

1986

# Constitutional Law-First Amendment- Establishment Clause-Aid to Parochial Schools (Aguilar v. Felton)

Sean P. Sullivan

Follow this and additional works at: [https://digitalcommons.nyls.edu/journal\\_of\\_human\\_rights](https://digitalcommons.nyls.edu/journal_of_human_rights)

Part of the [Education Law Commons](#), and the [First Amendment Commons](#)

---

## Recommended Citation

Sullivan, Sean P. (1986) "Constitutional Law-First Amendment-Establishment Clause-Aid to Parochial Schools (Aguilar v. Felton)," *NYLS Journal of Human Rights*: Vol. 4 : Iss. 1 , Article 11.

Available at: [https://digitalcommons.nyls.edu/journal\\_of\\_human\\_rights/vol4/iss1/11](https://digitalcommons.nyls.edu/journal_of_human_rights/vol4/iss1/11)

This Notes and Comments is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Journal of Human Rights by an authorized editor of DigitalCommons@NYLS.

## COMMENTS

CONSTITUTIONAL LAW—FIRST AMENDMENT—AID TO PAROCHIAL SCHOOLS AND THE ENTANGLEMENT OF CHURCH AND STATE—*Aguilar v. Felton*—Although the Court in *Aguilar v. Felton*<sup>1</sup> acknowledged that the education program in question had “done so much good and little, if any, detectable harm,”<sup>2</sup> the majority nonetheless struck down the program because of its potential for entangling church and state.<sup>3</sup> Under the program, teachers employed by the New York City Board of Education and paid with federal funds were sent into private religious schools to tutor.<sup>4</sup> Only students needing remedial work and living in economically deprived areas were eligible for the program.<sup>5</sup> The publicly paid teachers participating in the program were warned not to use religious ideas in their lessons, or to become involved in the religious activities of the school.<sup>6</sup> Regulations forbade any tutoring sessions from being held in any classroom containing religious symbols, and provided for inspections by supervisors to control teachers’ conduct.<sup>7</sup> Despite these precautions, the Court held that public employees teaching on religious premises constituted excessive entanglement.<sup>8</sup> The legislative benefit, in effect, was invalidated merely because of the site at which administrators chose to provide it.<sup>9</sup>

The Court has balanced freedom of conscience against educational development using its own maxims of interpretation whether or not those maxims corresponded to the facts.<sup>10</sup> Al-

---

1. 105 S. Ct. 3232 (1985).

2. *Id.* at 3239 (Powell, J., concurring) (quoting *Felton v. Secretary of Educ.*, 739 F.2d 48, 72 (2d Cir. 1985)). *Also quoted in* 105 S. Ct. at 3242 (Burger, C.J., dissenting).

3. *Aguilar*, 105 S. Ct. at 3238-39.

4. *Id.* at 3235.

5. *Id.* at 3234.

6. *Id.* at 3235.

7. *Id.*

8. *Id.* at 3238.

9. *Id.* The majority opinion implies consequences of the program upon which it also seeks to rely, but those implications arise solely from the location of the program. *Id.* at 3238-39.

10. For balancing, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 14-7 (1978). For maxims, see *Lemon v. Kurtzman*, 403 U.S. 602, 616-17 (1971), that parochial schools are

though the Court has at times allowed government to recognize the social contributions of religious institutions,<sup>11</sup> in *Aguilar*, the Court returned to applying mechanical principles justifying itself by asserting that it was defending absolute rights.<sup>12</sup> Denying educational aid to those who need it most, through an extensive search for potential constitutional violations, however, can hardly be supported by constitutional mandate.<sup>13</sup>

## I. CONSTITUTIONAL BACKGROUND

### A. *The Establishment Clause*

The establishment clause<sup>14</sup> and the free exercise clause<sup>15</sup> comprise the constitutional guarantee of freedom of religion. Colonial concerns with voluntarism, separatism, and federalism determined the final phrasing of the clauses,<sup>16</sup> but in construing them, the Court generally relies on separatism.<sup>17</sup> The legislative intent behind the first amendment can be articulated as separatism in three different contexts and for three different purposes: to keep religion safe from civil authorities, as espoused by Roger Williams; to keep civil society safe from religious authorities, as espoused by Thomas Jefferson; and to fractionalize society to

---

"pervasively sectarian;" *id.* at 616-19, that religious and secular education are inseparable in nonpublic schools; *id.* at 618, that teachers cannot be effectively supervised, whether public or private employees; *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1980), that neutrality to religion forbids even the appearance of joint authority between church and state; and *Everson v. Board of Educ.*, 330 U.S. 1 (1947), that religious education is a religious activity.

11. See generally *Mueller v. Allen*, 463 U.S. 388 (1983); *Walz v. Tax Commission*, 397 U.S. 664 (1969).

12. See the *Lemon* test, *infra* notes 84-95 and accompanying text.

13. See *infra* notes 19-57 and accompanying text.

14. U.S. CONST. amend. I, "Congress shall make no law respecting an establishment of religion . . ."

15. U.S. CONST. amend. I, " . . . or prohibiting the free exercise thereof . . ."

16. Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall - A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 773. Voluntarism denotes toleration of all sects and no compulsion to support any sect, as the Quakers allowed in Pennsylvania. Separatism meant no governmental support of religious institutions, as in Virginia. The federalism component represented the political compromise of the diverse states with their diverse relations with religion; none of the established sects could be established as the national religion, but neither could the national government disestablish any state churches. See also M. HOWE, *THE GARDEN AND THE WILDERNESS*, 19-23 (1968).

17. See *L. TRIBE*, *supra* note 10, at § 14-2.

prevent mob rule, as espoused by James Madison.<sup>18</sup> However useful the idea of separation is, and whatever the goal of the separatists, one must keep in mind that separation is not mandated by the words of the Constitution,<sup>19</sup> nor completely possible in a complex society.<sup>20</sup> Where the two clauses conflict, the Court uses the policy of separation to balance the countervailing clauses, and gives the free exercise clause precedence as the more absolute of the prohibitions.<sup>21</sup>

Establishment denotes official support for a church by civil authorities.<sup>22</sup> Support may consist of providing revenues through

18. *Id.* at § 14-3. As Justice Rehnquist points out in *Wallace v. Jaffree*, 105 S. Ct. at 2509, "Thomas Jefferson was of course in France" when the first amendment was written. Roger Williams was presumably in Providence, so James Madison is accordingly revealed as the true progenitor. Madison's approach, however, is based in political theory which may not be judicially cognizable.

19. See *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 247 (1948) (Reed, J., dissenting). "A rule of law should not be drawn from a figure of speech."

20. See *Walz v. Tax Commission*, 397 U.S. 664, 670 (1969). "No perfect or absolute separation is really possible."

21. See *L. TRIBE*, *supra* note 10, at § 14-7. See, e.g., *Wallace v. Jaffree*, 105 S. Ct. 2479, 2488 (1985) where the "underlying principle" of non-establishment was described as "individual freedom of conscience" which would make the establishment clause an aspect of free exercise, adding nothing to the scope of the protection.

A different perspective on separation of church and state can be obtained from other countries.

The original Soviet Constitution of 1918 permitted "freedom of religious and antireligious propaganda." If this reflected a certainty that the antireligious would prevail, the confidence soon ebbed, and the passage was amended in 1929 to "freedom of religious worship and antireligious propaganda." Thus deprived of its right to make "propaganda," the church lost its ability to transmit its creed and values formally: no group study, no Sunday schools, no evangelism. The party, meanwhile, was free, even obligated, to preach atheism. The Constitution adopted under Stalin in 1936 contained Article 124 on state-church relations, the provisions of which were retained in the revised Constitution of 1978, Article 52, guaranteeing citizens' "freedom of conscience," by declaring that "the church in the U.S.S.R. is separate from the state, and the school from the church." To an American ear attuned to the values of separation of church and state, this may sound surprisingly liberal. But in a society where the state is all-embracing, it means there is little room left for the church.

D. SHIPLER, *RUSSIA: BROKEN IDOLS, SOLEMN DREAMS*, 271-72 (1983). See also *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985) (upholding the military providing chaplains where necessary for religious exercises of personnel, but remanding to determine whether such chaplains are necessary in domestic urban areas).

22. Established church is defined as "a church recognized by law as the official church of a nation and supported by civil authority, and that receives in most instances financial support from the government through some system of taxation." *WEBSTER'S THIRD NEW INT'L DICTIONARY* 778 (1981).

taxation, enforcing weekly attendance requirements, or even persecuting apostates.<sup>23</sup> The Supreme Court has given a broad meaning to the establishment clause, construing it to forbid any fostering or supporting of religion in any form.<sup>24</sup> Potential violations are sufficient to estop governmental actions.<sup>25</sup> Even psychological linkage of church and state may violate the establishment clause.<sup>26</sup> The Court, however, has failed to explain how education can exclude exposure to religion and remain neutral between religion and non-religion.<sup>27</sup> Similarly, an observer could perceive separation as disfavor and disdain, in the same way

---

23. *Everson v. Board of Educ.*, 330 U.S. 1, 9-13 (1947) (quoting Virginia Bill for Religious Liberty). "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, nor shall otherwise suffer on account of his religious opinions or belief." 330 U.S. at 13.

