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“Drawing the Line”: Religion,
Education, and the Establishment
Clause, 1947-1997

Emma Long

2009

Abstract

“Drawing the Line”: Religion, Education, and the Establishment Clause, 1947-1997

In 1947, in *Everson v. Board of Education*, the United States Supreme Court held for the first time that the Establishment Clause of the First Amendment was applicable to the states through the Fourteenth Amendment. The Establishment Clause states: “Congress shall make no law respecting an establishment of religion” and governs the institutional relationships between the churches and the state in the United States. With *Everson* began a controversial and long-running debate: what exactly does the Establishment Clause mean and what kinds of relationship between church and state are forbidden under its terms? As arbiter of the Constitution, the task of interpreting the Clause and its meaning in the modern United States fell to the Supreme Court. This thesis investigates the Court’s interpretation of the Establishment Clause between *Everson* in 1947 and *Agostini v. Felton* in 1997, when the Court overruled itself for the first time in this area of constitutional law.

This thesis focuses on the Court’s decisions in the area of schools and education policy, such cases accounting for a majority of the Court’s Establishment Clause jurisprudence. It considers school aid and the provision of government benefits to religious schools and their students, school prayer and other school-sponsored religious exercises on public school grounds, and equal access, the question of voluntary student-initiated religious activities on public school premises. In seeking to investigate the Court’s decisions, three main influences are considered: the opinions of the Court, the Justices’ private discussions and the alignment of Justices in each case, and the social and political context against which the cases arose and were decided. This thesis takes an historical approach to analysing these events and investigates influences on the Court beyond those of legal origin. In taking this approach, the thesis addresses how and why the Court made its decisions and rulings, the consequences of those rulings for the meaning of the Establishment Clause, and the effect of both on the relationship between the institutions of the churches and the state in the modern United States.

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This thesis is dedicated to the memory of my grandfathers: Harry Knight and Tom Long.

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Introduction

Introduction

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.¹

The First Amendment to the United States' Constitution protects freedoms considered basic to the American way of life: freedom of speech and the press, the right to peaceably assemble and thus protest, and the ability to petition government. The Amendment begins, however, with what are known as the Religion Clauses: the Establishment Clause and the Free Exercise Clause. The Establishment Clause governs the relationships between the institutional forms of religion and government: churches, schools, religious groups and organisations as institutions of the "church" and governments, state or federal, and their representatives as institutions of the "state." At minimum, the state is forbidden from establishing its own church or designating one denomination as more favoured than others. Beyond this, there is widespread debate as to the exact scope of the Clause: does it forbid all aid to religion or just that with a religious purpose? Must the institutions of the churches and the state remain entirely separate and, if not, what degree of interaction can be allowed before cooperation becomes support? These questions are of importance in a nation where 90% of citizens or more declare a belief in God or a Higher Power, religious organisations and charities are active in social welfare provision, and several faiths maintain extensive religious school systems. As arbiter of the Constitution, the Supreme Court has been responsible for determining the meaning of the Establishment Clause and thus where the acceptable line between church and state should fall. While its rulings have not always been popular they remain the controlling principles in modern church-state relations by which organisations of both churches and state must abide.

By contrast, the Free Exercise Clause protects individuals from government coercion in matters of faith and belief. Individuals are free to choose religion or no religion without interference from government. In this sense both Religion Clauses operate with a similar intent. However, in practice, the Free Exercise Clause works by allowing exceptions to be carved out of applicable laws for people of faith whose beliefs are unduly burdened by the laws' operation. Thus, students may not be required to salute the flag, a Seventh Day Adventist may not be denied unemployment compensation for refusing to accept work on the Sabbath, the Amish may not be required to send their children to school beyond the eighth grade, and Jehovah's Witnesses may not be prevented from public proselytising and door-to-door canvassing.² However, the right is not absolute. In 1940 the Court stated: "The First Amendment embraces two concepts – freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot

¹ US Constitution, First Amendment.

² *Board of Education v. Barnette* 319 US 624 (1943); *Sherbert v. Verner* 374 US 398 (1963); *Wisconsin v Yoder* 406 US 205 (1972); *Douglas v. City of Jeanette* 319 US 157 (1943); *Martin v. Struthers* 319 US 141 (1943).

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be. Conduct remains subject to the regulation of society.”³ As a result, Sunday closing laws were upheld over the objection of Orthodox Jews, Amish parents cannot refuse to send their children to school before the eighth grade, government may use social security numbers despite religious objections, and forest service road construction and timber harvesting in areas of national parks traditionally used by Native American tribes for religious purposes have been permitted.⁴ The Free Exercise Clause differs from the Establishment Clause not in intent, which is to protect the religious choices of Americans from coercion or control, but in focus: the Free Exercise Clause concentrates on the rights of individuals, the Establishment Clause restricts the actions of the state. If the former allows exceptions to generally-applicable policies for people of faith, the latter dictates the type of policies that can even be considered. As such, the Free Exercise Clause concerns the place of faith in American society, while the Establishment Clause addresses how religious and secular institutions interact in a religious nation with a secular state. It is the latter with which this thesis is concerned.

This thesis investigates the Supreme Court’s role in interpreting the Establishment Clause. It focuses on cases involving schools and education policy since such cases account for a significant majority of the Court’s Establishment Clause jurisprudence. Three areas of conflict are considered: school aid and the provision of government benefits to religious schools and their students, school prayer and other school-sponsored religious exercises on public school grounds, and equal access, the question of voluntary student-initiated religious activities on public school premises.⁵ It analyses the opinions of the Court for what they reveal about the legal reasoning behind the decisions and about the meaning of the Establishment Clause. It also considers the Justices’ private discussions about the cases and the alignment of Justices in each case in order to investigate the influence of individuals and the internal politics of the Court on the way cases were discussed and decided. The Court does not work in a political vacuum and thus the social and political context is necessarily addressed. The impact of this context on the Court and its decisions is considered. This thesis investigates the history of Establishment Clause debates over school aid, school prayer, and equal access. It provides a chronology of major events and key debates, and so reveals the changes and developments in the arguments surrounding these issues. It also investigates how and why the Supreme Court made its decisions in school-focussed

³ *Cantwell v. Connecticut* 310 US 296, 303-4 (1940) (*per* Justice Roberts).

⁴ *McGowan v. Maryland* 366 US 420 (1961); *Braunfield v. Brown* 366 US 599 (1961); *Garber v. Kansas* 389 US 51 (1967); *Bowen v. Roy* 476 US 693 (1986); *Lyng v. Northwest Indian Cemetary Protective Association* 485 US 439 (1988).

⁵ This thesis does not address the issues of Creationism and the teaching of evolution. First, this thesis is focused only on the institutional relationship between church and state. While religious schools, student religious groups and clubs, and even prayer (as a religious act) can be considered institutions of the church, Creationism cannot. Second, although often discussed as Establishment cases, the debates over Creationism and evolution raise issues of religious freedom (for example, the right of teachers not to be forced to teach things they do not believe, the right of students to hear different points of view) that make them closer in nature to Free Exercise Clause cases and broad pedagogical concerns (for example, teachers’ academic freedom, the validity of Creation Science or Intelligent Design as an academic subject, the place of evolution in science or religion classes) both of which are beyond the scope of this thesis.

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Establishment Clause cases, what those decisions reveal about the meaning of the Clause, and the consequences, legal and political, of the decisions.

The Establishment Clause did not become a major part of constitutional jurisprudence until the mid-twentieth century. As written, the Clause restricted only *federal* government action “respecting an establishment of religion” and, by the terms of the Constitution, the federal government was small with limited powers; most power resided in state governments that were not bound by the terms of the First Amendment and maintained their own church establishments.⁶ The Court heard only two major Establishment Clause cases before the mid-twentieth century. In *Bradfield v. Roberts* (1899) the Court upheld federal funding for the care of indigent patients in a Catholic hospital on the grounds the funding benefited the patients and not the Church, and in *Quick Bear v. Leupp* (1908) allowed the use of federal funds appropriated for the Sioux to pay for tuition payments at religious schools because the funds belonged to the tribe and were only managed by the federal government.⁷ Two changes in the twentieth century brought the Establishment Clause to greater prominence. First, as the federal government grew in size and scope as a result of the New Deal and World War Two, public perceptions about, and expectations of, government activity at all levels altered to include social welfare provision, an area traditionally occupied by private, mainly religious, groups. With church and state organisations increasingly performing similar tasks the need arose for guidance about the proper relationship between them to prevent violations of the Constitution.

The second development had bigger consequences for the Establishment Clause: known as “incorporation,” it involved the process of making the provisions of the Bill of Rights applicable to the states. As written, the Bill of Rights applied only to the federal government and in 1833 Chief Justice John Marshall concluded: “These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.”⁸ However, ratification of the Fourteenth Amendment in 1868, “laid a new basis for applying the Bill of Rights to the states,” denying as it did states the power to “make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ... [or] denying any person life, liberty, or property without due process of law ... [or] deny to any person within its

⁶ Massachusetts was the last state to abandon such arrangements in 1833, 42 years after the federal government was barred from doing so by the First Amendment. Levy, L., *The Establishment Clause: Religion and the First Amendment* (London and Chapel Hill: University of North Carolina Press, 2nd Ed., revised, 1994), pp. 1-95.

⁷ *Bradfield v. Roberts* 175 US 291 (1899), *Quick Bear v. Leupp* 210 US 50 (1908). In *Pierce v. Society of Sisters* 268 US 510 (1925) the Court guaranteed the right of parents to send their children to religious schools, and thus the right of such schools to exist, when overturning an Oregon law requiring all children to be educated at public schools. However, the result rested on parents’ right to determine the kind of education received by their children and did not implicate the Establishment Clause.

⁸ *Barron v. Baltimore* 7 Pet. (32 US) 243, 250 (1833). See also *Permolli v. New Orleans* 3 How. (44 US) 589 (1845), *Mattox v. US* 156 US 237 (1894), and *Prudential Insurance Co. v. Cheek* 259 US 530 (1922).

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jurisdiction the equal protection of the laws.”⁹ The Court continued to maintain into the twentieth century that the Bill of Rights was not applicable to the states but was required to define the Fourteenth Amendment’s due process clause; without reference to the Bill of Rights, the Court was required to create its own standards.¹⁰ Then in *Gitlow v. New York* in 1925, Justice Edward Sanford noted: “[W]e may and do assume that freedom of speech and of the press ... are among the fundamental rights and ‘liberties’ protected ... from impairment by the States.”¹¹ *Gitlow* thus began the process of selective incorporation of the Bill of Rights that continued throughout the twentieth century.¹² In 1947, in *Everson v. Board of Education* the Supreme Court made the Establishment Clause applicable to the states through the Fourteenth Amendment.¹³ Not only was the Clause applicable to a new range of federal government activities, *Everson* held that state activities would also be held to the same standard. Without a long history of Establishment Clause interpretation, in *Everson* the Court accepted the task of determining what the Clause meant and how it should be applied to the mid-twentieth century United States.

Much of the difficulty and controversy surrounding the Court’s application of the Establishment Clause came from the inherent lack of clarity of its key terms, “respecting” and “establishment.” After 1833 when Massachusetts ended its support of churches within the state, no traditional form of church establishment existed in the United States. The continued relevance of the Clause rests on the term “respecting”: laws respecting an establishment of religion may be those which fall short of a traditional establishment but have some similar characteristics and, by implication, dangers. The Clause itself, however, makes no attempt to determine what such laws may be and records of the First Congress contain sparse information about the thoughts of the

⁹ O’Brien, D., *Constitutional Law and Politics, Volume Two: Civil Rights and Liberties* (New York: W.W. Norton & Company, 3rd Ed., 1991), p. 293. The question of incorporation and whether the Framers of the Fourteenth Amendment intended to apply the Bill of Rights to the states is controversial in academic and legal debate. For an introduction to the debate see Abraham, H., “The Bill of Rights: Reflections on Its Status and Incorporation,” in Wood, Jr., J., *The First Freedom: Religion and the Bill of Rights* (Waco, Texas: JM Dawson Institute of Church-State Studies, Baylor University Press, 1990). For arguments opposing incorporation see: Fairman, C., “Does the Fourteenth Amendment Incorporate the Bill of Rights?” 2 *Stanford Law Review* 1 (1949); Frankfurter, F., “Memorandum on ‘Incorporation’ of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment,” 78 *Harvard Law Review* 746 (1965); “Note: Rethinking the Incorporation of the Establishment Clause: A Federalist View,” 105 *Harvard Law Review* 1700 (1992). Supporting incorporation, see: Avins, A., “Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited,” 6 *Harvard Journal on Legislation* 1 (1968); Black, H., “The Bill of Rights,” 35 *New York University Law Review* 865 (1960); Curtis, M., “Still Further Adventures of the Nine-Lived Cat: A Rebuttal to Raoul Burger’s Reply on Application of the Bill of Rights to the States,” 62 *North Carolina Law Review* 517 (1984).

¹⁰ There were two exceptions: *Missouri Pacific Railway Co. v. Nebraska* 164 US 403 (1896) and *Chicago, Burlington, and Quincy Railway Co. v. Chicago* 166 US 226 (1897). Both involved the Fifth Amendment prohibition against the taking of private property for public use without just compensation. O’Brien, D., p. 294, 296.

¹¹ *Gitlow v. New York* 268 US 652, 666 (1925).

¹² See Appendix B.

¹³ *Everson v. Board of Education* 330 US 1 (1947) (holding New Jersey could reimburse parents for the cost of transporting their children to religious schools on public transport).

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ratifiers.¹⁴ As such, the legal and academic debate surrounding “original intent” has entered Establishment Clause debate. Originalists assert that that the Constitution is the supreme law of the land and should be followed to the letter; where clauses and phrases are unclear it should be the words, ideas, and intentions of the Founding Fathers that provide the answers. In opposition, interpretivists argue that the Constitution was a blueprint for a government that the Founding Fathers understood would need to change over time in order to endure, the vagueness of the wording intended to ensure that the spirit of the provisions survived but that they could be applied in different ways to account for new situations. The intentions of the Framers, where discernible, were deserving of deference but not unquestioning devotion.¹⁵ With regard to the Establishment Clause, the Court has never followed the route of original intent and has thus accepted the task of determining what the Clause means in the context of the modern world. Understanding what influenced the Court’s decisions in Establishment cases thus helps us to understand the modern meaning of the Clause and provide clarity about modern church-state relations.

In exploring the Court’s interpretation of the Establishment Clause, this thesis begins with *Everson* and the Court’s original statements about the meaning of the Clause and traces its jurisprudence through to *Agostini v. Felton* (1997), concerning the provision of remedial educational services to religious school students in New York City.¹⁶ In *Agostini*, half a century after incorporating the Establishment Clause, the Court for the first time explicitly overruled itself in this area of constitutional jurisprudence, overturning two long-standing principles of Establishment Clause jurisprudence: that aid to religious school students could not be provided on religious school grounds and that religious schools were so pervasively religious that any indirect benefit to them must be immediately suspect. In rejecting these positions, the Court effected a fundamental shift in the underlying principles of Establishment Clause interpretation and thus the meaning of the Establishment Clause.¹⁷ The case gave credibility to the long-standing criticism that the Court had been inconsistent and incoherent in such cases, fuelled by Court rulings striking down school prayer and Bible reading but allowing religious student groups to meet on school campuses, allowing textbook loans to students attending religious

¹⁴ See Chapter One.

¹⁵ See Bennett, R., “Judicial Activism and the Concept of Original Intent,” 69 *Judicature* 219 (1985/6); Berger, R., “Original Intent: Bittker v. Berger,” 1991 *Brigham Young University Law Review* 1201; Bittker, B., “The Bicentennial of the Jurisprudence of Original Intent: The Recent Past,” 77 *California Law Review* 235 (1989); Levy, L., *Original Intent and the Framers’ Constitution* (New York: Macmillan, 1988); Powell, H.J., “The Original Understanding of Original Intent,” 98 *Harvard Law Review* 885 (1985); Tushnet, M., “Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles,” 96 *Harvard Law Journal* 781 (1983).

¹⁶ *Agostini v. Felton* 521 US 203 (1997).

¹⁷ The Court’s subsequent Establishment Clause decisions followed the rationale established in *Agostini*. See in particular *Mitchell v. Helms* 530 US 793 (2000) (overturning, in part, *Meek v. Pittenger* and *Wolman v. Walter* in allowing provision of instructional materials other than books to students in religious schools) and *Zelman v. Simmons-Harris* 536 US 639 (2002) (upholding Cleveland’s school voucher programme).

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schools but not the loan of maps, charts, globes, and tape recorders, striking down programmes of speech therapy and careers advice to religious school students but allowing hearing tests.¹⁸ *Agostini's* significance, however, is that in this case, the Court consolidated changes in its Establishment Clause interpretation that had been present, although not explicit, in its opinions for a decade.¹⁹ As such, it stands as the single clearest expression of the approach taken by the majority of the Court under Chief Justice William Rehnquist (1986-2005), an approach that altered significantly the Court's approach to Establishment Clause interpretation. This thesis investigates why the Court took its original path of Establishment Clause jurisprudence and how and why that approach changed, resulting in *Agostini's* overruling of precedent for the first time.²⁰

In seeking to explain the Court's half century of Establishment Clause jurisprudence and the consequences of the meanings imparted by the Court, this thesis considers three areas. First, it investigates the role of precedent and the importance of existing legal interpretations.²¹ However, unlike much legal commentary, it does not judge whether the correct precedents were used, nor is precedent considered for its intrinsic legal value: of greater concern is the context of when, how, and for what reasons certain precedents were employed. The use, or absence, of certain tests or prior holdings is used to investigate the debates within the Court that ultimately shaped the final decisions. Second, the internal politics of the Court are explored. The influence of individual Justices, the development of voting blocs, and the Justices' varied approaches to Establishment Clause interpretation are considered to explain the tone and structure of opinions and thus the meaning given to the Establishment Clause in a given case and over time.²² Third, the thesis

¹⁸ *Engel v. Vitale* 370 US 421 (1962); *Abington School District v. Schempp* 374 US 203 (1963); *Widmar v. Vincent* 454 US 264 (1981); *Board of Education v. Allen* 392 US 236 (1968); *Meek v. Pittenger* 421 US 349 (1975); *Wolman v. Walter* 433 US 229 (1977).

¹⁹ *Witters v. Washington Department of Service for the Blind* 474 US 481 (1986); *Board of Education of the Westside Community Schools v. Mergens* 496 US 226 (1990); *Lamb's Chapel v. Center Moriches Union Free School District* 508 US 384 (1993); *Zobrest v. Catalina Hills School District* 509 US 1 (1993); *Rosenberger v. the Rector and Visitors of the University of Virginia* 515 US 819 (1995).

²⁰ At first glance this time frame, 1947-1997, fits only the Court's school aid cases and the path from *Everson* to *Agostini*. However, although the Court's first prayer case was not heard until 1962, the debates and developments which led to *Engel* began in the aftermath of World War Two and the beginning of the Cold War and thus coincided with *Everson*. Equally, shortly before *Agostini*, the Court restated in *Lee v. Weisman* (1992) the principles first established in *Engel* and *Schempp* despite an increasingly accommodationist stance elsewhere, and in 1995 President Clinton's Guidelines on Religious Expression in Public Schools (see Appendix D) sought to communicate those principles to a non-legal audience. The closeness of the vote in *Lee*, combined with broad public acceptance of the principles restated there and that the Court has not deviated from them since, makes these events a helpful counterpoint to *Agostini* as well as important events in their own right. Equal Access as a distinct issue did not emerge until the 1980s but the roots of the debate are found in the initial reaction to *Engel* and thus cannot be understood separately from the prayer debates. The ruling in *Agostini* is, in part, the result of the reasoning developed in Equal Access cases and, to a large extent, is the culmination of those cases. Thus it too fits into the timeline established in this thesis.

²¹ As such it reflects certain elements of the Legal Model of Court activity. See Chapter One.

²² This approach adopts aspects of both the Attitudinal and Rational Choice Models of Court activity. See Chapter One.

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investigates the influence on the Court of the social and political context from which cases arose and against the background of which the Court made its rulings.²³ However, the relationship between the Court and the broader context of the cases it hears is neither clear nor simple. Rarely does the Court openly acknowledge public debate surrounding issues raised by its cases, although private papers occasionally reveal Justices' thoughts on this issue and suggest the impact of such debate on the Justices as people, separate from their role as constitutional defenders. This study argues such influences do exist and seeks to consider them in particular ways. First, context is considered in the Court's own terms. In school aid and equal access cases the Court's approach to assessing constitutionality involved consideration of the "purpose" and "effect" of challenged programmes. These questions led the Court to consider, among other factors, the nature of the schools, groups, and individuals involved, the debates surrounding implementation of the policy, community reaction, and, where available, how the programme worked in practice. These issues, and any national debates influencing them, are considered for their impact on the Court. Second, when addressing the impact of the public and political debate, individual motivations for participation in that debate are considered of less significance than the general atmosphere such statements helped to create. For example, many politicians who criticised the Court immediately after the prayer cases were handed down in the 1960s did so not because it was their personal opinion but in order to gain political advantage with their constituents. But the general initial reaction of community leaders to the prayer decisions was overwhelmingly critical and the atmosphere created was overwhelmingly negative about the implication of the Court's actions. It is this broad reaction and atmosphere, and their consequences, that are considered.²⁴ Understanding this context, in addition to the impact of the Court's internal politics and use of precedent, allows for a deeper understanding of the Court's opinions and their meaning.

A significant volume of scholarly work exists discussing the Supreme Court and the Establishment Clause, yet relatively little of it approaches the subject from the historical perspective. As might be expected, commentary is dominated by legal scholars, lawyers, and occasionally judges, whose interest, by the nature of their profession, is heavily weighted to the logic of opinions, the Court's use of precedent, and the legal technicalities of a case or cases. None of the Court's Establishment cases have lacked law review analysis of their history through the lower courts, arguments made in briefs to and oral argument before the Court, and the structure and wording of the opinions.²⁵ In addition, a range of possible interpretations of the

²³ This most closely reflect elements of the Rational Choice Model. See Chapter One.

²⁴ Where individual motivations were widely acknowledged they are discussed in those terms, for example, President Reagan's overtures to the Religious Right. Otherwise the focus is on the general atmosphere.

²⁵ This is a large body of scholarship. However, for example, see: Hopkins, J., "State Transportation of Students to Parochial Schools: The *Everson Case*," 36 *Kentucky Law Journal* 328 (1947/8); Formicola, J., "*Everson* Revisited: 'This Is Not ... Just a Little Case Over Bus Fares'," *Polity*, Vol. 28 No. 1 (Fall 1995), pp. 49-66; Giannella, D., "*Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*," 1971 *Supreme Court Review* 147; Mahon, J.P., "*Mergens: Is the Equal Access Issue Settled?*" 19 *Journal of Law and Education* 543 (1990); Adams, T.J., "Interpreting State Aid to Religious Schools Under the Establishment Clause:

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Establishment Clause have been offered, the Court's actions analysed within a given framework and found successful or lacking.²⁶ But neither approach fully addresses *why* the Court decided as it did. The former discuss what the Court did and how; the latter what the Court should or might have done and why. Both frequently overlook the process by which those results were attained, and by focussing on the legal arena they dismiss by omission the impact of social and political debate.

A significant portion of this legal commentary, in addition to some non-legal studies, can be termed advocacy literature. Among commentators on the Court's Establishment Clause cases are those who argue the Court has, should, or failed to apply their preferred principles when deciding cases and respectively praise or lambast the Court for particular rulings. There are three main schools of thought concerning Establishment Clause analysis. Strict separationists believe there should be a complete separation between the scope and activities of church and state: they frequently praise the Court for the school prayer rulings and criticise decisions in the realm of school aid or equal access. Paul Freund's 1969 response to the Court's first textbook loan case, *Board of Education v. Allen*, is a moderate, thoughtful introduction to this position.²⁷ Isaac Kramnick and R. Laurence Moore's *The Godless Constitution* is more deliberately polemical in arguing how and why the Court should follow a separationist position, and Stephen Feldman's *Please Don't Wish Me a Merry Christmas* provides an insight into the individual and personal impact of Christian activities on a non-Christian family.²⁸ Accommodationists, alternatively, argue that the state is not barred from recognising religion and in fact has an obligation to do so under the Free Exercise Clause so long as no group is favoured over others. President Reagan and his Attorney General, Edwin Meese, were prominent advocates of this approach, as Justice

Zobrest v. Catalina Foothills School District," 72 *North Carolina Law Review* 1039 (1994); Chadsky, M., "State Aid to Religious Schools: From *Everson* to *Zelman*, A Critical Review," 44 *Santa Clara Law Review* 699 (2003); Waite, J., "Agostini v. Felton: Thickening the Establishment Clause Stew," 33 *New England Law Review* 81 (1998).

²⁶ Berg, T., "Religion Clause Anti-Theories," 72 *Notre Dame Law Review* 693 (1997); Craycraft, Jr., K., *The American Myth of Religious Freedom* (Dallas, Texas: Spence Publishing Co., 1999); Gedicks, F., *The Rhetoric of Church and State: A Critical Analysis of Religion Clause Jurisprudence* (Durham and London: Duke University Press, 1995); Greene, A., "The Political Balance of the Religion Clauses," 102 *Yale Law Journal* 1611 (1993); Howe, M., *The Garden and the Wilderness: Religion and Government in American Constitutional History* (Chicago: University of Chicago Press, 1965); Smith, S., *Foreordained Failure: The Quest For a Constitutional Principle of Religious Freedom* (New York and Oxford: Oxford University Press, 1995).

²⁷ Freund, P., "Public Aid to Parochial Schools," 82 *Harvard Law Review* 1680 (1969). *Board of Education v. Allen* 392 US 236 (1968) (upholding the loan of secular textbooks to religious school students).

²⁸ Kramnick, I., and R.L. Moore, *The Godless Constitution, The Case Against Religious Correctness* (New York and London: W.W. Norton & Co., 1996); Feldman, S., *Please Don't Wish Me A Merry Christmas: A Critical History of the Separation of Church and State* (New York and London: New York University Press, 1997). See also, Curry, T., *The First Freedoms, Church and State in America to the Passage of the First Amendment* (New York: Oxford University Press, 1986); Sullivan, K., "Religion and Liberal Democracy," 59 *University of Chicago Law Review* 195 (1992).

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Antonin Scalia has been on the Court.²⁹ Accommodationists strongly opposed the Court's prayer rulings but have largely approved of the more recent school aid and equal access cases from the Rehnquist Court.³⁰ William Murray's *Let Us Pray*, as with Feldman's book, is a personal appeal for this position: now an advocate for greater government accommodation of religion, Murray was one plaintiff in *Murray v. Curlett*, striking down school-sponsored Bible reading in 1963.³¹ Neutrality theory, the third approach to Establishment Clause interpretation, argues that while strict separation is not possible in modern society there are limits to the activities in which church and state may cooperate. Advocates reject absolutism in either form and argue the Court should weigh the demands of the Establishment Clause against the rights of the individual in each case based on the particular alignment of facts and circumstances. Carl Esbeck and Eugene Volokh have both analysed the Court's decisions in light of this approach, while Mark DeWolfe Howe's *The Garden and the Wilderness* finds support for the approach in the nation's history.³² That the Court has never explicitly accepted one approach over others, intimating that all three approaches have validity in certain circumstances, has provided even greater fuel for this academic debate.

The debate between strict separationists, accommodationists, and neutrality theorists has been lively and controversial and has revealed the potential consequences of employing one theory over another. It has helped illustrate more clearly the path chosen by the Court by suggesting alternatives. Yet in asserting what the Court *should* have done or trying to claim the Court's affinity with a particular approach, these commentators often overlook the question of *why* the Court took the approach it did and what factors beyond theory played a role in the Court's decisions. By seeking to explain the Court's actions in terms of a particular interpretation of the Establishment Clause such studies also overlook comments and interpretations which do not help their cause: thus their interpretations provide only a partial explanation of the ruling. In addition,

²⁹ See, especially, Justice Scalia's dissent in *Lee v. Weisman* 505 US 577, 631-46 (1992) and his concurrence in *Lamb's Chapel v. Center Moriches Union Free School District* 508 US 384, 397-401 (1993).

³⁰ Accommodationists have particularly praised *Witters v. Washington Department of Service for the Blind* 474 US 481 (1986); *Zobrest v. Catalina Hills School District* 509 US 1 (1993); *Agostini v. Felton* 521 US 203 (1997); and *Rosenberger v. the Rector and Visitors of the University of Virginia* 515 US 819 (1995). For the accommodationist viewpoint see Cord, R., "Church-State Separation: Restoring the "No Preference" Doctrine of the First Amendment," 9 *Harvard Journal of Law and Public Policy* 129 (1986); Presser, S., "Some Realism About Atheism: Responses to the Godless Constitution," 1 *Texas Review of Law and Politics* 87 (1997); Rice, C., *The Supreme Court and Public Prayer: The Need for Restraint* (New York: Fordham University Press, 1964); Robertson, M.G. "Pat", "Squeezing Religion Out of the Public Square – The Supreme Court, Lemon, and the Myth of the Secular Society," 4 *William and Mary Bill of Rights Journal* 223 (1995).

³¹ *Murray v. Curlett* was a companion case to *Abington School District v. Schempp* 374 US 203 (1963). Murray, W., *Let Us Pray: A Plea for Prayer in Our Schools* (New York: William Morrow & Co., Inc., 1995).

³² Esbeck, C., "Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause," 13 *Notre Dame Journal of Law, Ethics and Public Policy* 285 (1999); Volokh, E., "Equal Treatment is Not Establishment," 13 *Notre Dame Journal of Law, Ethics and Public Policy* 341 (1999); Howe, M.D., *The Garden and the Wilderness*. See also Monsma, S., *When Sacred and Secular Mix: Religious Nonprofit Organizations and Public Money* (Lanham, Maryland and London: Rowman & Littlefield Publishers, Inc., 1996).

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by focussing on how the Court employed precedent the question of why and for what purpose is less often addressed. The historical approach employed by this thesis asks these questions that are so often overlooked in the legal literature as a way to explain and understand the Court's actions.

Although not addressing the Establishment Clause specifically, a wide body of political science literature has addressed the questions so frequently overlooked by the legal literature. Looking to consider why the Court acts as it does and what factors influence the Justices' decision making, this literature offers the possibility of greater understanding of the Court's Establishment Clause jurisprudence by looking beyond traditional legal theories. Political science presents three main models of Supreme Court behaviour. The Legal Model shares some characteristics of strict separationist theory and asserts that the primary influences on Court behaviour are legal norms, principles, and methods such as original intent and *stare decisis*.³³ Raoul Berger's 1977 study of the Court's Fourteenth Amendment jurisprudence, *Government by Judiciary*, is a strong example of this approach.³⁴ The Attitudinal Model presents Justices as policy-orientated individuals influenced primarily, if not solely, by their desire to see their preferred outcomes written into opinions. Advocates reject the Legal Model as little more than rhetorical cover for judicial policy making. *The Supreme Court and the Attitudinal Model* and *The Supreme Court and the Attitudinal Model Revisited* by Jeffrey Segal and Harold Spaeth provide the clearest and most detailed introduction to this model.³⁵ Rational Choice, the third model of Court activity, has two strands. Internal Rational Choice Theory holds that the influences of other Justices and the need for Justices to gain and hold a majority for a binding opinion fundamentally influences how the Court operates. A clear understanding of any Court opinion must therefore consider the bargaining and discussion between the Justices in the period between the conference vote and announcement of the Court decision. Walter Murphy's *Elements of Judicial Strategy* is an early example of this approach, while Forrest Maltzman, James Spriggs, and Paul Wahlbeck provided statistical evidence of such activity on the Burger Court.³⁶ Louis Fisher's *Constitutional Dialogues* is a clear introduction to the second strand of

³³ See, for example, Berger, R., *Government By Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, Massachusetts and London: Harvard University Press, 1977); Bork, R., "Neutral Principles and Some First Amendment Problems," 47 *Indiana Law Review* 1 (1971); Dworkin, R., *Taking Rights Seriously* (London: Gerald Duckworth & Co. Ltd., 1977).

³⁴ Berger, R., *Government By Judiciary: The Transformation of the Fourteenth Amendment*.

³⁵ Segal, J., and H. Spaeth, *The Supreme Court and the Attitudinal Model* (New York: Cambridge University Press, 1993) and *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002). See also Boucher, Jr., R., and J. Segal, "Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court," *The Journal of Politics*, Vol. 57, No. 3 (August 1995); Moraski, B., and C. Shipman, "The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices," 43 *American Journal of Political Science* 1069 (1999); Songer, D., "The Relevance of Policy Values for the Confirmation of Supreme Court Nominees," 13 *Law and Society Review* 927 (1979).

³⁶ Murphy, W., *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964); Maltzman, F., J. Spriggs II, and P. Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (Cambridge and New York: Cambridge University Press, 2000).

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Rational Choice Theory which asserts that external factors such as lower courts, public opinion, and the other branches of government fundamentally influence Court activity.³⁷ While Fisher saw this as a cooperative relationship, others including Murphy and Robert Dahl perceived it to be an antagonistic one.³⁸ Despite these differences, those supportive of External Rational Choice Theory seek to place the Court as an institution in its political and social context and argue that failure to do so overlooks key influences on Court behaviour. Thus, although not directly addressing the Court's Establishment Clause jurisprudence, such studies provide an alternative framework within which to view the Court's actions in this area of constitutional law. While this thesis does not adopt this framework, the questions raised by the Legal, Attitudinal, and Rational Choice Models are considered and employed as a means to better understand the Court.

Histories of the post-World War Two Court or the tenures of the four Chief Justices who oversaw the first half century of Establishment Clause jurisprudence have addressed the importance of school prayer, school aid, and equal access cases yet rarely focussed on them in great detail. In the life of each Court there were cases more controversial, more wide-ranging, more groundbreaking, or simply more revealing about the nature of the Court in that period than Establishment cases. Studies of the Vinson Court (1946-53) have focussed frequently on anti-Communism and free speech cases in addition to the oft-discussed personality clashes among the Justices. However, as the case that incorporated the Establishment Clause into the Fourteenth Amendment, *Everson* has been widely discussed and occasionally *McCullum v. Board of Education* is mentioned in contrast.³⁹ *Brown v. Board of Education* and other civil rights cases, reapportionment, freedom of speech, and due process or defendants' rights cases have dominated studies of the Warren Court (1953-69).⁴⁰ But it is the political controversy resulting from the prayer cases *Engel v. Vitale* and *Abington School District v. Schempp* that ensures their discussion. Lucas Powe's 2000 study, *The Warren Court and American Politics* and *Decade of Decision: The Supreme Court and the Constitutional Revolution, 1954-1964* by G. Theodore Mitau are particularly good introductions, covering public and political reaction to the cases,

³⁷ Fisher, L., *Constitutional Dialogues: Interpretation as Political Process* (New Jersey: Princeton University Press, 1988).

³⁸ Dahl, R., "Decision Making in a Democracy: The Supreme Court as a National Policy Maker," 6 *Journal of Public Law* 279, (1957).

³⁹ *McCullum v. Board of Education* 333 US 203 (1948) (holding unconstitutional released time programmes of religious instruction on public school grounds). McCloskey, R., *The Modern Supreme Court* (Cambridge, Massachusetts: Harvard University Press, 1972); Pritchett, C.H., *Civil Liberties and the Vinson Court* (Chicago and London: University of Chicago Press, 2nd Impression, 1966). Palmer, J., *The Vinson Court Era: The Supreme Court's Conference Votes; Data and Analysis* (New York: AMS Press, 1990) and Rudko, F., *Truman's Court: A Study in Judicial Restraint* (Westport, Connecticut: Greenwood Press, Inc., 1988) focus most heavily on the internal politics of the Court.

⁴⁰ *Brown v. Board of Education* 347 US 483 (1954) (holding the "separate but equal" doctrine as applied to schools unconstitutional). Funston, R., *A Vital National Seminar: The Supreme Court in American Political Life* (Palo Alto, California: Mayfield Publishing Co., 1978); Horwitz, M., *The Warren Court and the Pursuit of Justice: A Critical Issue* (New York: Hill & Wang, 1998); Kurland, P., *Politics, the Constitution, and the Warren Court* (Chicago: University of Chicago Press, 1970); McCloskey, R., *The Modern Supreme Court*; Schwartz, B., with S. Leshner, *Inside the Warren Court, 1953-1969* (Garden City, New York: Doubleday & Co., Inc., 1983).

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congressional hearings, and attempts at non-compliance.⁴¹ Studies of the Burger Court (1969-86) have been dominated by the subjects of *Roe v. Wade* and abortion, the death penalty, freedom of speech both individual and commercial, and civil rights.⁴² The Court's school aid cases are rarely mentioned and receive detailed analysis even less often.⁴³ Of the Rehnquist Court's (1986-2005) Establishment Clause cases, *Lee v. Weisman* has received most attention from scholars of the period, decisions involving prayer seeming once again to attract the most attention.⁴⁴ But, as with other studies of the Court, Establishment cases are overlooked in favour of alternative subjects: for Rehnquist's tenure, abortion, the death penalty, freedom of speech, and civil rights. Scholars' inclusion of Establishment cases in studies of the Court have thus shown their ability to reveal deeper currents and trends within the Court and shown them to be worthy of consideration. Yet, with the exception of Mitau, Powe, and Redlich, most have chosen to focus attention on more controversial or higher profile cases. This thesis argues that Establishment Clause cases are worthy of study in their own right and can reveal just as much about the workings of the Court.

Historical approaches to the Court's Religion Clause jurisprudence have not, however, been entirely overlooked. A significant number of studies have examined the colonial era and the writing and ratification of the First Amendment in an attempt to understand the intentions of the Founding Fathers. Thomas Curry's *The First Freedoms*, Mark DeWolfe Howe's *The Garden and the Wilderness*, and Michael Malbin's *Religion and Politics* all consider the history of the

⁴¹ Powe, Jr., L., *The Warren Court and American Politics* (Cambridge, Massachusetts and London: Belknap Press, 2000); Mitau, G.T., *Decade of Decision: The Supreme Court and the Constitutional Revolution, 1954-1964* (New York: Charles Scribners Sons, 1967).

⁴² *Roe v. Wade* 410 US 113 (1973) (limiting the state's right to interfere with a woman's right to choose to end a pregnancy). Blasi, V. (Ed.), *The Burger Court: The Counter-Revolution That Wasn't* (New Haven and London: Yale University Press, 1983); Maltz, E., *The Chief Justiceship of Warren Burger, 1969-1986* (Columbia, South Carolina: University of South Carolina Press, 2000); Schwartz, H. (Ed.), *The Burger Years: Rights and Wrongs in the Supreme Court, 1969-1986* (New York: Viking Press, 1987); Simon, J., *The Center Holds: The Power Struggle Inside the Rehnquist Court* (New York: Simon & Schuster, 1995).

⁴³ See especially Bob Woodward and Scott Armstrong's *The Brethren: Inside the Supreme Court* (New York: Simon and Schuster, 1979) which covers the Court's 1969-75 Terms, during which several school aid cases were decided, including *Lemon v. Kurtzman* which developed the first clear test for Establishment Clause violations, without mentioning a single Establishment Clause case. But see Drinan, R., SJ, "Church and State" in Schwartz, B. (Ed.), *The Burger Court: Counter-Revolution or Confirmation?* (New York and Oxford: Oxford University Press, 1998); Maltz, E., *The Chief Justiceship of Warren Burger*; Redlich, N., "The Separation of Church and State: The Burger Court's Tortuous Journey" in Schwartz, H. (Ed.), *The Burger Years*. See also Kobylka, J., "Leadership on the Supreme Court of the United States: Chief Justice Burger and the Establishment Clause," *Western Political Science Quarterly*, Vol. 42, No. 4 (December 1989), pp. 545-568 (using the Burger Court's Religion Clause jurisprudence to consider the leadership skills of Burger).

⁴⁴ Savage, D., *Turning Right: The Making of the Rehnquist Supreme Court* (Chichester: John Wiley & Sons, Inc., 1993); Simon, J., *The Center Holds*; Tucker, D.F.B., *The Rehnquist Court and Civil Rights* (Aldershot, Hampshire: Dartmouth Publishing Co., 1995); Yarbrough, T., *The Rehnquist Court and the Constitution* (Oxford: Oxford University Press, 2000). In Edward Lazarus' *Closed Chambers: The Rise, Fall, and Future of the Modern Supreme Court* (London: Penguin Books, 2005), *Lee* is the only Rehnquist Court Establishment case mentioned, and even then only briefly.

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Religion Clauses.⁴⁵ Although all address the Court's post-*Everson* jurisprudence, the focus remains primarily on the Founding Fathers. While useful in themselves, the Court's rejection of original intent as the preferred way to interpret the Establishment Clause renders them of limited value for understanding the motivation of and influences on the Court. Leonard Levy's *The Establishment Clause: Religion and the First Amendment* overcomes this limitation by balancing discussion of the colonial era equally with analysis of the Court's jurisprudence and drawing parallels between them.⁴⁶ It is the best study of this subject, avoiding both a narrow chronological focus and explicit advocacy of any approach to Establishment Clause interpretation. Although critical of what he calls the "nonpreferentialist position" and acknowledging his sympathies with the separationists, Levy is a "middle-of-the-roader," who claims the Court "often finds an establishment of religion where one does not exist and ... often cannot see an establishment of religion where it does exist."⁴⁷ Revealing flaws in both the separationist and accommodationist arguments, *The Establishment Clause* provides a clarity of analysis of the debates in this area that is welcome, even if we do not accept all of Levy's conclusions.

Despite its historical focus, Levy's work is better considered as a quasi-legal study. Levy is a constitutional scholar, not an historian, and often the questions he asks of his sources are those of the former, not the latter. Other studies of the Religion Clauses show a similar approach. Martha McCarthy's *A Delicate Balance* and Leo Pfeffer's *Religion, State, and the Burger Court* are among the few studies focussed specifically on the Court's Religion Clause jurisprudence.⁴⁸ McCarthy's concern is the educational context of the Burger Court's opinions, Pfeffer's focus is more broadly on the Court's jurisprudence for a non-specialist audience. Both provide discussions of the broader political and policy debates surrounding school prayer, school aid, and equal access, yet little attempt is made to explain the significance of these debates in understanding the Court's actions or their consequences: the information contextualises the Court's decisions but little else.⁴⁹ For Levy, McCarthy, Pfeffer, and others, the focus is primarily

⁴⁵ The three studies make for interesting comparisons: Curry is a separationist, Howe supports neutrality, and Malbin is an accommodationist. Curry, T., *The First Freedoms*; Howe, M.D., *The Garden and the Wilderness*; Malbin, M., *Religion and Politics: The Intentions of the Authors of the First Amendment* (Washington, DC: American Enterprise Institute for Public Policy Research, 1978). See also Kramnick, I., and R.L. Moore, *The Godless Constitution*; Leahy, J., *The First Amendment, 1791-1991: Two Hundred Years of Freedom* (Jefferson, North Carolina and London: McFarland & Co., Inc., 1991); Levy, L., *The Establishment Clause*; Miller, W.L., *The First Liberty: Religion and the American Republic* (New York: Paragon House Publishers, 1985); Wood, Jr., J., *The First Freedom*.

⁴⁶ Levy, L., *The Establishment Clause: Religion and the First Amendment* (London and Chapel Hill: University of North Carolina Press, 2nd Ed., revised, 1994).

⁴⁷ Levy, L., *The Establishment Clause*, pp. xvi-xix, 253.

⁴⁸ McCarthy, M., *A Delicate Balance: Church, State, and the Schools* (Bloomington, Indiana: Phi Delta Kappan Educational Foundation, 1983); Pfeffer, L., *Religion, State and the Burger Court* (Buffalo, New York: Prometheus Books, 1984).

⁴⁹ For example, Pfeffer notes the constant reenacting of school aid laws in the late 1970s and early 1980s but provides no explanation for why. Pfeffer, L., pp. 37-8.

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on the Court's cases and decisions, with some additional discussion of the political debate: the social and historical background receives little attention.

The number of studies that address the Court's Establishment Clause jurisprudence from a historical perspective is small and their focus is often on individual cases or a specific time period. The school prayer cases have received most attention. John Laubach's survey of reaction to *Engel* and *Schempp* and his detailed analysis of the congressional hearings that followed provides an excellent insight into the political reaction to the cases.⁵⁰ Likewise, Kenneth Dolbeare and Philip Hammond, William Beaney and Edward Beiser, and William Muir, Jr. provide useful, if somewhat flawed, studies of community reaction, compliance, and non-compliance in the years after *Engel* and *Schempp*.⁵¹ Two of the best historical treatments of *Engel*, that provide detailed information on the context of the case, the individuals involved, and the consequences of the Court's decision are Julia Loren's *Engel v. Vitale* and Mark Dudley's book of the same name.⁵² Both were written specifically for a high school, non-specialist audience and so have received little scholarly attention, yet their non-legal backgrounds mean they find value in the historical context that is often overlooked elsewhere. Peter Irons' *The Courage of their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court* recounts the personal experiences of Ishmael Jaffree and his family when objecting to Alabama's moment of silence law and Robert Alley's *Without a Prayer: Religious Expression in Public Schools* provides a similar study of others bringing similar cases.⁵³ Both reveal the impact on a personal and community level that the Supreme Court decisions can have, thus broadening out the subject beyond purely legal significance. On school aid, Jo Renee Formicola and Hubert Morken edited a wide-ranging collection of essays discussing the legal, historical, and political context of *Everson*.⁵⁴ The book shows how Court cases and decisions can be influenced by the social context and political debate as well as by the legal context. It also reveals how study of

⁵⁰ Laubach, J., *School Prayers: Congress, the Courts and the Public* (Washington DC: Public Affairs Press, 1969). See also Alley, R., *School Prayer: The Court, the Congress, and the First Amendment* (Buffalo, New York: Prometheus Books, 1994) and Bendiner, R., *Obstacle Course on Capitol Hill* (New York: McGraw-Hill Book Co., 1964).

⁵¹ Beaney, W., and E. Beiser, "Prayer and Politics: The Impact of *Engel* and *Schempp* on the Political Process," 13 *Journal of Public Law* 475 (1964); Dolbeare, K., and P. Hammond, *The School Prayer Decisions: From Court Policy to Local Practice* (Chicago: University of Chicago Press, 1971); Muir, Jr., W., *Prayer in the Public Schools* (London and Chicago: University of Chicago Press, 1967). See Chapter Three for further discussion of these studies. See also Dierenfield, R., "The Impact of the Supreme Court Decisions on Religion in Public Schools," *Religious Education*, Vol. 62, No. 5 (September-October 1967), pp. 445-51 and "Religion in Public Schools: Its Current Status," *Religious Education*, Vol. 68, No.1 (January-February 1973), pp. 96-114, for studies which avoid some of the problems of other surveys.

⁵² Loren, J., *Engel v. Vitale: Prayer in the Public Schools* (San Diego, California: Lucent Books, 2001); Dudley, M., *Engel v. Vitale (1962): Religion and the Schools* (New York: Twenty-First Century Books, 2001).

⁵³ Irons, P., *The Courage of their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court* (New York: Penguin, 1990); Alley, R., *Without a Prayer: Religious Expression in Public Schools* (Amherst, New York: Prometheus Books, 1996).

