of the libertarian aspect, we do not exercise our judicial power unduly, and as though we ourselves were legislators by holding with too tight a rein the organs of government. . . .
"[M]y intention . . . was to use this opinion as a vehicle for preaching the true democratic faith of not relying on the Court for the impossible task of assuring a vigorous, mature, self-protecting and tolerant democracy by bringing the responsibility for a combination of firmness and toleration directly home where it belongs - to the people and their representatives themselves." Felix Frankfurter to Harlan F. Stone, 27 May 1940, Frankfurter Papers, Box 171-19, Harvard Law School Archives, Cambridge, Massachusetts.

The very fact that the Pennsylvania State Legislature had not acted in such a way as to take into consideration the religious beliefs of the Jehovah's Witnesses - hence the need for the suit - suggests that Frankfurter's efforts to defend his opinion on the grounds of judicial restraint were, in all likelihood, a justification rather than the motivating force behind his decision.

138 Id. at 654.
139 Id. at 660-61. In a letter to Stanley Reed regarding the second consideration of Jones v. Opelika (319 U.S. 105, 1943), Frankfurter commented: "[T]he more I think about it the more I agree with Black that these cases are probably but the curtain raisers of future problems of such range and importance that the usual objections to multiplicity of opinions are outweighed by the advantage of shedding as much light as we are capable of for the wisest unfolding of the subject in the future. This means not merely expressing a contrariety of views but even expressing the same views with different shades and nuances....

...[I]n this field we are in the realm which not only touches the liberties of our people, but we are in a field in which, through large, uncritical, congenial abstractions, opinions are going out to the people of a miseducative nature: For this reason, he continued, the dissenting justices had an equal responsibility to state their support for the Bill of Rights, even though they disagreed with the conclusions of the majority. Felix Frankfurter to Stanley Reed, 9 April 1943, Frankfurter Papers, Box 170-1, Harvard Law Archives.

140 Paul Blanshard's American Freedom and Catholic Power had appeared in serial form before its publication in 1949. Blanshard's writings, in particular, had stirred up popular feelings against the Catholic church as an institution.

141 Fine, Frank Murphy, p. 567.
142 Dunne, Hugo Black, p. 266.
143 Wiley Rutledge, Conference Vote on Everson, 23 November 1946, Rutledge Papers, Box 143.

One might note that Wiley Rutledge was also a Unitarian, Black was moving in that direction, and even Douglas had some ties with the Unitarian Church in Washington.

Jane McMasters to Harold H. Burton, 27 April 1948, Burton Papers, Library of Congress. The cases referred to are Cochran v. Louisiana and Everson v. Board of Education.


Rutledge Conference Vote.


Ibid., p. 713.
The Supreme Court did not decide another case involving aid to parochial schools for twenty years following *Everson* (1947). During that period, however, the justices had several opportunities to rule on the issue of establishment. Although the cases focused on the question of religion and the public schools, the justices recognized that their opinions would be used as precedents in cases involving government funding of sectarian education. In rendering these decisions, the justices developed two new and contrasting lines of reasoning with regard to separation of church and state. The first was a policy of strict separation that prohibited any kind of support of religious activity by the institutions of government, and the second, a policy of accommodation that prescribed government cooperation. In addition, they repeatedly attempted to define the principle of neutrality that had been employed in *Everson* and to establish guidelines distinguishing between neutral legislation and legislation respecting an establishment of religion.

The justices' efforts to determine the meaning and intent of the First Amendment coincided with a movement at both the state and federal levels to extend government assistance to nonpublic schools. Americans were becoming increasingly concerned with the quality of education in the years following the Second World War. The growing rivalry
between the United States and the Soviet Union, epitomized by Sputnik and the space race, linked national security to excellence in education. On the domestic scene, rising expectations associated with post-war prosperity led people to view education as a means by which their children might achieve a higher standard of living.

At the same time that costs of education were rising, the nation's largest parochial school system encountered serious problems of its own. Declining enrollments and greater reliance on lay teachers forced many Catholic schools to close, driving thousands of students into the public system and compounding the problems already faced by government and school administrators. Many legislators believed that the solution to this particular situation was to allocate public monies to nonpublic schools. Given the Court's ruling in *Everson*, this strategy appeared to be both practical and constitutional.

It is important to understand the political, social, and economic conditions that resulted in federal aid to public and nonpublic schools and in additional state programs to assist sectarian schools. On the one hand, these changes provided the reasons for legislation -- factors that the justices took into account in the process of deciding a case. On the other, they created an environment that influenced the attitudes of the justices as well as those of legislators.

The purpose of this chapter is, therefore, to examine four major church-state cases and the attendant changes in
American society from 1947 to 1968 when the Supreme Court's Allen decision marked a turning point as significant as Everson. The Allen decision itself will be considered in the next chapter.
Four major cases involving the question of establishment of religion came before the Supreme Court in the period between 1947 and 1967. Illinois ex rel. McCollum v. Board of Education (1948) and Zorach v. Clauson (1952) dealt with "released time" programs: in McCollum religious teachers were denied access to the public schools, but in Zorach the practice of releasing children from New York City schools for religious instruction was upheld.2 Engel v. Vitale (1962) and School District of Abington Township, Pennsylvania v. Schempp/Murray v. Curlett (1963) ruled on prayer in the school. Engel declared the New York State Regents' Prayer unconstitutional, while Abington declared unconstitutional all forms of religious exercise in the public schools.3 In each of these cases, the justices used the term "neutrality" to describe the proper relation of government toward religion. However, the meanings individual justices gave to this word ranged from cooperation and accommodation to isolation and strict separation. Moreover, opinions varied not only between justices but also for one justice, Douglas, between different cases.

The eight to one decision in McCollum is deceptive in suggesting near unanimity among the justices in forbidding religious education within the public schools. Four separate opinions were written: the majority opinion by Black, a concurring opinion by Frankfurter (in which he was joined by the other Everson dissenters, Burton, Jackson, and...
Rutledge), and a separate concurring opinion by Jackson as well as a strong dissent by Stanley Reed. Frankfurter reasserted the idea of strict separation, but Jackson, if judged by his separate opinion, appeared to be moving toward cooperation or accommodation.⁴

Reiterating the guidelines he had enunciated just a year earlier in Everson, Black concluded that the First Amendment required a separation of church and state, for "religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."⁵ The released time program implemented in Illinois, he declared, involved an element of coercion, implying that the students were essentially a captive audience. "This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith."⁶ To declare such a program unconstitutional was not, Black believed, inconsistent with the principle of neutrality he had employed in Everson. "To hold that a state cannot . . . utilize its public system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not," he declared, "manifest a governmental hostility to religion or religious teachings."⁷

Frankfurter's concurring opinion, joined by Jackson, Rutledge, and Burton, concentrated on the need to preserve the secular character of the nation's public schools. Referring to the public school as "a symbol of our [America's] secular unity," he explained:

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The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children... in an atmosphere free from pressures in a realm in which pressures are most resistant and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice.

The underlying premise in Frankfurter's opinion in *McCollum* is precisely the same one that had determined his vote in *Everson*: The purpose of the First Amendment is to free government from religious influence. "Separation," Frankfurter insisted, "is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally."9

Jackson expressed serious reservations with regard to standing of the appellant and linked these concerns to the broader principle of judicial restraint. "To me," he commented, "the sweep and detail of these complaints is a danger signal which warns of the kind of local controversy we will be required to arbitrate if we do not place appropriate limitation on our decision and exact strict compliance with jurisdictional requirements."10 Jackson was afraid that the *McCollum* decision would invite lawsuits by members of different sects who found the teaching in the public schools inconsistent with their beliefs. "If we are to eliminate
everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines," he warned, "we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits."11

Endeavoring to prove the seriousness of this threat, Jackson argued that religion cannot be completely separated from education. Conceding that it might be possible to secularize certain subjects, he pointed out that many cannot be divorced from religious heritage or history.12 In taking this position, Jackson implied that any effort to separate religion from education would be difficult and undesirable.

Stanley Reed rejected the theory of strict separation entirely. Past practices — appointing of a chaplain for each House of Congress, providing chaplains for the armed forces, religious exercises in the public schools — determined the meaning of the Establishment Clause, he claimed, rather than "a decorous introduction to the study of its text."13 Espousing a theory of "cooperation," Reed concluded that the released time program did not violate the First Amendment.14

Three years later, in Zorach v. Clauson, the Court considered and upheld (6 to 3) a New York City program allowing children to leave the school building during regular hours in order to attend religious instruction or devotional exercises. As had been true in the McCollum case, school officials took an active role in administering the
program, and nonparticipating students remained in the classroom for the duration.

Although Douglas had joined the majority in the earlier case, his opinion for the Court in Zorach v. Clauson rejected the policy of strict separation in favor of accommodation. "The First Amendment," he stated, "does not say that in every and all respects there shall be a separation of Church and State." Citing, as Reed had in the McCollum dissent, various ways in which the spheres of government and religion overlapped, Douglas launched into his now-famous statement:

"We are a religious people whose institutions presuppose a Supreme Being. . . . We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. 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. . . . [W]e 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 religious influence."

The problem of maintaining a separation of church and state, he concluded, "is one of degree."

Black rejected both the decision of the majority and the reasoning employed by Douglas. Finding no substantive difference between the Illinois and New York programs, he repeated his belief that "[a]ny use of such coercive power by the state to help or hinder some religious sects or to prefer all religious sects over nonbelievers or vice versa is just
what...the First Amendment forbids. As in the earlier case, he insisted, "it is only by wholly isolating the state from the religious sphere and compelling it to be completely neutral, that the freedom of each and every denomination and of all nonbelievers can be maintained." Government, Black concluded, "should not be allowed under cover of the soft euphemism of 'co-operation,' to steal into the sacred area of religious choice." Frankfurter and Jackson made clear in separate dissents that they agreed with Black's definition. Both men discussed the coercive power of the State inherent in the program and concluded, on that basis, that the New York version of released time was unconstitutional also.

Both Black and Douglas used the term "neutrality" to describe the proper relationship of government toward religion, yet their understanding of that concept was very different. Where Black viewed "establishment" as any form of government encouragement of religious activities, Douglas limited his definition to financial support. Where Black demanded "isolation," Douglas called for accommodation.
II.

The Supreme Court that decided the prayer cases, *Engel v. Vitale* (1962) and *Abington v. Schempp* (1963), was very different from the Court that had ruled on the earlier establishment cases. Six of the nine justices had been appointed after 1952, and a seventh had taken his seat in 1949. Only Black and Douglas remained, and their ideas on judicial decision making, especially in cases involving basic freedoms, had evolved in the years following *Everson*.

Perhaps the most important change in personnel was the appointment of Earl Warren to replace Fred Vinson as Chief Justice. Warren, a California Progressive in the tradition of Hiram Johnson, stressed the value of honesty and openness in government and approved of affirmative governmental action in the public interest. He placed great importance on public opinion, which he assumed to be enlightened, progressive, and honorable. From Warren's long experience in state politics, culminating with his election as governor, he had come to regard legislatures as "neither 'democratic' nor 'representative'". A recent biographer has noted:

> He had seen the capacity of legislators to create issues, to block humanitarian legislation on parochial or partisan grounds, to conceal their activities from their constituents, and to profit from their association with lobbyists. He remained as few of his peers on the Warren Court did, a thoroughgoing skeptic about the representativeness or democratic character of the legislative forum.

Political experience had, in short, convinced Warren of the propriety of judicial activism.
Warren's activism was impelled also by his ethical approach to decision making. Preoccupied with searching for the "just result," Warren readily abandoned the cardinal tenets governing the judicial process which may be defined as: (1) "the disinclination to usurp the proper powers of other branches of government" and (2) the practice of basing "judicial decisions on properly articulated reasons."\(^{27}\)

The Constitution spoke directly to Warren as a person, a judge, and an American citizen. He conceived of the Court as an embodiment of values that he believed in and as a basis for granting him, as a judge, power to protect those values. Warren repeatedly emphasized that he had a "duty" under the Constitution to see that his understanding of its imperatives was implemented, and he saw the Constitution's imperatives as ethical imperatives. The ethical imperatives that Warren read in the Constitution were so clear to him, and his duty to implement them so apparent, that matters of doctrinal interpretation were made simple and matters of institutional power became nearly irrelevant.\(^{28}\)

The guidelines that determined an activist approach derived from Warren's version of Progressivism. Committed to "the virtues of independence, self-reliance, and autonomy," Warren "preferred affirmative government action only when humans could not be expected to help themselves or one another."\(^{29}\) In situations such as those associated with the prayer cases where powerful interests threatened individual rights, activism provided the means to achieve a "just result."\(^{30}\)

Individual rights, especially those guaranteed by the Bill of Rights, were essential to justice, according to Warren. An adherent of the philosophy of natural rights, Warren believed that these amendments, "by codifying this sense of justice, provided a basis by which American law
could be brought "more and more into harmony with moral principles." Following from this perception of the Bill of Rights as embodying natural rights, Warren claimed judicial responsibility for protecting these basic freedoms from arbitrary action by government. Yet he also believed in the need to re-interpret the constitutional provisions according to changes over time, and he maintained that this responsibility fell to the judiciary as well.

It is also important to note that Warren placed enormous importance on education. Inherent in his Progressive idealism, education provided the means to assure an enlightened citizenry and social justice. Using language remarkably similar to that employed by President Lyndon Johnson in the 1960s, Warren expressed his feelings about education in an address to a convention of the National Education Association in 1951:

Within the limits of our financial means every social objective of the American people must be advanced not only to relieve undue hardship and afford equal opportunity for the good life, but also to demonstrate to an observing and critical world that our governmental and economic systems can work hand in hand in the elimination of poverty, suffering, and degradation.

The argument that aid to private and parochial schools was a means to improve the quality of education for disadvantaged children must have appealed to Warren's sense of social justice.

Both Wiley Rutledge and Frank Murphy passed on in 1949. Sherman Minton, appointed to fill the Rutledge vacancy, served from 1949-1956. He, in turn, was replaced by William
J. Brennan. Eisenhower's selection of Brennan has generally been viewed as a political move.\textsuperscript{35} Coming shortly before the Presidential election, the opening on the Court provided the President "an opportunity to demonstrate his peculiar ability for remaining 'above politics' while at the same time taking an action which might have considerable appeal among normally Democratic urban eastern Catholics."\textsuperscript{36} In addition, Eisenhower had earlier announced a policy of appointing men who had previous judicial experience, and Brennan was considered to be an able state judge.\textsuperscript{37}

Like Warren, Brennan was and is a judicial activist. He believes, one biographer has stated, "that the constitutional framework accords the judiciary the primary task of protecting the integrity of the individual and that the procedural aspects of the judicial process are essential safeguards for substantive rights."\textsuperscript{38} Brennan himself cited the increasing number of threats against individual rights by the government as a justification for activism in an article published in 1965.

It will remain the business of judges to protect fundamental constitutional rights which will be threatened in ways not possibly envisaged by the Framers. Justices yet to sit, like their predecessors, are destined to labor earnestly in that endeavor - we hope with wisdom - to reconcile the complex realities of their times with the principles which mark a free people.\textsuperscript{39}

The idea of the law as a "living process responsive to changing human needs" was also the theme of a lecture he delivered at the Georgetown University Law Center that same year. "The shift is to justice," he said, "and away from
fine-spun technicalities and abstract rules." Not surprisingly, Brennan was considered Warren's closest ally on the Court.

During the years between Murphy's passing and Brennan's appointment, no Catholic sat on the Court. In replacing Murphy with Tom Clark, President Truman insisted that religious considerations should not influence his decision. What did influence Truman was his desire to appoint a loyal friend who, conveniently, would also strengthen the Vinson bloc on the Court. As a justice, Clark earned a reputation for upholding government security measures designed to check communist subversion, reflecting a general pattern of favoring government policies over individual rights. His most important contribution in the area of church-state relations was his majority opinion in the second prayer case, *School District of Abington v. Schempp*.

To fill the vacancy left by Robert Jackson's death, Eisenhower appointed federal judge John Marshall Harlan. A conservative, Harlan espoused the doctrine of judicial restraint and, consequently, became the principal dissenter on the activist Warren Court. The dominant themes in his opinions and the dominant values in his approach to decision making included a recognition of the lessons of history, the importance of balancing opposing values, the need to weigh the practical over the theoretical, and the obligation to preserve federalism. One biographer has described Harlan's approach to decision making as governed by "the canons of Process Jurisprudence":

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Judicial detachment and disinterestedness; a limited lawmaking role for the elitist judiciary; a search for "principled adjudication," which for Harlan meant an adequately broad rationale in an opinion, to serve as a clear guide in deciding future cases; a presumption in favor of adherence to precedent so as to promote clarity and stability in the law, even when a prior decision was found to be distasteful; emphasis in opinion writing, on careful exposition of the facts, marshalling of the arguments on both sides, and full-blown statement of reasons for a decision; the fostering of harmony between lawmaking institutions by deference to the actions of administrative agencies whenever possible; and self-conscious, methodical, and articulate balancing of competing social values in circumstances where the Constitution required such weighing.

With regard to fundamental freedoms, Harlan modified his policy of restraint somewhat, yet he consistently opposed the absolute protection of First Amendment freedoms against the exercise of governmental power. When such cases came before the Court, Harlan attempted to balance individual rights against the demands of organized society.

Potter Stewart joined the Court in 1958, replacing Harold Burton, who had retired. Rejecting both a doctrinaire adherence to the idea of judicial restraint and an inflexible commitment to individual rights, Stewart insisted on the need to balance individual rights against the needs of society. "The unlimited extension of an individual right, without attempting to place it in its modern setting and giving consideration to countervailing claims," he warned, "may so reduce the legislature's efforts to promote for the common good that, as a practical matter, legal recognition of that right will be irrelevant for most people." Convinced of the need for government to respond to social and economic.
conditions, Stewart objected to those decisions that, in his estimation, placed excessive weight on individual rights—the rights of the accused, the right of privacy, the right to vote, and the prohibition of laws establishing religion. Stewart's approach to decision making, consequently, was to concentrate on the specific facts of a case "rather than on generalized formulations of substantive constitutional standards," such as separation of church and state.

In 1962 President Kennedy appointed two close associates to the Supreme Court. Byron White took the seat formerly occupied by Stanley Reed and, from 1957-62, by Charles Whittaker. White's friendship with John Kennedy extended back to their service in the Pacific during World War II, but it was renewed during the 1960 Presidential campaign when he volunteered to head the Kennedy forces in Colorado. At the request of Robert Kennedy, the newly-elected President appointed White to the position of Deputy Attorney General. As indicated by this evolving relationship, White was firmly committed to the Kennedy brand of twentieth-century liberalism, and "in areas where political solutions are often unavailing and where the claims at issue relate to the material interests of disfavored groups and not symbolic notions of liberty," he readily adopted an activist attitude. For example, he consistently ruled in favor of claimants in cases involving racial discrimination, voting rights, and equal educational opportunity.

Like White, Arthur J. Goldberg was a member of the Kennedy team. He had been one of Kennedy's chief advisors.
during the campaign and had served as Secretary of Labor before accepting the judicial appointment. He took the seat that had been occupied by Felix Frankfurter since 1939. Goldberg acquired a reputation for defending individual rights during the three years he was a member of the Court. Viewing judicial power as an integral part of our political system but concerned that judicial review not be confused with judicial supremacy, he concluded that the justices "do have the great power to assert our national conscience."54

The dominant factor in Goldberg's deciding cases dealing with the Bill of Rights and personal liberty was his "commitment to principle," by which he meant a strict adherence to constitutional provisions. This was reflected in his votes on the two prayer cases.55

Commitment to principle also characterized the approach taken by the two survivors of the 1947 Court. By 1962 both Black and Douglas had moved toward a literal interpretation of the First Amendment and an increasingly restrictive understanding of the Establishment Clause. With regard to church-state issues, their insistence on strict separation probably evolved as they saw the Everson decision inviting further legislation to aid sectarian schools. Since politicians had been undeterred by the pronouncements of the majority in Everson against any other forms of aid, the two senior justices presumably felt compelled to clarify their original meaning and set more definite barriers against infringement of the First Amendment.
Black's movement toward an "absolutist" position, evident in his McCollum and Zorach opinions, was a logical extension of his rejection of substantive due process. Black objected to substantive due process because he believed it undermined the purpose of a written constitution by requiring the Court to create nebulous standards such as "fundamental fairness," "conscience-shocking conduct," or "reasonableness." By adopting a literal interpretation of the First Amendment, Black contended, the Court could circumvent the problems of inconsistency and personal prejudice, which are inevitable in the process of "balancing." 56

The great danger of the judiciary balancing process [he wrote] is that in times of emergency and stress it gives the Government the power to do what it thinks necessary to protect itself, regardless of the rights of individuals. If the need is great, the right of Government can always be said to outweigh the rights of the individual. If "balancing" is accepted as the test, it would be hard for a conscientious judge to hold otherwise in times of dire need. And laws adopted in times of dire need are often very hasty and oppressive laws, especially when, as often happens, they are carried over and accepted as normal. Furthermore, the balancing approach to basic individual liberties assumes to legislators and to judges more power than either the Framers or I myself believe should be entrusted, without limitation, to any man or group of men. 57

In addition to enhancing the powers of legislators and judges, balancing would fundamentally change the nature of government. The balancing, he maintained, had already been done: "The Framers balanced [the] freedoms of religion, speech, press, assembly, and petition against the needs of a
powerful central government and decided that in those freedoms lies this nation's only true security."\textsuperscript{58}

During a 1962 interview with Professor Edmond Cahn, Black expounded on his "absolutist" position. "No law," he explained, referring to the wording of the First Amendment, "means no law." He then admitted to being "slightly influenced by the fact that I do not think Congress should make any law with respect to these subjects [the rights protected by the First Amendment]."\textsuperscript{59}

Douglas, too, was moving toward an absolutist interpretation of the First Amendment. "The importance of procedural integrity as a shield for freedom of conscience was," according to one biographer, "a central theme in Douglas's approach to civil liberties."\textsuperscript{60} The common rejection of judicial balancing did not, however, mean that Douglas and Black agreed on what is meant by the term "establishment" as used in the First Amendment. Quite the contrary. Douglas adhered to the definition he had used in \textit{Zorach}, that establishment inherently involved expenditure of public monies for religious purposes, and Black persisted in his belief that establishment included any form of support or encouragement of religion by government. These differences found expression in their separate opinions in \textit{Engel} and \textit{Abington}. 

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III.

As had been true in earlier establishment cases, the Court divided not only in its decisions involving prayer in public schools but also on the meaning of "neutrality" as applied in church-state cases. In both Engel and Abington the majority found religious exercises in public schools a violation of the Establishment Clause, but their opinions also conceded that in other situations the government sponsors religious activities in order to assure the right to free exercise. The difficulty in drawing a distinction between allowing prayer in schools and official support for religion elsewhere prompted concurring opinions in both Engel and Abington and shaped the dissenting opinions of Justice Stewart. "Neutrality" clearly meant different things to different people.

Engel and Abington are also important because they raised the issue of future aid to sectarian schools. Most of the justices were prepared to deal with the cases on their own terms, but William O. Douglas was not. For him the question of religion in the public schools was most important because it afforded an opportunity to lay the groundwork for future decisions on aid to parochial schools. The fact that Douglas wrote his opinions from this perspective adds weight to our examination of these two cases.

Black again spoke for the majority in the New York Regents Prayer case, Engel v. Vitale. In an effort to avoid the problem of reconciling McCollum and Zorach, he relied on
history to support his position that government should not in any way be involved in the business of religion. "When the power, prestige and financial support of government is placed behind a particular religious belief," Black wrote, "the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." But the purposes behind the Establishment Clause included also "the belief that a union of government and religion tends to destroy government and to degrade religion" and "an awareness of the historical fact that governmentally-established religions and religious persecution go hand in hand." Convinced that the only way to achieve neutrality is by maintaining a strict separation between church and state, he concluded:

It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance. [Emphasis added.]

Douglas concurred with the result of the majority's opinion: the government had no right to authorize prayer in public schools. However, he adhered to his earlier position that establishment inherently involves expenditure of public monies for religious purposes. His objection to the New York Regents prayer differed from Black's in that he found "no element of compulsion or coercion in New York's regulation." For that reason, the case was distinguished from McCollum. The question, Douglas maintained, was "whether New York oversteps the bounds when it finances a
religious exercise." According to his reasoning, "A religion is not established in the usual sense merely by letting those who choose to do so say the prayer that the public school teacher leads. Yet once government finances a religious exercise it inserts a divisive influence into our communities." On the basis of this definition of establishment, Douglas not only found the Regents' Prayer unconstitutional but also concluded that the Everson decision "in retrospect" was "out of line with the First Amendment." "Its result is appealing," he admitted, "as it allows aid to be given to needy children. Yet by the same token, public funds could be used to satisfy other needs of children in parochial schools - lunches, books, and tuition being obvious examples." In making this statement, Douglas was certainly not rejecting the basic principle of government's helping needy children, but he was expressing his doubts about providing the aid through a church-related institution. His rethinking of First Amendment issues convinced him that the child-benefit theory was merely a subterfuge to permit assistance that would otherwise be unconstitutional.

The fact that Douglas shifted the focus of his opinion from prayer to aid to parochial schools suggests that he considered government funding of church-related schools a pressing and far more serious threat to the First Amendment than daily recitation of a nondenominational prayer. It also encourages speculation regarding his motive in voting to declare the Regents' Prayer unconstitutional. Since he
disagreed with Black's understanding of "establishment" and reiterated within his Engel opinion that an establishment entails the expenditure of public monies for religious purposes, Douglas was obligated to show how the saying of the prayer constituted an additional expense to the taxpayer. He did not do this. Instead, he proceeded to the discussion of Everson. The sequence of Douglas' opinion reveals how serious he considered the threat of establishment inherent in state and federal programs that channelled funds to nonpublic schools. Further it indicates a desire to use the opportunity at hand to reaffirm his opposition to such aid. Douglas' intent was unquestionably to add another precedent to the arsenal that could be used by the Court in future parochial aid cases.

Justice Stewart's was the single voice of dissent in Engel v. Vitale. Like Douglas, Stewart found no element of coercion in the New York law since those who objected to saying the prescribed prayer were readily excused. Permitting children to say a prayer in the public schools, he indicated, was not the equivalent of compelling them to participate in a religious exercise. "On the contrary, ... to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation." What is relevant, he insisted, is the history of religious tradition in the United States, "reflected in countless practices of the institutions and officials of our government." In light of the many official acknowledgements of a Divine Power found in our
national symbols and our governmental practices, the Court's prohibition of a voluntary, nondenominational prayer in state schools, he concluded, was inconsistent and unnecessary.

The companion cases *School District of Abington v. Schempp* and *Murray v. Curlett* (1963) challenged the practice of reading from the Bible or reciting the Lord's Prayer at the beginning of the school day. In five separate opinions (three concurring and one dissenting), the Court ruled eight to one that religious exercises of any sort in a public school are unconstitutional. The care taken by the justices to set forth their reasoning anticipated the popular outrage that would greet this decision and, as in earlier establishment cases, revealed the difficulty of distinguishing between that which is forbidden by the First Amendment and that which is not.

Once again the justices tried to determine the meaning of "neutrality." This time the majority even offered a test that could be used by the Court when dealing with questions of establishment. The test and accompanying guidelines that were suggested in the concurring opinions tacitly acknowledged that the wall of separation was neither straight nor high. Stewart's dissent openly challenged the wall's existence.

Justice Clark readily admitted in his majority opinion that while the principle of neutrality was the governing rule in earlier church-state decisions, the working definition of that term varied according to individual interpretations of the Establishment Clause. For some, neutrality meant total
abstention "from fusing functions of Government and religious sects," whereas, for others, the First Amendment required total separation but not "in every and all respects." In an effort to achieve some consistency, Clark proposed a test:

What are the purpose and 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.

The coercive effect of an enactment, Clark continued, may also be a determining factor. In free exercise cases, a ruling that a law is unconstitutional depends on evidence of coercion, but that is not true in those involving the question of establishment.

Clark rejected charges that prohibition of prayer in public schools would constitute hostility toward religion while at the same time establishing a "religion of secularism." This decision, he pointed out, precluded religious exercises but did not forbid the study of comparative religion, the history of religion and its relationship to the advancement of civilization, nor the study of the Bible as literature.

Refuting the contention that the right to free exercise of religion implied action by the government to facilitate the practice of religion, Clark wrote:

We cannot accept that the concept of neutrality ... collides with the majority's right to free exercise of religion. While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has
never meant that a majority could use the machinery of the State to practice its beliefs. [Emphasis Clark's]78

In short, enforcement of the constitutional mandate against any law tending towards establishment did not, so far as Clark could see, undermine the guarantee of free exercise. His clear and firm pronouncement on this point purported to set strict limitations for dealing with the issue of aid to parochial schools.

As in his Engel opinion, Douglas anticipated future suits challenging government programs to fund nonpublic schools. He used Abington to restate his opposition to such programs. He contended that the use of public facilities for religious exercises was comparable to the expenditure of public funds and, for that reason, unconstitutional. Having pronounced this judgment, he continued:

The most effective way to establish any institution is to finance it; and this truth is reflected in the appeals by church groups for public funds to finance their religious schools. Financing a church either in its strictly religious activities or in its other activities is equally unconstitutional, as I understand the Establishment Clause.... [T]he institution is an inseparable whole, a living organism, which is strengthened in proselytizing when it is strengthened in any department by contributions from other than its own members. [Emphasis Douglas'] 79

The amount of the expenditure, Douglas concluded, is unimportant. "[I]t is the use to which public funds are put that is controlling."80

William Brennan's concurring opinion refuted, at considerable length, a central contention of Stewart's Engel dissent - that the history of this country reflected a
tradition of cooperation between religion and government manifest "in countless practices of the institutions and officials of our government."\textsuperscript{81} Emphasizing that a "too literal quest for the advice of the Founding Fathers [is] futile and misdirected" for a number of reasons, Brennan noted that four critical changes had occurred since ratification of the First Amendment: (1) the Framers "were concerned with far more flagrant intrusions of government into the realm of religion than any that our century has witnessed," (2) "the structure of American education has greatly changed," meaning that education is now largely a public responsibility where it had been almost entirely private in the late eighteenth century, (3) the population of the country is "vastly more diverse" in terms of religious belief than it was 200 years ago, and (4) "[t]he interaction of these two important forces in our national life has placed in bold relief certain positive values in the consistent application to public institutions generally, and to public schools particularly, of the constitutional degree against official involvements of religion which might produce the evils the Framers meant the Establishment Clause to forestall."\textsuperscript{82} He declared that the use of the history "must limit itself to broad purposes, not specific practices."\textsuperscript{83} What is relevant, Brennan maintained, is the history of religious toleration insofar as it applied or applies to the intermingling of religion and public education.
Government policy that provided for or merely allowed religious exercises in publicly-funded schools, Brennan showed, often resulted in conflict among religious groups and hostility toward government. Influenced by the widespread criticism of such policies, state courts in the late nineteenth century began to question the constitutionality of religious exercises, basing their decisions on state constitutional provisions. These courts, the Justice observed, "attributed much significance to the clearly religious origins of avoiding sectarian controversy in their conduct."

Brennan complemented his discussion of history with an analysis of the facts in the cases before the Court. These major arguments for continuing religious exercises had been presented to the court: (1) the assertion that the exercises had taken on a secular character and fulfilled the secular purpose of fostering tolerance and harmony among students; (2) the idea that the exercises would not violate the neutrality principle so long as the teachings of no particular sect dominated; and (3) the contention that participation was voluntary since students could be excused or exempted. Brennan rejected each of these. With regard to the first, he reasoned that "[t]o the extent that only religious materials" are employed to encourage tolerance and harmony among students, "it seems to me that the purpose as well as the means is so plainly religious that the exercise is necessarily forbidden by the Establishment Clause."

Rejecting the neutrality argument, the Justice explained that
"any version of the Bible is inherently sectarian," and added that objections from certain sects derive not so much from the specific materials used but, rather, from the manner in which they are used.88 The provision for excusal or exemption, he concluded, "necessarily operates in such a way as to infringe the rights of free exercise of those children who wish to be excused." Fearful of being criticized or condemned for a profession of disbelief or nonconformity, students would probably hesitate to apply for an exemption and thus forfeit their right to worship or not worship according to individual conscience.89

Despite his strong opposition to religious activities in the public schools, Brennan restated and clarified his position "that not every involvement of religion in public life is unconstitutional."90 Noting with approval provisions for chaplains and churches for the military establishment, the non-devotional use of the Bible in the public schools, tax exemptions for church property, nondiscriminatory programs of government aid, and activities - such as mandatory Sunday closings or the use of religious mottoes on public buildings, currency, and documents - that have essentially lost their religious meaning, Brennan indicated where he would draw the line in ruling government policies or programs constitutional.91 The two general categories of permissible activities were (1) government programs or policies to assure free exercise of religion, and (2) the continuation of traditions that originally had a religious purpose but are now part of the civil culture and,
therefore, may be considered religiously neutral. Conspicuously absent from his list of what might be allowed was the allocating of funds to sectarian schools.\(^92\)

Justice Goldberg similarly attempted to identify the purpose and appropriate guidelines for government action with regard to the First Amendment. Joined by Justice Harlan, Goldberg declared that the intent of the religion clauses "is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment to that end."\(^93\)

Like Brennan, Goldberg and Harlan acknowledged that "unavoidable accommodations" must be made by government in order to assure free exercise while guarding against establishment.\(^94\) And, like Clark, they warned that "untutored devotion to the concept of neutrality can lead to ... a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious."\(^95\) They concluded, however, that a ruling against religious exercises in public schools did not constitute hostility toward religion nor the establishment of secularism.