24. 330 U.S. at 15-16.

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

See also *id.* at 31 (Rutledge, J., dissenting),

Not simply an established church, but any law respecting an establishment of religion is forbidden. The Amendment was broadly but not loosely phrased. It is the compact and exact summation of its author's views formed during his long struggle for religious freedom . . . Madison could not have confused "church" and "religion," or "an established church" and "an establishment of religion."

This assumes that Madison had objective control over the legislative process that produced the amendment, because the final version was not Madison's original draft. The use of "respecting" may indicate mere positive and negative, and not the broader meaning ascribed by the Court. The use of "religion" may be attributed to the need for the word to act as the antecedent of "thereof" in the free exercise clause. Close scrutiny of the language proves too much. The Court should express its policy and expose itself. See M. Howe, *supra* note 16, at 19-23 (1968).

25. *Lemon*, 403 U.S. at 619.

26. *Larkin v. Grendel's Den*, 459 U.S. 116 (1982).

27. Note, *The Myth of Religious Neutrality by Separation in Education*, 71 VA. L. REV. 127, 166-72 (1985).

that the Court has perceived involvement as favoritism.<sup>28</sup>

### B. *The Doctrine of Entanglement*

Because the Court has depended on the metaphor of separation of church and state, it forbids excessive contact among the separate hierarchies. Whether any actual establishing, fostering, or supporting occurs, any potentiality is characterized as entanglement.<sup>29</sup> Limited or routine contact is not forbidden, and a one-time grant may be distinguished from a continuing series of grants.<sup>30</sup> An exemption from property taxes, while beneficial to a religious institution, can be justified by the reduction of contact between the competing bureaucracies of government and religion.<sup>31</sup>

Entanglement is the involvement in religion by government. Three types of entanglement have been identified.<sup>32</sup> Doctrinal entanglement arises when civil authorities decide questions of religious doctrine. An intra-congregational dispute about control over the congregation's property, for example may be determined according to which faction is found to be orthodox.<sup>33</sup> Administrative entanglement involves a relationship requiring monitoring or surveillance of a religious institution, especially in connection with religious activities.<sup>34</sup> Political divisiveness in-

---

28. The ridiculousness of this logical converse to the Court's tests shows how far the Court is reaching to formulate tests which support its policies. If the aim of separation is secularization of society as proposed by Jefferson, see *supra* note 18, then announce that policy explicitly, and explore how secularization impacts on society and the rights of individuals, and we all may learn something. See also M. Howe, *supra* note 16.

29. See *Walz*, 397 U.S. at 674-75, and *Lemon* 403 U.S. at 619-20.

30. See *Tilton v. Richardson*, 403 U.S. 672, 688 (1971), *Lemon*, 403 U.S. at 669 (White, J., dissenting). See also Note, *Political Entanglement as an Independent Test of Constitutionality Under the Establishment Clause*, 52 *FORDHAM L. REV.* 1209, 1225 (1980); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

31. *Walz*, 397 U.S. 664 (1969).

32. Schachner, *Religion and the Public Treasury after Taxation with Representation of Washington, Mueller, and Bob Jones*, 1984 *UTAH L. REV.* 275. See also *Abington School Dist. v. Schempp*, 374 U.S. 203, 231 (1963) (Brennan, J., concurring). "Equally the Constitution enjoins those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends where secular means would suffice."

33. Schachner, *supra* note 32, at 277-78.

34. *Id.* at 276-77.

volves inflammatory political conflict across sectarian lines.<sup>35</sup>

Different types of entanglement produce different concerns. In the first case to hold a program unconstitutional because of entanglement, Chief Justice Burger discussed the different implications of entanglement. "As well as constituting an independent evil against which the Religion Clauses were intended to protect, involvement or entanglement between government and religion serves as a warning signal."<sup>36</sup> The "independent evil" is doctrinal entanglement which arises when the state decides questions of religious doctrine.<sup>37</sup> The "warning signals" are administrative entanglement and political divisiveness, which do not involve governmental support for religion.<sup>38</sup> The working relationship between government and church involves potential decisions about what is secular or religious, what is permissible or not.<sup>39</sup> Inherent in the process of government spending is the promise of increased or decreased funding for the successful or unsuccessful contractor or delegatee. When government funding flows through religious institutions, the religious institutions must safeguard the secular nature of that funding in order that the funding continue. Where funding may not only continue but increase, a subtle pressure to secularize arises.<sup>40</sup> In the same manner, political division along sectarian lines may indicate that a majority has been created to provide benefits for religious institutions.<sup>41</sup> The Court looks beneath the surface of decision-making, to potential, future decisions, and to the motivations behind past decisions.<sup>42</sup>

---

35. *Id.* at 277.

36. *Lemon*, 403 U.S. at 624-25.

37. Where the state favors a group because of its particular doctrinal views, its action has the primary effect of advancing the views of that group. In its blatant form, entanglement, the third prong of the *Lemon* test, *see infra* notes 84-95 and accompanying text, is thus equivalent to primary effect, the second prong.

38. The potential for entanglement of these two types is sufficient to attract the Court's attention. The Court, however, does not explore the entangled relationship once detected, but quarantines the parties.

39. *Id.* at 619-20.

40. *Id.* at 622-24.

41. *Id.* at 624-25.

42. *See Wheeler v. Barrera*, 417 U.S. 402 (1974).

The task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one for the Court. Usually it requires a careful evaluation of the facts of the particular case . . . . It would be wholly inappropriate for us to render an opinion on the First

By depending on the metaphor of separation of church and state, rather than the actual text of the Constitution that mandates non-establishment, the Court reaches unsupportable results such as the doctrine of non-entanglement. One influential commentator<sup>43</sup> demanded "mutual abstention of the political and religious caretakers."<sup>44</sup> The Constitution does not block the input to governmental apparatus from religious persons, but prevents religious persons from acquiring for their religious institutions governmental benefits.<sup>45</sup> Prevention of political divisiveness may have been the intention of the establishment clause, specifically, and the Constitution, generally, but that intention is not specifically incarnated in any specific mechanism of the Constitution.<sup>46</sup> To elevate the Court's admonitions against political division to a legal test under the establishment clause would misconstrue the intent of the Framers to create a limited government as an intent to limit the power of religion.<sup>47</sup> People are free to act politically, regardless of religious motivation or affiliation, as long as by their actions they do not produce a governmental action which violates the Constitution.<sup>48</sup>

---

Amendment issue when no specific plan is before us. A federal court does not sit to attempt to render a decision on hypothetical facts . . . .

*Id.* at 426-27.

43. Paul Freund's article, *see infra* note 44, published in 1969 was a major part of the outcry following the *Allen* decision, *see infra* note 57, which lead to the substantial shift in the Court's decision in *Lemon*, *see infra* note 84, according to Schotten, *The Establishment Clause and Excessive Governmental- Religious Entanglement: The Constitutional Status of Aid to Nonpublic Elementary and Secondary Schools*, 15 WAKE FOREST L. REV. 207, 223 (1979).

44. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1684 (1969). *See also supra* note 24.

45. Kurland, *The Religion Clauses and the Burger Court*, 34 CATH. U.L. REV. 1, 6 (1984).

46. Note, *Political Entanglement as an Independent Test of Constitutionality Under the Establishment Clause*, 52 FORDHAM L. REV. 1209 (1984).

47. *See* L. TRIBE § 1-2, for the various theories behind creating a limited government.

48. Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U.L.J. 205 (1980). *See also* *McDaniel v. Paty*, 435 U.S. 618 (1978) (invalidating a Tennessee constitutional provision which prohibited ministers from holding public office).

The antidote which the Constitution provides against zealots who would inject sectarianism into the political process is to subject their ideas to refutation in the marketplace of ideas and their platforms to rejection at the polls. With these safeguards, it is unlikely that they will succeed in inducing government to act along religiously divisive lines, and, with judicial enforcement of the establishment clause, any measure of success they achieve must be short-lived, at



### C. *Early Aid to Parochial Schools Cases*

The two landmark cases which allow aid to parochial schools under the establishment clause<sup>49</sup> are *Everson v. Board of Educ.*<sup>50</sup> and *Allen v. Board of Educ.*<sup>51</sup> In *Everson*, the Court held that the "wall of separation between church and State"<sup>52</sup> would not be breached by reimbursing parents for the expense of bus fares paid to send their children to religious schools.<sup>53</sup> The program provided a general benefit of free transportation without differentiating between believers and nonbelievers.<sup>54</sup> The benefit flowed to parents, and only indirectly to religious institutions.<sup>55</sup> The dissenters viewed the benefit as flowing only

best.