⁵⁴ Formicola, J., and H. Morken (Eds.), *Everson Revisited: Religion, Education, and Law at the Crossroads* (Lanham, Maryland and Oxford: Rowman & Littlefield, 1997).

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that context can deepen understanding of a case, yet it remains the only study of its kind.⁵⁵ Such studies have focussed heavily on the social context of particular cases and public reaction to them, subjects often overlooked in the legal literature. However, with the notable exception of Formicola and Morken, they often avoid or omit detailed discussion of the Court opinion or the manner in which it was decided. Thus it is not always clear whether or in what ways the context discussed influenced the Court. Equally, the narrow chronological focus of the majority of these studies, considering individual cases or policy debates, means it is difficult consider the issue of change over time.⁵⁶ Thus, while these works deepen our understanding of certain events in the history of Establishment Clause interpretation they do not fully address the role and significance of the Court, nor how or why the Court's approach has changed with changing circumstances.

This thesis begins to address the gaps in the existing literature. Although it too focuses heavily on the Court's cases and opinions it also examines their political and social context. It explains not just the legal reasoning but what that reasoning reveals about the Court and the Justices' thoughts about the Establishment Clause. It shows how the Court's internal politics and individual Justices and their philosophical differences played a role in shaping the Court's opinions and how these aid in understanding the modern meaning of the Establishment Clause. It covers a period significantly longer than previous studies, revealing the influence of changing personnel and changing social and political contexts. It is not a piece of legal advocacy: it takes no position on whether the Court's approaches were right or wrong but seeks to explore why these approaches were used. This thesis argues that as controversial issues of public policy, school aid, school prayer, and equal access cannot be fully understood without an awareness of the nature of the social and political debate: it is this context from which the cases arose and against which they were decided. It argues that these debates influenced the tone and structure of the Court's opinions and that a full understanding of the Court's rulings is not possible without analysis of this broader context. Therefore this thesis goes beyond the existing legal literature. It rejects the narrow legal philosophies that have dominated so much of the debate over the Court's Establishment Clause jurisprudence. It also challenges the general reluctance to place Establishment Clause cases in a broad historical setting and to see them within their social and political environment. This thesis takes a deliberately broad, historical approach and asserts that such breadth is necessary for a full, clear understanding of the Court's Establishment Clause jurisprudence.

⁵⁵ Leah Farish's *Lemon v. Kurtzman: The Religion and Public Funds Case* (Berkeley Heights, New Jersey and Aldershot, Hampshire: Enslow Publishers, Inc., 2000) is an excellent introduction to the case but, written for a similar audience to Dudley and Loren's books on *Engel*, it includes significantly less detail than Formicola and Morken's study.

⁵⁶ But see Richard Dierenfield's studies referenced in n. 51. However, these discuss the impact of the Court's cases rather than the influence of the social context on the Court's decisions.

Chapter One: Methods and Interpretations

Chapter One

“The First Amendment has erected a wall of separation between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach,” wrote Justice Hugo Black for the Supreme Court in 1947.¹ With *Everson* began one highly controversial issue in modern constitutional jurisprudence: defining the “proper” relationship between church and state in the modern United States. While it is unanimously accepted that the Establishment Clause forbids the government to create and support its own church, just where the boundaries must be drawn and what constitutes a “breach” continues to be a matter of heated and extended debate.² This issue has been vastly complicated by the emergence of the modern welfare state and the expansion of governmental power. During the early years of the Republic the reach of the federal government was limited, mainly to matters that had little effect on, or involvement with, religion. However, the federal and state governments now foster a vast sector of publicly-supported, privately-administered social welfare programmes and allocation of resources to such programmes invariably affects religion. Thus the debate is not simply about the meaning of the religion clauses, but about their meaning in the modern world, and the best way to ensure the principles they embody are protected.

The terminology of this issue has been significantly complicated by a lack of clarity regarding the most commonly used phrases. Although the debates are complex and often context-dependent, three broad schools of thought exist. Strict separationists regard as absolute and inviolable the “wall of separation” that Justice Black wrote into constitutional law: the Establishment Clause created a complete and total separation of the spheres of civil authority and religious activity. The government, advocates assert, must maintain an entirely secular public sphere and be firmly committed to a position of official agnosticism. Accommodationists criticise other theories of interpretation for relying too heavily on the practices of the past and being blind to the consequences of such practices in modern society. Excluding religion from any governmental consideration simply because it is religion impermissibly disadvantages religion in a society where government is so active in social welfare. Nothing in the Establishment Clause, they argue, prevents government favouring religion over secular alternatives so long as no denomination or religious group is favoured over others. Neutrality theory posits that the Framers did not intend to forbid all aid to religious institutions in all circumstances. The government may neither advance nor inhibit religion or religious belief, advocates assert, in particular government may not prefer religion over nonreligion, but an indirect benefit from a neutrally-administered government programme is not unconstitutional *per se*. However, neutrality, Justice John Marshall Harlan observed, is “a coat of many colors,” depending for content on the context and nature of its use.³ In the context of the First

¹ *Everson v. Board of Education of Ewing Township* 330 US 1, 18 (1947).

² “... [S]o much has been written on establishment and free exercise issues, that one’s scholarly energy could be completely absorbed simply trying to keep track of it.” Presser, S., “Some Realism About Atheism: Responses to the Godless Constitution,” 1 *Texas Review of Law and Politics* 87, 92 (1997) (hereafter “Atheism”).

³ *Board of Education v. Allen* 392 US 236, 249 (1968) (Justice Harlan, concurring).

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Amendment's religion clauses it has been seized upon as a popular term, less pejorative than the alternatives. As a result, the term neutrality is often employed by scholars, lawyers, judges, and Justices with reference to very different ideas. These theories have competed for acceptance among scholars and Justices since 1947 and the incorporation of the Establishment Clause into the Fourteenth Amendment. The debates on and before the Court in religion clause cases highlight that all three theories of interpretation remain controversial and continue to have their devotees. That they often rely on the same evidence for vastly divergent positions has only increased the controversy and the confusion about what the Establishment Clause means and exactly where that meaning can be found. The following discusses these theories and their key arguments in order to show their strengths and weaknesses and their contributions to the Establishment Clause debate.

The Use of History

Traditionally, great weight has been accorded the words of the founding generation, especially Thomas Jefferson and James Madison, in determining the meaning of the Establishment Clause. The doctrine of original intent has a long history in constitutional jurisprudence and debate and has been claimed by both strict separationists and accommodationists as support for their interpretations. The appeal of the doctrine is clear: that the meaning of an ambiguously worded yet highly controversial clause can be ascertained through the mists of time in a form that is relevant to the modern world allows those in the political firing line to avoid criticism by claiming simply to be following the will of the Framers. However, "a handy quotation plucked from this or that letter can serve a lot of partisan causes," and the original intent argument has become as controversial and politicised as any other in this area of constitutional law.⁴ Attempting to interpret the words of the Framers, whether from letters, speeches, debates in Congress, or even the words of the Constitution itself, raises a number of highly specific concerns which, if not addressed, may seriously undermine any argument employing them.

In a highly controversial article, James Hutson raised one of the most fundamental questions: just how accurate are the records of the Constitutional Convention, the ratification debates, and

⁴ Kramnick, I., and R. L. Moore, *The Godless Constitution, The Case Against Religious Correctness* (New York and London: W.W. Norton & Co., 1996), p.16 (hereafter Kramnick and Moore). But see Smith, R., "Getting Off on the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the *Reynolds* and *Everson* Decisions," 20 *Wake Forest Law Review* 569 (1984). For an introduction to the debate over original intent see: Bennett, R., "Judicial Activism and the Concept of Original Intent," 69 *Judicature* 219 (1985/6); Berger, R., "Original Intent: Bittker v. Berger," 1991 *Brigham Young University Law Review* 1201; Bittker, B., "The Bicentennial of the Jurisprudence of Original Intent: The Recent Past," 77 *California Law Review* 235 (1989); Brennan, T., "Natural Rights and the Constitution: The Original "Original Intent"," 15 *Harvard Journal of Law and Public Policy* 965 (1992); Calinger, A., "Original Intent and the Ten Commandments: Giving Coherency to Ten Commandments Jurisprudence," 3 *Georgetown Journal of Law and Public Policy* 257 (2005); Laycock, D., "Nonpreferential" Aid to Religion: A False Claim About Original Intent," 27 *William and Mary Law Review* 875 (1985/6).

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the early activities of the First Congress.⁵ The theory of original intent rests on the assumption that somehow it is possible to discover “what the Framers meant” and advocates have turned to these sources as evidence for their arguments. Hutson’s research, however, illuminates a history of incompetence, ineptitude, and politically-motivated manipulation of the Convention records which raises doubts about the reliability of this evidence.⁶ Reliance on congressional debates raises similar problems. The debate on the Bill of Rights occurred at a level of superficiality that might be considered indecent given the importance attached to it in the modern United States. Historians seeking lengthy philosophical discussions about the relation of belief to government, or the meaning of the terms “respecting” and “establishment” will be gravely disappointed.⁷ Although these problems do not render a jurisprudence of original intent impossible, they show that an unquestioning reliance on contemporary sources is not sufficient justification. Advocates must “seek the intention of the Framers in the words of the Constitution, as the Framers themselves intended.”⁸

Even if it were possible to divine the exact meaning of the Establishment Clause as intended by the Framers there is doubt about the expediency of doing so. “Preoccupation by our people with the constitutionality, instead of the wisdom, of legislation or executive action is preoccupation with a false value,” wrote Justice Felix Frankfurter.⁹ There is a danger that lawyers, judges, and legal scholars become so caught up in the search for the “true meaning” of the words of Jefferson and Madison and others that they become blind to the issue of whether the challenged action or legislation is suitable for modern society. As constitutionality cannot simply be swept aside because a law is deemed “appropriate”, indeed the tyranny of the majority that implies is one of the few abuses constitutional scholars can agree the founding generation intended to prevent, it is the principles embedded in the Constitution that are of fundamental importance. The meaning and purpose of other constitutional provisions have changed with the

⁵ Hutson, J., “The Creation of the Constitution: The Integrity of the Documentary Record,” 65 *Texas Law Review* 1 (1986).

⁶ For scepticism about Madison’s Convention notes see especially Crosskey, W., *Politics and The Constitution in the History of the United States* (Chicago: University of Chicago Press, 2 vols., 1953) and Wofford, J., “The Blinding Light: The Uses of History in Constitutional Interpretation,” 31 *University of Chicago Law Review* 502, 503-6 (1964). But see Hutson, J., pp. 24-35. Questions have also been raised about the recorded debates of the state ratifying conventions. See Hutson, J., pp. 13-24, also Levy, L., *The Establishment Clause: Religion and the First Amendment* (London and Chapel Hill: University of North Carolina Press, 2nd Ed., revised, 1994), pp. 83-93. But see Laycock, D., “Nonpreferential” Aid to Religion ...,” (at 895-902) using the state ratifying debates as “intellectual history ... [to] help show how the concept of establishment was understood in the Framers’ generation.”

⁷ “... In the religiously divided tribal United States, nothing could kill the proposal quicker than to take a stand on religion so the Framers said as little as possible about the subject ...” Marsden, G., *Religion and American Culture* (Harcourt Brace Jovanovich, Inc., 1990), p. 46. Also, Presser, S., p. 112.

⁸ Hutson, J., p. 39.

⁹ Justice Frankfurter quoted in Tussman, J., “Preface to the 1962 Edition,” in Alley, R. (Ed.), *The Supreme Court on Church And State* (New York and Oxford: Oxford University Press, 1988), p. ix. Also, see Wofford, J., “The Blinding Light,” especially pp. 521-533. See also Levy, L., *Original Intent and the Framers’ Constitution* (New York: Macmillan, 1988).

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social evolution of the American nation and it would be foolish to suggest that the Establishment Clause is in any sense different.¹⁰

None of these arguments is intended to suggest that the words and beliefs of the men who framed the Constitution and the Bill of Rights are of no relevance or importance in determining how the Establishment Clause should be interpreted and applied. It would be blinkered to consider this question without resort to the wealth of information they provide. What they do illustrate is that an unqualified, unquestioning acceptance of the arguments they make, as the doctrine of original intent would have all do, may be severely misleading. And it must be borne in mind that for every quotation employed by those advocating an entirely secular public sphere an equally valid one is employed by those seeking increased government acceptance of religion.

Strict Separation

In *Everson v. Board of Education*, Justice Black wrote the theory of a “wall of separation” between church and state into constitutional law. Attempting to define the scope and meaning of the Establishment Clause he wrote:

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 nor influence a person to go or to remain away from Church ... No tax in any amount, large or small, can be levied to support any religious activities, whatever they may be called, or whatever form they may adopt ...¹¹

Strict separationists believe the Establishment Clause was intended to permanently and completely separate the secular from the religious.¹² Intertwining of the two must only damage both to the detriment of all. Advocates draw on American colonial history to illustrate the problems that stemmed from religious establishment and suggest that what the Framers intended to prevent through the First Amendment was federal government endorsement of religious beliefs and coercion of individuals to support or reject particular faiths. When the state becomes

¹⁰ This is the essence of the argument for judicial legislation. Often advocated in direct opposition to the “original intent” approach, it holds that in interpreting the meaning of the Constitution judges and Justices bring new meaning to existing principles as they are applied to new circumstances. For example, free speech, pornography and obscenity, symbolic speech, right to privacy, and “cruel and unusual punishment.” “Oliver Wendell Holmes said, “historical continuity with the past is not a duty, it is only a necessity.” That delphic statement can be construed to mean that we cannot escape history because it has shaped us and guides our politics, but we are not obliged to remain static.” Levy, L., *The Establishment Clause*, p. 239 (footnote omitted).

¹¹ *Everson v. Board of Education* 330 US 1, 15-16 (1947). The separationist language employed by Black contradicted the ruling which allowed New Jersey’s bus transportation programme to continue (see Chapter 2). Despite this, Black’s separationist language remained part of the opinion and thus part of the Court’s constitutional interpretation.

¹² Leading strict separationists include Thomas Curry, Paul Freund, Leo Pfeffer, and Kathleen Sullivan.

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involved with the church, irrespective of manner or extent, that cooperation lends an imprimatur of support for faith generally, or individual faiths, which equates to establishment. Prolonged or extensive contact will ultimately lead to state regulation of elements of religion or religious control of aspects of government policy, both dangers the Founding Fathers sought to avoid. Separationists accept that society has changed since 1791 but reject the idea that this should require an adaptation of the Establishment Clause: the principles embodied in the Clause are broader than the specific circumstances that brought it into being and these principles should continue to find protection in the modern world.

Many of the early settlers to arrive in the American colonies left Europe to escape the bondage of laws that compelled them to support and attend government-favoured churches. Yet for much of the colonial era most colonies maintained religious establishments, discriminating against those of other faiths. Catholics were hounded and proscribed because of their faith in most of the colonies; Quakers who followed their conscience went to jail, or worse; Virginia and Massachusetts were particularly incensed by the presence of Baptists; Roger Williams was banished from Massachusetts Bay in 1636 for nonconformity, the same state in which the established Congregational Church taxed and harassed Quakers, Baptists, and other minority religions because they steadfastly refused to betray their conscience.¹³ Americans of the colonial era thought of an establishment of religion in terms of the classic, single establishment of Great Britain, but they habitually viewed church-state relations within a predominantly Christian or Protestant framework.¹⁴ As Levy has extensively illustrated, of the six states that authorised multiple establishments in 1789, half established Protestantism while the other half established Christianity; all denominations and sects were recognised, not simply an individual one. The early American nation was predominantly Christian, the knowledge of other religions severely limited, thus what to modern sensibilities appears as a single establishment, to contemporary thinkers was a relatively plural society.¹⁵ Any attempt therefore to distinguish between single and multiple establishments in the minds of the founding generation is misleading according to strict separation theory since no difference was recognised.¹⁶ Support for one denomination or all denominations makes little difference in terms of constitutionality, strict separationists assert, because the founding generation made no such distinction.

¹³ See Leahy, J., *The First Amendment, 1791-1991: Two Hundred Years of Freedom* (Jefferson, North Carolina and London: McFarland & Co., Inc., 1991), pp. 1-18; also Kalir, E., "Is the Constitution "Godless" Or Just Nondenominational?" 106 *Yale Law Journal* 917, 919 (1996); *Everson v. Board of Education* 330 US 1, 8-10 (1947). For further discussion of the experiences of Roger Williams, see Kramnick and Moore, pp. 46-66. For a discussion of state establishments in Connecticut, Massachusetts, and New Hampshire see Levy, L., *The Establishment Clause*, pp. 17-26.

¹⁴ See especially Curry, T., *The First Freedoms, Church and State in America to the Passage of the First Amendment* (New York: Oxford University Press, 1986).

¹⁵ See Curry, T., and Levy, L., *The Establishment Clause*, pp. 27-78. The six states Levy discusses are Connecticut, Massachusetts, New Hampshire, New Jersey, New York, and Vermont.

¹⁶ Though this has not stopped many trying to find accommodationism in the words of the founders. See discussion below.

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“An establishment of religion in America at the time of the framing of the Bill of Rights meant government aid and sponsorship of religion, principally by impartial tax support of the institutions of religion, the churches.”¹⁷ The possibility that government funds may be used to support religion or religious institutions is particularly egregious to strict separationists who believe it is the essence of establishment. Drawing on Madison’s fight against a bill to levy a general tax for the support of religious teachers in Virginia, they generally hold with Jefferson that “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical ...”¹⁸ Bus transportation, textbook loans, auxiliary services, remedial education, and tuition tax credits have all been challenged before the Supreme Court on the grounds they provide financial benefits to religious schools and thus to religion generally. Programmes that distribute benefits to religious schools, whether financial or otherwise, as part of a broader programme of aid to education are no less dangerous than those which target religion specifically, suggest separationists. Jefferson’s claim to “have sworn upon the altar of God eternal hostility against every form of Tyranny over the mind of man” was not limited by caveat suggesting he opposed only a limited tyranny.¹⁹ Funding one religious group or funding all makes no difference, each is as abhorrent as the other; the only way to avoid the conflict is to fund nothing at all.

For strict separationists, church and state must remain removed to avoid the potential coercion of belief or support that had been evident in colonial history. Asked Madison: “Who does not see that the same authority ... which can force a citizen to contribute three pence only of his property for the support of any one establishment may force him to conform to any other establishment in all cases whatsoever?”²⁰ The Free Exercise Clause ensures the right to freedom of belief, the state only limits that freedom when it interferes with religion. Strict separationists reject the accommodationist claim that “the United States was established as a Christian nation by a Christian people, with the Christian religion assigned a central place in guiding the nation’s destiny” as “religious correctness.”²¹ They believe that the Constitution created a secular government which must be uninfluenced by, and indifferent to, religious concerns: the Establishment Clause mandates an official agnosticism. Because it implies favouritism when it endows religion with benefits, whether real or symbolic, the government makes religion more appealing and may influence individuals’ religious choices, violating genuine religious freedom. Coercion is the result of state support of religion so by restricting the latter the former is avoided.

The sense that religion’s involvement with politics has led to monumental hypocrisy among some American politicians is not restricted simply to those who argue for a strict separation of

¹⁷ Levy, L., *The Establishment Clause*, p. 76.

¹⁸ Jefferson, T., *A Bill for Establishing Religious Liberty*, 1785.

¹⁹ Thomas Jefferson, Letter to Benjamin Rush, 1800, quoted in Kramnick and Moore, p. 68.

²⁰ Madison, J., *Memorial and Remonstrance*, 1785.

²¹ Kramnick and Moore, p. 13.

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church and state, but they have adopted it as their own. Quoting scripture as justification is symbolic politics at its pinnacle, they argue: it garners votes and raises dollars, but does little to solve real social problems. It encourages the political use of religion in a way that allows elected officials to evade their real responsibilities “and claim for themselves a moral high ground that they too often have done nothing to earn,” while simultaneously trivializing and marginalizing the sincerely held beliefs of others.²² The very nature of faith, its sacredness, is undermined when it is used to justify one policy decision over another. Religion involves the spiritual, an area of life politics cannot address, and an area that is tainted when used for temporal concerns. Strict separationists also fear the incremental imposition of government controls on religious belief if the relationship between them becomes too extensive.²³ Less overt but equally pernicious is the possibility that religious institutions themselves will make accommodations to state requirements that may affect the practice of their religion.²⁴ Throughout the late 1970s and 1980s fundamentalist Christian schools objected to state regulation of even the secular aspects of their programmes on these grounds: “Our schools exist on the authority of the Church, which exists on the authority of Jesus Christ, who existed long before the State or the Federal Government,” argued one participant.²⁵ The likelihood of damage to religion in either manner, assert strict separationists, argues strongly against any connection between church and state.

Strict separationist theory is not, however, monolithic. Advocates disagree about its application and extent and the role of the Free Exercise Clause in the debate. Some strict separationists argue that any accommodation of religion rejects separationism and that no matter how small, any accommodation promotes religion over nonreligion. It is a “slippery slope”: nominal accommodations will lead to larger ones, eventually leaving the Establishment Clause impotent.²⁶ Echoes of this position are found in the Court’s opinion in *Employment Division, Department of Human Resources of Oregon v. Smith*, a 1990 case in which the Supreme Court held that Oregon’s interest in preventing illegal drug use outweighed the resulting burden on the religious practices of members of the Native American Church.²⁷ An alternative lies, for some

²² Kramnick and Moore, p. 165. “Perhaps legislators want to look religious to the God-fearing constituents at the expense of all taxpayers. Least of all is it clear that they receive divine guidance.” Levy, L., *The Establishment Clause* (discussing *Marsh v. Chambers*), p. 216. See, for example, the political debates over school prayer and Bible reading discussed in Chapter 3.

²³ See *Aguilar v. Felton* 473 US 402, 413 (1985).

²⁴ See *Wolman v. Walter* 433 US 229, 266 (1977) (Justice Stevens, concurring and dissenting).

²⁵ Reverend T. Robert Ingram quoted in Austin, C., “Church vs. State: Who Decides What to Teach,” *New York Times* (hereafter *NYT*), November 15, 1981, Educ. 20. See also, Ayers, Jr., B., “Private Schools Provoking Church-State Conflict,” *NYT*, April 28, 1978, A1, 23; Briggs, K., “Fundamentalist Schools Fight Controls,” *NYT*, January 26, 1979, A8; Miller, J., “Fundamentalists Fight Nebraska Over School,” *NYT*, October 22, 1982, A1, 18; Peterson, I., “Church Schools’ Battle,” *NYT*, January 18, 1983, C1, 4; Clendinen, D., “Conservative Christians Again Take Issue of Religion in Schools to Courts,” *NYT*, February 28, 1986, A19.

²⁶ See McCarthy, M., “Religion and Education: Whither the Establishment Clause?” *75 Indiana Law Journal* 123 (2000).

²⁷ “To make an individual’s obligation to obey ... a law contingent upon the law’s coincidence with his religious beliefs, except where the State’s interest is “compelling” ... contradicts both constitutional tradition and common sense,” *Employment Division, Department of Human*

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strict separationists, with the Free Exercise Clause. If religion is constitutionally burdened by the Establishment Clause, it is protected by the Free Exercise Clause: exemptions are necessary to protect the religious belief of citizens in the private sphere. "The Free Exercise Clause works as a counterweight to the Establishment Clause; it gives back what the Establishment Clause takes away."²⁸ In the arena of the public school this argument finds expression in "exit rights": the solution for those whose religion clashes with the secularity of the public school, or who simply wish their children to obtain a religiously-integrated education, is to leave the public school.²⁹ Religious schools are an available choice for parents and the Free Exercise Clause protects their existence therefore accommodation under the Establishment Clause is not only unconstitutional but unnecessary.³⁰ Despite these differences, however, separationists do agree that the Establishment Clause alone mandates a strict separation between church and state.

Although unwilling to take such a position in many religion cases, the Supreme Court has accepted strict separationist arguments in the controversial arena of prayer in public schools. In *Engel v. Vitale* (1962), *Abington School District v. Schempp* (1963), and again more than two decades later in *Wallace v. Jaffree* (1985) and *Lee v. Weisman* (1992) the Court rejected religious exercises in public schools as state support of religion.³¹ However, the Court has been unwilling to apply this reasoning to cases which involve no explicit religious practice or only indirectly involve religious organisations. Strict separationists have, as a result, criticised the Court's decisions in *Lynch v. Donnelly* (1984) and *County of Allegheny v. ACLU* (1989) which upheld the public display of a crèche and a menorah during the Christmas season, suggesting, "[n]ot to see the crèche as sending a message of exclusion to Jews, Muslims, or atheists is to see the world

Resources of Oregon v. Smith 494 US 872, 878-879, 885 (1990) (per Justice Antonin Scalia; Justices Blackmun, Brennan, and Marshall dissented). But see *Sherbert v. Verner* 374 US 398 (1963), upholding the payment of unemployment benefits to a Seventh Day Adventist despite her refusal to accept employment which required Saturday work.

²⁸ Greene, A., "The Political Balance of the Religion Clauses," 102 *Yale Law Journal* 1611, 1644 (1993). This is an argument shared with the neutrality theory of church-state relations. But see Freund, P., "Public Aid to Parochial Schools," 82 *Harvard Law Review* 1680, 1687 (1969): "If your religion prevents you from availing yourself of the public facility and compels you to make a financial sacrifice for the sake of your faith, surely the spirit of religion is better served by your act."

²⁹ Sullivan, K., "Religion and Liberal Democracy," 59 *University of Chicago Law Review* 195, 214 (1992) (hereafter "Liberal Democracy").

³⁰ See *Pierce v. Society of Sisters* 268 US 510 (1925) (recognising the existence of non-public schools). But see *Abington School District v. Schempp* 374 US 203, 290 (1963) (Justice Brennan, concurring) and Levy, L., *The Establishment Clause*, p. 188: "Excusal remedies solve nothing; they too frequently injure students of no faith or of faiths different from that of the majority. If excuses have to be offered, the exercise is wrong." See in particular *West Virginia State Board of Education v. Barnette* 319 US 624 (1943); *Abington School District v. Schempp* 374 US 203 (1963); *Wooley v. Maynard* 430 US 705 (1977); *Lee v. Weisman* 505 US 577 (1992).

³¹ *Engel v. Vitale* 370 US 421 (1962) (nondenominational prayer written by the school board); *Abington School District v. Schempp* 374 US 203 (1963) (school-sponsored Bible reading); *Wallace v. Jaffree* 472 US 38 (1985) (Alabama "moment of silence" statute); *Lee v. Weisman* 505 US 577 (1992) (prayers at school graduation ceremony).

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through Christian-tinted glasses.”³² The Court’s willingness to allow some forms of educational aid to reach religious school students, for example remedial education classes and textbook loans, has disappointed strict separationist advocates who see this as little different in principle to Patrick Henry’s 1785 General Assessment Bill in Virginia. Their argument views any aid to religious groups, whether direct or indirect, as sponsoring religion, implying some form of governmental approval of the creed endorsed by the religious institution and thus, by implication, disapproval of all other sects and religions. The Court, however, has drawn finer distinctions in defining “aid” to religion.

Strict Neutrality

Neutrality, or strict neutrality, occupies a position between strict separation and accommodation. It is not, however, a compromise between two extremes but a theoretical approach with its own foundations.³³ Drawing on the nation’s historic commitment to the principles of equality and voluntarism, advocates assert that the religion clauses of the First Amendment were intended to limit government interference with the religious choices of the people.³⁴ The state should be “religion-blind,” making decisions based solely on secular criteria. Strict neutrality rejects the applicability of the history of the founding period and ratification debates arguing instead that the changing nature of society requires flexibility in the way fundamental principles are upheld: strict separation may have been appropriate in the late eighteenth century but in the modern United States where society and government have changed so dramatically a new approach is necessary. Because the state is now involved in areas of social welfare that once belonged entirely to private groups and organisations, the likelihood of contact with religion has greatly increased. To ignore religion when secular groups are recognised is to discriminate against it. Instead, religion should be allowed to participate on equal terms with the secular, neither more favoured nor ignored; individuals are presented with a variety of options

³² Sullivan, K., “Liberal Democracy,” p. 207. *Lynch v. Donnelly* 465 US 688 (1984) (upholding a Pawtucket, Rhode Island display of a crèche); *County of Allegheny v. ACLU, Greater Pittsburgh Chapter* 492 US 573 (1989) (upholding the display of a menorah next to a Christmas tree outside a city office building).

³³ Leading advocates of neutrality include Thomas Berg, Carl Esbeck, Mark DeWolfe Howe, Stephen Monsma, and Eugene Volokh. Although he would object to the label, Leonard Levy’s views put him in this group. His willingness to accept some aid to religious school students puts him outside the realm of strict separation despite his acknowledged sympathies with their position.

³⁴ For discussions of the idea of equality in the religion clauses see Garvey, J., “Freedom and Equality in the Religion Clauses,” 1981 *Supreme Court Review* 193; Karst, K., “Equality As a Central Principle in the First Amendment,” 43 *University of Chicago Law Review* 20 (1975); and Paulsen, M., “Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication,” 61 *Notre Dame Law Review* 311, 318-322 (1986). See also, Choper, J., “The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments,” 27 *William and Mary Law Review* 943 (1986); Esbeck, C., “Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause,” 13 *Notre Dame Journal of Law, Ethics and Public Policy* 285 (1999); McConnell, M., “Coercion: The Lost Element of Establishment,” 27 *William and Mary Law Review* 933 (1985/6).

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and there is no establishment since the religious is made no more appealing than alternative choices.

Neutrality theory posits that equal treatment under law is just as applicable to issues of religion as it is to any other likely to arise under the Constitution. This theme recurs in the writings of the Framers, particularly those of Madison. In *Memorial and Remonstrance*, Madison opposed Patrick Henry's Assessment Bill because it violated "that equality which ought to be the basis of every law," arguing: "Government will be best supported by protecting every Citizen in the enjoyment of his Religion with the same even hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another."³⁵ The religion clauses may be seen, neutrality theorists argue, as an "attempt to achieve a rough balance of power" between church and state in their respective spheres to ensure neither can control the other.³⁶ The Constitution enshrined the philosophy of separation of powers based on the Framers' fear of the misuse or abuse of power and their distrust of large government; the Establishment Clause was a logical outgrowth of that philosophy as applied to religion. If equal treatment is the principle to be upheld the rigid line drawn by strict separation is inadequate since "it is the Court's job to design a series of walls over time, taking into account the relative power of church and state of that time in that scenario."³⁷ In strict neutrality theory the only way for government to neither advance nor inhibit religion is to maintain a neutral position: it must not ignore or exclude religion entirely, for that would hinder religion in modern society, but neither must it intentionally advance religious causes over secular ones.

A second, linked, principle of concern to neutrality theorists is voluntarism. The nation's historic commitment to the idea of voluntarism rests largely on the conclusion that, "Religion flourishes in greater purity, without than with the aid of Government," and that "both religion and society will be strengthened if spiritual and ideological claims seek recognition on the basis of their intrinsic merit."³⁸ Support for religious organisations is a matter for the individual to decide, just as he decides whether to hold any belief. Voluntarism is thus closely tied to the

³⁵ Madison, J., *Memorial and Remonstrance*.

³⁶ See in particular Hamilton, M., "Power, the Establishment Clause, and Vouchers," 31 *Connecticut Law Review* 807 (1999).

³⁷ Hamilton, M., p. 824. Hamilton's argument provides an alternative view of recent Supreme Court jurisprudence to that of many recent scholars who have seen only chaos and confusion in the Court's reasoning: "... [E]stablishment clause doctrine has evolved into a context-dependent and era dependent balancing approach, which affords the Court maximum flexibility to identify inappropriate relations of power." (p. 826). See Chapter 2.

³⁸ Letter from Madison to Edward Livingston, July 10, 1822, quoted in Adams, A. and C. Emmerich, *A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses* (Philadelphia: University of Pennsylvania Press, 1990), p. 25 and Giannella, D., "Religious Liberty, Nonestablishment and Doctrinal Development. Part II. The Nonestablishment Principle," 81 *Harvard Law Review* 513, 517 (1968). Strict separationists also hold this view. Where they differ from neutrality theorists is in the practical application of the principle.

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concern to avoid coercion.³⁹ Like strict separation, neutrality is concerned to avoid state dictation of the “correctness” of certain religious and spiritual beliefs. But whereas the former regards all government interactions with religion as indicating approval of religion, neutrality holds that if all are treated equally there can be no compulsion and thus no establishment. Equality, however, cannot be ensured by recourse to a bright line rule such as the wall of separation but requires an analysis of the specific circumstances of each link between church and state; different walls must be built over time.

Strict neutrality accounts for the numerous practices and activities of the First Congress which involved the government with religion in a manner that modern jurisprudence would find unconstitutional.⁴⁰ Such practices embarrass strict separationists, who are required to suggest that shortly after enacting the First Amendment the Framers violated it in countless ways. However, congressional and military chaplains, Thanksgiving proclamations, and government-funded missionaries were considered acceptable, partly because of the overwhelmingly Protestant nature of the early Republic, but also because they did not compel a belief, they simply allowed those holding such a belief to express it. Equally, strict neutrality allows for a more integrated analysis of Free Exercise concerns. In a concurring opinion in *Abington School District v. Schempp* (1963), Justices Arthur Goldberg and John Marshall Harlan warned that: “... untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and non-involvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular, and a passive, or even active, hostility to the religious.”⁴¹ Goldberg and Harlan argued that, in a modern state, explicitly excluding religion from any governmental consideration may, in effect, present a hostility towards religious belief. A legislative exemption for religion is not necessarily an affirmation of the religious faith involved. Rather, the exemption might be made on the ground of “secular respect” for the dilemma that would be faced by certain members of the community were they forced to choose between obeying the commands of law and obeying those of a separate font of authority.⁴² The exemption of sacramental wine from Prohibition in the 1920s and the Occupational Health and Safety Administration’s modification of its hard hat rule out of respect for the religious dress of Sikh construction workers had no purpose other than a protection of religious belief, actions strict separationists might define as establishing a belief by

³⁹ References to coercion and voluntarism occur throughout *Memorial and Remonstrance* suggesting it was a theme which occupied Madison’s thoughts.

⁴⁰ Such activities included appointing legislative chaplains; issuing Thanksgiving proclamations; congressional subsidization of missionary work among Native American tribes; Jefferson’s signing of a treaty with the Kaskaskia Indians to build a church and supply a Catholic priest in exchange for tribal land; and federal support of sectarian education for Native Americans, which continued until the late nineteenth century.

⁴¹ *Abington School District v. Schempp* 374 US 203, 306 (1963) (Justices Harlan and Goldberg, dissenting).

⁴² For further discussion of “secular respect” see Nuechterlein, J., “The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause,” 99 *Yale Law Journal* 1127 (1990).

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unconstitutionally favouring it. Advocates of neutrality assert, however, that the exemptions were only toleration for a belief that happened to be based in faith.⁴³ Placing these exemptions and the activities of the First Congress into a broader perspective shows them to be little more than methods to ensure the equal treatment of different religions and of the religious and the secular.

Strict neutrality, its advocates argue, is not only the most effective way to ensure continued protection for religion in the manner the Framers intended but avoids some of the major problems of other theories. Strict separationists argue that when church and state interact religion is “advanced” by the state action. But, asserts strict neutrality, “advancing” religion depends heavily upon the context. There is no evidence, for example, to suggest that the Founding Fathers believed they were advancing Quakerism when exempting adherents from loyalty oaths and recognising conscientious objection.⁴⁴ Only neutrality allows for examination of the context to understand the true impact of a particular relationship, they argue. Neutrality theorists also assert that other approaches require the Court, or government, to do exactly what is forbidden: in order to maintain separation, one must first understand what is religious and what is secular, while accommodation requires at least some inquiry into the nature of religious institutions to determine those that are “pervasively sectarian” and those with more “acceptable” levels of religious involvement.⁴⁵ Both inquiries violate church-state separation as defined by the Supreme Court. Indeed, defining what constitutes “true” faith or belief is something the Supreme Court has consistently refused to allow, either to juries, conscientious objector boards, or to itself.⁴⁶ By requiring the government to treat all equally, irrespective of religious concerns, neutrality avoids the need to enquire about religion and belief, according to its advocates. Finally, although drawing on sources from the Founding Fathers, neutrality advocates criticise strict separationists for their unbending reliance on colonial and early American history to determine the meaning of the First Amendment. Neutrality advocates accept that in the early years of the Republic no government funding of religious groups was possible and was not necessarily the result of government withholding resources or discriminating against those of faith. That view can only be applied in today’s society, they argue, by “clinging to the myth”

⁴³ Greene, A., pp. 1625-1626. Although these cases are ostensibly free exercise cases, they raise establishment issues as well. The issue is whether the exceptions to generally-applicable laws for religious adherents that the Court has interpreted the Free Exercise Clause as requiring may actually be a law “respecting” an establishment, favouring the beliefs of an individual or group in violation of the Establishment Clause.

⁴⁴ There is some suggestion that they had a Christianity-based reason for the exception. “But I say unto you, Swear not at all; neither by heaven; for it is God’s throne: Nor by the earth; for it is his footstool: neither by Jerusalem; for it is the city of the great King. Neither shalt thou swear by thy head, because thou canst not make one hair white or black. But let your communication be, Yea, yea; Nay, nay: for whatsoever is more than these cometh of evil. Matthew 5: 34-37 (King James Version).

⁴⁵ See Esbeck, C., “Myths, Miscues . . .,” pp. 292-8.

⁴⁶ For example, *U.S. v. Seeger* 380 US 163 (1965) (allowing exemptions from military service for three men who did not subscribe to traditional religion but claimed not to be “irreligious or atheists”); *U.S. v. Ballard* 322 US 78 (1944) (jury may not determine the truth or falsity of religious claims made by a couple prosecuted for mail fraud).

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that the modern state has limited control over resources. In the modern world government and religion regularly occupy the same space and it is impossible to separate them. Even if history suggests that the Constitution is entirely secular, in the modern United States a failure to distinguish between government action that promotes a majoritarian understanding of “proper” religion and government action that promotes the free exercise of diverse faiths ultimately harms religion and those who hold religious beliefs by putting them at a disadvantage. As government in the modern United States funds a wide variety of social welfare programmes there is “nothing improper about the individual recipients of ... evenhanded government aid voluntarily routing some of it to religious uses.”⁴⁷ Strict neutrality, say its advocates, allows for a recognition of current circumstances while still maintaining protection of the fundamental principles enshrined in the Establishment Clause.

In 1963, neutrality theory found expression on the Court in the words of Justice Tom C. Clark writing for the majority in *Abington School District v. Schempp*.⁴⁸ However, strict neutrality has most frequently found expression in the Supreme Court’s school aid and equal access cases, although rarely acknowledged explicitly by the Justices. The Court’s leading test for Establishment Clause violations, the three-prong *Lemon* test established in 1971, embodies the approach.⁴⁹ The Court has allowed benefits to flow to religious institutions and organisations when religion is not discernibly favoured over the secular, when the challenged programme is not motivated predominantly by religious reasons, and when the resulting relationship between church and state does not extend further than necessary nor result in coercion to participate. Thus, a sign language interpreter may be provided for a deaf student attending a religious school even if paid for by the state, state funding available to all college students may be provided for a blind student attending a private Christian college, and religious groups may meet on school property after school hours and may be attended by school-aged children with the written consent of their parents, but graduation prayers and Bible-reading in public schools during school hours are unconstitutional.⁵⁰ The Court’s willingness to distinguish between different types of relationship between church and state and different kinds of aid programmes based on the particular circumstances involved echoes the position taken by advocates of strict neutrality. However, the relationship between specific cases and the theory remains no stronger than this as the Court has never explicitly stated that it has adopted this approach.

⁴⁷ Volokh, E., “Equal Treatment is Not Establishment,” 13 *Notre Dame Journal of Law, Ethics and Public Policy* 341, 353 (1999). See also, Esbeck, C., “Myths, Miscues ...”.

⁴⁸ *Abington School District v. Schempp* 374 US 203, 226 (1963).

⁴⁹ *Lemon v. Kurtzman* 403 US 602 (1971). The so-called *Lemon* test inquires whether a statute or policy has a secular purpose, a primary effect which neither advances nor inhibits religion, and whether it fosters an “excessive” government entanglement with religion.

⁵⁰ *Zobrest v. Catalina Hills School District* 509 US 1 (1993); *Witters v. Washington Department of Services for the Blind* 474 US 481 (1986); *Board of Education of the Westside Community Schools v. Mergens* 496 US 226 (1990); *Lamb’s Chapel v. Center Moriches Union Free School District* 508 US 384 (1993); and *Good News Club v. Milford Central School* 533 US 98 (2001); *Lee v. Weisman* 505 US 577 (1992); *Abington School District v. Schempp* 374 US 203 (1963).

Accommodation

Accommodation, the third approach to Establishment Clause interpretation, asserts that as a fundamentally religious nation the United States has an obligation to protect the religious beliefs of its citizens.⁵¹ Advocates assert that to exclude religion deliberately from the public sphere or treat it as different to secular motivations is to devalue faith, reject the religious heritage of the nation, and discriminate against religious belief.⁵² Accommodationists find in the history of the founding period support for nonpreferential treatment of religion: as long as no sect or denomination is favoured the state may support religion over nonreligion. In the modern world, excluding religion from participation in the public sphere, whether as a recipient of government benefits or as individual expression, is not equal treatment and does not “protect” religion from state interference but actively discriminates against religion and its adherents. Accommodation holds that the Establishment Clause cannot require the state to take action forbidden by the Free Exercise Clause; putting religion at a disadvantage by ignoring it violates the Constitution. Advocates also assert that when the state actively supports the secular it “establishes” secularism and “prefers” it to religion which is as unconstitutional as establishing a state church.

Advocates of accommodation criticise other theories, and the Court at times, for framing the debate about the religion clauses in dichotomous terms: “more religion in public life or less; tearing down the wall of separation between church and state or building it up again.”⁵³ Regarding religion clause questions in this way necessarily leads to the exclusion of religion from the public sphere simply because it is religion, the essence of discrimination. This, accommodationists argue, cannot be considered the intention of the Founding Fathers, whose actions are far better regarded as establishing a regime of pluralism to protect the religious lives of the people from unnecessary governmental intrusions. That pluralism cannot be served in modern society by excluding religious beliefs, groups, organisations, and institutions from the benefits available to other social, but secular, organisations. The principle that the state may not act with the “purpose of advancing religion” has been taken too literally, argue accommodationists. They suggest strict separationists and neutrality theorists overlook, or ignore, an interpretation of this principle that primarily forbids the state to advance religion for

⁵¹ “Accommodation” is a controversial term. Some strict separationists accept that society must accommodate deeply held religious beliefs, but argue that it must be done only under the aegis of the Free Exercise Clause. Neutrality theorists also accept accommodation of religion, and will do so under the Establishment Clause, but only if it is done for a “secular purpose.” See *Lemon v. Kurtzman* 403 US 602 (1971). Accommodation therefore has a variety of meanings depending on its context, and in various forms is accepted by all Establishment Clause interpretive theories. Some advocates thus prefer “nonpreferentialism” to describe their position. However, accommodation is the more common term and is used here to refer to the ideas and positions outlined above.

⁵² Leading accommodationists include Robert Cord, Michael Malbin, Michael McConnell, Stephen Presser, Charles Rice, and Pat Robertson.

⁵³ McConnell, M., “Crossroads,” p. 116.

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religious purposes, “since only then does the state stigmatize religious minorities and corrupt the process of secular deliberation.”⁵⁴ The Court has commonly held that religious exemptions from regulatory burdens do not violate the Establishment Clause; it can do so because to establish a religion requires that government must take an affirmative step to do so. To establish a religion, that religion must deliberately be treated more favourably than its rivals: aid which benefits all religions will necessarily advance religion but neither stigmatizes nor endorses participants and therefore does not establish those beliefs in any way.⁵⁵

In response to Kramnick and Moore’s assertion of a “Godless Constitution,” Stephen Presser attempted to show that “[f]or most of our history ... most of our leaders appeared not to have believed in a Godless Constitution at all.”⁵⁶ Such arguments are tenable, but not entirely persuasive.⁵⁷ The accommodationist argument is undeniably weakest when attempting to find support in the history of the Republic and the writings of the Founders.⁵⁸ Although debateable that the First Congress explicitly expressed the “no preference” view, the four rejected drafts of the religion clauses implied a narrower interpretation of the substantive limitation on government than the version finally adopted.⁵⁹ Accommodationists argue these drafts indicate more clearly

⁵⁴ Nuechterlein, J., p. 1135. But see Justice Brennan in *Abington School District v. Schempp* 374 US 203, 294-5 (also 293-4) (1963): “What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which ... (c) use essentially religious means to serve governmental ends, where secular means would suffice.”

⁵⁵ Nuechterlein, J., pp. 1134-37.

⁵⁶ Presser, S., “Atheism,” p. 91, 97.

⁵⁷ Presser’s admission that he sought to defend prayer in public schools and advocated a constitutional amendment to allow state and local governments to “integrate law with morality and morality with religion” exposes his agenda in reading the Constitution and its history in this way: he sees a return to religious inclusion as a solution to America’s “moral crisis,” the same argument made by Presidents Ronald Reagan and George Bush, and the Christian Coalition, among others. The credibility of Presser’s textual analysis is undermined by its association with the conservative social agenda.

⁵⁸ Curry, T., p. 211.

⁵⁹ The House of Representatives sent to the Senate a draft which read:

“Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.”

The second proposal read:

“Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed.”

The Senate then rejected language providing:

“Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society.”

It also rejected the proposed alternative:

“Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.”

Accommodationists argue that two key omissions from these drafts imply Congress intended to allow for aid to all religious groups. First, that none mention laws “respecting” an establishment of religion mean the drafts applied to direct establishments only; anything less was not restricted. Second, the use of the term “preference” in two of the drafts considered implied that aid which benefited all religious groups was also not suspect. Accommodationists suggest that despite the differences in wording between these drafts and the amendment as enacted this narrower limitation on government was what the Framers intended with the Establishment Clause.

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than the amendment enacted the intent of the framers with regard to religion, rejecting support of a single sect or denomination but allowing for the possibility of nonpreferential aid. That the First Amendment forbids an establishment of “religion” in general, and not “a” religion, a “national” religion, “one sect or society,” or “any particular denomination,” lends support to this interpretation they argue. However, discussions about whether “an establishment of religion” meant something different to the Framers than “the establishment of religion” is an exercise in semantics: it is impossible to know since evidence from the congressional and state ratifying debates cannot be relied on for the word-for-word accuracy that such an argument requires.⁶⁰ Accommodationist attempts to interpret the words of the Founding generation are generally weak and few adherents of this school of thought have attempted to do so. Instead they argue that the changing nature of society requires a recognition that the relative positions of church and state have fundamentally altered and that this is what must be taken into consideration.