Stewart disagreed.

"[A] refusal to permit religious exercises ... is ... not ... the realization of state neutrality, but rather ... the establishment of a religion of secularism, or at the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private."\(^96\)

Defending his contention that the majority opinion was not neutral, Stewart charged that his colleagues had applied a different standard to public schools than to other
government-owned property. He also argued that because participation was voluntary, no coercion was involved so far as practice of religion was concerned. Rather, the question of coercion arose when the government forbade free exercise.

The duty laid upon government in connection with religious exercises in the public schools is that of refraining from so structuring the school environment as to put any kind of pressure on a child to participate in those exercises; it is not that of providing an atmosphere in which children are kept scrupulously insulated from any awareness that some of their fellows may want to open the school day with prayer, or of the fact that there exist in our pluralistic society differences of religious belief.

The fact that the exercises were not consistently drawn from the traditions of a particular denomination, Stewart believed, was further evidence that no establishment had occurred.

In challenging the definition of neutrality employed by his colleagues, Stewart objected to their reliance on Jefferson's description of a "wall of separation" between church and state. "[T]he two relevant clauses of the First Amendment," he declared, "cannot accurately be reflected in a sterile metaphor which by its very nature may distort rather than illumine the problems involved in a particular case." For the cases at hand, he concluded, the Court had insufficient facts to determine whether the contested laws violated the First Amendment. His decision was not, therefore, to uphold the laws but to remand the cases for rehearing.
IV.

The care and concern taken by the justices in deciding the released time and prayer cases was justified. During the period 1947-67, state legislatures expanded their programs for aid to nonpublic schools; and the federal government, after nearly two decades of debate, began actively to support education as well. Programs to assist private, including church-related, schools were part of a larger movement to improve the quality of education throughout America. This movement, in turn, resulted from a climate of rising expectations, concern over national security, and widespread acceptance of the idea that government has a responsibility to assure equal opportunities for all its citizens.

The political, social and economic changes in American society that convinced legislators of the need to increase government funding of education also influenced the thinking of the justices who ruled on the constitutionality of such funding. Those justices who adhered to a policy of restraint, deferring to the decisions of the democratic branches, essentially conceded that the high costs of education provided adequate reason to subordinate constitutional concerns. Judicial activists divided between those who were persuaded by the designation of the laws as equalizing opportunities and those who believed the legislation infringed on individual rights.
We should examine the social, economic, and political developments because of their relevance to the decisions of the Warren Court involving aid to sectarian schools. The focal point for this overview will be the campaign to secure federal aid to education, culminating in the passage of the Elementary and Secondary Education Act of 1965.

Attempts to allocate federal funds to education date as far back as the 1870s although widespread popular concern for the quality of American education did not emerge until the 1930s. The idea of federal aid to education was debated following World War I because of the discovery that large numbers of army draftees were illiterate. During the Depression, the National Education Association lobbied extensively for federal assistance since local community school systems had been hard hit by the economic crisis, forcing school closings, staff and salary cutbacks, and the elimination of programs. The NEA continued its campaign throughout the war and into the 1940s.

The argument for federal assistance evolved during the post-World War II period into a plea for equalizing educational opportunities. Diane Ravitch, a leading scholar in the history of education, explained:

...[T]here was reason to hope that the end of World War II might be the right time to break through these traditional grounds of deadlock [race, religion, and fear of federal control]. During the war years, Americans had talked a great deal about defending the ideals of democracy and the American way of life, and the education lobby sensed that the time had come to base its appeal on the promise of democratic ideology. But beyond ideology was compelling need. The teacher shortage was a national problem, as were low salaries.
There was also a critical need for new classrooms and schools, not only because replacement and repair had been deferred by the Depression and the war, but because as early as 1946 and 1947, it was clear that the fast-rising birthrate would produce a "baby boom" that would overwhelm existing classroom capacity. No less important than the sheer physical need was awareness, at least among educational leaders, that the nation was entering an age of technological and scientific advancement that required rising levels of education in order to maintain economic growth. And, perhaps more sharply than at any time in the past, there was concern that both of these trends—the growth of population and the rising levels of education—would exacerbate divisions within the society along the lines of race and class and intensify inequality unless educational opportunities were equalized across the nation.

The need to equalize opportunities was reinforced by the fact that education in America was no longer an intellectual pursuit for the exceptional student. Influenced by the progressive ideals of John Dewey, American education in the period between the wars had shifted from being primarily academic in its orientation to what was called "life adjustment education." This new view saw education as helping the individual to "get ahead."

It stimulated economic progress by producing an industrious and resourceful work force; it promoted social harmony by teaching children about the history and culture of the nation; it contributed to the nation's well-being by teaching children how the government works and why they should participate as citizens.

The new curriculum, as described in the Report of the Educational Policies Commission published in 1944 and entitled Education for All American Youth, was designed to provide an education to equip "all American youth to live democratically with satisfaction to themselves and profit to society as home members, workers, and citizens."
Increased reliance on technology in business and industry made additional years of schooling essential for anyone who wished to secure a job with a future. This change in the economy dictated that those who received an inferior education—regardless of inherent ability, ambition, or hard work—would be denied a fair chance to compete in the marketplace. The systematic discrimination against blacks in segregated school districts, therefore, took on greater importance as the twentieth century progressed, as did the _de facto_ "discrimination" against children who lived in poorer school districts.

Because of economic developments and resultant changes in popular attitudes toward education, the post-World War II effort to appropriate federal funds for education had bipartisan support. President Truman (Democrat) strongly supported such legislation. Senator Elbert Thomas (Democrat) of Utah proposed a bill in January 1949 to grant $300 million in federal aid to education, and Robert Taft (Republican) led the Senate in May of that year to a 58-15 vote in favor of assistance. The Thomas bill, which would have allowed states to decide whether nonpublic schools should receive public monies, was endorsed by the National Association for the Advancement of Colored People with the condition that funds be distributed equitably. White Southern senators, influenced by a 1938 federal court ruling that called for equalizing facilities and salaries of teachers in segregated schools, saw federal funds as the means to preserve segregation. Implicit in southern support was the
understanding that federal funds would not be accompanied by federal desegregation stipulations.\textsuperscript{109}

Although Catholics did not vote against the bill, the Church resented the potential exclusion of parochial schools. The Church's long-held fears that government aid would inevitably mean government control had dissolved as a result of participation in the National Youth Administration, the federal lunch program, and, later, the GI bill. Consequently, the Catholic Church supported government assistance for parochial schools.\textsuperscript{110}

The limited opposition to the Senate bill centered on the fear of federal encroachment into states' rights; however, when the House took up consideration of the measure, the possible establishment of religion became a focal point for discussion as well. Representative Graham A. Barden, a Democrat and former school teacher from North Carolina, was assigned responsibility for handling federal aid to education legislation. A supporter of federal assistance, Barden nevertheless objected to certain aspects of the Senate version and, consequently, wrote a separate bill. This House draft differed from the Senate's in three ways: (1) it limited federal funding solely to public schools; (2) it expressly barred federal expenditures for transportation and health services - thus challenging the \textit{Everson} decision; and (3) it removed the language that required Southern states to make a "just and equitable" distribution of funds between white and black schools.\textsuperscript{111}
The church-state issue was the determining factor in the debate over the Barden bill. Protestants and Other Americans United for Separation of Church and State, an organization formed in the wake of the Everson decision, strongly endorsed the measure, as did numerous Protestant and Jewish organizations. The NEA, won over by the assurance that all money would go to public schools, also supported the House measure. Other proponents of public education — veterans and civic groups — followed suit. The New York Times also put its weight behind the Barden bill.112

Catholic Church officials and Roman Catholic members of Congress protested, for the bill not only closed the door to possible new forms of government assistance but also attempted to cut off those kinds of aid — transportation and health services — deemed constitutional by the Supreme Court. Francis Cardinal Spellman took up the battle outside Congress, while John McCormack, majority leader in the House, and John Lesinski, Chairman of the House Committee on Education and Labor, led the opposition on the floor.113 Not surprisingly, the Barden bill was defeated, and federal aid to education was tabled once again.

The issue did not, however, go away. On the contrary, a series of publications — Arthur Bestor's Educational Wastelands (1953), Mortimer Smith's The Diminished Mind: A Study of Planned Mediocrity in Our Public Schools (1954), Rudolph Flesch's Why Johnny Can't Read (1955), and Paul Woodring's A Fourth of a Nation (1957) — raised serious questions regarding the ability of local and state
governments to provide high quality education in an increasingly technological age.

The launching of Sputnik in 1957 reinforced doubts and led to the passage of the National Defense Education Act of 1958. Using the rationale that quality education is essential to national strength and security in a technological age, the Members of Congress finally approved federal aid to public education. Congress initially allocated $40 million to provide federal money for student loans; to assist states in purchasing equipment for teaching science, mathematics, and modern languages; to support graduate education and retraining of teachers; to establish guidance counseling programs for high school students; and to expand programs in vocational education. Additional projects funded by the act included research and publication of information to update teaching techniques.

Public attention was again drawn to the need for excellence in education by a report sponsored by the Rockefeller Brothers Fund and coauthored by John Gardner, President of the Carnegie Corporation. Entitled The Pursuit of Excellence, this 1958 publication "advocated the development of human potential as a national goal and insisted that the nation could encourage both excellence and quality without compromising either."114 The following year, James B. Conant, former president of Harvard University, suggested ways of achieving excellence in his best-seller, The American High School Today. Comprehensive high schools, he believed, could provide a good general education for all
students as well as nonacademic courses for the non-college bound and advanced courses in mathematics, science, and foreign language for the academically talented.\textsuperscript{115}

By 1960, the federal government's policy toward public education had developed around three major principles:

1. It recognized the responsibility of the states for the control of operation of public education;
2. It proclaimed federal responsibility when it identified a danger that the citizens were being insufficiently educated to maintain the nation's political and economic stability, and its defense;
3. It exercised its responsibility by contributing to the support of public educational activities, not by controlling them.\textsuperscript{116}

All three found expression in the Democratic Party Platform of 1960 and in the campaign speeches of John F. Kennedy.\textsuperscript{117}

From the beginning of his political career, Kennedy had supported federal aid to education. In 1949, he had introduced legislation to allocate federal funds for buses, health services, and textbooks for parochial and private schools.\textsuperscript{118} In 1958, he not only supported the National Defense Education Act but also introduced legislation to channel federal monies through the states to local communities to finance school construction, either directly or indirectly.\textsuperscript{119} In contrast to many of his colleagues in the Senate, Kennedy did not limit his support for federal assistance to science and technology. "[A]re we concerned only with the production of scientists, mathematicians, engineers, and foreign-language specialists?" he asked in a speech before the Senate, January 28, 1958.

Recognizing our serious handicaps in those areas, are we not in equally urgent need of improving the education of all Americans - the
diplomats and politicians who must make the hard decisions of the cold war, the judges and educators and writers who must carry on the American way in its hour of greatest challenge, the citizens of every occupation and status who will decide, in the last analysis, whether we stand or fall as a nation? More and better educated scientists cannot alone save the United States today. All American education is in crisis. 120

Kennedy's commitment to excellence in education was coupled with a recognition of the gross disparities in the quality of education resulting from poverty and discrimination. 121 "The expenditures per pupil in the 10 poorest States are less than half the expenditures made in the 10 richest States," he declared during his 1960 presidential campaign in a statement prepared for the National Education Association. "The resulting differences in the quality of education received in the various States make the need for remedial action painfully evident." He continued:

These conditions cannot get better without substantial assistance from the Federal Government. In four years, 4.3 million more children will be clamoring for admission to our schools. By 1969, high school enrollment will increase at least 40 per cent.

We are devoting less than $1 out of every $30 to our educational system. State and local governments cannot keep up with fast-rising construction demands. They are already spending six times as much for education as they did 20 years ago. Meanwhile, the Federal Government has failed to do its share. 122

Kennedy's own efforts to expand the role of the federal government in education were thwarted because he objected to public funding for sectarian schools. Conscious of the fact that he was the first Roman Catholic to be president, he insisted on an "absolute" separation of church and state. In
striking contrast to his earlier position that non-religious services could constitutionally be provided to all children, he rejected all proposals to extend government assistance to church-related schools. In 1961 this inflexible position led to the defeat of his aid-to-education bill by a coalition in the House of Representatives made up of Republicans who opposed federal social programs, Catholics who resented the exclusion of parochial schools, and Conservative Southern Democrats who saw the civil rights implications of receiving federal funds.123

Lyndon Johnson's extraordinary commitment to federal aid to education derived from more than a desire to fulfill the Kennedy legacy. During the 1930's, Johnson had taken advantage of his appointment as director of the National Youth Administration for the State of Texas, using his position to enlarge his political network and to establish a base for election to Congress. In the 1960's, he would use federal aid to education - a latter-day counterpart to the NYA - as a means to demonstrate his political influence.124

While education and poverty had been central to the Kennedy agenda, Johnson carefully distinguished his own program for reform using the rubric "The Great Society." His vision for America included the equalizing of opportunities and a general improvement in the standard of living. Influenced by sociologists and economists and, more directly, by his own political advisors, the President on January 12, 1965, proposed a $1.5 billion appropriation for elementary and secondary schools, both public and private. Central to
the President's proposal was reliance on the child-benefit theory, used by Black in the Everson opinion. John Kenneth Galbraith, whose book The Affluent Society had influenced both Kennedy and Johnson, was instrumental in convincing the administration to adopt a child-benefit approach based on levels of family income and disregarding the nature of the schools. This idea won the support of three key figures: Wilbur Cohen, Undersecretary of the Department of Health, Education and Welfare; John Gardner, Chairman of the President's task force on federal aid to education; and Francis Keppel, Commissioner of Education under both Kennedy and Johnson.125

Johnson's own speech in support of the education package emphasized the idea that the aid was directed toward the individual disadvantaged child. The purposes of the bill, he explained, were:

- To bring better education to millions of disadvantaged youth who need it most.
- To put the best educational equipment and ideas and innovations within reach of all students.
- To advance the technology of teaching and the training of teachers.
- To provide incentive for those who wish to learn at every stage along the road to learning.126

The President's determination to pass the Elementary and Secondary Education Act without amendment indicates that his purpose was not merely altruistic but also highly political. Johnson envisioned the "Great Society" as the means by which he would leave a significant mark on American society. The education bill, a cornerstone of his program, had to be
passed intact so that his contribution could be clearly identified.\textsuperscript{127}

Furthermore, Johnson was confident that he had the political clout to effect the passage of the bill in precisely the form he wanted. He had, just two months before, won a landslide election, defeating Republican Barry Goldwater by a margin of nearly seventeen million votes. His personal victory was enhanced by increased majorities for the Democrats in both the Senate (68-32) and the House of Representatives (295-140), representing a gain of two in the upper chamber and of thirty-seven in the House.\textsuperscript{128} Relying on his popular mandate, his powerful influence in Congress cultivated while serving as Senate majority leader, and his expertise in political manipulation, Johnson was certain that he could push through his proposals.

Johnson's goal was to avoid lengthy debate of the church-state issue. Administration officials were in close touch with pressure groups during the writing of the bill so that the final draft met the approval of the lobbies that were most influential and most directly concerned.\textsuperscript{129} The bill was then pushed through the House Committees with only minor amendments. On reaching the floor, the Democratic party leadership "rammed through a vote limiting the whole floor consideration of the bill to three days."\textsuperscript{130} The debate - though limited - focused on constitutional issues: the First Amendment prohibition of laws "respecting an establishment of religion" and the transfer of local authority to the federal government. Given the seriousness
of the issues as well as the size of the appropriation, members of Congress resented the strong-arm tactics of the administration. In an effort to temper these feelings and hoping to shift the attention from the Bill of Rights to basic human rights, Johnson appealed "as your President, to give these American kids what they deserve." The bill passed 263-153 and went on the Senate where, after just three days of debate, it was approved 73-18. The swift passage of the bill - eighty-seven days - was a dramatic statement of Johnson's political skill and influence, but the passage of the bill was also evidence of profound political and social developments.

The most obvious political factor was that Catholics, for the first time, constituted the largest number of representatives from a single denomination in the House. Previously, Protestants had dominated. In the 89th Congress, however, Catholics outnumbered their closest rivals, the Methodists, 107 to 88. This growing presence and power of Catholics in Congress pointed toward greater accommodation by non-Catholics.

In addition, the strongest opponents of earlier proposals for federal education assistance were, by 1965, willing to compromise. The National Education Association, which had strongly objected to any aid to nonpublic schools, agreed to support certain programs providing indirect assistance; the NEA's continued opposition might have prevented public schools, too, from receiving federal funds. Catholic educational leaders realized that they could not
expect aid equal to that given the public schools and took what was offered. Southerners withdrew their opposition following the passage of the Civil Rights Act of 1964 since their objections to federal aid to education — interference with local segregation policies — were no longer meaningful. In addition, Johnson won the support of key northern urban and suburban congressmen by promising "to go 'all out' to alleviate the problems of the public schools" in their districts. In a speech delivered in March 1965, the President "assured these critical legislators . . . that he would 'use every rostrum and every forum and every searchlight that I can to tell the people of this country and their elected representatives that we can no longer afford over-crowded classrooms and half-day sessions.'" Beyond the particular political circumstances, American attitudes were changing.

The opinion framers among Protestants, Catholics and Jews were living side by side in Metroamerica, anxious to appear educated and emancipated beyond their religious group clashes that were now being called bigotry. . . . The influence of Metroamerica on the general population joined with the spreading national popularity of ecumenicism to lessen the rancor over whose children received public funds for their schooling.

In other words, the tenor of the debate on the issue of aid to sectarian schools was modified. Greater accommodation resulted from the fact that members of different denominations lived and worked together and had come to respect one another's beliefs and practices combined with the concerted efforts among religious leaders to emphasize the
common characteristics of their faiths and to encourage cooperation for broad social goals, such as peace and human rights. Consequently, thinking on the subject of church-state separation shifted from a pre-occupation with establishment of religion to commitment to protect free exercise. In terms of aid to parochial schools, this shift found expression in the argument that parents and children should be free to choose church-related schools and children should not be deprived of certain benefits provided by government because of that choice.

In addition, reliance on the child-benefit theory by state legislatures had increased as the financial plight of parochial schools became more apparent. Such widespread use of the child-benefit approach helped, in turn, to legitimize this indirect method of assisting nonpublic schools. By the early 1960s at least 280 school systems, mainly in the midwest, had instituted shared time programs to enrich the curriculums of parochial schools. Private school advocates were lobbying for the extension of auxiliary aids and services to include textbooks, lunches, guidance and counselling programs, the loan of educational equipment, programs for speech and learning disabilities, and remedial reading programs as well as transportation. In addition, Citizens for Educational Freedom, an organization of Catholic laymen, had proposed a voucher plan. Under this system, all parents of school-age children would be provided with vouchers from the local government to pay from the public
coffers the cost of "tuition" at either public or private, including parochial, schools. The real crisis for Roman Catholic schools came in the mid-sixties, at the very moment when Johnson was pushing his program through Congress. The United States Office of Education reported 4,370,277 children enrolled in Catholic elementary schools in 1965-66; by 1970 only 3,700,000 remained. Secondary schools experienced a similar decline. The wave of closings began in 1966-67 and reached its peak in 1968-69 when 445 Catholic schools went out of existence. That figure, Paul Sorauf reminds us, "does not in any way measure the retrenchments in programs of other schools." The rising costs of education due to inflation, higher salaries for teachers, and new expectations for education help to explain some of the financial difficulties of the Catholic schools; however, circumstances within the Church were more important. During the 1960s a large number of nuns and priests left their religious orders. The departure of these individuals, who had in 1960 provided two-thirds of the teachers in the parochial schools, forced the Church to hire lay teachers who had to be paid much higher salaries and were more militant. By 1970 over half of the elementary school teachers in Catholic schools were laypersons. Furthermore, declining enrollments, caused in part by demographic factors, represented a trend away from religiously-segregated schools. As Catholics moved to the suburbs, they left behind inner-city parish schools that became both unused and outdated. Church members who remained
in the city could not afford or chose not to provide the necessary funds to revitalize their schools. Increasingly, middle-class Catholic parents sent their children to public schools not only to take advantage of the superior facilities and more varied programs but also because of the greater pluralism in those schools. The upward social mobility of Catholics found expression in their rebellion against religious orthodoxy and discipline.\(^{143}\)

As both church attendance and Sunday giving fell off, schools were forced to raise tuition fees. In doing so, they cut off those who would have attended: children whose parents had not yet achieved a level of success sufficient to migrate to the suburbs, children for whom the parochial school had provided a desirable alternative to urban public education.\(^{144}\)

In light of these developments, lobbyists for aid to parochial schools emphasized the burden on taxpayers if all church-related schools were forced to close. A 1961 brief prepared by the National Catholic Welfare Council included statistics demonstrating the extent of responsibility for education assumed by Catholic schools.

\[\text{In nineteen states (and the District of Columbia) having a total school population of 21,868,683, and whose school population represents 51.9\% of the total national school population, Catholic parochial schools are performing the public service of educating 18.6\% of all children in elementary and secondary schools.} \quad \text{[Emphasis Ball's]}\]

Catholic elementary schools are conducted in all of the fifty states, with a total, in 1960, of 10,662 schools throughout the nation. The number
of such schools per state varies from eight in Alaska to 1,136 in the state of New York. In the Archdiocese of Chicago alone are 426 Catholic elementary schools. In the City of Pittsburgh, Catholic elementary schools educate 44% of the entire elementary school population. There were in 1960 2,426 Catholic elementary schools in the United States.145

The underlying argument here was that the public received substantial benefit from the existence of sectarian schools, particularly because the services provided by the church-related schools were, in many cases, of a secular nature.

The public welfare function of parochial schools, the brief asserted, was evident in both the curriculum and the policies. "[T]he religious aspect in church-related schooling is in addition to, ... not a subtraction from, basic citizen-education requirements. The pupil ... learns religion in addition, and the religious dimensions of secular knowledge."146 Like their counterparts in public schools, Catholic school teachers "always stressed patriotism and other civic virtues."147

[I]t may further be noted that Catholic educational efforts - like many nonpublic educational efforts - have evolved over the years numerous schools of special achievement and schools for exceptional groups, such as the gifted and the mentally or physically handicapped, and have pioneered many valuable new teaching methods.148

And, finally, the Catholic school "is an important source for social democracy" by helping to integrate children from different ethnic and racial backgrounds.149

The argument that Catholic schools played an important role in furthering racial and ethnic integration was clearly intended to address issues that were gaining increasing
attention as the country moved into the 1960s. As Diane Ravitch explains: "[T]he Cold War competition with the Soviets moved to the back burner and lost its motivating power. Identifying the gifted and stimulating high achievement paled as a national goal in comparison to the urgency of redressing racial injustice." The NCWC brief supported its public welfare argument by claiming substantial responsibility for helping to achieve a socially desirable end:

Although the [parochial] schools are primarily for the education of Catholic children, non-Catholic children are admitted as a matter of universal policy where there is room. The record of Catholic schools generally with respect to Negro and other nonwhite children has been distinctly creditable. These schools have for the most part not been located according to de facto zoning which divides neighborhoods racially or economically. Thus, the Catholic school has been an invaluable training ground to prepare citizens for a full participation in a pluralist society.

The civil rights argument extended, however, beyond racial integration to include the individual's right to free exercise.

Proponents of aid insisted that the closing of church-related schools would deny those who preferred sectarian education the right to free exercise. Charging that public schools were no longer "neutral" but increasingly secular, they maintained that the rights of parishioners deserved particular attention to assure that all who preferred religiously-oriented education would have it available for their children. One spokesman for aid to parochial schools explained, "Catholics do not look upon the claim to
share in general welfare benefits — including education itself — as a raid on the public treasury but as an issue to be argued in the civic forum because they feel it concerns civil rights."153

Indeed, First Amendment issues provided a focal point for the public debates on aid to sectarian school throughout the period from 1947 to 1967. Where opponents based their objections on the prohibition of any law respecting an establishment, supporters constructed their case around the free exercise clause. However, when the Supreme Court agreed to decide on the constitutionality of a New York textbook law, modelled after the Elementary and Secondary Education Act of 1965, the justices gave considerable weight to the economic and social concerns that had impelled the legislators. Consequently, the majority were persuaded by practical considerations — the higher costs of education and the possible closing of a large number of sectarian schools and by the dominant philosophy of the day — the desire for equal and high quality education for all of America's children.

Felix Frankfurter warned Jackson that his jurisdictional point (the focus for his separate opinion in McCollum) would "give the dominant impression that you are retreating from your concurrence in Everson. I have very little doubt - the truth is I have none - that such will be the interpretation, and not unreasonably, placed upon what you have written." Felix Frankfurter, Letter to Robert H. Jackson, 12 February 1948, Frankfurter Papers, Box 69, Library of Congress.

5. McCollum, 333 U.S. at 212.
6. Id. at 210.
7. Id. at 211.
8. Id. at 216-17.
9. Id. at 227.
10. Id. at 235.
11. Id.
12. Id. at 235-36.
13. Id. at 256.
14. Id. at 255.
15. Zorach, 343 U.S. at 312.
16. Id. at 313-14.
17. Id. at 314.
18. Id. at 318.
19. Id. at 319.
20. Id. at 320.
21. Id. at 320-25.
Students of the Court have labelled Douglas' theory, as presented in *Zorach v. Clauson*, "benevolent neutrality."

Two of the justices who participated in the *Zorach* case were new on the Court. Sherman Minton filled the vacancy left by Wiley Rutledge's passing, and Tom C. Clark replaced Frank Murphy. Minton resigned in 1956 and William J. Brennan took his place.

G. Edward White, *Earl Warren: A Public Life* (New York: Oxford University Press, 1982), p. 16. White states that "Early California Progressives envisaged affirmative government as a restorative moral force, the purpose of which was to purge California's political culture of corrupt special interests. Government was more of an admonitory than a paternalistic agent: The idea that citizens were entitled to certain economic and social benefits, notwithstanding their status or condition, was foreign to early California Progressive thought." *Ibid.*, p. 102.


White, *Earl Warren*, p. 218. Anthony Lewis makes this same point. In a speech given by the Chief Justice to the Jewish Theological Seminary in New York in 1962, Lewis states, Warren "spoke of law as floating 'in a sea of ethics' but indicated that law did not go ethically far enough. . . . [I]n the absence of other formal methods of weighing ethical considerations in life, the Chief Justice evidently felt that law and the courts must do so to a significant degree." Lewis, *Earl Warren*, p. 2725.


Earl Warren, "Address to the National Convention of
the National Education Association, San Francisco, California, 2
July 1951," in The Public Papers of Chief Justice Earl
Warren, ed. Henry H. Christman (New York: Simon and Schuster,

Frankfurter commented that if Minton had waited until
after election day to retire, Brennan "would never have been
on the Supreme Court of the United States. Because they
wouldn't have looked for a sitting Catholic judge in a state
in which it's important." Felix Frankfurter, interview by
Gerald Gunther, 15 September 1960, Part II, Frankfurter

John R. Schnichaisyer, Judges and Justices: The Federal

Stephen J. Friedman, "William J. Brennan," in Justices
of the U.S. Supreme Court, p. 2855.

William J. Brennan, "Constitutional Adjudication,"
Notre Dame Law Review 40 (1965):559, 569, quoted in Friedman,
"William J. Brennan," Justices of the U.S. Supreme Court, p.
2855.

William J. Brennan, "The Role of the Court - the

Benno Schmidt, Jr., interview by Lawrence Bruser, 1975,

Richard Kirkendall, "Tom C. Clark," in Justices of the
U.S. Supreme Court, p. 2667.

William Douglas claimed that Harlan's appointment "was
due largely to the efforts of Harold Burton." (The Justice
Harlan appointed by President Eisenhower was the grandson of
Justice John Marshall Harlan, who had been the sole dissenter
in the 1896 Supreme Court decision upholding the
constitutionality of segregation.) Burton, he explained,
"thought that the name Harlan was an important one in
Constitutional history at this particular time [1955] in view
of the emergence of the racial problem and the increasing
importance of the decisions in the field of minority rights,
protection of Negroes, restrictive covenants, segregation.
And the symbol of equality had for the races centered
pretty much around Harlan's dissent . . . in Plessy v.
Ferguson." William O. Douglas, interview by Professor Walter
F. Murphy, 5 April 1963, pp. 297-98, Princeton University
Library.
In the 1967 Term, Harlan wrote 20 concurring opinions; no other justice wrote more than 11. Harlan had "come to believe that the dissenting opinion has an important place and that the judge as advocate of his own convictions must speak to future courts, to the bar, and to the public as well as to his colleagues. Thus the Justice went from 23 dissenting votes and 8 dissenting opinions during his first full term to 97 dissenting votes and 24 dissenting opinions in the 1963 Term." David L. Shapiro, ed., The Evolution of a Judicial Philosophy: Selected Opinions and Papers of Justice John M. Harlan (Cambridge: Harvard University Press, 1969), p. xxvi.

A study of dissent of the Supreme Court for the period 1963-1967 revealed the following (average dissenting votes per term):

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White, American Judicial Tradition, p. 345. White's sharp evaluation may be related to the fact that he was at one time a clerk to Chief Justice Warren.


White, American Judicial Tradition, p. 354.


Blasi, ed., The Burger Court, p. 255.
53 Ibid.
55 Ibid., p. 2989.
58 Ibid., p. 48.
61 Engel, 370 U.S. at 431.
62 Id. at 431-32.
63 Id. at 435.
64 Id. at 438.
65 Id. at 439.
66 Id. at 442.
67 Id. at 443.
68 Id.
69 Concerned that his Engel opinion might be misunderstood, Douglas published The Bible and the Schools in 1966. He said: "[Christianity] does not need state subsides, nor state privileges, nor state prestige. . . . What the Roman Catholics, the Baptists, or the Presbyterians can command of the public treasury or in other public support, so in time can the Moslems or the Mormons as they grow politically stronger." Stephen Paul Strickland, ed.,
This was not the only occasion in which Douglas redirected his discussion to the question of government aid for parochial schools when dealing with a church-state issue. In *Walz v. Tax Commission of the City of New York* (397 U.S. 664, 1970), he embarked on a lengthy discussion of aid to parochial schools even though the case dealt with the related but distinct question of tax exemption of church property. See pp. 714 ff.

71 *Engel*, 370 U.S. at 442-43.

72 Id. at 445.

73 Id. at 446.

74 *Abington*, 374 U.S. at 219-20.

75 Id. at 222.

76 Id. at 223. Paul Freund has labelled this principle used in *Abington v. Schempp* "voluntarism" rather than "neutrality" since "taxpaying families could not be required to support a concededly religious activity; nor could pupils, by the psychological coercion of the classroom, be compelled to participate in devotional exercises." Paul A. Freund, "Public Aid to Parochial Schools," *Harvard Law Review* 82 (1969): 1684.

77 *Abington*, 374 U.S. at 225.

78 Id. at 225-26.

79 Id. at 229.

80 Id. at 230.

81 *Engel*, 370 U.S. at 446.


83 Id. at 241.

84 Id. at 267-278.

85 Id. at 276.

86 Id. at 278-294.

87 Id. at 280.

88 Id. at 282-83.
Early in his opinion Brennan implied that the principle of church-state separation is essential if sectarian schools are to maintain their character and purpose: "The choice . . . is between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own. In my judgment the First Amendment forbids the State to inhibit that freedom of choice by diminishing the attractiveness of either alternative — either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public schools from private or sectarian pressures." \textit{Id.} at 242.

so 'conservative' in some areas and yet so 'liberal' in support of federal aid to education, Taft explained that children were entitled, not as a matter of privilege but as a matter of right, to a decent roof, decent meals, decent medical care and a decent place in which to go to school."


The breakdown for the Senate vote on the Thomas bill shows 36 Democrats and 22 Republicans supporting the measure and 3 Democrats and 12 Republicans opposed. Shortly before the vote was taken, Senator Forrest C. Donnell, a Republican from Missouri, had proposed to restrict the funds to public schools. His motion was defeated, 71-3. Facts on File, 1949, pp. 7 and 149.


Ravitch, Troubled Crusade, p. 27. Shortly before the Senate voted on the Thomas bill, Senator Henry Cabot Lodge, Jr., Republican from Massachusetts, proposed that federal funds be withheld from states with racially segregated schools. The motion was defeated, 65-16, because its adoption would have insured Southern opposition and inevitable defeat of the Thomas bill. Facts on File, 1949, p. 149.

Ravitch, Troubled Crusade, p. 27.

Ravitch, Troubled Crusade, p. 34.

Ravitch, Troubled Crusade, p. 35.

Ravitch, Troubled Crusade, p. 230.


Kennedy was strongly influenced by the structural school of sociologists. Gunnar Myrdal, whose writings Kennedy found particularly persuasive, insisted that poverty was an economic, as distinguished from a cultural condition, and indicated that education was a critical factor in ending it. For a discussion of Myrdal's ideas, see James T. Patterson, *America's Struggle Against Poverty, 1900-1980* (Cambridge: Harvard University Press, 1981), p. 115.