*Id.* at 642 (Brennan, J., concurring).

49. Before *Everson*, the Court denied the establishment clause was implicated in the disbursement of funds for a Catholic school on an Indian reservation, because the funds belonged to the Indians and were only held in trust by the government. *Quick Bear v. Leupp*, 210 U.S. 50 (1908). Other cases involving private education were decided under the due process clause. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the state could not forbid the teaching of the German language because parental choice in education is a fundamental liberty interest. In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the state could not limit parental choice in education to public schools, because such choice is a fundamental liberty protected by substantive due process. Property interests of private schools (a military academy as well as a religious school) were also protected in *Pierce*. Textbook loans to private school pupils serve a public purpose, education, and thus do not constitute a governmental taking for a private purpose. *Cochran v. Louisiana State Board of Educ.*, 281 U.S. 370 (1930).

The establishment clause is regarded as incorporated by *Everson* in the liberty guarantee of the due process clause of the fourteenth amendment, although dicta in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), incorporated it there along with the free exercise clause. *Everson* held that the establishment clause was not implicated, so that the first case holding the establishment clause was violated is *McCollum*, see *supra* note 19.

This slipshod incorporation has not gone unnoticed, especially in light of the influence of federalism on the establishment clause, see *supra* note 16. Justice Brennan in *Abington* 374 U.S. at 255, reasoned that the Framers of the fourteenth amendment relied on the disestablishment of state churches by 1833 in forming their notion of liberty. The abortive Blaine Amendment, to apply the establishment clause to the states, was unnecessary, because state constitutions and the fourteenth amendment were already a sufficient barrier.

Justice Rehnquist, in *Wallace v. Jaffree*, 105 S. Ct. 2479, 2508 (1985), also re-examines the constitutional history, arguing that religion was preferred over nonreligion, even if one sect could not be preferred over another.

50. 330 U.S. 1 (1947).

51. 392 U.S. 236 (1968).

52. 330 U.S. at 16.

53. *Id.* at 18.

54. *Id.*

55. *Id.*

to those attending religious schools, although public school students were already receiving free transportation.<sup>56</sup>

In *Allen*, the Court upheld the validity of textbook loans to parochial school students.<sup>57</sup> Rejecting the argument that any aid to a religious school benefits religion,<sup>58</sup> the Court allowed the textbook loans, because textbooks have specific, determinable contents.<sup>59</sup> Local school board officials had to approve textbooks before the state could provide them to religious schools.<sup>60</sup> Such public officials cannot be assumed to disregard their official duties by approving texts with religious themes and points-of-view merely because administrators of religious schools request them.<sup>61</sup>

#### D. Other Early Cases

As the Court developed its method of analysis between 1947 and 1971, the establishment clause was applied to school situations other than aid to parochial schools.<sup>62</sup>

In *Illinois ex rel. McCollum v. Board of Educ.*,<sup>63</sup> a released-time program was challenged for violating the establishment clause.<sup>64</sup> In order to relax the state's monopoly over prime learning time created by compulsory attendance laws, the public school releases some of the student's time to the student, so that the student can seek religious instruction that the state may not provide but that the student's parents desire.<sup>65</sup> The Illinois program required parents to request a religious class and a particu-

---

56. *Id.* at 20, and at 3 n.1.

57. 392 U.S. 236, 248.

58. *Id.* But see *Meek v. Pittenger*, 421 U.S. 349, 387 (1975) (Brennan, J., concurring).

59. *Allen*, 392 U.S. at 244. See also *Lemon*, 403 U.S. at 617.

60. *Allen*, 392 U.S. at 245.

61. *Id.* "Absent evidence, we cannot assume that school authorities, who constantly face the same problem in selecting textbooks for use in public schools, are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under law."

Such officials act in the public eye and are readily amenable to suit, with the books constituting immutable evidence of their actions. That is, the school boards are accountable to the courts.

62. That is between the first establishment clause case, *Everson*, and the development of a highly structured test in *Lemon*, see *infra* notes 63-84 and accompanying text.

63. 333 U.S. 203 (1948).

64. *Id.*

65. *Id.* at 222 (Frankfurter, J., concurring).

lar denomination before the student could be required to attend a religion class.<sup>66</sup> The classes were held in public school buildings.<sup>67</sup> School officials had some discretion in choosing whether to allow religious teachers to hold classes.<sup>68</sup> The Court held the program unconstitutional because the location of the classes, and the possible discrimination among sects involved public school officials with religious issues and the possibility of supporting religion.<sup>69</sup>

Four years later, in *Zorach v. Clauston*,<sup>70</sup> the Court upheld a New York released-time program, and refused to recognize the existence of issues under the free exercise<sup>71</sup> and establishment clauses.<sup>72</sup> Under this program, students left the public school to attend classes at a nearby parochial school. The Court apparently distinguished *McCullum* on the basis of the shift in location.<sup>73</sup> The released-time program still involved enforcement of compulsory attendance laws for a religion class, and presumably some screening of teachers or institutions for the safety of the students, yet, this released-time program was upheld by the Court.<sup>74</sup>

Other cases involved efforts to remove prayer from public schools. In *Abingdon School Dist. v. Schempp*,<sup>75</sup> the Court ruled that the state could not sponsor Bible readings and prayer recitals.<sup>76</sup> Although the children could choose to absent themselves during the readings, the authoritarian setting, as well as peer pressure, would inhibit the exercise of that right.<sup>77</sup> Sponsoring prayers, even with a secular purpose, has the effect of promoting religion.<sup>78</sup> Similarly, an effort to introduce religious values into

---

66. *Id.* at 209.

67. *Id.* at 205, 209.

68. *Id.* at 208.

69. *Id.* at 209.

70. 343 U.S. 306 (1952).

71. *Id.* at 311.

72. *Id.* at 311-12.

73. *Id.* at 308-09.

74. The Court's change of heart may be due to political furor rather than factual distinction. See Kurland, *The Religion Clauses and the Burger Court*, 34 CATH. U.L. REV. 1, 8 (1984).

75. 374 U.S. 203 (1963).

76. *Id.* at 205-12.

77. *Id.* at 225-26, 208 n.3.

78. *Id.* at 222-25.

science classes was invalidated.<sup>79</sup>

Outside the school context, the Court validated Sunday Closing laws which were originally intended to enforce a day of rest by limiting commercial activity. The Court held that over a period of time such laws had lost their original religious intent, and were presently justified by a secular purpose.<sup>80</sup> Similarly, in *Walz v. Tax Commission*,<sup>81</sup> tax exemptions for properties of religious institutions were upheld, because of the non-religious contributions of such institutions to society,<sup>82</sup> and the distance created between institutions by exemptions as compared to the institutional involvement entailed in taxation of such property.<sup>83</sup>

### *E. The Lemon Test and Current Interpretation*

In 1971, the Court promulgated a three-pronged test for the establishment clause in *Lemon v. Kurtzman*.<sup>84</sup> The Court took the first two prongs from *Abington*,<sup>85</sup> and the third prong from either an *Abington* concurrence,<sup>86</sup> or *Walz*.<sup>87</sup> The test required that "first, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not

---

79. See *Epperson v. Arkansas*, 393 U.S. 97 (1968) (state law barring teaching of evolution in public schools was unconstitutional because it did not have a secular legislative purpose). See also *Edwards v. Aguillard*, 765 F.2d 1251 (5th Cir. 1985), *aff'd*, 778 F.2d 225 (en banc), *prob. juris. noted*, 106 S. Ct. 1946 (1986) (statute requiring balanced treatment of creation-science and evolution-science held unconstitutional); *Daniel v. Waters*, 515 F.2d 485 (6th Cir. 1975) (statute violated Establishment Clause by requiring equal time for Genesis when evolution is taught). *But cf.* "There is no reason . . . why a state is without power to withdraw from its curriculum any subject deemed too emotional and controversial for its public schools." 397 U.S. at 113 (Black, J., concurring); *Mercer v. Michigan State Board of Educ.*, 379 F. Supp. 580 (E.D. Mich. 1980) (state had power to remove the topic of birth control from public school curricula without violating Establishment Clause or teacher's free speech right). See generally Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE L.J. 515 (1978).

80. *McGowan v. Maryland*, 366 U.S. 420 (1961).

81. 397 U.S. 664 (1969).

82. *Id.* at 687 (Brennan, J., concurring).

83. *Id.* at 674-76. Valuation would be the true root of entanglement if exemptions were denied. Variations in assessments could result from a policy of favoring property of one sect over another, or property of religious organizations over other property. In addition, increased concern over finances could lead to the secularization of many sermons.