One of the most controversial areas of religion clause jurisprudence is that of public funds, the question of whether tax dollars may be funnelled to religious institutions. Opponents assert that when the government contributes public funds to religious organisations or institutions the taxpayer is denied the freedom to choose whether to support his religion financially and when that money goes to a religion the taxpayer does not support the harm is further compounded.⁶¹ Accommodationists, critics argue, fear that religion is not strong enough to survive on its merits, requiring government patronage and promotion.⁶² However, accommodationists argue, this argument misrepresents the nature of the modern taxation system. To suggest that diverting some of the billions of dollars raised through taxation to a religious group or institution harms the individual taxpayer who does not hold that same belief and who contributes a few thousand dollars to the communal pot stretches the boundary of credibility. Accommodationists assert that if such aid is being distributed to a wide variety of groups and individuals, including those of faith, then the claim of endorsement must fail for there can there be no endorsement if all are involved.⁶³ That the question of taxation occupied the thoughts and fears of the Framers has been amply demonstrated by scholars of the era but, they argue, the nature of the system has altered so dramatically in the intervening period that the original means of redress are no longer suitable, and may in fact be inherently harmful.

Accommodationists point to the nation’s religious schools as an example of how excluding religion from public benefits may harm believers rather than protecting them. The Court has traditionally viewed aid to “pervasively religious” schools in the United States with suspicion,

⁶⁰ See “The Uses of History,” discussed above.

⁶¹ See Levy, L., *The Establishment Clause*, pp. 144-45; Sullivan, K., “Liberal Democracy,” pp. 209-213; and *Thomas v. Review Board of Indiana Employment Security Division* 450 US 707 (1981) (Justice Rehnquist, dissenting).

⁶² See Levy, L., *The Establishment Clause*, pp. 144-45.

⁶³ Esbeck, C., “Myths, Miscues ...”, p. 313. See also, *Flast v. Cohen* 392 US 83 (1968); *Tilton v. Richardson* 403 US 672 (1971); and *Valley Forge Christian College v. Americans United for the Separation of Church and State* 454 US 464 (1982).

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partly because of their religious element, and partly because it involves children, a class of citizen accorded significant protection by the Court. Many of the most controversial debates about the place of religion in public life centre on the school and, in particular, the level and type of aid the government can provide to parochial schools for secular activities. Such aid has been strictly limited by the Supreme Court under the Establishment Clause.⁶⁴ Specifically excluding religious schools from such programmes, accommodationists argue, places them at a disadvantage in the competition for students and places an undue burden on parents whose faith requires the choice of a religious school. Without non-discriminatory aid being extended to religious as well as public schools, the only choice parents have when rejecting state "standardization" is to forfeit the right to free education for their children.⁶⁵ Parents who object to the secularity of the public school, and whose choice of a religious school is constitutionally protected, are forced to pay twice for the "privilege" of exercising that constitutionally protected right.⁶⁶ Accommodation, advocates assert, allows for the non-discriminatory allocation of resources to all schools which, far from establishing religion, would simply restore to religious parents a neutral set of incentives.⁶⁷

Accommodationists draw on the Court's Free Exercise jurisprudence for support for their position. In *Sherbert v. Verner* (1963) the Court held that unemployment benefits could be paid to a Seventh Day Adventist who had lost her job as a result of refusing to work on her Sabbath. For the Court, Justice William O. Douglas argued that the denial of benefit under such circumstances is equivalent to a fine for adhering to religious convictions:

... the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government. These considerations, however, are not relevant here. If appellant is otherwise qualified for unemployment benefits, payments will be made to her not as a Seventh Day Adventist, but as an unemployed worker ...⁶⁸

⁶⁴ See Chapter 2.

⁶⁵ McConnell, M., "Crossroads," p. 132.

⁶⁶ However, the Court has frequently rejected the assertion that just because the Constitution protects a right the government is required to pay for its exercise. "Although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category." *Harris v. McRae* 448 US 297, 316 (1980) (arguing that the government is not required to pay for abortions for indigent women). See also *Maher v. Roe* 432 US 464, 475 (1977), where Justice Powell argued that states who refused to pay the bus fares of women seeking abortions outside of the state did not infringe upon their constitutional rights. Equally, opponents of Accommodation assert, taxpayers without children are required to pay taxes to support public schools because they are a public service. This should be no different for religious parents who retain the choice of sending their children to religious schools.

⁶⁷ McConnell, M., "Crossroads," p. 132 and Volokh, E., pp. 364-365.

⁶⁸ *Sherbert v. Verner* 374 US 398, 412-413 (1963). Douglas, however, objected to the use of public funds for religious activities. See in particular his concurrence in *Schempp*. *Sherbert* was decided by a 7:2 majority, Justices Harlan and White dissenting.

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The same argument holds under the Establishment Clause, argue accommodationists. In providing non-discriminatory support to religious schools the government supports them not as religious institutions but as what they are: institutions of learning which provide a vital service to the community.⁶⁹ To deny benefits to otherwise eligible institutions forces them to choose between the precepts of their religion and forfeiting benefits, or abandoning the precepts of their religion in order to obtain support, the same choice the Court ruled unconstitutional for individuals to be required to make in *Sherbert*.⁷⁰ Allowing government benefits to flow to religious schools thus not only prevents discrimination against religious parents but allows for a more integrated approach to religion clause jurisprudence assert advocates.

The way the Supreme Court has treated civil religion, accommodationists argue, is evidence of the danger to religion of either strict separation or strict neutrality. As described by the sociologist Robert Bellah in 1967, "civil religion" denotes a secularization of elements of traditional religious practice and their assimilation into wider culture and society.⁷¹ In the United States this includes pledging allegiance to a nation "under God," incorporating the national motto "In God We Trust" into the design of the national currency, and, somewhat more controversially, legislative chaplains in Congress. In *Marsh v. Chambers*, *Lynch v. Donnelly*, and *County of Allegheny v. ACLU* the Supreme Court held religious practices or displays did not violate the Establishment Clause because their religious elements had been secularized.⁷² But, critics assert, it is the Court doing the secularizing because it does not wish to embark on the politically unattractive task of assessing widely-accepted, historically-supported practices against the establishment standard because they are constitutionally suspect under the current line of jurisprudential theory.⁷³ If the Court uses neutrality theory it faces an unattractive choice: finding civil religious practices unconstitutional or secularizing those aspects which are religious. In choosing the latter the Court excludes those who hold conflicting beliefs, distorts the genuineness of adherence, and necessarily privileges one religion over others by adopting the symbols and language common to that religion.⁷⁴ The requirement that the state take no notice of

⁶⁹ The Court has recognised that religious schools provide such a service. See *Everson v. Board of Education* 330 US 1, 6, 7 (1947) (deference to legislative decisions that religious schools have a public function); *Mueller v. Allen* 463 US 388, 401-2 (1983) (discussing *Wolman v. Walter* 433 US 229 (1977)).

⁷⁰ See McConnell, M., "Crossroads," p. 133, 186. But see Freund, P., p. 1687 quoted supra, n. 28.

⁷¹ See Bellah, R., "Civil Religion in America," *Daedalus* (Winter 1967) reprinted in Vol. 34, No. 4 (Fall 2005), pp. 40-56 and Mirsky, Y., "Civil Religion and the Establishment Clause," 95 *Yale Law Journal* 1237 (1986).

⁷² *Marsh v. Chambers* 463 US 783 (1983); *Lynch v. Donnelly* 465 US 688 (1984); *County of Allegheny v. ACLU* 492 US 573 (1989).

⁷³ Furth, A., "Secular Idolatry and Sacred Traditions: A Critique of the Supreme Court's Secularization Analysis," 146 *University of Pennsylvania Law Review* 579, 590 (1998). See also, Mirsky, Y., pp. 1241-2. See, for example, *Elk Grove Unified School District v. Newdow* 542 US 1 (2004) in which the Court rejected for lack of standing a challenge to the words "under God" in the Pledge of Allegiance.

⁷⁴ See Furth, A., pp. 601-602. "The Court appears to have arrived at the worst of all possible outcomes. It would be better to forbid the government to have religious symbols at all than to

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religion or that it must be specifically excluded from the public sphere serves only to damage and devalue religion, accommodationists argue. Excluding religion from the public sphere relegates it to the realm of private choice, of individual taste, defining it as something of little importance to everyday life and therefore unworthy of consideration or understanding. Only when the importance of faith to individuals is recognised and religion is permitted to participate fully in the public sphere can religion be properly protected.

In 1986, the National Conference of Catholic Bishops composed the "Pastoral Letter on Catholic Social Teaching and the US Economy" entitled *Economic Justice For All*. "The Pastoral Letter was written because the bishops thought that if certain things were not said by the church regarding various issues, those things might remain unsaid or unheard."⁷⁵ For accommodationists religion has a unique role to play in political debate for it is the touchstone for the opinions believers hold. There may be a valid secular argument for their position, but it does not resonate, it is not "cast in the terms" in which they think about things. In the final analysis it may be the only argument they have the vocabulary to make.⁷⁶ Religion is important to its adherents, regardless of sect, denomination, or faith. In some cases that belief is the moral foundation for an individual's position on issues as wide-ranging as foreign policy, economic growth, family life, and personal conduct. To prevent that person drawing on his fundamental beliefs, as strict separationists require, undermines the very basis of the position he is attempting to advocate or defend. This places him at a disadvantage, it also implies that his religious belief is not important enough to be considered in a wider context. In the accommodationist view those who fear that an explicit acceptance of religious debate in the political sphere will lead to "narrow and divisive appeals to particularistic religious traditions" forget the nature of democratic government. To be enacted into law or included in public policy, opinions and positions must appeal to a majority of the population or their representatives.⁷⁷ Any religion-

require that they be festooned with the trappings of modern American materialism." McConnell, M., "Crossroads," p. 127.

⁷⁵ Waldron, J., "Religious Contributions in Public Deliberation," 30 *San Diego Law Review* 817, 817-8 (1993). Goldman, A., "Catholic Bishops Criticised on Poor," *NYT*, November 5, 1986, A20. The letter described an American economy that failed millions and urged sweeping governmental changes to help the poor and unemployed: "The fundamental moral criterion for all economic decisions, policies and institutions is this: They must be at the service of all people, especially the poor."

⁷⁶ See in particular, Laycock, D., "Freedom of Speech That Is Both Religious and Political," 29 *University of California-Davis Law Review* 793, 805 (1996); Bishop J. Malone, "Opening Address" in Griffin, L. (Ed.), *Religion and Politics in the American Milieu* (The Review of Politics and the Office of Policy Studies, 1986), pp. 135-41; and Wolterstorff, N., "The Role of Religion in Decision and Discussion of Political Issues" in Audi, R. and N. Wolterstorff, *Religion in the Public Square: The Place of Religious Convictions in Political Debate* (Lanham, Maryland and London: Rowman and Littlefield, Inc., 1997), pp. 102-105.

⁷⁷ Laycock, D., "Freedom of Speech," p. 808. Some issues are simply so controversial that they divide the population no matter what the source of the argument: the death penalty, abortion, homosexuality, and civil rights, for example. Americans are perennially divided about the "proper" role of religion and religious beliefs in political debate, argues Perry: "This is due in substantive part ... to the fact that we are perennially divided in our judgments about a whole host of important moral issues ..." Perry, M., "Why Political Reliance on Religiously Grounded

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based belief that is enacted into law can only achieve such a position by gaining the acceptance of the democratic majority. While some supporters will accept the position because of its religious foundation, in the religiously plural United States it is more likely to be accepted because it comports with the secular beliefs of others. Religion, accommodationists argue, will not be enacted into law simply because it is religion and as such there is no danger that requires religion to be excluded from political debate simply because it is religion.⁷⁸

Despite the passion with which accommodationists make their case, a majority of the Supreme Court has never accepted their approach to Establishment Clause interpretation. In a nation divided about the “proper” place of religion in public and private life, acceptance of accommodation by the Court could appear as advocacy of religion over nonreligion. Instead, the Court has recognised that a pragmatic accommodation of changing social circumstances is required to uphold the bedrock principles of the Constitution:

Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to any one faith – as an absolutist approach would dictate – the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith or tends to do so.⁷⁹

Thus in *Everson* the Court held that the state “cannot under the free exercise clause hamper its citizens in the free exercise of their religion by denying them the benefits of public welfare legislation.” In *Zorach v. Clauson* (1952) six justices upheld a “released time” programme in public schools claiming, “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.”⁸⁰ Under the leadership of Chief Justices Warren Burger and William Rehnquist the Court remained flexible in religion cases, assessing challenged school aid and equal access programmes by investigating in detail the nature of the programme and the context in which they operated.⁸¹ The Court neither mechanically invalidated all such programmes nor

Morality is not Illegitimate in a Liberal Democracy,” 36 *Wake Forest Law Review* 217, 223 (2001).

⁷⁸ See Gilligan, J., “The American Catholic Politician,” in Griffin, L. (Ed.), for a discussion of the influence, or lack thereof, the religious beliefs of politicians have on their voting patterns and the arguments they make.

⁷⁹ *Lynch v. Donnelly* 465 US 668, 678 (1984). Justice John Paul Stevens expressed a similar view in 1992, see Stevens, J., “The Bill of Rights: A Century of Progress,” 59 *University of Chicago Law Review* 15 (1992).

⁸⁰ *Everson v. Board of Education* 330 US 1, 16 (1947); *Zorach v. Clauson* 343 US 306, 313-314 (1952).

⁸¹ See, for example, *Committee for Public Education and Religious Liberty (CPERL) v. Nyquist* 413 US 756, 772 (1973) (“What our cases require is careful examination of any law challenged on establishment grounds with a view to ascertaining whether it furthers any of the evils against which that Clause protects.”); *Widmar v. Vincent* 454 US 263, 240 (1981) (“Whether a specific student group is a “noncurriculum related student group” will therefore depend on a particular school’s curriculum, but such determinations would be subject to factual findings ...”) and 251 (“We do not lightly second-guess such legislative judgments, particularly where the judgments are based in part on empirical determinations.”). See also Justice Blackmun’s opinion for the

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overlooked potential problems in their operation. An unwillingness to automatically invalidate all school aid programmes without further investigation is as close to accommodation as the Court has been willing to step.

Some Conclusions and A Different Approach

Despite initial appearances, strict separation, strict neutrality, and accommodation have factors in common. Advocates of all three positions agree that at the very least the Establishment Clause prevents the state supporting its own church or favouring one set of beliefs over others. They also agree that the state is prevented from interfering with the religious choices, beliefs, and practices of its citizens: government may not coerce belief or nonbelief under the Free Exercise Clause and at minimum the Establishment Clause reinforces this limitation. All three theories recognise that religion is an important part of the lives of many Americans and has played a significant role in the nation's history and as such is deserving of respect. These underlying principles are significant because they reveal a unity of purpose between the different positions that is frequently overlooked in the rush to criticise as undermining constitutional principles advocates of alternative views. The major disagreements centre not on these principles but on the best way to ensure their protection in the modern United States.

Many scholars associated with the church-state issue have drawn on the same material, the same letters and speeches of the founding generation, the same convention records, the same constitutional wording, to arrive at polar opposites. The ambiguity of the Establishment Clause is partly to blame, leading to instances of close textual analysis which border on the semantic. The lack of detailed discussion in the First Congress and the debate surrounding the reliability of existing records further complicates the argument. However, even if a comprehensive record did exist, if the opinions of the Founding Fathers could be discerned through the mists of time, the question about the propriety of employing such information when applying the theory embodied in the Amendment to the reality of the modern world remains. Too often the doctrine of original intent has been manipulated to serve the political or personal ends of the manipulator. Strict adherence to a particular interpretation has led to confusion and misunderstanding, not greater clarity, as advocates attempt to explain even the unexplainable in light of their point of view, often ignoring the very exceptions which highlight the flaws in their argument.⁸²

This is not to suggest that strict separation, neutrality, and accommodation have contributed nothing to the understanding of the principles embodied in the Establishment Clause. The

plurality in *Wolman v. Walter* 433 US 229 (1977) in which each type of programme challenged is discussed. See Chapters Two and Four for further discussion of these cases.

⁸² While this may be the result of scholars seeking publication and lawyers looking to encourage different decisions by claiming a lack of clarity in opinions, the point still stands. The cumulative effect of the debates remains a confused commentary on the meaning of the Establishment Clause.

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strength of strict separationism is in its understanding of history, neutrality provides a potential for understanding how to balance secular and sectarian needs and demands, and accommodation is strongest when arguing for the need to recognise the changing requirements of modern society. However, these theories illuminate only part of any debate about the relationship between state and church in the United States. At various times the Supreme Court has articulated principles in its opinions that echo each of the three theories: it has not consistently advocated one approach over the others. Separation, neutrality, and accommodation provide the language for, and theoretical underpinnings of, the debate but any attempt to understand the particular nature of the church-state relationship as defined by the Supreme Court must look beyond theory to the social and political context within which cases developed and decisions were made.

The Supreme Court's unwillingness to accept a single theory of Establishment Clause interpretation, however, raises additional questions about the extent to which these theories can help in understanding the Court's actions in Establishment Clause cases. As the Court has never accepted the theories in a consistent manner across all cases then their use as insights into the thinking of the Justices and the working of the Court is severely limited. A clearer understanding of the Court's actions in Establishment Clause cases requires looking beyond legal theory. Recent debates in political science offer ways of looking at the Court and its decisions that may suggest alternative interpretations of Establishment Clause jurisprudence. Although the debates cover a wide range of issues related to courts generally and the Supreme Court in particular three main approaches can be identified. The Legal Model asserts that the Justices' decisions can and must be understood in the context of legal norms and restraints that operate on the Court: original intent, *stare decisis*, plain meaning, and the Court's institutional position under the Constitution are all central to this approach. The Attitudinal Model argues that the Justices' personal policy preferences determine the outcome of cases. The institutional protections afforded the Justices by their position on the Court leaves them free to vote based purely on their preferred outcomes; opinions are little more than justifications for these outcomes. Rational Choice Theory encompasses a large number of varied studies and interests but, broadly defined, argues that while Justices will, when possible, vote for their preferred outcomes, those votes are limited by institutional constraints. Such constraints include the need to gain and hold a majority on the Court in order to hand down a binding precedent, Congress, the President, and the role of public opinion. Although few of the studies comprising this debate directly address the Court's Establishment Clause cases, their assertions about the workings of the Court may help illuminate further this area of constitutional law.

The Legal Theory

The Legal Theory developed from the concepts of oracular judging or mechanical jurisprudence that were dominant in the nineteenth century. Under such theories, "law was conceived as a mystical body of permanent truths, and the judge was seen as one who declared

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what those truths were and made them intelligible – as an oracle who “found” and interpreted the law.”⁸³ In such a conception of judicial activity, judges did not make law, a task left to the legislature under the Constitution, but were simply responsible for applying the law as written to the cases that came before them.⁸⁴ Although modern advocates of the Legal Theory largely reject the idea that judges “find” the law and recognise the Supreme Court as a law- or policy-making institution, they maintain that legal processes, norms, and institutions play a key role in shaping Justices’ discussions and Court opinions.⁸⁵ Central to this argument is their perception of the Court’s role in the constitutional framework of government: in the language of Chief Justice John Marshall, “Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature.”⁸⁶ The Court is not a democratic institution yet it exists in a society governed by democratic principles including popular representation and majority rule. If the Court’s actions challenge either, it can legitimately do so only on the basis of protecting fundamental principles, most commonly those embedded in the federal or state constitutions. For Legal Theorists, then, the very legitimacy of the Court’s role within the American system of government, the foundation upon which its rulings rest, is the understanding that the Justices do not impose their own will but that of the sovereign people as enshrined in legislation or in the Constitution, for if “the sense in which the Constitution was accepted and ratified by the Nation ... be not the guide in expounding it, there can be no security for a consistent and stable [government], more than for a faithful exercise of its powers.”⁸⁷

Central to the Legal Theory, as might be expected from its underlying assumption of limited judicial discretion, is original intent and the plain meaning of the law or statute being interpreted. As such it shares some characteristics with the strict separationist theory of Establishment Clause jurisprudence.⁸⁸ It has also been employed by conservatives such as President Ronald Reagan and his Attorney General Edwin Meese in calls for “judicial restraint,” although it is not necessarily a conservative philosophy. “Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any

⁸³ White, G. Edward, *The American Judicial Tradition: Profiles of Leading American Judges* (New York and Oxford: Oxford University Press, Expanded Ed., 1988), p. 2. See also Ronald Dworkin who describes this approach as “a set of timeless rules stocked in some conceptual warehouse awaiting discovery by judges.” Dworkin, R., *Taking Rights Seriously* (London: Gerald Duckworth & Co. Ltd., 1977), p. 15.

⁸⁴ See *US v. Butler* 297 US 1, 62 (1936) (per Justice Roberts): “When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the Government has only one duty – to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question.”

⁸⁵ But see Dworkin: “It remains the judge’s duty, even in hard cases, to *discover* what the rights of the parties are, not to invent new rights retrospectively.” Dworkin, R., p. 18 (emphasis added).

⁸⁶ *Osborn v. Bank of the United States* 9 Wheaton 738, 866 (1824).

⁸⁷ James Madison quoted by Berger, R., *Government By Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, Massachusetts and London: Harvard University Press, 1977), p. 3.

⁸⁸ See discussion above.

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other,” wrote Robert Bork, one of the leading advocates of the Legal Model. “The judge must stick close to the text and the history, and their fair implications, and not construct new rights.”⁸⁹ Bork’s strict interpretation of the principle of original intent would hold any and all Court decisions going beyond the words and meaning of the constitutional provision as outside the judicial sphere and thus illegitimate. Under such reasoning, the right to privacy established in *Griswold v. Connecticut* and any case based upon it falls short of legitimacy, as does protection of freedom of speech beyond purely political speech and, even though Bork argues the result of *Brown v. Board of Education* can be defended as an application of the “no government discrimination” principle established by the Fourteenth Amendment, he criticises the Warren Court’s approach to the case as unwarranted judicial activism.⁹⁰ A similar position was taken by Raoul Berger in his 1977 study of the Supreme Court’s Fourteenth Amendment jurisprudence, *Government By Judiciary*. Berger criticised the Warren Court in particular for acting as a “continuing constitutional convention,” “read[ing] its libertarian convictions into the 14th Amendment,” and “reject[ing] the framers’ intention as irrelevant.”⁹¹ For Berger, the framers of the Fourteenth Amendment did not intend to incorporate the Bill of Rights, desegregate schools, or protect voting rights; no matter how politically or socially acceptable, without legislation the Court’s actions went beyond the boundary of its powers as outlined in the Constitution.

The problem with such a strict approach, as strict separationist advocates have discovered, is that the words of a constitutional provision or a statute may be unclear or deliberately vague. Berger’s sources, the legislative records of the 39th Congress, in his words “comparable to a news film of an event at the moment it was taking place and free from the possible distortion of accounts drawn from recollection or hearsay,” are unusual in their apparent clarity.⁹² The records of the Constitutional Convention regarding the Establishment Clause, for example, do not provide the kind of detail that would be necessary for a study similar to Berger’s.⁹³ Alternative approaches have been advocated by McNollgast and by Ronald Dworkin. Focussing primarily on statutory rather than constitutional interpretation, McNollgast established a process by which the purpose of the statute in question, as well as related statutes and the legislative history, can be taken into account by judges and Justices. Justices should use this information to determine whether the statute “reflects politically legitimate values or the pathologies of representative democracy.”⁹⁴ For McNollgast, legislative history can provide useful information

⁸⁹ Bork, R., “Neutral Principles and Some First Amendment Problems,” 47 *Indiana Law Review* 1 (1971), p. 8.

⁹⁰ Unlike other supporters of original intent, Bork is willing to accept the politically unattractive consequences of the approach he advocates. See Bork, R., “Neutral Principles ...”. *Griswold v. Connecticut* 381 US 479 (1965) (protecting the right of married couples to use contraception based on the concept of a right to privacy); *Brown v. Board of Education* 347 US 483 (1954) (holding school segregation unconstitutional).

⁹¹ Berger, R., p. 2, 3, 408.

⁹² Berger, R., p. 6.

⁹³ See discussion above.

⁹⁴ McNollgast, “Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation,” 57 *Law and Contemporary Problems* 3 (1994), pp. 4-5.

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about the intent of the provision that goes beyond its specific wording but without undermining the centrality of original intent.⁹⁵ Dworkin is critical of a strict approach to original intent that “yield[s] a narrow view of constitutional rights because it limits such rights to those recognised by a limited group of people at a fixed date of history.”⁹⁶ Instead, he asserts, Justices and scholars should distinguish between rules, or absolute limitations on behaviour, and principles, an indication of intent but without specific proscriptions on behaviour. Where principles embedded in a challenged statute or constitutional provision clash or are unclear Justices must use judgment as to which is the most important or what most closely represents the intent of the framers. Judgment, however, is not the discretion to overturn rules based on Justices’ preferences but a recognition that within a limited sphere Justices must balance provisions enacted at different times.⁹⁷ Dworkin’s work echoes Justice William Brennan’s assertion in *Abington School District v. Schempp*, the 1963 Bible-reading case, that, “A more fruitful enquiry ... is whether the practices here challenged threaten those consequences which the Framers deeply feared.”⁹⁸

Thus Legal Theory is not monolithic regarding the role of original intent and plain meaning. However, Berger, Bork, Dworkin, and McNollgast all agree that judges and Justices do not, nor should, have unlimited discretion in interpreting statutes and the Constitution. All are expected to follow, as far as is possible, the intent of those who wrote the challenged provisions even if there is disagreement as to how such “intent” is to be found and measured. The inherent problems with such an approach, as Dworkin appeared to acknowledge and Bork explicitly stated, is that original intent restricts legal interpretation to the ideas and intentions of people in a specific time facing particular circumstances. It makes adapting the Constitution in particular to new and unexpected social developments incredibly difficult. For supporters this is the price paid for legal stability. For opponents this is the fundamental weakness of original intent: the relative inability of the law to adapt quickly to changes in the society which it governs. For those who value adaptability over stability, as do, for example, strict neutrality advocates in the arena of Establishment Clause interpretation, strict adherence to original intent may do more damage to the principles embodied in a law than deviating from any perceived view of its framers. The danger here for Legal Theory is that rejecting the desirability of original intent undermines a major element of its argument and this potentially weakens the entire model.

⁹⁵ For example, in *Board of Education of the Westside Community School v. Mergens* 496 US 226 (1990), both Justice O’Connor for the majority and Justice Stevens in dissent looked to congressional hearings and debates over the Equal Access Act to determine the meaning of the key phrase, “noncurriculum related student group.” Understanding the meaning of this phrase was, for both O’Connor and Stevens, central to understanding congressional intent as to the scope of the Act. Both made extensive reference to the Act’s history in Congress in their respective opinions, even though interpreting what they found quite differently. See Chapter Four for discussion of the case.

⁹⁶ Dworkin, R., p. 134.

⁹⁷ “Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction.” Dworkin, R., p. 31. See generally pp. 25-38.

⁹⁸ *Abington School District v. Schempp* 374 US 203, 236 (1963) (Justice Brennan, concurring).

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Equally central to Legal Theory and its supporters' understanding of the role of the Supreme Court is precedent and the importance of *stare decisis*. Previous cases establish legal precedent which must then be followed to ensure a Court decision is both legitimate and consistent. Congruence with previously established legal rules and guidelines ensures the law remains predictable and understandable to all those whose actions it governs. Equally, the consistent application of legal principles is, according to Legal Theorists, evidence that it is the law which controls, not the policy preferences of judges. Even leading Attitudinalists Jeffrey Segal and Harold Spaeth acknowledge that *stare decisis* occasionally influences Court decisions: "... does precedent actually cause justices to reach decisions that they otherwise would not have made? Of course, ... in some cases the answer clearly appears to be yes."⁹⁹ While, however, Segal and Spaeth deny that such occasions occur at "systematic and substantively meaningful levels," Legal Theorists assert that precedent and *stare decisis* are key to understanding Court decisions.

Legal Theorists point first to the Court's own professions of the importance of precedent in its decisions. For example, in *Planned Parenthood v. Casey*, a 1992 decision which reaffirmed, in part, *Roe v. Wade*, the Court stated:

... only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court stated its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.¹⁰⁰

Central to the Court's ruling in *Casey* was its statement that, "After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed."¹⁰¹ In slightly less direct fashion, the Court's decision in *Abington School District v. Schempp* in 1963, striking down school-sponsored Bible reading activities, reinforced the precedent established the year before in *Engel v. Vitale* by so closely repeating its key points as to make the link undeniable.¹⁰² Equally important are instances where Justices who dissented in a case later reaffirm the principles that case established in subsequent cases. For example, Justice Potter Stewart objected to the creation of a right to privacy in *Griswold v. Connecticut* (1965) yet upheld it seven years later in *Eisenstadt v. Baird* (1972). Justice, later Chief Justice, William Rehnquist, dissented in jury exclusion cases in 1986 and 1991 yet concurred in such a decision in

⁹⁹ Segal, J., and H. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002), p. 295.

¹⁰⁰ *Planned Parenthood v. Casey* 505 US 833, 867 (1992).

¹⁰¹ *Planned Parenthood v. Casey* 505 US 833, 845-6 (1992).

¹⁰² See Chapter 3 for discussion of these cases. *Engel v. Vitale* 370 US 421 (1962) (striking down as unconstitutional a nondenominational prayer written by the school board); *Abington School District v. Schempp* 374 US 203 (1963) (striking down school-sponsored Bible reading).

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1992.¹⁰³ In the realm of Establishment Clause jurisprudence, Justice Anthony Kennedy's switch from supporting graduation prayers to striking them down on the grounds that his original opinion "looked quite wrong" is testament to the strength of the principles established in *Engel* and *Schempp* nearly three decades earlier.¹⁰⁴ Thus, argue Legal Theorists, there is significant evidence to show the substantial, continuing influence of precedent on Supreme Court decision making.

Some studies have attempted to quantify the influence of what Jack Knight and Lee Epstein called "the norm of *stare decisis*."¹⁰⁵ Focussing on the four centre Justices of the Warren Court, Justices Clark, Harlan, Stewart, and White, Saul Brenner and Marc Steir concluded that precedent was followed, on average, in 47% of key cases.¹⁰⁶ Donald Songer and Stefanie Lindquist, studying the decisions of the Warren and Burger Courts, concluded precedent influenced approximately 30% of cases.¹⁰⁷ Although these numbers are lower than Legal Theory would suggest they should be, they remain substantially higher than the results reported by Segal and Spaeth.¹⁰⁸ They also reflect the nature of the Supreme Court's role: cases come to the Court precisely *because* there is no clear, controlling precedent. As the Court frequently hears cases raising new legal issues related to new and changing social and political circumstances new precedent is created at least as often as existing precedent is followed. The very nature of the Court's role means it has no choice but to create new precedent in many circumstances. While statistics may not provide conclusive proof, Legal Theorists continue to assert *stare decisis* as an influence on the Court. If it was not, why would Justices continue to rely on it in opinions and make reference to prior cases in private conference discussions and why would attorneys continue to invoke it in briefs and oral argument? Such activities suggest a continued belief in precedent as a substantial influence in Supreme Court decision making. A judge, Ronald Dworkin argued, "will always try to connect the justification he provides for an original decision with decisions that other judges or officials have taken in the past." He or she does so because "institutional history is

¹⁰³ See *Georgia v. McCollum*: "I was in dissent in *Edmonson v. Leesville Concrete Co.* and continue to believe that case to have been wrongly decided. But so long as it remains the law, I believe it controls the disposition of this case ... I therefore join the opinion of the Court." 505 US 42, 52 (1992). The earlier cases were *Batson v. Kentucky* 476 US 79 (1986) and *Edmonson v. Leesville Concrete Co.* 500 US 614 (1991). *Griswold v. Connecticut* 381 US 479 (1965); *Eisenstadt v. Baird* 405 US 483 (1972).

¹⁰⁴ Memorandum from Justice Kennedy to Justice Blackmun, March 30, 1992. See also a memo from Kennedy to Rehnquist confirming the situation to him, also March 30, 1992. Blackmun Papers, Box 586, Folder 6. See Chapter 3 for discussion.

¹⁰⁵ Knight, J., and L. Epstein, "The Norm of *Stare Decisis*," *American Journal of Political Science*, Vol 40, No. 4 (November 1996).

¹⁰⁶ Brenner, S., and M. Steir, "Retesting Segal and Spaeth's *Stare Decisis* Model," *American Journal of Political Science*, Vol. 40, No. 4 (November 1996), p. 1043.

¹⁰⁷ Songer, D., and S. Lindquist, "Not the Whole Story: The Impact of Justices' Values on Supreme Court Decision Making," *American Journal of Political Science*, Vol. 40, No. 4 (November 1996). What should be noted about these and similar studies is that they start by challenging the coding and selection practices of Segal and Spaeth; the challenge is as much one of methodology as one based on final conclusions. Equally, neither Brenner and Steir's study, nor that of Songer and Lindquist, are strictly supportive of Legal Theory. While they support the influence of *stare decisis*, they do not put as much emphasis on it as strict Legal Theorists would do.

¹⁰⁸ Segal, J., and H. Spaeth, p. 298. See discussion below.

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part of the background that any plausible judgment about the rights of an individual must accommodate.”¹⁰⁹

Legal Theory, as its title suggests, puts legal norms and principles at the centre of the Court’s operations. As such it is an orthodox view of the Court’s activities, limiting the influence of the Justices and ignoring the role of social and political circumstances in case outcomes. It echoes the nineteenth century view of the law as a neutral body of principles separate from the influences of politics and personal interest, and regards judges as inherently constrained by the existing norms of original intent and *stare decisis*. Yet the Legal Model cannot fully explain how Justices make decisions in cases raising new legal issues where there is no precedent, little or no legislation, or where existing legislation is unclear. Neither can it explain how changing personnel on the Court can, over time, lead to different decisions in otherwise similar cases: if all Justices did was neutrally apply the law then such changes should make little difference. The Legal Model also underestimates the Court’s ability to use its opinions to inform and influence public opinion and the other branches of government. The Legal Model’s strength lies in the understanding it provides of the role of key legal principles and approaches in judicial decision making. But its focus is narrow and, as such, it explains only part of what the Supreme Court does. A more detailed understanding of the Court requires consideration of a far broader range of factors than those addressed by the Legal Model.

The Attitudinal Model

The most prominent advocates and defenders of the Attitudinal Model of judicial decision making are Jeffrey Segal and Harold Spaeth. Their joint studies of the Supreme Court, *The Supreme Court and the Attitudinal Model* (1993) and *The Supreme Court and the Attitudinal Model Revisited* (2002), provide arguably the most comprehensive account of the Attitudinal Model.¹¹⁰ Segal and Spaeth, and Attitudinalists generally, are puzzled about why “the fairytale of a discretionless judiciary survives” when “the legal model and its components serve only to rationalize the Court’s decisions and to cloak the reality of the Court’s decision-making process.”¹¹¹ The Attitudinal Model challenges “the popular conviction that the emanations from the Marble Palace alone safeguard the American way of life,” by arguing that Justices are influenced primarily by their policy preferences and desired outcomes in cases, and not by the neutral principles of law embodied in the Legal Theory.”¹¹² For Attitudinalists, Justices are policy makers, influenced by their preferred outcomes and placed in a position within the political system

¹⁰⁹ Dworkin, R., p. 113, 87.

¹¹⁰ Segal, J., and H. Spaeth, *The Supreme Court and the Attitudinal Model* (New York: Cambridge University Press, 1993) and *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002).

¹¹¹ Segal, J., and H. Spaeth, p. 8, 53.

¹¹² Segal, J., and H. Spaeth, p. 177.

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which allows that policymaking almost free reign. Failure to understand this is failure to understand the true nature of the Supreme Court.

Segal and Spaeth assert that five key factors provide the Court with almost unlimited policymaking potential. The first is fundamental law, the idea that the Constitution is imbued with fundamental principles which are enduring, stable, and permanent. Any statute or institution connected with such law through the Constitution is encompassed by the same reverence in which the fundamental law is held. Second is the distrust of governmental power that influenced the Founding Fathers. As a coordinate branch of government and as arbiter of the Constitution which limited governmental power, the Court stands for the principle of limited and separated government. The third factor is federalism and the division of power and responsibility that it entails, in conjunction with the Court's arrogation of power to itself to decide cases falling under this issue. Fourth, is the separation of powers which limits the direct control that can be exerted over the Court by the other branches of government. This allows the Court to be, or claim to be, above and separate from politics. Finally, judicial review, upon which much of the modern Court's power and influence is based, provides the potential for Court involvement in almost any issue.¹¹³ Thus, within the Attitudinal Model's conception, the place of the Court in the political system is far different, and much less constrained, than the Court of the Legal Model. In addition, several characteristics of the Court itself provide greater latitude for decision making than traditionally accepted. The Court's control over its own docket allows Justices to choose those cases and issues with which they wish to deal and ignore those they wish to avoid. In the 1980s, for example, the Court accepted an unusually large number of Religion Clause cases leading some to wonder about the Justices' motives.¹¹⁴ The lack of direct electoral accountability removes one pressure that may often constrain legislators in their policy choices and, in the Attitudinalist view, the difficulty of overturning a Court ruling, especially a constitutional one, ensures the Court is usually immune from political accountability.¹¹⁵ In addition, the nature of the selection and appointment process of Supreme Court Justices means that Justices' preferences are rarely out of line with that of the dominant political coalition which further weakens the likelihood of opposition and strengthens the Justices' policymaking position.¹¹⁶ For Attitudinalists, the Court is not the weak, deferential, restrained institution of the Legal Theory, but a powerful, well-placed body whose members have the opportunity to read their personal policy preferences into law with little opposition.

The Attitudinal Model, as defined by Segal and Spaeth, "represents a melding together of key concepts from legal realism, political science, psychology, and economics. This model holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological

¹¹³ Segal, J., and H. Spaeth, pp. 12-27.

¹¹⁴ See Chapter Two for further discussion.

¹¹⁵ But see the Rational Choice Model, discussed below.

¹¹⁶ Segal, J., and H. Spaeth, pp. 92-6.

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attitudes and values of the Justices.”¹¹⁷ Far more important for understanding the Court’s actions and decisions than general legal principles are the philosophies of the Justices on the Court. In taking such a position, supporters need to provide evidence not only that their approach holds true but that the claims of the Legal Model cannot be supported. Addressing what they regard as the central principle of the Legal Theory, the role of precedent and *stare decisis*, Segal and Spaeth report only 12% of votes cast on the Vinson, Warren, Burger, and Rehnquist Courts reflect precedential voting.¹¹⁸ In addition, they found that dissenters from landmark liberal precedents later voted to support that precedent in only 14% of votes cast, while dissenters from landmark conservative precedents switched votes only 2.3% of the time. In such instances, they argue, precedent clearly had little or no effect on the Justices’ decision making in later cases.¹¹⁹ Looking specifically at the early Rehnquist Court, only Justices John Paul Stevens and Lewis Powell could be considered moderate in their voting patterns while all other Justices voted predominantly for their preferences. Segal and Spaeth thus concluded: “The Justices are rarely influenced by *stare decisis* ... The levels of precedential behavior that we find in the US Supreme Court are simply not consistent with the sort of arguments we find ... [by the] legalists that we have discussed.”¹²⁰ Addressing the second major principle of Legal Theory, Segal and Spaeth note that for every statement of principle like that in *Casey* there is a *Lochner v. New York*, *Griswold v. Connecticut*, or *Roe v. Wade* which applies no clear precedent and stretches to the limit, if it does not overstep, the boundaries of the respective constitutional provisions.¹²¹ The difficulties inherent in finding the intent of the original drafters of a given provision or seeking the “plain meaning” of words and phrases left deliberately vague make such phrases little more than rhetorical cover for policy-based decisions. Thus neither precedent nor original intent operate as a strict limit on the Justices’ decisions unless they choose to make them so. As such, assert Segal and Spaeth, the key principles underlying the Legal Theory cannot be supported and, by implication, neither can the theory itself.

The Attitudinal criticism of Legal Theory potentially provides a theoretical underpinning to arguments criticising the Burger Court’s school aid jurisprudence. Critics accuse the Court of a

¹¹⁷ Segal, J., and H. Spaeth, p. 86.

¹¹⁸ But see studies above at n.106 and n.107 which are critical of their methodology and interpretations of data. While Segal and Spaeth’s study is a benchmark for other scholars there is room for criticism and refinement of their methods. See also Segal, J. and H. Spaeth, “Norms, Dragons, and *Stare Decisis*,” *American Journal of Political Science*, Vol. 40, No.4 (November 1996) for a rebuttal of some of these criticisms.

¹¹⁹ For example, see Justice Marshall’s refusal to use *Mueller v. Allen* as precedent in *Witters v. Washington Department of Services for the Blind* because he felt it had been wrongly decided. *Mueller v. Allen* 463 US 388 (1983) (holding constitutional tax deductions for the cost of tuition, textbooks, and transport for all parents); *Witters v. Washington Department of Services for the Blind* 474 US 481 (1986) (upholding payment of funds to a blind student undertaking a Bible studies degree).

¹²⁰ Segal, J., and H. Spaeth, pp. 298-301.

¹²¹ Segal, J., and H. Spaeth, p. 61. *Lochner v. New York* 198 US 45 (1905) (holding a statute limiting the hours of work for bakers unconstitutional as a violation of the liberty of contract); *Griswold v. Connecticut* 381 US 479 (1965); *Roe v. Wade* 410 US 113 (1973) (limiting states’ ability to interfere with a woman’s choice to terminate a pregnancy).

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lack of coherence and consistency in such opinions, failing to provide either a clear test for constitutionality or clear reasoning for the results reached in particular cases.¹²² But the perception of the need for consistency and legal tests comes from seeing the Court in the role presented by the Legal Model: the Court is criticised because it appears not to abide by precedent and fails to clearly state the principles on which the opinions are based. But, according to Attitudinalists, the Court does not act according to such principles: criticism of the Burger Court's school aid jurisprudence is actually criticism of the Court for not acting as it should under the Legal Model, which, from an Attitudinalist perspective, is a misleading view of the Court. Rejecting the Legal Model frees the Burger Court's critics to challenge the Court's rulings on more honest grounds: that they do not like the results reached in the cases. Alternatively, it makes standard criticisms of school aid cases redundant: consistency is not a value recognised as important under the Attitudinal Model. In this conception, school aid jurisprudence is simply the result of a series of opinions resulting from the Justices voting for their preferred outcomes in each case and there is no procedural or structural criticism to make. In either approach, the Attitudinal Model presents a very different view of the Burger Court and its critics than traditional legal scholarship allows.

As its title suggests, the Attitudinal Model argues that the most important factor in seeking to explain and understand the Court's decisions is the attitudes or preferences of the Justices. Attitudes are defined as, "a relatively enduring interrelated set of beliefs about an object [parties to the case] or situation [the dominant legal issue in a case]."¹²³ Combined with Harold Spaeth and David Peterson's model which held that cases involving similar parties and legal issues can be correlated to form "issue areas," understanding Court rulings requires only knowledge of the Justices and their preferences and the issue area involved in a given case.¹²⁴ Applying this approach to cases between 1970 and 1976, Spaeth was able to predict the outcome in 88% of cases and 85% of the votes cast in those cases.¹²⁵ Applied to the Court's Establishment Clause jurisprudence the model is again most successful in explaining votes in school aid cases. Justices Brennan, Douglas, Marshall, and Stevens never voted in favour of a statute that would potentially provide government aid to the religious mission of a school, effectively supporting a strict separationist position. Likewise, Justices Kennedy, Scalia, and Thomas, and Chief Justice Rehnquist never voted to restrict such aid, taking a largely accommodationist position.¹²⁶ Factual

¹²² See Chapter Two for discussion of the Burger Court's school aid jurisprudence and its critics.

¹²³ Segal, J., and H. Spaeth, p. 91. Although attitudes are considered to be relatively stable, recent research suggests that some Justices' attitudes can and do change over time. See, in particular, Epstein, L., A. Martin, K. Quinn, and J. Segal, "Ideological Drift Among Supreme Court Justices: Who, When, and How Important?" 101 *Northwestern University Law Review* 1483 (2007).

¹²⁴ Spaeth, H., and D. Peterson, "The Analysis and Interpretation of Dimensionality: The Case of Civil Liberties Decision Making," *Midwest Journal of Political Science*, Vol. 15, No. 3 (August 1971), pp. 415-441.

¹²⁵ Segal, J. and H. Spaeth, p. 324. Also Segal, J., and H. Spaeth, *Attitudinal Model*, pp. 208-60.

¹²⁶ Justice Douglas voted with the majority in *Everson* but later explicitly repudiated his position. Justice Brennan voted in favour of the loan of secular textbooks to religious school students but this had already been upheld on Fourteenth Amendment grounds (see *Cochran v. Louisiana State Board of Education* 281 US 370 (1930)). Justice Kennedy's vote in *Lee* may seem

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differences in the cases appeared to have made little difference to the voting positions of these Justices, suggesting their solicitude for certain outcomes played a significant part in determining their vote.¹²⁷

Although Segal and Spaeth's study focuses primarily on the influence of Justices' attitudes and preferences on decisions in cases, Attitudinalists see such influence throughout the Court's activities. Why, they ask, is a president's nominee to the Court so closely scrutinised for previously expressed views on key issues? If all a Justice was expected to do was follow existing legal principles, as the Legal Model suggests, then all that should be required is a strong legal background. Focus on the nominee's views, however, suggests some degree of recognition that Justices can and do vote for their preferred outcomes.¹²⁸ Once on the Court, Justices' decisions as to which cases to hear and which to deny are also influenced by personal preferences, according to Attitudinalists. Although Attitudinalists recognise that factors such as congressional control of the Court's jurisdiction and regulations regarding standing to sue also influence the Court's decisions on granting *certiorari*, the Court's control over its own docket and ability to interpret legislation allows Justices' preferences a high degree of influence, they assert. Justices are more likely to vote to grant *certiorari* if they seek to reverse the decision of the lower court.¹²⁹ Since decisions on the merits are heavily influenced by policy preferences, then decisions on *certiorari* in these instances must also be influenced in a similar manner. Segal and Spaeth have also argued that policy preferences play a role in opinion assignment. Although this is largely constrained by the need for operational efficiency on the Court, they found that particularly on the Burger and Rehnquist Courts Justices assigned to write major opinions were frequently those ideologically closest to the assigner.¹³⁰ The key consequence of such a situation is that Justices in a majority

anomalous under the Attitudinal Model suggesting a potential weakness in the theory. See discussion below. See Chapter Two for further discussion of school aid cases.

¹²⁷ This situation also suggests a potential connection between the legal theories related to the Establishment Clause and the political science theories addressed to the Court. However, given the problems with the legal theories discussed above, this link may suggest similar problems with regard to the Attitudinal Model. See discussion of the Rational Choice Model below.

¹²⁸ See Moraski, B., and C. Shipman, "The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices," 43 *American Journal of Political Science* 1069 (1999); Songer, D., "The Relevance of Policy Values for the Confirmation of Supreme Court Nominees," 13 *Law and Society Review* 927 (1979). See also Segal, J., and H. Spaeth, pp. 178-222.

¹²⁹ See especially Boucher, Jr., R., and J. Segal, "Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court," *The Journal of Politics*, Vol. 57, No. 3 (August 1995).