See Robert A. Caro, *The Path to Power* (New York: Alfred A. Knopf, 1983), Ch. 19, for a discussion of Johnson's career as director of the National Youth Administration.


Ibid., p. 302.

Ibid., p. 303.

Ibid., p. 298. Not only was the number of Protestants in Congress reduced by the 1964 election, so too was the number of conservatives who would ordinarily have opposed the liberal programs of Johnson's Great Society. Henry J. Abraham, *Freedom and the Court*, 4th ed. (New York: Oxford University Press, 1982), p. 302.

Abraham, *Freedom and the Court*, p. 302. In the House the Southern Democrats voted 54-41 against the education measure; but in the Senate the Southern Democrats strongly supported the bill by a vote of 15-4.


Ibid., p. 325.

Ibid., p. 321.

Ibid., p. 322.


Sorauf, *Wall of Separation*, p. 322

Ibid.

Ibid.

Ibid.

Ball, "The Constitutionality of the Inclusion of Church-Related Schools," pp. 11-12.

Ibid., p. 12. The phrase "and the religious dimensions of secular knowledge" is especially noteworthy in light of later contentions that the religious and secular programs in parochial schools were entirely separate.

Ibid., p. 13.


Ibid., p. 13.

Ravitch, *Troubled Crusade*, pp. 233-34.


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Ibid.
BOARD OF EDUCATION V. ALLEN:  
POLITICS PREVAILS

On 10 June 1968 the Supreme Court ruled by a vote of six to three that New York State's statute authorizing the loan of textbooks to students attending parochial schools was constitutional. In the suit brought against State Commissioner of Education James E. Allen, Jr., the Board of Education of Central School District No. 1 had challenged the constitutionality of the New York law modeled after a federal statute, the Elementary and Secondary Education Act of 1965. The state law, also passed in 1965, required local public school authorities to lend textbooks free of charge to all students in grades seven through twelve, including those attending church-related schools. An earlier law, passed in 1950, had permitted voters to authorize a special tax to pay for free textbooks. The New York legislature justified the amendment, i.e. making the loan of textbooks mandatory, on the grounds that "public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state."1

The Court's decision in Board of Education v. Allen was, in large part, a political decision in the sense that it was grounded on the liberal political ideals that characterized the 1960s and, most particularly, the commitment to improving and equalizing educational opportunities. The majority opinion, written by Kennedy-appointee Byron White, emphasized

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the advantages to the child that would result from the loaning of textbooks as well as the value to the community in maintaining a high quality of education in sectarian schools. These two themes coincided with a fundamental premise of Lyndon B. Johnson's Great Society: that the government had a responsibility for assuring each individual the opportunity to develop his potential.

The three dissenters - Justices Black, Douglas, and Fortas - raised the question of whether government should extend its authority over the general welfare by providing aid that would indirectly benefit a religious institution. They did not, however, challenge the expanded role of government in the area of education. The political concerns of the dissenters centered on the increased participation of churches in legislative lobbying and the potential conflicts that would result should aid to parochial schools be approved - what the court would later label "entanglement." This chapter examines the opinions comprising the Allen decision, focusing on the issues raised by justices in oral argument and their resultant opinions.
I.

Oral argument in *Board of Education v. Allen*, which took place on 22 April 1968, raised the major themes that would appear in the majority and dissenting opinions. On the one hand, the lawyers appearing for the appellees - Jean M. Coon and Porter R. Chandler - emphasized the general welfare purpose of the statute and its neutral character. In contrast, Marvin E. Pollock, the attorney representing the appellants, focused on the religious nature of the schools and insisted that the secular and religious aspects of sectarian education are not separable. Their arguments and the line of questioning followed by the justices during oral argument are all instructive.

Pollock's presentation emphasized the dangers surrounding the process of choosing the textbooks that would be loaned to sectarian schools. He found a receptive audience in Justice Fortas. Fortas was particularly disturbed by the wording of the law. By pointing out that the responsibility for approving texts fell to a broadly-defined group designated as "school authorities," the Justice led Pollock into a discussion of the pitfalls of delegating the decision-making to popularly-elected officials. In an effort to describe the political implications of allowing local officials to choose or approve the books to be used, Pollock explained:

I am arguing that the public authorities in many cases consist of a board of education elected by the residents of a particular school district and
in some cases, . . . particularly where some religious group has . . . an ethnic majority, they
are prone to follow their views and that once this board is elected and does have the power to
designate books, it would not be unusual to have these boards designate books which are not contrary
to the faith they hold. I think to that extent you have some involvement or some possibility of
involvement, so whether the books are designated by a public authority, if the public authority is made
up of the people.

Justice Stewart asked whether local school boards might not
make the same religiously-prejudiced decisions even if books
were not being loaned to church-related schools, and Pollock
conceded the point. Douglas then intervened to clarify the
issue: "I suppose that your answer to Justice Stewart's
question is if that happens, if there were a school board, a
public school board funneling religious tracts publicly in a
particular school, that too would be unconstitutional?"
Pollock agreed.3

Fortas then shifted attention to the fact that the
statute did not specify "secular textbooks" to be loaned to
parochial schools. The law had simply stated "textbooks,"
and the opinion of counsel had used the phrase "non-
sectarian" in explaining that denominational editions were
excluded from the act; Fortas found neither of these
satisfactory.4 Pollock not only agreed that this was a
legitimate concern but added that the loan of any text to a
sectarian school would be unconstitutional.

A textbook, unlike a reference book or a book in
general, is not intended to be used by a student
alone as a rule. Its contents are not fully
utilized until subjected to the interpretation and
analysis of the teacher. The book is used in a
place where the syllabus, the teacher, the
curriculum and the whole atmosphere is oriented toward a religious objective. The fact that it is secular makes no difference. . . . If the aid is not used in connection with the functions associated with religion, it would be permissible.5

Pressed by White and then Marshall to show how a secular textbook, such as algebra or geometry, might contribute to religious training, Pollock declared that "religion permeates a religious school in everything that is taught there."6

Although Coon's oral argument also touched on the issues of choosing textbooks and the vague language of the statute, the thrust of her defense emphasized the law's secular benefits. By zeroing in on the goal of equalizing educational opportunities, Coon attempted to show that the law had far-reaching benefits for individual children and for the community at large:

There is an educational crisis developing not only in New York but in the country as a whole, and it has developed to a point where not only local government but also the state and the federal government are pouring immense amounts of money into the school systems, primarily to help the educationally disadvantaged.

The private schools' children who are involved in this case are not simply children of parents who can afford to send them to tuition-paying schools. There are among them also the educationally disadvantaged, and in this particular instance, New York, in deciding that it was important that students in the schools, that the school children of the State of New York have available to them up-to-date textbooks, consider the question of not only how to provide them but to whom.7

Denying that the statute respected an establishment of religion, Coon argued instead that the act was neutral in all respects:

[The textbooks are available to all children regardless of the school they attend, and in that regard is a law which does not discriminate between
the religious and non-religious, between sectarian and non-sectarian schools. It is neutral, as not only between religions but between religious and non-religious. I think to that extent it meets the tests laid down in this Court, such as in Everson and some others, and also of course brings out the secular purpose of providing this means of educating a child, access of a child to educational material in the sense of a textbook to children regardless of their school they attend.

This is a purpose which is secular in origin.

It is a primary purpose of aid to the school child in this particular case helping him to get a secular education, not an education in sectarian or religious subjects, but in those subjects which he needs to enjoy, to further his competitive advantage economically, as he gets older and gets out of school.9

Porter Chandler adopted a strategy comparable to that taken by Coon. He insisted that the aid was directed toward parents and children rather than toward the schools since parents of non-public school students usually purchased the class texts.9 He argued also that the local school board could approve or disapprove of texts on the basis of whether they were secular or religious.10 Most important, Chandler presented the statute as one intended to enhance the general welfare and thus neutral in its application. He warned the Court against "seeking to . . . single out and to bar from the benefits of this broad general welfare statute, one particular class of children, and to bar them on the grounds, sole grounds of the religious nature of the schools which they attend." 11 Appealing to the liberal philosophy of the time, he continued:

I suggest the only free exercise question involved in this case is the free exercise question they have raised by such a type of discrimination, which runs squarely into the language of Everson, that the court in guarding against the Establishment Clause must see to it that it does
not prevent a state from extending the benefits of a broad general welfare statute to all people, whether they be Mohammedan, Lutheran, or Jew.  

Neither Black nor Douglas was satisfied with the contention that the religious and secular aspects of sectarian education could be separated, and both men directed questions to Chandler at this point. Black attempted to uncover the purposes and limitations placed on parochial schools. Focusing on the Catholic schools because they were largest in number, Black asked: "is there any way we can get[,] is there a charter gotten out by the church itself, by the school itself, as to what they can do in those schools and what are their duties?"  

Chandler tried to side-step the issue of religious control but Black was persistent:

Chandler: All education, public and private, in New York State is under the very broad powers of the Regents. Their basic statute describes them as having legislative functions. . . . Catholic schools have to be chartered by the Regents. They are subject to visitation by the Regents. The curricula are described in great detail. . . .

Black: What is the basic purpose of a religious school? . . . Is there any charter for these parochial schools that will show us what are the lines they must stay in and where they can get out?

Chandler: Yes, but they have to meet the secular requirements laid down by the state or they cannot exist.

Douglas took a somewhat different approach, suggesting that the effect of the act would be to secularize the church-related schools. Chandler acknowledged that a similar concern had been expressed by one of the dissenters in the Court of Appeals but added, "that's not a danger of which we are conscious."  

Following another line of questioning,
Douglas conveyed his skepticism regarding religiously-neutral texts.16
II.

The opinions in the *Allen* case flowed logically from the concerns raised during oral argument. The majority opinion in *Board of Education v. Allen* employed the same arguments and reflected the same concerns as those expressed by counsel for the appellees. Similarly, the dissenting opinions of Black, Douglas, and Fortas picked up on precisely the same points as the respective justices had raised during the oral argument.

Justice White's majority opinion relied upon the primary purpose and effect test that had been formulated by the Court when deciding *Schermer* (1963). White found that the loaning of textbooks by the State of New York was a valid use of legislative power. The "express purpose" of the act was the "furtherance of the educational opportunities available to the young," and appellants had presented no evidence to suggest that the effects of the statute were contrary to this stated purpose.17 Elaborating on this point, White explained:

> The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.18

By using the phrase "at least technically," White was conceding that, for all intents and purposes, either the pupil or the school became the owner of the books supplied by
the state. By relying on the technicality that ownership remained in the state and employing the long-accepted child-benefit theory, White hoped to circumvent the problem of establishment while emphasizing the advantages that would result from loaning the textbooks.

White based his opinion on two contentions. First, that the secular educational offerings of sectarian schools are distinct from religious instruction. Second, that the state can legitimately support the secular aspects of a parochial school curriculum without violating the Establishment Clause of the First Amendment. Such support, he made clear, would be in the broader public interest.

Critical to the first contention, that the secular and religious aspects of education in a sectarian school are distinct, was the Supreme Court's ruling in Pierce v. Society of Sisters. "A premise of this holding," White observed, "was the view that the State's interest in education would be served sufficiently by reliance on the secular teaching that accompanied religious training."19

By holding the idea that parochial schools perform a secular educational function, White emphasized general acceptance of government's right to set standards and assure compliance.20 Underlying both legislation and subsequent judicial decisions, White stated,

has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for

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achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their secular function, the task of secular education.21

These comments reflect the broad educational ideas espoused by Kennedy and incorporated into Johnson's Great Society as well as White's own inclination to remedy the inequalities within society. Since appellants presented no evidence to show that the borrowed texts had actually been used for religious purposes, White concluded that the New York statute - rather than being a law respecting an establishment of religion - was a legitimate exercise of government power for the public interest.

Justice Harlan, in a short concurring opinion, attempted to define or describe what is meant by government neutrality toward religion. "[W]here the contested governmental activity is calculated to achieve nonreligious purposes otherwise within the competence of the State, and where the activity does not involve the State 'so significantly and directly in the realm of the sectarian as to give rise to . . . divisive influences and inhibitions of freedom,'" he explained, "it is not forbidden by the religious clauses of the First Amendment."22 Since the New York textbook law did not "employ religion as a standard for action or inaction," Harlan judged it constitutional.
Harlan's opinion was not intentionally liberal, yet his definition of neutrality was nevertheless one that would have been embraced by those who favored an expanding role for government. Indeed, Harlan was a political conservative and probably supported the loaning of textbooks as a measure that would enable the parochial schools to stay open, thus reducing the threat of increased costs for public education.

For Hugo Black, who led the dissent, the case did not turn on government providing for the general welfare by equalizing educational opportunities. Indeed, Black was among the strongest proponents of general welfare legislation and in *Everson* had upheld a program for reimbursement of costs of transportation of children to Catholic schools because he viewed it as a safety measure. The loaning of textbooks to students in sectarian schools was, he believed, a different matter, for textbooks are central to the education provided in a church-related school. Black believed that by providing texts for use in sectarian schools, the government was violating the principle of neutrality. "The First Amendment's bar to establishment of religion," he explained, "must preclude a State from using funds levied from all of its citizens to purchase books for use by sectarian schools, which, although 'secular,' realistically will in some way inevitably tend to propagate the religious views of the favored sect."23

Black viewed the textbook law as a small but significant inroad that would logically lead to extensive government support for sectarian schools. He warned:
It requires no prophet to foresee that on the argument used to support this law others could be upheld providing for state and 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.24

Furthermore, the assumption by government of the costs of sectarian education was not done in the general welfare but as a result of lobbying by religious groups. "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," he charged, "can and doubtless will continue their propaganda, looking toward complete domination and supremacy of their particular brand of religion. And it is nearly always by insidious approaches that the citadels of liberty are most successfully attacked."25 The vehemence of Black's opinion made clear his belief that the New York statute violated the Establishment Clause in terms of purpose and effect.

Douglas, too, saw the loaning of textbooks to students in sectarian schools as a violation of the separation between church and state. And, like Black, he was convinced that Catholic church officials had actively lobbied for this measure. In a note to Black regarding the Allen case, he had written: "I think if the Catholics get public money to finance their religious schools, we better insist on getting some for prayers in public schools or the Protestants are out of business."26 He attached to his dissenting opinion a
1967 letter from Francis Cardinal Spellman encouraging New York Catholics to support a new constitution because it would repeal the Blaine Amendment, which had been passed in the late nineteenth century to prevent public funds from going to parochial schools. The possibility of opening the door to increased state aid to Catholic schools was central to Spellman's plea, yet he clothed his statement in the language of political liberalism. "I am disappointed," Spellman wrote, "that so much of the opposition to the constitution comes from those forces in our pluralistic society who would deny equal educational opportunities to children attending parochial schools."27 Spellman continued:

The proposed new Constitution . . . . addresses itself to values basic to the fulfillment of our lives as citizens. We must be aware that this Constitution contains new provisions designed to facilitate the rebuilding of our communities, new provisions committing the State to the maximum development of the educational potential of every citizen, new provisions enabling government, in a responsible way, to mobilize all the forces of society to meet the changing needs of all our people, enhance their environment and to promote their well-being.28

Douglas, who dissented, did not include the Cardinal's letter to show that the measure in question was a legitimate use of government power but, instead, to prove the political involvement of the Catholic church.

For Douglas, the difficulties with the law were inherent. With the Supreme Court's approval of textbook loans, he declared, "We can rest assured that a contest will be on to provide those books for religious schools which the dominant religious group concludes best reflect the
theocentric or other philosophy of the particular church."29

Should the religious groups fail to win over the local school boards and nonsectarian books be imposed, the outcome "would tend toward state domination of the church."30 Neither of these situations was acceptable, for in one case the state supported religion while in the other, it undermined sectarian education.

Douglas' opinion went beyond the other dissents by rejecting the idea that certain subjects are wholly secular. He gave specific examples from published works that clearly incorporated or refuted religious doctrines in such "nonsectarian" disciplines as embryology, comparative economics, and history. Citing a general history text, Man in Time, Douglas demonstrated how religious doctrine could be infused into the teaching of a secular subject. The book, used in parochial schools, described capitalism as "an economic system based on man's right to private property and on his freedom to use that property in producing goods which will earn him a just profit on his investment." The book went on to explain: "Man's right to private property stems from the Natural Law implanted in him by God. It is as much a part of man's nature as the will to self-preservation."31

Convinced that the law was intended to benefit parochial schools, Douglas did not even consider the possible benefits to students or their parents. The school officials - mainly nuns and priests - would be responsible for selecting texts and, as indicated on the form included as an appendix, for requisitioning them as well.32

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Justice Fortas agreed. "[D]espite the transparent camouflage that the books are furnished to students," he wrote, "the reality is that they are selected and their use is prescribed by the sectarian authorities. The child must use the prescribed book. . . . The purpose of these provisions is to hold out promise that the books will be 'secular' . . . ; but the fact remains that the books are chosen by and for the sectarian schools."33 For Fortas, the majority opinion was misleading in its description of the law as part of a "general program" intended to benefit all children. A general program, Fortas explained, would make available to all children the books selected for and used in the public schools. "But this program is not one in which all children are treated alike, regardless of where they go to school. This program, in its unconstitutional features, is hand-tailored to satisfy the specific needs of sectarian schools."34

What is significant in Fortas' dissent is his tacit acceptance of the concept of general welfare legislation and an expanded role for government in the area of education. Neither Fortas, Douglas, nor Black had repudiated the ideas of improving the quality of education or of equalizing the opportunities available to America's children. Their disagreement with the majority lay in their perception of the purpose and character of sectarian schools. Convinced that the religious element could not be divorced from the education offered by such schools, they could not countenance the loaning of books that would further the educational
process. Furthermore, both Black and Douglas were certain that the underlying intent of the act was to aid the religious schools, and they were unmoved by the argument that parochial schools would be forced to close or that the quality of sectarian education might decline if aid were withheld. The constitutional prohibition against laws respecting establishment, they believed, required invalidation of the New York law.

The majority, in contrast, was persuaded that the law had a secular purpose and effect. Consequently, they based their decision on liberal political ideals, most particularly the responsibility of government to equalize opportunities.

Id. at 17.
Id. at 18.
Id. at 23.
Id. at 26-30.
Id. at 49.
Id. at 54.
Id. at 60.
Id. at 63.
Id. at 74.
Id.
Id. at 68.
Id. at 68-69, 72-73.
Id. at 69-70.
Id. at 71.


Id. at 243-44.
Id. at 245.
Id. at 247.
Id. at 247-48.
Id. at 249.
Id. at 252.
Id. at 253.

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25 Id. at 251-52.
26 William O. Douglas to Hugo Black, undated, Black papers, Box 59, Library of Congress.

27 Board of Education v. Allen, 392 U.S. at 268.
28 Id. at 268-69.
29 Id. at 265.
30 Id. at 266.
31 Id. at 258-62.
32 Id. at 255, 267.
33 Id. at 270.
34 Id. at 271.
On June 10, 1968, the Supreme Court handed down a second church-state decision but in a different area of litigation. *Flast v. Cohen* focused on the right of Florence Flast, a federal taxpayer, to challenge laws that she believed violated specific constitutional provisions and, in this case, the Establishment Clause of the First Amendment. Because the Court agreed with Flast and overturned a long-standing precedent prohibiting suits by federal taxpayers, the case is important in a study of judicial decision making; the opinions of the Court and concurring justices provide useful insight into the reasoning and criteria needed to set aside an accepted precedent. In this case, the two determining factors or conditions were (1) the suit brought by Flast related directly to the Establishment Clause of the First Amendment and (2) the significant increase in federal taxation and spending that had taken place since earlier taxpayer standing cases, had made the taxpayer's contribution to federal programs more than merely incidental.

*Flast* is also valuable as a case study of the influence of lower court opinions on Supreme Court Justices. Chief Justice Warren drew heavily from the opinions of Federal District Judge Marvin E. Frankel (S.D. New York) in writing his majority opinion. William Douglas, concurring, also relied heavily on the reasoning used by Frankel and arrived at essentially the same conclusions.
Constitutional scholars expected *Flast v. Cohen* to be a critical decision, determining the future of litigation involving federal aid to sectarian schools. At least one expert speculated that this might turn out to be the most important church-state case of the Warren Court, for a decision to uphold federal taxpayer standing would invite suits challenging the Elementary and Secondary Education Act (ESEA) of 1965.² A 1974 decision by the Supreme Court, *Wheeler v. Barrera*, put off ruling on the constitutionality of Title I funds that were used to provide remedial instruction in nonpublic schools. In 1985, however, the justices determined that the Title I provision was invalid. That case, *Aguilar v. Felton*, was initiated by federal taxpayers.³

*Flast v. Cohen* originated in a suit brought by a coalition of groups and individuals strongly opposed to any kind of government support for sectarian schools. Florence Flast was a well-known opponent of state aid for church-related schools. During the 1960s she cooperated in a number of suits sponsored by the American Jewish Congress and Americans United for Separation of Church and State, an organization formed in the wake of the *Everson* decision. Subsequent to *Flast v. Cohen*, she headed the Committee for Public Education and Religious Liberty (PEARL), which served as the principal plaintiff in three cases involving aid to parochial schools that came before the Supreme Court in the 1970s.⁴ Albert Shanker, President of the American Federation
of Teachers, was among those who joined Flast in bringing suit.

The cooperation of the American Jewish Congress in this case was further evidenced in the appointment of Leo Pfeffer as counsel for the plaintiffs. During his long association with the AJC, Pfeffer has participated in nearly every Supreme Court case (and many lower court suits) involving church-state separation. His 1953 text, *Church State and Freedom*, though influenced by his own position favoring strict separation of church and state, is still considered a standard work covering the history of religious freedom and related litigation.5

In addition, an *amicus curiae* brief was filed by North Carolina Senator Sam J. Ervin, Jr, representing Americans for Public Schools and the Baptist General Association of Virginia. Ervin's participation is noteworthy in part because of his membership on the Senate Judiciary Committee and in Americans United.6

Flast's original suit named John Gardner, Secretary of the Department of Health, Education and Welfare, as defendant. Formerly the president of the Carnegie Corporation, Gardner had chaired the presidential task force on education established by Lyndon Johnson and contributed to the drafting of the Elementary and Secondary Education Act of 1965.7 When the case finally came before the Supreme Court, March 12, 1968, Wilber J. Cohen was Secretary of HEW. He, too, had participated in developing the program for federal aid to education that extended assistance to
parochial as well as public schools. Erwin Griswold, Solicitor General and former Dean of Harvard Law School, argued on behalf of the Government.

The law that the appellants in *Plast* wished to gain standing in order to challenge was the Elementary and Secondary Education Act of 1965. A cornerstone of the Great Society, this federal statute appropriated money to build up library and textbook resources for children in public and private schools, to establish experimental educational centers, and to promote research on innovative teaching techniques. More important, the federal government was authorized to provide funds to each state based on the number of children in the state from low-income families, multiplied by fifty percent of the state's average expenditure per pupil. At least ninety percent of the school districts in the nation qualified for this assistance. Although money was granted only to public school boards, the boards were instructed to take into account the needs of students in private as well as public schools. Title I permitted the local boards to extend special educational services and arrangements, such as dual enrollment, educational radio and television, and mobile educational services and equipment, to nonpublic schools and their students. Title II provided federal grants for the acquisition of school library resources, textbooks and other printed and published instructional materials for the use of children and teachers in public and private schools.
The issue of federal taxpayer standing grew out of a 1923 Supreme Court decision in the case of *Frothingham v. Mellon*. Justice Sutherland, speaking for the Court, had denied standing in that case because the taxpayer's interest in the federal budget was "comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." The administration of government funds, he added, "is essentially a matter of public and not of individual concern." In closing comments, Sutherland linked the Court's refusal to grant standing in this case to the principle of separation of powers. The Court, he explained, has no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justifiable issue, is made to rest upon such an act. . . . It amounts to little more than the negative power to disregard an unconstitutional enactment, which would otherwise stand in the way of the enforcement of a legal right.

The *Frothingham* suit fell short of meeting the criteria laid down by Sutherland as grounds for standing. The suit was directed against the Sheppard-Towner Act, an early public welfare measure authorizing appropriations by the federal government to states "for the purpose of cooperating with them to reduce maternal and infant mortality and protect the health of mothers and infants." Both the *Frothingham* suit and a companion case, *Massachusetts v. Mellon*, charged that
the Maternity Act constituted an attempt to infringe on a power properly left to local and state governments and, consequently, violated the Tenth Amendment to the Constitution. In claiming standing as a taxpayer, Frothingham argued that "the effect of the appropriations complained of [would] be to increase the burden of future taxation and thereby take her property without due process of law." While the appellant raised questions regarding the constitutionality of the Maternity Act, those questions involved states' rights. She could show no "direct injury suffered or threatened," only the possible, indirect, and immeasurable threat of increased taxes.

This failure to show direct injury set the Frothingham case apart from Flast. In the later suit, taxpayers claimed standing in order to protect a specific right - freedom from the establishment of religion - guaranteed in the First Amendment to the Constitution. This distinction between the two cases served as the basis for the decision of District Court Judge Frankel to grant the motion for a three-judge court to hear Flast v. Gardner. It was also the reason for Frankel's dissent when that three-judge court denied standing, and it was central to the nearly unanimous opinion handed down by the Supreme Court.

Ruling on the motion for a three-judge court, Frankel emphasized the distinction between Flast and Frothingham but also took into consideration changing conditions and attitudes. As critics of the earlier decision had pointed out, "the nature of taxpayers' interests has changed as the
size of the economy and government has burgeoned in the period of almost half a century," thus rendering an individual's interest in the federal government often less remote and uncertain than in his state government. For Frankel this fact introduced an important qualification on the use of Frothingham as a precedent, for the Constitution did not itself "announce a limitation on standing."18

Frankel further noted that the Senate had passed a bill "which would give to any federal taxpayer the right to raise in a suit for a declaratory judgment the First Amendment questions tendered here, with no 'additional showing of direct or indirect financial or other injury ... on the part of the plaintiff ...' (Sec. 3(21)."19 Not entirely convinced by defendants' contention that the need for such a bill proved that the court lacked jurisdiction in this case, Frankel cited the conclusion of the Congressional Committee's report that "the Frothingham decision was founded on grounds other than purely constitutional ones."20 Regarding the principle of separation of powers, Frankel noted, the Senate's Committee on the Judiciary saw no threat should federal taxpayers be given standing to sue. Prompted by cases such as Flast, their report had stated:

"Several cases are now pending which challenge the constitutionality of the Elementary and Secondary Education Act of 1965. The pendency of these cases may be cited by opponents of judicial review as a substitute for legislation. The committee feels, however, that if the question of standing is raised by the defendants in these cases, they will undoubtedly be successful under the present state of the law."21

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In short, Frankel found support for his judgment in precisely that branch of government whose powers would allegedly be threatened if federal taxpayer standing were granted.

Frankel noted that the courts, too, had moved in recent years toward "increasingly relaxed criteria for the achievement of standing to sue" in cases involving the First Amendment. Given the complexity of church-state cases and the difficulty of rendering opinions in that area, Frankel determined that the motion for a three-judge court should be granted. "It is enough," he explained, "that the potential results of such an analysis are not predictable with the certainty that would warrant dismissal of plaintiffs' action by a single judge."

The underlying premise throughout Frankel's first opinion was that Flast differed in significant ways from Frothingham.

The alleged injury here is not merely, or mainly, economic loss. And the roles in which plaintiffs allege injury are not simply their roles as taxpayers. ... The concern was with a specially cherished form of spiritual and intellectual freedom. And so it is arguable that the essentially economic analysis in Frothingham cannot be dispositive in a case of this kind.

Dissenting from the opinion of the three-judge court, Frankel took the opportunity to develop this argument at considerable length. Indeed, his dissent in this case appears to have laid the groundwork for the Supreme Court's opinion, written by Chief Justice Warren.

The majority opinion in Flast v. Gardner recognized no meaningful distinction between Frothingham and the case at
hand. Circuit Judge Paul R. Hays considered irrelevant the plaintiff's contention that Frothingham established "a rule of judicial restraint" that was not determined by Article III of the Constitution. "Since the Frothingham decision is binding on this court regardless of whether it states a constitutional principle or a rule of policy," he declared, "we need not consider the much debated question whether the rule is one of constitutional dimension."

Relying on the Supreme Court's ruling in Dorensus v. Board of Education, Hays determined that the First Amendment concerns made no difference on the question of standing. In that case a group of taxpayers wished to challenge the reading of Bible verses in the public schools; the Supreme Court had cited Frothingham in its decision that the plaintiffs lacked standing to raise the First Amendment claim. Conceding that considerable criticism had been directed against the Frothingham principle, Hays pointed out that the case had never been overruled or limited by the Supreme Court. The fact that the Senate had recently passed a bill "for the express purpose of creating an exception to the Frothingham rule by conferring standing on any federal taxpayer to raise the First Amendment questions tendered here," Hays believed, "further supports our conclusion."

Frankel's dissent followed from his earlier judgment in favor of a three-judge court but, more important, it laid out the basic argument that would be incorporated into the opinions of Warren and Douglas. What distinguished Flast's suit from that of Frothingham and thus justified an
overturning of the earlier decision was the fact that Flast was not merely interested in how her tax money was spent. Rather, she wished to bring suit because she believed that the law in question violated a specific constitutional provision. That First Amendment provision, Frankel contended, inherently carried with it the right of any individual to challenge a law he deemed unconstitutional.

Before dealing with the Frothingham precedent, Frankel addressed the constitutional and practical issues relevant to the Flast suit. His first point, that the "establishment clause forbids the use of tax money to support any religion, and confers an enforceable 'right' upon the federal taxpayer claiming this basic protection," was based largely on Rutledge's dissent in Everson and Black's majority opinion in Engel v. Vitale. The reasoning of the Court in Engel not only clarified for Frankel what the Founding Fathers meant by "establishment" but also underlined the importance of allowing taxpayers standing to challenge federal laws. "If we wrote on an utterly clean slate," the Judge remarked, "even the fact of tax payments might be immaterial." In the context of his discussion of the meaning of "establishment," Frankel cited the phrase from Zorach v. Clauson indicating that the separation must be "complete and unequivocal." Referring to the case at hand, he held that if, as the plaintiffs allege, there is support for religion under the education law, "then 'the wall of separation' has been breached, and the evil denounced by the First Amendment has been realized."
Moving on to his second point, Frankel argued that a federal taxpayer should be accorded the same standing under the First Amendment as is accorded state taxpayers under \textit{Everson}.”\textsuperscript{35} To support his contention, he examined the Court's ruling in \textit{Everson} and determined that no precise measurement of the plaintiff's tax burden was required in the case. To demand a significant financial interest at the federal level as a requirement for standing was inconsistent and inappropriate.

Frankel's third point focused on the need for rules of standing to evolve in order "to fit the needs of a living Constitution." He noted that the "fact that, as a practical matter, only plaintiffs like the ones here can sue is in itself a ground for their standing."\textsuperscript{36} The essence of his position was that changes in society and resultant new kinds of legislation demand flexibility on the part of the judiciary to ensure that fundamental freedoms were protected. Frankel concluded, that there is "weighty reason for doubting that motions of 'standing' imported from wholly alien contexts should serve to make lifeless slogans of basic liberty."\textsuperscript{37}

The question of standing, Judge Frankel insisted, should not be based on the merits of the complaint nor on the fact that the alleged threat is insignificant. To insure the right of federal taxpayer standing - regardless of the nature or extent of the threat in the present case - would allow future challenges in which the threat might be more real.
The principle of standing was the means to protect the First Amendment.38

Having explored the practical reasons for allowing federal taxpayer standing, Frankel then confronted the facts of the case at hand. The critical factor in the Flast suit was the reliance on "the specific right, defined broadly but certainly by the Establishment Clause."39 The use of the Frothingham decision as a precedent was inappropriate, he maintained, for standing in that suit had been denied, as Sutherland himself explained in a later case, because Mrs. Frothingham "asserted 'no legal or equitable right' eligible for judicial protection, 'no such interest and . . . no such legal injury' as the courts are constituted to redress."40

With regard to the principle of separation of powers, Frankel held that a taxpayer suit based on First Amendment freedoms would not violate that principle. He noted that in the 1923 decision Sutherland had not arbitrarily ruled out all taxpayers suits. The judicial power to "review and annul acts of Congress on the ground that they are unconstitutional" he had stated, may be employed "only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act." This text, Frankel maintained, was met by the plaintiffs in Flast v. Gardner.41

The Supreme Court overturned the longstanding precedent set in Frothingham v. Mellon because they, too, found a significant difference between the earlier case and the suit brought by Flast. Writing for the majority, Chief Justice

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Earl Warren observed that the *Frothingham* decision had been unclear in its ruling against federal taxpayer standing. "The confusion has developed," he explained, "as commentators have tried to determine whether *Frothingham* establishes a constitutional bar to taxpayer suits or whether the Court was simply imposing a rule of self restraint which was not constitutionally compelled."42 The fact that the appellant was denied standing because her tax bill was not large enough led Warren to conclude that the earlier decisions rested on "pure policy considerations," which were, in fact, outdated.43

Having concluded that *Frothingham* provided inadequate grounds to preclude standing, Warren then proceeded to examine the constitutional guidelines for jurisdiction, but found these unclear. The doctrine of justiciability, he declared, "has become a blend of constitutional requirements and policy considerations" and, consequently, was a doctrine of "uncertain and shifting contours."44 However, the "fundamental aspect of standing" remained clear: "it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated."45

The weakness of the Government's case lay in its emphasis on the principle of separation of powers, which, Warren reasoned, had no bearing on the standing of an individual.
The Government's position is that the constitutional scheme of separation of powers, and the deference owed by the federal judiciary to the other two branches of government within that scheme, present an absolute bar to taxpayer suits challenging the validity of federal spending programs.46

Warren rejected this argument.