84. 403 U.S. 602 (1971).

85. 374 U.S. 203, 222.

86. 374 U.S. at 231 (Brennan, J., concurring). See also *supra* note 32.

87. 397 U.S. 664, 674.

foster 'an excessive governmental entanglement with religion.' ”<sup>88</sup>

Regarding aid to parochial schools, the secular legislative purpose has generally been accepted at face value: aiding education generally, rather than aiding religious education particularly.<sup>89</sup> The burden of proving the other two prongs of the *Lemon* test negative has been imposed on the government to make certain that the government is not aiding religion.<sup>90</sup>

The *Lemon* case barred reimbursement to religious schools for salaries of teachers of secular subjects, such as mathematics or science.<sup>91</sup> In order to prevent the inculcation of religion, a regulatory system accompanied the aid, resulting in a “comprehensive, discriminating, and continuing state surveillance”<sup>92</sup> of the religious schools.<sup>93</sup> The Chief Justice noted the possibility of political debate dividing along sectarian lines, and intensifying over annual appropriations.<sup>94</sup> Since the relationship would become increasingly entangled and virulent, the initial entanglement must be taken as a “warning signal.”<sup>95</sup>

The Court, in the companion case of *Tilton v. Richardson*,<sup>96</sup> distinguished aid to an institution of higher education from aid to an elementary or secondary school. By characterizing elementary and secondary schools as “pervasively sectarian,”<sup>97</sup> the Court distinguished higher education as not including “religious indoctrination as a substantial purpose or activity.”<sup>98</sup>

The Court used its new test to construe the establishment clause strictly, preventing most aid to religious institutions. In *Levitt v. Committee for Pub. Educ. and Religious Liberty*,<sup>99</sup> the Court considered a New York program which reimbursed non-

---

88. *Lemon*, 403 U.S. at 612-13.

89. *Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216, 3223, “[a]s has often been true in school aid cases, there is no dispute as to the first test.”

90. *Felton*, 739 F.2d at 65-66.

91. 403 U.S. at 607 (supplementing income in Rhode Island program), and at 610 (reimbursing salaries in Pennsylvania).

92. *Id.* at 619.

93. *Id.*

94. *Id.* at 622.

95. *Id.* at 624-25. See also *supra* text accompanying note 36.

96. 403 U.S. 672 (1971).

97. *Lemon*, 403 U.S. at 613.

98. *Tilton*, 403 U.S. at 687.

99. 413 U.S. 472 (1972).

public schools for services mandated by state law including record-keeping and testing.<sup>100</sup> Testing was found to be an integral part of the teaching process.<sup>101</sup> The state cannot be certain that payments to religious school teachers will not have the effect of advancing religion.<sup>102</sup> On the same day, in *Committee for Pub. Educ. and Religious Liberty v. Nyquist*,<sup>103</sup> two other New York programs, one granting cash subsidies to nonpublic schools in low income areas for maintenance and repair of facilities,<sup>104</sup> and another providing for tuition reimbursement,<sup>105</sup> were also invalidated.<sup>106</sup> Neither program "was sufficiently restricted to assure that it would not have the impermissible effect of advancing the sectarian activities of religious schools."<sup>107</sup> In *Meek v. Pittenger*,<sup>108</sup> the Court reviewed a Pennsylvania statute apparently designed to provide the broadest benefits possible to nonpublic school students without violating establishment clause principles.<sup>109</sup> The statute provided loans of not only textbooks,<sup>110</sup> but also other non-religious instructional materials.<sup>111</sup> Such instructional materials were found to be too susceptible to religious uses.<sup>112</sup> Some members of the Court would have gone further, reversing *Allen*, and disallowed the textbook loans as susceptible to religious uses.<sup>113</sup> Auxiliary services, such as guidance, testing, and therapeutic services, were found to create the same entanglement as a teaching relationship.<sup>114</sup> The Court was divided

---

100. *Id.* at 474-75.

101. *Id.* at 481.

102. *Id.* at 480.

103. 413 U.S. 756 (1972). *See also* *Hunt v. McNair*, 413 U.S. 734 (1972) (upholding aid to a nonpublic college under *Tilton*).

104. *Nyquist*, 413 U.S. at 762-64.

105. *Id.* at 764.

106. *Id.* at 798.

107. *Id.* at 794.

108. 421 U.S. 349 (1975).

109. *Id.*

110. *See Allen*, *supra* notes 57-61 and accompanying text.

111. 421 U.S. at 362-66 (including projectors, recorders, films, recordings, maps, charts, and laboratory equipment).

112. *Id.*

113. *Id.* at 379 (Brennan, J., concurring and dissenting), "it is pure fantasy to treat the textbook program as a loan to students." *See Allen*, *supra* notes 57-61 and accompanying text. *Allen*'s precedential value could have been expanded to include instructional material, or contracted to exclude it. In any event, it seems the Court decided on the new facts and then returned to *Allen* to decide whether it was expanded or contracted.

114. 421 U.S. at 369-70.

into three factions of three justices each. The moderate faction was able to create a plurality decision by depending on votes from both extremes on different points.<sup>115</sup>

Two years later, with an almost identical alignment in another plurality decision, *Wolman v. Walter*,<sup>116</sup> the Court took a more accommodationist approach to aid to parochial schools under an Ohio statute. Diagnostic services<sup>117</sup> were found not to involve a continuing relationship between church and state, and were thus permissible.<sup>118</sup> Therapeutic, guidance, and remedial services<sup>119</sup> could be provided, but only on neutral sites off non-public school premises.<sup>120</sup> Equipment and material loans, and provision of bus transportation for field trips were not permissible,<sup>121</sup> because they put state resources under the control of non-public school teachers.<sup>122</sup>

The Court's willingness to accommodate aid to parochial schools continued in *Committee for Pub. Educ. and Religious Liberty v. Regan*.<sup>123</sup> After *Levitt*,<sup>124</sup> the New York legislature passed a new statute to reimburse nonpublic schools for the costs of complying with state requirements. The statute only covered activities not part of the teaching process.<sup>125</sup> For example, teachers could be paid only for marking state-mandated, standardized tests.<sup>126</sup> Such tests are not part of the on-going,

115. Justices Douglas, Brennan, and Marshall would have restricted aid. Chief Justice Burger, and Justices White, and Rehnquist would have allowed broader aid. Justices Stewart, Blackmun, and Powell were the moderate faction. *Id.* at 350

116. 433 U.S. 229 (1977). Justice Douglas was replaced by Justice Stevens, who voted with the same group, and Chief Justice Burger voted with the moderate faction. This minor difference demonstrates how the Court remained sharply divided, but moved ever so slightly in the direction of less restriction on aid.

117. *Id.* at 241-44. That is, services to diagnose speech, hearing, and psychological problems.

118. *Id.*

119. Such aid would involve a continuing relationship through repeated sessions. *Id.*

120. *Id.* at 244-48.

121. *Id.* at 248-55, but see *id.* at 264 (Powell, J., concurring and dissenting, who would find that bus service was a permissible form of aid under *Everson*, see *supra* notes 52-56 and accompanying text).

122. These forms of aid were capable of diversion to sectarian purposes. 433 U.S. at 249, 254.

123. 444 U.S. 646 (1980). Edward Regan replaced Arthur Levitt as Comptroller of New York State, and as PEARL's target.

124. See *supra* notes 99-102 and accompanying text.

125. *Regan*, 444 U.S. at 656.

126. *Id.* at 657-59.

personal evaluation a teacher must make to teach appropriate material to his class. In addition, state audits would prevent excessive or misdirected reimbursements.<sup>127</sup>

*Mueller v. Allen*<sup>128</sup> demonstrated an even more marked swing away from the position that "any aid" was too much.<sup>129</sup> A Minnesota statute allowed a tax deduction for tuition, textbooks, and transportation for parents with children in elementary and secondary schools.<sup>130</sup> Although the lion's share of the benefit would flow to parents of nonpublic school students, the statute was neutral on its face, because public school students could incur qualifying expenses for extracurricular activities.<sup>131</sup> The Court distinguished between providing instructional materials to be used by the students, which would benefit the individuals, and direct loans of instructional materials to nonpublic schools, which would benefit the institutions.<sup>132</sup>

In an even more accommodationist vein, the Court declined to apply the *Lemon* test in two recent cases.<sup>133</sup> *Marsh v. Chambers*<sup>134</sup> upheld the constitutionality of legislative chaplains because of the existence of such chaplains at the time of the drafting and ratification of the first amendment, and the acceptance of such chaplains throughout history.<sup>135</sup> *Lynch v. Donnelly*<sup>136</sup> upheld a municipal Christmas display as merely engendering community and seasonal spirit and goodwill, instead of estab-

---

127. *Id.* at 659-61.

128. 463 U.S. 388 (1983).