¹³⁰ Segal, J., and H. Spaeth, pp. 372-8. Segal and Spaeth's method of data analysis involved comparing the number of opinions written by a Justice with the number he or she would have written if exact equality had been achieved: a negative score indicated underassignment, a positive score overassignment. On the Burger Court the liberals, Justices Douglas, Brennan, Marshall, Stevens, and Blackmun were all underassigned, while all conservatives except Harlan (who served only two years) were overassigned, Justices Rehnquist, Stewart, and Powell receiving the highest scores. On the Rehnquist Court (of which the first five terms are considered), Justices White and O'Connor and Rehnquist himself received the highest scores (Brennan's score was also comparable although the authors attribute this to his self-assignment as senior associate Justice). Blackmun and Souter were both underassigned, as was Kennedy, although he served less than the five terms considered by the authors.

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coalition have far more opportunity to shape not only the decisions made but the structure of opinions. Again, this is not decision making based on fundamental legal principles but personal preferences, a further challenge to Legal Theory.

Attitudinal Theory thus rejects the Legal Model's view of the Court as an institution limited by neutral principles of law and process in favour of an institution active in shaping policy and operating under few legal or institutional constraints. Claims of *stare decisis* or original intent are merely distractions, unsupported by evidence, from the reality of policy-oriented Justices voting for their preferences. In changing perceptions of the Court towards that of a more dynamic institution, the Attitudinal Model more closely represents the modern Supreme Court than the image presented by the Legal Model. However, in focussing so heavily on Justices' preferences, the Attitudinal Model is as narrow as the Legal Model, failing to take into account influences beyond those internal to the Court. Segal and Spaeth's evidence for the Model seems compelling but their methodology and classification of data has been challenged by those whose results have led to different conclusions.¹³¹ Equally, the Court's position in the political system suggests that the legislative and executive branches have *some* role to play in influencing and shaping the Court and that this must at least be considered. Attitudinalists' rejection of all influences other than Justices' preferences goes too far for some and overlooks other factors considered at least as important by others. Such criticisms are made by those who expound the Rational Choice Theory.

Rational Choice Theory

Like Attitudinalists, Rational Choice advocates accept that judges and Supreme Court Justices will, when given the opportunity, vote for their preferred policy outcomes. Unlike Attitudinalists, however, supporters of a Rational Choice approach argue that judges rarely have an unfettered opportunity to vote in such a way. Institutional constraints, some internal to the Court, others external, operate to limit the options available to the Justices. As Walter Murphy commented, "the policy-oriented Justice in this model acts much like the rational man of economic theory. He has only a limited supply of such resources as time, energy, staff, prestige, reputation, and good will, and he must compute in terms of costs and revenues whether a particular choice is worth the price which is required to attain it."¹³² Justices may seek to achieve their preferred outcomes in cases but, as rational actors, are aware of the limits of their resources and the limitations on their power. Taking these into consideration Justices will seek the best possible outcome, that closest to their preferences, that can be achieved in a given situation. As such, under Rational Choice approaches, factors beyond policy preferences that may influence Court behaviour become of increased significance. Rational Choice studies can be divided into two types: those which focus on internal restraints on Justices' behaviour, such as the need for a majority in order to obtain a binding

¹³¹ See discussion of Rational Choice Theory below and references at n. 106 and n. 107 above.

¹³² Murphy, W., *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964) p. 35-6.

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decision, and those which consider external limits on the Court, including the President, Congress, and public opinion.

“Because opinions of the Court require the support of a majority of the justices and the content of final opinions have legal and political import, a rational justice writing the Court’s opinion should be influenced by the collaborative environment in which he or she works.”¹³³ For Rational Choice theorists interested in the internal dynamics of the Court, the interplay between the Justices in creating a majority opinion is of central importance. The Attitudinal Model assumes that since all Justices will vote for their preferences, a majority opinion results simply from a tally of votes. Rational Choice theory, however, asserts that the opinions are potentially more important than the final vote since it is the opinion which shapes the law and establishes the controlling legal principles. As such, Justices have an incentive to seek to influence the content of opinions as well as the final result. The consequence is that Justices may be required to bargain, compromise, or accommodate their own preferences to those of others in order to achieve a majority opinion. “Thus,” concluded Walter Murphy, “how to bargain wisely – not necessarily sharply – is a prime consideration for a Justice who is anxious to see his policy adopted by the Court.”¹³⁴ For supporters of an internal Rational Choice approach, one of the key factors limiting a Justice’s ability to impose his personal preferences on an opinion is the views and attitudes of the other Justices on the Court.

A 2000 study of the Burger Court by Forrest Maltzman, James Spriggs, and Paul Wahlbeck presented statistical evidence of the frequency of bargaining among the Justices. Most importantly, their study revealed that most bargaining occurred among Justices in the nominal majority after conference: Justices clearly in the minority had little incentive to seek to influence the Court’s opinion since their position was somewhat removed from that of the majority. But, for Justices in the majority, the opportunity to influence the opinion was an opportunity to shape the law in a way they perceived to be more favourable. Thus, in 42.1% of cases, a Justice in the majority circulated a concurrence, potentially seeking to encourage changes in the majority opinion. Less dramatically, in 23.7% of cases such Justices sought to bargain with the author of the majority opinion, primarily through memoranda suggesting changes.¹³⁵ In politically salient cases instances of such bargaining increased to 57.4% over 20.6% in non-salient cases, leading the

¹³³ Maltzman, F., J. Spriggs II, and P. Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (Cambridge and New York: Cambridge University Press, 2000), p. 123 (hereafter Maltzman, Spriggs, and Wahlbeck).

¹³⁴ Murphy, W., p. 57.

¹³⁵ Maltzman, Spriggs, and Wahlbeck, p. 68, 81. In comparison, attempts to bargain with the author of the majority opinion by any Justice, whether in the majority or minority, occurred in 23.4% of cases (see p. 61). These may not be the only options available to the Justices to influence their colleagues. In one of the first studies to take a Rational Choice approach, Walter Murphy suggested a range of additional methods a Justice might employ. These included convincing colleagues his opinion was the right one, threatening sanctions such as a harsh dissent, or seeking to increase his personal regard among colleagues who might then be more inclined to consider his position. Murphy, W., pp. 37-90.

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authors to comment: "The cases that attract the most attention from those outside of the Court also attract the most attention from the justices themselves."¹³⁶ Regardless of how frequently such changes were adopted by the author of the majority opinion, the willingness of Justices to seek such changes indicates that while opinion authors have some ability to shape the content of the Court's opinion, that ability is not unlimited.¹³⁷ In cases with potentially wide-ranging consequences, that ability is further limited by the interests of a Justice's colleagues. The Court's own rules are thus a limitation on the ability of Justices to simply write their preferences into law, as Attitudinalists suggest they do: the need for a majority of five to create binding precedent requires Justices to take into consideration the views of colleagues and, in some circumstances, to modify the opinion accordingly.¹³⁸

As might be expected, there is significant evidence of bargaining on the Court in Establishment Clause cases, being easily classed as "politically salient" cases given the political interest in them and the potential consequences of the rulings. Such bargaining includes Justices noting they will wait for additional opinions to be written before deciding whether to join the majority, perhaps hoping to secure some change favourable to them, to requests for specific changes to be made.¹³⁹ Two examples illustrate the importance of such actions. In *Witters v. Washington Department of Services for the Blind*, Justice Marshall wrote for a unanimous Court upholding the provision of state financial assistance to a blind student pursuing a Bible studies degree.¹⁴⁰ Yet the unanimity hid deep disagreements. During opinion writing Marshall had rejected a suggestion from Justice Powell that an earlier case, *Mueller v. Allen*, would provide a stronger precedent for his opinion than the approach he was taking because he believed the earlier case had been wrongly decided. The result was that although all nine Justices joined Marshall's opinion, five Justices filed three separate concurrences all upholding the earlier precedent and thus, in part, undermining the

¹³⁶ Maltzman, Spriggs, and Wahlbeck, p. 83, 89. The authors, however, do not define "salience," noting only that "the concept of salience is somewhat ambiguous." (p. 37). The closest they come is to suggest that salience relates to the importance of a case. However, this is clearly a subjective definition that leaves these figures open to challenge. If they are accepted, however, Attitudinalists and some Rational Choice advocates might suggest they reflect the fact that in such cases the stakes involved are much higher and the significance of gaining a preferred outcome much increased. It might also, however, be seen as recognition that politically difficult cases have potentially difficult political consequences and thus require care when shaping an opinion. This can be seen in the Justices' approaches to the school prayer cases, especially in *Schempp* and *Wallace v. Jaffree*. See Chapter Three for further discussion.

¹³⁷ Maltzman, Spriggs, and Wahlbeck, p. 61.

¹³⁸ One extreme example of this was *Abbate v. US* 359 US 187 (1959) in which Justice Brennan wrote the opinion for the Court and a separate concurrence for himself. See Murphy, W., p. 24.

¹³⁹ For the former see Justices Blackmun and Brennan in *Lemon v. Kurtzman* (Justice Brennan Papers, Box I:238, Folder 8; Justice Marshall Papers, Box 69, Folder 1), Justice Marshall in *Widmar v. Vincent* (Justice Blackmun Papers, Box 342, Folder 6), and Justices Blackmun and Brennan in *Board of Education of the Westside Community Schools v. Mergens* (Justice Blackmun Papers, Box 549, Folder 8). For the latter see Justice Douglas in *Engel v. Vitale* (Justice Douglas Papers, Box 1276), Justice Harlan in *Lemon v. Kurtzman* (Justice Brennan Papers, Box I:238, Folder 8), and Justice O'Connor in *Widmar v. Vincent* (Justice Blackmun Papers, Box 342, Folder 6).

¹⁴⁰ *Witters v. Washington Department of Service for the Blind* 474 US 481 (1986).

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majority opinion.¹⁴¹ Justice Stevens faced a more difficult task in *Wallace v. Jaffree* when striking down Alabama's moment of silence statute. In order to gain a majority, Stevens needed to attract the support of either Powell or O'Connor, yet the issues dividing them made it likely that the support of one would mean the loss of the other.¹⁴² With some careful drafting, Stevens secured concurrences from both, securing his majority and, in fact, gaining additional support. Both instances illustrate the importance of compromise among the Justices. Stevens' willingness to do so ensured a majority for his opinion and a clear statement of the grounds on which the majority reached its opinion. Marshall's unwillingness to compromise, while not affecting the outcome in *Witters*, resulted in a weakened majority opinion and confusion over the status of *Mueller*.

In a significant departure from the Attitudinal Model, internal Rational Choice theory allows for the possibility that legal norms and principles may govern or influence Justices' decisions and shape opinions. They do so not, as the Legal Model suggests, because there is something intrinsically worthy about legal principles, but because such principles may offer advantageous outcomes. Louis Fisher, in his 1988 study of the interaction between the Supreme Court and the other branches of government, argued that the Court's "gatekeeping rules," or threshold requirements, did more than limit access by litigants: the Court employed them to limit its power and shield itself from cases that might threaten the institution's independence or effectiveness.¹⁴³ Adverseness, advisory opinions, declaratory judgements, mootness, ripeness, and standing issues allow the Court to protect its institutional integrity by avoiding potentially damaging cases. "Judges invoke access rules," wrote Fisher, "to promote the adversary system, preserve public support, avoid conflicts with other branches of government, and provide flexibility of action for the judiciary."¹⁴⁴ Such considerations are given little attention by either the Legal or Attitudinal Models. John Ferejohn and Barry Weingast further argued that judicial preferences might arise from what they called "procedurally induced values." Rather than seeking preferred policy outcomes, Justices potentially seek opinions which apply a particular method of interpretation.¹⁴⁵ Justices might employ the principle of *stare decisis*, for example, not as a cover for preferential decision making or because they are obliged to do so, but because they believe it is the best

¹⁴¹ See Justice Marshall Papers, Box 348, Folder 8. See discussion in Chapter Two.

¹⁴² See Chapter Three.

¹⁴³ Fisher, L., *Constitutional Dialogues: Interpretation as Political Process* (New Jersey: Princeton University Press, 1988), p. 6, 85.

¹⁴⁴ Fisher, L., p. 85. See generally pp. 85-113. Fisher's argument is that the Court uses these tactics to avoid cases it does not wish to hear or which might result in congressional retaliation. As such, the desired outcome is avoidance of conflict with other branches of government or maintenance of the Court's prestige by avoiding unpopular decisions and issues.

¹⁴⁵ Ferejohn, J., and B. Weingast, "A Positive Theory of Statutory Interpretation," 12 *International Review of Law and Economics* 263, 265 (1992). Ferejohn and Weingast are particularly interested in the influence of legislative intent on Justices' choices. However, the basic principle they expound can be applied more broadly to other legal principles such as original intent and *stare decisis*. See also Murphy, W., pp. 43-7.

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principle for the Court to follow.¹⁴⁶ Rational Choice Theory thus restores significance to the legal norms and principles that the Attitudinal Model rejects and considers unimportant. Rational Choice also allows for the possibility that legal principles are simply part of the way in which Justices think about cases and controversies. As Justice Felix Frankfurter wrote in 1954:

[A Justice] brings his whole experience, his training, his outlook, his social, intellectual and moral environment with him when he takes his seat on the Supreme Bench. But a judge worth his salt is in the grip of his function. The intellectual habits of self-discipline which govern his mind are as much a part of him as the influence of the interest he may have represented at the bar, often much more so.¹⁴⁷

Rational Choice Theory thus adopts some key elements of Legal Theory, rather than dismissing them entirely, but places them within a broader institutional context: they are important but not to the exclusion of other influences. Understanding the personalities of the Justices and the internal workings of the Court is equally important, if not more so, for a full understanding of Court decisions and the Court as an institution. Internal Rational Choice Theory thus considers a far wider range of influences on Justices than either the Legal or Attitudinal Models allow. As such it can be argued to more accurately reflect the reality of life on the Court.

However, internal factors are only one potential limitation on the Court. A second branch of Rational Choice Theory looks beyond the Court to argue that the political and legal framework within which the Court operates also imposes restrictions on the Court's activities. The work of Walter Murphy and Louis Fisher is central to this approach. Both argued that the Court's decisions are shaped by reactions to them, and the reactions to them that the Justices expect, from Congress, the President, and public opinion. However, whereas Murphy largely portrayed these factors as dangers or threats to the Court that must be accommodated to avoid negative consequences, Fisher saw the relationship as more interdependent.¹⁴⁸ Fisher's portrayal of constitutional law as a "constant, creative interplay between the judiciary and the political system" overcomes Murphy's concern that compromise between the branches of government undermines the Framers' desire to keep the Court independent of political control and influence by politicians

¹⁴⁶ This has links to the idea that the Court is limited by public opinion and public perception of the Court's legitimacy which, at times, requires explicit use of legal principles. See discussion below.

¹⁴⁷ Justice F. Frankfurter, "Some Observations on the Nature of the Judicial Process of Supreme Court Litigation," 98 *Proceedings of the American Philosophical Society* 233, 238 (1954) quoted in Fisher, L., p. 179.

¹⁴⁸ Compare Murphy ("... even a judge who had little respect for technical law court rules would find it prudent to assume such respect before some of the popular bureaucratic, or political checks were applied against his tribunal." (p. 31)) with Fisher ("Constitutional law is a process that operates both inside and outside the judicial arena, challenging the judgment and conscience of all three political branches at the national level, the state governments, and the public at large." (p. 8)).

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or public opinion.¹⁴⁹ Thus Rational Choice Theory is not monolithic with regard to the significance or consequences of the influences it discusses. Where Murphy, Fisher, and others agree, however, is that a genuine understanding of the Supreme Court and its opinions requires considering the political system far more broadly than the Legal or Attitudinal Models do.

Segal and Spaeth criticised the Rational Choice approach for too easily accepting that the Court will defer to real or perceived congressional preferences.¹⁵⁰ Yet as the Court itself recognised in *US v. Nixon*, “In the performance of assigned constitutional duties each branch of Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.”¹⁵¹ Under the terms of the Constitution, the legislative and executive branches have some responsibility for interpreting the Constitution when enacting and administering statutory law. Laws must comport with the Constitution and, since not all legislation is challenged in the courts, legislatures, governors, and presidents inherit the role of constitutional interpreters. Rational Choice Theory seeks to explain how the relationship between the Court and the other branches of government operates and how and in what ways it has an impact on Court decisions and decision making. For some Rational Choice supporters the relationship is an adversarial one: Congress threatens to curb the Court’s power or seeks to do so. At the constitutional level, Congress has two main ways to challenge the Court’s power. Constitutional amendment to overturn the Court is a rare event and difficult to achieve, as supporters of a school prayer amendment or an anti-abortion amendment will attest. However, it remains a potential weapon with which Congress can threaten the Court. More rare but available is congressional action to withdraw the Court’s jurisdiction, a power also threatened over the issues of school prayer and abortion, among others.¹⁵² At the statutory level, and therefore more common, is the power of statutory reversal, re-enacting legislation after a Court decision to alter or overturn the Court’s interpretation. Rational Choice Theory asserts that Justices are aware of these dangers and will take them into consideration when deciding cases and writing opinions. In an equilibrium analysis, as outlined by Ferejohn and Weingast, among others, Justices will choose a position that is closest to their preferred policy outcomes without risking action by Congress or the President.¹⁵³ Thus under this conception of Rational Choice Theory the Justices will always

¹⁴⁹ Fisher, L., p. 4; Murphy, W., pp. 186-7. See also Dahl, R., “Decision Making in a Democracy: The Supreme Court as a National Policy Maker,” 6 *Journal of Public Law* 279, 293 (1957).

¹⁵⁰ See, in particular, Segal, J., and H. Spaeth, pp. 103-112.

¹⁵¹ *US v. Nixon* 418 US 683, 703 (1974).

¹⁵² Theoretically, Congress also has the power to change the number of Justices on the Court. However, the failure of President Franklin Roosevelt’s “court packing” plan makes this an unlikely option.

¹⁵³ Ferejohn, J., and B. Weingast, “A Positive Theory of Statutory Interpretation.” See also Segal, J., and H. Spaeth, pp. 326-40. Robert Dahl conceived the situation in a slightly different manner, arguing that the Court would be least likely to successfully oppose a current political majority but might be able to take action to overturn that majority’s actions at some future date (see Dahl, R., “Decision Making in a Democracy ...”). Against a strong, determined, and persistent political majority the Court would be largely defenceless, holding power only against

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factor in Congress' perceived position on the challenged issue before the Court when making decisions and crafting opinions. They do so because they will not risk the Court's prestige or position by forcing congressional retaliation. Understanding the Court's jurisprudence, from this perspective, requires only knowledge of the Justices' preferences and Congress' position since the result in any given case will fall between the two.¹⁵⁴

Considering these approaches it is easy to understand Segal and Spaeth's criticism. Dahl and especially Ferejohn and Weingast suggest that the possibility of congressional or presidential retaliation is sufficient to prevent the Court taking certain actions. By implication they argue that the Court will almost never oppose a strong Congress. Yet, as *Brown v. Board of Education*, *Engel v. Vitale*, or *Roe v. Wade* attest, there are instances when the possibility of such retaliation has not restricted the Court's actions. These can either be considered anomalies, instances in which the Justices felt so strongly about an issue they believed it important to take action regardless of any potential reaction, or an alternative view of inter-branch governmental relations needs to be considered.¹⁵⁵ Louis Fisher's important study, *Constitutional Dialogues*, contributed an alternative way of viewing Court-Congress relations. For Fisher, the relationship was less a directly adversarial one than one built on an understanding of mutual responsibility: "Under the doctrine of "coordinate construction," the President and members of Congress have both the authority and the competence to engage in constitutional interpretation, not only before the courts decide but afterwards as well."¹⁵⁶ Fisher traced a history of cooperation between the main branches of the federal government to suggest that such behaviour was the norm. Congressional action to allow the Court to review certain cases, he argued, suggested an understanding of the Court's role in constitutional and statutory interpretation. In response, Court opinions explicitly inviting congressional action to modify or overturn a ruling suggested the understanding was reciprocated.¹⁵⁷ In addition, "resolving conflicts between constitutional values involves all branches of government," argued Fisher.¹⁵⁸ Constitutional principles are so important that all branches should be considered participants in the discussion.¹⁵⁹ Fisher also highlighted two types

majorities considered "dead," "transient," "fragile," or "weakly united" on a policy of lesser importance (Dahl, R., pp. 286-291. See also Murphy, W., pp. 123-4).

¹⁵⁴ This of course assumes that Congress' position on a given issue can be accurately perceived. Given the frequency of debate and disagreement in Congress this is not as simple as Ferejohn and Weingast and others suggest. The imperfect nature of this knowledge outside the realm of theory is a weakness in this model of Rational Choice.

¹⁵⁵ This is not to say that *actual* congressional reaction may not have an impact on the Court. Chief Justice Marshall and the 1802 Judiciary Act, Chief Justice Hughes and the New Deal Court, and certain actions by the Court in response to public reaction to *Engel* are all such instances. However, they are particular examples, not evidence of the consistent type of action suggested by Dahl and others.

¹⁵⁶ Fisher, L., p. 231.

¹⁵⁷ Fisher uses examples of tax issues in the 1940s, insurance cases in the same decade, and fairness in broadcasting standards in the 1980s. See pp. 247-251.

¹⁵⁸ Fisher, L., p. 255.

¹⁵⁹ A case can be made for the applicability of this to Equal Access cases which, on the surface, appeared to present a conflict between freedom of speech and the Establishment Clause (see Chapter Four). The Court's decision in *Widmar v. Vincent* 454 US 263 (1981) (allowing a

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of action taken by the Court which allowed Congress room for response. First, by choosing statutory interpretation over constitutional interpretation, the Court "enters into a dialogue with the other branches [of government] concerning the intent of prior statutes." Second, with reference to the exclusionary rule, by treating it as a rule of evidence rather than a solely constitutional question, the Court again allowed Congress a greater role in shaping the rule.¹⁶⁰ Fisher presented a far different picture of the rational choices made by Justices than that of Dahl or Ferejohn and Weingast. For Fisher, the rational choice is the understanding that the branches of government need to work together to solve legal and constitutional disputes. Conflict may still arise but such conflict is the exception and not the rule. And, in many instances where conflict does occur, one branch accepts that another will respond; this is the normal process of government, not an attack on the other's authority. "It is this process of give and take and mutual respect," Fisher argued, "that permits the unelected Court to function in a democratic society. An open dialogue between Congress and the courts is a more fruitful avenue for constitutional interpretation than simply believing that the judiciary possesses certain superior skills."¹⁶¹

The Court's school aid cases can be considered in this context. What critics have portrayed as Court deference to the will of legislatures can, from a Rational Choice perspective, be viewed as a tacit agreement between the legislative and judicial branches that, in the absence of a clear constitutional command, cooperation was required to find a workable definition. Thus the series of Court cases between *Lemon v. Kurtzman* in 1971 and *Aguilar v. Felton* and *Grand Rapids School District v. Ball* in 1985 did not result from legislative attempts to avoid restrictive Court decisions, as is often argued, but were legislatures working out the implications of Court decisions.¹⁶² Likewise, the Court's decision to hear so many cases was not the result of non-compliance and the resultant need to bring legislatures "in to line" but evidence of Court participation in an ongoing debate as to the application of Establishment Clause commands to the issue of government funding programmes and religious schools. Such a reading is particularly apt when it is considered that the balance of the Court during this period was held by the centre Justices: Blackmun, Powell, and Stewart. If the separationist bloc of Black, Marshall, Brennan, Stevens, and Douglas, and the accommodationist bloc of Justices Rehnquist, White, O'Connor, and Chief Justice Burger can be considered "preferentialist," to borrow Segal and Spaeth's phrase, the centre bloc appear far closer to the model Justice of Rational Choice Theory.¹⁶³ The Legal Model has to be rejected in order to view judicial-legislative cooperation in this manner as

religious student group to use university facilities on the same terms as secular groups) was considered by Congress during discussions regarding the Equal Access Act. In turn, the Court reviewed congressional testimony when interpreting the Act in *Board of Education of the Westside Community Schools v. Mergens* 496 US 226 (1990).

¹⁶⁰ Fisher, L., pp. 260-7.

¹⁶¹ Fisher, L., p. 273.

¹⁶² See Chapter Two for further discussion of these cases and development of this argument.

¹⁶³ See Chapter Two. Equally, the Court's willingness to accept a broad reading of the Equal Access Act in *Mergens* on the basis of the legislative history is further support for this approach to understanding the Court. Once again it shows Congress and the Court cooperating to interpret and apply a vaguely worded constitutional provision to a relatively new area of concern.

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anything other than the Court's abandonment of its duty to interpret the Constitution and seek compliance with its rulings from other branches of government. As with the Attitudinal Model, Rational Choice Theory provides a way to look quite differently at this complex and controversial area of constitutional jurisprudence and the Justices who shaped it, and to see these cases as far more complex than traditional approaches allow.

In addition to the elected branches of government, one other major external factor is considered by Rational Choice theorists: public opinion. Although the connection between public attitudes and Court action is difficult to measure, Rational Choice theorists consider it an important factor in understanding the Court.¹⁶⁴ Although lacking direct electoral accountability, the Court's ability to ensure compliance with its rulings rests, in large part, on its continued prestige and public acceptance that it is performing its intended role. As such, argued Walter Murphy, Justices are charged with the task of writing reasoned, intellectually respectable, logical opinions that can be clearly understood. Equally, while Justices should in certain instances undertake campaigns of public education to inform and enlighten citizens on given issues, they should be careful to avoid activities that might bring the Court into disrepute.¹⁶⁵ Public opinion could be an ally but might also prove dangerous to the Court's role.¹⁶⁶ Failure to adequately explain a decision might lead to non-compliance by the public or by governmental institutions based on public opposition that, in turn, might also damage the Court's power and prestige. Justice Holmes, Fisher noted, warned the Court to avoid issues of great social change for there was "no use talking about a law that will not be willingly obeyed by at least 90% of the population."¹⁶⁷ However, as Justice Cardozo argued, "great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by."¹⁶⁸ If only as individuals, separate from their judicial role, Justices cannot avoid being affected by the events and opinions of the time.¹⁶⁹ Combined with the interplay of Court activities with the influence of Congress and the executive branch, themselves subject to public opinion to a far greater extent, the Justices need, in some way, to take account of public views, even if taking action contrary to them, argue Rational Choice theorists. The Court does so, according to Fisher, by "mov[ing] with a series of half steps, disposing of the particular issue at hand while preparing

¹⁶⁴ "The link between social cause and judicial effect cannot be measured with scientific accuracy, or anything approaching it, but we can make reasonable and informed judgments about social influences on constitutional law." Fisher, L., p. 12.

¹⁶⁵ Such activities, according to Murphy, might include political campaigning or lobbying Congress for certain types of law. The Justices have shown an increasing willingness to speak publicly in recent years. When Justice Douglas wrote *The Bible and the Schools* (Boston, Massachusetts: Little, Brown & Co., 1966) to comment on *Engel and Schempp*, and even in 1981 when Justices Stevens and Powell spoke publicly on the issue, their comments were unusual. Yet since the 1980s, books, law review articles, public speeches, and interviews by sitting Justices have become more common, suggesting Rational Choice Theory may be correct in its assertions about the importance of such activities as a tool the Court can use.

¹⁶⁶ Murphy, W., pp. 126-8, 158-9, 181-3.

¹⁶⁷ Justice Holmes quoted in Fisher, L., p. 221.

¹⁶⁸ Justice Cardozo quoted in Fisher, L., p. 11.

¹⁶⁹ See, for example, Chief Justice Burger's comment in conference on *Lemon v. Kurtzman* 403 US 602 (1971): "I am troubled by these cases ... I am influenced by the financial crisis that exists." Douglas Papers, Box 1509.

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for the next case. Through instalments it lays the groundwork for a more comprehensive solution, always sensitive to the response of society and the institutions of government that must enforce judicial rulings."¹⁷⁰ By doing so, the Court both responds to public opinion and helps educate the public about an issue to allow future developments.¹⁷¹ Although the relationship between Court action and public opinion may be difficult to measure, it nevertheless exists and must, Rational Choice Theory asserts, be taken into consideration when studying the Court.

Conclusion

Demonstrated clearly by the political science studies interested in understanding more clearly how the Court works is the complexity of both the Court as an institution and the factors which act as influences upon it. Studies by scholars such as Robert Bork, Louis Fisher, Walter Murphy, Jeffrey Segal, and Harold Spaeth suggest that seeking to understand the Court's Establishment Clause jurisprudence through narrow legal categories, as much scholarship in this area has done, is both limiting and misleading. Asking whether the Court took a separationist or accommodationist approach in a school aid case and why, for example, ignores numerous other factors that may have influenced the decision, including the Justices' personal preferences, recent congressional statements on school aid programmes, the similarities and differences between this case and earlier cases addressing similar issues, public opinion, and the character of individual Justices hearing the case. Ignoring such factors ensures only a very small part of a much larger picture is revealed. The true nature of the Court's Establishment Clause jurisprudence requires taking a much broader view of the political and social background within and against which the Court operates.

Yet taken individually the Legal, Attitudinal, and Rational Choice Models exhibit some of the same weaknesses as the more traditional legal approaches represented by strict separation, accommodation, and neutrality. The Legal Model ensures that the importance of the law and legal norms and practices are not entirely overlooked yet focuses on them to the exclusion of other potential influences. The Attitudinal Model is weakened by a similar narrowness of view, though its assertion that the Justices themselves are of central importance in understanding Court activities demands that the individuals comprising the Court are given due consideration. Of the three models, the Rational Choice approach takes the broadest view, requiring that the Court be considered as the legal and political institution it actually is and that it be viewed very much as a branch of government, governed by similar rules to those of the legislative and executive branches. It also demands that the collegial nature of the Court be taken into account. Yet Rational Choice also has its weaknesses. Equilibrium analysis and the focus on Congress assumes a level and clarity of knowledge that is rarely possible outside the realms of hindsight or theory. Equally, the collaborative approach expounded by Fisher does not always fully recognise that

¹⁷⁰ Fisher, L., p. 13. This complements the Rational Choice reading of school aid cases made above.

¹⁷¹ Although Fisher also notes that at times, on certain issues (prayer, bussing, abortion) the Court stands against public pressure without really saying why these cases are different.

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different branches of government carry different weight in certain circumstances, especially when interpreting the Constitution. Thus, individually, these models explain only part of what the Court does; taken together, however, they present the possibility of a fuller, clearer understanding of the Court.¹⁷² By avoiding narrow consideration of only particular theories, whether legal or political science in origin, and by taking a broader historical view of the Court, its activities, its personnel, and its influences, this study provides a much clearer understanding of the Court's Establishment Clause jurisprudence than any individual theory can offer.

¹⁷² This thesis does not seek, however, to test which model best explains the Court's decisions in Establishment Clause cases, but to employ their insights to better understand the Court's jurisprudence in this area of constitutional law.

Chapter Two: School Aid

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“When a Religion is good, I conceive that it will support itself; and when it cannot support itself, and God does not care to support it, so that its Professors are oblig’d to call for the help of the Civil Power, it is a sign, I apprehend, of its being a bad one,” asserted Benjamin Franklin in 1780.¹ For much of the nation’s history Franklin’s concerns held little relevance for the relationship between government and religion: with a small federal government limited in its powers and social welfare provided largely through private, charitable organisations, the realms of church and state remained mostly separate. The New Deal brought a fundamental change. The size of and responsibilities undertaken by governments, state and federal, expanded dramatically and public opinion came to expect greater governmental responsibility for social welfare legislation. Both moved the state closer to an area of influence traditionally occupied by religious organisations and churches, increasing the likelihood of contact between them. As the federal government became increasingly active in these areas, the Establishment Clause of the First Amendment gained greater prominence. At the same time schools became a particular focus of attention as educators lobbied the federal government for financial aid to support the educational enterprise and overcome state deficiencies in financing and support. With the end of World War Two and the coming of the Cold War, education for individual development and national strength seemed crucial in the fight for freedom. However, the existence of a significant religious school system in many states, predominantly Roman Catholic schools, implicated the Establishment Clause further.

With the Supreme Court’s acceptance of *Everson v. Board of Education* for oral argument in 1946 began the Court’s task of expounding the meaning of the Establishment Clause in the modern world. The uses of history and the framers’ intent competed with the vastly changed nature of American society and government for consideration in discussions about what the First Amendment “meant.” Establishment, aid, government action, and even religion required defining in the context of mid-twentieth century church-state relations. The Court’s accepted task was to untangle the threads and enunciate a clear interpretation of the Establishment Clause, within the confines of specific cases. This task was complicated by the consequences for social welfare legislation of the Court’s interpretations. Funding cases did not involve theoretical interpretations of constitutional provisions but affected legislation enacted by the federal and state governments that reflected broader policy decisions. When the Supreme Court accepted *Everson* and later cases for consideration, the resulting opinions had practical consequences for education policy, even when the Court’s opinions focused solely on the religious elements.

¹ Benjamin Franklin, letter to Richard Price, October 9, 1780, quoted in Lee, F. (Ed.), *All Imaginable Liberty: The Religious Liberty Clauses of the First Amendment* (Lanham, Maryland, and London: University Press of America, 1995), p. 163.

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The broad implications of the Supreme Court's school aid decisions ensured that the resulting commentary would be social and political as well as legal.² However, it has been the latter which has been most damning of the Court's actions. Critics have accused the Court of inconsistency, lack of clarity, and blatant attempts to reach politically desirable results through spurious reasoning. Focussing particularly on the period of the Burger Court (1969-86), legal scholars have argued that the Court's jurisprudence was confused and lacked any consistent philosophy leading to disparity in results and consequent confusion about the meaning and scope of the Establishment Clause. However, analysing the Court's opinions and placing them in their broader social and political context reveals a more complex situation than most critics have allowed. The decisions of the Burger Court reflected ideas that had been discussed in earlier opinions while the Rehnquist Court (1986-2005) drew on the precedents established by the Burger Court in finding its own direction in school aid cases. Placing the Court's decisions in this broader context allows for a different perspective which may account for many of the Court's alleged "inconsistencies".

Laying the Foundations: *Everson v. Board of Education*

The case which set the Court on its path of Establishment Clause jurisprudence began in 1943 when Arch Everson, a New Jersey taxpayer, filed suit against Ewing Township alleging that the practice of reimbursing parents for the cost of using public transport to take their children to non-public schools violated five provisions of the New Jersey Constitution and the Fourteenth Amendment of the United States Constitution. On the surface the case seemed straightforward but it touched on deeper currents of history and emotion which combined to make *Everson v. Board of Education* a difficult and potentially explosive case. As a result of nineteenth century battles between Catholics and Protestants over prayer and Bible reading, the public schools became a symbol of the history of anti-Catholicism in the United States, a perception reinforced by debates over school aid immediately before World War Two.³ In 1930, the Supreme Court held in *Cochran v. Louisiana State Board of Education* that the state could provide free textbooks to students in private schools as well as public schools on the grounds that they benefited the children and not the institutions, and by 1936, as a result of the New Deal, *Cochran's* "child benefit" principle had been used to provide bus transportation, free hot lunches, and medical, dental, and public health services to children in non-public schools.⁴ Hesitantly, Catholic opinion

² Although many of the programmes challenged in the Court's cases provided aid to students or their parents rather than to the schools, the term "school aid" is here used to refer to both types of cases.

³ See references in Chapter 3, n.3 for nineteenth century battles over school prayer and Bible reading.

⁴ *Cochran v. Louisiana State Board of Education* 281 US 370 (1930). For an overview of these and other areas of federal involvement with education see *Federal Activities in Education* (Washington, DC: National Education Association and American Association of School Administrators, 1939). See also Tyack, D., R. Lowe, and E. Hansot, *Public Schools in Hard Times: The Great Depression and Recent Years* (Cambridge, Massachusetts, and London: Harvard University Press, 1984).

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towards federal aid to education, including religious schools, became more favourable, based on the idea that if Congress could aid the "general welfare" it could extend funds to all schools equally without violating the traditional church-state relationship.⁵ In response, religious and secular opponents demanded that federal aid be specifically limited by Congress to public schools, defined as free, tax-supported institutions. Whether intended or not, the implication was that this was an attempt to prevent aid being diverted to Catholic schools. Combined with Protestant-Catholic splits over similar state programmes, particularly in Maryland, New York, and Ohio, the issue of state aid to religious schools seemed a religiously divisive one. With the case of Arch Everson this was reinforced by the participation of the Junior Order of United American Mechanics (JOUAM) who sponsored and paid for Everson's lawsuit. By the 1940s JOUAM was a fraternal benefit life insurance society but its origin in the 1840s was as a secret nativist organisation, gradually developing throughout the century into a broader anti-radical, anti-immigrant, anti-Catholic organisation.⁶ This history made it anathema to Catholics and further reinforced the mistaken image that *Everson's* lawsuit was an attack on the Catholic school system, an image that persisted even after the American Civil Liberties Union (ACLU) intervened on Everson's behalf in 1943.

This potential for religious divisiveness may have been one of the reasons the Supreme Court accepted *Everson* for oral argument in late 1946. If the issue could be turned from a political issue into a legal one, or better a constitutional one, the argument about religious discrimination might be averted. Although not mentioned in conference the Justices could not have been unaware of the religious angle of the political dispute and both Justice Hugo Black's majority opinion and the dissent by Justice Wiley Rutledge avoided references to any particular religious denomination or sect.⁷ The activity of, and disagreement among, the states regarding statutes similar to New Jersey's also appears to have motivated the Court. The growing nature of the debate across the country suggested some guidelines were necessary to ensure all conformed to the federal Constitution.⁸ In addition, *Everson* provided the Court with the opportunity to

⁵ See Clegg, Jr., A., "Church Groups and Federal Aid to Education, 1933-1939," *History of Education Quarterly*, Vol. 4, No. 3 (September 1964), pp. 139-146.

⁶ Fair, D., "The *Everson* Case in the Context of New Jersey Politics," in Formicola, J., and H. Morken (Eds.), *Everson Revisited: Religion, Education, and Law at the Crossroads* (Lanham, Maryland and Oxford: Rowman & Littlefield, 1997), p. 7.

⁷ See *Everson v. Board of Education* 330 US 1, 14 (1947) (Justice Black) and 330 US 1, 33 (1947) (Justice Rutledge, dissenting). See also letter to Thomas Mulroy from Justice Rutledge, March 19, 1947 ("My own effort, as I am sure you characteristically sensed, was to keep the problem entirely free from sectarianism of any sort ... I wanted my treatment and the expression of my views to be applicable to all sects alike."), Justice Wiley Rutledge Papers (hereafter Rutledge Papers), Box 143, and undated draft of Black's opinion, Rutledge Papers, Box 144.

⁸ By the time *Everson* reached the Supreme Court at least sixteen states (California, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Montana, New Hampshire, New Jersey, New York, Oregon, and Rhode Island) had similar bus transportation laws, the result, in part, of litigation by the Catholic Church after the success of *Pierce v. Society of Sisters* 268 US 510 (1925). Courts in California, Illinois, Kentucky, Louisiana, Maryland, and New Jersey had all upheld bus transportation laws, in the other ten states no court challenges had been brought. In Delaware, Oklahoma, South Dakota,

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complete what had begun with *Cantwell v. Connecticut* (1940): the incorporation of the Religion Clauses into the Fourteenth Amendment.⁹ That all the Justices present in conference on November 23, 1946 discussed *Everson* in First Amendment terms suggests a tacit understanding that irrespective of the final result in the case the Court would incorporate the Establishment Clause. Thus a combination of factors aligned to make *Everson* an acceptable case for contemplation by the Supreme Court.

“The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here,” wrote Justice Black for the five Justice majority in *Everson*, beginning a long running debate in Establishment Clause commentary: exactly what did *Everson* mean?¹⁰ The wall metaphor, taken from Roger Williams and Thomas Jefferson, and the clear passages in the opinion referring to a strict separation between church and state led the majority of commentators to see in *Everson* the embodiment of the strict separationist argument. But this immediately raised a conflict with the result in the case, which allowed New Jersey’s law to remain in operation, leading many of the same individuals to decry Black’s opinion for its ambiguity.¹¹ *Everson* is, however, better understood as a clash of competing interpretations: strict neutrality as expressed for the Court by Black versus strict separation as argued by Rutledge in dissent. Frequently overlooked in the rush to find strict separation in Black’s opinion is that Rutledge’s dissent provides arguably the clearest expression of that position ever articulated in a Court opinion.¹² Failure to recognise this does a disservice to Rutledge and his opinion which provided a template for those looking to make separationist arguments in the future. Such an interpretation also allows for a more coherent understanding of Black’s majority opinion.

Washington, and Wisconsin they had been struck down. See “Note: Catholic Schools and Public Money,” 50 *Yale Law Journal* 917 (1941). In *Pierce v. Society of Sisters* the Supreme Court ruled that Oregon could not limit education to public schools only, recognising the right of religious schools to exist and the right of parents to send their children to them. See also *Judd et al v. Board of Education* 278 NY 206, 15 N.E. (2d) 576 (1938). For an account of the New Jersey debate see Fair, D., pp. 2-3.

⁹ *Cantwell v. Connecticut* 310 US 296 (1940) incorporated the Free Exercise Clause into the Fourteenth Amendment in a case holding that Jehovah’s Witnesses could not be required to obtain a permit before proselytising on the street. On the significance of incorporation in *Everson* see Kauper, P., “*Everson v. Board of Education*: A Product of the Judicial Will,” 15 *Arizona Law Review* 307 (1973).

¹⁰ *Everson v. Board of Education* 330 US 1, 18 (1947). For information on *Everson* and all other school aid cases, see Appendix A, Table 1.

¹¹ See, for example, Monsma, S., “The Wrong Road Taken,” in Formicola and Morken, pp. 123-47; Hudson, C., “From *Everson* to *Davey*: The Road is Long, With Many a Winding Turn, That Leads us to Who Knows Where, Who Knows When,” 40 *Tulsa Law Review* 343 (2004/5); Kaselonis, Jr., R., “*Everson* and “The Wall of Separation Between Church and State”: The Supreme Court’s Flawed Interpretation of Jefferson’s Letter to the Danbury Baptists,” 17 *Regent University Law Review* 101 (2004/5). But see Hopkins, J., “State Transportation of Students to Parochial Schools: The *Everson* Case,” 36 *Kentucky Law Journal* 328 (1947/8).

¹² See discussion below.

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Often overlooked or simply dismissed when trying to show that Black wrote the wall of separation into constitutional law is the passage that stated: "That Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."¹³ The opinion was permeated with similar ideas and references. Often criticised as inaccurate and misleading, Black's use of colonial and early American history served not as a comprehensive introduction to the period but as a tool to show how unrelated to the traditional idea of "establishment" the New Jersey law was. The examples he used of oppression and forced belief were so alien to mid-twentieth century American sensibilities that the bus transportation statute appeared to be in a completely different category, barely related to an "establishment" of religion.¹⁴ The approach was also visible in Black's comparison of bus transportation with the provision of other public services such as police and fire protection, sewage disposal, and sidewalks.¹⁵ Religious institutions and individuals could not be excluded from public benefits simply because of their religion, Black argued, therefore they could be included should a state wish to do so, so long as they were not eligible solely because of their religion. Equally, services provided by the state to religious institutions which did not touch on their religious function were also acceptable under the newly incorporated Establishment Clause. In no way can these passages be reconciled with a strict separationist position.

There were elements of strict separation in Black's opinion but they were neither pervasive nor central to the ruling; they were simply dicta. Although Black's use of history emphasised the Founding Fathers' desire for a separation of church and state it was limited in its advocacy of this position by its ultimate aim of distancing mid-twentieth century New Jersey from the founding period. The strict separationist reading rests on two particular passages: the use of the wall metaphor and the oft-quoted description of practices forbidden under the Establishment Clause.¹⁶ The first is little more than two sentences and seems designed to catch attention, to end with a flourish rather than providing a convincing argument. The second is more substantial, appears unambiguous and, separated from the final ruling, its implication is clear: no state aid, financial or otherwise, should reach religion or religious institutions. That the passage was intended as an espousal of strict separation is clear from earlier drafts which provided for far less stringent restrictions on the government aid to religion.¹⁷ A comparison of these earlier expressions with

¹³ *Everson v. Board of Education* 330 US 1, 18 (1947).

¹⁴ *Everson v. Board of Education* 330 US 1, 8-10 (1947).

¹⁵ *Everson v. Board of Education* 330 US 1, 17-18 (1947). For earlier expressions of this argument see *Wright v. Hart* 182 NY 330 (1905) (striking down a bus transportation statute) and *Board of Education of Baltimore County v. Wheat* 199 Atl. 628 (Md. 1938) (upholding a textbook loan programme).

¹⁶ See *Everson v. Board of Education* 330 US 1, 18, quoted above at n.10 and 330 US 1, 15-6 (quoted in Chapter 1, n. 11).

¹⁷ In his first draft, Black wrote: "No tax can be levied to support the religious tenets or the modes of worship of any religious sect," allowing a much broader range of activities to remain outside the limitation than the final draft which makes reference to "religious activities." In the second draft, Black appeared to allow for the possibility of nondiscriminatory aid when he wrote: "Neither can pass laws which prefer one religion over another," an option foreclosed in the final opinion. Rutledge Papers, Box 144.

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the final passage indicates that the latter was far closer to a position of strict separation, arguably reinforcing the tone of the entire opinion. However, these passages still do not comport with *Everson's* ruling. Black reportedly told his friends that he made the victory "as tight" as possible to render it a "pyrrhic victory" for aid proponents.¹⁸ This statement, and Black's *Everson* opinion more generally, have been interpreted as evidence of strict separationism and a product of the Justices' mistrust of Catholicism, reflecting similar attitudes in the population of the country.¹⁹ However, the separationist dicta can alternatively be viewed as a warning to Catholics that the Court's ruling was not *carte blanche* for the complete aid that they were advocating. From this perspective, the dicta operated to limit the granting of aid to those forms represented by New Jersey's statute: non-financial, indirect, and part of a general programme of aid which made no reference to religion. In this way the ruling was still "tight" since it implied that other forms of aid being sought by the Catholic Church, whether the paying of teachers' salaries or the provision of funds for building work, would not be acceptable, or would at least require close judicial scrutiny.²⁰

The social and political context of *Everson* provides some explanation for the position of the majority and the arguments made by them. "Changing local conditions create new local problems which may lead a state's people and its local authorities to believe that laws authorizing new types of public services are necessary to promote the general well-being of the people," wrote Black.²¹ In 1947, the constitutions of forty-six states contained provisions that prevented an intermingling of church and state; thirty-seven of them made explicit reference to sectarian institutions, the so-called Blaine Amendments.²² Yet at the same time, at least 340 arrangements

¹⁸ Newman, R., *Hugo Black: A Biography* (1994), pp. 363-4, quoted in Berg, T., "Anti-Catholicism and Modern Church-State Relations," 33 *Loyola University of Chicago Law Review* 121, 127 (2001).

¹⁹ See Berg, T., pp. 123-32. Also, Blum SJ, V., *Catholic Parents, Political Eunuchs* (St. Cloud, Minnesota: Media and Materials, 1972) who sees anti-Catholicism in actions and decisions in this area as late as the 1970s.

²⁰ See *State ex rel Johnson v. Boyd* 28 N.E. (2d) 256 (Ind. Sup. Ct., 1940); *Reichwald v. Catholic Bishop* 258 Ill. 44, 101 N.E. 266 (1913). Either interpretation places Black close to the Justice of the Attitudinal Model: looking for a particular result in a case. Black's limited use of legal precedent challenges the applicability of the Legal Model here, supporting further the Attitudinal perspective.