The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government.47

The question of standing is determined by whether the dispute is presented in an adversary context and in a form considered to be capable of judicial resolution. The requisite personal stake of the taxpayer, he concluded, depended on the circumstances of the particular case.48

The substantive issue, Warren contended, was important in deciding standing in order "to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated."49 Given this fact, he set down two criteria essential for standing: (1) "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Article 1, sec. 8, of the Constitution," and (2) "the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power . . . ."50

Using these criteria, the Court held that Flast should be granted standing. The ESEA had been passed under the
Congressional authority to spend for the general welfare, and appellants challenged the expenditures as violating the Establishment and Free Exercise Clauses of the First Amendment. The distinction between this case and Frothingham lay in the fact that Mrs. Frothingham had merely charged that the Maternity Act of 1921 exceeded the general powers delegated to Congress, thus invading the legislative jurisdiction of the states. She had not based her case on the violation of a specific constitutional limitation.51

Warren was especially careful not to rule on the merits of the case Flast wished to bring against the federal education law, but he did acknowledge that the "complaint contains sufficient allegations . . . to give them standing to invoke a federal court's jurisdiction for an adjudication on the merits."52

Douglas concurred with the decision to award standing, but his separate opinion came closer to dealing with the merits of the case than did that of the majority. Douglas argued that Frothingham should be abandoned in its entirety. Because the Supreme Court no longer relied on substantive due process in determining a law's constitutionality, he explained, it should not be bound by a decision made when the Court used that criterion to determine the constitutionality of legislation.53 More importantly, Frothingham deprived individuals of the opportunity to challenge federal laws which they believed infringed on constitutional rights. "We have a Constitution," he stated, "designed to keep government out of private domains. But the fences have often been
broken down; and Frothingham denied effective machinery to restore them."54

Douglas devoted much of his opinion to the idea that the taxpayer should be allowed to serve as a "private attorney general seeking to vindicate the public interest."55 Some state decisions had specifically assigned such a role to taxpayers with the idea that these individuals - despite minimal financial interest - had a stake in the outcome that was "very great when measured by a particular constitutional mandate."56

Agreeing with the philosophy of the late Edmond Cahn, law professor at New York University, Douglas insisted that the federal judiciary was designed to protect the basic rights of the individual against majoritarian control.

The judiciary is an indispensable part of the operation of our federal system. With the growing complexities of government it is often the one and only place where effective relief can be obtained. If the judiciary were to become a superlegislative group sitting in judgment on the affairs of people, the situation would be intolerable. But where wrongs to individuals are done in violation of specific guarantees, it is abdication for courts to close their doors.57

Unlike most of his colleagues, Douglas expressed the belief that the courts could distinguish between frivolous and substantial questions and thus avoid being overwhelmed by taxpayer suits.58

Having established the principle that taxpayers should be allowed to challenge laws threatening their constitutional rights, Douglas then turned to the immediate cause for concern. "We have recently reviewed the host of devices used
by the States to avoid opening to Negroes public facilities enjoyed by whites. . . . There is a like process at work at the federal level in respect to aid to religion. . . . The mounting federal aid to sectarian schools," he charged, "is notorious and the subterfuges numerous."59 Given the fact that the Senate bill to allow taxpayer standing in First Amendment cases had been defeated, Douglas concluded:

I would be as liberal in allowing taxpayer standing to object to these violations of the First Amendment as I would in granting standing to people to complain of any invasion of their rights under the Fourth Amendment or the Fourteenth or any other guarantee in the Constitution itself or in the Bill of Rights.60

The tone of Douglas' comments regarding aid to sectarian schools suggests that his decision was based on the merits of the case as well as the broader principle of affording the individual an opportunity to protect basic constitutional rights.

Concurring opinions of Justices Stewart and Fortas took the opposite tack from Douglas'. Both men reaffirmed the principle laid down in Frothingham prohibiting generalized grievances by federal taxpayers, but each recognized that the specific threat to religious freedom raised by Flast provided sufficient reason for an exception to the broader rule.61

In contrast, Harlan refuted the fundamental premise of the majority opinion and insisted that no distinction should be made between constitutional issues in determining the standing of litigants. The criteria suggested by the majority, he maintained, were untenable since they failed to measure the plaintiffs' interest in the outcome of a
Referring to the Court's rule that the challenged expenditure be a legislative enactment under the taxing and spending clause and not merely incidental to an essentially regulatory statute, Harlan protested that the form of the expenditure is immaterial. The stipulation that the contested law exceed specific constitutional limitations imposed on the taxing and spending power of Congress also seemed irrelevant to Harlan:

I am quite unable to understand how, if a taxpayer believes that a given public expenditure is unconstitutional, and if he seeks to vindicate that belief in a federal court, his interest in the suit can be said necessarily to vary according to the constitutional provision under which he states his claim. I have not found historical evidence that properly permits the Court to distinguish, as it has here, among the Establishment Clause, the Tenth Amendment, and the Due Process Clause of the Fifth Amendment as limitations upon Congress' taxing and spending powers.

The distinction the Court made, he charged, indicated "something implicit in their purposes."

The reason for Harlan's disagreement with the majority lay in his commitment to a philosophy of judicial restraint. "[U]nrestricted public actions," he warned, "might well alter the allocation of authority among the three branches of the Federal Government." Consequently, he would allow standing only in those instances where "Congress has appropriately authorized such suits."

Conceding that a taxpayer may legitimately contest the constitutionality of a tax obligation, Harlan pointed out that in both Frothingham and Flast the plaintiffs challenged
the uses for which Congress had authorized expenditures, not the taxes themselves. In Flast, appellants made "no allegation that the contested expenditures will in any fashion affect the amount of these taxpayers' own existing or foreseeable tax obligations." Money collected through revenues went into the general funds and expenditures were made for public purposes. The government, Harlan explained:

holds its general funds, not as stakeholder or trustee for those who have paid its imposts, but as surrogate for the population at large. Any rights of a taxpayer with respect to the purposes for which those funds are expended are then subsumed in, and extinguished by, the common rights of all citizens.

Consequently for Harlan, taxpayers held no special rights to challenge the ways in which government money is spent.

Harlan's inability to overcome the mental barriers imposed by his commitment to a philosophy of judicial restraint made him the sole dissenter in Flast v. Cohen. His colleagues on the bench - though disagreeing over the general principle of federal taxpayer standing - nevertheless agreed on the essential point that the religion clauses of the First Amendment could be protected only if individuals were granted the right to challenge those laws that either violated the right to free exercise or respected an establishment of religion. To hold such laws unconstitutional would not jeopardize the separation of powers, they reasoned, for the Amendment itself forbade federal legislation that might threaten religious freedom. Judicial action precipitated by a taxpayer suit would not, therefore, infringe on legitimate legislative authority but would, instead, prohibit the
usurpation of power in areas specifically protected by the Bill of Rights.

In establishing this criterion for federal taxpayer standing, the justices drew on the opinions of District Court Judge Frankel. Such reliance on lower court rulings is not unique to Flast but rather demonstrates a common practice of the justices to weigh the opinions of state and federal judges and the records of the lower court proceedings. In the major parochial decision following Flast, Lemon v. Kurtzman/Robinson v. Dicenso, the records and opinions of the lower courts significantly influenced the opinions of the Supreme Court justices.70
5 Leo Pfeffer, Church State and Freedom, revised ed. (Boston: Beacon Press, 1967).
9 Ibid., pp. 300-301.
10 Flast v. Cohen, 392 U.S. at 86.
12 Id. at 487.
13 Id. at 488.
14 Id. at 479.
15 Id. at 486.
16 Id. at 488.
18 Id.
20 Id.
Flast v. Gardner, 271 F. Supp. 1 (1967); Hays was joined by District Court Judge John F. X. McGohey in his majority opinion.


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On 28 June 1971 the Supreme Court, by a vote of 7 - 1, declared unconstitutional programs that had been implemented in Pennsylvania and Rhode Island for state payment of the salaries of nonpublic school teachers. Their decision in Lemon v. Kurtzman/Robinson v. DiCenso was significant for several reasons. It was, for example, the first case involving aid to sectarian schools in which the recently appointed Chief Justice, Warren E. Burger, participated. The other new member of the Court, Justice Harry Blackmun, who had replaced Abe Fortas in 1970, also joined in the majority opinion.

Of particular importance in this study of judicial decision making was the reliance by the Supreme Court justices on the opinions of the District Court judges. Suits had been brought by taxpayers in Pennsylvania and Rhode Island challenging the programs on First Amendment grounds. The Pennsylvania District Court, in a split decision, had upheld in Lemon v. Kurtzman the act passed in that State, but Judge William Henry Hastie had issued a strong dissent based on the potential for government intrusion into the affairs of a religious institution. The need for official surveillance to assure that public funds were not used for religious purposes, he insisted, constituted a serious threat to the separation of church and state. The Chief Justice used essentially the same argument five months later when he gave
the majority opinion in *Valz v. Tax Commission of the City of New York*, a case involving tax exemptions for church-owned property.² Such exemptions, he declared, actually reduced the potential for "excessive government entanglement" with religion. This new test for determining whether a law violated the Establishment Clause became the basis for the opinion of the Rhode Island District Court *DiCenso v. Robinson*, evaluating that State's program to pay the salaries of teachers in sectarian schools.³ It was also the critical factor in Burger's majority opinion in *Lemon*.

The majority opinion of the Supreme Court relied heavily on the specific evidence included in the opinion of the Rhode Island Court. The Pennsylvania case did not go to trial, but the Rhode Island case did. Consequently, the Rhode Island judges heard testimony from teachers and administrators of nonpublic schools and from state education officials. They also examined a number of documents regarding parochial schools whose teachers had been subsidized by the State law. Although additional information was made available to the Supreme Court justices in briefs and oral argument, Burger used only the evidence cited in the Rhode Island opinion when he wrote his majority opinion.

In contrast, Justice Douglas felt impelled to supplement the facts presented by Burger in order to strengthen his contention that the religious character of the schools precluded any form of government assistance. Differing from the majority in his insistence that religious and secular education could not be separated from one another in a
sectarian school, Douglas was nevertheless agreeing with the position taken by Judge Coffin in the Rhode Island case.

The two concurring opinions - the other was written by Brennan - along with the dissenting opinion of Justice White indicate the continued disagreement among the justices in the handling of the issue. They also point to a hardening of the positions taken in the Allen decision. Douglas, joined by Black, adopted the toughest stance because he believed that the parochial school was an integral part of the church institution, and he was adamantly opposed to any public money going to support a religious activity. Brennan accepted this same premise, that sectarian schools were established in order to offer an education in which religious beliefs and values played a major role. Because of this, Brennan found that the primary purpose and effect tests afforded sufficient justification for declaring the Pennsylvania and Rhode Island programs unconstitutional. Consistent with his reasoning in Allen, White maintained that the secular and religious activities of parochial schools could be distinguished and implied that certain forms of aid could be given directly to such schools. The application of the "excessive entanglement" test, he charged, created a no-win situation.

Unique to Lemon was the civil rights issue. Pointing to the racial imbalance in most sectarian schools, plaintiffs in the Pennsylvania case charged that government funding of these schools constituted official support for de facto segregation. This allegation was of special interest to Judge Hastie, a long-time advocate of civil rights for
blacks. His questions during oral argument indicate the weight he gave to this matter even though he found inadequate grounds to include it in his final decision. It should be noted, however, that his decision did find the Pennsylvania program unconstitutional and effectively cut off aid to schools where de facto segregation persisted. Justice Marshall's own close association with the NAACP apparently led him to disqualify himself from taking part in the Lemon decision.

The Supreme Court's decision in Lemon v. Kurtzman provides insight into another aspect of the decision-making process: the reliance on lower court opinions - both in suggesting the guidelines that should be used in determining establishment and in supplying the facts and information to justify a decision. The sequence of decisions and the way in which the justices used the opinions of the District Court judges in this case also suggest the reasons for such reliance.
I.

On 28 November 1969 a three-judge panel of the United States District Court, Eastern District of Pennsylvania, upheld by a vote of two to one a law passed by the Pennsylvania State legislature on 10 June 1968 that provided public assistance for nonpublic schools. Plaintiffs in Lemon v. Kurtzman charged that the Nonpublic Elementary and Secondary Education Act was unconstitutional because it tended toward an establishment of religion and because it encouraged de facto segregation by allocating funds to racially-imbalanced schools. Defendants had moved that the motion be dismissed for lack of standing and for failure to state a claim upon which relief could be granted. The judges agreed that only Alton J. Lemon had standing to sue and that the plaintiffs had failed to provide sufficient evidence to support their equal protection argument. However, they disagreed on the issue of establishment. District Judges E. Mac Troutman and Alfred L. Luongo held that the contested law had a secular purpose and effect and thus did not violate the test for establishment that had been relied on by the Court since Abington v. Schempp. Chief Circuit Judge William Henry Hastie concluded that both the purpose and the effect of the law were to aid religious institutions and, furthermore, that the character of the law was such as to encourage political activity by the churches of the sort the First Amendment was designed to prohibit.
The law provided for the "purchasing" by the state of secular educational services in nonpublic schools, specifically, the payment of teachers' salaries and the purchase of textbooks and instructional materials. The criteria for the purchase specified which subjects could be included and outlined the kinds of materials that could be used in the courses as well as specifying acceptable levels of performance by the students and qualifications for the teachers. All of these requirements entailed supervision or judgment by the State's Superintendent of Public Instruction, who was charged with administering the law. In order to assure that public funds would only be used for secular purposes, the schools were instructed to maintain separate accounts for religious and secular activities, and these records would be subject to review by the Auditor General. Money to purchase these secular services would come from the proceeds of horse and harness racing in the State.8

The stated purpose of the Act was to promote the general welfare by improving the quality of education available to all students within the State. Legislators perceived a "crisis" in American education resulting from rapidly increasing costs brought about by the growing student population, demands for excellence in education, and the general effects of inflation. They also acknowledged that twenty percent of the school children in Pennsylvania attended nonpublic schools and agreed that the "freedom to choose nonpublic education . . . is a fundamental parental liberty and a basic right."9 In conjunction with the state's
responsibility to provide for education, lawmakers asserted that the government had the "right and freedom . . . to enter into contracts for the purchase of needed services with persons or institutions whether public or nonpublic, sectarian or nonsectarian," especially because of the threat to public education should large numbers of parents remove their children from Pennsylvania's nonpublic schools.10

Passage of this law had been strongly opposed by Protestant and Jewish groups, public school advocacy groups, farmers' associations, and some Negro organizations. A few weeks after Governor Raymond P. Shafer signed the bill, the Greater Philadelphia Branch of the American Civil Liberties Union began to put together a coalition to challenge the constitutionality of the Act.11 This coalition eventually included three individual plaintiffs, including Alton J. Lemon, and the following organizations: Pennsylvania State Education Association, Pennsylvania Conference National Association for the Advancement of Colored People, Pennsylvania Council of Churches, Pennsylvania Jewish Community Relations Conference, Americans United for Separation of Church and State, and American Civil Liberties Union for Pennsylvania, Inc.

The principal defendants were David H. Kurtzman, Superintendent of Public Instruction, and Grace Sloan, the State Treasurer. They were joined by several sectarian schools representing several denominations: St. Anthony's Roman Catholic Church School, Archbishop Woods Girls High School, Ukrainian Catholic School, Germantown Lutheran
Academy, Akiba Hebrew Academy, Philadelphia Montgomery Christian Academy, and Beth Jacobs Schools of Philadelphia. All of these schools had contracted with the State for the purchase of secular educational services.¹²

The majority opinion for the District Court first addressed the issue of standing. Basing their decision on the guidelines suggested in Flast v. Cohen, the judges concluded that none of the organizational plaintiffs should be granted standing since they had no personal stake in the outcome nor would they be harmed by the implementation of the Act. This ruling applied to their status in terms of both the church-state and the equal protection issues involved.¹³

Insofar as the individual plaintiffs were concerned, the Court held that all three had just cause to challenge the law on church-state grounds. Lemon had paid an admission fee to a Pennsylvania race track; consequently, his money had been used for the purchase of services from sectarian schools. The judges found, therefore, that Lemon met both of the requirements for standing dictated by the Flast decision: (1) there was a logical link between his status as purchaser of an admission ticket and the legislative enactment; and (2) he was able to show a clear connection between that status and "the precise nature of the constitutional infringement alleged."¹⁴ Although neither of the other individual plaintiffs had purchased tickets, Judges Troutman and Luongo accepted their explanation --- "that to do so would require them to pay tax for the support of religion in violation of

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their rights of conscience" — and granted them standing on the basis of the Free Exercise Clause.¹⁵

The Court could find no reason to award standing on equal protection grounds because the Education Act was not intentionally discriminatory and because none of the plaintiffs nor their children claimed to have been victims of discrimination. "The Education Act on its face does not use religion or race as a standard or guideline to determine who may enter into a contract with the Commonwealth," Troutman wrote. "As such the Act itself does not purport to make any classifications to deny equal treatment to members of any particular race or religion."¹⁶ Despite the fact that Lemon was himself a Negro, he presented no evidence showing either intentional or de facto segregation in the nonpublic schools that had contracted with the state government. There was, the Court observed, "no allegation that Lemon's child attempted to enroll at any of these schools and was denied admission because of race or religion."¹⁷

Judge Hastie rejected the determination by his colleagues that the individual plaintiffs other than Lemon should be given standing under the Free Exercise Clause. Their complaint, he pointed out, "contains no factual allegation that these plaintiffs desire to go to the races and have been deterred by reason of the known application of the racing revenues" to the purchase of secular services from sectarian schools. Nor, he added, had any plaintiff alleged the infringement of free exercise resulting from the Education Act.¹⁸ By his way of reasoning, "the plaintiffs
should have established monetary interest in the relief sought.19

Lemon's standing under the Establishment Clause, Hastie believed, had been correctly granted. "Although Lemon was not compelled to attend a harness race," he reasoned, "he has been constrained by the state government to pay a tax on his attendance, a tax that is specifically earmarked by statute for purposes that allegedly support an establishment of religion."20

Hastie also agreed that none of the plaintiffs had reason to challenge the Education Act as a violation of the Equal Protection Clause. Following from a natural concern that sectarian schools were sometimes chosen because parents did not want their children to attend racially integrated public schools. Hastie had pursued the charge of racial discrimination in his questioning at the October 13 hearing.21 He had, for example, asked State Attorney General William C. Sennett:

Is there anything in the regulations or the published policy and intention of the State in administering this Act that precludes the distribution of this public money to schools which discriminate because of religion or race in the admission of students? 22

Although he was assured that a State Executive Order "directly forbids any discrimination by any department of state government from doing business with anyone who discriminates on any of the bases, race, religion, or sex," Hastie continued with this line of questioning.23 He asked William B. Ball, counsel for Archbishop Wood High School,
whether the Act would be unconstitutional if plaintiffs could prove that the policies or practices of private institutions discriminated on the basis of race or religion, and he later directed a similar question to Henry T. Reath, lawyer for the Pennsylvania Association of Independent Schools.\textsuperscript{24} The fact that the Education Act did not on its face discriminate on the basis of race was sufficient reason to deny standing to the plaintiffs in this case.\textsuperscript{25} Hastie was not, however, convinced that sectarian schools were free of racial discrimination or, at least, racial bias. His Lemon v. Kurtzman files contain, among other things, a lengthy article published in the Civil Rights Digest dealing with the racial imbalance of parochial schools, including those in Philadelphia.\textsuperscript{26}

In denying standing on equal protection grounds, the judges determined that this case would be considered solely within the framework of the religious clauses of the First Amendment. Because the majority had granted standing on the grounds of both establishment and free exercise, their opinion encompassed both clauses of the Amendment. Hastie's opinion dealt only with the question of establishment.

Judge Troutman, writing for the majority, defined the question for consideration in terms of the test proposed in the Schempp decision: "whether the purpose or primary effect of the Pennsylvania Education Act on its face or in the necessary effect of its administration is to advance or inhibit religion."\textsuperscript{27} Referring to the legislature's statement of purpose - to promote the general welfare and to

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promote the secular education of children — and their specific findings with regard to the costs of education, he concluded that the intent of the law was indeed to assure a high quality of education for all children in the State. The majority refused, as did Judge Hastie, to examine the legislative history of the Act since the pressures placed upon legislators do not necessarily reflect the motivations of the lawmakers in approving a statute.\(^{28}\)

Turning to the effects of the Act, the majority again found no violation of the Establishment Clause.

[\(\text{\textbf{We believe that the State may aid the secular function rather than the sectarian function of private educational institutions in the public interest of education within proper confines and without participating in a forbidden involvement in religion proscribed by the First Amendment. The Education Act on its face authorizes the Commonwealth to contract only for services connected with the \textit{strictly secular} function of educating Pennsylvania's school children. \ldots Th\text\textup{us limited and restricted we cannot hold that the statute advances religion either in purpose or primary effect.} \text{[Emphasis Troutman's]}^{29}\)]

On the contrary, "the statute here maintains a position of complete \textit{religious} neutrality," and this neutrality, they declared, is the "mandate of the First Amendment." [Emphasis Troutman's]

While it may be argued that the consequential result of the instant statute may be to indirectly benefit nonpublic sectarian schools, the purpose and primary effect of the Education Act is secular in nature and such an incidental benefit is not sufficient to infringe upon the non-establishment principle of the First Amendment.\(^{31}\)

Having decided that the Education Act did not use government monies to advance religion, the Court dismissed the free exercise claim that purchase of a ticket to horse or harness
racing would compel an individual to contribute to religion in violation of his rights of conscience.32

The Court rejected also the argument that government money in support of secular education must be paid to the child. Earlier decisions upholding the child-benefit approach on the grounds of general welfare legislation had led many to conclude that indirect forms of aid were acceptable, whereas direct grants to sectarian schools were not. "Such an approach," Troutman pointed out, "would place form over substance in that a constitutional result would depend upon minute distinctions and technicalities."33

Ironically, Judge Kastie's dissent placed great emphasis upon the need to discern the substance of a law and not to be misled by the form. His disagreement with the majority rested on their unquestioned acceptance of the statute as written and consequent failure to examine its real character. The terminology of "contracting for secular educational services" used by the legislature, Hastie stated, was an "artificial characterization of this procedure."

Actually, this phrase is not descriptive of the statutory scheme. A nonpublic school that desires financial aid under the Act need do no more than submit, on a form prescribed by the state, an application designating the portions of its curriculum for which it wants assistance. The State Superintendent of Education then agrees that the state will do what the statute requires, namely, pay the school such sums as Act No. 109 entitles it to receive. This is the so-called "contract". The school need not undertake to enlarge its curriculum or to increase its enrollment. Indeed, it can decrease its enrollment and diminish its curriculum and still qualify for state subsidy. It merely goes through a prescribed procedure in asking for aid and later proving that it has made expenditures that are reimbursable
under the Act, without ever obligating itself to do anything for or in the interest of the state. The state buys no services and the school sells none.34

The true character of the law, Hastie suggested, could be determined by first examining the purpose and nature of the participating schools. Reasoning from the premise that sectarian schools were established primarily for religious purposes, Hastie concluded that "the crucial consideration" in this case was "that the total teaching program is offered in a separate religious environment and for the better achievement of appropriate religious objectives."35 As a result, whenever the state subsidizes any part of the curriculum, "it directly finances and supports a religious enterprise."36 While the Constitution does not forbid the state from providing all forms of assistance to religious institutions, it does preclude direct public financing of a religious activity.37 The Education Act could, therefore, be distinguished from the indirect forms of aid that received Supreme Court approval in Everson and Allen.

Of greater importance than the distinction between indirect and direct assistance, Hastie insisted, was the fact that the Pennsylvania law "invites religious groups or organizations to act politically and involves the state intrusively in the affairs of religious institutions."38 In making this charge, Hastie reiterated the concerns expressed by Madison in his "Memorial and Remonstrance," and, in the process, suggested an additional test to be used in establishment cases.39 Although he did not use the phrase

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"excessive entanglement" (this was coined by Chief Justice Burger six months later in *Walz*), Hastie was nevertheless referring to precisely the same kinds of involvement that Burger would cite as violations of the Establishment Clause on the grounds of excessive entanglement. The District Court judges in *DiCenso v. Robinson* as well as the Supreme Court justices in *Lemon v. Kurtzman/Robinson v. DiCenso* would base their decisions on the potential for excessive entanglement rather than on the distinction between direct and indirect forms of aid.

Hastie viewed the passage of the Education Act as an invitation to religious organizations to petition for state subsidies to support their other "secular" activities. Should the constitutional prohibition be removed so that all "secular" parts of sectarian education could be funded by public monies, political controversy would probably result.

Leaders and devout members of various organized religious groups will see it as their duty to their church or sect to seek such aid and to insist that state and local governments contribute liberally to their sectarian enterprises. Legislators, government executives and candidates for elective office in whose judgment other claims upon the public purse merit higher priority can anticipate political opposition as enemies of the faith.40

Undermining of the principle of separation of church and state, he explained, would deprive candidates of the needed authority to avoid taking a position on religious issues, and, as a result, there would be "no escape from the evils that attend a widespread and pervasive intermingling of politics and religion."41
But the entanglement of church and state would not be limited just to political activity by religious organizations. Under the Pennsylvania Education Act, government assumed responsibility to assure that public funds would not be used for religious purposes, and this implied state intrusion into the affairs of organized religion. State financing of education would, for example, carry with it the requirement that schools adopt non-discriminatory admissions standards; they could no longer select students on the basis of religious affiliation. In addition, the state would have the right and duty to monitor curriculum and instruction "to assure that teaching in these state-supported areas is not so oriented as to inculcate sectarian or religious tenets or doctrines."42

Church-related schools would be asked to disclose the extent to which sectarian precepts are involved in the teaching of secular subjects; whether teachers of such subjects are clerics, and what religious materials and symbols are used or displayed in the schools in connection with activities other than religious ceremonies.43

Such "pervasive monitoring and investigation," Hastie observed, would be highly "offensive."

Yet, it is to just such intrusion that the Pennsylvania Statute opens the door, if by necessary implication it does not go farther and mandate the entry of state overseers as the only means by which the state can adequately check upon the initial and continuing eligibility of particular "secular" instruction for state financing.44

The specter of state officials patrolling sectarian schools convinced Hastie that the Education Act resulted in an excessive entanglement of government in religion.
II.

Chief Justice Burger devised the phrase "excessive entanglement" when deciding *Walz v. Tax Commission of the City of New York*, six months after Hastie had issued his opinion in *Lemon*. *Walz* raised the question of whether a tax exemption for church property constituted an establishment of religion. In an eight-one decision, the Court ruled on 4 May 1970 that such exemptions maintained a greater separation between church and state than would the collection of taxes. Finding the primary purpose and effect tests inadequate, Burger had instead considered whether the exemption policy increased government intrusion into the private affairs of churches, leading to "excessive government entanglement."

Burger's proposal for an additional test in establishment cases was significant. Because *Walz* was the first church-state case in which he participated, his decision gave some indication of the position he would take in cases involving aid to sectarian schools. Adoption of the excessive entanglement test, if viewed in light of Hastie's recent dissent, implied that Burger would be reluctant to find programs of direct aid to sectarian schools constitutional.

In *Walz* Burger apparently sought to maintain the widest possible separation between church and state. Conceding that the "course of constitutional neutrality... cannot be an absolutely straight line," he went on to state that "[w]e must also be sure that the end result - the effect - is not
Elaborating on the idea that the "test is inescapably one of degree," he explained:

[T]he questions are whether the involvement is excessive, and whether it is a continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory and administrative standards. ... 46

The references to "continuing surveillance," "direct money subsidy," and "sustained and detailed administrative relationships" focus on the same problems that Hastie had raised in urging that Pennsylvania's Education Act be declared unconstitutional.

In ruling on tax exemption, the Court was not confronted by a direct subsidy, and for that reason the justices - with the exception of Douglas - concluded that exempting churches from paying taxes on church property did not respect an establishment of religion. However, in clarifying what he meant by excessive entanglement, Burger set down guidelines that would be used later in deciding parochial cases. He may even have been aware of Hastie's dissenting opinion and found the ideas of the Circuit Judge sufficiently sound to incorporate as a general measure for determining establishment. Certainly Brennan and Harlan, who wrote concurring opinions, and Douglas, who wrote the sole dissenting opinion in Walz, did so with a full awareness that their opinions would be used as precedents in deciding the

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constitutionalitv of government programs to aid sectarian schools.

Brennan's concurring opinion in *Walz* reiterated the guidelines he had used in his *Abington* opinion. He emphasized that the Establishment Clause forbids the use of "essentially religious means to serve governmental ends, where secular means would suffice." As did Burger, Brennan distinguished between tax exemptions, which he considered preferable to government taxation of church property because it minimized the interaction between church and state, and general subsidies of religious activities, which "would, of course, constitute impermissible state involvement with religion."48

Harlan declared himself "in basic agreement" with Burger's reasoning but attempted to integrate the new rule of excessive entanglement with the established principles of neutrality and voluntarism. These principles, Harlan noted, though "at the 'core' of the Religion Clauses, ... may not suffice by themselves to achieve in all cases the purposes of the First Amendment."49 Referring both to the majority opinion and to a recent article by Professor Paul Freund on aid to parochial schools, Harlan declared: "Although the very fact of neutrality may limit the intensity of involvement, government participation in certain programs, whose very nature is apt to entangle the state in details of administration and planning, may escalate to the point of inviting undue fragmentation" and risk the politicizing of religion.50 Subsidies, he cautioned, "must be passed on
periodically and thus invite more political controversy than exemptions."

Moreover, subsidies or direct aid, as a general rule, are granted on the basis of enumerated or more complicated qualifications and frequently involve the state in administration to a higher degree, though, to be sure, this is not necessarily the case. 51

As had been true for Burger and Brennan, Harlan recognized the need to distinguish carefully between the exemption issue raised in this case and the question of direct grants that would soon be considered by the Court.

Douglas, however, was not comfortable with that distinction. Convinced that the trend toward government aid to sectarian schools would continue, he wanted to make certain that no aspect of existing policy could be interpreted as legitimizing grants to church-related activities. Douglas' basic premise was that "[a] tax exemption is a subsidy." 52 Quoting a 1933 study published by The Brookings Institution, Douglas stated, "such grants [for exemptions] would seem justified only if the purpose for which they are made is one for which the legislative body would be equally willing to make a direct appropriation from public funds equal to the amount of the exemption." [Emphasis Douglas'] 53 Undoubtedly seeing a parallel between the welfare programs of the churches, which his colleagues had cited as justifying tax exempt status, and the allegedly secular service performed by parochial schools, he challenged the notion that the religious character of a church could ever be separated from any of its activities. 54

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Furthermore, Douglas charged, the churches had substantial assets and incomes, thus precluding the need for government to grant them tax-exempt status or provide any kind of financial assistance. Yet, he added, "the extent to which they are feeding from the public trough in a variety of forms is alarming." This observation led the Justice directly into a discussion of the expanding number of government programs to aid parochial schools. Given his specific reference to the two state aid-to-education programs that would be examined by the Supreme Court in Lemon v. Kurtzman, Douglas' comments in Walz deserve to be quoted at length.

We are advised that since 1968 at least five States have undertaken to give subsidies to parochial and other private schools -- Pennsylvania, Ohio, New York, Connecticut, and Rhode Island. And it is reported that under two federal acts, the Elementary and Secondary Education Act of 1965 ... and the Higher Education Act of 1965 ..., billions of dollars have been granted to parochial and other private schools. [Emphasis Douglas']

The federal grants to elementary and secondary schools ... were made to the States which in turn made advances to elementary and secondary schools. These figures are not available.

But the federal grants to private institutions of higher education are revealed in Department of Health, Education, and Welfare (HEW), Digest of Educational Statistics 16 (1969). These show in billions of dollars the following:

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<tr>
<th>Year</th>
<th>Amount</th>
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<tbody>
<tr>
<td>1965-66</td>
<td>$1.4</td>
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<tr>
<td>1966-67</td>
<td>$1.6</td>
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<td>1967-68</td>
<td>$1.7</td>
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<tr>
<td>1968-69</td>
<td>$1.9</td>
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<tr>
<td>1969-70</td>
<td>$2.157</td>
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The tone of his remarks as well as the detailed information on government expenditures in support of nonpublic education
lead to the conclusion that in this case, as in the two prayer decisions, Douglas made his decision with the issue of aid to parochial schools uppermost in thought.
III.