129. *Id.* at 396 n.5. "[I]t may be that religious institutions benefit very substantially from allowance of such deductions. The Court's holding in [*Walz*], indicates, however, that this does not require the conclusion that such provisions of a State's tax law violate the Establishment Clause." *Id.* (citation omitted).

130. *Id.* at 390 n.1.

131. *Id.* at 398-99.

132. *Id.* at 402 n.10.

133. See *supra* notes 116-132.

134. 463 U.S. 783 (1983). Legislative chaplains open sessions with prayers and counsel legislators and staff who request such services.

135. *Id.* at 789-90.

Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress— their actions reveal their intent.

*Id.* at 790.

136. 465 U.S. 668 (1984).



lishing religion.<sup>137</sup>

*F. Title I: Statutory Background of Aguilar v. Felton*

Title I of the Elementary and Secondary Education Act of 1965<sup>138</sup> provides federal funds to increase the educational opportunities of children who are educationally and economically deprived.<sup>139</sup> Title I funds are intended to supplement, not supplant, otherwise available programs and services, so that educational benefits are improved, rather than maintained at the same, inadequate level.<sup>140</sup> Under Title I, programs are proposed by local educational agencies, and must be approved by state educational agencies before federal funds are disbursed.<sup>141</sup> In *Wheeler v. Barrera*,<sup>142</sup> the Court decided that Title I funds must be allotted to provide comparable benefits for all deprived children, regardless of whether they attend public or nonpublic schools.<sup>143</sup> The use of private school facilities under Title I was upheld in *Nebraska State Board of Educ. v. School Dist. of Hartington*,<sup>144</sup> but apparently only because no public facilities were available.<sup>145</sup>

New York City attempted to comply with the statute by providing assistance to deprived children without regard to what school they attended.<sup>146</sup> Originally, nonpublic school students were brought to public schools after regular school hours.<sup>147</sup> Lagging attendance and safety concerns, however, led the city to send public school teachers to nonpublic schools during regular

---

137. *Id.* at 685.

138. Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C.A. §§ 3801-3876 (West Supp. 1986)).

139. 20 U.S.C.A. §§ 3801, 3804(c), 3805(d), 3806 (West Supp. 1986).

140. 20 U.S.C.A. § 3807(b) (West Supp. 1986).

141. 20 U.S.C.A. § 3805(a) (West Supp. 1986).

142. 417 U.S. 402 (1974). *See also* 20 U.S.C.A. § 3862 (West Supp. 1986).

143. 417 U.S. 402. Parents of nonpublic school students had sued to force state officials to provide Title I programs for their children.

144. *Nebraska State Board of Educ. v. School Dist. of Hartington*, 188 Neb. 1, 195 N.W.2d 161 (1972) *cert. denied*, 409 U.S. 921 (1972).

145. 409 U.S. at 925. Justice Brennan, agreeing with the denial of certiorari, would have affirmed this leasing of classrooms because there were no other available facilities and both public and nonpublic school students would have attended the classes. Justice Brennan filed this opinion to answer the dissent from denial of certiorari by Justice Douglas, joined by Justice Marshall.

146. *See supra* notes 138-145 and accompanying text.

147. 739 F.2d at 51.

school hours.<sup>148</sup> To prevent any identification of the classes with religion or any fostering of religion by the public school teachers, public school administrators promulgated regulations regarding the content and decoration of classrooms in the parochial schools, and inspection and evaluation of publicly paid teachers working in those schools.<sup>149</sup>

## II. PROCEDURAL BACKGROUND OF *Aguilar v. Felton*

### A. *The District Court*

In the eastern district of New York, basing their standing to sue on their status as taxpayers,<sup>150</sup> the plaintiffs in *Aguilar v. Felton* sought an injunction against the distribution of federal funds under Title I<sup>151</sup> for sending New York City public school teachers into private schools to provide remedial classes.<sup>152</sup> Since a similar suit had been filed in the southern district against the same defendants and based on the same subject matter, Judge Neaher of the eastern district stayed his decision pending the final determination of that case.<sup>153</sup>

The case in the southern district, *National Committee for*

---

148. *Id.*

149. *Id.*

150. Taxpayers have standing to challenge infringements of fundamental rights under *Flast v. Cohen*, 392 U.S. 83 (1968). Apparently, some of the original parties in *Flast* initiated this suit also, see Nat'l Coalition for Pub. Educ. and Religious Liberty v. Califano, 446 F. Supp. 193, 195 (1978). Under *Flast*, a specific limitation on governmental power which is related to the parties' status as taxpayers is sufficient to create standing to challenge the governmental action. The only such limitation recognized is the establishment clause. See McCoy & Devins, *Standing and Adverseness in Challenges of Tax Exemptions for Discriminatory Private Schools*, 52 FORDHAM L. REV. 441 (1981), which suggests the Court could have based standing on taxpayer status, rather than racial group membership for civil rights violations. The Court employs *Flast* standing to defend fundamental liberty rights, not to defend taxpayer property, see L. TRIBE *supra* note 10, at § 14-12 ("to recognize in the religion clauses a fundamental personal right not to be part of a community whose official organs endorse religious views fundamentally inimical to one's deepest beliefs."), and not to create a right to air "generalized grievances about the conduct of government," see *Flast*, 392 U.S. at 106.

Now that the underlying controversy in *Flast* has been determined using a test developed subsequent to *Flast*, the time may be ripe to reconsider whether the establishment clause is an absolute prohibition that can justify taxpayer standing.

151. See *infra* notes 138-145 and accompanying text.

152. See *infra* notes 146-149 and accompanying text.

153. *Felton*, 739 F.2d 48, 52 (2d Cir. 1984). Parents of nonpublic school students were allowed to intervene as defendants to protect their children's interests. *Id.*

*Public Education and Religious Liberty v. Harris*, ("PEARL"), was heard by a three-judge court.<sup>154</sup> In 1978, the court denied the plaintiffs a preliminary injunction, because their delay in pursuing their legal battle, originally begun in 1966, indicated they would not suffer irreparable harm.<sup>155</sup> The court also denied summary judgment to the plaintiffs because the plaintiffs themselves had, by their specific challenge to New York City's implementation of the statute through providing educational services within religious schools during school hours, raised issues of fact; although plaintiffs claimed they were challenging the constitutionality of the entire statute, their specific complaint could not support that contention.<sup>156</sup>

The bulk of the evidence in PEARL was presented in affidavits and documents.<sup>157</sup> The three-judge court upheld the program under the three-pronged *Lemon* test.<sup>158</sup> Although the program was being implemented in religious schools, its purpose was secular, to assist education generally.<sup>159</sup> Instead of benefiting religious institutions, the program had the primary effect of aiding students by supplementing regular programs in order to achieve a minimum level of education.<sup>160</sup> The court found no excessive entanglement, because the schools were not pervasively sectarian. It found that the regulations prevented misuse of the funds, and that the working relationships between public and

---

154. 489 F. Supp. 1248 (S.D.N.Y. 1980) (three-judge court) *appeal dismissed*, 449 U.S. 808.

155. Nat'l Coalition for Pub. Educ. and Religious Liberty v. Califano, 446 F. Supp. 193 (1978).

156. *Id.* at 196. Having failed to prevent the passage of this statute in Congress, whether or not its potential consequences were understood, plaintiffs sought to have the courts repeal it.

157. PEARL, 489 F. Supp. 1252. Plaintiffs could not afford to finance a trial and present evidence attacking the program. They preferred to challenge the interpretation of the program which allowed the program. The City presented affidavits from various officials and a few witnesses. See Hitchcock, *The Supreme Court and Religion: Historical Overview and Future Prognosis*, 24 St. Louis U.L.J. 183, 197 (1978), suggesting that public officials are not committed defenders of aid to parochial schools. A different trial strategy and a different burden of proof could have left the plaintiffs buried under a ton of paper.

158. PEARL, 489 F. Supp. at 1257. For the *Lemon* test see *supra* notes 84-95 and accompanying text.

159. PEARL, 489 F. Supp. at 1257.

160. *Id.* at 1258-62.

parochial school personnel were limited and routine.<sup>161</sup> Where public school supervisory personnel evaluated the performance and detachment of teachers sent to parochial schools, the plaintiffs charged the supervisors with "intrusionary investigatory entrances into the religious schools."<sup>162</sup> The court disagreed, finding "[t]he supervisors have only casual and periodic contact with nonpublic school administrators and little or no contact with nonpublic school teachers when they visit the parochial schools."<sup>163</sup> The plaintiffs appealed to the Supreme Court, and the Court dismissed appeal.<sup>164</sup>

Deciding on the basis of the record in PEARL and supplemental affidavits, Judge Neaher, in the eastern district, also upheld the program in an unreported decision.<sup>165</sup>

### B. The Second Circuit

On appeal the second circuit, in an opinion by Judge Friendly, reversed the eastern district decision.<sup>166</sup> Judge Friendly found defendants' contentions contrary to Supreme Court precedents.<sup>167</sup> Under *Lemon*,<sup>168</sup> the schools were pervasively sectarian.<sup>169</sup> Under *Meek*,<sup>170</sup> auxiliary services, such as remedial education, could not be provided in nonpublic schools.<sup>171</sup> Under *Wolman*,<sup>172</sup> such aid could be provided for nonpublic school students only if the location of the services was not iden-

---

161. *Id.* at 1265-68.