²¹ *Everson v. Board of Education* 330 US 1, 6-7 (1947). The brief for the school board suggested that these changing conditions were the health and safety of children and equal treatment of all at a time of changing ideas about the duty of the state to its citizens. Several *amicus* briefs mentioned the "motor age" as an influencing factor while the National Councils of Catholic Men and Women in a joint brief suggested the influence of the growing idea of the school role as *parens patriae*. The Court's consideration of such factors echoes Louis Fisher's concept of a "dialogue" between governments on constitutional issues. Fisher, L., *Constitutional Dialogues: Interpretation as Political Process* (New Jersey: Princeton University Press, 1988). See Chapter One.

²² In 1875, James G. Blaine, Speaker of the House of Representatives, proposed an amendment to the US Constitution that would prevent the use of federal funds by religious schools. Although defeated, thirty-five states consequently enacted similar provisions in their constitutions, either by choice or as a precondition to admission to the Union. In most cases the wording of the amendments is far stricter than the Court's interpretation of the First Amendment. On the Blaine Amendment see O'Brien, F.W., "The Blaine Amendment, 1875-1876," 41 *University of Detroit*

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were in place across the states to provide public support to private, mostly Catholic, schools in forms ranging from tax exemption to salary reimbursement.²³ Across the country by 1947, states with Blaine Amendments far stricter and more specific than the First Amendment were providing some form of public financial assistance to religious schools. Such state practices suggested that programmes such as that in *Everson* did not violate the idea of separation of church and state: Black's language in the opinion and his emphasis on deference to the New Jersey legislature's decision suggests that this was a factor of significant influence for the Court.²⁴ State court decisions also influenced the Court however: Black's carefully constructed argument that religious schools perform a public purpose and so fall within the public domain had been expressed in at least one earlier state court opinion; likewise, Justice William Douglas' conference comment that bus transportation was a "service indirectly benefiting" the schools.²⁵

The Justices in the minority were aware of legislative activity in this area but for them it meant something different. "Neither so high nor so impregnable today as yesterday is the wall raised between church and state ... New Jersey's statute sustained is the first, if indeed it is not the second breach to be made by this Court's action. That a third, and a fourth, and still others will be attempted, we may be sure."²⁶ It was infused from beginning to end with separationist references and key arguments.²⁷ For the dissenters, statutes similar to that in New Jersey and the

Law Journal 137 (1963). On the state Blaine Amendments see DeForrest, M., "An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns," 26 *Harvard Journal of Law and Public Policy* 551 (2003).

²³ See "Note: Catholic Schools and Public Money." With regards to bus transportation, sixteen states and the District of Columbia permitted provision of such services to private school pupils (California, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Montana, New Hampshire, New Jersey, New York, Oregon, and Rhode Island), Colorado and Minnesota allowed for transportation under the decisions of state attorneys general, and Connecticut, Ohio, and West Virginia provided transportation by local practice with no legal ruling. However, fourteen states specifically limited bus services to public school students only (Alabama, Delaware, Florida, Georgia, Idaho, Nebraska, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, and Virginia).

²⁴ However, in following the legislatures Black frequently overlooked actions by the courts striking down similar provisions. In New York, for example, the bus transportation law was only put into place by constitutional amendment after the Court of Appeals struck down the original legislation. See *Judd et al v. Board of Education* 278 NY 200, 15 N.E. (2d) 576 (1938). Similar events occurred in South Dakota and Wisconsin.

²⁵ For the public purpose argument see: *Borden v. Louisiana State Board of Education* 168 La. 1005, 123 So. 655 (1929); *State ex rel. Johnson v. Boyd* 28 N.E. (2d) 256 (Ind. Sup. Ct., 1940). See also Brief for Appellees, pp. 18-27, 37, and brief of the National Conferences of Catholic Men and Catholic Women, pp. 5-8, 14-21. For the opposite argument, see Brief for Appellant, pp. 6-19, and brief of the General Council of 7th Day Adventists and Baptist Joint Conference Committee on Public Relations. For the "indirect benefit" argument, see: *Dunn v. Chicago Industrial Schools* 280 Ill. 613, 117 N.E. 735 (1917) and *Borden v. Louisiana State Board of Education* 168 La. 1005 (1929). Opposition to the argument was expressed in *Smith v. Donahue* 202 App. Div. 656, 195 NY Supp. 715 (1922); *State ex rel. Van Straten v. Milquet* 180 Wis. 109, 192 N.W. 392 (1923); *Traub v. Brown* 172 Atl. 835 (Del. 1934). Justice Douglas quoted by Justice Rutledge, Rutledge Papers, Box 143.

²⁶ *Everson v. Board of Education* 330 US 1, 29 (1947) (Justice Rutledge, with Justices Frankfurter, Jackson, and Burton, dissenting).

²⁷ See 330 US 1, 33-43 (1947) for use of history; 330 US 1, 29, 49, 50 (1947) for the "slippery slope" argument (advocated strongly by the ACLU as *amicus*); 330 US 1, 44-8 (1947) for the

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Court's apparent acceptance of them signalled the abandonment of the principle of separation of church and state established by James Madison. "[O]nce [the] door is opened [there] is no telling where it will end," argued Rutledge, the author and driving force behind the dissenting opinion, in conference, "[Y]ou can't draw a line between a little and a lot of pregnancy. If you can justify these you can [go] much further."²⁸ Black wanted to avoid causing immediate upheaval with his opinion but Rutledge and his three colleagues were focussed on the longer term and wider scale. They feared, as had Madison, that allowing religious groups to compete for public financial benefits would ultimately lead to social fragmentation and religious disharmony in the nation. Rutledge's detailed discussion of the history of the First Amendment and the views of its framers was intended to reinforce this image.²⁹ For the dissenters, current practice was less important than the separationist intent of the Founding Fathers.³⁰

The opinion was important to Rutledge: he worked at length on the dissent, an opinion significantly longer and more detailed than Black's, and the dissenters consulted frequently among themselves as the opinion took shape.³¹ The original conference vote was 6:2 in favour of allowing the statute to stand, with Rutledge and Frankfurter in the minority, but shortly after first drafts were circulated Justices Harold Burton and Robert Jackson joined Rutledge's position.³² In his post-*Everson* correspondence Rutledge indicated disappointment that he had been unable to convince a fifth vote to his position but hoped that a reversal would not be long in coming.³³ His experience between conference and final opinion indicated that his optimism was not without foundation and may have motivated him to write what could, at some future date, become the foundation for a majority opinion. In a 1948 letter to Harold Meek, editor of the *St. Louis Post Dispatch*, Rutledge expressed this sentiment: "Just among us girls, perhaps I can say that there

"pretense" of the child benefit argument (in conference, Justice Robert Jackson had called them "phoney"). Justice William Douglas Papers (hereafter Douglas Papers), Box 140. See also *Smith v. Donahue* 202 App. Div. 656, 195 NY Supp. 715 (1922); *State ex rel. Van Straten v. Milquet* 180 Wis. 109, 192 N.W. 392 (1923); *Traub v. Brown* 172 Atl. 835 (Del. 1934).

²⁸ Justice Harold Burton Papers (hereafter Burton Papers), Box 138, Folder 11. In contrast to Black and the majority, the dissenters appear far more concerned with the Framers' intent and their approach supports the Legal Model of Court decision making.

²⁹ *Everson v. Board of Education* 330 US 1, 33-43 (1947) (Justice Rutledge *et al*, dissenting). Rutledge also included as an appendix to the opinion Madison's *Memorial and Remonstrance Against Religious Assessments* and the *Virginia Bill for Religious Freedom*, authored by Thomas Jefferson, reinforcing his argument.

³⁰ *Everson v. Board of Education* 330 US 1, 63 (1947) (Justice Rutledge *et al*, dissenting).

³¹ See memoranda in the Rutledge Papers, Boxes 143 and 144.

³² Justice Frank Murphy passed in conference but eventually joined the majority. Burton wrote to Rutledge on January 8, 1947: "Please include me in this dissent. I am deeply indebted to you for its exposition of the meaning of "an establishment of religion" as used in the First Amendment." Rutledge Papers, Box 143. With regard to a change of wording to indicate that New Jersey's law fell within the scope of Madison and Jefferson's intended restrictions, Jackson wrote: "I did not think so originally but I am convinced it is." Rutledge Papers, Box 144.

³³ See letters to Irving Dillard, February 19, 1947; Ernest Kirschten, February 20, 1947; Luther Smith, March 10, 1947; Thomas Mulroy, March 19, 1947; and Justice Armstead Brown, April 4, 1947. Rutledge Papers, Box 143.

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are times when it pays to yell like hell even if one is licked, on the chance that the yelling may have some effect toward retrieving a victory for the future.”³⁴

Federal Aid to Education: The Political Context

Everson came at an awkward time for the debate on government aid to education. Between 1900 and the end of World War Two approximately a dozen federal aid to education bills came before Congress, each defeated by a combination of educators, states' rights supporters, and a variety of religious groups. The issue of federal aid to education was controversial: education was traditionally the province of the states, and states and local school boards feared a loss of autonomy, especially after the experiences of centralization during the New Deal and the War. In addition, educators were divided between the old fear that in the wake of federal funds would come federal control and a loss of local control and flexibility, and the new problems of a critical teacher shortage, lack of facilities, and limited financial resources.³⁵ Educators thus found themselves caught in a dilemma: while they did not want federal government scrutiny they did need greater financial resources.³⁶ However, by mid-1947, leading educational organisations, including the National Education Association (NEA), American Association of School Administrators (AASA), and the American Council on Education, had shifted to support federal aid to education, influenced by a recognition of low teacher morale, lack of adequate facilities, the need to increase salaries, and the necessity of maintaining the United States' leadership in the world.³⁷ Congress responded with a series of bills between 1946 and 1949 that sought different ways to provide federal financial support without restrictive controls or regulations. However,

³⁴ Letter to H. MEEK from Justice Rutledge, March 11, 1948. Rutledge Papers, Box 144. By 1997, bus transportation was operating in California, Connecticut, Idaho, Illinois, Kentucky, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, and Pennsylvania. Statutes had been rejected in Alaska, Delaware, Hawaii, Oklahoma, and Washington (Kentucky, New York, and Wisconsin courts struck down statutes but were overturned by constitutional amendments in the latter two and a later court decision in the first).

³⁵ Illustrating the extent of these problems, see testimony before the House Subcommittee No. 1 of the Committee on Education and Labor, Hearings on Bills having for their object the granting of federal aid for educational purposes, 80th Congress, 1st Sess., April 29-May 29, 1947 (hereafter House Hearings (1947)).

³⁶ A February 1948 report by the NEA, "Still Unfinished Business in American Education," indicated average national expenditure for schools was \$99 per pupil, a level below which nearly half the states fell. The report noted specifically the problem of education inequalities across the nation: New York's per pupil expenditure was \$234 in 1946-7; Arkansas' expenditure was \$37 per pupil. "Still Unfinished," *NEA Journal*, Vol 33, No. 3 (March 1948), pp. 143-6. A further report in May updated the figures, indicated the same problems, and asserted that most states' unallocated resources would not be sufficient to raise expenditure to the national average. "States' Surpluses for School Aid Hit," *New York Times* (hereafter *NYT*), May 25, 1948, A31.

³⁷ See *NEA Journal*, Vol. 35, No. 6 (September 1946); *NYT*, March 4-8, 1947 (coverage of the AASA Conference); *Federal Aid to Education: A Review of Pertinent Facts* (Washington, DC: NEA, 1942); *Still Unfinished: Our Educational Obligation to America's Children* (Washington, DC: NEA, 1948); *National Policy and the Financing of Public Schools* (Washington, DC: NEA, 1959).

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the contentious issue of the participation of religious schools defeated all attempts at school aid.³⁸ The conflict between the two leading proposals, S.472 introduced by Senator Robert Taft (R-Ohio) in 1947, and HR.4643 introduced by Representative Graham Barden (D-NC) two years later, symbolised the conflict.³⁹ The Taft bill permitted states to distribute funds according to their existing policies, potentially allowing some benefit to flow to religious schools; the Barden bill restricted federal funds to tax-supported schools. Protestant groups largely opposed the Taft bill as violating the First Amendment and opening the way for diversion of other funds to religious schools while supporting the Barden bill which they described as “sound, honest, and consistent with the Constitution.”⁴⁰ Catholic groups generally opposed the Barden bill and supported Taft as a recognition of the double financial burden placed on Catholic parents and of the public function performed by Catholic schools. Although educators’ opposition had largely been overcome, the religious issue continued to defeat all attempts at federal aid to education.

One new element was added to the debate: in 1948, the Supreme Court handed down *McCullum v. Board of Education*. In an 8:1 decision the Court held that so-called “released time” programmes in which public school students were released from regular classes during the school day to receive religious instruction on school grounds violated the Establishment Clause.⁴¹ Reaction to the ruling varied from support on the grounds that it upheld the principles inherent in the First Amendment to fears that the Court was attempting to secularise American education and, by default, the whole of American society. The decision divided religious groups and fueled discussions about the proper place of religion in American society, both of which affected the aid to education debate. First, the decision appeared contrary to *Everson*, taking a position less favourable to religion than the 1947 case, raising questions about the meaning of the 1947 decision. Second, Catholic and some Protestant groups saw *McCullum* as an attack on religion generally, making them far more sensitive to perceived slights, such as proposals to exclude religious schools from any federal aid bills. Third, the debate about religion in society established a precedent for religiously-motivated arguments that while not new added further intensity to the debates.

³⁸ See House Hearings (1947), also US Congress. Senate. Subcommittee of the Committee on Labor and Public Welfare. Hearings on Bills relative to federal aid to education, 80th Congress, 1st Sess., April 9-May 2, 1947.

³⁹ On the Taft bill see “Taft Urges Federal Aid to Schools to Raise Standards in 33 States,” *NYT*, March 7, 1947, A44. See also Taft’s comments in Senate debate, March 24, 31, and April 1, 1948, *Congressional Record* (hereafter *Cong. Rec.*), 80th Congress, 2nd Sess., pp. 3346-52, 3789-98, 3804, 3908. On the Barden bill see Kizer, G., “Federal Aid to Education: 1945-1963,” *History of Education Quarterly*, Vol. 10, No. 1 (Spring 1970), p. 87-8.

⁴⁰ Kizer, G., pp. 87-8. For explicitly anti-Catholic positions, see testimony of John Cowles and Elmer Rogers of the Ancient and Accepted Scottish Rite of Freemasonry, Southern Jurisdiction, House Hearings (1947), pp. 326-52. For slightly less offensive but still anti-Catholic views see testimony of Dr. Frederick Fowler of the National Association of Evangelicals, pp. 525-32.

⁴¹ *McCullum v. Board of Education* 333 US 203 (1948). Justice Stanley Reed dissented on the grounds released time was less advantageous to schools than *Everson* had been.

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The activities of Francis Cardinal Spellman only exacerbated the conflict. In an address at Fordham University in June 1949, Spellman denounced Barden as a “new apostle of bigotry.” The following month he attacked Eleanor Roosevelt for her “anti-Catholic campaign,” and accused her of “discrimination unworthy of an American mother” for having opposed federal aid to religious schools in a newspaper column.⁴² Spellman’s attacks on such leading figures inflamed already heated feelings of discrimination while doing little to further the Catholic cause. By arguing in such sectarian terms Spellman made any challenge to his position appear anti-Catholic. While this was most likely his intention it served only to damage the movement for federal aid, portraying those with a secular interest in opposing federal aid as anti-Catholic, and denying any possibility that the bill could be debated calmly and without religious undercurrents. A significant subsidiary effect was to create a political bandwagon onto which politicians seeking reelection could easily jump: oppose the Barden bill, gain the Catholic vote, support the bill and gain the Protestant vote.⁴³ By creating such a situation, Spellman and those who vociferously opposed him ensured the subject became too divisive for Congress to debate. By mid-1950, proponents and opponents had argued themselves to a “political stalemate,” helped in large part by the divisive religious debate that had obscured almost all other positions.

With the shelving of any attempt at federal aid to education the heat of the debate passed and more cordial interdenominational relations were re-established. Two main factors account for this development: anti-Communism and the Second Vatican Council. With the Cold War and the portrayal of the “bad guys” as “atheistic Communists” came a belief that the best way to fight the influence of Communism at home was by strength of faith. Elements of a civil religion, a generalised expression of Judeo-Christian traditions, had been present in American society since its founding, but as the Cold War deepened the perceived need for a strengthened civil religion increased. The Supreme Court contributed to this development. In 1952, the Court handed down *Zorach v. Clauson*, a second released time case in which the Court ruled that such programmes would be acceptable if conducted off campus. Finding New York’s programme did not violate the Constitution, Justice Douglas wrote: “We are a religious people whose institutions presuppose a Supreme Being ... When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule public of events to sectarian needs, it follows the best of our traditions.”⁴⁴ Irrespective of the problems this dictum has caused for scholars

⁴² See “Spellman Denounces Author of School Aid As Bigot,” *NYT*, June 10, 1949, A1, 20. For the comments made by Eleanor Roosevelt see *NYT*, July 23, 1949, A26. For discussion of the impact of this exchange, see Bendiner, R., *Obstacle Course on Capitol Hill* (New York: McGraw-Hill Book Co., 1964), pp. 92-7.

⁴³ An early contemporary example was Herbert Lehman, former Governor of New York and Democratic candidate for Senator who, less than a month after Spellman’s attacks, openly opposed the Barden bill and supported Spellman’s position at a time when he was unpopular among the state’s Catholics, despite having previously supported Eleanor Roosevelt’s argument.

⁴⁴ *Zorach v. Clauson* 343 US 306, 313 (1952). Technically *Zorach* did not overrule *McCullum* but distinguished between on-campus and off-campus instruction which would become an important part of the Court’s school aid jurisprudence. However, to a general audience it

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since 1952 in trying to decipher the Court's philosophy of Establishment Clause interpretation, it is clear that Douglas was referring to the nation's civil religion while seeking to avoid inflaming the religious debate. Two years later Congress added "under God" to the Pledge of Allegiance, made "In God We Trust" the national motto, and added the phrase to paper currency. In addition, generalised prayers and Bible readings officially sponsored in the public schools were a fundamental element of the civil religion of the 1950s. In all of these elements Catholics were free to participate, in fact their participation was welcomed. Catholic schools might be perceived by Protestants and secular groups as divisive forces endangering national unity but Catholicism shared some common values with Protestantism which made it a welcome partner in the anti-Communist fight. At a time when atheism was considered dangerous the strength of Catholic belief made it a valuable force.⁴⁵

The second factor changing relations between Catholics and other religious groups was the Second Vatican Council (Vatican II) of 1963-5 that modernised the Church and opened it up to modern trends. Significantly, the Council's Declaration on Religious Freedom recognised the freedom of belief and practice of all people, Catholic or not. In addition, the Declaration pointed towards greater cooperation with other faiths, an increased role in worship and administration for the laity, and generally reduced the authoritarianism exercised by the clergy.⁴⁶ Taken together these changes addressed many of the concerns expressed by non-Catholic Americans during debates on state aid throughout the century. The breaking down of the Church's own walls of separation reduced much of the suspicion and mistrust that had surrounded the faith. With regard to Catholic schools, Vatican II allowed for increased participation of lay teachers, both in education and administration, bringing new perspectives to the schools which complemented the opening of the curricula. Catholic schools were no longer intended to be insular, doctrinaire defenders of the faith but "enlivened by the gospel spirit of freedom and charity," becoming less separatist and engaging more with the communities within which they were situated.⁴⁷ The changing nature of the Catholic Church and of Catholicism generally, combined with the impact of John F. Kennedy's presidency, allowed Catholics to feel more integral to American society and non-Catholics to perceive the Catholic Church as less alien and suspect.⁴⁸

As religious antagonisms declined, one barrier to federal aid was removed and several bills were passed providing limited, indirect aid to pupils attending religious schools and colleges.⁴⁹

appeared that by allowing released time programmes the Court had reversed the *McCollum* decision.

⁴⁵ See Rothman, S., "The Politics of Catholic Parochial Schools: An Historical and Comparative Analysis," *Journal of Politics*, Vol. 25, No. 1 (February 1963), p. 71. Also, Carey, P., *The Roman Catholics* (Westport, Connecticut and London: Greenwood Press, 1993), pp. 93-114.

⁴⁶ Berg, T., pp. 152-8.

⁴⁷ Berg, T., pp. 153-4.

⁴⁸ See Rothman, S., p. 69. See also the paper given by Dr. Vernon Bourke at the 1963 Annual Judicial Conference of the 10th Circuit, 34 F.R.D. 29, 59-71 (1963).

⁴⁹ The National School Lunch Act (1946) included participation by private school pupils; the National Defense Education Act (1958) authorised low-interest loans to religious elementary and

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These programmes, along with silence from the Supreme Court on school aid issues until 1968, indicated favourable conditions for a new, comprehensive bill. However, the Court's 1954 ruling in *Brown v. Board of Education* introduced a new factor into the debate on government and private schools: race.⁵⁰ In Congress, Southern segregationists united in opposition to any federal aid to schools fearing federal government interference in school segregation patterns.⁵¹ After defeats on education bills in 1955, 1956, and 1957 criticism of the Administration and Congress even in Protestant and Catholic journals centred on the race issue rather than religion.⁵² The position of Catholic schools as private schools also complicated the issue since more than one state attempted to circumvent *Brown* by subsidising private schools. As the Supreme Court struck down state subsidies for private schools it seemed unlikely that Congress would provide similar subsidies, even if the motivation was different.⁵³ A third factor working against federal aid to Catholic schools was that as so few blacks were Catholic, Catholic schools faced the danger that they might unintentionally end up racially segregated. In 1967, Dr. Eugene Reed, president of the New York State branch of the NAACP announced a fund-raising drive to oppose aid to religious schools, stating, "[w]e are against aid in any way, shape, or form, because it only helps those who would skirt legislation on desegregation."⁵⁴ Thus race became an additional obstacle for school aid advocates to overcome.

Kennedy's candidacy for the presidency in 1960 brought a resurgence of the religious issue and debate about how Catholicism and civic duty could coexist. Kennedy's response during the campaign to fears about a Catholic in the White House, that he would make decisions as a president, not as a Catholic, reflected his awareness of the broader national concern about his religion as well as discomfort with being identified solely as a Catholic congressman promoting parochial interests.⁵⁵ Although successful in overcoming the public's fear about a Catholic in the White House, Kennedy could not overcome the religious issue in relation to aid to education. The Administration's 1961 attempt to aid public schools directly while expanding the scope of

secondary schools for equipment for science, mathematics, and foreign language classes; and the Higher Education Facilities Act (1963) allowed religious colleges to receive federal construction grants.

⁵⁰ *Brown v. Board of Education* 347 US 483 (1954) (holding racially-segregated schools unconstitutional).

⁵¹ This had been a minor issue in the 1947 House hearings. See testimony of Irma Smith King, Supervisor of Negro Schools (pp. 150-8), Leslie Perry of the NAACP (pp. 394-408), Alexander Ginsburg, American Jewish Congress (pp. 589-601), and the frequent questions of Representative Thomas Owens (R-II) (pp. 167-8, 376, 563-5, 572-3).

⁵² Kizer, G., p. 92 (see pp. 90-2 for discussion of the provisions of the defeated bills). For an overview of the debates, see Bendiner, R., pp. 119-39.

⁵³ See, for example, *Griffin v. County School Board* 377 US 218 (1964) (striking down private school subsidies) and *Green v. County School Board* 391 US 430 (1968) (striking down a "freedom of choice" plan).

⁵⁴ Quoted in *NYT*, February 6, 1967. For discussion of some of these problems see Smith, S., "Parochial Schools in the Black Cities," *Journal of Negro Education*, Vol. 42, No. 3 (Summer 1973), pp. 379-91, especially pp. 379-83.

⁵⁵ Dallek, R., *John F. Kennedy: An Unfinished Life* (London: Penguin Books, 2004), pp. 146-7. See also, Graham, H., *The Uncertain Triumph: Federal Education Policy in the Kennedy and Johnson Years* (Chapel Hill and London: University of North Carolina Press, 1984), pp. 3-25.

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the 1958 National Defense Education Act to benefit religious schools was defeated by a familiar triumvirate of Republicans, Southern Democrats, and the religious issue. Republican opposition rested on the federal nature of the aid, fearing loss of autonomy and more federal interference in education, an argument that predated Kennedy's presidency. Southern opposition rested on the belief that federal aid would be used to enforce desegregation throughout the region, a concern exacerbated by Kennedy's apparent support for the civil rights movement. Kennedy's attempts to find a compromise in the religious debate convinced no-one: opponents of school aid saw the extension of the NDEA for what it was, expanded federal aid to religious schools, while Kennedy's public opposition to including such schools in a general aid program alienated Catholics, including the eighty-eight Catholics in the House whose votes would be necessary for success.⁵⁶ Further attempts the following year were defeated by the same problems, fuelled additionally by the Supreme Court's prayer ruling in *Engel v. Vitale* on June 25, the Administration's proposed ban on literacy tests in federal elections, and the growing controversy surrounding the admission of James Meredith to the University of Mississippi.⁵⁷ The Administration's two successes, the Higher Education Facilities bill, which provided construction loans for all colleges, and extension of the NDEA combined with greater funding of vocational education were both signed into law by President Lyndon Johnson in December 1963. Although providing necessary financial benefits for schools and colleges, the two Acts were limited successes for the Kennedy Administration: most of the controversial or innovative provisions had been defeated or excluded based on earlier experience, their scope and application far smaller than those envisioned in 1961. The Kennedy era thus indicated the continued divisiveness of the religious issue and its ability, in combination with other factors, to defeat federal aid bills.

Yet on Sunday April 11, 1965, in front of the former one-room schoolhouse in which he began his own schooling, President Johnson signed into law the Elementary and Secondary Education Act (ESEA). Two years after the defeat of Kennedy's third aid to education bill in Congress, Johnson presided over the single largest federal aid to education bill Congress had ever passed. The ESEA's success was due to a combination of skilful political manoeuvring, lessons learned, and a confluence of events. Johnson was committed to education as an issue, believing as he did that it had made his own rise from poverty possible and that it was a logical extension of the New Deal.⁵⁸ In fact, Johnson's linking of poverty with education proved to be the key in

⁵⁶ See, for example, Kennedy's response to questions about his school aid bills at a March 1, 1961 press conference, *Public Papers of the President: John F. Kennedy, 1961* (Washington, DC: United States Government Printing Office, 1962), pp. 107-11, also p. 156; *NYT* Editorial, June 20, 1961.

⁵⁷ Graham, H., pp. 26-40.

⁵⁸ In a 1968 speech, Johnson added to Franklin Roosevelt's "Four Freedoms" a fifth: freedom from ignorance. McGuinn, P., and F. Hess, "Freedom From Ignorance?: The Great Society and the Evolution of the Elementary and Secondary Education Act of 1965," in Milkis, S., and J. Mileur (Eds.), *The Great Society and the High Tide of Liberalism* (Amherst and Boston: University of Massachusetts Press, 2005), pp. 289-319. *Public Papers of the President of the*

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overcoming the political and religious divisions that had defeated earlier bills. Few disputed the need to do something about the increasingly documented poverty problem in the country: linking school aid to this aim helped overcome earlier objections.⁵⁹ In addition a series of events altered the political context to the Administration's advantage. In the 1964 elections, the Democrats won 38 new seats in the House; new members provided a potential bloc switch of 76 votes to break the previous stalemate making legislative passage potentially easier. In addition, the 1964 Civil Rights Act prevented segregated institutions participating in federally-funded programmes: the Act thus deflected the racial issue away from any education bill the Administration might advocate. Meanwhile, the Civil Rights Movement created greater public awareness of the inequalities faced by black and other minority children in the United States, bringing pressure for greater federal involvement in education. Johnson's skilful handling of the outpouring of congressional and public goodwill in the aftermath of Kennedy's death, combined with his political experience and skill, proved a third factor making federal aid to education easier. However none of these elements could counteract the religious issue. While Johnson as a Protestant had arguably more leeway than Kennedy to move on school aid, no bill could be successful without some movement in the religious stalemate that had developed during the previous Administration. "[B]e sure that whatever you do you don't come out with something that's going to get me right in the middle of this religious controversy. I don't want to have the Baptists attacking me from one hand and the Catholics from another," Johnson told his advisers.⁶⁰ However, the defeat of Kennedy's bills showed that if aid to education was to be successful some compromise would be necessary. Hard work by Commissioner of Education Francis Keppel and a new spirit of compromise combined with the child-oriented emphasis of the bill to resolve, at least temporarily, the religious debate: religious school supporters would accept that some, but not all, of their schools would receive indirect aid through their students while aid opponents could claim that it was the needy students who benefited and not the schools. Although tenuous, the agreement between the NEA and National Catholic Welfare Conference helped Johnson and his staff to overcome the biggest of the obstacles to federal aid. The ESEA was a remarkable political achievement. Circumstance, political manoeuvring, and the ability of the individuals involved combined to ensure passage of one of the most significant pieces of Great Society legislation.

The Emergence of a Test: Allen and Lemon

In 1968, the Supreme Court heard oral argument in its first school aid case since *Everson*. With the calming of the political debate over school aid at national level and the development of

United States: Lyndon B. Johnson (Washington, DC: US Government Printing Office, 1966-70) (hereafter *Public Papers: Johnson*) p. 63-4, 372, 183.

⁵⁹ Graham, H., pp. 70-5; Jeffrey, J., *Education for Children of the Poor: A Study of the Origins and Implementation of the ESEA of 1965* (Columbus, Ohio: Ohio State University Press, 1978), pp. 59-72. *Public Papers: Johnson*, I:706, 2:706, 780, 916, 1430, 1318.

⁶⁰ Quoted in Jeffrey, J., p. 70.

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a degree of consensus about the position of religious schools in general education programmes it seemed unlikely that a Court ruling would result in the debate seen at the time of *Everson*. *Board of Education v. Allen* involved a challenge to a New York law requiring local public school authorities to lend textbooks free of charge to all students in grades seven through twelve, including students attending religious schools.⁶¹ Under the terms of the statute, books were requested by and loaned to students but the schools consolidated the requests, submitted them to the state authorities, and stored the books provided. The textbook issue had come before the Court in 1930 when in *Cochran v. Louisiana* the Court upheld Louisiana's textbook loan statute under the Fourteenth Amendment, arguing that the state's interest in the secular education provided by religious schools justified their equal treatment.⁶² The case suggested little about the result in *Allen* however as the contemporary case involved an Establishment Clause challenge, an option not available to participants in *Cochran*. The Court's rulings in *Engel v. Vitale* and *Abington School District v. Schempp* earlier in the decade also served to obscure the Court's leanings: both were perceived as strict separationist opinions yet the most direct precedent for *Allen*, *Everson*, had, in result at least, allowed the aid statute to stand.⁶³ With apparently conflicting precedents and a Court containing only two of the *Everson* Justices, the outcome of *Allen* was unpredictable.

The Justices' conference discussions and the opinions that developed from them indicated a Court unsure of the grounds on which to proceed. In conference, Chief Justice Earl Warren argued that the *Allen* statute was a welfare measure for students, similar to that in *Everson*, and so should stand. Justice Abe Fortas objected to the programme's operation and the significant role of the religious school in requesting and maintaining the books on loan. Justices Black and Douglas, the only remaining members of the *Everson* Court, sought to distinguish between lunches and bus transportation and books, the latter being far more fundamental to the educational process than the former.⁶⁴ Lacking a clear test for constitutionality, the Justices also lacked agreement on the issues of central importance to school aid cases.

Writing for the 6:3 majority, Justice Byron White drew heavily on the few available precedents as if drawing strength from them to uphold the statute and offset the lack of a clear test within the opinion. *Everson*, White noted, was "most nearly in point for today's problem": textbook loans raised different Establishment Clause questions than school prayer and Bible reading and thus required a different approach to that taken by the Court in *Engel* and *Schempp*.⁶⁵

⁶¹ *Board of Education v. Allen* 392 US 236 (1968).

⁶² *Cochran v. Louisiana* 281 US 370 (1930).

⁶³ *Engel v. Vitale* 370 US 421 (1962) and *Abington School District v. Schempp* 374 US 203 (1963) were the Warren Court's school prayer rulings. See Chapter 3 for discussion.

⁶⁴ Douglas Papers, Box 1399; Justice William Brennan Papers (hereafter Brennan Papers), Box I:161, Folder 1.

⁶⁵ *Board of Education v. Allen* 392 US 236, 241-2 (1968). White did make use of the "purpose and primary effect" test established in *Schempp* but only insofar as it applied to the *Everson* ruling.

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The crux of the Court's opinion contained strong echoes of Black's *Everson* opinion: the programme was general and provided to all children, and the benefit was to parents not the schools.⁶⁶ White thus strengthened the precedential value of *Everson*, which had been in some doubt after *Engel* and *Schempp*, while employing it to strengthen his own argument. As Black had done, White also drew on the existing political situation for support: if politicians and school boards decided that including religious schools in general education programmes was a permissible and effective way to strengthen education, he argued, the Court was not prepared to suggest they were wrong, at least on the "meagre record" presented in *Allen*.⁶⁷

In dissent, Black lambasted the majority opinion and its interpretation of *Everson*.⁶⁸ Defending the "wall of separation" and arguing against "compelled tax support" of religious institutions there was no ambiguity about the separationist stance of the author, in stark contrast to *Everson*. Black sought to distinguish between the "general and nondiscriminatory transportation service" he had written to uphold in 1947 and the textbook loan now at issue, suggesting "[b]ooks are the most essential tool of education" and if allowed there was no limit to where the claims might end, an argument supported by Justices Douglas and Fortas.⁶⁹ Despite the passion of the opinion and attempts to distinguish his *Everson* opinion, nothing could disguise that Black's arguments were almost direct repetitions of those made by Rutledge in 1947. His suggestion that a distinction could be made between different types of general aid based on whether the educational function of the schools was aided, an argument forcefully supported by Douglas in separate dissent, introduced a further element of subjectivity to the issue: not only would legislatures and courts need to decide whether a programme was a "general" one, under Black's approach they would also be required to distinguish between educational and non-educational aid. Although used in dissent and therefore not binding, Black's opinion was widely analysed because of his role in *Everson*; the *Allen* opinion was retrospectively applied to try and understand an already ambiguous opinion leading only to greater confusion.⁷⁰

⁶⁶ *Board of Education v. Allen* 392 US 236, 243-4 (1968). On the surface, White's use of *Everson* as precedent and similarities in structure between the two cases suggest the Legal Model is of most use here. Yet taken in context with the lack of consensus among the Justices about how to approach this case, it seems more likely that precedent here is a refuge from confusion and the only ground on which a majority could agree. As such, the Rational Choice Model may be more useful to show the bargaining and compromise that led to this central ground.

⁶⁷ *Board of Education v. Allen* 392 US 236, 247-8 (1968). See also 244 n.6 and 248 for discussion of the paucity of the record before the Court.

⁶⁸ See especially *Board of Education v. Allen* 392 US 236, 250, 251 (1968) (Justice Black, dissenting).

⁶⁹ *Board of Education v. Allen* 392 US 236, 253 (1968) (Justice Black, dissenting).

⁷⁰ Douglas also switched from the majority in *Everson* to dissent in *Allen*. However, in *Engel* in 1962 he had repudiated his earlier stance and in *Schempp* issued a stinging attack on the possibility of public funds being used by religious institutions. As such his *Allen* opinion was consistent. The reasons for Black's shift remain obscure as his papers were destroyed shortly before his death. However, one possible reason may have been simply that when *Everson* was decided only a few similar programmes existed and were limited to bus transportation and textbooks; by the time *Allen* reached the Court the type and scope of the programmes had

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Allen indicated that despite an increase in the number of Establishment cases in the nation's courts, the Supreme Court had not formulated a clear approach to school aid cases. The debate in conference and within the opinions suggested a lack of agreement on what constituted the important facts in such cases: should it be the final recipient of the aid or that statutes were facially neutral and defined recipients without reference to religion, as Warren suggested? Should the form of the aid be considered, as Douglas and Black argued, or was it more important that the students attended religious schools, that fact alone to be sufficient? Without agreement on these issues no clear test could be formulated: a test cannot be created if it is unclear what needs to be tested. White's opinion, closely tied to the specific facts of the case, answered none of these questions beyond the scope of New York's textbook loan programme. Black's dissent, challenging a majority opinion that claimed *Everson* as its foundation, made the situation more complex by seemingly providing a reinterpretation of his own opinion. Such opacity came at an awkward time. As enrolment in religious schools fell from their height in the mid-1960s and criticisms of public schools increased, states were seeking new ways to aid the religious school endeavour. Without clear guidelines as to the constitutionality of such statutes the spectre of increased litigation and lower court confusion loomed.

Lemon v. Kurtzman, along with companion cases *Earley v. DiCenso* and *Robinson v. DiCenso*, represented the type of litigation resulting from the confusion over the Court's opinions and the forms of legislation being employed in states to address educational problems. Pennsylvania permitted the state Superintendent of Public Instruction to "purchase secular educational services" from non-public schools. Such schools were reimbursed from state funds for the costs of teachers' salaries, textbooks, and instructional materials.⁷¹ The case differed from *Everson* and *Allen* insofar as it involved financial aid provided directly to religious schools rather than services or materials provided to individual parents or students. In Rhode Island, the salaries of non-public school teachers providing instruction in secular subjects were supplemented by up to 15% by public funds so long as the resulting salary did not exceed that of public school teachers. In practice, all teachers involved in the programme taught at Catholic schools.⁷² After detailed consideration of the operation and intention of both programmes the

expanded exponentially making the risk of total funding of religious schools appear increasingly possible. Alternatively, given Black's comment about making the ruling in *Everson* "tight" (see n.18 above), it may have been that he was sympathetic to Rutledge's arguments generally but did not see in *Everson* the same kind of danger perceived by Rutledge.

⁷¹ *Lemon* was the Pennsylvania case. It is noteworthy that the statute covered only mathematics, foreign languages, physical sciences, and physical education, the same subjects covered by the National Defense Education Act of 1958. Similar arrangements existed in Connecticut (struck down by federal court in *Johnson v. Sanders* 319 F.Supp. 433 (Conn. 1970)), Louisiana (held unconstitutional by the state Supreme Court), Ohio, and Michigan (ended by state referendum) at the time *Lemon* was decided.

⁷² *Earley* and *Robinson* were the cases from Rhode Island. Because they were combined with *Lemon* for decision, all three cases are collectively referred to as *Lemon*.

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Court, in an opinion written by Chief Justice Warren Burger, struck down both statutes as violating the Establishment Clause.

Lemon's most enduring significance was in the eponymous three-part test Burger formulated against which Establishment Clause violations could be judged: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion ...; finally, the statute must not foster an excessive government entanglement with religion."⁷³ The test was not new, Burger culled parts one and two from *Schempp* and the entanglement "prong" from *Walz v. Tax Commission* (1970), but for the first time the Court had a specific test to employ in school aid cases. However, Burger warned against unqualified adherence to tests and argued that the main aim was to guard against the "three main evils" the Establishment Clause was formulated to prevent: "sponsorship, financial support, and active involvement of the sovereign in religious activity."⁷⁴ Significantly, *Lemon* and the test it spawned did not adhere to a strict separationist position: Burger explicitly rejected this approach early in the opinion.⁷⁵ Burger was not prepared to repudiate the Court's prior school aid rulings but with Brennan and Black on the Court neither did he have a consensus to broaden the area of permissible connection between church and state. With a tenuous majority resting heavily on the wording of an opinion and a need to bring a degree of clarity to school aid jurisprudence, *Lemon* was not the opportunity to create new constitutional doctrine. Instead Burger sought to consolidate the existing position and lay foundations for future developments.⁷⁶

In ruling the Pennsylvania and Rhode Island statutes unconstitutional Burger employed a series of considerations which worked to expand the meaning of the rather vague terms laid down in the three-part test. Burger's first concern was the nature of the aid provided. "In terms of potential for involving some aspects of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not": "secular, neutral, or nonideological services" could be provided to religious schools, any possible danger that religion might be

⁷³ *Lemon v. Kurtzman* 403 US 602, 612-3 (1971) (internal references and quotation marks omitted).

⁷⁴ *Lemon v. Kurtzman* 403 US 602, 612 (1971). This position echoes Ronald Dworkin's approach to original intent. Dworkin, R., *Taking Rights Seriously* (London: Gerald Duckworth & Co. Ltd., 1977). See Chapter One. However, the *Lemon* test appears more like a balancing test which, in theory, is closer to the Rational Choice Model of the Court.

⁷⁵ *Lemon v. Kurtzman* 403 US 602, 614 (1971). The joint dissent by Justices Black and Douglas was far closer to strict separation. 403 US 602, 625-42.

⁷⁶ Memoranda between the Justices in the period March to June 1971 indicate that the wording and structure of the opinions was crucial to the final alignment. See Justice Thurgood Marshall Papers (hereafter Marshall Papers), Box 69, Folder 1; Brennan Papers, Box I:238, Folder 8. There has been much academic debate about why *Lemon* did not extend constitutional protection to the Pennsylvania and Rhode Island programmes. See Kobylka, J., "Leadership on the Supreme Court of the United States: Chief Justice Burger and the Establishment Clause," *Western Political Science Quarterly*, Vol. 42, No. 4 (December 1989); Morgan, R., "The Establishment Clause and the Parochial Schools: A Final Installment?" 1973 *Supreme Court Review* 57, 545-68; Young, D., "Constitutional Validity of State Aid to Pupils in Church-Related Schools – Internal Tension Between the Establishment and Free Exercise Clauses," 38 *Ohio State Law Journal* 783 (1977).

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supported by public funds and the aid violated the Constitution.⁷⁷ This connected to Burger's second concern that aid should not take the form of direct financial grants. This had been implicit in *Everson* and *Allen* and few were willing to go so far as to advocate the direct provision of public money to religious schools: the image of religion funded by tax dollars seemed far closer to the eighteenth century definition of "establishment" than either textbooks or bus transportation. In light of concern about the potential misuse of benefits, concern about financial aid may also have been influenced by the difficulty of monitoring how it was employed, Burger's third concern and the foundation for the entanglement prong of the *Lemon* test. Having concluded that church and state must interact at some point, Burger's intention was to ensure those connections were no more extensive than necessary. He also recognised that the line between the permissible and the unacceptable was not an obvious one: "[j]udicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship."⁷⁸ In Burger's opinion, entanglement could only be uncovered after a thorough consideration of the challenged programme's operation, including the nature of the institutions benefited, the kind of aid provided, and the resulting relationship between the government and religious institutions. Finding that Pennsylvania's programme involved a direct financial subsidy to religious schools and Rhode Island's salary supplement could be easily misused, Burger concluded for the majority: "the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion."⁷⁹ It was not the monitoring alone that violated the Constitution but the very fact that such a requirement was necessary.

On the surface, the Court in *Lemon* appeared to have overcome the divisions of *Allen*. *Lemon* itself was decided by an 8:0 vote and *Earley* and *Robinson* were decided 8:1, Justice White, the author of *Allen*, the lone dissenter. The change in personnel in the intervening years had little impact: Warren and Fortas had retired, one in the *Allen* majority, the other in dissent, leaving the basic split unaltered. The positions of Chief Justice Burger and Justice Harry Blackmun on religion clause cases were unknown but appeared unlikely to shift the balance significantly. The original conference vote, however, indicated the problems of *Allen* continued: four Justices voted to strike down the laws, two voted to uphold, and three Justices declined to vote.⁸⁰ Burger assigned the opinion to himself, despite his ambiguous vote in conference, a tactic for which he would become well-known, and forged the consensus expressed in the *Lemon* ruling. *Lemon* was

⁷⁷ *Lemon v. Kurtzman* 403 US 602, 617 (1971).

⁷⁸ *Lemon v. Kurtzman* 403 US 602, 614 (1971).

⁷⁹ *Lemon v. Kurtzman* 403 US 602, 614 (1971).

⁸⁰ Black, Douglas, Stewart, and Blackmun voted to reverse, Harlan and White to affirm. The passes came from Burger and Brennan, while Marshall did not participate due to NAACP involvement in the litigation. Burger commented, "I am troubled by these cases ... I am influenced by the financial crisis that exists." Douglas Papers, Box 1509.

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a compromise opinion written to secure the broadest possible concurrence within the Court.⁸¹ However, for Douglas, Black, Brennan, and White the opinion did not go far enough. Brennan and Douglas filed separate concurrences that expressed strict separationist sentiments. Douglas, joined by Black, concentrated primarily on the argument that religious schools served no significant public purpose and so government should not involve itself with them. Brennan drew heavily on his own opinions in *Schempp* and *Walz v. Tax Commission*, restating briefly a broad range of arguments for ensuring limited church-state contacts, making a particular point of the danger to religious schools of government control.⁸² White criticised the majority for dismissing legislative findings and the ability of schools themselves to reject government funds should they wish to do so. These concurrences and White's partial dissent indicated the tenuous nature of *Lemon's* nearly unanimous opinion. *Lemon* brought a degree of clarity to school aid jurisprudence and the test provided lower courts with more definitive guidelines than had existed to that point, but under the surface fundamental disagreements existed about the practical implications of the Establishment Clause.

Reassessing the Burger Court, 1971 – 1985: Social and Political Background

Lemon v. Kurtzman proved to be the beginning of a flood of Establishment cases to the Supreme Court which lasted for at least fifteen years. It was a rare term that saw the Court without such a case on its docket. Two major factors stimulated this trend. First, the Court itself had indicated clearly that it did not view all government aid to religious institutions as unconstitutional, leaving open the way for states to devise programmes of aid that fell within the limits imposed by the Court's rulings. The narrow nature of the rulings also meant that new approaches and forms of aid were not necessarily encompassed within existing doctrine and thus were open to challenge. Second, the economic situation of the 1970s highlighted both the contribution made by religious schools to keeping education costs to the state low and the financial burden placed on parents who chose a religious education for their children as tax rates rose and private tuition costs increased. Unwilling to challenge the Supreme Court's rulings directly, many states and legislators increasingly saw the benefit to public education provided by religious schools and sought to ease their financial positions, and that of parents, in small, if significant, ways. Portrayed by critics as attempts to subvert the wall of separation or to "get round" Court rulings, state law sought generally to abide by their dictates while expanding their application to new areas.

⁸¹ As such, it is a clear example of Rational Choice activity, especially that expounded by Walter Murphy. Murphy, W., *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964).

⁸² *Lemon v. Kurtzman* 403 US 602, 625-42 (1971) (Justice Douglas, with Justice Black, concurring), 642-61 (Justice Brennan, concurring). *Abington School District v. Schempp* 374 US 203, 230 (1963); *Walz v. Tax Commission of the City of New York* 397 US 664, 680 (1970).