The District Court's ruling in DiCenso v. Robinson on 9 November 1970 relied almost exclusively on the excessive entanglement test introduced in Walz, yet the concerns expressed by the judges echoed those voiced in Hastie's Lemon dissent. Citing both the potential for political controversy and the inevitable intrusion by government into the workings of the sectarian schools, Judge Frank Coffin declared Rhode Island's Salary Supplement Act unconstitutional. In a separate opinion, Judge Raymond J. Pettine concurred in the result but disagreed with the Court's contention that the religious nature of the schools manifests itself in all aspects of the curriculum.

The Rhode Island Salary Supplement Act, passed in 1969, authorized state officials to supplement the salaries of teachers in nonpublic elementary schools up to fifteen percent of an individual's current annual salary, but the total earnings of the nonpublic school teacher could not exceed the maximum paid to public school teachers. The money was paid by the State directly to the recipient. To qualify, a teacher had to be certified by the State Board of Education and was restricted to teaching only secular subjects, using only those materials approved for use in the State's public schools. In addition, the recipient had to teach in a nonpublic school at which the average per-pupil expenditure on secular education was less than the average in the State's
public schools during a specified period. For all practical purposes, that provision limited the pool of qualified applicants to those who taught in parochial schools. The law called for examination of the schools' financial records by the State Commissioner of Education to assure that the various requirements were met.\textsuperscript{59}

The legislature's stated purpose in passing this measure resembled that of other state assemblies that had approved programs to aid nonpublic schools: to assure a high quality of education for all Rhode Island students. Confronted by the fact that fewer nuns were available to teach in parochial schools, church officials and lay leaders of the Catholic Church had informed lawmakers of their plight. Catholic schools had become increasingly dependent on lay teachers, but without government assistance, they could not pay these teachers salaries that were competitive with those offered in the public system.\textsuperscript{60} If parochial schools were not able to attract highly qualified teachers, the quality of education in the parochial schools would decline, and children would be denied the right to an education equal to that available in the public schools. Should the quality of sectarian schools drop to a low enough level that parents felt compelled to transfer their children to public schools, the parental right to choose the kind of education they wanted for their children would be effectively withdrawn.\textsuperscript{61} By subsidizing salaries in the parochial system, legislators sought to appease these concerns.
A group of citizens and taxpayers, including Joan DiCenso, brought suit charging that the Act violated the Establishment and Free Exercise Clauses of the First Amendment. Their complaint alleged that Catholic schools were the principal beneficiaries, that these schools had as their goal the propagation of the Catholic faith, and, as a result, that the purpose and primary effect of the statute was the advancement of religion. In addition, plaintiffs maintained that their rights under Free Exercise were violated since they were compelled as taxpayers to pay money in support of religion.

The District Court based its decision on the merits of the case. The hearing, conducted three months earlier, had included testimony from the Superintendent of Schools for the Archdiocese of Providence, an Associate Commissioner of Education for the State, and several teachers. In addition, the Court had received depositions and documentary evidence, the most important of which was a copy of the "Handbook of School Regulations" issued by the Archdiocese.

The principal question was whether the Rhode Island law respected an establishment of religion; however, the judges also had to consider the claims made on both sides with regard to free exercise and equal protection. Because the plaintiffs had offered no testimony concerning their personal beliefs or practices, the Court dismissed their complaint that the statute infringed on the free exercise of religion. The judges also found the equal protection claims of the teacher-intervenors (Earley, et al.) inadequate. These
teachers, beneficiaries under the Act, maintained that the exclusion of teachers in sectarian schools from receiving the state supplement to their incomes would constitute discrimination on an impermissible ground — i.e., religion. The Court pointed out that such a charge was essentially hypothetical since no teachers in secular private schools had applied for aid and, consequently, no aid would be given. "Moreover, intervenors' hypothetical scheme would not discriminate on the basis of the teachers' personal beliefs . . . but on the basis of the institutions which employ them."65 This distinction, Coffin added, was mandated by the Establishment Clause.

Though "more plausible," the Court denied, too, the claim of parent-intervenors based on the Free Exercise Clause. These individuals stated that they might be forced to ignore the dictates of conscience — i.e., the conviction that education should be imbued with religious values — and transfer their children to public schools if the quality of the parochial schools dropped to an unacceptable level. To avoid this result, they argued that "the free exercise benefits which flow from aid to parochial education should prevail over the establishment clause values protected by strict separation."66 The judges, however, rejected "the notion that the Free Exercise Clause demands affirmative state action to accommodate such personal evaluations when society at large has accepted the premise that religious and secular education can be successfully separated."67

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In dealing with the establishment question, Coffin began by examining the facts of the case. Looking first to the statute itself, he noted that the general purpose was to provide "a quality education for all Rhode Island youth," while the specific purpose was "to assist nonpublic schools to provide salary scales which will enable them to retain and obtain teaching personnel who meet recognized standards of quality."68

The next matter for consideration by the Court was the financial crisis confronting the Catholic schools, which had convinced legislators of the need for government assistance. Drawing from the testimony of the Catholic School Superintendent Edward W. K. Mullen, Coffin reviewed the facts: a significant increase in the number of lay teachers employed by the Catholic schools (from four or five percent in 1959 to thirty-three percent in 1969); the far greater cost of hiring lay teachers (they were paid three times as much as nuns); and the increasing salary levels of public schools (starting salaries for public school teachers increased from $6,000 to $7,000 for the 1969-70 year, while those of parochial school teachers rose from $5,000 to $6,000, and that increase had included the state supplement).69 These statistics not only demonstrated the "monumental" crisis already facing parochial schools but also pointed to "deepening" financial difficulties. The rapidly changing composition of the parochial school facilities, Coffin observed, "will inescapably require substantially
greater appropriations subsidizing substantially greater percentages of the salaries of lay teachers.\textsuperscript{70}

The third subject of concern was the character of the Catholic elementary schools and, specifically, the extent to which religion pervaded the educational program. The evidence presented to the Court revealed that the schools were under the general supervision of the Bishop of Providence and of the Diocesan Superintendent of Schools, who was himself appointed by the Bishop. Furthermore, the parish usually assumed ultimate financial responsibility for the schools, and the parish priest was responsible for allocating the funds. With only two exceptions, the principals of the schools were nuns. All lay teachers were interviewed and hired by church officials, and their salaries were set by the Diocese with some discretion left to the parish priest.\textsuperscript{71} Of particular interest to the Court was the "Handbook of School Regulations."

This Handbook, though admittedly modified in practice, made clear the religious character of the schools and emphasized the role of the teacher in fulfilling the religious mission. Citing relevant passages from the Handbook, Judge Coffin wrote:

\begin{quote}
The keynote to education in a parochial school is perhaps best reflected in the Handbook's remarks about the importance of a teacher: "The prime factor for the success or failure of the school is the spirit and personality, as well as the professional competence, of the teacher. . . ." Consistent with this view is the Handbook's view of the scope of religious activities: "Religious formation is not confined to formal courses; nor is it restricted to a single subject area." Teachers are further advised by the Handbook to try to
\end{quote}
stimulate interest in pursuing religious vocations and in missionary work.72 Yet teachers, including some who were not Catholics, had testified that they did not inject religion into the teaching of secular courses. The Court noted also that the materials used by participating teachers had been approved for use in the public schools.73

Further evaluation of the schools, particularly the presence of religious symbols and the incorporation of religion into the curriculum, led the judges to conclude that an intangible "religious atmosphere" existed.74 Coffin discussed its importance:

[T]he diocesan school system is an integral part of the religious mission of the Catholic Church. It is not that religious doctrine overtly intrudes into all instruction. Rather the combined conveniences of ready access to church and pastor, homogeneous student body, and ability to schedule throughout the day a blend of secular and religious activities makes the parochial school a powerful vehicle for transmitting the Catholic faith to the next generation.75

Because the success of the religious mission depended on the quality of teaching in the secular subjects, he added, the two could not be artificially separated.76

Having concluded his analysis of the facts, Judge Coffin then addressed the constitutional question and applied the primary purpose and effect test proposed in Schempp. He refused to explore the activities of lobbyists as a means of determining the intent of the legislators but accepted instead the declaration of purpose included within the statute: "to provide a quality education for all Rhode Island youth, those in public and non-public schools alike."77 In

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his judgment, the Act was not intended either to advance or interfere with religion.

Ascertaining whether the "primary effect" was one which promoted or inhibited religion proved a more difficult task. The Court first had to decide what is meant by the term "primary." The contending parties had offered markedly different definitions: plaintiffs interpreted it as meaning "essential" or "fundamental," while defendants employed the literal definition, "first in order of importance." An arbitrary choice of which definition is correct would have essentially decided the case. Coffin chose another route. The entanglement test proposed in Walz, he explained, constituted a "significant refinement" of the effect test. It also provided a legitimate means of judging the Act so its use gave added authority to the Court's decision. Most important, reliance on the excessive entanglement test eliminated the problem of determining primary effect.

Walz thus makes it clear that the test of a statute's effect is not whether the secular result is more important than the religious result, nor whether the activity aided is in form secular, but whether the degree of entanglement required by the statute is likely to promote the substantive evils against which the First Amendment guards.

Using this measure, the Court found "two significant dangers" resulting from the salary supplement. On the one hand, the Rhode Island statute required annual review of the appropriations. This would "inevitably excite bitter controversy" since the various sects would either compete for funds or actively oppose assistance going to other churches. In those areas where one denomination was dominant and
government monies went only to the schools supported by that church, the subsidies "may amount to an establishment in the classic sense."81

On the other hand, careful supervision to assure that no public funds were being used for religious purposes would "inevitably produce significant state limitations on the freedom of denominational schools."32 The testimonies of teachers demonstrated that the Act had already sharply restricted their roles.83 Official inquiries into the content of courses also "represent a substantial limitation on the freedom of parochial schools to set their own curriculum."84 Continued and very likely expanded assistance would, Coffin warned, entail compliance with government policies forbidding discrimination in admissions and in the hiring of teachers. Because such changes would threaten the essential character of sectarian schools, the potential for disputes between church administrators and government officials would greatly increase.85 Controversies of this sort, the Court concluded, were precisely what the First Amendment was intended to preclude. The excessive entanglements inherent in the Salary Supplement Act consequently rendered the statute unconstitutional.

District Judge Pettine agreed that the Act resulted in an excessive entanglement of government and religion but objected to the Court's finding that it provided substantial support to a religious enterprise. On the contrary, the teachers had offered "unanimous unrebutted testimony... that religion does not enter into their teaching process."86

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The parallel between the Supreme Court's opinion and that of the United States District Court in Rhode Island affords convincing evidence of the reliance of justices on lower court opinions in certain instances. The particular circumstances in Lemon v. Kurtzman serve to identify those situations where such a reliance is most likely to occur. The justices found the reasoning of the Rhode Island judges appealing because they had adopted the excessive entanglement test recently proposed by the Supreme Court in an opinion written by Chief Justice Burger. In addition, the dissenting opinion in the Pennsylvania case came from the highly respected Circuit Judge, William H. Hastie. This opinion, raising many of the same points and, in some instances, used by the Rhode Island judges to substantiate their own arguments meant a clear majority (4-2) of the lower court judges disapproved of programs to provide direct aid because of the inevitable intrusion of church and state in the other's sphere.

As a practical consideration, reliance on the District Court opinions provided the most efficient way to discern the salient facts. The justices received well over 2,000 pages of briefs and records for these two cases -- an overwhelming amount of material to read and digest, especially when viewed in the context of their total caseload. They also heard an hour of oral argument for each of the cases (equal to about sixty pages of transcript per case). Since Judge Coffin had
selected the evidence for his opinion from the documents and testimony presented to his court and since most of the justices found the evidence adequate to support the decision, they had little reason to go back through the records for additional information or even to incorporate the facts presented in oral argument.87

Although Burger, Douglas, and Brennan all drew heavily from the District Court decisions, the differences in their opinions were significant. Neither Douglas nor Brennan was willing to concede, as Burger did in the majority opinion, that the secular and religious aspects of education in a sectarian school could be separated. Douglas incorporated additional evidence from the Rhode Island records in order to prove that religion pervaded all aspects of a parochial education. Since that was the case, he argued, any state funding would constitute an establishment, and taxpayers would be compelled to support a religious activity despite the First Amendment. In addition, he argued that the freedom of the schools would be undermined should they receive public monies. Brennan, too, emphasized this latter point in his opinion. Drawing heavily from his Abington opinion, Brennan reasoned that both laws led to state interference in religious activities.

Justice White, dissenting from the ruling on the Rhode Island case, agreed with neither his colleagues on the Supreme Court nor with the District Court judges in either Rhode Island or Pennsylvania. The basic premise on which he based his reasoning -- that the religious and secular aspects
of education in parochial schools could be separated — led him to conclude that state funds could legitimately be allowed to sectarian schools.

The principal objection of the Supreme Court majority to the education acts under consideration was the potential each of these held for an excessive entanglement of government and religion. Burger began by listing the three tests commonly used to determine establishment: secular legislative purpose, a primary purpose that neither advances nor inhibits religion, and excessive entanglement. Cursory consideration of legislative intent satisfied the Chief Justice that improvement in education rather than advancement of religion had motivated the lawmakers.88 He then skipped over the primary purpose and effect test, as Coffin had done in DiCenso, and focused on the question of entanglement.89 To determine whether the programs resulted in an unconstitutional intrusion of government in church affairs, Burger suggested three areas for inquiry: the character and purposes of the schools, the nature of the assistance the states provided, and the resulting relationships between the government and the religious authority.90 The criteria were essentially the same as those used by Judge Coffin.

In examining the Rhode Island Salary Supplement Act, Burger's reliance on the District Court's findings was even more conspicuous. Making only minor changes in the wording, he cited the evidence Coffin had used: the proximity of the schools to parish churches, the presence of religious symbols, the religious orientation of extracurricular
activities, the encouragement of religious vocations, and the administrative responsibility of church officials over the schools as well as the instructions included in the Diocesan "Handbook."\textsuperscript{91}

Despite his incorporation of evidence that had led Coffin to the conclusion that the religious character pervaded all aspects of a parochial school's curriculum, Burger shied away from such a judgment. He did admit the difficulties a teacher might have in trying to separate the secular from the religious or moral values from church doctrine, but added, "We do not assume... that parochial school teachers will be unsuccessful in their attempts to segregate their religious beliefs from their secular educational responsibilities."\textsuperscript{92}

The "potential for impermissible fostering of religion" had, however, compelled the State to impose "pervasive restrictions" and to implement a "comprehensive, discriminating, and continuing" program of surveillance.\textsuperscript{93} "These prophylactic contacts," Burger declared, would result in excessive entanglement.\textsuperscript{94} This holding echoed the pronouncements made by Judges Coffin and Hastie.\textsuperscript{95}

An additional entanglement problem cited by both Coffin and Burger entailed the review of sectarian school accounts and records by the state. The purpose of such auditing would be to determine the percentage of money spent on secular as opposed to religious activities. "This kind of state inspection and evaluation of the religious content of a religious organization..." the Chief Justice wrote, "is a
relationship pregnant with dangers of excessive government direction of church schools and hence of churches.®

Turning to the Pennsylvania statute, Burger logically drew from Hastie's opinion. Like the Circuit Judge, he emphasized "the divisive political potential" of the state programs.® Faced with the pressures of trying to preserve sectarian schools, he predicted, church officials and interested laymen would lobby for state support, opponents would respond, and political candidates would be forced to choose sides. Burger cited a comment by Professor Freund and opinions by Justices Harlan and Goldberg, precisely the same ones Hastie had used, to lend credibility to his assertion.® Like Hastie, Burger believed that the direct payment of public money to the schools distinguished this case from earlier ones.®

Burger's dependence on the lower court opinions stands in striking contrast to the concurring opinion written by Justice Douglas. Where the Chief Justice was content to rely on the research and reasoning of Judges Coffin and Hastie, Douglas endeavored to strengthen the argument by introducing evidence that would not only corroborate the material used by the District Court judges but would, in fact, provide more convincing proof of the need to block public funding of sectarian education. The basic point of disagreement between Burger and Douglas was the extent to which religion permeated the curriculum of church-related schools. Since Burger believed that teachers could separate the secular subject from a teaching of religious values or church doctrine, he

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was satisfied with the evidence and explications of Coffin and Hastie. Douglas, on the other hand, was convinced that religion pervaded all aspects of education in a sectarian school; and he, consequently, felt impelled to provide proof that this was indeed the case. His purpose in writing a concurring opinion was, therefore, to supplement the evidence used by the lower courts and to counter the position presented by Burger.

The basic premise underlying Douglas' opinion was that state monies should not be allocated to church-related schools because the "raison d'etre of parochial schools is the propagation of a religious faith." To defend this contention, he briefly discussed the emergence of sectarian schools in the United States. More importantly, he cited the relatively recent observations by a prominent Catholic educator indicating that "in a parochial school religion permeates the whole curriculum, and is not confined to a single half-hour period in the day." The thrust of his argument derived from the "Handbook of School Regulations" that had been cited by Judge Coffin and Chief Justice Burger.

Douglas' extensive excerpts from the Handbook were carefully chosen to emphasize the control over parochial schools by church officials and the importance of religion in the curriculum. While the majority opinion referred to the Handbook and included short passages from the guidelines to show that religious authority was present in the school system, Douglas' detailed and lengthy selections have a greater impact in conveying the message that religion was
central to the purpose and, therefore, to the curriculum of the Catholic schools in Rhode Island. In addition to references regarding the responsibilities of the school board, superintendent, bishop, pastors, and community supervisors, Douglas reviewed the regulations mandating religious instruction as a separate subject and within the context of otherwise secular courses, providing for religious activities including daily Mass, and governing the selection of students. These, he concluded, "are only highlights of the handbook. But they indicate how pervasive is the religious control over the school and how remote this type of school is from the secular school." 

In taking the position that religion cannot be divorced from any aspect of education in a parochial school, Douglas aligned himself with Rhode Island's Judge Coffin. Although Coffin's evidence and much of his reasoning had been adopted by Burger, his actual judgment on the religious character of the Catholic schools in Rhode Island was closer to that of Douglas.

By including evidence that had been discussed in the lower court opinion, Douglas was essentially reasserting a fundamental point in the reasoning of the District Judge. The restoration of this point was necessary because it was the one element in Coffin's opinion that had not been incorporated by Burger into the majority opinion and it was, so Douglas believed, the linchpin in Coffin's argument.

Hastie's reliance on Douglas' Allen dissent explains the similarity in reasoning in Hastie's Lemon dissent and the
Justice's concurring opinion. Both men insisted that allocation of public monies would require state supervision to assure that funds were not used for religious purposes. Hastie explained:

If the state is to finance "secular" teaching in parochial and other church-related schools, the state must have the power and responsibility of monitoring curriculum and instruction to assure that teaching in these state-supported areas is not so oriented as to inculcate sectarian or religious tenets or doctrines... It is difficult to imagine a type of intrusion by the state more offensive to a religious community than such pervasive monitoring and investigation of instruction and academic organization in order to purge the secular areas of the curriculum of religious orientation.

Douglas' comments are comparable, though his tone is sharper:

The surveillance or supervision of the States needed to police grants involved in these cases, if performed, puts a public investigator into every classroom and entails a pervasive monitoring of these church agencies by the secular authorities. Yet if that surveillance or supervision does not occur the zeal of religious proselytizers promises to carry the day and make a shambles of the Establishment Clause.

In developing the argument against entanglement, Douglas again chose to supplement the reasoning of the lower court judges by providing additional evidence to show the dangers of government intrusion. He described, for example, the surveillance by the British government over sectarian schools that are supported by public monies. In contrast to the minimal requirements imposed on nonpublic schools in the United States to assure a basic level of education, the British government "exerts control by prescribing standards; it requires some free scholarships; [and] it provides nondenominational membership on the board of directors." He
also noted the consequences when states attempted to avoid desegregating public schools by providing public funds to private schools; the private schools were forced to comply with constitutional requirements for equal protection because they accepted government money. To complete his case, he returned to Madison's "Memorial and Remonstrance" and quoted what he labelled an "extremely relevant" passage from that document: Taxation to support religious activities, "will destroy the moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects."

Brennan's opinion, like those of Burger and Douglas, drew more heavily from the Rhode Island decision than from Hastie's dissent in the Pennsylvania case. The greater value of Coffin's opinion lay not so much in the quality of reasoning as in the fact that the Rhode Island case, because it had gone to trial, included substantial information on the character of parochial schools and the actual effects the law had had on sectarian education in that state. Another advantage of relying on the later case was its use of the "excessive entanglement" guideline proposed by the Supreme Court. Both of these factors account for Brennan's incorporation of various elements from the Rhode Island decision.

The thrust of Brennan's opinion was that the Pennsylvania and Rhode Island laws seriously threatened the independence of church-related schools. Their enforcement would result, as Coffin had pointed out, in severe
restrictions on teachers, inhibiting regulations and surveillance of administration and curriculum, and significant changes in admissions policies and faculty selection pursuant to the Equal Protection Clause of the Fourteenth Amendment. Brennan did not, however, cite the second danger mentioned by the District Judge—the likelihood of political controversy arising from groups either competing for aid or from those opposing such assistance. His central concern lay in preserving the original character of the parochial school.

Unlike Burger, Brennan was not persuaded that the secular and religious aspects of education could or should be separated. Rather, he maintained that education in parochial schools involved the integration of religion into the curriculum. Referring to Pierce and Allen, cases in which the Court had acknowledged that church-related schools perform a secular educational service, Brennan explained:

I read them as supporting the propositions that as an identifiable set of skills and an identifiable quantum of knowledge, secular education may be effectively provided either in the religious context of parochial schools, or outside the context of religion in public schools. ... But the State has no proper interest in prescribing the precise forum in which such skills and knowledge are learned since acquisition of this secular education is neither incompatible with religious learning, nor is it inconsistent with or inimical to religious precepts.

The purpose of parochial schools, Brennan had already made clear in his discussion of their origins in the nineteenth century, was to provide an education in which religious values and beliefs were a dominant feature. The statutes
under consideration by the Court, "require[d] 'too close a proximity' of government to the subsidized sectarian institutions and in [his] view create[d] real dangers of 'the secularization of a creed.'" 114

Brennan was able to distinguish the cases before the Court from the precedents that had upheld certain forms of aid. Where Judge Coffin had found in Everson and Allen inadequate guidance for evaluating the Rhode Island program, Brennan used these earlier cases to point out the differences between what was constitutionally permissible and what was not. Because the payment for costs of transportation and textbooks previously had been assumed by parents, the aid for these services could not be viewed as subsidies for religious institutions. "The present cases, however, involve direct subsidies of tax monies to the schools themselves and we cannot blink the fact that the secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence." 115

In addition, Brennan continued to believe that the two-part test introduced in the Abington decision was still valid. Despite the fact that the "excessive entanglement" rule provided the basis for the opinions of Burger and Douglas as well as that of Judge Coffin, Brennan relied more heavily on the earlier guidelines. His analysis of "the operation, purposes, and effects of these statutes" led him "inescapably to the conclusion that they do impermissibly involve the States . . . with the 'essentially religious activities' of sectarian educational institutions." Quoting
again from the test laid down in Abington, he continued: "I think each government uses 'essentially religious means to serve governmental ends, where secular means would suffice.'"

Byron White, in his dissent, also focused on purposes, operation, and effects but concluded that religious and secular functions can be separated and that the evidence presented in the Rhode Island case demonstrated an effective separation of those functions. Earlier decisions by the Supreme Court had recognized that parochial schools have a dual role and had acknowledged the possibility of separating the two elements of secular and religious education. "That religion may indirectly benefit from governmental aid to the secular activities of churches," he argued, "does not convert that aid into an impermissible establishment of religion . . . ."

"It is unnecessary, therefore, to urge that the Free Exercise Clause of the First Amendment at least permits government in some respects to modify and mold its secular programs out of express concern for free-exercise values." Following a line of argument not unlike that used by Black in Everson, White continued:

While a state program seeks to ensure the proper education of its young, in private as well as public schools, free exercise considerations at least counsel against refusing support for students attending parochial schools simply because in that setting they are also being instructed in the tenets of the faith they are constitutionally free to practice."
White insisted that the majority opinion in the Rhode Island case created "an insoluble paradox." On the one hand, the Court ruled that public funds could not be used to support the teaching of religion. But, on the other hand, it forbade the implementation of administrative mechanisms and procedures to guard against the misuse of monies because these would lead to an excessive entanglement.119

No fault is found with the secular purpose of the [Rhode Island] program; there is no suggestion that the purpose was aid to religion disguised in secular attire. Nor does the Court find that the primary effect of the program is to aid religion rather than to implement secular goals. The Court nevertheless finds that impermissible "entanglement" will result from administration of the program. The reasoning is a curious and mystifying bland, but a critical factor appears to be an unwillingness to accept the District Court's express findings that on the evidence before it none of the teachers here involved mixed religious and secular instruction.120

As evident in this statement, White's principal objection to the Court's opinion lay in their reliance on the "excessive entanglement" test. Its use essentially precluded the giving of any government monies to church-related schools, even though the designated use of the funds might be for legitimate secular purposes, and this, White contended, infringed on the right of free exercise.

By concentrating on the excessive entanglement argument, White not only found himself at odds with the District Court judges from Rhode Island but he also distinguished his position from that of the majority on the Pennsylvania Court. Judges Luongo and Troutman, writing before the Walz decision, had relied on the purpose and primary effect tests; they had
insisted on the possibility of separating secular from religious education, and they had adhered to the principle of religious neutrality. However, they had no reason to consider the idea of entanglement other than the fact that Hastie warned of political conflict and excessive supervision in his dissent. White's opinion was governed by the succession of decisions beginning with the Pennsylvania District Court ruling in Lemon and including Walz and DiCenso. But this dissent was a reaction to, rather than a refinement or reiteration of, the preceding decisions.
VI.

Pursuant to the Court's ruling in 1971, the Eastern Pennsylvania District Court enjoined any payments for services rendered under the Pennsylvania Education Act after the decision was handed down. The lower court ruled unanimously to permit the State to reimburse schools for services performed prior to that decision. As a result, plaintiffs in the earlier case again brought suit, charging that the District Court had erred in allowing the payment of $24 million to compensate sectarian schools for secular services contracted by the State. This case, Lemon v. Kurtzman — II, was argued before the Supreme Court on 8 November 1972. The justices, in a split decision, affirmed the ruling of the District Court on 2 April 1973. Chief Justice Burger again wrote the opinion for the majority. He was joined by Justices Blackmun, Powell and Rehnquist — only one of whom had participated in the first Lemon decision. Byron White concurred in the judgment of the majority. Justices Brennan and Stewart joined Douglas in a sharply-written dissent. Marshall again took no part in the consideration or decision of the case.

As had been true in the first Lemon case, the opinion of the Supreme Court majority drew directly from that of the District Court. The same three judges, Hastie, Luongo, and Troutman, issued their opinion in Lemon II on 22 February 1972. Basing their judgment on the Supreme Court's reasoning in the earlier case, they concluded that the potential for
entanglement had been eliminated when the Education Act was declared unconstitutional. The job of the Court was, therefore, to "balance the equities between the parties in order to determine whether any hardship or injustice would result from either a prospective or retrospective application of the Supreme Court's decision." Since no additional injustice would be inflicted on the plaintiffs because the money for the subsidy had already been collected, and since the schools had drawn up their budgets expecting to be reimbursed for certain items, the judges decided that the money could be paid for services rendered during the 1970-71 school year.

Similarly, the majority of the justices understood the question in this second Lemon case to be one of equity. Burger stated it in these words:

"The problem of the instant case is essentially one relating to the appropriate scope of federal equitable remedies, a problem arising from enforcement of a state statute during the period before it had been declared unconstitutional." The guidelines for making such a decision, he declared, "are a special blend of what is necessary, what is fair, and what is workable." Relying on these criteria, they concluded that the payments approved by the District judges would not "substantially undermine the constitutional interests at stake in Lemon I." Central to the majority's decision was the judgment that the relations between government and the church-related schools no longer held the potential for excessive entanglement. Since the constitutional question had already

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been decided and no further allocations would be made, the threat of political dissension had been virtually eliminated. The necessity for a final audit of school records by the State would entail minimal contact between public and church officials. And, finally, the payment would involve no "risk of significant intrusive administrative entanglement" because all of required surveillance had already been completed.129 "This single proposed payment," Burger wrote, "reflects no more than the schools' reliance on promised payment for expenses incurred by them prior to June 28, 1971."130

Under the federal system of government, the majority agreed, it is unreasonable for state officials not to administer a law that is being challenged in the federal courts. This is particularly true "when there are no fixed precedents." In such a case, "the choice is essentially one of political discretion and one this Court has never conceived as an incident of judicial review."131 The implementation of the Pennsylvania Statute, consequently, was not an irresponsible act by state officials, but rather a natural carrying out of responsibilities delegated by law. As a result, the schools should not be penalized for contracting in good faith for services that government officials were authorized to give.

The dissenters read the case very differently. To their way of thinking, the central question here, as in the first Lemon case, was whether the payments violated the Establishment Clause. Because the First Amendment prohibition had existed long before the Pennsylvania
legislature passed the Education Act, a refusal to pay amounts contracted before the statute was declared unconstitutional was not the same as making a law retroactive. "Here there is no new rule supplanting an old rule. The rule of no subsidy," Douglas asserted, "has been the dominant one since the days of Madison."132

Retroactivity of the decision in Lemon I goes to the very core of the integrity of the judicial process. Constitutional principles do not ride on the effervescent arguments advanced by those seeking to obtain unconstitutional subsidies. The happenstance of litigation is no criterion for dispensing these unconstitutional subsidies no matter the words used for the apologia, the subsidy today given to sectarian schools out of taxpayers' monies exceeds by far the "three pence" which Madison condemned in his Remonstrance.133

The tone of Douglas' comments - evident in his choice of words such as "effervescent" and "happenstance" - conveys his belief that lobbyists and lawmakers had acted with full knowledge that the appropriations violated the First Amendment.

Douglas was convinced that the Education Act was the product of a political plot to allocate as much money to sectarian schools as possible before the courts intervened.

The issues presented in this type of case are often caught up in political strategies, designed to turn judicial or legislative minorities into majorities. Lawyers planning trial strategies are familiar with those tactics. But those who use them and lose have no equities that make constitutional what has long been declared to be unconstitutional.134

The majority, in approving the payment of the $24 million, simply was cooperating in this scheme to achieve unconstitutional ends.
Although both of the Supreme Court's decisions in *Lemon v. Kurtzman* rely heavily on the research and reasoning of the lower court judges, both decisions also provide evidence of the justices refining and rethinking the arguments. The process of recasting opinions would continue throughout the 1970s. While the justices would inevitably take heed of the lower court rulings, they would find themselves building more on their own precedents, reconsidering and revising their earlier decisions in light of legislative action and political pressures.


5 The NAACP was one of the organizational plaintiffs when the case was heard by the District Court.


8 Id. at 55-58.

9 Id. at 55.

10 Id.


12 Lemon v. Kurtzman, 310 F. Supp. at 38. The several schools who joined the suit as defendants represented a small percentage of the schools under contract with the State at the time of the hearing: 1187 nonpublic elementary and secondary schools, having a total pupil population of 535,215 children, and located in 55 of Pennsylvania's 67 counties were participating in the program in the fall of 1969. On 2 September 1969 Pennsylvania had paid its first quarterly installment. Id. at 40.

13 Id. at 41.

14 Id. at 41-42.

15 Id. at 42.

16 Id.

Ibid., pp. 40-46. Sennett provided Hastie with a copy of the Executive Directive otherwise known as the Governor's Code of Fair Practices. A memorandum from the Attorney General, which accompanied the Directive, explained:

It is recognized that there is a fundamental American right for members of various religious faiths to establish and maintain educational institutions exclusively or primarily for students of their own religious faith. In such institutions students, otherwise qualified, should have equal opportunity to attend therein without discrimination because of race, color, ancestry or national origin.

Hastie Papers, Box 41-1, Harvard Law Archives.

Transcript of Hearing at 48-49.

"Parochial Schools: A Delay in Desegregation," Civil Rights Digest (Winter 1971); in Hastie Papers, Box 40-6, Harvard Law Archives. During the hearing for Lemon v. Kurtzman, Henry W. Sawyer, III had presented some statistics on the racial imbalance in Philadelphia's Catholic schools. In contrast to a 59 percent black enrollment in the city's public schools, blacks constituted six to seven percent of the students in the parochial schools, and the overwhelming proportion of those youngsters were in fifteen virtually all-black schools. Sawyer conceded that the Catholic Church had established these schools for blacks, in the city's ghettos, and he described these as "mission" schools since there was virtually no integration. Transcript of Hearing at 117-18.

Lemon v. Kurtzman, 310 F. Supp. at 43.

Ibid. at 45. The policy of refusing to consider the legislative history as a means of determining the intent of lawmakers had been suggested by Justice Frankfurter in
Court, Frankfurter explained: "[T]he private and unformulated influences which may work upon legislation are not open to judicial probing. 'The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.' McCray v. United States, 195 U.S. 27, 56..." McGowan v. Maryland, 366 U.S. at 469.

Hastie was not the first member of the bench to suggest that approval of a parochial aid law would invite political participation by religious organizations, especially those that would benefit from assistance to church-related schools. Both Rutledge and Frankfurter had cautioned of this during the Everson conference. Douglas issued his warnings in separate opinions in the prayer cases.