162. *Id.* at 1268 (quoting Plaintiffs' Trial Memorandum of Law at 10).

163. 489 F. Supp. at 1268.

164. *Appeal dismissed sub nom.* Nat'l Comm. for Pub. Educ. and Religious Liberty v. Hufstedler, 449 U.S. 808, *reh'g denied*, 449 U.S. 1028 (1980).

165. *Felton v. Secretary of Educ.*, No. 78 CV 1750 (E.D.N.Y. Oct. 11, 1983).

166. *Felton*, 739 F.2d at 72.

167. *Id.* at 50-54 (recounting the facts of the program). *Id.* at 54-64 (discussion of precedent leading to a finding of "constitutionally excessive entanglement of church and state,").

168. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See supra* notes 84-95 and accompanying text.

169. *Felton*, 739 F.2d at 55-56, 68-70.

170. *Meek v. Pittenger*, 421 U.S. 349 (1975). *See supra* notes 108-15 and accompanying text. Judge Friendly also relied on *Public Funds for Public Schools v. Marburger*, 417 U.S. 961 (1974), *aff'ing mem.*, 358 F. Supp. 29 (D.N.J. 1973), which struck down a New Jersey statute similar to Title I.

171. *Felton*, 739 F.2d at 59-61.

172. *Wolman v. Walter*, 433 U.S. 229 (1977). *See infra* notes 116-22 and accompanying text.

tified with religion.<sup>173</sup> Excessive entanglement would be implicated by any public personnel entering "a sectarian milieu".<sup>174</sup> Aid must not require policing, or the state cannot be certain that it is not aiding religion.<sup>175</sup>

The second circuit put the burden on the government to prove there was no potential risk, and that the schools were so secular that no significant surveillance would be necessary.<sup>176</sup> Governmental neutrality toward religion obviates even the mere appearance of joint authority of church and state because there is a "significant symbolic benefit to religion in the minds of some."<sup>177</sup>

### C. *The Companion Case*

The Supreme Court accepted *Aguilar* for review along with *Grand Rapids School District v. Ball*,<sup>178</sup> another Title I case. In that case, a Community Education program and a Shared Time program funded under Title I were held to have the primary effect of supporting religious activities in violation of the establishment clause.<sup>179</sup>

Community Education teachers in nonpublic schools were generally employees of the nonpublic school in question, hired to teach courses outside regular school hours as part-time public employees.<sup>180</sup> These courses were open to the general public, and held in classrooms leased from nonpublic schools by the state.<sup>181</sup>

Shared Time teachers were full-time public school employees teaching in classrooms leased from nonpublic schools during regular school hours.<sup>182</sup> Shared Time courses supplemented the state-mandated core curriculum with "remedial" and "enrich-

---

173. *Felton*, 739 F.2d at 61-62.

174. *Id.* at 64.

175. *Id.*

176. *Id.* at 65. The government has the burden of proving a negative, that a teacher could not be supporting religion.

177. *Id.* at 67 (quoting *Grendel's Den*, 459 U.S. at 125-26). See also *Abington School Dist.*, 374 U.S. 203, 222 (1963).

178. 105 S. Ct. 3216 (1985), *aff'ing*, 718 F.2d 1389 (6th Cir. 1983).

179. *Id.* at 3230.

180. *Id.* at 3219.

181. *Id.*

182. *Id.* at 3218-19.

ment" courses.<sup>183</sup> These were, as a practical matter, open only to students of the nonpublic school in which they were held.<sup>184</sup> During these classes the parochial school students were denominated part-time public school students.<sup>185</sup>

Although the Community Education program was struck down by a 7-2 vote,<sup>186</sup> the Shared Time program was invalidated by a 5-4 vote.<sup>187</sup> The Shared Time program attracted the support of two additional justices, because it was not simply a subterfuge through which private school teachers were paid to teach private school classes. Shared Time was regarded as providing a discrete public benefit, beyond advancing the mission of the religious schools.<sup>188</sup>

### III. THE SUPREME COURT'S ANALYSIS

#### A. *The Opinion of the Court and the Concurrence*

The structure of the Court's review in *Aguilar* indicates a return to the *Lemon* test, and its strict application.<sup>189</sup> No challenge was made to the actual Title I statute.<sup>190</sup> Consequently, the Court did not address the first prong of secular legislative purpose in great detail.<sup>191</sup> In *Grand Rapids*, the Court found the programs had the primary effect of aiding religion, thus re-af-

---

183. *Id.* at 3218-19.

184. *Id.* at 3220.

185. *Id.*

186. Justices White and Rehnquist would have upheld both programs. *Id.* at 3248-49 (White, J., dissenting), and *id.* at 3231-32 (Rehnquist, J., dissenting). Chief Justice Burger and Justice O'Connor would have upheld only the Shared Time program. *Id.* at 3231 (Burger, C.J., concurring and dissenting), and *id.* at 3232 (O'Connor, J., concurring and dissenting).

187. *Id.* at 3230.

188. *Id.* The Court fails to show how subtle indoctrination could be in particular tenets, or how overt indoctrination would be difficult to prevent. The Court also puts forth the proposition that "any aid to religious education is aid to religion" without distinguishing the opposite principle in *Allen*, see *supra* note 58 and accompanying text.

189. See *supra* notes 84-95 and accompanying text. "We therefore reaffirm that state action alleged to violate the Establishment Clause should be measured against the *Lemon* criteria." *Grand Rapids*, 105 S. Ct. at 3223.

190. *Aguilar*, 105 S. Ct. at 3234-36. See also *supra* note 156, 138-45.

191. *Grand Rapids*, 105 S. Ct. at 3223, "[a]s has often been true in school aid cases, there is no dispute as to the first test. Both the District Court and the Court of Appeals found that the purpose of the Community Education and Shared Time programs was 'manifestly secular.'" See also *Wallace v. Jaffree*, 105 S. Ct. 2479 (1986) where the Court re-affirmed the first prong of the *Lemon* test, during the same term as *Aguilar*.

firming the second prong of the *Lemon* test.<sup>192</sup> In *Aguilar*, to reaffirm the third prong of the *Lemon* test, the Court assumed that no primary effect of the program was aiding religion,<sup>193</sup> and proceeded to find excessive entanglement.<sup>194</sup>

The majority opinion, written by Justice Brennan,<sup>195</sup> held the regulations that defendants claimed would prevent teachers from inculcating religion in violation of the establishment clause prohibition against aiding religion,<sup>196</sup> resulted in excessive entanglement, a different establishment clause violation.<sup>197</sup> The Court noted that the principle of nonentanglement rests on two concerns: that governmental involvement with a sect reduces the freedom of nonadherents to believe otherwise, and that government involvement interferes with adherents' control over their own sect.<sup>198</sup> Relying on *Lemon*<sup>199</sup> and *Meek*,<sup>200</sup> and noting the distinction between aid to institutions of higher education and aid to elementary and secondary schools,<sup>201</sup> the Court found that two elements of entanglement were present: aid was provided to a pervasively sectarian institution, and that aid required contin-

---

192. See *supra* notes 182-88.

193. 105 S. Ct. at 3237.

194. *Id.* at 3239.

195. Concurred in by Justices Marshall, Blackmun, Powell, and Stevens.

196. 105 S. Ct. at 3236-37.

197. *Id.* at 3239. The Court alludes to regulations controlling teacher conduct in *Lemon*, 403 U.S. at 620, and in *Meek*, 421 U.S. at 372, but the regulation in *Lemon* regulated religious school employees. The difficulty of serving two masters at the same time was the basis for the distinction in *Lemon*, but the regulations in *Meek* and *Aguilar* were aimed at public employees.

Furthermore, Catholic high schools may no longer be under the control of the authoritarian hierarchies with which the Court was concerned in *Lemon*. The author's alma mater, Nazareth Regional High School, has been operating as a Catholic school under the control of a community board of directors independent of the Brooklyn Diocese since 1975. See generally *Nazareth Regional H.S. v. N.L.R.B.*, 549 F.2d 873 (1977).

198. 105 S.Ct. at 3237.

199. See *supra* notes 84-95.

200. See *supra* notes 108-15.

201. *Roemer v. Maryland Pub. Works Board*, 426 U.S. 736 (1976); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971).