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The school aid debate of the 1970s was much different to that of the late 1940s and 1950s. In the 1970s Americans experienced what President Jimmy Carter famously termed the “crisis of confidence.” The result of a combination of factors, including the loss of the Vietnam War and the fall of Saigon to the Communists, the effects of the social upheaval of the late 1960s, Watergate, OPEC price rises and the energy crisis, and inflation and unemployment, the impact of the “crisis” was as much financial as emotional. Economists termed the economic situation “stagflation,” a combination of high unemployment, inflation, and lack of growth that defied orthodox laws of economics. Such economic problems affected many areas of public policy, education was no exception. As part of his plan of “New Federalism” President Nixon instituted block grants to the states in 1972 as part of a five-year revenue-sharing plan designed to reduce the centralization of power that he perceived had resulted from the New Deal, World War Two, and the Great Society. As a consequence, education was returned firmly to the sphere of the states making federal aid an unlikely prospect.

As they struggled financially throughout the decade, a debate about how to fund education efficiently and effectively emerged in most states.⁸³ Inflation affected schools and school budgets severely. Basic education costs soared, consuming allocated funds faster than anticipated. Inflation also reduced state aid: in many states school finance was provided partly on the basis of real estate wealth; as local property values soared districts became “wealthier” and thus eligible for less state aid. The combination of inflation and unemployment made many Americans unwilling and unable to pay increased taxes instituted to cover spiralling costs.⁸⁴ States sought new ways to finance education that might offset some of the cost increases. New Jersey instituted an income tax in 1976 that had been widely resisted, Maine enacted a statewide property tax in 1973 that was repealed four years later after arousing bitter resentment, and Cleveland and other Ohio school districts were forced to borrow against the following year’s tax receipts in order to pay their staff.⁸⁵ These and other initiatives had little impact as costs spiralled and budgets suffered real as well and proportional cuts. In the Gallup annual survey of

⁸³ See Thomas, J.A. and R. Wimpelberg (Eds.), *Dilemmas in School Finance* (Chicago: Midwest Administration Center, University of Chicago, 1978); Jordan, K.F. and N. Cambron-McCabe (Eds.), *Perspectives in State School Support Programs* (Cambridge, Massachusetts: Ballinger Publishing Co., 1981); Leggett, S. (Ed.), *Managing Schools in Hard Times* (Chicago: Teach ‘em Inc., 1981). For a discussion of the Supreme Court’s role in this debate see Wagstaff, C., “Race, Class and Federalism: A History and Analysis of *San Antonio Independent School District v. Rodriguez* (1973)” (unpublished PhD thesis, University of Kent, 2001).

⁸⁴ Shanker, A., “Where We Stand,” *NYT*, May 18, 1975, E11. The most extreme reaction was California’s Proposition 13 (1978) which limited property tax to 1% of market value.

⁸⁵ Maurer, A., “Schools in N.J. May Need More Than Money,” *NYT*, June 20, 1976, E6; Knight, M., “Maine Officials Seeking Substitute for Repealed School-Finance Tax,” *NYT*, December 7, 1977, A20; “Schools in Cleveland Permitted to Borrow Money for Salaries,” *NYT*, December 7, 1977, A20. See *Review of Existing State School Finance Programs: A Commission Staff Report* (Report to the President’s Commission on School Finance, 1972) for discussion of the range and type of proposals considered by the states.

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public attitudes towards education, "lack of proper financial support" rated among the top five "major problems confronting the public schools" for most of the decade.⁸⁶

The financial crisis coincided with a growing disenchantment with the public school system. The experiences of desegregation and bussing had disillusioned parents across the country and the Court's decisions in *Engel* and *Schempp* in the early 1960s led to fears of growing secularism in the public schools. Studies showing high dropout rates, falling standards as measured by standardised tests, increased truancy, poor discipline and high suspension rates raised questions about the effectiveness of the nation's public schools. The problems were worst in inner-city schools catering for students facing such problems as "poverty, slums, racial discrimination, disorganised families, disease ... [and] injustice."⁸⁷ The financial cuts forced on schools by reductions in state aid only reinforced perceptions of the decline of the public schools as enrichment programmes, including music programmes, school trips, and team sports, were cut as being non-essential to the education function, the number of guidance counsellors was reduced, and class sizes increased as teachers were made redundant.⁸⁸ Schools were, it appeared, increasingly unable to provide a well-rounded education, moving instead to concentrate only on the basics which, while necessary, resulted in narrower, duller programmes. Educators feared that for those students for whom a basketball programme or violin instructor provided the motivation to take school seriously, the cutting of "frills" might do irreparable damage.⁸⁹

Like public schools, religious schools struggled financially throughout the decade for many of the same reasons. However, religious schools, especially those under Catholic control, faced additional problems. From a high of 5.6 million in 1965, Catholic school enrolment fell to 3.8 million in 1973 and 3.29 million by 1978.⁹⁰ As numbers fell tuition increased as schools attempted to cover their operating expenses. Simultaneously, the effect of the ecumenism of Vatican II influenced the nature of school staff: as men and women found alternative ways to serve the church than taking vows the number of lay teachers increased exponentially. In 1971, for the first time, a majority of faculty members were laymen, a trend which continued

⁸⁶ The Annual Gallup Poll of Public Attitudes Towards Education is published annually in the *Phi Delta Kappan*.

⁸⁷ Shanker, A., "Where We Stand," *NYT*, February 4, 1973, E9. On the problems of inner city schools see Rosenfeld, G., *"Shut Those Thick Lips!": A Study of Slum School Failure* (New York: Holt, Rinehart and Winston, Inc., 1971); Iannaccone, L., *Political, Social, and Cultural Constraints Upon Financing Improved Urban Education and Proposals to Overcome Them* (Report to the President's Commission on School Finance, 1972); Marcus, S. and P. Vairo (Eds.), *Urban Education: Crisis or Opportunity?* (Metuchen, New Jersey: The Scarecrow Press, 1972); Rist, R., *The Urban School: A Factory for Failure* (Cambridge, Massachusetts, and London: MIT Press, 1974).

⁸⁸ Fiske, E., "New York Crisis Forcing Schools to Stress the 3Rs," *NYT*, June 22, 1976, A46.

⁸⁹ Fiske, E., *NYT*, June 22, 1976, A46.

⁹⁰ Figures taken from *United States Catholic Elementary and Secondary Schools 2003-2004: The Annual Statistical Report on Schools, Enrolment and Staffing* (Washington, DC: National Catholic Educational Association, 2004), pp. 2-3.

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unabated.⁹¹ The biggest impact was on schools' salary budgets: lay staff took no vows of poverty and although they frequently served at lower-than-average salaries they demanded remuneration that would cover their living costs. In Chicago, 60% of parish income went to maintaining the 486-school system, in some dioceses the figure was as high as 80%.⁹² Increased financial demands on parishes and raised tuition fees came at a time when Catholic schools' traditional constituency, blue collar, urban families, were suffering as a result of the nation's economic troubles and many could no longer afford the cost of the schools. In addition, in making the Catholic Church less insular, Vatican II prompted many Catholics to question whether church schools were necessary or viable. As Catholic culture became less distinctive the need to defend and protect such a culture through schools came into question.⁹³ If Catholic schools were no longer as unique as in the past, what should be their mission? This question occupied Catholic educators throughout the 1960s and 1970s, Father Paul Reinert, President of St. Louis University, concluded that: "If we as Catholic educators cannot transmit an additional quality to our graduates beyond the accumulation of knowledge, then we should give up our mandate as Catholic educators. It is not enough that Johnny should learn to read and write or become a biochemist in an institution which is different solely because it is supported by Catholic dollars."⁹⁴ "When Pope John opened the windows at Vatican II," commented one Catholic school teacher, "he let in a hurricane." "All we can do," responded another, "is to try and weather the storm while we find a definitive solution."⁹⁵

Despite these problems Catholic schools in the 1970s were, politically at least, in a stronger position than in previous decades. As the Jewish Day School Movement flourished and some Protestant denominations established their own schools, Catholic educators acquired valuable allies.⁹⁶ In August 1971, President Nixon announced through the President's Panel on Non-

⁹¹ For a statistical analysis of these trends see Barteau, E., "Costs and Revenues of Nonpublic Elementary and Secondary Education: The Past, Present, and Future of Roman Catholic Schools" in *Economic Problems of Nonpublic Schools: A Report to the President's Commission on School Finance* (1972), pp. 211-82.

⁹² Malcolm, A., "Troubled Catholic Schools Seeking Ways to Survive," *NYT*, July 1, 1973, A1, 15. For a detailed survey see Larsen, M., *When Parochial Schools Close: A Study in Educational Financing* (Washington, DC and New York: Robert B. Luce, Inc., 1972). For discussion of the impact on a single school system, see Gurash, J., *The Report of the Archdiocesan Advisory Committee on the Financial Crisis of Catholic Schools in Philadelphia and Surrounding Counties* (Philadelphia: 1972).

⁹³ Berg, T., pp. 156-7. Brown, A. and A. Greeley, *Can Catholic Schools Survive?* (New York: Sheed and Ward, Inc., 1970); "Has the Church Lost its Soul?" *Newsweek*, October 4, 1971, pp. 80-9; Greeley, A., W. McCreedy, and K. McCourt, *Catholic Schools in a Declining Church* (Kansas City: Sheed and Ward, Inc., 1974); Plude, F., *The Flickering Light: What's Happening to Catholic Schools?* (New York: William H. Sadler, Inc., 1974). For the influence of socio-economic factors in parents' school choices, see Fahey, F. and R. Kieckbusch, "Attitudes Toward Nonpublic Education," in *Economic Problems of Nonpublic Schools*, pp. 1-154.

⁹⁴ Reinert, P., quoted in Smith, S., "Parochial Schools in the Black Cities," p. 385.

⁹⁵ Malcolm, A., "Troubled Catholic Schools Seeking Ways to Survive," *NYT*, July 1, 1973, A1, 15.

⁹⁶ In 1969, the Jewish Day School movement reported 80,000 students in 388 schools. Feuerstein, S., "Torah Umesorah, 1944-1969: A Quarter of a Century" in Kaminetsky, J., *Hebrew Day School Education: An Overview* (New York: Torah Umesorah, 1970). See Larson, M., pp.

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Public Education that the Administration would be favourably disposed towards federal tax credit schemes.⁹⁷ While no bill passed Congress, Nixon's support added weight to the push for some form of government aid to religious schools. At state level Catholic educators also found allies among politicians seeking to ease the burdens on public schools or simply looking for the best educational alternatives available. Governor William T. Cahill of New Jersey and Governor Nelson A. Rockefeller of New York were leading advocates of the cause of the religious schools within their states. Throughout the 1970s, as state courts, federal courts, and the Supreme Court struck down a variety of programmes intended to provide aid to religious schools, Cahill and Rockefeller continued to advocate, support, and sign into law new ways of funding education whether public or private.

While religious and political motivations played their part, defences of state aid programmes also followed the route laid down by Black in *Everson*: religious schools provided a public service and so should be eligible for public aid. Speaking in 1973, Cahill defended a recently defeated aid proposal on these grounds: "We believe that it is in the overall public interest to provide the financial assistance needed to ensure the continued viability of the non-public schools. If these schools were forced, one by one, to close their doors the burden of educating these children would be shifted to the state public school system."⁹⁸ Across the country states with large nonpublic school systems sought to enact legislation that would ease the financial burden of such schools, ensuring their survival and thus easing the potential financial burden on public schools. Unlike the debates of the immediate post-war period, in many instances religious schools were not advocated as alternatives because they were religious but because they provided effective education at no higher cost than that provided by the state. Opponents of tuition grants, tax credits, or voucher plans just as frequently objected that such plans were not effective education measures as they did to the fact that religious schools were included; religion was only

153-67, discussing Lutheran, 7th Day Adventist, Missouri Synod Lutheran, and Church of the Nazarene schools, among others. Arthur Corazzini identified similar groups in his 1972 report, *The Non-Catholic Private Schools*, for the 1972 President's Commission on School Finance.

⁹⁷ See *NYT*, August 18-26, 1971, and Morgan, R., "The Establishment Clause and Sectarian Schools," pp. 57, 59-60. However, public opinion remained largely opposed to such aid. *PDK/Gallup* polls asking about tax dollars to religious schools found 48% in favour with 44% opposed in 1970, 40:51 in 1981, and 42:50 in 1986.

⁹⁸ Quoted in Sullivan, R., "Church Schools Lose Jersey Aid," *NYT*, April 6, 1973, A45. Thomas Schwartz estimated the cost of such absorption to be between \$1,348,655,147 and \$3,176,371,885 in 1971, with New York facing the highest cost and New Jersey the fourth highest. "The Estimated Marginal Costs of Absorbing all Nonpublic Students into the Public School System," in *Economic Problems of Nonpublic Schools*, pp. 301-50. For arguments in support of private schools as providing a public function see Degler, C., "Why Not Aid to Parochial Schools?" *Vassar Alumnae Magazine*, Vol. 47 (February 1963), pp. 2-7; Ward, L., *Federal Aid to Private Schools* (Westminster, Maryland: The Newman Press, 1964), pp. 24-32. But see Thayer, V.T., *The Attack Upon the American Secular School* (Boston: Beacon Press, 1951); LaNoue, G., *Public Funds for Parochial Schools?* (New York: National Council of Churches in Christ, 1963), pp. 33-5.

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part of a broader debate about effective education policy, a fact easily overlooked as a result of the new Establishment Clause cases reaching the Supreme Court in the 1970s.⁹⁹

The broad range of programmes instituted by states and school boards throughout the 1970s explains the variety of cases heard by the Supreme Court. The Court's tendency to write narrow, fact-specific opinions meant that the constitutionality of innovative programmes was not always clear to legislators writing laws or courts hearing challenges to them. The frequency with which school aid cases were litigated led to the perception that legislators were trying to "get around" the Court's rulings, to circumvent the Establishment Clause in order to win electoral favour.¹⁰⁰ A brief consideration of the statutes that found their way to the Supreme Court indicates that this was generally untrue. In *Meek v. Pittenger* (1975) the Court noted that Pennsylvania's statute providing textbooks, instructional equipment, and auxiliary services to public and religious school students had a secular purpose and was extended to all students within the state: in *Committee for Public Education and Religious Liberty v. Nyquist* (1973) two years earlier the Court had specifically noted that if a programme only benefited religious school students it was constitutionally suspect.¹⁰¹ In *Wolman v. Walter* (1977) Justice Blackmun's plurality opinion noted that the Ohio law in question "was enacted after this Court's May 1975 decision in *Meek v. Pittenger* ... and obviously is an attempt to conform to the teachings of that decision."¹⁰² The aid provided by Ohio covered all students, did not involve direct financial aid to the religious schools, and placed certain limits on the manner in which the aid could be used, all concerns raised by the Court in *Nyquist* and *Meek*. In all cases heard by the Court, defenders of the challenged programme could make a reasonable attempt at showing how the statute conformed to the *Lemon* test, even if the Court eventually rejected the arguments based on the operation of the programmes in question. This does not imply that *all* statutes passed by the states were genuine attempts to conform to the Court's rulings, at least one notable case from New Jersey indicated they were not, but it does suggest that a larger number were honestly structured and thus not blatant attempts to circumvent the Court's rulings for political gain.¹⁰³

⁹⁹ See Areen, A., "Public Aid to Nonpublic Schools: A Breach in the Sacred Wall?" 22 *Case Western Reserve Law Review* 230 (1971) arguing that the states' preoccupation with the religion question undermined the aim of improving education. See also, Deedy, J., "Should Catholic Schools Survive?" *The New Republic*, March 13, 1971. *The Notre Dame Report to the President's Commission on School Finance* (1972) repeatedly noted that Catholic schools and some other religious schools provided education at a lower per pupil cost than public schools.

¹⁰⁰ A *NYT* article in mid-1973 implied that Nixon and Rockefeller "sought to win favor with anxious Catholic parents by devising aid programs to slip past the Constitutional obstacles." Weaver, Jr., W., "The Court Reverses a Trend," *NYT*, July 1, 1973, E7. Similar views persisted throughout the decade. See Otero-Ziegler, W., "The Remains of the Wall: *Everson v. Board of Education* to *Strout v. Albanese* and Beyond," 10 *Temple Political and Civil Rights Law Review* 207, 221 (2000/1).

¹⁰¹ *Committee for Public Education and Religious Liberty (CPERL) v. Nyquist* 413 US 756 (1973); *Meek v. Pittenger* 421 US 349 (1975). The Court ultimately found the Pennsylvania programme unconstitutional on other grounds.

¹⁰² *Wolman v. Walter* 433 US 229, 233 (1977).

¹⁰³ See "New Jersey's Plan for Private School Aid is Invalidated," *NYT*, June 3, 1979, E7.

Reassessing the Burger Court, 1971 – 1985: The Court's Jurisprudence

Between *Lemon* and *Aguilar v. Felton* and *Grand Rapids School District v. Ball* in 1985, the Supreme Court addressed a broad range of issues that stemmed from the social and political debate over education policy and aid to religious schools.¹⁰⁴ Over the course of fourteen years the Burger Court upheld loans of textbooks to religious school students¹⁰⁵; provision of funds for standardised testing and scoring in religious schools¹⁰⁶; diagnostic hearing and speech services on religious school grounds; therapeutic, guidance, and counselling services to religious school students provided off campus¹⁰⁷; general purpose funds for non-sectarian uses to religiously-affiliated colleges and universities¹⁰⁸; and tax deductions for educational expenses for all parents.¹⁰⁹ In the same period the Court struck down grants to religious schools for maintenance and repair costs¹¹⁰; reimbursement of tuition costs to low income parents¹¹¹; income tax benefits to parents of children attending private, including religious, schools¹¹²; loans of instructional materials including maps, tape recorders, and overhead projectors¹¹³; auxiliary services, including remedial education, guidance counselling, and speech and hearing services to students on religious school campuses¹¹⁴; reimbursement for the cost of field trips¹¹⁵; and direct reimbursement to religious schools for the costs of record keeping and testing required by state law.¹¹⁶

A cursory glance at such a list raises a number of questions. For example, what is the practical difference between textbooks and other “instructional materials”? Why is reimbursement of tuition less acceptable than income tax deductions? How could the Court make so many seemingly contradictory rulings in such a short period of time? The orthodox view suggests that this period in the Court's history of Establishment Clause jurisprudence was confused, inconsistent, and symptomatic of a Court without strong leadership or clear guidelines for deciding cases.¹¹⁷ However, those who criticise the Burger Court for its inconsistency and

¹⁰⁴ *Aguilar v. Felton* 473 US 402 (1985); *Grand Rapids School District v. Ball* 473 US 373 (1985).

¹⁰⁵ *Meek v. Pittenger* 421 US 349 (1975).

¹⁰⁶ *Wolman v. Walter* 433 US 229 (1977) and *CPERL v. Regan* 444 US 646 (1980).

¹⁰⁷ Both *Wolman v. Walter* 433 US 229 (1977).

¹⁰⁸ *Roemer v. Maryland Public Works Board* 426 US 736 (1976); *Americans United for the Separation of Church and State v. Blanton* 433 F. Supp. 97 (M.D.Tenn., 1977) aff'd mem., 434 US 39 (1977).

¹⁰⁹ *Mueller v. Allen* 463 US 388 (1983).

¹¹⁰ *CPERL v. Nyquist* 413 US 756 (1973).

¹¹¹ *CPERL v. Nyquist* 413 US 756 (1973).

¹¹² *CPERL v. Nyquist* 413 US 756 (1973).

¹¹³ *Meek v. Pittenger* 421 US 349 (1975) and *Wolman v. Walter* 433 US 229 (1977).

¹¹⁴ *Meek v. Pittenger* 421 US 349 (1975).

¹¹⁵ *Wolman v. Walter* 433 US 229 (1977).

¹¹⁶ *New York v. Cathedral Academy* 434 US 125 (1977).

¹¹⁷ This is a frequent criticism of the Burger Court. A brief introduction to the literature might include: Cannon III, J., “First Amendment I,” 1984 *Annual Survey of American Law* 265; Gedicks, F., *The Rhetoric of Church and State: A Critical Analysis of Religion Clause Jurisprudence* (Durham and London: Duke University Press, 1995); Hersman, N., “*Lynch v.*

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lack of clarity frequently fail to consider the reasoning offered in the opinions of the Justices. These opinions show that the Court was far more consistent than critics have allowed. Equally, the orthodox view adopts the Legal Model of political science with regard to the Court, which sees consistency as central to the Court's role in constitutional interpretation. Alternative approaches, whether the Attitudinal or Rational Choice Models, place less emphasis on the need for consistency. A broader approach to these cases reveals elements of both models in the Justices' approaches to these cases, as seen in earlier cases, and allows for a very different interpretation of the Burger Court's Establishment Clause jurisprudence.

Several concerns became an informal framework for analysing Establishment cases, providing further guidance for any analysis employing the "effects" prong of *Lemon*. These significant but unstated questions were whether the aid provided was direct or indirect aid, financial or non-financial in form, whether a challenged programme took place on or off religious school campuses, and whether a programme was specifically aimed at individuals or institutions because of religious concerns. This was a fluid, functional set of guidelines that, while rarely stated explicitly by the Justices in opinions, was nevertheless highly influential in deciding cases. These were not new concerns, possibly one of the reasons why they remained significant for so long: *Allen* upheld textbook loans to students on the grounds that books were not financial aid and were an indirect benefit to the schools, *Lemon* struck down additional salary payments because they were direct, financial, and used on religious school campuses. Any attempt to understand the Establishment Clause jurisprudence of the Burger Court as it related to school aid must take these approaches into account.

Black established the direct-indirect aid distinction in *Everson* when the Court held that New Jersey could not provide aid to religious schools but that reimbursing parents for the cost of bus transportation provided only an indirect benefit to the schools concerned. This was reinforced by White's reasoning in *Allen* and further underscored in *Lemon* when Burger struck down the programmes because the aid went directly to the schools. In none of these cases was it the sole consideration but it was a significant one. Direct aid related closely to the concerns of the Founding Fathers that one way to establish a religion was to finance it. In the case of school aid this analysis rested heavily on the perception of church-affiliated schools as "pervasively

Donnelly: Has the *Lemon* Test Soured?" 19 *Loyola of Los Angeles Law Review* 133 (1986); Howe, M., *The Garden and the Wilderness: Religion and Government in American Constitutional History* (Chicago: University of Chicago Press, 1965); Hudson, C., "From *Everson* to *Davey* ..."; Levinson, R., "Separation of Church and State: And the Wall Came Tumbling Down," 18 *Valparaiso Law Review* 707 (1984); Marshall, W., "We Know It When We See It": The Supreme Court and Establishment," 59 *Southern California Law Review* 495 (1986); McConnell, M., "Religious Freedom at a Crossroads," 59 *University of Chicago Law Review* 115 (1992). But see Hamilton, M., "Power, the Establishment Clause, and Vouchers," 31 *Connecticut Law Review* 807 (1999); Kirby, J., "*Everson* to *Meek* to *Roemer*: From Separation to Détente in Church-State Relations," 55 *North Carolina Law Review* 563 (1976/7); Teitel, R., "The Supreme Court's 1984-85 Church-State Decisions: Judicial Paths of Least Resistance," 21 *Harvard Civil Rights-Civil Liberties Law Review* 651 (1986).

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sectarian” institutions, permeated to such an extent by the doctrines of the church that they could be perceived as nothing other than religious institutions. Such concerns were expressed about religious dominance in church related schools throughout the Burger Court era but were articulated most clearly by Justice Potter Stewart for the Court in *Meek v. Pittenger*. Having established the nature of the schools in question, Stewart stated: “We agree ... that the *direct* loan of instructional material and equipment has the unconstitutional primary effect of advancing religion because of the *predominantly religious character of the schools* benefiting from the Act.”¹¹⁸ In one sentence Stewart cogently summarised the link in the majority’s mind between direct aid and the religious nature of the schools in question; the message to legislators and school districts was that in order to pass constitutional muster programmes of aid must not be aimed at the religious schools themselves but at easing the burden of parents or children.¹¹⁹

The second of the informal considerations addressed by the Court involved differentiating between programmes which provided, or appeared to provide, financial aid and programmes which provided materials or equipment. Government programmes exhibiting signs of transferring public funds to religious schools incurred far greater scrutiny from the Court. Implicit in Chief Justice Burger’s argument for the Court in *Lemon* (1971) was the concern that controlling the use of money is far more difficult than controlling the use of a textbook.¹²⁰ In *Committee for Public Education and Religious Liberty v. Nyquist* (1973) the Court employed a similar argument to rule unconstitutional maintenance and repair grants to non-public schools in low income areas: not only did the grants directly subsidise the religious function of the school, there were no practical restrictions which could be imposed upon their use.¹²¹ Striking down the tuition reimbursement statute also challenged in *Nyquist*, the Court employed a similar argument. Rejecting a statute that provided financial benefits to parents, not the schools, challenged two arguments made previously by the Court: that parents form a break in the chain between church and state, and that indirectly influencing parents to choose religious schools does not *per se*

¹¹⁸ *Meek v. Pittenger* 421 US 349, 356, 363 (1975) (emphasis added). For an earlier expression of this view, see *Bergham v. Reorganised School District* 364 MO 121, 260 SW2d 573 (1953). See *CPERL v. Nyquist* 413 US 756, 767-9, 782 (1973) and *Wolman v. Walter* 433 US 229, 234 (1977). The one exception was in *Mueller v. Allen*, but as Rehnquist determined the tax deduction to be indirect aid, the character of the school did not become an issue in the case.

¹¹⁹ The exceptions to this only serve to reinforce the point. In *Tilton v. Richardson* 402 US 672 (1971) the Supreme Court, in a 5:4 decision, upheld the constitutionality of carefully limited construction grants to colleges and universities. One of the main grounds for this decision was that unlike schools institutions of higher education were less “pervasively sectarian.” In *Hunt v. McNair* 413 US 734 (1973) the Court upheld lower interest rates in South Carolina for religious schools on similar grounds. See also *Smith v. Board of Governors of the University of North Carolina* 429 F.Supp. 871 (WDNC, 1977) judgment aff’d. 434 US 803 (1977); Kauper, P., “The Supreme Court and the Establishment Clause: Back to *Everson*?” 25 *Case Western Reserve Law Review* 107 (1974/5).

¹²⁰ *Lemon v. Kurtzman* 403 US 602, 619 (1971).

¹²¹ *CPERL v. Nyquist* 413 US 756, 774 (1973) (these grants were struck down with an 8:1 majority, Justice White the only dissenter; the tuition reimbursement and tax deduction statutes also challenged in the case were held unconstitutional by a vote of 6:3). The issue of restrictions was central to Powell’s opinion, as indicated by his shift of position on income tax benefits between *Nyquist* and *Mueller v. Allen* (1983).

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constitute a constitutional violation, both of which had been advanced in *Everson* and *Allen*. The effect was to impose much greater scrutiny on financial aid programmes and to require far stricter limits on them than on alternative forms of aid.¹²² The message from the Court was clear: financial benefits were far more likely to be considered a direct aid to the religious function of the school because, simply, the use of such benefits was virtually impossible to regulate and any attempt to do so would have to be so extensive that it would raise entanglement concerns.¹²³

This, however, does not address the most common criticism of the Burger Court's jurisprudence: that the distinctions drawn between different types of non-financial aid made little sense. At first glance there is little discernible difference between the tuition reimbursement grants of *Nyquist* and the income tax benefits of *Mueller v. Allen*, between textbooks and "periodicals, documents, pamphlets, photographs ... maps, charts, globes, sound recordings ... [and] films" in *Meek v. Pittenger* (1975).¹²⁴ The distinctions appear meaningless until they are viewed in light of the Court's concerns regarding financial aid: the aid provided must be of a kind which cannot be diverted or subverted to religious purposes. The most striking example of this train of thought was *Meek v. Pittenger* (1975).¹²⁵ In *Meek*, the Court addressed challenges to Pennsylvania's programmes of textbook loans, loans of instructional materials, provision of auxiliary services, and the loan of instructional equipment to religious schools and their students. A fractured Court upheld the textbook loans by a 6:3 majority and struck down the remaining three programmes by the same margin but with different Justices forming the opposing sides.¹²⁶ Textbook loans had already been upheld by the Court in *Allen*, a fact relied on heavily by Justice Potter Stewart for the Court, in addition to noting that the books were lent to the students and not to the schools. In contrast, the instructional materials and equipment were loaned directly to the non-public schools which to the majority equated to the aiding of the religious function of the school thereby violating the First Amendment.¹²⁷ The lack of restrictions on the use of the materials and the equipment was also determinative for the Court, as it had been in *Nyquist*. Two

¹²² Powell, however, did not explicitly acknowledge this as a foundation for his argument, claiming instead that the direct link between the financial benefit and school expenditures distinguished *Nyquist* from earlier cases. Some, however, have seen in *Nyquist* a retreat from the accommodationism of *Allen* and *Lemon* and of a reemergence of separationism. See Morgan, R., "The Establishment Clause and the Sectarian Schools ..." and Kobylka, J., "Leadership on the Supreme Court of the United States..."

¹²³ The question of financial benefits was not raised again in significant form until 2002 in *Zelman v. Simmons-Harris* 536 US 639, when the Court ruled Cleveland's school voucher programme constitutional.

¹²⁴ *Mueller v. Allen* 463 US 388 (1983) (holding constitutional tax deductions for the cost of tuition, textbooks, and transport for all parents); *Meek v. Pittenger* 421 US 349 (1975) (see discussion below).

¹²⁵ *Meek v. Pittenger* 421 US 349 (1975) (holding textbook loans constitutional but striking down loans of other instructional materials, auxiliary services including counselling, testing, psychological services, speech and hearing therapy with a 6:3 majority).

¹²⁶ Justices Brennan, Douglas, and Marshall objected to the textbook loan programme, which was upheld, but supported the rejection of the other three programmes. Chief Justice Burger and Justices Rehnquist and White argued to uphold all four programmes in question. This left only Justices Blackmun, Powell, and Stewart (who wrote the opinion) to form the plurality.

¹²⁷ *Meek v. Pittenger* 421 US 349, 362-6 (1975).

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years later in *Wolman v. Walter* the distinction became clearer when the Court addressed Ohio's programmes of textbook loans, testing and scoring services, the provision of diagnostic, therapeutic, guidance, and remedial services, loans of instructional materials and equipment, and reimbursement for the cost of field trips. For a Court more fractured than in *Meek*, Justice Blackmun wrote for the shifting majority.¹²⁸ Limited by their medical, health related nature, diagnostic hearing, speech, and psychological services could take place on religious school campuses because the content was effectively self-regulating.¹²⁹ In contrast, therapeutic services, including those provided as a result of the testing services, allowed the therapist to "establish a relationship with the pupil in which there might be opportunities to transmit ideological views" and as such could only be upheld if taking place at "truly religiously neutral locations."¹³⁰

Reading between the lines in these cases it is possible to see the Court's fear that overhead projectors paid for with public funds might be used to show biblical images and texts, that tape recorders would be used to play hymns and sermons, and that maps, globes, and photographs might be employed in theology or religious studies classes. Because there was no way, without unconstitutional entanglement, to limit the use of the aid, the possibility that it might be misused was sufficient to render the loans unconstitutional. The auxiliary services, including remedial instruction, guidance counselling, and speech and hearing services, suffered a similar fate. Unlike books which, arguably, could be read once and the religious content determined, teachers, guidance counsellors, healthcare professionals, and equipment used by them, could not be simply and easily monitored and thus no way existed to ensure that those benefits would not be employed for religious purposes, particularly when the religious environment was so pervasive. Benefits whose use was known were thus acceptable; any uncertainty about that use and the immediate presumption was of unconstitutionality.¹³¹

The on-campus/off-campus distinction was originally drawn by the Court in two cases dealing not with the provision of public aid to religious institutions but the use of public institutions to provide religious instruction: *McCullum v. Board of Education* (1948) and *Zorach v. Clauson* (1952).¹³² In *McCullum*, the religious education classes were conducted on the public school campus; in *Zorach*, students were taught at 'religious centers' off-campus. Holding that "[t]his is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith," Justice Black struck down the Illinois programme with

¹²⁸ In *Wolman*, the Court upheld the textbook loan programme and testing services with a 6:3 majority, the diagnostic services with an 8:1 vote, and therapeutic services with a 7:2 majority. The loan of instructional materials was struck down with 6:3 majority and the field trips with a 5:4 vote.

¹²⁹ *Wolman v. Walter* 433 US 229, 244 (1977).

¹³⁰ *Wolman v. Walter* 433 US 229, 247 (1977).

¹³¹ But see Stevens in *Wolman*, Marshall in *Mueller*, and Brennan in *Meek*, arguing that any benefit to religious organisations frees funds to be used for other, potentially religious, activities. See also Garvey, J., "Another Way of Looking at School Aid," 1985 *Supreme Court Review* 61.

¹³² *McCullum v. Board of Education* 333 US 203 (1948); *Zorach v. Clauson* 343 US 306 (1952).

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only Justice Stanley Reed dissenting.¹³³ Only four years later, Justice Douglas, writing for a 6:3 majority, upheld New York's programme, largely rejecting the applicability of *McCullum* because the programme in question "involves neither religious instruction in public school classrooms nor the expenditure of public funds."¹³⁴ Given the similarities in all other respects of the programmes, Douglas' opinion seems ingenious in the least, and it is with some sympathy that one reads Black's pointed dissent: "I see no significant difference between the invalid Illinois system and that of New York here sustained[,] [e]xcept for the use of the school buildings in Illinois ..."¹³⁵ Despite its controversial beginnings, however, the on-campus/off-campus distinction remained an integral part of the Court's analytic framework, appearing in both *Meek* and *Wolman*. Closely linked to the belief in church-affiliated schools as pervasively sectarian institutions, the argument shared many similarities with the direct-indirect distinction as interpreted by the Burger Court: aid provided on campus, such as auxiliary and therapeutic services, was frequently considered closer to direct than indirect aid.¹³⁶ The distinction had a significant symbolic element too. The image of teachers or others entering religious schools or setting up mobile classrooms on school grounds implied a relationship between the two, a relationship less obvious when aid was provided to individuals or at alternative locations. Concerned to avoid actual "entangling" relationships between church and state, the Court was unwilling to allow the appearance of improper ties.¹³⁷ Thus the distinction addressed multiple concerns.

Established by Justice Black in *Everson*, the issue of eligibility criteria for the programmes challenged remained part of the Court's informal standards for constitutionality throughout the Burger era.¹³⁸ Essentially, if a programme was available to all who met the eligibility criteria, and those criteria were not religiously based, then the benefit could not be ruled unconstitutional without further consideration. In *Nyquist*, the Court employed this analysis to strike down New York's tuition reimbursement programme and income tax benefits on the grounds that they were available only to parents with children attending non-public schools, approximately 85 per cent of which were religiously affiliated.¹³⁹ For the plurality, that the benefits were not also available to parents of public school children suggested that the programme was not general and available to all and that the result was a favouring of religious schools. In *Meek* two years later, the Court found neutral eligibility criteria crucial in upholding Pennsylvania's textbook loan initiative.¹⁴⁰ Eligibility for challenged programmes was elevated to a more influential position by Justice Rehnquist in *Mueller v. Allen*. Central to his opinion was that "the [tax] deduction is available

¹³³ *McCullum v. Board of Education* 333 US 203, 210 (1948).

¹³⁴ *Zorach v. Clauson* 343 US 306, 308-9 (1952).

¹³⁵ *Zorach v. Clauson* 343 US 306, 316 (1952) (Justice Black, dissenting).

¹³⁶ The distinction also linked to the Court's concern for how forms of aid were used by their recipients. See, for example, *Wolman v. Walter* 433 US 229, 247 (1977).

¹³⁷ See Marshall, W., "We Know It When We See It," p. 498 discussing the symbolic nature of the Court's jurisprudence.

¹³⁸ *Everson v. Board of Education of Ewing Township* 330 US 1, 16, 17 (1947).

¹³⁹ *CPERL v. Nyquist* 413 US 756, 780-94 (1973).

¹⁴⁰ See *Meek v. Pittenger* 421 US 349, 353, n.2 (1975).

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for educational expenses incurred by *all* parents, including those whose children attend public schools ...”¹⁴¹ For the bare majority, the programme was sufficiently broad to avoid the concerns raised by *Nyquist* because the benefit to religious parents was only incidental to a benefit provided to all parents. The dissenters accused Rehnquist of exalting form over substance, noting that although the benefit was technically available to all parents, “the vast majority of the taxpayers who are eligible to receive the benefit are parents whose children attend religious schools.”¹⁴² *Mueller* signalled a change in emphasis: broad eligibility criteria were no longer simply a baseline requirement but were now a factor in a programme’s favour.

Mueller also elevated to greater prominence the “child benefit” theory. Positing that if government provides benefits to an individual and that individual chooses to use those benefits to attend, or when attending, a religious school, the chain between the secular and the religious is broken, this mode of analysis suggests that it is the individual who is the beneficiary of the government aid and not the religious institution.¹⁴³ The genesis of the theory was in *Cochran v. Louisiana*, where Chief Justice Charles Evans Hughes held the state’s policy of providing textbooks to students in religious schools benefited the students, not the schools they attended.¹⁴⁴ Justice Black wrote the theory into Establishment Clause jurisprudence in *Everson* and in *Allen* the Court upheld New York’s textbook loan programme specifically on the grounds that the aid was provided to the student and not to the school.¹⁴⁵ With *Meek* and *Wolman* the child benefit theory was firmly embedded into the Court’s jurisprudence.¹⁴⁶ In *Mueller*, however, Rehnquist extended the reach of the theory to encompass for the first time financial benefits to parents in addition to materials and services.¹⁴⁷ As with the use of eligibility criteria, Rehnquist followed precedent by employing the child benefit theory but by ignoring the differences between financial and non-financial benefits in its application weakened the restrictions on state aid to religious schools that had been established by the Burger Court since *Lemon*.

The approaches and analysis employed by the Justices in school aid cases explains some of the most obvious “inconsistencies” between the cases heard through the 1970s. In doing so, it allows that the Legal Model is not obsolete in this area of constitutional jurisprudence. However,

¹⁴¹ *Mueller v. Allen* 463 US 388, 397 (1983).

¹⁴² *Mueller v. Allen* 463 US 388, 405 (1983) (Justice Marshall, with Justices Brennan, Blackmun, and Stevens, dissenting).

¹⁴³ See Esbeck, C., “A Constitutional Case For Governmental Cooperation With Faith-Based Social Service Providers,” 46 *Emory Law Journal* 1 (1997); Underkuffler, L., “Vouchers and Beyond: The Individual as Causative Agent in Establishment Clause Jurisprudence,” 75 *Indiana Law Journal* 167 (2000).

¹⁴⁴ *Cochran v. Louisiana* 281 US 370, 375 (1930).

¹⁴⁵ *Everson v. Board of Education* 330 US 1, 18 (1947). The argument was also advanced by Congress in the 1940s and 1950s when enacting legislation allowing indirect benefits to flow to religious schools and their students as a result of general education programmes. *Board of Education v. Allen* 392 US 236 (1968). The argument was rejected by Powell in *Nyquist* because the programmes challenged went directly to the schools and were financial in nature. Thus “child benefit” could only be argued with reference to indirect, nonfinancial aid.

¹⁴⁶ See especially *Meek v. Pittenger* 421 US 349, 361, 362 (1975).

¹⁴⁷ *Mueller v. Allen* 463 US 388, 399, 400 (1983).

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the results were only one aspect for concern among scholars, critics, and members of the legal profession. Equally disconcerting was the inability of the Court to form and maintain a stable majority: on Establishment Clause issues the Justices appeared to shatter into voting blocs and alliances between them appeared as fluid and inconsistent as the results they produced. The Court had divided before, *Everson*, *Allen*, and *Lemon* were decided by the smallest of majorities, but the frequency with which plurality opinions were handed down, or opinions in which different Justices signed to different sections, was unprecedented.¹⁴⁸ The explanation, however, lay in consistency rather than its opposite.

Vincent Blasi's description of the "rootless activism" of the Burger Court, the control exerted by moderate, pragmatic men at the Court's political centre, was nowhere more evident or apt than in the school aid cases.¹⁴⁹ Analysis of the voting patterns of the Justices on the Court between 1969 and 1985 in Establishment cases shows three distinct voting blocs: Rehnquist, White, Burger and O'Connor voted for "accommodationist" results in more than 73% of cases they heard; Black, Marshall, Brennan, Stevens, and Douglas voted for "separationist" results in more than 80% of cases. This left a centre bloc of Powell, Harlan, Stewart, and Blackmun who voted slightly more frequently for separationist results than accommodationist ones but who were clearly the swing votes.¹⁵⁰ Between 1973 and 1977, the period between *Nyquist* and *Wolman*, these voting blocs remained steadiest: Brennan, Marshall, and Stevens voted together in 100% of cases, as did Burger, White, and Rehnquist: the separationist and accommodationist camps were clearly established.¹⁵¹ The centre grouping of Powell, Blackmun, and Stewart agreed in 83% of cases, only marginally less than the 90% agreement rate in the pre-1973 period.¹⁵² Significantly, in three of the most important and controversial cases of this period, the majority opinions were written by these swing voters.¹⁵³

The consequences of this control by the centre were narrowly written opinions, closely related to the specific facts of the case. In *Nyquist*, Powell drew on the jurisprudence of Oliver Wendell Holmes, stating: "Our Establishment Clause precedents have recognised the special relevance in this area of Mr. Justice Holmes' comment that 'a page of history is worth a volume of logic'."¹⁵⁴

¹⁴⁸ The clearest examples of this are in *Meek v. Pittenger* and *Wolman v. Walter*.

¹⁴⁹ See Blasi, V. (Ed.), *The Burger Court: The Counter-Revolution That Wasn't* (New Haven and London: Yale University Press, 1983).

¹⁵⁰ Although these figures apply to all Establishment Clause cases, the voting patterns are sufficiently close to voting patterns in school aid cases to make them applicable. Figures taken from Kobyłka, J., p.551. Exact figures showing the Justices percentage of votes for accommodationist results: Rehnquist, 91%; White, 86%; Burger, 74%; O'Connor, 73%; Powell, 46%; Harlan, 40%; Stewart, 38%; Blackmun, 37%; Black, 20%; Marshall, 15%; Brennan, 14%; Stevens, 12%; Douglas, 0%.

¹⁵¹ To 1972, Brennan, Marshall, and Blackmun (who Stevens replaced) agreed in 83% of cases; Burger, Rehnquist, and White in 80%. Figures taken from Kobyłka, J., p.555.

¹⁵² Kobyłka, J., p.555.

¹⁵³ Powell wrote in *Nyquist*, Stewart in *Meek*, and Blackmun in *Wolman*.

¹⁵⁴ Citing *New York Trust Co. v. Eisner* 256 US 345, 349 (1921) in *CPERL v. Nyquist* 413 US 756, 777, n.33 (1973).

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The sentiment was echoed by Stewart in *Meek* who suggested that while the *Lemon* test was the proper mode of analysis the Court should be wary of unquestioned adherence to such tests.¹⁵⁵ For the Justices of the centre the Constitution required pragmatism, not dogma, and their respective approaches to the cases reflected this clearly.¹⁵⁶ Echoing his *Nyquist* opinion, Powell offered in partial concurrence in *Wolman* a statement that serves to challenge those who accuse the Court of inconsistency and a lack of clarity. He wrote: "Our decisions 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."¹⁵⁷

The Burger Court's Establishment Clause jurisprudence thus provides support for both the Attitudinal and Rational Choice Models of Court activity proposed by political scientists. The accommodationist and separationist blocs are clear examples of the Justice motivated by his or her own policy preferences as portrayed by Attitudinalists. Yet the centre Justices are a challenge to this view and provide support for the Rational Choice approach: Justices influenced by context, legal principles, government positions, and the operation of programmes, seeking the "best" result in a case, irrespective of adherence to precedent or legal norms. The control of the centre suggests these cases are best understood from a Rational Choice perspective since the support of this group, and the need to bargain to achieve it, ultimately determined the outcome in the majority of the Burger Court's Establishment cases. Yet this is ultimately misleading since for some Justices personal preferences controlled their vote and their written opinions. Rational Choice explains the result but it provides only a limited picture of what occurred on the Court. Both models thus find support in these cases but are also challenged at the same time. Considering *both* models, and the insights provided by them, allows for a broader, more complete understanding of the Court and these cases.

Neither so widespread nor so influential as traditional thinking suggests, inconsistencies and problems nevertheless existed in the Court's jurisprudence. Two elements of opinions were particularly problematic for clarity of meaning: poorly reasoned, weak opinions and the use of dicta. Powell's opinion for the Court in *Nyquist* was arguably the weakest of the Court's Establishment Clause cases to that point. Trying to distinguish New York's maintenance and

¹⁵⁵ *Meek v. Pittenger* 421 US 349, 358-9 (1975). This echoed Burger's own warning, stated in *Lemon* at 403 US 602, 614 (1971).

¹⁵⁶ It is possible that the Justices of the centre also adhered to *stare decisis* (or "let the decision stand") in these cases, the principle that precedent should be followed by the courts. However, the narrow decisions handed down by the Court meant that in many instances cases arose because there was no conclusive precedent to follow. While the Justices of the centre bloc were certainly concerned to adhere to the guidelines established in earlier cases, the influence of *stare decisis* seems of lesser importance in their deliberations than producing narrow rulings that reflected a pragmatic response to the situation addressed. This is essentially a Rational Choice approach.

¹⁵⁷ *Wolman v. Walter* 433 US 229, 263 (1977) (Justice Powell, concurring in part and dissenting in part). But see Young, D., "Constitutional Validity of State Aid . . .," arguing that case-by-case analysis led to misleading, illusory results and suggesting alternative reasons for such division.

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repair grants from earlier aid cases by arguing that those programmes were channelled to the separate secular educational function of the schools while the maintenance grants were not was the sort of "hair-splitting" for which critics attacked the Court.¹⁵⁸ Rehnquist's opinion for the Court in *Mueller* suffered from similar problems. In trying to distinguish *Nyquist*, Rehnquist argued that Minnesota's tax deduction fell under the exception left open in the earlier case for laws benefiting all students. Elsewhere, however, he appeared to suggest that the difference between the cases was that Minnesota's programme involved a "genuine tax deduction" while *Nyquist* did not, a claim equally in danger of being labelled "hair splitting."¹⁵⁹

Mueller was also full of non-decisive but prominent dicta which embodied both Rehnquist's commitment to federalism and his political conservatism. The opinion appeared to tie the Court more closely to the political arena in the area of religion than at any time before.¹⁶⁰ Although the subject had been debated for nearly two decades, tax credits or deductions as an education policy had been rejected in the wake of the Court's 1973 *Nyquist* ruling. However, the issue returned to Congress in 1981 as a result of continued disenchantment with public schools, continued financial problems, and the Reagan Administration's attempt to shift responsibility from the government to the private sector. Those supporting credits argued that they would provide effective competition for the public schools, thus encouraging their improvement, that private schools provided a public service and parents should not be penalised for making that choice, and that credits would promote diversity and freedom. Opponents of tax credits, including a majority of public school educators as well as secular organisations supporting a strict separation of church and state, argued that such a policy would damage the public schools, turning them into repositories for those students other schools refused to take, that public schools served as unifying forces in American society while private schools did not and could not, and that if religious schools were to be included a violation of the Establishment Clause would occur.¹⁶¹

¹⁵⁸ See *CPERL v. Nyquist* 413 US 756, 775-6 (1975). Providing little reasoning for the claim, Powell also attempted to turn the "primary effect" test of *Lemon* into a "direct and immediate effect" test, thus blurring, at least temporarily, the scope of *Lemon* (at 783).