Paul Freund had pointed out that President Kennedy was able to avoid taking a political position upon issues of religious character by relying on the authoritative decisions on the constitutional separation of state and religion as controlling. Freund, "Public Aid to Parochial Schools," 1969, 82 Harv. L. Rev. 1680, 1692." Id.

Walz v. Tax Commission, 397 U.S. at 669, 674.

Id. at 674-75.
47 Id. at 680.
48 Id. at 690.
49 Id. at 695.
51 Id. at 699.
52 Id. at 704.
54 Walz v. Tax Commission, 397 U.S. at 710.
55 To support this contention Douglas cited a 1969 publication, The Churches: Their Riches, Revenues, and Immunities. The authors of this book were Martin Larson, a member of the National Advisory Council of Americans United for Separation of Church and State, and C. Stanley Lowell, the Associate Director of Americans United and Editor of its monthly magazine Church & State.
56 Walz v. Tax Commission, 397 U.S. at 714.
57 Id.
58 Judge Coffin has written a book on the workings of the federal appellate court in which he discusses the role of the appellate court and the process of decision making. Frank M. Coffin, The Ways of a Judge: Reflections from the Federal Appellate Bench (Boston: Houghton Mifflin, 1980).
59 Lemon v. Kurtzman, 403 U.S. at 607-608.
60 In the hearing before the three-judge District Court on 18 March 1970, Edward W. K. Mullen, Superintendent of Schools for the Diocese of Providence, testified that the proportion of lay to religious teachers was 1:2. Later, during the questioning, he added that the number of lay teachers would probably increase, thus aggravating the situation further. Transcript of Hearing by U.S. District Court, 18 March 1970, at 73 and 93, DiCenso v. Robinson, 316 F. Supp. 112 (1970).
62 The records showed that 95 percent of the children enrolled in nonpublic schools in Rhode Island attended schools affiliated with the Roman Catholic Church, and all of the 250 teachers who had applied for the salary supplement
were employed by Catholic schools. *Lemon v. Kurtzman*, 403 U.S. at 508.

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Id. at 118.

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Id. at 122. The validity of this distinction is apparent in the fact that some of the lay teachers were not Catholics and yet were deemed not eligible to receive the salary supplement because they were employed by parochial schools.

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Id. at 123.

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Id.

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Id. at 114.

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Id. at 115.

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Id. at 116.

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Id.

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Id. at 116-17.

73

Id. at 117.

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The Court cited the proximity of the parish church, the presence of crucifixes in the classrooms, the practice of praying during the school day, the inclusion of religious instruction as part of the curriculum, the provision for church-related activities in the program of extra-curricular activities, and the requirement that teachers participate in an annual two-day meeting of the Catholic Teachers Institute in which the teaching of religion was occasionally discussed. In addition, they noted the presence of nuns on the faculty and their influence on the students. Id.

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Id.

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Id. at 118.

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Id. at 119.

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Id.

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Id. at 120.

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Id.

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Id. at 121.

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Id.
"The evidence before us," Coffin wrote, "indicates that some otherwise qualified teachers have stopped teaching courses in religion in order to qualify for aid under the Act. One teacher, in fact, testified that he no longer prays with his class lest he endanger his subsidy." Id.

Id.

Id.

Id.

Id. at 124. In a memo to Mr. Justice Harlan, Tom Krattenmaker (Clerk for the 1970 Term) inserted the following comment regarding Pettine's dissent: "Frankly, in light of the theory the majority extracted from Nale -- that the test of 'effect' is the extent of 'entanglement' -- and the fact that Judge Pettine did not dissent at all from this portion of the opinion, I do not see the relevance of his partial dissent." Tom Krattenmaker, "Sectarian Schools and the Public Purse: Issues for the 1970 Term," 10 September 1970, p. 32, Harlan Papers, Princeton University Library, Princeton, New Jersey.

Hilton Stansler, counsel for the appellees in Robinson v. DiCenso, presented several facts during his appearance before the Supreme Court to demonstrate the religious character of the parochial schools and the importance placed by school officials on maintaining a religious atmosphere, despite the influx of lay teachers. None of these was cited in the opinions of the Supreme Court Justices. Oral argument at 51-56, Robinson v. DiCenso, 403 U.S. 602 (1971).

Lemon v. Kurtzman, 403 U.S. at 613.

Id. at 613-14; DiCenso v. Robinson, 316 F. Supp. at 119-20.

Lemon v. Kurtzman, 403 U.S. at 615.

Id. at 615, 617-18; DiCenso v. Robinson, 316 F. Supp. at 116-17.

Lemon v. Kurtzman, 403 U.S. at 619.

Id.

Id.

Id.

DiCenso v. Robinson, 316 F. Supp. at 121; Lemon v. Kurtzman, 310 F. Supp. at 52

Lemon v. Kurtzman, 403 U.S. at 62.

Id. at 622; Lemon v. Kurtzman, 310 F. Supp. at 51-52.


Lemon v. Kurtzman, 403 U.S. at 628.

Id. at 628-29.

Id. at 635.

Id. at 638-40.

Id. at 640.

Lemon v. Kurtzman, 310 F. Supp. at 52.

Id.

Lemon v. Kurtzman, 403 U.S. at 627.

Id. at 631.

Id. at 632.

Id. at 634.

Id. at 650-51.

Id. at 655-56.

Id. at 645-47.

Id. at 649.

Id. at 657.

Id. at 658.

Id. at 664.

Id. at 665.

Id. at 668.

Id. at 665-66.


Id. at 305.

Lemon v. Kurtzman II, 411 U.S. at 199.

Id. Burger added: "In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots." Id. at 201.

Id.

Id. at 202.

Id. at 203.

Id. at 208.

Id. at 211.

Id. at 211-12.

Id. at 210.
Lemon v. Kurtzman (1971) was a watershed case. It was distinctive in that it was the one case involving aid to sectarian schools in which both Justice Black and Chief Justice Burger participated. As such it provides a link between the "absolutist" position settled on by Black and what has commonly been described as a "balancing" approach, employed by the Chief Justice. Despite their agreement on the results of Lemon, Black and Burger held fundamentally different perceptions of the meaning of the religion clauses of the First Amendment. Black never entirely succeeded in persuading his colleagues to read the Amendment as an absolute prohibition, but he significantly influenced their reasoning and provided a strong ally to those who opposed aid to church-related schools. Burger, in contrast, called for "preserving doctrinal flexibility and recognizing the need for a sensible and realistic application of the Religion Clauses." These different perceptions account, in part, for the trend of church-state decisions before but especially after the Lemon decision.

The idea of "balancing" and the emphasis on "sensible and realistic application" invited numerous suits involving aid to sectarian schools. These were decided by the Supreme Court between 1972 and 1985. The initial invitation, it should be noted, was extended to state legislatures seeking solutions to the enormous costs of education. State and
local governments welcomed the possibility of curbing overall educational costs simply by supplementing the budgets of the nonpublic schools. Legislators in many states had limited choices in this respect since taxpayers' anger had resulted in taxcap laws, which put a ceiling on all public expenditures. But public aid to nonpublic schools created a different problem since the vast majority of the schools receiving public grants were church-related. Thus, groups and individual taxpayers initiated suits to challenge such programs as violations of the Establishment Clause.

As the Supreme Court sought to adjudicate this issue, its decisions refined and reworked the criteria for constitutionally permissible forms of aid. The justices struggled to differentiate between programs that serve a legitimate secular purpose and those that might afford some benefit to religion. Using the Court's decisions as guidelines, lawmakers designed their programs to avoid constitutional roadblocks, often relying on technicalities rather than substantive qualifications. In turn, the justices have responded with further refinements. In some cases, when theory and implementation proved not to coincide, individual justices have called for reversal of earlier decisions. A review of recent cases will illustrate these points.
I.

On 25 June 1973 the Supreme Court handed down decisions in three cases involving aid to sectarian schools: *Levitt v. Committee for Public Education and Religious Liberty* (PEARL), *Sloan v. Lemon*, and *Committee for Public Education and Religious Liberty v. Nyquist*. *Levitt* resulted from a New York State law passed in April 1970, before *Lemon* was decided. *Sloan* and *Nyquist*, however, developed from statutes passed in the wake of *Lemon*. *Sloan* resulted from a Pennsylvania law pushed through within two months of the Supreme Court's ruling in *Lemon*; this law, entitled the "Parent Reimbursement Act for Nonpublic Education," provided funds to partially reimburse parents for the cost of tuition for children attending private, including church-related, schools. The State appealed the District Court's summary judgment that the law was unconstitutional, and the Supreme Court heard oral argument for *Sloan v. Lemon* on 16 April 1973. On the same day, lawyers appeared before the bench to argue the constitutionality of a New York State law to help cover the costs of maintenance in nonpublic schools and to alleviate the financial burden of parents who sent their children to private schools. The resultant case, *PEARL v. Nyquist*, pitted a special interest group against the New York State Commissioner of Education, Ewald B. Nyquist.

Justice Lewis Powell wrote the majority opinions in both *Sloan* and *Nyquist*, declaring these laws violations of the First Amendment. Powell began by recognizing that the
contested laws had been "designed, albeit unsuccessfully, to tailor state aid in a manner not incompatible with the recent decisions of this Court." Since the Court's reasoning in *Lemon* had focused on the potential for excessive entanglement, the legislators in Pennsylvania and New York adopted programs which they believed would not require government surveillance. The Pennsylvania plan provided for reimbursement for costs of tuition – up to $75 for each dependent in elementary school and $150 for each child attending private secondary school. Reviewing the provisions, Powell commented:

> In an effort to avoid the "entanglement" problem that flawed its prior aid statute, ... the new legislation specifically precludes the administering authority from having any "direction, supervision or control over the policy determinations, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic school or schools." Similarly, the statute imposes no restrictions or limitations on the uses to which the reimbursement allotments can be put by the qualifying parents.

The New York statute, signed into law in May 1972, included similar features. A parent having an annual taxable income of less than $5,000 could be reimbursed up to $50 for tuition of each child attending private elementary school and up to $100 for each one attending secondary school; in addition taxpayers whose adjusted gross incomes did not exceed $25,000 were afforded some tax relief. Schools having a high concentration of students from low-income families could receive grants from the state for maintenance and repairs.
Such grants were identified in the statute as "clearly secular, neutral or non-ideological in nature."\(^7\)

The Court issued separate rulings for Sloan and Nyquist; however, the reasoning employed by the justices was given fuller explication in the Nyquist decision, while the distinguishing elements were treated in the Sloan opinion. In deciding Nyquist, the Court ruled by a vote of seven to two that state payment of the costs of maintenance and repairs for parochial schools was unconstitutional. By a vote of six to three, the justices found the companion programs for tuition reimbursement and tax relief unconstitutional. Dividing along the same lines, six to three, the justices determined that the tuition reimbursement program challenged in Sloan v. Lemon was also impermissible.

In both cases, Justice Powell measured the specific provisions against the precedents that had been set in Everson, Allen, and Lemon. Consequently, his decision-making process was essentially one of refining and clarifying the boundaries of acceptable appropriations. In making his judgments, he used the same three-part test that had been employed in Lemon.

Both laws met the requirement of having a "secular legislative purpose." Powell explained:

> We do not question the propriety, and fully secular content, of New York's interest in preserving a healthy and safe educational environment for all of its schoolchildren. And we do not doubt — indeed, we fully recognize — the validity of the State's interest in promoting pluralism and diversity among its public and nonpublic schools. Nor do we hesitate to acknowledge the reality of its concern for an already overburdened public school system.
that might suffer in the event that a significant percentage of children presently attending nonpublic schools should abandon those schools in favor of the public schools.8

Turning to the question of whether these laws had a "primary effect" that advanced religion, Powell concluded that all three parts of the New York statute as well as the reimbursement program in Pennsylvania provided substantial benefits to the sectarian schools in their respective states. The "maintenance and repair" provisions of the New York education act differed from reimbursement for costs of transportation approved in Everson and the supplying of textbooks upheld in Allen because in both of the earlier cases parochial school students or their parents received the benefits as a part of general programs to assist all schoolchildren.9 In contrast, the grants for maintenance and repairs went only to nonpublic schools. Of even greater importance was the fact that the state placed no qualifications on how the money could be used; this distinguished the New York statute from the conditions in Tilton v. Richardson, a case involving state aid to sectarian colleges.10 In the earlier case, the Court had approved construction grants to colleges so long as the buildings were not used for religious purposes. "If the State may not erect buildings in which religious activities are to take place," Powell reasoned, "it may not maintain such buildings or renovate them when they fall into disrepair."11

The limitation that grants not exceed fifty percent of the amount expended for comparable services in the public

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schools was inadequate. Finding a parallel between that stipulation and a similar restriction on payment of salaries in the Rhode Island act found unconstitutional in *Lemon*/*DiCenso*, the Justice commented that "a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education."¹²

Dealing with the program for tuition reimbursement, Powell found the "controlling question" to be "whether the fact that the grants are delivered to parents rather than schools is of such significance" as to render the program constitutional.¹³ While acknowledging that again *Everson* and *Allen* provided precedents for sustaining assistance on the grounds that it benefited the children, Powell cautioned that disbursement of aid to parents rather than to schools "is only one among many factors to be considered."¹⁴ In *Everson* the service was one "provided in common to all citizens" and was "so separate and so indisputably marked off from the religious function" that it would "fairly be viewed as [a reflection] of a neutral posture toward religious institutions."¹⁵ In *Allen* the records indicated that textbooks could only be provided for secular courses.¹⁶ Consequently, in neither instance was the child-benefit theory used to circumvent the prohibition against aid to church-related schools. In contrast:

[I]t is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian. By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-
oriented schools. And while the other purposes for that aid — to perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools — are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions.17

That the payment was made in the form of reimbursement was irrelevant so far as the question of establishment was concerned.18

The argument that this program of reimbursements was designed to promote free exercise of religion was also untenable. Endeavoring to assure the right of the poor to choose nonpublic education for their children, Powell stated, "the State has taken a step which can only be regarded as one 'advancing' religion."19

Powell's Nyquist decision, which reversed the decision of the District Court, found that reimbursements and tax benefits offered no mitigation to the issue of separation.20 "The qualifying parent in either program receives the same form of encouragement and reward for sending his children to nonpublic schools."21 The tax benefit program, the Justice charged, was a "recent innovation, occasioned by the growing financial plight of such nonpublic institutions." The lawmakers, he implied, used this device because the Supreme Court had approved tax exemptions for churches in the Walz decision, and they believed that the tax benefits would be upheld in a similar manner.22

The parallel was not, Powell wrote, so close as the legislators had surmised. He noted three critical distinctions. First, he pointed out that the allowance of
tax exemptions for churches had a long history, demonstrating that neither political conflict nor excessive entanglement would result from such a policy. Second, he examined the purposes behind the two programs. The exemption for church property "was a product not of any purpose to support or to subsidize, but of a fiscal relationship designed to minimize involvement and entanglement between Church and State." In contrast, the tax benefit plan "would tend to increase rather than limit the involvement." Third, the tax exemption upheld in *Walz* was not an exclusive privilege given only to churches. The exemption granted to churches applied to other non-profit organizations as well; whereas, the benefit allowed by New York State applied only to parents whose children attended nonpublic schools and primarily to those whose youngsters were enrolled in sectarian schools. Special tax benefits of this sort, he declared, "cannot be squared with the principle of neutrality established by the decisions of this Court." The "importance of competing societal interests" led Powell to consider the question of entanglement even though none of the three contested programs had met the "primary effect" test. Conceding that annual reexamination of the programs would not be necessary, the Justice observed that "pressure for frequent enlargement of the relief is predictable." He based his deduction on evidence relating to general aid programs and on the expressed desire of the State to avoid assuming responsibility for educating children.
previously enrolled in private institutions. An added factor was the "deeply emotional" nature of issues involving church-state relations. In light of these considerations, Powell concluded that "while the prospect of [political] divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a 'warning signal' not to be ignored."28

The Court found "no constitutionally significant distinctions" between the tuition reimbursement program adopted in New York and that employed in Pennsylvania.29 However, the intervenors in the Pennsylvania case proffered a distinction, and Justice Powell addressed their contention in his opinion for Sloan v. Lemon. Because the New York Law had provided grants only for low-income parents, intervenors had argued, "it would be reasonable to predict that the grant would, in fact, be used to pay tuition, rendering the parent a mere 'conduit' for public aid to religious schools." In contrast, all parents of nonpublic school children would be reimbursed by the State of Pennsylvania.30 Powell dismissed the argument since the Court's judgment in Nyquist had not been dependent on the suggested reasoning.

Instead, we look to the substance of the program, and no matter how it is characterized its effect remains the same. The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions.31
The three dissenters in _Nykquist_, Chief Justice Burger and Justices White and Rehnquist, disagreed with the distinctions made by Powell and found, instead, that the earlier decisions by the Court supported the provisions in the New York and Pennsylvania statutes. In addition, they pointed to the need to balance the right of free exercise against the prohibition of an establishment. White went even further, insisting that the broader need of the community to provide quality education for its young people should be taken into account.

Rehnquist's decision, joined by Burger and White, rejected the Court's reasoning with regard to both the reimbursements and the tax benefits allowed under the New York law. Beginning with a review of the _Walz_ decision, he insisted that allowing tax benefits to parents of parochial school children was further from the verge of establishment than the granting of exemptions to the churches themselves. In addition, he charged that the logic employed to justify tax exemptions because of a long and successful history but to deny similar privileges because they are innovations was spurious.

Regardless of what the Court chooses to call the New York plan, it is still abstention from taxation, and that abstention stands on no different theoretical footing, in terms of running afoul of the Establishment Clause, from any other deduction or exemption currently allowable for religious contributions or activities. The invalidation of the New York plan is directly contrary to this Court's pronouncements in _Walz_.

Citing both _Everson_ and _Allen_, Rehnquist defended the reimbursement program as consistent with the policy of
"benevolent neutrality." In both cases, the Court had acknowledged that the aid given to parents and children might afford some benefit to the schools themselves but had nevertheless determined that the assistance was constitutional. The reimbursement program was also consistent with the principle of neutrality because the State was simply "effectuating the secular purpose of the equalization of the costs of educating New York children that are borne by parents who send their children to nonpublic schools."35

Rehnquist concluded his dissent by pointing to those factors that had led legislators to endorse these measures. The financial difficulties facing private schools constituted sufficient reason for "those who wish to keep alive pluralism in education to obtain through legislative channels forms of permissible public assistance which were not thought necessary a generation ago." Changes in circumstances justified, indeed mandated, flexibility and innovation by lawmakers, and the Court has the corresponding obligation to "distinguish between a new exercise of power within constitutional limits and an exercise of legislative power which transgresses those limits."36

The Chief Justice, including the Pennsylvania reimbursement program in his dissent, also disagreed with the Court's use of precedents.37 Where the majority had found critical distinctions between the earlier cases and those under consideration, Burger discovered a consistent principle underlying the earlier decisions that was perfectly
applicable to the Pennsylvania and New York programs. This principle was "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." Rather than being based on logic, he explained, this "fundamental principle... is premised more on experience and history." It is also the preferred outcome when the free exercise clause is balanced against that which prohibits an establishment. In weighing these two clauses against each other, "the experienced judgment of various members of this Court" found the scales tipping in favor of the right of free exercise "when the legislation moves away from direct aid to religious institutions and takes on the character of general aid to individual families."39

Comparing the facts of the Pennsylvania and New York cases to those in the earlier cases, Burger saw little to distinguish them. The "only discernible difference," the fact that the programs under review benefited only parents sending their children to nonpublic schools, was of little importance. To regard it "as constitutionally meaningful," he declared, "is to exalt form over substance."40

Burger also challenged the majority for basing their judgment on the fact that the programs would most benefit the parents of children attending church-related schools. The tendency to measure the "effect" of a law "by the percentage
of the recipients who choose to use the money for religious, rather than secular, education" was "unsupportable." 

"[S]uch a consideration is irrelevant to the constitutional determination of the 'effect' of a statute." 41

Justice White prefaced his dissenting opinion with an overview of the problem that had impelled legislation, not just in New York and Pennsylvania but throughout the country.42 Over five million children attended private schools in 1972, and of these eighty-three percent were enrolled in Roman Catholic schools. Sixty-two percent of nonpublic school enrollment was concentrated in eight industrialized, urbanized states. Thus the six percent annual decline in nonpublic school enrollment would have serious consequences in those states where the dependence on private education was greatest.43 In light of these statistics, White cautioned, the Court should "proceed with the utmost care in deciding these cases," for the right of parents "to follow the dictates of their conscience and seek a religious as well as secular education" should be taken into account as well as the need to guard against establishment.44

White began his argument by challenging the Court's majority opinion in Lemon, particularly, its reliance on the "excessive entanglement" test. Reiterating the concerns he had stated in a separate opinion in Lemon, White insisted that the use of that test created an insoluble dilemma by forbidding the states from administering assistance programs. He then added:
But whatever the weight and contours of entanglement as a separate constitutional criterion, it is of remote relevance to the cases before us with respect to the validity of tuition grants or tax credits involving or requiring no relationships whatsoever between the State and any church or any church school.45

Insofar as the maintenance and repair grants were concerned, White had "little difficulty" in finding them also to be constitutional.46

The critical question White determined, was whether the New York and Pennsylvania programs violated the test of "primary effect." In his judgment, they did not. The test, he declared, "is one of 'primary' effect not any effect." [Emphasis White's] Conceding that both states had adopted assistance programs in order to prevent the demise of the parochial school systems, he concluded that "preserving the secular functions of these schools is the overriding consequence of these laws and the resulting, but incidental, benefit to religion should not invalidate them."47

Turning to Levitt v. PEARL, the third church-state case decided on 25 June 1973, the Court ruled eight to one that a New York law passed in 1970 appropriating funds to reimburse nonpublic schools for various services mandated under state law was unconstitutional. Of particular concern to the justices was the provision to pay the schools for the "administration, grading and the compiling and reporting of the results of tests and examinations" since most of the tests were those prepared by the teachers themselves. Reviewing the law, Chief Justice Burger, who wrote the opinion for the majority, noted that it contained "no

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provision authorizing state audits of school financial records" nor requiring the schools "to submit reports accounting for the moneys received and how they are expended." The failure of the State "to assure that internally prepared tests are free of religious instruction" led the justices to conclude that this act, too, was constitutionally flawed.

Again distinguishing the statute under consideration from those ruled constitutional in Everson and Allen, Burger found the 1970 law allowed "state-supported activities of a substantially different character from bus rides or state-provided textbooks." Quoting Lemon, he added: "[i]n 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."

In a brief concurring opinion, Justices Douglas, Brennan and Marshall stated their belief that the Court's decision in Levitt was "compelled" by their decisions in Nyquist and Sloan. Only Byron White dissented, without comment, from the Levitt ruling.

The Supreme Court's handling of the three cases discussed above set the pattern that would be followed throughout the seventies. Since the justices, for the most part, agreed on the tests that should be used to determine constitutionality, the area of disagreement lay in their efforts to apply these guidelines to particular statutes. The result was a series of split decisions, reflecting the fact that the justices employed different criteria when
comparing the cases. Where some observed general similarities, others focused on specific differences. The inclination of a justice to find similarities or differences was not determined by a strict reading of the First Amendment or of the precedents but rather by the individual's predisposition to approve or disapprove of government assistance for sectarian schools.
II.

Wheeler v. Barrera, decided by the Court on 10 June 1974, presented a new set of questions for consideration. This was a class action suit brought by parents of children attending parochial schools. They charged that school officials for the State of Missouri had arbitrarily and illegally denied their children services stipulated by federal law in Title I of the Elementary and Secondary Education Act of 1965. The Act had authorized federal assistance for educationally deprived children in both public and private schools but had delegated responsibility for administering the funds to local public education officials. Congress had left the administration of the Act to local officials so as to avoid "federalizing" educational policy-making. In addition, lawmakers had recognized that certain programs, if mandated for church-related schools, would violate state constitutional restrictions involving church-state separation, and their intent was not to override with federal legislation the state prohibitions against aid to parochial schools.

Missouri officials had approved the expenditure of federal funds for teachers in public schools to provide remedial instruction but had denied such an expenditure for parochial schools. They had, however, sanctioned the use of government money for mobile educational services and equipment, visual aids, and educational radio and television. But the parochial schools refused any services other than
those provided in the public schools on the grounds that the statute had called for "comparable" services in the public and nonpublic schools. As a result, far less money per pupil had been expended for eligible students in private schools.

In a decision that was written by Justic Harry Blackmun, the Supreme Court affirmed, by a vote of eight to one, the decision of the Court of Appeals that the gross discrepancy in expenditures was a violation of the comparability requirement. The judges from the Eighth Circuit Court had "reasoned that although the Act was generally to be accommodated to state law, the question whether Title I funds were 'public,' within the meaning of the Missouri Constitution [which explicitly forbade public funds from being paid to sectarian schools] must necessarily be decided by federal law." Regarding the question of establishment, the judges refused to express an opinion since no plan had yet been implemented.

Reviewing the provisions of Title I, Blackmun concluded that the Congress had required "comparable" rather than "identical" services and that this wording had been adopted in deference to state proscriptions regarding aid to sectarian schools.

The key issue, namely, whether federal aid is money "donated to any state fund for public school purposes," within the meaning of the Missouri Constitution . . . is purely a question of state and not federal law. By characterizing the problem as one involving "federal" and not "state" funds, and then concluding that federal law governs, the Court of Appeals, we feel, in effect nullified the Act's policy of accommodating state law. The

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The choice of programs was, consequently, left to the state, and, so long as they insured comparable programs for public and nonpublic schools, they could disallow those services to sectarian schools that would violate the state constitution.

Insofar as the First Amendment was concerned, the majority agreed with the ruling by the Court of Appeals. Since "the range of possibilities is a broad one and the First Amendment implications may vary according to the precise contours of the plan that is formulated[,]" Blackmun explained, "[i]t would be wholly inappropriate for us to attempt to render an opinion ... when no specific plan is before us." In adopting this tack, the justices avoided the rough waters where they would be compelled to decide if the Act itself violated the Establishment Clause.

Justices White and Douglas were not so cautious in charting their courses. White, in a concurring opinion, noted that while the Court had not ruled on whether payment of special education teachers in parochial schools would be constitutional, they had "implied that there are programs and services comparable to on-the-premises instruction that the State could furnish private schools without violating the First Amendment." Viewing Wheeler v. Barrera as a reversal of the Court's earlier holdings, White was "pleasantly surprised" by this decision.

Douglas, too, found the Court's reasoning in Wheeler to be inconsistent with prior rulings. "I fear the judiciary
has been seduced," he stated, because the designated aid was intended for "教育ally deprived" children.\textsuperscript{62} The distinction between deprived children and those who are normal was not, to his way of thinking, sufficient to render constitutional programs that would otherwise be ruled unconstitutional. Acknowledging that the Act was probably motivated by political considerations, Douglas found no constitutional justification for allowing it to stand.

Federal financing of an apparently nonsectarian aspect of parochial school activities, if allowed, is not even a subtle evasion of First Amendment prohibitions. The parochial school is a unit; its budget is a unit; pouring in federal funds for what seems to be a nonsectarian phase of parochial school activities "establishes" the school so that, in effect, if not in purpose, it becomes stronger financially and better able to proselytize its particular faith by having more funds left over for that objective.\textsuperscript{63}

The broad rule, as Douglas saw it, was that no public monies should be granted to sectarian schools. The efforts of legislators to specify how the money would be used or who would benefit made no difference to Douglas, for the church-related school was an entity and its purpose was religious. Similarly, the efforts of his colleagues to distinguish between legitimate and illegitimate forms of aid made no sense to him.
Meek v. Pittenger (1975), one of the most complex cases involving aid to sectarian schools and the last one in which Douglas participated, illustrates the shifting tides surrounding the issue. Brennan and Marshall, renouncing their earlier vote in Allen, aligned themselves with the outspoken Douglas and declared unconstitutional two acts passed by the Pennsylvania legislature in 1972. This shifting of positions by Brennan and Marshall in the case of Meek v. Pittenger was significant, for it indicated a willingness to weigh the reasoning used in an earlier decision against subsequent legislation. The inclination of lawmakers to take advantage of technical distinctions in an effort to provide assistance to nonpublic schools contributed to the belief of Justices Brennan and Marshall that Allen should be overturned. Of greater importance, however, was their rereading of the Lemon decision, which, as Brennan explained, introduced a fourth test - political entanglement - and, consequently, had the effect of overriding Allen. By becoming advocates of strict separation, Brennan and Marshall filled a position that would otherwise have been vacated by Douglas' departure.

The Supreme Court's decision in Meek v. Pittenger also illustrates the difficulty encountered by the justices in deciding cases involving aid to sectarian schools. The problem of applying the tests to determine establishment was compounded by the legislative maneuverings to get around
constitutional barriers. Presented with three separate programs involving auxiliary services, textbooks, and instructional equipment, a majority of the justices could not agree on all aspects of the decision. Justice Stewart wrote the opinion of the Court for all but the loaning of textbooks. By a vote of six to three, the justices declared unconstitutional the providing of auxiliary services and instructional equipment and, by the same margin, upheld the loaning of textbooks. But the Court was divided into three separate groups: Blackmun and Powell agreed with Stewart on all points; Douglas, Brennan, and Marshall would have invalidated all parts of the statute; and Burger, White and Rehnquist would have upheld all three programs.

In addition, the justices used this opportunity to resolve the issues left open the year before in the Wheeler v. Barrera decision. As White had pointed out, the Court had implied that a state might be able to come up with programs or services for nonpublic schools that would avoid the quagmire of entanglement. The ruling in Meek, however, made clear that that possibility was remote.

The background of Meek v. Pittenger is as follows. In July 1972, the Pennsylvania General Assembly authorized three programs to aid children in nonpublic schools. The "auxiliary services" provided under Act 194 included counseling, testing, and psychological services, speech and hearing therapy, teaching and related services for exceptional children, "and such other secular, neutral, nonideological services as are of benefit to nonpublic school
children and are presently or hereafter provided to public school children.**7 The two parts of Act 195 included the loaning of textbooks to nonpublic elementary and secondary school students and the loaning of instructional materials and equipment directly to nonpublic schools. The bill defined "materials" to include periodicals, photographs, maps, charts, sound recordings, films, "or any printed and published materials of a similar nature." "Equipment" referred to projection, recording, and laboratory equipment.**8

A taxpayer suit challenged that the laws violated the Establishment Clause because most of the schools were church-affiliated and, as such, were governed by church policy and denominational interests.**9 In a divided decision the three-judge District Court upheld all but the granting of equipment that could be used for religious purposes. All three judges approved the loan of textbooks, and all three disapproved the loaning of equipment, but the other issues were carried by a vote of two to one. The dissenting opinion by Judge A. Leon Higginbotham characterized the statutes as products of "the unswerving persistence and perseverance of state legislatures throughout the nation in continually seeking to alleviate the increasing financial plight and monetary strain of nonpublic secondary and elementary schools." And, he observed, "each successive legislative scheme, heeding the sage admonitions reflected in the growing number of Supreme Court pronouncements, becomes inevitably more sophisticated and
refined as it endeavors to approach as close as feasible to the 'verge' of the constitutional precipice."70

The United States Supreme Court was likewise sensitive to the efforts of state legislatures to avoid crossing constitutional boundaries. Justice Stewart's majority opinion commented that the tests used to determine establishment "must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired."71

His effort to distinguish between programs that might provide more than incidental aid to sectarian schools and those that could legitimately be viewed as benefitting the child appeared inconsistent to other members of the Court. Both Brennan and Rehnquist, in their separate opinions, questioned the Court's finding that the program for auxiliary services would lead to excessive entanglement while the other two would not.

Relying solely on Allen, Stewart found the program for loaning textbooks to students in nonpublic schools in Pennsylvania to be constitutional. The provisions of Act 195 were "constitutionally indistinguishable" from those upheld in the New York case: the books were loaned to the students, requests were filed through school administrators, and all children--not just those attending nonpublic schools--were beneficiaries under the two statutes. Since the New York law had been deemed constitutional, Stewart made the same judgment regarding the Pennsylvania statute.72 The Justice
did acknowledge, in a footnote, that a more recent ruling by the Supreme Court, Public Funds for Public Schools v. Marburger (1974), had affirmed the decision of the District Court for New Jersey that a program for loaning textbooks to nonpublic school students in that state violated the Establishment Clause. However, the New Jersey law differed from those passed in New York and Pennsylvania in that the privilege was not extended to parents of all students but only to those whose children were enrolled in private institutions.73

Stewart concluded that the loaning of instructional material and equipment directly to the schools had the primary effect of aiding religion. Seventy-five percent of the recipient institutions were religiously-oriented, and the strong religious character of these schools made it impossible to separate secular educational activities from the basic mission of inculcating religious values and beliefs. "Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian enterprise as a whole."74

The Marburger decision, Stewart found, was a suitable precedent insofar as it applied to instructional material and equipment. Confining his comments regarding Marburger to another footnote, Stewart pointed out that the District Court in that case and the District Court in Meek had both determined that excessive entanglement "would result from attempts to police use of material and equipment that were readily divertible to religious uses."75 Yet Stewart did not
even raise the issue of entanglement in his discussion of material and equipment loans. He may have felt the "primary effect" test was sufficient to justify his ruling.