This distinction has also been applied to other areas of the law, besides aid to parochial school. See *Catholic Bishop v. N.L.R.B.*, 440 U.S. 490 (1979) (jurisdiction over teachers in religious, secondary schools denied). Cf. *Catholic High School Ass'n v. Culvert*, 753 F.2d 1161 (2d Cir. 1985) (state labor relations board had jurisdiction to determine whether dispute between teachers and religious high schools was based on religious or secular concerns).

uing supervision to ensure the absence of religious influence.<sup>202</sup> Administrative cooperation to allow the public and nonpublic schools to work together would result in frequent contacts and a "continuing day-to-day relationship"<sup>203</sup> violating the principle of neutrality.<sup>204</sup>

While concurring in the majority opinion, Justice Powell wrote a separate opinion.<sup>205</sup> Powell provided the fifth vote to strike down this aid program, in contrast to his joining a five-member majority in *Mueller* to uphold an aid program.<sup>206</sup> Although the majority mentioned political divisiveness,<sup>207</sup> Powell emphasized this "additional risk"<sup>208</sup> as arising especially in the context of "the proper allocation of limited governmental resources."<sup>209</sup>

Justice Powell, in acknowledging the Court's discussion of the primary effect test in *Grand Rapids*,<sup>210</sup> stated that the *Aguiar* program was invalid under the primary effect prong of the *Lemon* test as well as under the excessive entanglement prong. He maintained that assistance to the religious institutions was not "indirect or incidental."<sup>211</sup> The programs, in his view, aided the religious mission of the parochial schools (to educate children within the traditions of the faith) by not limiting themselves to "evenhanded secular assistance to both parochial and public schools that could be administered, without governmental supervision in the private schools, so as to prevent the diversion of aid from secular purposes."<sup>212</sup>

### B. The Dissents

Chief Justice Burger voted to uphold the New York City program<sup>213</sup> and the Shared Time program in *Grand Rapids*.<sup>214</sup>

---

202. 105 S. Ct. at 3238.

203. *Id.* at 3239 (quoting *Walz*, 397 U.S. at 674).

204. 105 S. Ct. at 3239.

205. *Id.*

206. 463 U.S. 388. See *supra* notes 128-32 and accompanying text.

207. 105 S. Ct. at 3239.

208. *Id.* at 3240.

209. *Id.*

210. *Id.* at 3241. See also text accompanying note 179.

211. 105 S. Ct. at 3241.

212. *Id.* at 3242.

213. *Id.*



Chief Justice Burger did not believe that providing public school teachers was an impermissible form of state aid, in contrast to providing support for private school teachers.<sup>215</sup> The failure of the majority "to identify any threat to religious liberty,"<sup>216</sup> indicated to Chief Justice Burger that the majority's decision was based on "nothing less than hostility toward religion and the children who attend church-sponsored schools."<sup>217</sup>

Justice Rehnquist referred to his dissent in *Wallace v. Jaffree*,<sup>218</sup> a school prayer case in which he re-examined the origin and intent of the religion clauses.<sup>219</sup> He called for the formulation of a workable test which would not sharply divide the Court on narrow questions nor lead to plurality decisions on important issues.<sup>220</sup> Justice Rehnquist voted to uphold the New York City program as "nondiscriminatory nonsectarian aid,"<sup>221</sup> "which ob-

---

214. *Grand Rapids*, 105 S. Ct. at 3231.

215. *Aguilar*, 105 S. Ct. at 3242. Burger does not give an explanation for his distinction between the programs in *Grand Rapids*, 105 S. Ct. at 3231, but he apparently agrees with Justice O'Connor's analysis of the *Grand Rapids* programs. Both would uphold the program paying public school employees to teach in parochial schools, but would invalidate the program paying parochial school teachers to teach extra classes outside regular school hours. Title I requires programs to supplement, not supplant, existing opportunities. Expanding curricula with enrichment or remedial classes supplants the normal classes those children would have attended. On the other hand, paying parochial school teachers to teach extra classes as in the Community Education programs, or tutoring individual students instead of entire classes supplements educational opportunities without merely replacing services the parochial school was already providing.

Justice Brennan's consideration of the supplement/supplant distinction arrived at the conclusion that it "would permit the public schools gradually to take over the entire secular curriculum of the religious school, for the latter could surely discontinue existing courses so that they might be replaced a year or two later by a Community Education or Shared Time course with the same content." *Id.* at 3230.

The distinction made in the statute between supplementing and supplanting has been ignored by the Court. The original distinction was intended to limit federal involvement in local affairs, and would similarly have limited governmental involvement in religious affairs.

216. *Aguilar*, 105 S. Ct. at 3242.

217. *Id.* at 3242-43.

218. 105 S. Ct. 2479.

219. *Id.* at 2508.

220. *Id.* at 2516 n.6, and at 2518. See also *supra* notes 108-15 and accompanying text for *Wolman* and *Meeh*. The swing from Justice Rehnquist's opinion in *Mueller*, see *supra* notes 128-32 and accompanying text, to Justice Brennan's opinions in *Grand Rapids* and *Aguilar*, see *supra* notes 195-204 and accompanying text, was made possible by Justice Powell's switch, see *supra* note 206. Surely, Powell did not change his view as completely between *Mueller* and *Aguilar* as the Court's opinions suggest.

221. 105 S. Ct. at 3243.

viously meets an entirely sectarian need."<sup>222</sup>

Like Chief Justice Burger, Justice O'Connor voted to uphold the New York City program<sup>223</sup> and the Grand Rapids Shared Time program.<sup>224</sup> Justice O'Connor attacked the majority's reliance on the conclusion in *Meek*<sup>225</sup> "that public school teachers who set foot on parochial school premises are likely to bring religion into their classes, and that the supervision necessary to prevent religious teaching would unduly entangle church and state."<sup>226</sup> Although she joined in condemning the Community Education program for subsidizing religious schools,<sup>227</sup> Justice O'Connor found that, based on its nineteen-year history, the New York City program did not have the effect of advancing religion.<sup>228</sup> Teachers are able to resist a sectarian atmosphere. The plaintiffs' should have the burden of showing religious influence, rather than requiring the defendants to prove the lack of religious influence.<sup>229</sup> The setting of a remedial class is the distinction that the Court employed in *Wolman*,<sup>230</sup> but it is difficult to prove that the religious setting has an effect on the teachers or students.<sup>231</sup>

Turning to the excessive entanglement prong, Justice O'Connor rejected *Meek*. As a precedent it lacked "logical support,"<sup>232</sup> and it contradicted the facts, which show no proselytizing by Title I teachers.<sup>233</sup> She maintained that supervision of public school teachers need not increase just because they are sent to different locations.<sup>234</sup> Justice O'Connor also found that neither the administrative entanglement nor the political divisiveness grounds were supported by the facts.<sup>235</sup>

Justice White filed a cursory dissent referring to his dissents

---

222. *Id.*

223. *Id.*

224. 105 S. Ct. at 3231.

225. 421 U.S. 349, 367-73. *See also supra* notes 108-15 and accompanying text.

226. 105 S. Ct. at 3243.

227. 105 S. Ct. at 3231.

228. 105 S. Ct. at 3245.

229. *Id.* at 3245.

230. 433 U.S. 229, 244-48. *See also supra* notes 116-22 and accompanying text.

231. 105 S. Ct. 3245-46.

232. *Id.* at 3246.

233. *Id.*

234. *Id.* at 3247.

235. *Id.*

in *Lemon* and *Nyquist*.<sup>236</sup> In *Lemon*,<sup>237</sup> Justice White urged the Court to consider the policies behind the various positions, rather than to mandate an outcome viscerally.<sup>238</sup> Education provided by religious schools may be aided by the state in Justice White's view, because it is a "separable secular function of overriding importance,"<sup>239</sup> and the benefit to religious institutions is incidental.<sup>240</sup> Where the state obligates itself to educate, it should be free to support the secular education of those children whose parents choose to provide them with both religious and secular education.<sup>241</sup> Social institutions and forces are entangled to some degree, and state surveillance may accompany even a one-time grant in order to determine the effectiveness of such grants to plan future programs.<sup>242</sup> Justice White's view on aid to religious schools may best be summarized by his statement in *Nyquist*: "[a] state should put no unnecessary obstacles in the way of religious training for the young."<sup>243</sup>

#### IV. CONCLUSION

In deciding *Aguilar*, the Court limited its decision to the particular program being challenged.<sup>244</sup> It failed to address the fact that no particular religious institution was being aided. The aid flowed directly to students. Religious schools participated only to identify eligible students, and to provide a room for tutoring.<sup>245</sup> These schools were already responsible for the edu-

---

236. *Id.* at 3247. See *Lemon*, 403 U.S. at 661, and *Nyquist*, 413 U.S. at 756. White's opinion applies to both *Grand Rapids* and *Aguilar*, and is printed at the end of the cases out of order of seniority and under a unified case heading, set off from the other opinions, symbolizing his isolation and unique point of view.