¹⁵⁹ *Mueller v. Allen* 463 US 388, 398, 396 (1983).

¹⁶⁰ This applies even when taking the school prayer cases into account. In the aftermath of *Engel* and *Schempp* the Court became the focus of political attacks but its opinions avoided mention of such debates. Other than deciding cases the Court made no comment on the political battles surrounding school prayer; in *Mueller*, Rehnquist appeared to be explicitly advocating positions similar to those advanced by the Reagan Administration.

¹⁶¹ These were arguments that had once been made specifically against religious schools, echoing the debates of the 1940s and 1950s, but the religious element was now only a minor part of the debate. Similar arguments have since been made about school vouchers. In favour of tax credits see: Coleman, J., *et al.*, *High School Achievement: Public, Catholic, and Private Schools Compared* (New York: Basic Books, 1982) (see, in particular, Chapter 3); English, R., "For Tuition Tax Credits and Vouchers," *NYT*, April 19, 1981, E15; McGarry, D., "Tuition Tax Credits: Their Advantages and Constitutionality," 2 *Public Law Forum* 101 (1982); "Note: Government Neutrality and Separation of Church and State: Tuition Tax Credits," 92 *Harvard Law Review* 696 (1978/9); "Tuition Tax Credits: Now or Never," *America*, December 13, 1980, pp. 380-1. Organisations taking this position included: National Institute for Education, American Enterprise Institute, Council for American Private Education, and the Heritage Foundation. In opposition to tax credits see: Catteral, J., and H. Levin, "Public and Private

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Although not mentioned in the opinions, the Justices were aware of the controversy surrounding tax credits.¹⁶² Rehnquist's majority opinion however appeared at times to be advocating policy decisions favourable to school aid.¹⁶³ Not only did Rehnquist's dicta suggest that the Court was looking more favourably at religious schools than it had in the past, they came remarkably close to policy statements, blurring the line between constitutionality and political preference.¹⁶⁴ In addition, Rehnquist's reference to *Widmar v. Vincent*, an "equal access" case decided two years previously, also served to obscure *Mueller's* foundations.¹⁶⁵ Traditionally the Court had approached equal access cases in a different way to school aid cases; because of the nature of equal access programmes greater emphasis was placed on free speech and free exercise analysis than was traditionally present in school aid decisions. By suggesting that aid cases should take note of this approach, Rehnquist implied, for the first time in a majority opinion, that financial aid implicated the Free Exercise Clause. Conservatives had been arguing this for some time, Rehnquist's opinion appeared to give it credibility.¹⁶⁶ Although never accepted by a majority of the Court, Rehnquist's dicta served to blur the lines that had existed between equal access and school aid cases, further confusing Establishment Clause doctrine. The combination of these problems in *Mueller* with confusion about the Court's other school aid cases ensured the issue would return to the Court.

Schools: Evidence on Tuition Tax Credits," *Sociology of Education*, Vol. 55, No. 2/3 (April-July 1982), pp. 144-51; Gordon, A., "The Three Cs on Tax Credits," *NYT*, October 3, 1982, CN24; "Segregating Schools: The Foreseeable Consequences of Tuition Tax Credits," 89 *Yale Law Journal* 168 (1979/80); Shanker, A., "Tuition Tax Credits: An Election Issue," *NYT*, September 19, 1982, E9; Wood, Jr., J., "Tuition Tax Credits for Nonpublic Schools," 23 *Journal of Church and State* 5 (1981). Organisations which opposed tax credits included: National Education Association, National Coalition for Public Education, Americans United for the Separation of Church and State, and the American Jewish Committee.

¹⁶² See Brennan Papers reproduced in Dickson, D. (Ed.), *The Supreme Court in Conference (1940-1985)*, (New York: Oxford University Press, 2001), pp. 415-7.

¹⁶³ *Mueller v. Allen* 463 US 388, 395 (1983) (see also 401-2). As such, it is a clear example of Segal and Spaeth's Attitudinal Model of judicial behaviour. Segal, J., and H. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002). See Chapter One.

¹⁶⁴ However, *Mueller* fell short of ruling in favour of the constitutionality of Reagan's plan because while Minnesota's programme had involved a tax deduction by which all parents were eligible to reduce their tax liability, the Administration's tax credit proposal operated through a reimbursement system and covered only parents with children in private schools. This difference, combined with an estimated cost of \$229 million in fiscal year 1984, defeated Reagan's proposal. See Pear, R., "Ruling Touches Off New Debate on Prospects of Tuition Credit Bill," *NYT*, June 30, 1983, D23. On the history of tax credits and the Reagan Administration see McAndrews, L., "Late and Never: Ronald Reagan and Tuition Tax Credits," 42 *Journal of Church and State* 467 (2000).

¹⁶⁵ *Widmar v. Vincent* 454 US 263 (1981) (allowing a religious student group to use university facilities on the same terms as secular groups). See Chapter 4 for discussion of the Court's equal access cases.

¹⁶⁶ Chief Justice Burger had made similar arguments in both *Nyquist* and *Meek* but as dissents in both cases his arguments received much less attention. See *CPERL v. Nyquist* 413 US 756, 801 (1973) (discussing *Quick Bear v. Leupp* 210 US 50 (1908) and *Meek v. Pittenger* 412 US 349, 386-7 (1975)).

Reassessing the Burger Court, 1971 – 1985: *Aguilar* and *Ball*

Aguilar v. Felton and *Grand Rapids v. Ball* resulted, in part, from a growing sensitivity about church-state relationships.¹⁶⁷ In many cases challenges to statutes or programmes were brought before they went into effect, or at least while their history was relatively brief. The lack of an adequate record on which to judge constitutional violations was noted by Justices in *Nyquist*, *Meek*, and *Wolman*. In contrast, *Grand Rapids*' Community Education and Shared Time programmes were first instituted in the 1976-7 school year, operating for at least three years before being challenged, while New York's programme had been in operation for fourteen years. In comparison to earlier cases both programmes were well-established. But by the early 1980s the political climate had changed and religion had become a more prominent issue, driven in part by the rise of conservative evangelicals and the Religious Right, and the presidency of Ronald Reagan. The congressional battle in the early 1980s over so-called "court stripping" bills, intended to restrict the Supreme Court's jurisdiction over school prayer and abortion cases, stimulated debate about the Supreme Court's Establishment Clause jurisprudence. Reagan's vocal, if not practical, support for a school prayer amendment to the Constitution, combined with forceful professions of his own religious beliefs, provided impetus to the Religious Right and those who opposed it. Secular advocacy groups such as the ACLU, Americans United for the Separation of Church and State, and People for the American Way undertook legal and political campaigns to challenge what they saw as "the moral majoritarians['] ... crusade to impose their beliefs on everyone."¹⁶⁸ The prayer debate politicised all areas of church-state relations: previously uncontroversial accommodations, such as legislative chaplains challenged in *Marsh v. Chambers* and New York's remedial education programmes, suddenly became battlegrounds between those who viewed them as legitimate government recognitions of religion and those who perceived them as unconstitutional government favouritism.¹⁶⁹ Statutes and programmes became more than statutes and programmes, they became substitutes for discussions about the "proper" place for religion in American life.

The debate had been a particular factor in the 1984 presidential election. At the Republican National Convention in Dallas, fundamentalist Protestants played a prominent role and stressed links between patriotism, morality, and religion. At a prayer breakfast the day after the Convention, Reagan suggested that religion and politics were inseparable and those who argued otherwise were "intolerant of religion." Although the Religious Right had been a significant force in the 1980 election, the perception in 1984 was that it was more proactive and visible, and

¹⁶⁷ *Aguilar v. Felton* 473 US 402 (1985); *Grand Rapids School District v. Ball* 473 US 373 (1985).

¹⁶⁸ See Appendix C.

¹⁶⁹ On increased sensitivity see Smith, S., *Foreordained Failure: The Quest For a Constitutional Principle of Religious Freedom* (New York and Oxford: Oxford University Press, 1995), pp. 110-3. *Marsh v. Chambers* 463 US 783 (1983) (upholding the constitutionality of legislative chaplains paid by the state).

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that Reagan had been more assertive in embracing its leaders and its causes.¹⁷⁰ Such activities stimulated others to comment in opposition. In early September, a joint statement by the American Jewish Committee, Baptist Joint Committee on Public Affairs, National Council of Churches, National Coalition of American Nuns, and Synagogue Council of America, condemned recent events and called on Democrats and Republicans to “reject categorically the pernicious notion that only one brand of religion meets with God’s approval and that others are necessarily evil.”¹⁷¹ At the same time, Norman Lear, founder of People for the American Way, a group organised specifically to combat fundamentalist influence in politics, released letters between himself and President Reagan discussing the church-state issue.¹⁷² Nothing in Reagan’s replies to Lear was particularly controversial, nor was it new to those familiar with his speeches, but publication of the letters fuelled the existing debate, as Lear no doubt intended. Democratic presidential candidate Walter Mondale used the occasion of a speech to B’nai B’rith, a non-partisan Jewish service organisation, to respond to Reagan and comment on the church-state debate.¹⁷³ The debate rumbled on throughout the autumn, reinforcing the sense that religion and politics were becoming intimately intertwined. A CBS/*New York Times* poll found 42% of respondents felt that the candidates were misusing religion and only 22% believed candidates should discuss religion in the campaign.¹⁷⁴ Although unlikely to affect the Justices’ deliberations in *Aguilar* and *Ball* directly, the controversy of the election raised the visibility of church-state issues, politicising the positions in a very public way. The lengthy and frequently emotional debate increased public sensitivity to the potential consequences of a Court ruling and threatened to increase the political divisiveness the Court had warned of in earlier opinions.

Aguilar developed from New York City’s provision of remedial educational services to students in private, including religious, schools using Title I funds, the largest such programme in the country. Title I of the Elementary and Secondary Education Act of 1965 authorised the provision of funds to local educational agencies to meet the needs of educationally deprived children from low-income families.¹⁷⁵ Using such funds, New York implemented a programme

¹⁷⁰ For a range of activities see Gordis, D., “Honor Thy Bill of Rights,” *NYT*, August 19, 1984, E19; Herbes, J., “Political and Religious Shifts Rekindle Church-State Issue,” *NYT*, September 2, 1984, A1, 20; Schanberg, S., “Thoughts of an Infidel,” *NYT*, September 8, 1984, A21; “Voters Found Uneasy Over Religion as Issue,” *NYT*, September 19, 1984, B9.

¹⁷¹ Briggs, K., “Clergy Sees Danger in State Religion,” *NYT*, September 6, 1984, B13.

¹⁷² Reprinted in *NYT*, September 6, 1984, B14.

¹⁷³ Speech reprinted in *NYT*, September 7, 1984, A14: “No President should attempt to transform policy debates into theological disputes. He must not let it be thought that political dissent from him is unchristian. And he must not cast opposition to his programs as opposition to America ... I don’t doubt Mr. Reagan’s faith, his patriotism and his family values. And I call on him and his supporters to accept and respect mine.”

¹⁷⁴ However, the poll also showed this had little effect on the way people were likely to vote in the election. The controversy appeared to increase sensitivity to the religious issue without changing voters’ fundamental beliefs. See “Voters Found Uneasy Over Religion As Issue,” *NYT*, September 19, 1984, B9.

¹⁷⁵ For text see *Aguilar v. Felton* 473 US 402, 406, n. 1 (1985). Although superseded by Chapter I of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. § 3801, the provisions

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whereby private school pupils would be transported to public schools after school hours for instruction. Concern for the safety of the students, poor attendance, and tired pupils and staff led the Board of Education to move after-school instruction on to private school campuses “as Congress had contemplated when it enacted Title I.”¹⁷⁶ The programme yielded equally mixed results and led the Board to implement the programme challenged in *Aguilar* where Title I services were provided by public employees on private school premises during school hours. Only public employees were eligible to participate, assignments were made on a voluntary basis, and an extensive system of monitoring was established.¹⁷⁷ *Ball* involved similar programmes but funded by state resources, not federal funds. Grand Rapids established two programmes: Shared Time and Community Education. The former provided remedial and enrichment reading and mathematics classes, in addition to other subjects intended to supplement the core curriculum of the schools, took place during school hours, on religious school grounds, but were taught by full-time public school teachers. The Community Education Program, offered to children and adults after school hours, on religious school grounds, provided a wider range of subjects and classes, and were taught by employees of the particular school who were designated as “part-time public employees” for the duration of the classes.¹⁷⁸ Unlike the New York programme, Grand Rapids had not provided for any monitoring of the programmes. The result in each case was the same, the programmes violated the Establishment Clause because they created too close a link between church and state.¹⁷⁹

Aguilar and *Ball* took much of the legal community by surprise. Although believing that “to uphold the programs, the Supreme Court will either have to draw some exquisitely fine lines or disavow the key precedents that have placed tight limits on parochial aid,” this was exactly what the Court had been criticised for and was not considered beyond possibility.¹⁸⁰ An additional factor was the Court itself. In *Mueller*, Rehnquist’s dicta had suggested a more accepting attitude towards religious schools, a perception reinforced in 1984 when the Court handed down *Lynch v. Donnelly* upholding a city-sponsored display of a crèche in a public park as part of a Christmas celebration. Writing for the 5:4 majority, Burger argued that the nativity scene was acceptable as part of Pawtucket’s broader recognition of Christmas as it formed only part of a predominantly

were virtually identical and the Supreme Court continued to use “Title I” to refer to the statute in question.

¹⁷⁶ *Agostini v. Felton* 521 US 203, 211 (1997). See discussion below at pp. 110-15.

¹⁷⁷ *Aguilar v. Felton* 473 US 402, 406-7 (1985) and *Agostini v. Felton* 521 US 203, 210-12 (1997). In 1985, 20,000 students were served in 253 nonpublic schools at a cost of \$30 million. In total, New York’s Title I programme served 178,595 students eligible under the income and educational limitations requirements. Maeroff, G., “Education Board Faulted on Parochial Aid Stance,” *NYT*, January 22, 1985, B1, 3.

¹⁷⁸ *Grand Rapids School District v. Ball* 473 US 373, 375-8 (1985).

¹⁷⁹ *Aguilar* was decided 5:4, *Ball* was decided 7:2. The two votes difference were those of Chief Justice Burger (arguing the result in *Aguilar* disadvantaged students and the Court had not adequately considered the context of New York’s programme) and Justice O’Connor (arguing against the on-campus/off-campus distinction and the use of entanglement. See below).

¹⁸⁰ Greenhouse, L., “The Top Court Will Have More to Say on Religion,” *NYT*, May 5, 1985, E5.

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secular display.¹⁸¹ In the weeks before the *Aguilar* and *Ball* opinions were announced, the Court ruled against positions favoured by accommodationists in two other cases but because they were not specifically school aid cases the perception of growing accommodationism on the Court prevailed.¹⁸²

To understand *Aguilar* and *Ball* they must be viewed as companion cases. Argued together and handed down together, Brennan explicitly stated the link in his *Aguilar* opinion.¹⁸³ This connection was not just adhered to by the majority: in their *Ball* opinions, Chief Justice Burger and Justices White and O'Connor directed attention specifically to their opinions in *Aguilar*, writing only to discuss minor differences between the cases.¹⁸⁴ Considering these cases together addresses the most common criticism of the *Aguilar* opinion: its almost exclusive reliance on the entanglement prong of the *Lemon* test. Rather than representing an expansion of entanglement beyond its natural bounds, *Aguilar* was one part of a much broader argument; considered with the purpose and effects analysis of *Ball*, the cases served not to undermine the *Lemon* test but to reinforce its centrality to Establishment Clause jurisprudence. If *Aguilar* undermined the *Lemon* test, it is difficult to understand how in *Ball*, the case which precedes it in the Court reports, Brennan could assert:

We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children ... The *Lemon* test concentrates attention on the issues – purpose, effect, entanglement – that determine whether a particular state action is an improper “law respecting an establishment of religion.” We therefore reaffirm that state action alleged to violate the Establishment Clause should be measured against the *Lemon* criteria.¹⁸⁵

For those expecting inconsistency from the Court in light of earlier cases, *Aguilar* and *Ball* simply reinforced existing preconceptions, but to overlook the clear link between the two cases is to misunderstand what the Justices were trying to do.

¹⁸¹ *Lynch v. Donnelly* 465 US 688 (1984).

¹⁸² The cases were *Wallace v. Jaffree* 472 US 38 (1985), striking down an Alabama moment of silence statute (see Chapter 3), and *Estate of Thornton v. Caldor* 472 US 703 (1985), which rejected a Connecticut law requiring employers to give workers a weekly day off for their Sabbath.

¹⁸³ *Aguilar v. Felton* 473 US 402, 404 (1985).

¹⁸⁴ Burger and O'Connor concurred in part and dissented in part in *Ball*, White filed one opinion dissenting in both cases.

¹⁸⁵ *Grand Rapids School District v. Ball* 473 US 373, 383 (1985). This passage caused some debate among the Justices of the majority. Originally conceived as a longer passage acknowledging criticism of the *Lemon* test, it was shortened to the final version. Originally, however, “should” read “must.” It was altered at the suggestion of Justice Powell whose long-standing pragmatism in such cases led him to object to the restraints of the word “must.” He wrote to Brennan: “I shy away from using the word “must,” however, as it is stronger than necessary. Bearing *Marsh v. Chambers* in mind, it occurs to me that none of us can foresee whether in some future case application of the *Lemon* test alone would not be dispositive.” Memorandum from Justice Powell to Justice Brennan, May 16, 1985. Marshall Papers, Box 362, Folder 8. *Marsh* involved an Establishment Clause challenge to legislative chaplains which the Court had rejected by relying on history rather than employing the *Lemon* test.

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Viewed in this way there was little remarkable or unpredictable about the *Aguilar* and *Ball* opinions. In *Ball*, Brennan found “no reason to disagree” with the lower court’s finding that the Community Education and Shared Time programmes had a secular purpose.¹⁸⁶ In analysing “effect” the role of the teacher was crucial: as in *Meek* and *Wolman*, that the teachers could not be easily controlled because of the nature of the teacher-student relationship raised concerns about the “misuse” of the aid provided.¹⁸⁷ The same cases provided precedent for Brennan’s claim that “[t]his kind of direct aid to the educational function of the religious school is indistinguishable from the provision of a direct cash subsidy to the religious school that is most clearly prohibited by the Establishment Clause.”¹⁸⁸ Because state provision of the courses relieved the schools of the financial burden of running such courses themselves, the state freed funds which the school could use elsewhere, potentially for religious instruction. In this way the aid was both direct and financial, the two types of aid traditionally receiving closest scrutiny and least support from the Court. In neither of these arguments did the majority veer from the established path.

More unusual was Brennan’s use of “symbolic union” analysis. More akin to a balancing of church-state interaction, the test implied a greater openness to accommodation than Brennan’s history of separationist opinions reflected.¹⁸⁹ Its inclusion was most likely an attempt to win Justice Sandra Day O’Connor’s vote for the majority. In her relatively short time on the Court O’Connor had shown a tendency towards pragmatism in Establishment cases, based on close reading of the factual records and a willingness to question existing tests, making her vote the most unpredictable among Justices whose positions were already well-established.¹⁹⁰ However, the intention behind “symbolic union” was not new to the Court’s jurisprudence. Both the on-campus/off-campus distinction and the direct-indirect aid division included symbolic elements and Brennan’s reference to *McCullum* and *Zorach* as part of his analysis served to reinforce the link. In *Ball*, the majority was concerned that because the remedial and supplementary education classes were taught by employees of the religious school in which the instruction took place, the children participating would be unable to distinguish between the religious and secular providers, thereby creating in their minds a union of church and state. The combination of the religious affiliation of the teachers and the religious schools in which the classes were taught presented far

¹⁸⁶ *Grand Rapids School District v. Ball* 473 US 373, 383 (1985).

¹⁸⁷ *Grand Rapids School District v. Ball* 473 US 373, 386, 388 (1985).

¹⁸⁸ *Grand Rapids School District v. Ball* 473 US 373, 395 (1985). Powell made the same argument about New York’s programmes in concurrence in *Aguilar v. Felton* 473 US 402, 419 (1985) (Justice Powell, concurring). Similar arguments were made about instructional materials and auxiliary services in *Meek* and about field trips in *Wolman*.

¹⁸⁹ *Grand Rapids School District v. Ball* 473 US 373, 390 (1985). This is further evidence of the importance of the centre bloc on the Burger Court and the validity of the Rational Choice Model in certain circumstances.

¹⁹⁰ The move was partially successful: O’Connor wrote separately but concurred in the decision with regards to Community Education, drawing specifically on symbolic union analysis. Arguably Powell’s vote was equally unpredictable during his time on the Court. However, close reading of his opinions showed a consistency in reasoning that would indicate his most likely vote in a given case.

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too great a danger of a constitutional violation for the Justices who, it might be supposed, would have felt far more comfortable had the programme been offered anywhere but the religious school premises.¹⁹¹

Elements of these arguments also appeared in Brennan's *Aguilar* opinion. However, the first two prongs of the *Lemon* test were addressed in *Ball*; the only significant difference in *Aguilar* was that a system of monitoring had been established, providing the Court with a forum to discuss the least used of the Court's *Lemon* test concerns. The entanglement test was initially formulated in *Walz v. Tax Commission of the City of New York*, a 1970 case in which the Court addressed the constitutionality of New York's tax exemption for buildings used solely for religious purposes.¹⁹² Upholding the programme, Chief Justice Burger not only suggested that "there is room for play in the joints productive of a benevolent neutrality," but went a step further by suggesting that government support of religion was permissible as long as there was no "excessive government entanglement with religion."¹⁹³ In *Lemon*, Burger established categories for entanglement analysis and warned that the test should not become an end in itself but a means to the end of upholding the Constitution: "This is not to suggest, however, that we are to engage in a legalistic minuet in which precise rules and forms must govern. A true minuet is a matter of pure form and style, the observance of which is itself the substantive end. Here we examine the form of the relationship for the light that it casts on the substance."¹⁹⁴ Entanglement, as Burger noted in *Lemon*, was implicitly tied to other concerns in Establishment cases. Without the belief in religious schools as pervasively sectarian institutions monitoring would be unnecessary and the concern would be irrelevant, as in the religious college cases. If direct aid to religious schools had been accepted by the Court, monitoring of the kinds of aid provided and how it was used would have been equally obsolete. Thus, although *Aguilar* appeared to involve only entanglement, it rested heavily on well-established concerns.

¹⁹¹ *Grand Rapid School District v. Ball* 473 US 373, 387 (1985). The 'pervasively sectarian' nature of the schools involved in *Ball* was a factor relied on heavily by the Court in reaching its conclusion.

¹⁹² *Walz v. Tax Commission of the City of New York* 397 US 664 (1970).

¹⁹³ *Walz v. Tax Commission of the City of New York* 397 US 664, 669 (1970). That *Walz* employed entanglement to uphold a challenged programme makes it unusual among the Court's aid cases and that Burger employed the test in a positive fashion, as a way to praise New York's policy, suggests that the Court's subsequent negative, suspicious employment of it was a change in emphasis. This subtle difference has been overlooked, unsurprisingly given Burger's role as architect of the *Lemon* test the following year, but it is intriguing, suggesting the possibility that a far different Establishment Clause jurisprudence might have developed on the Court. The absence of entanglement was also noted by Rehnquist in *Mueller v. Allen* 463 US 388, 403 (1983) when upholding Minnesota's tax deduction. However, unlike *Walz*, it was simply noted that the programme did not raise entanglement concerns rather than being employed to praise the challenged programme. In this way, *Mueller* is more in keeping with the Court's post-*Lemon* jurisprudence than with *Walz*.

¹⁹⁴ *Lemon v. Kurtzman* 403 US 602, 614 (1971). The categories Burger referenced were the character and purposes of the institutions aided (pervasively sectarian), the nature of the aid provided (direct/indirect, on-campus/off-campus, financial/in-kind), and the resulting relationship between the government and the religious authority (at 615).



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This interlinking is important not only for the opinion in *Aguilar* but the entanglement test in general. In dissent, Rehnquist accused the majority of “tak[ing] advantage of the “Catch-22” paradox of its own creation ... whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement.”¹⁹⁵ The argument became a popular one for attacking the entanglement test in the aftermath of *Aguilar*. Yet Rehnquist’s attack fundamentally misread precedent. Especially in *Meek* and *Wolman*, programmes of aid that were not considered self-governing were struck down because they could easily be put to illegitimate religious uses; while noting that prevention of aid being used in such a manner would result in entanglement, the aid was primarily struck down under the former reasoning. The Court never said that monitoring would make a programme constitutional, but that if a programme would require supervision to ensure no transgressions then it was likely the aid violated the Establishment Clause. This was the argument advanced by the *Aguilar* majority in its relatively brief opinion. Taken in context with this and the opinion in *Ball*, entanglement was a part of these additional concerns, not separate from them. Thus *Aguilar* and *Ball* were neither major changes in Establishment Clause doctrine nor evidence of entanglement gone mad.

The majority’s unwillingness to consider the detailed records of the operation of both the New York and Grand Rapids programmes was unusual, however. In the majority of the Court’s earlier cases there had been no history to consider: the laws and programmes were recent attempts to deal with new problems affecting public and religious schools and were challenged either before they went into effect or very soon after. In both *Aguilar* and *Ball* extensive histories were submitted to the Court for consideration. The majority’s failure even to address the existing record signalled a weakening of the control of the pragmatists on the Court. As in *Mueller*, the Court divided largely along ideological lines, the Court’s liberals, Brennan, Marshall, Blackmun, and Stevens, voting consistently for strict separationist results, the conservatives, Burger, Rehnquist, and White, favouring accommodationist positions. Powell and O’Connor thus held the balance but their influence was not so strong that they could shape the final opinion. Powell provided the liberals with their fifth vote but the tone and structure of Brennan’s opinion reflected little of the balancing evident in Powell’s *Nyquist* and *Wolman* opinions. In both majority opinions, the heavy emphasis on the “pervasively sectarian” nature of the schools involved and the dominant role it played in determining the outcome signalled a far greater concern for the symbolic nature of the relationship between religion and government than had been evident in other cases. Combined with a similar ideological division in *Mueller*, *Aguilar* and *Ball* signalled that the pragmatism of earlier years was coming to an end.

¹⁹⁵ *Aguilar v. Felton* 473 US 402, 420-1 (1985) (Justice Rehnquist, dissenting) (internal citations omitted). See also Chadsky, M., “State Aid to Religious Schools: From *Everson* to *Zelman*, A Critical Review,” 44 *Santa Clara Law Review* 699 (2003); Levy, L., *The Establishment Clause: Religion and the First Amendment* (London and Chapel Hill: University of North Carolina Press, 2nd Ed., revised, 1994), p. 161-2.

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Significant among the *Aguilar* dissents was that of Justice O'Connor. As the newest member of the Court, her view of church-state relations and the Establishment Clause was least well known. Appointed by Reagan in 1981 to fill the seat left vacant by Potter Stewart's resignation, O'Connor was viewed as "a sometime conservative with a moderate, even progressive streak, a determined woman but not a dogmatic one."¹⁹⁶ Initially sceptical, the conservative right embraced O'Connor over the course of her first year as she voted with Rehnquist in 123 of 139 cases, a closer relationship than that between Rehnquist and Burger.¹⁹⁷ In religion clause cases, however, O'Connor appeared closer to the pragmatists of the early Burger years than the conservatives. Given her position as a potential swing vote on the Court, two particular elements of O'Connor's opinion were significant. The first was her rejection of the idea expressed so clearly by the majority that the "pervasively sectarian" nature of religious schools made them constitutionally suspect. Removing this initial hurdle of suspicion made defending programmes of aid less difficult. The second was her challenge to the on-campus/off-campus distinction.¹⁹⁸ By identifying a potential inconsistency in the argument rather than simply attacking it as wrong, O'Connor offered the first significant challenge to the long-standing category. For Justices looking to secure her support in future cases, these two areas were potential starting points, either of which could alter fundamental thinking about the Establishment Clause.

Reaction to *Aguilar and Ball* was mixed but largely predictable.¹⁹⁹ Amid the political debates, school boards across the country began the process of finding alternative ways to supply remedial services to religious school students as mandated by Title I. Off-site services, educational television, and mobile vans were among the earliest suggestions.²⁰⁰ The Reagan Administration's reaction was twofold. Education Secretary William Bennett and Attorney General Edwin Meese both publicly denounced the Court and the two rulings, promising to find new ways to get Title I funds to religious school students that did not violate the Court's requirements.²⁰¹ In addition, the Administration renewed its efforts to pass through Congress a bill providing school vouchers for poor families, a new approach to the "choice" debate. After *Aguilar*, the Reagan Administration repeatedly attempted to legislate for school vouchers, partly

¹⁹⁶ "Nominee for High Court: A Record Defying Labels," *NYT*, July 12, 1981, A22.

¹⁹⁷ Greenhouse, L., "The O'Connor Record Proves Surprising to Fans and Foes," *NYT*, July 11, 1982, E4.

¹⁹⁸ "... [I]t is difficult to understand why a remedial reading class offered on parochial school premises is any more likely to supplant the secular course offerings of the parochial school than the same class offered in a portable classroom next door to the school." *Aguilar v. Felton* 473 US 402, 426 (1985) (Justice O'Connor, with Justice Rehnquist, dissenting).

¹⁹⁹ See, for example, the groups quoted in Fiske, E., "Ruling Means Cities Must Work Out How to Get Help to Parochial Pupils," *NYT*, July 2, 1984, A14.

²⁰⁰ For discussion of local approaches to *Aguilar* and *Ball* along with Department of Education guidelines see *After Aguilar v. Felton: Chapter 1 Services to Nonpublic Schoolchildren, A Report Prepared for the House Subcommittee on Elementary, Secondary, and Vocational Education of the Committee on Education and Labor* (March 1986).

²⁰¹ "Bennett Assails Justices on 'Disdain for Religion'," *NYT*, September 5, 1985, A24. See Vitullo-Martin, T. and B. Cooper, *Separation of Church and Child: The Constitution and Federal Aid to Religious Schools* (Indianapolis: The Hudson Institute, 1987) advocating a variety of methods to circumvent *Aguilar*.

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as a way to circumvent the Court's decision, but also as an integral part of a long-standing campaign to broaden educational choice to all parents. Congress showed little interest and another of Reagan's plans for American education faded away as states adjusted to newly organised methods of providing Title I services to students within their borders.

A New Direction? The Rehnquist Court, 1986 - 1997

The year after *Aguilar* and *Ball*, the Court addressed the extension of state financial assistance to a blind student pursuing a Bible studies degree at a Christian college under a Washington state statute providing rehabilitation assistance to the blind. *Witters v. Washington Department of Services for the Blind* (1986) allowed the aid to continue with all nine Justices, in a rare moment of Establishment Clause unity, agreeing that this aid could in no way be considered a benefit to the religious institution.²⁰² The case undermines the argument of those who suggest *Aguilar* was evidence of the Court's "return" to strict separation: the ACLU, Americans United for the Separation of Church and State, and the Anti-Defamation League, all long-standing advocates of strict separation, filed *amicus* briefs opposing the statute. Equally, *Witters* is disappointing for those who argue that *Aguilar* was evidence of the emergence of entanglement as the most significant part of any *Lemon* analysis: the Court rejected any entanglement analysis on the grounds of an insufficient record and no lower court decision on the matter, hardly evidence of entanglement gone mad.²⁰³ In many ways, *Witters* was similar to the opinions in *Allen*, *Nyquist*, *Meek*, and *Wolman* in that the opinion was narrowly tailored to the specific facts of the case and made no sweeping statements of doctrine or principle.²⁰⁴ The content of the Court's opinion in *Witters* was unremarkable: it restated the applicability of *Lemon*, found a valid secular purpose in promoting the "well-being of the visually handicapped through the provision of vocational rehabilitation," and found the aid was provided to individuals and not institutions, thereby falling under the long-standing direct-indirect aid distinction.²⁰⁵ The opinion appeared designed to avoid any potential area of doctrinal controversy.

In terms of its actual impact on Establishment Clause doctrine, *Witters* was relatively unimportant. However, differences highlighted by the three concurrences signalled a new debate on the Court. The debate began in December 1985 when Powell responded to circulation of the first draft of Marshall's majority opinion with a suggestion that *Mueller* provided better support for the argument being made. Marshall refused the suggestion, responding: "I continue to believe that the Mueller case was wrongly decided, and am concerned that extensive discussion

²⁰² *Witters v. Washington Department of Service for the Blind* 474 US 481 (1986) (hereafter *Witters v. Washington Department ...*).

²⁰³ The Washington State Supreme Court found no reason to address the issue of entanglement, having held that the aid resulted in the unconstitutional effect of advancing religion by funding the religious studies of Larry Witters. 102 Wash.2d 624, 629; 689 P.2d 53, 56 (1984).

²⁰⁴ This was Marshall's intent. See Memorandum from Justice Marshall to Justice Powell, January 3, 1986. Marshall Papers, Box 384, Folder 8.

²⁰⁵ *Witters v. Washington Department ...* 474 US 481, 485 (1986).

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of it would only muddy the waters here.”²⁰⁶ In *Mueller*, Marshall had objected to the tax deduction for educational expenses because, he argued, it provided a direct financial subsidy to religious schools since the deduction in reality only benefited religious parents and thus subsidised a religious choice. *Witters* differed because no greater aid was received by individuals attending religious colleges, thus ensuring the funds went to a religious college because of the free, unfettered choice of Larry Witters. In both cases, Marshall’s analytical starting point was the institution receiving the aid. For Powell, *Mueller* meant that if a programme was directed towards individuals, the institution receiving the aid was less important than whether those eligible for the programme were defined according to religion.²⁰⁷ Because this was not the case in either *Mueller* or *Witters* the effect was to aid the individual and any aid reaching religious schools or colleges was no longer state-provided: the individual broke the link between church and state. In this approach, the focus of attention was on the eligibility criteria. The debate was not new: eligibility criteria played a part in decisions in *Nyquist* and *Meek*. What made *Witters* significant was that Justices O’Connor, Powell, Rehnquist, and White, and Chief Justice Burger, the *Mueller* majority, all concurred with the latter approach, effectively reaffirming *Mueller* even though the ostensible majority opinion made no reference to the case.²⁰⁸ The balance on the Court also showed post-*Aguilar* and *Ball* claims of a ‘reemergence’ of strict separation in Establishment Clause jurisprudence were premature. The concentration on the issue of neutral eligibility criteria in *Witters*, combined with the *Aguilar* dissenters’ views of religious institutions, indicated potential for a fundamental shift in the Court’s approach to school aid cases.

The change came seven years later in *Zobrest v. Catalina Hills School District* although because of the limited scope of the case the full significance of the shift did not become evident until later.²⁰⁹ *Zobrest* involved Arizona’s refusal to provide a sign-language interpreter to a profoundly deaf student, James Zobrest, under the Individuals with Disabilities Education Act (IDEA) on the grounds that he attended a Roman Catholic high school. Providing an interpreter in such a situation, argued appellees and the four dissenting Justices, amounted to a state subsidy of the religious function of the school since James Zobrest could not learn without such aid and would “authorize[...] a public employee to participate directly in religious indoctrination” in an

²⁰⁶ Memorandum from Justice Marshall to Justice Powell, January 3, 1986. See generally Marshall Papers, Box 384, Folder 8. Attitudinalists would undoubtedly use this to challenge the Legal Model’s emphasis on the importance of *stare decisis* and to support their own position of judicial preference. Yet the division between Marshall and the concurring group could as easily be seen as a simple disagreement over the most applicable precedent.

²⁰⁷ *Witters v. Washington Department ...* 474 US 481, 490-1 (1986) (Justice Powell, with Chief Justice Burger and Justice Rehnquist, concurring).

²⁰⁸ *Witters v. Washington Department ...* 474 US 481, 490 (1986) (Justice Powell, *et al*, concurring). Justices White and O’Connor also noted their agreement with this view in separate opinions.

²⁰⁹ *Zobrest v. Catalina Hills School District* 509 US 1 (1993). Adams, T., “Interpreting State Aid to Religious Schools Under the Establishment Clause: *Zobrest v. Catalina Foothills School District*,” 72 *North Carolina Law Review* 1039 (1994); McCarthy, M., “Religion and Education: Whither the Establishment Clause?” 75 *Indiana Law Journal* 193 (2000).

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“ongoing, daily, and intimate” fashion.²¹⁰ The majority rejected such claims and in doing so authorised the presence of a public employee with a significant role to play in the education of a child on religious school grounds for the first time.²¹¹ Although the Court’s opinion rested on the understanding that an interpreter was little more than a conduit for information, adding nothing of substance in the transmission from teacher to student, the precedent was set: publicly financed aid to students attending religious schools no longer automatically had to be provided at off-campus locations. Combined with the ruling in *Witters* and a shift away from the “pervasively sectarian” portrayal of religious schools, *Zobrest* provided the foundation upon which the Court rested to reject its longest standing line of demarcation.

The Court’s opinion contained two key arguments: one was the issue of broad eligibility criteria, the other was the significance of the individual. In suggesting past concern with eligibility, Rehnquist accurately drew on the Court’s jurisprudence but his emphasis on that issue over the religious nature of the institution involved was a reversal of earlier opinions.²¹² Relying solely on *Mueller* and *Witters*, the two school aid cases which exhibited a similar preference for the issue of eligibility, Rehnquist suggested that facial neutrality alone might be sufficient to withstand an Establishment Clause challenge, a remarkable shift from the Court’s holdings in *Meek* and *Wolman* that eligibility was only a threshold issue.²¹³ The apparent lack of concern about James Zobrest’s attendance at a Catholic school was reinforced by the absence of any explicit mention of the *Lemon* test. The test was premised on the understanding that as religious institutions, religious schools were immediately suspect and only limited types of aid could flow to them. Rejecting this as “smacking of antiquated notions of taint” and ignoring the traditional *Lemon* criteria, Rehnquist implied that the majority were no longer concerned with institutions but with the operation of the programmes of aid.²¹⁴ The role of the individual in Establishment Clause cases had been addressed by Rehnquist in *Mueller*; in *Zobrest* the argument was much the same but easier to make since the programme was challenged with respect to one individual, unlike *Mueller* where a whole class of people was implicated.²¹⁵ That the aid in *Zobrest* was provided to an individual was uncontroversial and the dissent did not challenge it: in *Everson*,

²¹⁰ *Zobrest v. Catalina Hills School District* 509 US 1, 18, 22 (1993).

²¹¹ It should, however, be noted that *Zobrest* allowed but did not require such aid to disabled students, leaving local school districts substantial leeway to interpret their own constitutions. See *KR by MR v. Anderson Community School Corporation* (7th Cir., 1997) and *Russman v. Board of Education of the Enlarged City School District of the City of Watervliet* (NDNY, 2000) limiting aid available to religious school students. But see also *KDM by WJM v. Reedsport School District* (9th Cir., 1999) and *John T. by Paul T. and Joan T. v. Delaware County Intermediate Unit* (ED Pa, 2000). *Zobrest* was not the first time public employees had been allowed by the Court on to religious school campuses to perform certain tasks. Where *Zobrest* is significant is in the extensive relationship between the signer and the student and the lack of external restrictions placed on the signer by the Court.

²¹² *Zobrest v. Catalina Hills School District* 509 US 1, 8 (1993).

²¹³ The trend continued in *Mitchell v. Helms* 530 US 793 (2000) with Scalia’s plurality opinion (see 809).

²¹⁴ The dissenters believed this was the majority’s position. *Zobrest v. Catalina Hills School District* 509 US 1, 20 (1993) (Justice Blackmun, with Justice Souter, dissenting).

²¹⁵ *Zobrest v. Catalina Hills School District* 509 US 1, 10, 12 (1993).

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Allen, *Nyquist*, and *Meek* the Court had accepted that aid genuinely provided to individuals did not create an impermissible link between church and state. In that respect, Rehnquist continued the Court's approach. The significance of the role of the individual in *Zobrest* lay in its combination with the Court's rejection of immediate suspicion of religious schools; together they shifted the Court's focus away from religious schools and towards a programme's eligibility criteria, a far more lenient standard for allowing aid under the Establishment Clause.

Brief consideration of the central disagreement between the majority and dissent highlights this change.²¹⁶ In earlier cases the Court had distinguished between neutral forms of aid that could not be diverted to religious purposes and aid that conceivably might require monitoring to ensure no Establishment Clause violation: the former was constitutional, the latter constitutionally suspect. For the majority, the signer was nothing more than a conduit for information, no less neutral than the textbooks or auxiliary services staff the Court had previously allowed. In a thoughtful and compelling dissent, Blackmun challenged such an interpretation. "In an environment so pervaded by discussions of the divine, the interpreter's every gesture would be infused with religious significance," Blackmun asserted, arguing the interpreter was not a neutral conduit but an aid to religious education.²¹⁷ For Blackmun and Souter, who joined the dissent, that the signer must pass on religious teachings, possibly including Catholic mass, was sufficient to violate the Constitution: it was irrelevant that the religious message did not originate with the signer since he or she must transmit it to the student thereby implicating them in the religious mission of the school.²¹⁸ When paid for with state funds this equated to state financing of religious indoctrination. In this debate the signer became either a religiously-neutral aide through whom religion was passed or an active participant in religious indoctrination. The dissenters were influenced by the fact the signer was present on religious school grounds and that the school was pervasively sectarian. The majority, however, ignored this and concentrated on eligibility criteria. The debate over the role fulfilled by the signer thus became an extension of the debate about where the Court's attention should be focussed: the programme or the institution. The dissenters' position was far closer to that advocated by the Burger Court, the majority opinion showed the shift the Court had taken.

The Court's shift was the result of a number of factors. First, the change of personnel on the Court between *Witters* and *Zobrest* had a significant impact. Between the two cases, Burger, Brennan, Marshall, and Powell retired from the Court to be replaced by Anthony Kennedy,

²¹⁶ In addition to the argument discussed here, the dissenters also objected to the majority raising constitutional questions when statutory interpretation was available. The procedural question was the only one addressed by O'Connor and Stevens who refused to even consider the constitutional question (see 509 US 1, 23-4). Blackmun also raised this issue but challenged the majority on the substantive questions too. Because the debate had little impact on Establishment Clause doctrine it is outside the scope of this inquiry and is not discussed here.

²¹⁷ *Zobrest v. Catalina Hills School District* 509 US 1, 19 (1993) (Justice Blackmun, with Justice Souter, dissenting).

²¹⁸ *Zobrest v. Catalina Hills School District* 509 US 1, 22 (Justice Blackmun, with Justice Souter, dissenting).

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Antonin Scalia, David Souter, and Clarence Thomas. The Burger Court's leading liberals and consistent strict separationists, Brennan and Marshall, had gone, along with Powell, arguably the epitome of the Burger Court's pragmatism. Scalia and Thomas were known conservatives and favourable towards accommodation in religion cases, Souter was a relative unknown, and Kennedy, although a moderate conservative, had shown evidence of a balancing approach to the Establishment Clause when he switched votes during the consideration of *Lee v. Weisman* the year before *Zobrest*.²¹⁹ With the loss of two strict separationists and arrival of two accommodationists, the balance of the Court tipped more favourably toward the latter, especially in those cases where the swing votes of O'Connor and Kennedy could be won. Thus, only clear violations of the Establishment Clause were likely to be struck down by the Court.

Second, the Court's approach to equal access cases increasingly appeared in school aid cases. Because equal access most usually involved use of public school facilities, the question of the religious nature of the institution did not arise, and the Court had generally taken an approach closer to that of Free Exercise and free speech cases: religious and secular groups had to be treated equally unless there was good reason not to do so. This approach placed a greater burden on those seeking limits on school aid to prove why religion should be treated differently, a factor in *Zobrest* and to a lesser extent in *Witters*. While the approach made sense in the context of equal access, in the arena of school aid it undermined traditional principles of wariness about religious institutions, a principle upon which the Establishment Clause was originally founded. Third, the role of precedent was also a factor. *Witters* and *Zobrest* rested on the role of the individual and facially-neutral programmes of aid, both of which had been Establishment concerns since *Everson*. The danger inherent in the Court's use of uncodified guiding principles was that with changed personnel might come a shift in the relative importance of those principles. This is what happened with *Zobrest*: the accommodationists did not discard past approaches, they simply modified them. There were fundamental changes in the Court's approach, however other changes wrought by *Witters* and *Zobrest* had been possible within existing modes of analysis and were simply a reorganisation of concerns, not a repudiation of them.

An additional factor in the Court's shifting perception was the changing nature of the religious school universe. Major changes occurred within the realm of religious schools between the early 1970s and the 1990s that effected a shift in public perception about benefits to such institutions. Arguably the biggest change came within Catholic schools. Originally the epitome of the "pervasively sectarian," insular parochial school, by the 1990s Catholic schools served large numbers of poor, minority, non-Catholic students. In 1970, non-Catholic enrolment stood at 2.7%, by 1990 this had increased to 14.3% nationally. In the nation's inner-city schools the

²¹⁹ *Lee v. Weisman* 505 US 577 (1992) (striking down prayers at graduation services). See Chapter 3 for further discussion. The loss of the Court's centrists, as evidenced in *Zobrest*, resulted in greater control by the dominant accommodationist bloc. As such, Rational Choice is of less help in these cases and the Attitudinal Model becomes more relevant.

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figures were frequently higher: in Chicago, non-Catholic enrolment stood at 40%, in individual schools in Harlem and Chinatown in New York the figure was as high as 70%.²²⁰ The trend was the result of increased enrolment generally in religious schools, fuelled in part by continued disillusion with the public schools. Research by Andrew Greeley, James Coleman, and others in the 1980s showed that Catholic schools could provide better educational results than public schools at a lower cost per student, mainly because of effective discipline, lack of bureaucracy, and an atmosphere of spiritual commitment.²²¹ Despite criticisms of these studies they appeared to reflect wider public opinion. "My three children in the sixth, fourth, and third grades at St. Aloysius started in the public schools. They are getting a better education here, learning the fundamentals. I believe religion is the lesser evil when you think of what's out there," one atheist father told the *New York Times* in 1988.²²² As Catholic schools served increasingly large non-Catholic student populations the perception of them as religious enclaves dedicated solely to perpetuation of the faith could no longer be maintained. Although some Catholic educators expressed doubts about the continued mission of Catholic schools serving large numbers of non-Catholics, the majority of schools maintained elements of Catholic religious instruction to which few parents, Catholic or otherwise, objected, considering it an integral part of the schools' mission. Catholic schools remained recognisably "Catholic" but the change in staff and student composition ensured they were not the dogmatic, insular schools of an earlier era.²²³

²²⁰ Stout, H., "More Non-Catholics Using Catholic Schools," *NYT*, November 28, 1987, A25, 26; Mautner, L., "Enrolment Rising in Catholic Schools," *NYT*, May 15, 1988, NJ18, 19; Johnson, D., "Catholic Schools Reach Out to Serve and to Borrow," *NYT*, September 13, 1988, A1, 25; *The Non-Catholic in the Catholic School* (Washington, DC: Department of Religious Education, National Catholic Educational Association, 1987). But see O'Keefe SJ, J., "No Margin, No Mission," in McLaughlin, T., J. O'Keefe SJ, and B. O'Keefe, *The Contemporary Catholic School: Context, Identity, and Diversity* (Washington, DC and London: The Falmer Press, 1986), pp. 177-97, and Murnion, P., "The Future of the Church in the Inner City," *America*, December 15, 1990, p. 478-85 for some of the problems caused by this trend.