Entanglement was, however, central to his declaration that the auxiliary services were impermissible. Addressing at the same time the questions left unresolved by Wheeler, Stewart explained:

That Act 194 authorizes state funding of teachers only for remedial or exceptional students, and not for normal students participating in the core curriculum, does not distinguish this case from Barley v. Dicenso and Lemon v. Kurtzman. . . . Whether the subject is "remedial reading," "advanced reading," or simply "reading," a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists. . . . To be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that those restrictions were being followed.76

In addition to the entanglement of government in the affairs of religious institutions, Stewart also acknowledged the potential for political entanglement. The Act, he stated, "provides successive opportunities for political fragmentation and division along religious lines, one of the principal evils against which the Establishment Clause was intended to protect."77

Brennan sharply disagreed with Stewart's finding that the program for loaning textbooks was constitutional. He based his judgment on the potential for political entanglement inherent in the process of legislative review. In this regard, he insisted, neither textbooks nor other
loans to the nonpublic schools could realistically be distinguished from the supplying of auxiliary services.

Contrary to the plain and explicit teaching of [Lemon v. Kurtzman or Nyquist . . . and inconsistently with its own treatment of Act 194, the plurality, in considering the constitutionality of Act 195 says not a single word about the political-divisiveness factor in . . . upholding the textbook loan program.]

Their failure to apply the test for political entanglement, Brennan charged, resulted from a desire to avoid declaring unconstitutional a statute that met a pressing public need.

Furthermore, the reliance by the plurality on the Allen decision was not valid because that opinion had been superseded by Lemon. Where the justices had raised only the questions of purpose and effect in deciding the earlier textbook cases, the adoption of two additional tests in the interim required that those who ruled on the Pennsylvania statute weigh the potential for administrative and political entanglement as well.

In an early draft of his Meek opinion, Brennan referred to the Court's ruling in Allen as "a decision which I now expressly disavow." Noting the dependence of the 1968 ruling on Everson and Black's strong objection to the Allen ruling, Brennan stated: "I agree . . . that Allen absolutely cannot be reconciled with related decisions of this case before or since." Though not quite so forthright in his published opinion, Brennan certainly made clear his dissatisfaction with the earlier decision.

Brennan's disagreement with Stewart's reliance on Allen went beyond his belief that the decision was obsolete. He
also took issue with Stewart's reading of the law. Citing several pieces of evidence, Brennan argued that "it is pure fantasy to treat the textbook program as a loan to students. ... [T]he regulations implementing Act 195 make clear, as the record in Allen did not, that the nonpublic school in Pennsylvania is something more than a mere conduit between the State and pupil."83

In addition, he challenged Stewart's contention that the Pennsylvania law benefited all children and not just those attending nonpublic schools. This reading of the statute was critical to Stewart's opinion, for he distinguished the Pennsylvania program from the New Jersey program condemned in Marburger on just those grounds.84 Yet Brennan correctly pointed out that the Pennsylvania act contained "the same fatal defect."85

Justice Rehnquist also found Stewart's Meek opinion to be inconsistent, but he took another approach from that followed by Brennan. Rather than dismissing the Allen decision as no longer adequate, Rehnquist argued that it should have been applied to all three programs and not simply to textbook loans. The application of different criteria to the other two programs led to the incorrect, so far as he was concerned, conclusion that they violated the Establishment Clause.

Following the reasoning used in Nyquist, Stewart had measured "primary effect" in terms of the numbers of sectarian schools that would benefit from the legislation, and this, Rehnquist urged, was invalid. Calculation of
percentages could be done so as to show the church-related schools as a majority of recipients of aid or as a minority, depending on whether all schools receiving similar services were counted or only those covered by the particular bill. The determination of primary effect was, therefore, arbitrary. To distinguish the loaning of instructional material and equipment from the loaning of textbooks because the test of primary effect was applied inappropriately to the former was neither consistent nor fair.

For several reasons, Rehnquist found the Court's reliance on Lemon inappropriate. First, he challenged the methods used to consider evidence. As in Lemon, the justices chose to ignore testimony showing that no public monies had been used for religious purposes. Furthermore, he argued that the auxiliary services program litigated in Meek could be distinguished from the program declared unconstitutional in 1971. Opportunities for religious instruction were "greatly reduced because of the considerably more limited reach of the Act." Another difference lay in the fact that the auxiliary services were provided by personnel of the public school system, thus lessening the potential for administrative entanglement.

Rehnquist's dissatisfaction with the Court's opinion extended beyond the problem of inconsistency and choice of precedents. "I am disturbed as much by the overtones of the Court's opinion as by its actual holding." He explained:

The court apparently believes that the Establishment Clause ... not only mandates religious neutrality on the part of the government.
but also requires that this court go further and throw its weight on the side of those who believe our society as a whole should be a purely secular one.90

The Chief Justice grounded his objections on the child benefit theory and the obligation to assure free exercise. By disallowing the auxiliary services for nonpublic schools, the Court denied special assistance to handicapped children in nonpublic schools "only because they attend a Lutheran, Catholic, or other church-sponsored school." To do so, he declared, "does not simply tilt the constitution against religion; it literally turns the Religion Clauses on their heads."91 [Emphasis Burger's] The "crabbed attitude the court shows in this case," Burger charged, resulted in "a gross violation of Fourteenth Amendment rights."92
IV.

By the mid-1970s, a pattern of legislative response to judicial decisions, with a subsequent refining of the initial decision, had developed. The Supreme Court's ruling in *Meek v. Pittenger* impelled the Ohio legislature to repeal a statute similar to the Pennsylvania laws that had been declared unconstitutional. In its place Ohio legislators passed a six-part act in "an [obvious] attempt to conform to the teachings of [the Meek] decision." The law provided for (1) the loaning of textbooks to children who attended nonpublic schools or to their parents, (2) supplying standardized tests and scoring services used in public schools, (3) providing speech and hearing diagnostic services and diagnostic psychological services through public employees, (4) supplying therapeutic, guidance, and remedial services through public employees and administered off the nonpublic school premises, (5) loaning of instructional materials and equipment to pupils or their parents, and (6) providing field trip transportation and services.

The Ohio law was challenged by a group of taxpayers and citizens, Benson A. Wolman et al. It was declared constitutional on all counts by a three-judge District Court. The Supreme Court heard oral argument for *Wolman v. Walter* on 25 April 1977 and handed down its decision on June 24. But again, a majority of the justices could not agree on all parts of the decision. The Court upheld loaning of textbooks (6-3), supplying standardized tests and scoring services (6-
3), providing of diagnostic services (8-1), and providing of therapeutic services (7-2). However, they determined that the loaning of instructional materials and equipment (6-3) and the providing of transportation for field trips (5-4) carried too great a potential for fostering religion and declared those portions of the law unconstitutional. The Court divided into essentially the same three groups as it had in *Meek*; Justice John Paul Stevens, who had replaced Douglas, aligned himself on this issue with Brennan and Marshall. Justice Blackmun delivered the opinion of the Court with respect to the last four sections of the statute.

All justices but Potter Stewart wrote separate opinions. As had been true before, the disagreements among the justices resulted from the increased complexity of the law as well as from their efforts to determine which precedents were suitable. Following the line of reasoning used by Brennan in *Meek*, Marshall called for the overturning of *Allen*. He then proposed a new set of guidelines for dealing with cases involving aid to sectarian schools. The other justices reiterated arguments they had presented in earlier opinions.

Blackman's approach was to compare the specific provisions of the Ohio Act to similar laws on which the Court had previously ruled. If the laws matched and the earlier ruling had declared the law constitutional, Blackmun made the same judgment. If the earlier ruling had been unfavorable, he examined the Ohio law to see if the flaw had been corrected. Using this procedure, he concluded that the first
four sections of the statute conformed to the guidelines indicated by the Court.

Yet the efforts of the Ohio legislators to avoid constitutional difficulties were not always successful. Aware that the Court would not allow the loaning of instructional materials or equipment to nonpublic schools, the Ohio law had stipulated that such loans could be made to pupils or their parents. Suspicious that this was merely using a technicality to violate the separation of church and state, several of the justices had questioned the counsel for the appellees during oral argument. In the opinion for the Court, Blackmun commented that "it would exalt form over substance if this distinction were found to justify a result different from that in Meek." He explained his reasoning:

Before Meek was decided by this Court, Ohio authorized the loan of material and equipment directly to nonpublic schools. Then, in light of Meek, the state legislature decided to channel the goods through the parents and pupils. Despite the technical change in legal bailee, the program in substance is the same as before. . . .

In addition, he found an analogous ruling in Nyquist, where the Court deemed an unrestricted cash grant to parents unconstitutional. "If a grant in cash to parents is impermissible," he reasoned, "we fail to see how a grant in kind of goods furthering the religious enterprise can fare any better." 97

Although bus transportation had been upheld in Everson, the expenditure of public funds for field trips was, according to Blackmun, not the same. The distinguishing features were that the sectarian schools in the earlier
instance had no control over the expenditure of the funds and
the effect of the expenditure was unrelated to the
educational process. In contrast, the Ohio schools made all
the decisions related to the trips, and the trips were "an
integral part of the educational experience."98 Not only did
the subsidy for field trips constitute "an impermissible
direct aid to sectarian education," but the need for
continuous government surveillance would result in excessive
entanglement."99

Chief Justice Burger and Justices White and Rehnquist
found no objection to the Ohio law. Thus, they disagreed
with the decision of the Court insofar as it applied to
instructional materials and equipment and to field trips.
White referred the reader to his dissenting opinion in
Nyquist, and Rehnquist, to his separate opinion in Meek.100

Brennan stood alone in declaring all of the programs
unconstitutional. "[I]ngenuity in draftsmanship cannot
obscure the fact that this subsidy to sectarian schools
amounts to $88,800,000 . . . just for the initial biennium."101
Inherent in the statute was "divisive political potential of
unusual magnitude." That threat of political
entanglement, as in Meek, provided sufficient justification
for Brennan to declare the law in violation of the
Establishment Clause.

Justice Thurgood Marshall would have disallowed all but
the diagnostic testing and therapy. This judgment grew out
of his conviction that Allen should be overturned. "I am now
convinced that Allen is largely responsible for reducing the

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'high and impregnable' wall between church and state erected by the First Amendment. . . to a 'blurred, indistinct, and variable barrier,' . . . incapable of performing its vital functions of protecting both church and state.'102 The Court in Meek had rejected the basic premise of the Allen decision, that secular and sectarian functions could be separated. In deciding Wolman, the majority had conceded that there is no "constitutionally significant difference between a loan of pedagogical materials directly to a sectarian school and a loan of those materials to students for use in sectarian schools."103 Consequently, the distinction that the Court made between loaning textbooks and loaning other materials made no sense.

Referring back to Brennan's dissent in Meek, Marshall reiterated the point that the political entanglement test used in Lemon had superseded Allen. "It is . . . unquestionable that the cost of textbooks is certain to be substantial," he stated. "Under the rationale of Lemon, therefore, they should not be provided because of the dangers of political 'divisiveness on religious lines.'"104

By setting aside Allen, the Court could establish new guidelines. The line between acceptable and unacceptable forms of aid, Marshall suggested,
the kind of assistance to the religious mission of sectarian schools we found impermissible in Meek. Moreover, because general welfare programs do not assist the sectarian functions of denominational schools, there is no reason to expect that political disputes over the merits of those programs will divide the public along religious lines.105

Applying this guideline to the case at hand, the Justice concluded that the provisions for diagnostic testing and therapy were permissible. He rejected, however, the related programs for guidance counseling and remedial education. Marshall also rejected the provision for testing and scoring. Since Ohio had no requirements regarding student performance on standardized tests, he could find no reason for the state to pay for their administration.106

Justice Powell prefaced his opinion with a recognition of the positive contribution of parochial schools and the need to adapt constitutional interpretations to twentieth-century conditions. "Our decisions," he remarked, "have sought to establish principles that preserve the cherished safeguard of the Establishment Clause without resort to blind absolutism. If this endeavor means a loss of some analytical tidiness, then that too is entirely tolerable."107

Turning then to the question of government assistance for sectarian schools, he clarified the Court's ruling in Meek. They had not ruled out all loans of instructional materials and equipment. Both the Pennsylvania program and that adopted by Ohio allowed items to be loaned that could be used for religious as well as secular purposes. But, he added, "I would find no constitutional defect in a properly
limited provision lending to the individuals themselves only appropriate instructional materials and equipment similar to that customarily used in public schools."108

Regarding state funding of transportation for field trips, Powell found "this aid indistinguishable in principle from that upheld in Everson." The state did not pay the salary of the teacher but simply supplied the bus and driver in cases where a secular destination was chosen.109

John Paul Stevens, in his first decision involving aid to sectarian schools, dismissed as irrelevant the distinctions made by legislators and some of his colleagues between direct and indirect aid or among different kinds of assistance. "The financing of buildings, field trips, instructional materials, educational tests, and school-books are all equally invalid. For all give aid to the school's educational mission, which at heart is religious."110 Despite "some misgivings," he agreed with Marshall that a state might provide public health services to children attending private, including parochial, schools.111 Stevens was clearly dissatisfied with earlier church-state decisions. Labelling them "[c]orrosive precedents," he charged that they had "left us without firm principles on which to decide these cases. As this case demonstrates, the States have been encouraged to search for new ways of achieving forbidden ends."112
The Ohio case did not end the volley between justices and lawmakers. The next two cases decided by the Supreme Court involving aid to sectarian schools related to the New York statute held unconstitutional in *Levitt v. Pearl*. The first, *State of New York v. Cathedral Academy*, resulted from a law passed by the legislature following the District Court's ruling in *Levitt* but preceding the Supreme Court's consideration of the case. The District Court had found the 1970 Education Act unconstitutional and had enjoined any payments under the act, including reimbursement for expenses already incurred by the schools. In June 1972, two months after *Levitt* was handed down, the State lawmakers "explicitly authorized what the District Court's injunction had prohibited: reimbursement to sectarian schools for their expenses of performing state-mandated services through the 1971-1972 academic year." By a vote of six to three the Supreme Court determined that this law circumvented the specific provisions of the injunction and thus was invalid. The majority opinion was written by Justice Stewart; Chief Justice Burger and Justices Rehnquist and White dissented.

The second case, *Committee for Public Education and Religious Liberty v. Regan*, reviewed a 1974 enactment which had been passed to correct the flaws in the 1970 law declared unconstitutional in *Levitt*. The 1974 law limited reimbursement for testing to those examinations prepared by state officials and provided for auditing to assure that
state funds would be used only for secular purposes. In a majority opinion written by White, the Court decided that the revised statute did not violate the Establishment Clause. Four justices dissented: Blackmun, Brennan, Marshall, and Stevens.

In both cases the refining process was evident. The New York State legislature had designed these laws with specific church-state decisions in mind. The earlier statute was passed just four months after the Pennsylvania District Court had approved payment to schools for services provided before that State's education assistance program was declared unconstitutional in Lemon v. Kurtzman. The legislature's effort to override the Court's injunction was undoubtedly based on the Pennsylvania ruling. The 1974 New York Act, as Blackmun pointed out in his Regan dissent, was also "produced [by the legislature] in response to its defeat in Levitt I."116

The decisions in these cases illustrate, too, the continued disagreement among the justices regarding both the specific programs under review and the broad issue of aid to sectarian schools. Divisions and uncertainty were more apparent in PEARL v. Regan. Justice Blackmun was clearly disturbed by the fact that Stewart and Powell had shifted their positions. Acknowledging that the membership on the Court had changed over time, Blackmun nevertheless observed that "some of those who joined in Lemon, Levitt I, Meek, and Wolman in invalidating [now] depart and validate." He continued: "I am able to attribute this defection only to a
concern about the continuing and emotional controversy and to a persuasion that a good-faith attempt on the part of a state legislature is worth a nod of approval."117

In New York v. Cathedral Academy, the majority found that the facts were not comparable to those in Lemon II. A critical difference was that the New York legislators, following the District Court's prohibition of payment for services already performed, passed a law to counter that ruling. The act "recognize[d] a moral obligation to provide a remedy whereby . . . schools may recover the complete amount of expenses incurred by them" prior to the Court's ruling since they had anticipated reimbursement from the State."118 Stewart explained that approval of this act would empower legislatures to "modify a federal court's injunction whenever a balancing of constitutional equities might conceivably have justified the Court's granting similar relief in the first place."119 In other words, the question in Cathedral Academy was whether the legislature could override the ruling of a federal court; whereas, in Lemon II the issue was solely one of equity.

The Supreme Court decision pointed to a further distinction. The initial objection to the Pennsylvania statute had been that administration of the law entailed the intrusion by government into church affairs. The payment for services already rendered, approved in Lemon II, did not carry with it the potential for such intrusion. In contrast, the flaw in the New York law lay in the payment itself because "the aid that [would] be devoted to secular functions
I was] not identifiable and separable from aid to sectarian activities. The authorization of payment by the New York legislature for identical services was, therefore, also invalid. A detailed audit to assure that public funds were not used for religious purposes, Stewart explained, would result in excessive entanglement of government in school administration and, consequently, could not be considered as a solution. Rather, it could lead to litigation if schools attempted to establish their right to reimbursement by proving the secular content of their courses. This situation, Stewart observed, was precisely what the First Amendment was intended to avoid.

The prospect of church and state litigation in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying that it will only happen once.

Stewart also noted that the New York law reimbursed schools for performing services required by preexisting law. The importance of this lay in the fact that the 1974 law enabled the schools to use money normally allocated for the services to be reimbursed for nonmandated, including sectarian, activities that they would otherwise not have been able to afford. "While this Court has never held that freeing private funds for sectarian uses invalidates otherwise secular aid to religious institutions," the Justice reasoned, "it is quite another matter to accord positive weight to such a reliance interest balanced against a measurable constitutional violation."
The dissents were brief. White justified his dissent on the grounds that "the Court continues to misconstrue the First Amendment in a manner that discriminates against religion and is contrary to the fundamental educational needs of the country." Burger and Rehnquist simply stated their belief that this case was controlled by the principles established in Lemon II.

New York legislators had designed the 1974 Education Act so as to avoid the pitfalls of the 1970 Act. Where the earlier law had included teacher-prepared tests in the program for reimbursement, the revised statute limited reimbursements to administration, grading, and reporting of state-prepared tests. In addition, the newer law provided a means by which state funds would be audited so as to ensure that only secular services would be paid for from the public coffers.

The history of litigation leading up to the Supreme Court's decision in PEARL v. Regan demonstrates the uncertainty of the courts in deciding which programs are constitutional and which are not. The first test of the 1974 law was in 1976 before the U.S. District Court in New York. The judges based their unanimous decision on the Supreme Court's ruling in Meek and declared the New York statute unconstitutional. Discounting the amendments to the earlier law, the judges found the religious and secular aspects of education in sectarian schools to be inseparable and concluded that all aid to these institutions would violate the Establishment Clause. The Supreme Court vacated.
the District Court's judgment and remanded the case for consideration in light of the 1977 ruling in Wolman.

The District Court's second decision upheld the revised statute. Using the "more flexible concept" suggested in Wolman, the judges ruled that:

state aid may be extended to [a sectarian] school's educational activities if it can be shown with a high degree of certainty that the aid will only have secular value of legitimate interest to the State and does not present any appreciable risk of being used to aid transmission of religious views.

Unlike the first decision, the Court was not unanimous; Judge Robert J. Ward wrote a strong dissent in Levitt III.

The Supreme Court, by a vote of five to four, upheld the District Court's second decision. Writing for the majority, White argued that the changes incorporated into the 1974 law were adequate to meet the objections raised by the Supreme Court with regard to the earlier statute. Conceding that the facts in this case were not identical to those in the Ohio case, the Justice maintained that Wolman was controlling since the differences were "not of a constitutional dimension." The New York law, for example, reimbursed nonpublic school employees for the grading of examinations where the Ohio statute had not. Because the tests were prepared by the State, White argued that grading arrangements were of incidental concern. Similarly, White found that reimbursement to sectarian school employees for maintaining records specifically prescribed by the State would not violate constitutional barriers. He explained his reasoning:

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Although recordkeeping is related to the educational program, the District Court characterized it and the reporting function as "ministerial [and] lacking ideological content or use." . . . These tasks are not part of the teaching process and cannot "be used to foster an ideological outlook." . . . Reimbursement for the costs of so complying with state laws, therefore, has primarily a secular, rather than a religious, purpose and effect.131

The fact that the New York law allowed for direct cash payments to the nonpublic schools did not raise constitutional concerns for the majority. The Ohio statute upheld in Wolman had provided a variety of services for sectarian schools but had made no provisions for cash reimbursements. The distinction, according to the majority, was not critical. The determination that grading of secular tests furnished by the State had a secular purpose and primarily a secular effect "is not changed simply because the State pays the school for performing the grading function."132 To distinguish between paying state employees and sectarian school employees for performing exactly the same service, White insisted, had "so little relationship either to common sense or the realities of school finance" as to have almost no bearing on the case.133

White again made apparent his reluctance to employ the excessive entanglement test in cases involving aid to sectarian schools. Following the argument of the District Court (Levitt III), he stated that the "reimbursement process . . . is straightforward and susceptible to the routinization that characterizes most reimbursement schemes." By suggesting that renewals would be "routine" rather than highly politicized events, White essentially rejected the
political entanglement test that had become an accepted measure of establishment. His disavowal of this test as a legitimate means of determining establishment is emphatic. "On its face," he declared, "the New York plan suggests no excessive entanglement, and we are not prepared to read into the plan as an inevitability the bad faith upon which any future excessive entanglement would be predicated."134

White also reiterated his belief that the Court must weigh certain needs of the community against the no-establishment provision of the First Amendment.

Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the States — the former charged with interpreting and upholding the Constitution and the latter seeking to provide education for their youth — produces a single, more encompassing construction of the Establishment Clause.135

White's commitment to flexibility was not, however, shared by every member of the Court.

Justice Blackmun, joined by Justices Brennan and Marshall, objected to the majority's decision because it diverged from guidelines that had emerged in earlier cases. Blackmun began his dissent by explaining: "I thought that the Court's judgments in Meek v. Pittenger ... and in Wolman v. Walter ... at last had fixed the line between that which is constitutionally appropriate public aid and that which is not." "The line was necessarily not a straight one," he
admitted, but it had been an effort by justices with differing views "to make order and a consensus out of earlier decisions."^{136}

Blackmun condemned the majority's opinion for its failure "to examine the statute's operational details with great precision."^{137} He emphasized the fact that the New York law provided for direct cash payments and the Ohio law had not. Making the distinction between the two cases, he insisted:

> At the very least . . . the Court's holding today goes further in approving state assistance to sectarian schools than the Court had gone in past decisions. But beyond merely failing to approve the type of direct financial aid at issue in this case, Wolman reaffirmed the finding of the court in *Meek v. Pittenger* that direct aid to the educational function of religious schools necessarily advances the sectarian enterprise as a whole. [Emphasis Blackmun's]^{138}

To substantiate this point, the Justice noted that certain parts of the Ohio statute had been deemed invalid because they were seen as providing direct assistance to the sectarian schools, because secular and religious education could not be separated, and because the need for surveillance would lead to excessive entanglement. In both *Wolman* and *Meek* the Court had recognized the risk of furthering the religious mission of the school if certain kinds of aid were permitted, and that same risk was inherent in the New York statute.^{139}

Blackmun contended that since New York reimbursed schools for services they were required to perform to be accredited and which they had previously paid for out of
their operating budgets, the schools would be free to re-allocate funds to religious activities. Were this done, the assistance would have the effect of providing direct aid to religion. In addition, Blackmun charged that state-mandated records and reports could contribute to the religious mission of sectarian schools. Citing attendance records as an example, he noted that the law made "no attempt, and none is possible, to separate the portion of the overall expense of attendance-taking attributable to the desire to ensure that students are attending religious instruction from that portion attributable to the desire to ensure that state attendance laws are complied with."140

Blackmun concluded that excessive entanglement would result since government surveillance would be required. Although the tests were prepared by State officials and would be largely objective, Blackmun determined that there would still be room for subjective judgments by those grading them. Because of the need for yearly revisions of the examinations, the State's supervision would be continual, and the possibility for disagreement between state education officials and the graders would also persist. In addition, government officials would have to monitor the activities of sectarian school teachers in order to calculate the amount the school should be reimbursed.141

Blackmun's dissent rested on his determination that the New York Act violated both the primary effect and excessive entanglement tests. Justice John Paul Stevens, in comparison, declared himself in "more fundamental disagreement with the
The Court's consent to the direct subsidy for services mandated by State law "confirm[ed] his view . . . that the entire enterprise of trying to justify various types of subsidies to nonpublic schools should be abandoned." In a brief but forceful opinion, Stevens stated his position:

Rather than continuing with the sisyphean task of trying to patch together the "blurred, indistinct, and variable barrier described in Lemon v. Kurtzman . . ., I would resurrect the "high and impregnable" wall between church and state constructed by the Framers of the First Amendment."
VI.

A 1983 Minnesota case made clear that there would be further debate and refinement in the judicial decisions involving aid to sectarian schools. *Mueller v. Allen* afforded the justices the opportunity to distinguish that state's tax deduction plan from the tuition reimbursement program that had been struck down in *PEARL v. Nyquist*.145 In *Mueller*, the majority (Rehnquist, Burger, White, Powell, and O'Connor) concluded that the Minnesota statute was constitutional because it allowed a deduction to all parents for certain expenses incurred in providing for the education of their children. Four justices (Marshall, Brennan, Blackmun, and Stevens) dissented on the grounds that a substantial proportion of the benefit went to parents as reimbursement for tuition paid to send their children to sectarian schools. The case was argued on 18 April 1983, and the decision was handed down on June 29.

The contested Minnesota law had been enacted in 1955 and revised in 1976 and 1978. It allowed a deduction on state income taxes for costs of tuition, textbooks, equipment, fees, and transportation, and it applied to parents who sent their children to public schools as well as to those whose children attended private, including sectarian, schools. Parents could claim a maximum of $500 for each child in grades kindergarten through six, and $700 for each one in grades seven through twelve.
petitioners brought suit as taxpayers. Citing statistics which showed that ninety-five percent of the students whose parents qualified for a deduction attended sectarian schools (since parents whose children attended public schools incurred few expenses), they charged that the statute provided substantial financial assistance to sectarian institutions and, therefore, violated the Establishment Clause. The District Court ruled that the statute was "neutral on its face and in its application and does not have a primary purpose of either advancing or inhibiting religion."146 The U.S. Court of Appeals (Eighth Circuit) affirmed the ruling. The Supreme Court granted certiorari in order to resolve a conflict between the Mueller case and a similar case decided by the Court of Appeals for the First Circuit, Rhode Island Federation of Teachers v. Norberg, in which the judges had found a violation of the Establishment Clause.147

Justice Rehnquist's majority opinion contended that the Court had agreed on "one fixed principle" in dealing with cases involving aid to sectarian schools. That principle "is our consistent rejection of the argument that 'any program which in some manner aids an institution with a religious affiliation' violates the Establishment Clause."148 The task for the justices was, therefore, "to decide whether Minnesota's tax deduction bears greater resemblance to those types of assistance to parochial schools we have approved, or to those we have struck down."149 Noting petitioners' reliance on the Nyquist decision, Rehnquist observed that the
Minnesota plan should be distinguished from the New York tuition reimbursement program on the grounds that tax deductions could be claimed by parents of all school children, not just those whose children attended nonpublic schools. The more appropriate precedents, he argued, were *Everson* and *Allen*. The statutes in those two cases, both of which were upheld by the Supreme Court, had applied to all parents and all schoolchildren.

Rehnquist employed the now familiar three-part test (that a law have neither a primary purpose nor effect that advances religion and that it not involve excessive government entanglement with religion) to come to his conclusion that the tax deduction program was constitutional. Applying the first test, he found that the state's interest in providing education for its young people gave the state a legitimate secular purpose of trying to defray the cost of educational expenses incurred by parents. In addition, Rehnquist asserted that "there is a strong public interest in assuring the continued financial health of private schools." He explained: "By educating a substantial number of students such schools relieve public schools of a correspondingly great burden - to the benefit of all taxpayers." As a final point, the Justice suggested that private schools perform a valuable service in providing both an alternative to public schools and a benchmark against which public schools may measure themselves.

The more difficult question was whether the act had "the primary effect of advancing the sectarian aims of the
nonpublic schools." Rehnquist determined that it did not. It was, according to his reasoning, neutral in its appearance. An "essential feature" of the act, leading to this conclusion, was the fact that the deduction for costs of education was "only one among many deductions ... available under Minnesota tax laws." The Court should defer to state legislators, he added, since they could best judge the means to equalize the tax burden and encourage desirable expenditures for education.

The availability of the deduction to all parents provided further proof of the law's neutrality. This factor also distinguished the Minnesota statute from the law declared unconstitutional in Nyquist.

There, public assistance amounting to tuition grants, was provided only to parents of children in nonpublic schools. This fact had considerable bearing in our decision striking down the New York statute at issue; we explicitly distinguished both Allen and Everson on the grounds that "in both cases the class of beneficiaries included all schoolchildren, those in public as well as those in private schools." (emphasis in original). Moreover, we intimated that "public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefited," might not offend the Establishment Clause.

Furthermore, Rehnquist reasoned that the financial benefit to the schools that resulted from the tax deduction came as a result of individual choices by parents and, therefore, did not violate the First Amendment. With the exception of Nyquist, the Justice pointed out, all of the recent decisions invalidating state aid had involved direct assistance. "Where, as 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.155

Rehnquist next asserted that any statistical analysis of
beneficiaries was irrelevant since the law was "facially
neutral." "Such an approach," he stated, "would scarcely
provide the certainty that this field stands in need of, nor
can we perceive principled standards by which the statistical
evidence might be evaluated."156 In short, the law did not
lose its neutral character because some individuals claimed
the deduction and others did not.

To conclude his consideration of primary effect, the
Justice reiterated his contention that sectarian schools
provided important services for the community. In addition
to offering an alternative to public schools, the parochial
schools significantly decreased the tax burden on all
citizens. This fact justified the granting of deductions to
parents who sent their children to church-related schools.157

In dealing with the possibility of "excessive
entanglement," Rehnquist focused on the administrative rather
than the political aspect of the question. The only
participation by state officials in administering the law
came with their deciding which textbooks might be included in
the claim; this role was similar to that assigned to New York
school boards in the loaning of textbooks and approved in
Board of Education v. Allen.158

Justice Marshall, writing also for Brennan, Blackmun,
and Stevens, flatly rejected the distinctions that Rehnquist
drew between the tuition reimbursement program ruled invalid
in Nyquist and the Minnesota tax deduction program. Calling
the Minnesota statute "little more than a subsidy of tuition
masquerading as a subsidy of general educational expenses,"
Marshall declared that the "principle of neutrality forbids
... any tax benefit, including the deduction at issue here,
which subsidizes tuition payments to sectarian schools."159
The tone and language of Marshall's opinion clearly conveyed
his belief that state legislators were attempting to
circumvent constitutional restrictions by using legal devices
designed to avoid the pitfalls of programs previously deemed
invalid.

Marshall's principal objection to the granting of tax
deductions lay in the absence of restrictions. Most of the
deductions, he pointed out, would be taken for the payment of
tuition at church-related schools. The schools would receive
an indirect but substantial financial benefit and one that
was in no way restricted to the secular expenses incurred by
such institutions. Given the purpose of parochial schools,
"to provide an integrated secular and religious
education,' ... aid to sectarian schools must be restricted
to ensure that it may be not used to further the religious
mission of those schools."160 He explained:

Indirect assistance in the form of financial aid
to parents for tuition payments is ... impermissible because it is not "subject to ... restrictions" which "guarantee the separation between secular and religious educational functions and ... ensure that State financial aid supports only the former." ... By ensuring that parents

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will be reimbursed for tuition payments they make, the Minnesota statute requires that taxpayers in general pay for the cost of parochial education and extends a financial "incentive to parents to send their children to sectarian schools."161

The form of the aid, he added, is of little importance. "What is of controlling significance is . . . the 'substantive impact' of the financial aid," in short, the inevitable effect that the statute would aid and advance religious institutions.162

The distinction drawn by the majority between a "genuine tax deduction" and the tuition reimbursement program used in New York was, Marshall declared, "a distinction without a difference."163 Although the New York plan more closely resembled a "tax credit," the effects of both laws were virtually identical: to provide financial relief for parents that would indirectly benefit the schools their children attended.

The fact that most parents could not claim the largest deduction convinced Marshall that the law was not neutral. "Parents who send their children to free public schools are simply ineligible to obtain the full benefit of the deduction," he observed, since the main item that could be claimed was tuition.164 Apart from the statistical analysis that Rehnquist set aside as an inappropriate measure of constitutionality, the inclusion of tuition as a deductible expense meant that the statute primarily benefited those who sent their children to sectarian schools.165

Marshall did not, however, confine his objections to the deduction for costs of tuition. Deductions for the cost of
textbooks and other instructional materials were similarly invalid. "A tax deduction has a primary effect that advances religion," he wrote, "if it is provided to offset expenditures which are not restricted to the secular activities of parochial schools." Although the law had set specific guidelines for the purpose of excluding books and materials used in teaching religion, Marshall maintained that financial aid for secular activities would nevertheless further the religious mission of the school.