237. *Lemon*, 403 U.S. at 661.

238. *Id.* at 662.

239. *Id.* at 664.

240. *Id.* See also *Nyquist*, 413 U.S. at 823-24.

241. *Nyquist*, 413 U.S. at 814-15. See also *Pierce*, *supra* note 49.

242. *Lemon*, 403 U.S. at 669, "[s]urely the notion that college students are more mature and resistant to indoctrination is a makeweight, for in *Tilton*, there is careful note of the federal conditions on funding and the enforcement mechanism available." *Id.* at 668.

243. *Nyquist*, 413 U.S. at 814.

244. See *supra* note 190 and accompanying text, and notes 138-49 and accompanying text.

245. *Felton*, 739 F.2d at 53. Cf. *Aguilar*, 105 S. Ct. 2d at 3235 ("The professional personnel [employed by public school authorities] are solely responsible for the selection of the students").

cation of these students under compulsory attendance laws, and already had these students under their physical control.<sup>246</sup>

In *Lemon*, the government could not subsidize the salaries of parochial school teachers.<sup>247</sup> In *Meek*, public school teachers could not be sent to parochial schools.<sup>248</sup> Although the Court addressed and dismissed the distinction between parochial and public school teachers at that point, it did not explain it.<sup>249</sup> The second circuit, in the present case, also noted the distinction and failed to explain it.<sup>250</sup> The Court then relied on the weight of this unexplained precedent.<sup>251</sup> In each case, *Lemon*, *Meek*, *Wolman*, and *Aguilar*, the relationship of the aid to the parochial school has diminished, but the aid is still not permitted. Some aid is permissible, but the distinction between permissible and impermissible aid is not restated or re-examined.<sup>252</sup>

The Court essentially relies on the tautological statements

---

246. N.Y. EDUC. LAW §§ 3201-43 (McKINNEY'S 1981 & SUPP. 1986).

247. 403 U.S. at 607.

248. 421 U.S. at 367.

249. The fact that the teachers and counselors providing the auxiliary services are employees of the public intermediate unit, rather than of the church-related schools in which they work, does not eliminate the need for continuing surveillance. To be sure, auxiliary-service personnel, because not employed by the non-public schools, are not directly subject to the discipline of a religious authority . . . . But they are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained . . . . The potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present. 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.

421 U.S. at 371-72 (citations omitted).

250. We cannot escape the conviction that, despite the attempted distinctions, appellees are really asking us to say that *Meek* was wrongly decided—that the majority, although expressly addressing the issue . . . did not adequately appreciate the difference between surveillance of religious school teachers condemned in *Lemon* and the surveillance of public school teachers in religious schools condemned in *Meek*. Whatever the merits of that argument may or may not be, we are nevertheless bound by the *Meek* decision.

739 F.2d at 72 (citations omitted).

251. "[B]ecause assistance is provided in the form of teachers, ongoing inspection is required to ensure the absence of a religious message." 105 S. Ct. at 3238.

252. Basically the Court refuses to recognize that whatever can be said about public school teachers who enter private premises, can also be said about public school teachers on public premises. See *supra* note 27.

that religious schools are religious, and public schools are not religious or anti-religious. The location where aid is provided distinguishes between permissible and impermissible programs.<sup>253</sup> Justice Powell, as the fifth vote of the majority, has apparently led the majority to announce its decision in terms of the nature of teaching relationships.<sup>254</sup> That relationship, however, is only explored in theory.<sup>255</sup> The Court finds that teachers, no matter how hard they try not to do so, will inculcate religion in a location identified with religion.<sup>256</sup> In other cases, Justice Powell has been amenable to exploring the actual facts of the case, rather than relying solely on location as a determining factor. Precedent guides Justice Powell's decision that teachers are an impermissible form of aid. On the other hand, no precedent dictated a result regarding municipal crèches or education tax credits.<sup>257</sup>

Entanglement analysis is itself a fabrication of the Court which is not mandated by the Constitution. This analysis is not a tool for processing raw facts, but a replacement for those facts. The Court disposes of defendants' claims as insufficiently certain for constitutional purposes, and relies instead on facts drawn from thin air. The particular interactions of the parties, however, is the focus of entanglement analysis. The preferable form of contact between the separate bureaucracies would be occasional and limited.<sup>258</sup> Administrative contact will be increased by the greater need for setting schedules for transportation of students. Except for location, teacher-student contact will remain the same.

In order to keep its Title I funding for public school students, New York City will be forced to find alternative sites for

---

253. This distinction was first developed in *McCollum* and *Zorach*, see *supra* notes 63-72 and accompanying text.

254. Powell's concurrence reiterates the majority opinion to such an extent it is difficult to understand why he writes separately. But see *supra* Powell's opinion in *Wolman*, 433 U.S. at 262-64, where he would have upheld bus transportation as a form of aid, because as a category of aid, buses were upheld in *Everson*.

255. Plaintiffs were spared the expense and difficulty of proving an actual violation of the establishment clause at trial. *Felton*, 739 F.2d at 52. See also *Hitchcock*, *supra* note, 157.

256. *Aguilar*, 105 S. Ct. 2d at 3239.

257. See *Meek* and *Wolman*, *supra* notes 108-22 and accompanying text. Cf. *Marsh* and *Lynch*, *supra* notes 134-37 and accompanying text.

258. See *Walz* *supra* notes 81-83 and accompanying text.

tutoring parochial school students, to spend money for transportation in some cases, and even to purchase vans for use as mobile classrooms.<sup>259</sup> The involvement of the state in the education of these children will become much greater. The affected students will be made aware of the existence of separate spheres of church and state, although at the cost of the possibility of psychological impressions of religious dependence or inferiority.<sup>260</sup> Children in need of tutoring will not be aided by this layer of constitutional protection. Tutors will have less contact with the students' regular teachers, and may have difficulty getting students to concentrate in unfamiliar surroundings. The taxpayers bringing this suit will not save any money, and the public schools may lose resources as education money is consumed by increased administrative costs.<sup>261</sup> The Court understands education and religion in its own way.<sup>262</sup> Each justice decides on the basis of his own preconceptions, and in this area there is no consensus on which theory to apply to the facts.<sup>263</sup> The doctrine of entanglement does not provide a framework through which facts can be analyzed at present, but is merely a means for the justices to express their personal views. However painstaking their analysis, the justices can express no better rationale for striking down the program than the legislators and educators who implemented it could express for providing it.<sup>264</sup>

---

259. See *Felton*, 739 F.2d at 51, stating that a study done in 1977-78 indicated transporting parochial school students to public schools would require \$4.2 million, or 42% of the city's Title I budget. See also N.Y. Times, April 22, 1986, at B1, col. 4: the City is planning to spend \$7 million dollars on 70 custom-built vans to be used as classrooms outside parochial schools. Only 15% of the parochial school students would use the vans, the remainder being taught at nearby public schools or other neutral sites. See also *Felton v. Secretary of Educ.*, 787 F.2d 35 (2d Cir. 1986), affirming the district court's grant of a one-year stay of enforcement of the Supreme Court's decision.

260. See *Larkin v. Grendel's Den*, 459 U.S. 116, for the converse prohibition of psychological affiliation or identification.

261. See *supra* notes 150 and 253.

262. "[P]ublic school teachers may be regarded as performing a task 'that go[es] to the heart of representative government.'" *Ambach v. Norwick*, 441 U.S. 68, 75-76 (1979) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)).

263. Mueller, *Religious Rights of Children: A Gallery of Judicial Visions*, 14 N.Y.U. REV. OF L. & SOC. CHANGE 323 (1986) which delineates four models for deciding cases involving the religious rights of children.

264. Some cases have claimed equal protection grounds for maintaining aid to parochial school students, and some programs have separate provisions for programs for public and private schools students. Separability provisions would maintain benefits for public school students when programs for parochial school students would be struck down as

Education can serve political or religious ends, but it provides a distinct social benefit not connected to religion or politics.<sup>265</sup> Where schools serve religion or politics to the exclusion of education, the emphasis should return to education. Before the Court denies children the opportunity to learn, it should consider their concrete needs and the reality of the classroom, and not possible abstractions.

*Sean P. Sullivan*

---

unconstitutional. The provision of equal benefits would not be defended by the equal protection clause, even though the programs were passed as a unit and religious differences were the only reason for one part being struck down.

265. Some children are sent to religious schools for education rather than religious education. See Schotten, *supra* note 43, for reasons besides religion for which parents would incur the expense of sending their children to parochial schools, (acceptance of racial minorities in the face of white flight; emphasis on discipline and order in a time of increasing school violence and vandalism; ability to maintain academic standards; and assimilation of racial minorities).