Recognizing the inconsistency between this position and the Court's ruling in Board of Education v. Allen, Marshall reiterated his belief that Allen should be overturned. Although this Court upheld the loan of secular textbooks to religious schools in Board of Education v. Allen, . . . the Court believed at that time that it lacked sufficient experience to determine "based solely on judicial notice" that "the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public [will always be] instrumental in the teaching of religion." . . . This basis for distinguishing secular instructional materials and secular textbooks is simply untenable, and is inconsistent with many of our more recent decisions concerning state aid to parochial schools.

He added, incorrectly, that the Minnesota statute did not limit the deduction to books officially approved for use in public schools, as had been required for the loaning of textbooks by New York.

Marshall concluded his opinion by defining the issue. "It is beside the point," he declared, "that the State may have legitimate secular reasons for providing such aid." The responsibility of the Court in this case was to determine
whether the tax deduction program implemented by Minnesota could "'be squared with the dictates of the Religion Clauses."\(^{172}\) In other words, the justices needed to focus on potential or actual violations of the First Amendment rather than on those features of sectarian schools that met secular community needs. The failure of the majority to discern the fundamental issue or their conscious decision to disregard it led them to a result denounced by Marshall as "flatly at odds with the fundamental principle that a State may provide no financial support whatsoever to promote religion."\(^{173}\)
VII.

The Court's decisions in the companion cases of Grand Rapids School District v. Ball and Aguilar v. Felton reveal essentially the same alignments as had emerged in the earlier cases. Brennan, Marshall, Blackmun, Powell, and Stevens constituted the majority that declared the programs unconstitutional. White and Rehnquist dissented in both cases; Burger and O'Connor, who had been appointed by President Reagan to replace retiring Justice Potter Stewart, dissented in part from the Grand Rapids opinion and in toto from Aguilar. While most of the opinions followed the reasoning used by the respective justices in their earlier decisions, the dissent written by Justice O'Connor in Aguilar v. Felton was a notable exception. Disturbed by the Court's handling of the evidence in this case, she not only rejected their judgment of excessive entanglement but also argued that the entanglement test was an unsuitable measure for determining establishment.

Both cases involved "supplementary" educational programs subsidized by government, in one case by the local government and in the other by federal funds, and carried out on the premises of sectarian schools. The taxpayer suit against Grand Rapids School District charged that the Shared Time and Community Education Programs instituted in that community in 1976-77 violated the Establishment Clause. Both programs provided classes for nonpublic school students at public expense in classrooms located in and leased from
nonpublic schools. Under the Shared Time program, the public school system offered classes during the regular school day that would supplement the state-required curriculum. Included among the courses were remedial and enrichment classes in mathematics, reading, art, music, and physical education. Evidence showed that approximately ten percent of the teachers employed in this program by the public school system had previously taught in nonpublic schools and sometimes in the schools where they were currently employed.\textsuperscript{175} The Community Education courses, although conducted in nonpublic elementary schools, were nevertheless separate from the regular school program. These courses took place after school and enrolled adults as well as children. As was true of the Shared Time courses, most of the offerings in the Community Education program were available in the public schools as part of their regular curriculum.\textsuperscript{176} In every instance, the individual hired to teach a Community Education course was a full-time teacher in the nonpublic school where that course was given.\textsuperscript{177}

The administration of both programs required cooperation between public officials and nonpublic school employees. They worked together in deciding on course offerings, drawing up the academic schedule (taking into account religious holidays), and arranging for the leasing of classrooms to the public system. Forty of the forty-one participating schools were sectarian in character, and "substantial evidence suggest[ed] that they share[d] deep religious purposes."\textsuperscript{178}
The suit brought in *Aquilar v. Felton* challenged the use of federal rather than state funds, but the nature of the program was essentially the same as those instituted in Grand Rapids. Taxpayers, Betty-Louise Felton, et al., contested the use of federal funds by the City of New York to pay the salaries of public school teachers and other professionals who were assigned to sectarian schools. Under Title I of the Elementary and Secondary Education Act of 1965, the Secretary of Education was authorized to distribute financial assistance to local schools, both public and nonpublic, to meet the needs of educationally deprived children in low income families. Beginning in 1966, New York City had extended to qualifying parochial school students courses in remedial reading, reading skills, remedial mathematics and English as a second language. It had also provided guidance services. All of these programs were conducted in the sectarian schools by public school employees. Just over thirteen percent of the students eligible to receive funds in 1981-82 attended private schools; of these, eighty-four percent went to Catholic schools and eight percent went to Hebrew day schools.179

Unlike the Michigan program, the administration of Title I funds lay solely in the hands of public officials. City employees were responsible for appointing teachers and supervising the program. Teachers and the other professionals had minimum contact with private school personnel in carrying out their assignments.180
In both cases the Supreme Court granted certiorari. The Grand Rapids case had been decided first by a District Court, following an eight-day bench trial. The Court found that the two programs violated the effect and entanglement tests. The Court of Appeals for the Sixth Circuit had affirmed that ruling.\textsuperscript{181}

The history of the New York suit was somewhat more complicated. Taxpayers had initiated the action in 1978, but it was held for the outcome of National Coalition for Public Education and Religious Liberty v. Harris, which involved an identical challenge to the Title I program.\textsuperscript{182} The District Court upheld Title I in the Harris case, and the Supreme Court dismissed the appeal for want of jurisdiction. Felton and her fellow taxpayers renewed their challenge, and the District Court granted appellants' motion for summary judgment based on the evidentiary record developed in Harris. The Court of Appeals for the Second Circuit reversed. Although that judgment could not be appealed to the Supreme Court, the Supreme Court justices decided to treat the papers as a petition for certiorari and then granted that petition.\textsuperscript{183} Following the practice adopted in comparable cases, the justices referred to the parties in the Aguilar case as appellants and appellees rather than as petitioners and respondents.

The critical factor in the majority's opinion in Grand Rapids v. Ball was the "pervasively sectarian" character of forty of the forty-one schools participating in the two programs.\textsuperscript{184} The secular purpose behind the programs could
not, Brennan wrote, "validate government aid to parochial schools when the aid has the effect of promoting a single religion or religion generally or when the aid unduly entangles the government in matters religious." Indeed, Brennan conceded the [n]onpublic schools have played an important role in the development of American education," but the need to maintain the separation between government and religion for the protection of both mandated a judgment against both the Shared Time and Community Education programs.

The majority found that the programs implemented by the Grand Rapids School District had the potential of advancing religion in three different ways. Each of these resulted from the use of parochial school buildings or from the employment of parochial school teachers.

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

In short, the majority determined that the programs had a primary effect that aided religion even though the specific purpose was secular.

Brennan found significant similarities between the Michigan programs and those declared invalid in Meek v. Pittenger. In both situations public funds were used to pay
professional staff, including teachers, in nonpublic schools. A major shortcoming of the Pennsylvania program, the lack of any system of surveillance to assure that funds were not used for religious purposes, also characterized both the Community Education and Shared Time programs. This presented "a substantial risk" that courses offered in parochial schools and, in some cases, by parochial school teachers might be infused with a religious message even though the funding for such courses came from the public coffers. Individuals who taught within the parochial curriculum during the day might find it difficult to divest their after-school classes of religious ideas or attitudes; whereas those who taught courses outside of the religious curriculum but during the regular school day might be influenced by the religious atmosphere. Brennan explained: "Teachers in such an atmosphere may well subtly (or overtly) conform their instruction to the environment in which they teach, while students will perceive the instruction provided in the context of the dominantly religious message of the institution, thus reinforcing the indoctrinating effect."

The lack of specific evidence that religious indoctrination had occurred was "not dispositive." "[T]here is no reason to believe," Brennan reasoned, "that this kind of ideological influence would be detected or reported by students, by their parents, or by the school system itself."

The students are presumably attending religious schools precisely in order to receive religious instruction. After spending the balance of their school day in classes heavily influenced by a religious perspective, they would have little
motivation or ability to discern improper ideological content that may creep into a Shared Time or Community Education course. Neither their parents nor the parochial schools would have cause to complain if the effect of the publicly supported instruction were to advance the sectarian schools' mission. And the public school system itself has no incentive to detect or report any specific incidents of improper state-sponsored indoctrination. Thus, the lack of evidence of specific incidents of indoctrination is of little significance.190

Brennan's first point, therefore, rested on the potential for religious indoctrination and the risk of government sponsorship of religion rather than on proof that such doctrination had occurred.

Brennan based his second point—the symbolic link between government and religion—on a broad definition of "establishment." A close identification of government with religion, he argued, "conveys a message of government endorsement or disapproval of religion."191 Such identification may result when the government uses its powers and responsibilities on behalf of a sectarian institution. Perception is an important element. The Justice pointed out that "an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval, of their individual religious choices."192 In situations involving children, the symbolic link is apt to be critical. Consequently, the notices placed above classroom doors to designate public, as distinguished from parochial, courses made little difference to the
students who associated all activities within their schools with the religious context. If anything, the impact of the signs would be to link rather than to separate government and religion.193

On the third point, Brennan declared that the aid through these two programs was direct and substantial. He rejected petitioners' argument that the aid was intended for the student and not the schools. Quoting Justice Powell's opinion in Wolman v. Walter, Brennan stated, "Where, as here, no meaningful distinction can be made between aid to the student and aid to the school, 'the concept of a loan to individuals is a transparent fiction.'"194

Brennan also set aside the contention that the programs supplemented the regular curriculum. The purpose of such a distinction was to categorize the courses as incidental to the schools' academic programs. To accept this notion, the Justice remarked, would be to "let the genie out of the bottle," for the courts had no way of determining which programs supplemented an established curriculum and which merely supplanted courses that might otherwise be offered by the schools without government sponsorship. The possibility of the government picking up courses that the sectarian schools found too expensive to fund "would be to permit even larger segments of the religious school curriculum to be turned over to the public school system, thus violating the cardinal principle that the State may not in effect become the prime supporter of the religious school system."195
Brennan pursued a different line of reasoning in his majority opinion in *Aguilar v. Felton*. The careful supervision by the City of New York, Brennan tacitly conceded, precluded the possibility of public funds being used to teach religion. However, he said, the system of monitoring did result in the excessive entanglement of government in the affairs of a religious institution, and such entanglement harms both those who are adherents of the denomination and those who are not. On the one hand, government intrusion into sacred matters infringes on the freedom of those who are adherents. On the other, "[w]hen the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers, even when the governmental purpose underlying the involvement is largely secular."\(^{196}\)

Distinguishing this case from those involving aid to sectarian colleges, Brennan noted two critical factors. First, the Court had found that the colleges, though affiliated with specific denominations, were not "persuasively sectarian" and, consequently, the allocation of public funds to such schools could be made without the need for regular surveillance to assure that such funds were not used for religious purposes.\(^{197}\) In addition, some of the grants were made on a one-time basis and, therefore, did not entail regular monitoring.

In contrast, Brennan continued, the secular elementary and secondary schools in New York that received Title I
funding had distinctly religious environments, and the assistance was provided in the form of teachers thereby requiring continual supervision.198

This pervasive monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement. Agents of the state must visit and inspect the religious school regularly, alert for the subtle or overt presence of religious matters in Title I classes. . . . In addition, the religious school must obey these same agents when they make determinations as to what is and what is not a "religious symbol" and thus off limits in a Title I classroom.199

Further entanglement resulted from the need for administrative cooperation. Brennan asserted that it would be impossible to maintain a policy of neutrality when government officials and parochial school personnel were working together "in resolving matters related to schedules, classroom assignments, problems that arise in the implementation of the program, requests for additional services, and the dissemination of information regarding the program."200 Should state agents be forced to make decisions that affected the religious character of the schools, political divisiveness might also result. The potential for intrusion of government in matters religious, consequently, constituted the basis for the majority's opinion in Aguilar.

Justice Powell's concurring opinion emphasized the problems of entanglement. In addition to the risks of government interference in the process of monitoring the use of public funds, the allocation of Title I funds for use in sectarian schools carried with it the threat of political
divisiveness. Relying on the premise that direct aid to certain religious groups would encourage competition or resentment, Powell surmised:

In states such as New York that have large and varied sectarian populations, one can be assured that politics will enter into any state decision to aid parochial schools. Public schools, as well as private schools, are under increasing financial pressure to meet real and perceived needs. Thus, any proposal to extend direct governmental aid to parochial schools alone is likely to spark political disagreement from taxpayers who support the public schools, as well as from non-recipient sectarian groups, who may fear that needed funds are being diverted from them.201

This threat of divisiveness Powell labelled "a strong additional reason" for deciding against both the Michigan and New York programs.202

Another reason for declaring the New York program unconstitutional, according to Powell, was the fact that its primary effect was to aid religion. Like the two programs implemented in Grand Rapids, the New York scheme, "by directly assuming part of the parochial schools' education function," had the inevitable effect of subsidizing and advancing the religious mission of those schools.203

Powell's closing remarks noted by implication his criticism the City's distribution of Title I funds: "If... Congress could fashion a program of evenhanded financial assistance to both public and private schools that could be administered, without governmental supervision in the private schools, so as to prevent the diversion of the aid from secular purposes, we could be presented with a different question."204
Chief Justice Burger concurred with the majority's ruling on the Grand Rapids Community Education but dissented from their judgments with regard to both shared time programs. Charging that the decisions "border[ed] on paranoia" and exhibited "nothing less than hostility toward religion," Burger insisted that the efforts to meet the educational needs of disadvantaged children by assigning public teachers to church-related schools was the legal equivalent of supplying textbooks, transportation, or school nursing services.205

Justice O'Connor, like Chief Justice Burger, found the Community Education program unconstitutional but the two shared time programs valid. Her objections to the majority's opinions centered on their handling of the evidence for the two cases and their use of the entanglement test. The shared time programs, she argued, supplemented the curriculum of the parochial schools and, both in design and implementation, served a secular purpose. In contrast, she conceded that the Community Education program had "the perceived and actual effect of advancing the religious aims of the church-related schools."206

In separate opinions for Grand Rapids and Aguilar, O'Connor charged that the majority had either distorted or ignored the evidence. The Court had relied on the District Court's finding that "a significant portion of the shared time instructors [in Grand Rapids] previously taught in nonpublic schools." "In fact," O'Connor pointed out, "only 13 Shared Time instructors have ever been employed by any
parochial school, and only a fraction of those 13 now work in a parochial school where they were previously employed."207 The risk of teachers inculcating religion or of children making the association between publicly-funded programs and parochial school teachers was so small as to be of no real consequence and did not, therefore, justify the majority's decision.

Although the Court had restricted its analysis of the Title I program in New York to the potential for entanglement, O'Connor dealt with both purpose and effect in her dissenting opinion. She defended the policy of funding public teachers to work on parochial school premises because the alternative means to reach disadvantaged students had been unsuccessful, and she insisted that the program was "undeniably animated by a legitimate secular purpose."208 Turning to the question of effect, O'Connor maintained that "[t]he abstract theories explaining why on-premises instruction might possibly advance religion dissolve in the face of experience in New York."209 The record showed not a single incident during the nineteen years that the program was in effect in which an instructor used his position to advance religion. This was not surprising in light of the professional character of the teachers and their status as public employees who visited several different schools, often held different religious beliefs from those of their students, and were carefully supervised.210 Furthermore, the Secretary of Education had "vigorously enforced the requirement that Title I funds supplement rather than
supplant the services of local education agencies." To outlaw classes merely because they were conducted on parochial school premises but to allow the same classes for the same students and taught by the same teachers if located elsewhere was, O'Connor charged, an arbitrary and meaningless distinction. 212

Of greater significance was O'Connor's objection to the use of the entanglement test. She disagreed not only with the Court's analysis of entanglement in the case at hand but also with the "utility" of the test "as a separate Establishment Clause standard in most cases." 213 In taking this position, she aligned herself most particularly with Justice Rehnquist, who had challenged the use of the entanglement test in earlier cases involving aid to sectarian schools. Not surprisingly, Rehnquist joined O'Connor in that portion of her dissent dealing with the issue of entanglement.

O'Connor began by attacking the Court's opinion in Meek v. Pittenger. The reasoning in that case, she argued, was flawed. Where the majority had based their decision on the risk that teachers would "intertwine religious doctrine with secular instruction," experience had "given greater force to the arguments of the dissenting opinions in Meek." 214 She explained:

It is not intuitively obvious that a dedicated public school teacher will tend to disobey instructions and commence proselytizing students at public expense merely because the classroom is within a parochial school. . . . Given that not a single incident of religious indoctrination has

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been identified as occurring in thousands of classes offered in Grand Rapids and New York over the past two decades, it is time to acknowledge that the risk identified in *Meek* was greatly exaggerated.²¹⁵

Insofar as the shared time programs were concerned, measures had been taken to ensure that public teachers were not influenced by the sectarian environment, yet the nature of the supervision was essentially the same as that found in the public schools. Given this fact, O'Connor determined that the City's efforts to monitor public employees in parochial schools were adequate rather than excessive.²¹⁶

Shifting her attention from administrative to political entanglement, the Justice found little cause for concern. In fact, the only evidence of political divisiveness was the litigation itself. "It seems curious indeed," she observed, "to base our interpretation of the Constitution on speculation as to the likelihood of a phenomenon which the parties may create merely by prosecuting a lawsuit."²¹⁷

But the "institutional aspects" of the entanglement test also bothered O'Connor. She objected, as did Rehnquist, to the fact that programs that served a valid secular purpose and met the secular effect test as well might be declared invalid by virtue of undue entanglement.

Pervasive 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. [Emphasis O'Connor's]²¹⁸

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In other words, she did not believe the entanglement test should be used in situations where cooperation between church and state existed in order to avoid violating the First Amendment.

Justice Rehnquist questioned the Court's reliance on a "symbolic link" as grounds for declaring the Grand Rapids' programs unconstitutional. In addition, he objected to the slur on the integrity of public school teachers, despite the lack of evidence showing any attempt at religious indoctrination. Referring to the Court's application of the entanglement test as a "Catch-22 paradox," Rehnquist dissented from the Aguilar decision on the grounds that it deviated from the original intent of the Founding Fathers by precluding badly needed assistance of a purely secular nature.

White's single, brief dissent merely referenced his own opinions in Lemon v. Kurtzman and PEARL v. Nyquist. By declaring unconstitutional programs designed to supplement the curriculum of parochial schools, he commented, the Court was acting contrary to the long-range interests of the country.
VIII.

To describe the decision making process during the period 1972 to 1985 as one of "refinement" is not entirely accurate, for "refinement" implies improvement and elimination of impurities. While the justices struggled to establish guidelines for deciding cases involving aid to sectarian schools, individual perceptions often led to disagreement, fragmentation, and further confusion. In addition, the justices sometimes changed their own minds in light of legislative interpretation of earlier rulings or in response to legislative efforts to circumvent constitutional problems by resorting to technicalities. These factors along with the inevitable "changing of the guard" on the Court resulted in a series of decisions that were sometimes contradictory.

The one constant appears to be the tendency of the individual justices to base their decisions on their own political and judicial philosophies. Most conspicuous are Brennan and Marshall, both strongly committed to protecting individual rights and liberties, and Rehnquist and O'Connor, whose political conservatism leads them to see government aid to sectarian schools as an economizing measure. Byron White, following the liberal tradition of the sixties, has preferred tangible gains for the disadvantaged over abstract freedoms.

With the exception of John Paul Stevens, who has taken the least flexible position on this issue of any justice since Douglas, the remaining members of the Court - Burger,
Blackmun, and Powell — seem to have been influenced by their more doctrinaire colleagues. Uncertain of the principles that should be followed, these men have searched for precedents or relied on the reasoning of others in making their decisions and writing their opinions. Yet even this approach has problems, for the precedents are not entirely clear and the choices of whose reasoning to follow vary greatly. Burger has consistently aligned himself with Rehnquist and White. But Powell and Blackmun have shifted back and forth, and their changing positions have contributed to the inconsistency in the Court's decisions.
5 PEARL v. Nyquist, 413 U.S. at 792.
6 Sloan v. Lemon, 413 U.S. at 829.
7 PEARL v. Nyquist, 413 U.S. at 764.
8 Id. at 773.
9 Id. at 775.
10 Tilton v. Richardson, 403 U.S. 672 (1971).
11 PEARL v. Nyquist, 413 U.S. at 777.
12 Id. at 778. The Rhode Island law had authorized salary supplements to teachers of secular subjects, but these were not to exceed fifteen percent of any teacher's annual salary. Powell explained that the State law could not have "prevailed by simply relying on the assumption that, whenever a secular teacher's inabilities to refrain from mixing the religious with the secular, he would surely devote at least fifteen percent of his efforts to purely secular education, thus exhausting the state grant." Id. at 779.
13 Id. at 781.
14 Id.
15 Id. at 782.
16 Id.
17 Id. at 783.
18 Id. at 786.
19 Id. at 788.
20 Id. at 782.

Powell concluded that the tax benefit program was a mix between a tax deduction and a tax credit. "It is, at least in its form, a tax deduction since it is an amount subtracted from adjusted gross income, prior to computation of the tax
due. Its effect . . . is more like that of a tax credit since the deduction is not related to the amount actually spent for tuition and is apparently designed to yield a predetermined amount of tax 'forgiveness' in exchange for performing a specific act which the State desires to encourage - the usual attribute of a tax credit." \textsuperscript{21} Id. at 789.

\textsuperscript{22} Id. at 791.

\textsuperscript{23} Walz v. Tax Commission of the City of New York, 397 U.S. 664 (1970) upheld tax exemptions for churches on the grounds that this policy would lead to less government interference with church affairs than would the imposition of a tax. In equating tax exemptions and tax benefits, lawmakers failed to recognize this central point in the reasoning of the Court.

\textsuperscript{24} PEARL v. Nyquist, 413 U.S. at 792.

\textsuperscript{25} Id. at 793.

\textsuperscript{26} Id. at 794.

\textsuperscript{27} Id. at 793.

\textsuperscript{28} Id. at 797.

\textsuperscript{29} Id. at 797-98.

\textsuperscript{30} Sloan v. Lemon, 413 U.S. at 830.

\textsuperscript{31} Id. at 831.

\textsuperscript{32} Id. at 832.

\textsuperscript{33} PEARL v. Nyquist, 413 U.S. at 807.

\textsuperscript{34} Id. at 808.

\textsuperscript{35} Id. at 810.

\textsuperscript{36} Id. at 812.

\textsuperscript{37} Id. at 813.

\textsuperscript{38} Justices White and Rehnquist joined in this dissent.

\textsuperscript{39} PEARL v. Nyquist/Sloan v. Lemon, 413 U.S. at 799.

\textsuperscript{40} Id. at 802.

\textsuperscript{41} Id. at 803.
Chief Justice Burger and Justice Rehnquist joined in this dissent only insofar as it related to the tuition grants and tax benefit program.

Levitt v. Pearl, 413 U.S. at 477-78.

Lemon v. Kurtzman, 403 U.S. at 617, quoted in Id.


The Missouri Constitution, Art 9, Sec. 5, quoted in Id. at 412 n. 9.


Marshall would emphasize this reason in his opinion in Wolman v. Walter, 433 U.S. 229 (1977). In the later case he wrote: "I am now convinced that Allen is largely responsible for reducing the 'high and impregnable' wall between church
and state erected by the First Amendment." *Id.* at 257.

No majority opinion was written with regard to the loaning of textbooks since the Burger-White-Rehnquist block did not agree with the reasoning employed by Stewart, Blackmun, and Powell.

*Meek v. Pittenger,* 421 U.S. at 353.

*Id.* at 353-54.

*Id.* at 355. In addition to three individual plaintiffs, four organizations joined in the suit: ACLU, NAACP, Pennsylvania Jewish community Relations Council, and Americans United for Separation of Church and State. Each organization had members who were taxpayers in the State.


*Meek v. Pittenger,* 421 U.S. at 359.

*Id.* at 359-62.


*Id.* at 372.

*Id.* at 377.

*Id.* at 378.

*Id.*


*Meek v. Pittenger,* 421 U.S. at 379. For Stewart's comments, see *Id.* at 361.

*Id.* at 360, 362 n. 12.

*Id.* at 383. Act 195, sect. c stated: "The Secretary of Education directly, or through the intermediate units, shall have the power and duty to purchase textbooks and, upon
individual request, to loan them to all children residing in the Commonwealth who are enrolled in grades kindergarten through twelve of a nonpublic school wherein the requirements of the compulsory attendance provisions of this act may be met." Despite the wording in this section of the act, Brennan pointed out, the procedure for effecting the loans and the wording in other sections of the Act made clear that the books were in fact loaned to the nonpublic schools and not to the students. \textit{Id.} at 380-82.

86 \textit{Id.} at 388-91.
87 \textit{Id.} at 391-92.
88 \textit{Id.} at 393.
89 \textit{Id.} at 394.
90 \textit{Id.} at 395.
91 \textit{Id.} at 387.
92 \textit{Id.} at 386-87.
95 \textit{Wolman v. Walter}, 433 U.S. at 250.
96 \textit{Id.}
97 \textit{Id.} at 251.
98 \textit{Id.} at 253.
99 \textit{Id.}
100 \textit{Id.} at 255.
101 \textit{Id.} at 256.
102 \textit{Id.} at 257.
103 \textit{Id.} at 257-58.
104 \textit{Id.} at 258-59.
105 \textit{Id.} at 259-60.
106 \textit{Id.} at 261-62.
107 \textit{Id.} at 263.
108 Id. at 264.
109 Id.
110 Id. at 265.
111 Id. at 266.
112 Id.
114 Id. at 127.
116 Id. at 664.
117 Id. Burger had "defected" in 1973 in Levitt v. PEARL, but Stewart and Powell had aligned themselves with Blackmun in both Meek and Wolman.
118 New York v. Cathedral Academy, 434 U.S. at 127.
119 Id. at 130.
120 Id. at 131.
121 Id. at 133.
122 Id. at 134.
123 Id.
124 Id.
127 Id. at 1127, quoted in PEARL v. Regan, 444 U.S. at 653.
128 PEARL v. Regan, 444 U.S. at 652.
129 Id. at 654.
130 Id. at 655.
131 PEARL v. Levitt (III), 461 F. Supp. at 1130, quoted in PEARL v. Regan, 444 U.S. at 656-57.

375
PEARL v. Regan, 444 U.S. at 657-58.

Id. at 658.

Id. at 660-61.

Id. at 662.

Id. at 663-64.

Id. at 664.

Id. at 666.

Id. at 667-68.

Id. at 669.

Id. at 670.

Id. at 671.

Id.

Id.


Id.; Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855 (1980).

Mueller v. Allen, 463 U.S. at 393.

Id.

Id. at 395.

Id.

Id. at 396.

Id.

Id. at 398.

Id. at 399.

Id. at 401.

Id. at 401-402.

Id. at 403.
The Minnesota Statute sect. 290.09(22) (1982) stipulated: "textbooks' shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship, nor shall it include such books or materials for, or transportation to, extracurricular activities including sporting events, musical or dramatic events, speech activities, driver's education, or programs of a similar nature." Id.

Wolman v. Walter, 433 U.S. at 257-58.


Brennan explained the reason that the case could not come to the Court on appeal: "The Court of Appeals held that the plan adopted and administered by the City of New York violates the Establishment Clause, 739 F.2d 48, 72 (1984). Appeals from this ruling were taken pursuant to 28 U.S.C. sect. 1252. An appeal under sect. 1252, however, may be taken only from an interlocutory or final judgment that has held an Act of Congress unconstitutional as applied ('i.e., that the section, by its own terms, infringed constitutional freedoms in the circumstances of that particular case') or as a whole. . . . Because the ruling appealed from is not such a judgment, the appeals must be dismissed for want of jurisdiction." Aguilar v. Felton, 105 S. Ct. at 3236 n. 7.

Aguilar v. Felton, 105 S. Ct. at 3237.

Id. at 3238.

Id.
199  
  Id. at 3239.

200  
  Id.

201  
  Id. at 3240-41.

202  
  Id. at 3241.

203  
  Id.

204  
  Id. at 3242.

205  
  **Grand Rapids v. Ball**, 105 S. Ct. at 3231; **Aguilar v.**
  Felton, 105 S. Ct. at 3242.

206  
  **Grand Rapids v. Ball**, 105 S. Ct. at 3231.

207  
  Id.

208  
  **Aguilar v. Felton**, 105 S. Ct. at 3244.

209  
  Id.

210  
  Id. at 3245.

211  
  Id.

212  
  Id. at 3245-46.

213  
  Id. at 3243.

214  
  Id. at 3246.

215  
  Id.

216  
  Id. at 3247.

217  
  Id.

218  
  Id. at 3248.

219  

220  
  **Aguilar v. Felton**, 105 S. Ct. at 3243.

221  
CONCLUSION

The movement in support of aid to sectarian schools, like the movement for federal aid to education, resulted from an enlarged understanding of the general welfare clause that emerged during the Great Depression and served as the underpinning for the New Deal. "General welfare" was not, however, clearly defined, and when the Supreme Court faced the first case challenging aid to sectarian schools as a violation of the First Amendment, the justices disagreed over the meaning of the term. The meaning remained unclear when the question of government aid to parochial schools resurfaced in the 1960s in the wake of the Great Society.

The major points of disagreement remained essentially the same even though the composition of the Court changed over time. Where some justices emphasized that aid was specifically directed toward the secular aspects of education in a sectarian school, others insisted that religion pervaded all aspects of education in such schools. Where some contended that government assistance was justified in order to assure equal opportunities for children in nonpublic schools and thus necessary to maintain sectarian schools as a viable option in order to protect the right of free exercise, others declared that government funding of sectarian schools infringed on the rights of those who were forced to support religion involuntarily. Where some minimized the threat posed by government surveillance, others found the presence
of government officials an intolerable violation of the independence of the religious institutions. Where some gave priority to community interests and the need to defer to the democratic branches, others emphasized the natural rights of the individual and the responsibility of the judiciary to guard individual and minority rights.

An individual justice's position on this issue derived from a variety of factors. Of primary importance was the justice's political temperament. Supporters of individual rights soon came to view most programs for aid to sectarian schools as respecting an establishment of religion. Those concerned with tangible reforms and equalizing of opportunities along with those who wished to economize in the area of funding for education tended to uphold parochial aid programs.

Similarly, the judicial philosophy of an individual sometimes determined his vote. A judicial activist, such as William O. Douglas, readily overturned legislation that threatened the rights protected by the Constitution. In contrast, a justice like Felix Frankfurter or John Marshall Harlan who believed in restraint and deference to the legislative and executive branches avoided declaring a law unconstitutional unless the violation was blatant and extensive.

Also influencing the decision making process were individual religious beliefs and experiences, knowledge and appreciation of history, reliance on precedents, the persuasive efforts of one's colleagues, the opinions of
District Court judges, and the response by legislatures to earlier pronouncements.

A study of the past often invites speculation about the future. This is especially true if the issue is, as in this case, one of continuing interest. Of primary importance is the composition of the Court itself. With the elevation of William Rehnquist to the position of Chief Justice and the appointment of Antonin Scalia as Associate Justice, the conservative faction of the Court is strengthened. Scalia is expected to align himself with Rehnquist, White, and O'Connor in cases involving aid to sectarian schools; however, he is credited with greater intellectual prowess than retiring Chief Justice Burger. Both in conference and in written opinions, this ability may be critical in persuading swing men to vote in support of aid. Also worth noting is the fact that all four justices who support government programs to aid church-related schools are relatively young.

In contrast, among those who regularly or frequently oppose funding of sectarian schools, only John Paul Stevens is younger than seventy-seven. Should the conservative trend in politics continue, it seems likely that Brennan, Marshall, Powell, and Blackmun will be replaced by men whose political and judicial philosophies place community interests over individual rights, i.e. by men who are likely to uphold programs for aid to church-related schools.
Conservatism in the eighties, in part because it is based upon the support of religious fundamentalists, tends to see a renewed commitment to moral and religious education as the means to correct many of society's ills. The idea of government support of religion—whether through prayer in the public schools or through funding of sectarian schools—is, therefore, popular. Proponents of these policies argue that our country was founded on a strong religious tradition that persisted even after the adoption of the First Amendment. Strict separation of church and state, they maintain, has contributed to the secularization of society; government accommodation or actual support of religion is the leaven needed to raise society out of its moral malaise.

The recent resurgence of interest in the quality of American education has complicated the issue and raised serious financial questions. Reagan's plan for educational vouchers that could be used at either public or nonpublic schools, a plan that is particularly popular among educators in sectarian schools, has come under strong attack from the National Education Association, most of whose members are employed in the public sector. Spokesmen for the NEA charge that the voucher system would encourage many of the best students to choose private rather than public schools, and they point out that the plan would redirect funds from the public system, thus undermining the ability of the public schools to maintain a high quality of education. Other groups, such as Americans United, which are concerned with
maintaining a separation of church and state, charge that the voucher system is simply an indirect way of channeling public monies into church-related schools and, as such, would respect an establishment of religion.

Judicial opinions in cases involving aid to sectarian schools reflect a shifting in popular attitudes away from strong commitment to individual rights and freedoms to achieving economic security in a highly competitive marketplace. The Supreme Court's willingness to overlook specific constitutional safeguards - intended to protect our natural rights and viewed by the Founding Fathers as the lifeblood of this new nation - is perhaps the most serious development in recent politics. Indeed, the decisions to allow public monies to be used to support religious institutions, the "three pence" to which Madison referred over two hundred years ago, may be symptomatic of a much greater threat to the American political system.
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