²²¹ Greeley, A., *Catholic High Schools and Minority Students* (New Brunswick, New Jersey and London: Transaction Books, 1982, 2nd Ed, 2002); Coleman, J., *et al*, *High School Achievement: Public, Catholic, and Private Schools Compared* (New York: Basic Books, 1982). Martin, S., "Is Catholic Schooling Providing Something Public Schools Cannot?" *America*, May 26, 1990, pp. 520-2.

²²² The same article reported the views of a Moslem mother with two children in Catholic schools: "It is organised. I like the close supervision. With any religion one's beliefs may differ, but are not the principles the same? They all teach honesty, humility." Quoted in Mautner, L., "Enrolment Rising in Catholic Schools," *NYT*, May 15, 1988, NJ18, 19. See also *Zelman v. Simmons-Harris* 536 US 639, 704, n.11, n. 12 (2002) (Justice Souter, dissenting).

²²³ See Bryk, A., V. Lee, and B. Holland, *Catholic Schools and the Common Good* (Cambridge, Massachusetts and London: Harvard University Press, 1993) (hereafter Bryk, Lee, and Holland) discussing exactly this issue. Also Devine, G., "Fortress Days Are Over," *NYT*, February 4, 1973, E9; Goldman, A., "Catholic Colleges in US Debate Academic Freedom Amid Disputes," *NYT*, October 8, 1986, A1, D23; DePalmo, A., "The Lesson's of St. Joe's," *NYT*, Sunday Magazine, February 5, 1989, pp. 34-7; McLaughlin, T. *et al*, *The Contemporary Catholic School* (although several articles in this volume deal with British Catholic schools, many of the principles discussed are relevant to changes in US Catholic schools); Youniss, J., J. Convey, and J. McLellan, *The Catholic Character of Catholic Schools* (Notre Dame, Indiana: University of Notre Dame Press, 2000).

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Also influencing the world of the religious schools was the rise throughout the 1970s and 1980s of Jewish day schools, Christian schools and fundamentalist Protestant schools.²²⁴ Of the three, the fundamentalist schools represented the fastest growing and most politically influential. For many of the same reasons some parents turned to Catholic schools, fundamentalist parents began establishing their own schools to counteract the growth of "secular humanism" in public school curricula and to teach their own religious beliefs. German Baptists, Nazarenes, and Assembly of God congregations were among those involved in the movement. By 1980, enrolment in such schools reached one million for the first time.²²⁵ Thus, by the 1990s opponents of school aid could no longer claim that it would benefit only one religious group at the expense of others. Approximately 50% of private school students in 1991 attended Catholic schools compared to 90% in 1971, while Catholic schools constituted only 30% of religious schools, compared to 65% when *Lemon* was decided.²²⁶ In addition, religious schools could no longer be accused of perpetuating racial segregation. Catholic schools in inner-city areas served increasing numbers of minority students leading one scholar to note, "[w]hen religious preference[s] [are] taken into account ... blacks attend Catholic secondary schools in higher proportions than do whites or Hispanics."²²⁷ Equally, Black churches began extending their traditional mission of serving the community by soliciting money from private foundations and government sources to establish educational programmes of their own.²²⁸ By the mid-1990s, National Center for Education Statistics' figures showed the number of African-Americans attending conservative Christian schools had reached 12%, nearly double the 1991 figure, and significantly higher than the first years of such schools when they were often established to be bastions of segregation.²²⁹ Such diversity within and among religious schools made more traditional arguments against school aid harder to make. While schools provided a religious education, some more strictly than others, public funds directed to all students attending religious schools could no longer be portrayed as benefiting one religious group or expressing favouritism

²²⁴ Schick, M. and J. Dauber, *The Financing of Jewish Day Schools* (New York: Rabbi Jacob Joseph School, 1997). For a good introduction to the philosophy of Jewish Day Schools see Kaminetsky, J., *Hebrew Day School Education*, and Kramer, D.Z., *The Day Schools and Torah Umesorah: The Seeding of Traditional Judaism in America* (New York: Yeshiva University Press, 1984) (although this is more a history of Torah Umesorah and the Day School Movement, there are some useful insights into the philosophy of Jewish education).

²²⁵ National Center for Education Statistics' figures quoted in Maeroff, G., "Private Schools Look to Bright Future," *NYT*, January 4, 1981, Educ. 1, 14. For an insight into the culture of Christian schools see Billings, R., *A Guide to the Christian School* (Washington, DC: The New Century Foundation Press, 1983); Bramblet, J., *An Introduction to the Christian School* (Tacoma, Washington: James M. Bramblet, 1985); Peshkin, A., *God's Choice: The Total World of a Fundamentalist Christian School* (Chicago: University of Chicago Press, 1986); Parsons, P., *Inside America's Christian Schools* (Macon, Georgia: Mercer University Press, 1987); Menendez, A., *Visions of Reality: What Fundamentalist Schools Teach* (Buffalo, New York: Prometheus Books, 1993) (highly critical review of fundamentalist textbooks).

²²⁶ Lupu, I., "The Increasingly Anachronistic Case Against School Vouchers," 13 *Notre Dame Journal of Law, Ethics, and Public Policy* 375, 375 (1999); Berg, T., pp. 164-4.

²²⁷ Bryk, Lee, and Holland, p. 69. See also, Greeley, A., *Catholic High Schools and Minority Students; America*, March 29, 1980 special volume titled "Black Catholics and their Church."

²²⁸ Chira, S., "Black Churches Renew a Mission: Education," *NYT*, August 7, 1991, A1, 19.

²²⁹ Dent, D., "African-Americans Turning to Christian Academies," *NYT*, August 4, 1996, Educ. Life, pp. 26-9. But see Parsons, P., pp. 16-17, 113-26.

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towards a particular belief. Given that the Supreme Court's precedents rested heavily on such arguments, these changes suggested the possibility of a fundamental change in Court doctrine.

The consequences of the changes seen in *Mueller*, *Witters*, and *Zobrest* became clear in the Supreme Court's 1997 ruling in *Agostini v. Felton*.²³⁰ The case was, in effect, an appeal from the Court's *Aguilar* decision twelve years earlier, involving the same programme and many of the same schools. As a result of *Aguilar*, New York City's Board of Education modified its Title I programme so it could continue serving students in private religious schools. The solution was to provide remedial educational services on public school campuses, at leased sites, or in mobile instructional units parked near the religious schools, often simply across the street. In part, the shift was merely a return to a pre-*Aguilar* practice, but it reflected the Court's stance in *Aguilar* that it was not the programme *per se* which violated the First Amendment but how and where that programme operated. By the time *Agostini* reached the Supreme Court it was estimated that a decade of "Aguilar costs" had cost the school board more than \$100 million, costs which were deducted from Title I funds, reducing by an estimated 28,000 the number of New York City students aided by Title I.²³¹ Noting that these costs were anticipated in *Aguilar*, Justice O'Connor's opinion for the Court in *Agostini* nevertheless took pains to note the negative impact of the *Aguilar* ruling suggesting it was an issue of some importance to the Justices.²³² In a 5:4 decision, the Court, for the first time in Establishment Clause cases, overruled itself and held New York's Title I programme did not violate the Constitution.

For those who already held doubts about the consistency, durability, and logic of the Supreme Court's Establishment Clause jurisprudence, *Agostini* confirmed their worst fears. Not only had the Court overruled previous cases, an event notable in itself, it had apparently done so, critics argued, by explicitly rejecting the premises on which Establishment Clause jurisprudence had stood since *Everson* in 1947.²³³ For the first time the Supreme Court had allowed significant numbers of public employees to enter religious schools and rejected the long-standing belief that this created an impermissible commingling of the functions of church and state, outraging strict separationists both on and off the Court. The changing perception of the nature of religious schools and the function of teachers was also a striking characteristic of the *Agostini* ruling and one that the Court subsequently applied in later cases.²³⁴ What critics of the decision singularly

²³⁰ *Agostini v. Felton* 521 US 203 (1997).

²³¹ The estimated costs and numbers of students affected are quoted in *Agostini v. Felton* 521 US 203, 213-4 (1997) from appellants' brief. The numbers include both public and religious school students.

²³² *Agostini v. Felton* 521 US 203, 216, 240 (1997).

²³³ McCarthy, M., "... Whither the Establishment Clause?"; Waite, J., "*Agostini v. Felton*: Thickening the Establishment Clause Stew," 33 *New England Law Review* 81 (1998); Mozer, G., "The Crumbling Wall Between Church and State: *Agostini v. Felton*, Aid to Parochial Schools, and the Establishment Clause in the Twenty-First Century," 31 *Connecticut Law Review* 337 (1998).

²³⁴ In particular, see *Mitchell v. Helms* 530 US 793 (2000) and *Zelman v. Simmons-Harris* 536 US 639 (2002).

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failed to note, however, was that these changes had not occurred suddenly or without warning.²³⁵ What was different about *Agostini* as compared to *Witters* or *Zobrest* was that it applied to a much larger group of people; what was not significantly different was the reasoning employed. *Agostini* did not constitute a change in Supreme Court jurisprudence, it simply consolidated in a high profile case changes that had already occurred.

In *Zobrest* Chief Justice Rehnquist criticised the Court's prior holdings as "smacking of antiquated notions of 'taint'."²³⁶ *Agostini* unequivocally rejected the possibility that the atmosphere of a religious school was so potent that all who entered would be influenced by it.²³⁷ O'Connor's matter-of-fact statement of this position for the Court belied the striking nature of the argument in light of the Court's own precedent. Concern for the "uncontrollable" nature of certain types of aid had frequently been evident in the Court's opinions. Despite the Court's objection to Stanley Geller's assertion in oral argument of the "unprofessionalism" of teachers, that was exactly the concern of the majority in *Meek*, that the "pervasively sectarian" atmosphere of the school would overcome the professionalism and training of those same teachers.²³⁸ *Agostini* thus appeared anomalous; public school employees were permitted to interact freely with religious school staff and students, there were minimal monitoring procedures, and access to religious school classrooms was unrestricted within the procedures laid down in the Title I programme. Justice O'Connor explained the reason for the apparent shift with a single sentence repudiation of the Court's traditional portrayal of the all-pervasive force of religion in religious schools: "we have abandoned the presumption erected in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination."²³⁹ Although the Court could, and should, have employed a different mode of analysis given the differences between teachers and a sign-language interpreter upon which Rehnquist based his *Zobrest* opinion, the principle had already been established in *Zobrest*.

Agostini also clarified several other themes that had been implicit in *Witters* and *Zobrest*. Signalling the demise of the on-campus/off-campus test, the Court stated: "cooperation between Title I instructors and parochial school faculty is the same no matter where the services are provided."²⁴⁰ If there is no difference in the level of contact between staff of the respective

²³⁵ Critics also failed to note that of the three Justices involved in *Aguilar* who were still on the Court in 1997, none had altered their position. Justice Stevens had been part of the five-member majority in *Aguilar* but found himself in equally silent dissent in *Agostini*. Rehnquist and O'Connor had both dissented in 1985; Rehnquist, now Chief Justice, was one of the five-member majority in *Agostini*, while O'Connor wrote the majority opinion, drawing on a number of arguments made in her *Aguilar* dissent.

²³⁶ *Zobrest v. Catalina Hills School District* 509 US 1, 13 (1993).

²³⁷ *Agostini v. Felton* 521 US 203, 226-7 (1997).

²³⁸ See Transcript of Oral Argument (*Agostini v. Felton*) pp. 39-40. Stanley Geller appeared on behalf of the private respondents.

²³⁹ *Agostini v. Felton* 521 US 203, 224 (1997).

²⁴⁰ *Agostini v. Felton* 521 US 203, 227 (1997).

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institutions whether the classes are taught at the religious school or elsewhere, there is no real foundation for distinguishing between the two; if the contact violates the First Amendment it does so no matter where the instruction takes place and should be stopped completely, if it does not then it should be freely allowed.²⁴¹ O'Connor's opinion also addressed the issue of entanglement. "Regardless of how we have characterized the issue ... the factors we use to assess whether an entanglement is 'excessive' are similar to the factors we use to examine 'effect' ... Thus, it is simplest to recognize why entanglement is significant and treat it ... as an aspect of the inquiry into a statute's effect."²⁴² Until *Agostini*, entanglement was technically an Establishment Clause violation in its own right, O'Connor's opinion reduced it to no more than one of a number of factors to be considered. In doing so O'Connor did little more than state the approach the Court had generally taken towards entanglement analysis. Its strength, however, was in ending the idea, perpetuated by the Court's own language, that entanglement alone was sufficient to warrant a finding of unconstitutionality. Where previous opinions had foundered under the weight of rhetoric or legalisms, O'Connor's opinion sought to be clear and unambiguous. Avoiding the problems of earlier Courts, O'Connor made clear what the Court was looking for in its effects analysis.²⁴³ The three elements she pointed to expressed the Court's concern for the nature and operation of the programmes and statutes in question and nowhere reflected the now defunct concern about the types of institutions receiving the aid: a new period of Establishment Clause jurisprudence was being ushered in.

Although these changes indicated a greater acceptance by the majority of closer links between government and religion, the Court also made clear that this was not an unrestricted relationship. The use of three particular arguments by the *Agostini* majority linked the opinion to those of an earlier era and highlighted the restraints. As with New Jersey's bus transportation reimbursement programme in *Everson*, the majority argued, the benefit to religious schools of New York's Title I programme was only a result of the children in receipt of the benefit attending such schools; no money was provided to the schools and the likelihood that more parents might choose a religious school for their children as a result of the programme was considered negligible.²⁴⁴ Thus unrestricted grants of aid, whether financial or in kind, remained unconstitutional under *Agostini*. Equally, defining beneficiaries by religious criteria remained unacceptable to the Court: eligibility requirements must remain neutral and secular to pass constitutional scrutiny.²⁴⁵ Third, the child benefit theory continued to play a significant role in the Court's analysis. *Agular*'s critics emphasised that the only real impact of the Court's ruling was to disadvantage further those children already labouring under significant social and

²⁴¹ *Agostini v. Felton* 521 US 203, 227 (1997).

²⁴² *Agostini v. Felton* 521 US 203, 232-3 (1997). (Internal references and quotation marks omitted).

²⁴³ "It does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." *Agostini v. Felton* 521 US 203, 234 (1997).

²⁴⁴ See *Everson v. Board of Education* 330 US 1, 18, 17 (1947) and *Agostini v. Felton* 521 US 203, 228-9, 232 (1997).

²⁴⁵ *Agostini v. Felton* 521 US 203, 231, 232 (1997).

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economic disadvantages. The effect of the *Agostini* ruling, although not emphasised in the Court's opinion, was to free a significant proportion of Title I funds for providing places for greater numbers of children.²⁴⁶ Although criticised by some as a smokescreen to cover otherwise blatant benefits to religious institutions, the child benefit theory ensured that programmes must provide some appreciable improvement in the lives and/or education of the individuals involved and that the benefit was received by the individuals, even if large numbers of them, and not just the schools. In combination with neutral eligibility criteria it operated to ensure programmes did not simply provide large grants of aid to religious schools without secular motivations. These limitations were neither as strict nor as pervasive as those of earlier eras, but while the relationship between churches and the state has become freer, it was not entirely unrestricted.

In the terms offered by the three political science models, *Agostini* is difficult to characterise. For critics, it undoubtedly represented Justices' personal preferences for accommodationist results, irrespective of precedent or the critics' own preferences for separation. That the dissenters were all separationists suggests a similar interpretation. Yet the balance in the opinion, the use of precedent, and the consideration of the operation of the programme were all reflective of Rational Choice principles. The result was closer to accommodationism than that of *Everson* or *Aguilar* but it was not unbridled accommodationism, suggesting the influence of limiting factors. Again, both theories provide a partial explanation of the case but neither can provide a definitive one.

The immediate effect of *Agostini* was the end of mobile vans for teaching and the return of public school teachers to religious school classrooms. The \$14 million a year charge to the city of New York for the lease and running costs of the 114 mobile classrooms was released to be used to provide places for more disadvantaged students. "We finally got some common sense," said one high school principal, voicing the complaints of many others about the inconvenience of the *Aguilar* arrangements.²⁴⁷ Among commentators two issues were raised: the problem of church-state separation in which traditional lines were drawn and familiar arguments repeated, and the procedural issue by which the case had been decided. Because the Court had not specifically overruled *Aguilar* in cases prior to *Agostini*, many saw in the Court's approach a "willingness to sidestep normal procedures" to provide relief in New York City and allow a greater accommodation between church and state. The argument had strong support: it was the focus of the dissent filed by Justice Ginsburg, in which Justices Stevens, Souter, and Breyer

²⁴⁶ Warpula, C., "The Demise of Demarcation: *Agostini v. Felton* Unlocks the Parochial School Gate to State-Sponsored Educational Aid," 33 *Wake Forest Law Review* 465, 508 (1998). Arguably the best indicator of the theory's potency and continued vitality is *Zelman v. Simmons-Harris* 563 US 639 (2002). Rehnquist's repeated emphasis that Cleveland's tuition voucher scheme was designed to benefit low income and minority families leaves little doubt that the majority viewed this as one of the most important factors resulting in approval of the programme.

²⁴⁷ Steinberg, J., "After Years of Classes in Vans, It's Back to School," *NYT*, June 24, 1997, B9. One student was not so impressed with the ruling, remarking that he would miss "the fun" of the vans: air-conditioning in the summer and "get[ting] to play in the snow on the way to class" in the winter.

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joined.²⁴⁸ Support for the ruling came from those who saw common sense and pragmatism in the Court's opinion. "The Court correctly understood that it was absurd for New York City ... to have to spend \$100 million in Federal education money to lease vans for use as classrooms so that public school teachers would not have to set foot in religious schools to teach remedial students," argued one defender.²⁴⁹ Although *Agostini* was controversial and much political and academic comment followed the announcement of the opinion the debate was not as heated as it had been in earlier cases. Two reasons in particular account for this. First, fifty years of Establishment Clause debate had refined arguments on every side of the issue: reactions from the ACLU, CPERL, and various Catholic groups were predictable and well-rehearsed. There were no surprises to cause tension. Second, the decision had been widely anticipated in the wake of *Witters*, *Zobrest*, and a 1994 decision in *Board of Education of Kiryas Joel v. Grumet* in which five Justices had expressed dissatisfaction with *Agular*.²⁵⁰ While these factors did little to lessen the divisions between separationists and accommodationists, they did ensure a more moderate, thoughtful debate between the groups that was far less politically divisive than debates of an earlier era.

Agostini gave new impetus to the school choice debates that had been in existence since the early 1980s. As perception of urban public schools as places of low academic achievement, poor discipline, and limited resources continued, so did discussion about alternatives to public schools. Under Reagan, tax credits or deductions had been the proposed method of broadening private school availability; by the early 1990s, choice advocates were looking for additional ways to provide alternatives to the public schools. By far the most frequently advocated proposal was for school vouchers: governments would provide to parents a "voucher" for a predetermined value that could be used towards tuition costs at public or private schools. Rarely did the voucher cover the full cost of non-public school tuition and only occasionally did voucher plans include religious schools. By the time the Supreme Court handed down its decision in *Agostini*, California, Colorado, Connecticut, New York, Ohio, Oregon, Vermont, Washington DC, and Wisconsin had all debated voucher plans, although only in Cleveland and Milwaukee had plans been put into operation. *Agostini* did not speak to the voucher debate but the Court's greater openness to large scale programmes of aid to religious school students, along with the perceived abandonment of strict separation, held out hope to voucher supporters that they might receive a more sympathetic hearing. Against that, *Agostini* involved nonfinancial aid to individuals whereas vouchers raised the spectre of direct financial grants to religious schools nominally provided to parents. The openness of the legal issue combined with a continuing search for

²⁴⁸ *Agostini v. Felton* 521 US 203, 240-54 (Justice Souter, dissenting) and 255-60 (Justice Ginsburg, dissenting). See "Public Teachers in Parochial Schools," *NYT*, June 24, 1997, A18.

²⁴⁹ Glendon, M., "Religious Freedom and Common Sense," *NYT*, June 24, 1997, A18.

²⁵⁰ *Board of Education of Kiryas Joel v. Grumet* 512 US 687 (1994). The case involved a New York State law which created a special public school district encompassing only the town of Kiryas Joel, home to Satmar Hasidic Jews, in order to provide public aid to the community's disabled students in their own, religious, schools.

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improved education suggested that new relationships between religion and government in the area of education would require the continued mediation of the Supreme Court.

Conclusion

The Court's position in *Agostini* has been echoed in subsequent decisions. In *Mitchell v. Helms* (2000) the Court upheld Louisiana's practice of providing instructional materials to students in public and religious schools, overturning parts of *Meek* and *Wolman*. In 2002, the Court rejected a challenge to Cleveland's school voucher programme in an opinion narrowly tailored to the specifics of the city's statute in *Zelman v. Simmons-Harris*.²⁵¹ The trend seen in *Witters*, *Zobrest*, and *Agostini* has thus been continued by the Court. Strict separationists accuse the Court of fundamentally misreading the meaning and history of the Establishment Clause and of rejecting "inconvenient" precedents in favour of preferred accommodationist results. Those advocating strict neutrality and accommodationism have strongly challenged the first criticism but the second remains virtually unchallenged, used by some as further ammunition to attack the Court and frequently ignored by those who embrace the rulings. But the results are only one facet of the Court's opinions. A results-only analysis, as provided by much traditional scholarship, leads to a skewed interpretation of the Supreme Court's first half century of Establishment Clause jurisprudence that overlooks the importance of alliances between the Justices, the means of analysis employed by them, and the impact of the external political debate on matters before the Court.

The opinions written by the Justices in the Court's school aid cases show a far higher degree of consistency than popular thought allows. Inconsistencies existed but they were neither so fundamental nor so prevalent as might be expected. Contrary to separationist belief, the Supreme Court never held to the idea that church and state must be completely separate. In nearly every major school aid case the Court made clear that complete separation was not possible in the modern United States.²⁵² Representations of Court decisions implying that by striking down aid programmes the Court was supporting strict separation were fundamentally misleading and led to as much confusion about the Court's jurisprudence as the lack of clarity in the opinions themselves. The Court's opinions from *Everson* in 1947 to *Aguilar* and *Ball* in 1985 show that the Justices adhered to a series of firm, yet uncodified, considerations when assessing the constitutionality of statutes: whether the aid was direct or indirect, financial or material, provided on or off religious school campuses, or provided to individuals or institutions. In every major school aid case one or more of these requirements was considered by the Justices. Rather than superseding these elements, the *Lemon* test embraced them and loosely codified them into a

²⁵¹ *Mitchell v. Helms* 530 US 793 (2000); *Zelman v. Simmons-Harris* 536 US 639 (2002).

²⁵² The exceptions to this were Brennan's opinions in *Aguilar* and *Ball* which were clearly infused with a separationist approach. However, the concurrences and dissents did make this point; with Powell's concurrence in *Aguilar* a majority adhered to the more accommodationist position in that case even though the challenged programme was struck down.

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coherent test that could be applied by lower courts. One consequence of such an approach was a need to undertake a detailed consideration of the exact operation of the challenged programme. *Everson* and *Allen* embodied such analysis, as did the Burger Court's cases, despite the lack of factual records in cases where laws had been challenged before coming into effect. The result was a series of narrowly-tailored opinions that spoke little to programmes similar, but not identical, to those challenged in the case under consideration and a jurisprudence based heavily upon specific factual situations where a minor change in a programme's operation could lead to a significantly different result.²⁵³ An additional consequence was frequent disagreement over the "relevant" facts of the case, yet rather than evidence of inconsistency, such disagreements appear little more than the normal disagreements found between nine individuals on any subject.

The change in the Court's jurisprudence after the mid-1980s showed in comparison a further area of agreement among the Justices of an earlier era: a general suspicion that the religiosity of religious schools was so high that the provision of any aid violating the Establishment Clause. References to the "pervasively sectarian" nature of religious schools were frequent in opinions to 1985. Also significant was the proportion of religious schools belonging to a single denomination: Catholic schools dominated the religious school universe until the late 1970s making aid to religious school students generally appear as aid to a single religion, the clearest definition of "establishment." The Court was not prepared to reject all benefits to religious schools as unconstitutional but given these circumstances such benefits needed to be strictly limited in scope and potential application. The *Lemon* test and additional guidelines ensured any benefits remained within acceptable boundaries. But by the mid-1980s the religious school universe was changing; the rise of Jewish and Protestant schools diversified the range of religious schools in many states while growing dissatisfaction with inner-city public schools saw a vastly increased non-Catholic population attending Catholic schools. The religious school of 1990 was significantly different to the religious school of 1950. A majority of the Justices on the Court recognised this change as significant to Establishment Clause jurisprudence, altering as it did the circumstances in which challenged programmes operated. This adaptation to broader circumstances had precedent: Black had considered state practices on bus transportation in *Everson*. As immediate suspicion of links with religious schools declined, so did the need for the on/off campus distinction and the direct/indirect test. Instead, the Court's concern shifted to eligibility criteria: were a programme's participants chosen as a result of religious criteria, if so the programme was constitutionally suspect, if not, the programme was valid. The Court's shift did not mean the removal of all barriers to church-state interaction but was simply a recognition that changed circumstances required new guidelines. A minority of the Court disagreed, especially Justices Stevens and Souter, seeing in the majority's altered emphasis a desire for greater accommodation not a genuine reinterpretation of the Establishment Clause. For this

²⁵³ See, for example, the difference between textbooks in *Allen* and *Meek* and instructional materials in *Meek* and *Wolman*; also, compare *Everson* and *Allen* with *Lemon* and *Wolman* for the significance of aid provided to individuals compared to benefits provided to institutions.

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group, religious schools remained suspect because they were religious: changed circumstances, they argued, did not extend to a decline in the schools' religious mission and so they remained religious institutions with which government must maintain only limited contacts. The Rehnquist Court thus saw the first significant disagreement about the basic principles for deciding Establishment cases.

Internal factors played a significant role in shaping the Court's school aid jurisprudence. Particularly noticeable as the Burger Court sought to construct a coherent approach to Establishment cases was the influence of factions within the Court, the development of predictable groups based on individual Justices' philosophies and approaches to interpreting the Establishment Clause.²⁵⁴ Between 1969 and 1985 clear separationist and accommodationist blocs developed on the Burger Court, neither able to form a majority without the concurrence of one or more of the swing voters: Harlan, Stewart, Blackmun, and Powell. This gave these four Justices substantial influence over the structure and content of opinions where they guaranteed the majority.²⁵⁵ Although all four had different views and approaches to deciding cases, their jurisprudence was characterised by pragmatism and a wariness of unquestioned adherence to tests, arguably the dominant characteristics of the Burger Court's school aid jurisprudence. More than any other, Powell symbolised the pragmatism of the Burger Court era, voting with the majority more times than any other Justice with whom he sat. Moderating the more extreme views of either the accommodationists or separationists, the Justices of the centre bloc accounted for much of the tenor and shape of the Burger Court's Establishment cases. On the Rehnquist Court, Justices Kennedy and O'Connor most frequently provided the swing votes, but with a larger number of Justices sympathetic to accommodationism in some form their ability to influence the majority was not as strong as the centre during Burger's era. The significance for understanding the Court's opinions as opposed to its rulings is in suggesting that statements strongly favouring either strict separation or unqualified accommodation, as seen in *Aguilar* and *Mueller*, were most likely dicta rather than arguments fundamental to the Court's holding. In some cases, *Aguilar* and *Mueller* in particular, this may have altered the general public's overall perception of the opinion's underlying approach. In attempting to understand the Court's opinions it is necessary to recognise that majority opinions reflect compromise, an "institutional

²⁵⁴ In *Everson* and *Allen* the school aid issue was so new to Establishment jurisprudence that it is difficult to evaluate the relative importance of factions as compared to other factors.

²⁵⁵ In an interview given shortly before he left the Court, Justice Blackmun reflected on the process of opinion writing and indicated the significance swing voters might play: "... other Justices say, if you put in this kind of paragraph or say this, I'll join your opinion. So you put it in. And many times the final result is a compromise. I think the public doesn't always appreciate this but many times the final result is not what the author would originally have liked to have. But five votes are the answer and that's what the coached judgment is. So you swallow your pride and go along with it if you can." "All Things Considered," National Public Radio, December 28, 1993, quoted in O'Brien, D., *Storm Center: The Supreme Court in American Politics* (New York and London: W.W. Norton & Co., Ltd., 4th Ed., 1996), pp. 296-7. Blackmun's comments suggest that on the Burger and early Rehnquist Courts, Establishment Clause negotiations were no different from negotiations over other issues.

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justification for a collective decision” and to judge the words used and arguments made accordingly.²⁵⁶

The Rehnquist Court accepted closer links between church and state. The changing circumstances of religious schools accounted for part of this but the larger number of Justices personally and philosophically sympathetic to accommodation was also important. Rehnquist, Scalia, and Thomas, joined White in advocating closer church-state relations. Also O'Connor and Kennedy were more sympathetic to the inclusion of religious school students in government aid programmes than the swing voters of the Burger Court and only one of them was required for the accommodationists to secure a majority.²⁵⁷ However, Justices Breyer, Ginsburg, Souter, and Stevens formed a reliable separationist bloc more than capable of attracting O'Connor or Kennedy if the circumstances were right. Although sympathetic to accommodation, Kennedy and O'Connor never accepted the constitutionality of all aid programmes and O'Connor in particular required the presence of restrictions and limitations.²⁵⁸ Those seeking a majority were required to adapt and modify approaches to attract the votes of either one or both Justices. Neither *Witters*, *Zobrest*, nor *Agostini* advocated an unlimited, unregulated relationship between church and state; they allowed for a broader range of aid to be provided to religious school students but this has not meant the abandonment of Establishment Clause principles, simply their modification.

Factors external to the Court also influenced school aid cases, although most often in the structure of opinions rather than rulings in a particular case. Rarely did the Court publicly acknowledge awareness of the political and policy debates surrounding the programmes at issue before it but the Justices' private comments indicated that they were aware and that such debate played a part in their personal deliberations. Black and Rutledge's determination to avoid sectarianism in their respective *Everson* opinions reflected their knowledge of the potential for religious divisiveness given the case's circumstances; the Court's unwillingness to strike down all aid programmes designed to alleviate the economic distress of religious schools and their students in the 1970s reflected a deference to legislative decisions and a recognition of the difficult economic circumstances; Rehnquist's comments in *Mueller* reflected his personal position on tax credits; and in *Agostini*, O'Connor drew heavily on the inconvenience and expense of mobile classrooms to argue for reconsideration of the Court's earlier ruling. External factors did not perceptibly alter the Court's rulings in school aid cases from 1947 but they did occasionally influence the tone and structure of the opinion issued.

²⁵⁶ O'Brien, D., p. 267.

²⁵⁷ At least until 1993 when Justice White retired and Justice Ginsburg was appointed. After 1993, the accommodationists required *both* swing votes for a majority.

²⁵⁸ See, for example, her majority opinion in *Agostini v. Felton*.

Chapter Three: School Prayer

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"I have a feeling of sadness because these are so-called Godly people ... If their God teaches them to wish my kids get polio and my house be bombed, then I think He hasn't done a very good job with them," commented Frances Roth, one of the plaintiffs in *Engel v. Vitale* shortly after the decision was handed down.¹ In *Engel*, the Supreme Court ruled unconstitutional school-sponsored prayer activities; a year later in *Abington School District v. Schempp* Bible reading was also struck down.² Reaction to the cases was diverse but the commentary was vocal and passionate. For many, *Engel* and *Schempp* signalled the banning of God from school classrooms and from the lives of children, leading ultimately to the secularization of society. For those who supported the decisions, this was nonsense: the Court had not barred religion from public schools at all, it had simply ensured the schools could not organise religious activities or require participation. The issue of prayer was a sensitive one: as a fundamental part of so many religions, allowing the individual to communicate with their God or Gods, prayer went to the heart of religious faith for many Americans and any comment regarding prayer appeared as a comment on religion itself. Involvement with the issue thus drew the Supreme Court into a highly emotional, sensitive area of American life, requiring the Justices to seek the correct balance between the demands of the Constitution and the faith of the American people.

Battles over prayer and Bible reading were not new to American education. In the nineteenth century conflict between Protestants and Catholics over the prayers said or the version of the Bible read in public schools was partly responsible for the development of the Catholic school system.³ Without continued scrutiny such religious exercises became part of the normal daily routine. This continued into the early twentieth century, although with less frequency in some areas of the country than others. In the aftermath of the Second World War and with the coming of the Cold War a new movement for greater recognition of religion in the nation's schools developed, linked to issues of democracy and anti-Communism. Initially the subject seemed outside the purview of the Supreme Court: although the Establishment Clause had been incorporated into the Fourteenth Amendment by the Justices in *Everson v. Board of Education* in 1947, the Court had shown little interest in considering religion in the context of public schools. Although the striking down of on-campus released time programmes in 1948 had been cause for concern among advocates of school prayer, the Court's 1952 decision allowing off-campus programmes appeared to redress the balance: the silence that followed suggested the Court was

¹ Quoted in "The Court Decision and the School Prayer Furore," *Newsweek*, July 9, 1962, p. 44; *Engel v. Vitale* 370 US 421 (1962).

² *Abington School District v. Schempp* 374 US 203 (1963). For information on these, and all other school prayer cases discussed here see Appendix A, Table 2.

³ See Binder, F., *The Age of the Common School, 1830-1865* (New York: John Wiley & Sons, Inc., 1974), especially pp. 57-72, 97-9, 118; Carey, P., *The Roman Catholics* (Westport, Connecticut: Greenwood Press, 1993), especially pp. 37-42, 56-60; Kaestle, C., *The Evolution of an Urban School System, New York City, 1750-1850* (Cambridge, Massachusetts: Harvard University Press, 1973), especially pp. 142-55; Ravitch, D., *The Great School Wars, New York City, 1805-1973: A History of Public Schools as Battlefields of Social Change* (New York: Basic Books, 1974), especially pp. 4-84.

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no longer concerned with such practices.⁴ *Engel* served notice that the Court *was* concerned, an interest that continued throughout the following decades.

The Court's prayer cases provide commentary on the meaning and application of the Establishment Clause in the modern United States and one perspective on the place of religion in American life. They provide evidence of the Court's position on and role in the development of the debate surrounding schoolhouse religion. Consideration of the reaction to the Court's opinions demonstrates the roles played by politicians, legal scholars, and religious groups in shaping the debate. Yet close analysis of these cases offers more than information on the Court's final rulings, revealing the role played by individual Justices in shaping opinions, the need for compromise, and the impact of the political and social context on the structure of the opinions handed down. The true significance of these opinions is revealed only by considering the factors which shaped them, in addition to their impact and effect.

Background to *Engel*: Religion and Education After World War Two

"The shattering power of the atomic bomb has focussed our sense of need for a kind of education which gives first place to making a life rather than a living," wrote Erwin Shayer, member of the International Council of Religious Education in December 1946.⁵ As Americans sought to comprehend the consequences of a second world war, the growing understanding of the Holocaust, and the implications of the new atomic age, state and national attention turned to the country's schools and the question of education. As Congress debated the need for federal aid to education to attract more teachers and improve resources and facilities, educators were also re-evaluating the purpose and function of education. Since the days of Jefferson and Madison a function of education had been to create good citizens in order to maintain a healthy democracy; in the late 1940s and 1950s educators and interested others engaged in a debate about how best to achieve this aim. The nation's emergence as the leading international economic power after 1945 and the development of the Cold War later in the decade lent urgency to the discussion: in fighting an ideological war a nation's greatest strength was its citizens and good citizens required effective schools. Spurred on by national and international factors as well as pedagogical concerns, educators began to debate and study methods to improve the citizenship education provided by America's schools.

The greater use of religion was one method explored by educators after World War Two to strengthen the citizenship education of students. The national political debate gave impetus to the

⁴ *Everson v. Board of Education of Ewing Township* 330 US 1 (1947); *McCullum v. Board of Education* 333 US 203 (1948); *Zorach v. Clauson* 343 US 306 (1952).

⁵ Shayer, E., "Approaches to Religious Teaching," *Phi Delta Kappan* (hereafter *PDK*), Vol. 28, No. 4 (December 1946), p. 170. The *PDK* was a magazine written for and by the nation's educators, both well-known and unknown. As such it reflects many of the attitudes and ideas of educators at the time.

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movement. As the Cold War deepened and politicians increasingly represented the Soviet Union and Communism as atheistic, religion increasingly became the cornerstone for defence of the nation and the American way of life. In 1954, Congress endorsed the perceived link between democracy and faith when it added the words "under God" to the Pledge of Allegiance. The McCarthy hearings reinforced the connection by implying that atheists were immediately suspect either as dangerous subversives, or worse, as potential Soviet spies. In such a climate, where religion and education were both considered fundamental to the survival of American democracy, the likelihood of greater emphasis on religion in public education increased significantly. Educators themselves called for greater recognition of religion in the school environment. In June 1947, the American Council on Education published a report entitled *The Relation of Religion to Public Education*. Based on a three-year study, the Council called upon schools and colleges to give more curricula recognition to the place of religion in the spiritual and cultural life of the American people. Fearful of inviting sectarianism into their schools, educators had nevertheless "gone too far" in studiously avoiding any mention of religion in their educational programmes, argued the report.⁶ Greater care should be taken to ensure the role of religion in history, literature, the arts, and other areas of life was neither overlooked entirely nor treated in "an inadequate and superficial manner" that might appear to devalue religion.⁷ Suggestions included using Bible verses in character education, studying the Ten Commandments and the Beatitudes as well as Hitchens' Good American Code in discussions of law and civics, employing religious art in studies of culture and artistic development, religious music in music classes, and the Bible and other religious writings in literature classes. In addition, history classes should include discussions of religious motivations and the faiths of historical figures. But for a small group of educators these suggestions did not go far enough. "When religion is left out of education then secularism by default, if not by intent, is the resulting frame of reference," they argued.⁸ Only religiously-grounded values and morals were sufficiently strong, enduring, and relevant to influence the individual student, mould his character, and ensure his continued good

⁶ Committee on Religion and Education, *The Relation of Religion to Public Education: The Basic Principles* (Washington, DC: American Council on Education, 1947).

⁷ See also *Moral and Spiritual Values in the Public Schools* (Washington, DC: NEA and AASA, 1951) in which the National Education Association (NEA) and the American Association of School Administrators (AASA) concurred with this view. See also Illson, M., "Teaching Religion in Schools Backed," *New York Times* (hereafter *NYT*), December 18, 1951, A47. For an introduction to the range of sources available to teachers see Politella, J., *Religion in Education: An Annotated Bibliography* (New York: American Association of Colleges for Teacher Education, 1956) and Hunt, M.G., *Values Resources Guide: Annotated for the Elementary School Teacher* (New York: American Association of Colleges for Teacher Education, 1958). For a practical discussion of teaching about religion and some of the problems of doing so, see Brown, N. (Ed.), *The Study of Religion in the Public Schools: An Appraisal* (Washington, DC: American Council on Education, 1957).

⁸ Reverend James Pike quoted in "Foes of Religion in Schools Scored," *NYT*, April 21, 1952, A18. Ball, W., "The School Prayer Case: The Dilemma of Disestablishment," 8 *Catholic Lawyer* 182 (1962) and "The School Prayer Case: What Course for the Future?" 8 *Catholic Lawyer* 286 (1962).

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citizenship.⁹ For advocates of such a position, secular values were insufficient to maintain a strong nation and a moral individual, many pointing to pre-1939 Germany as an example of their fears. If education was to create the strong, moral citizens that circumstances required, they argued, religion should not be overlooked because to do so was to ensure weaker secular values dominated. Thus religion found greater inclusion in the school environment for a variety of reasons.

However, the trend towards greater inclusion of religion in public school curricula was rarely accompanied by demands for sectarian use of religion, at least explicitly.¹⁰ Among many in the fifteen years after World War Two was a concern to avoid the dangers of classroom proselytising while simultaneously attempting to raise awareness of religious tenets and their applicability to modern life. In 1949, for example, a Dallas school district reported on its use of morning devotionals over the previous year, reprinting devotionals written by Catholic priests, rabbis, and Protestant ministers which covered such issues as freedom of thought, the importance of hard work, tolerance for difference, and acceptance of newcomers to the school.¹¹ Such use of religion in public schools was not intended to deepen divisions between those of different faiths but to emphasise those values perceived as fundamental to good character and good citizenship while teaching and encouraging tolerance and respect for the beliefs of others. Although likely that in some schools blatant attempts to inculcate religion as dogma occurred, there is little more than anecdotal evidence which makes it near impossible to prove. Discussions among educators, however, suggested that the motives of the majority were benign, representing genuine attempts to encourage tolerance of and respect for different beliefs while drawing on religion to encourage good character development.

For opponents of the greater use of religion in public schools the difficulties of teaching about religion outweighed any possible benefits. V.T. Thayer, former superintendent of Wisconsin schools, advocate of Progressive education, and one of the leading critics of released time and Bible reading programmes, argued, "secular education today is under severe attack from

⁹ See Statement of the Protestant Teachers' Association of New York published in *NYT*, November 16, 1952, A81; Harner, N., *Religion's Place in General Education* (Richmond, Virginia: John Knox Press, 1949): "A flat, one-dimensional character education, which never dares to mention the will of God as the final source and resource of all attempts at ethical living, is like the play of *Hamlet* without Hamlet." (p. 35).

¹⁰ The heavily Christian-centric nature of the debate can, however, appear as sectarian to a modern audience. See, for example, Fleming, W.S., *God in Our Public Schools* (Pittsburgh, Pennsylvania: National Reform Association, 1947). Fleming's less than tolerant views of Jews, Catholics, and other "alien minorities" are offensive to modern sensibilities but his argument reveals clearly the Christian-centric way in which some contributors to this debate in the 1940s and 1950s viewed the situation. "Religious doctrines are those on which the Christian sects agree. Sectarian doctrines are those on which the Christian sects do not agree." (p. 170). For a more recent view of this from a Jewish perspective see Feldman, S., *Please Don't Wish Me A Merry Christmas: A Critical History of the Separation of Church and State* (New York and London: New York University Press, 1997).

¹¹ See McElvaney, M., "Devotionals in Highland Park," *PDK*, Vol. 30, No. 5 (January 1949), pp. 190-2.

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individuals and groups who would transform its traditional character.”¹² Thayer and others perceived several key dangers. First, the variety of faiths and beliefs in the United States made it almost impossible to teach elements of religion that did not conflict with someone’s faith. The secular public school developed to ensure that education provided to all would offend no-one on the grounds of their religion; the introduction of religion into schools thus threatened the very foundation of the public school. Second, attempts to find common ground between religions, called the “common core” by Henry Van Dusen, president of Union Theological Seminary, and others, only offended those with genuine faith by picking and choosing certain elements that were “acceptable” and those that were not. The separation of church and state had been intended to avoid both dangers and should thus be adhered to strictly. Third, teaching about religion without indoctrination required careful balancing that, critics asserted, most teachers were unequipped to handle as a result of insufficient training or personal bias. Whether intended or not, more religion in classrooms would lead to religious advocacy, violating the separation of church and state. An alternative was character education, and later moral education. For supporters, values and virtues should be taught through students’ active involvement and participation in a range of activities. Field trips and excursions, studies of the local community and its problems, attempts to develop solutions to local problems, participation in community activities and projects, and involvement with established youth groups were among the suggestions to encourage students to take responsibility for community matters and thus develop civic virtue. Active participation and creative thinking were crucial to this approach, things rarely associated with religious instruction classes of the era.¹³ Although eventually falling out of favour, character education programmes revealed that educators were looking at alternatives to religion as a solution to good citizenship. Given the potential pitfalls of introducing religion into the public school curriculum, the apparent lack of evidence for religion or against character education, and the concerns about church-state separation, many educators looked to more secular means of character training.

Thus by the time *Engel v. Vitale* reached the courts there was no broad agreement among educators concerning the best or most effective way to instil American values into their students. Despite a slight favouring of religious exercises, among those responsible for educating the nation’s children there was no consensus on the question of the proper place for religion in the public schools. Throughout the period educators made suggestions for programmes of character education, posed questions to be considered when religious exercises were introduced into the curriculum, and advocated further study of the issue to more fully understand the options and their consequences. Concentration on state laws conceals the significance of local practice that

¹² Thayer, V.T., “Our Secular Schools and Religion,” *PDK*, Vol. 34, No. 9 (June 1953), p. 394. See also Thayer, V.T., *The Attack Upon the American Secular School* (Boston: The Beacon Press, 1951).

¹³ See “Will the Golden Rule Work?” *PDK*, Vol 30, No. 4 (December 1948), pp. 107-8. For Kentucky’s results, see *Moral and Spiritual Values in Education* (Frankfort, Kentucky: Department of Education, Vol. XVII, No. 11, January 1950) pp. 986-993 and Vol. XVIII, No. 8, October 1950. Also Bower, W., *Moral and Spiritual Values in Education* (Lexington: University of Kentucky Press, 1952).

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was often commented on but rarely studied, but indicates the breadth of opinion on the subject of religious exercises in the public schools. A 1948 report on the Golden Rule experiment in California indicated a relatively small number of teachers employed the Bible or religion in their classes yet a 1955 study noted that religious teaching "is going on quietly and effectively and with the full knowledge and support of parents in many school systems."¹⁴ In 1950, in one of the few detailed studies of the subject, Andrew Edington reported that four states prohibited Bible reading in schools while 27 states had no law regarding the practice.¹⁵ Four years later it was estimated that thirteen states required Bible reading and eight prohibited it entirely, the other states maintaining no law.¹⁶ "There is," one commentator concluded, "no consistent policy among states, among communities within a state, or even among public schools within a single public school system."¹⁷ In 1955, Rolfe Lanier Hunt, executive director of the Department of Religion and Public Education for the National Council of Churches in Christ (NCC), argued: "There will be no national solution answering questions of how the public schools should deal with religion ... There will be no one solution ... The solution we seek should observe the voluntary principle so far as possible."¹⁸ His argument embodied the opinion of many educators, although not all, who did not appear unhappy at the lack of a national policy and accepted that different communities would come to their own arrangements at a time when no position could attract a majority and no evidence could conclusively prove the success of either religious or purely secular teaching. The Supreme Court's intervention in the debate in 1962 brought federal involvement for the first time and with it something approaching a national requirement.

First Principles: *Engel v. Vitale*

In April 1962, the Supreme Court heard oral argument in *Engel v. Vitale*, the first time the Court had been called on to judge the constitutionality of school prayer activities.¹⁹ *Engel* involved a challenge to a twenty-two word prayer composed by the members of the Board of Education of New Hyde Park, New York, adopted by the State Board of Regents as an exercise to be performed daily in the public schools. The prayer read: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our

¹⁴ Brown, F., "Studies of Religion in Public Education," *PDK*, Vol. 36, No. 7 (April 1955), p. 256. See also Sutherland, A., "Public Authority and Religious Education: A Brief Survey of Constitutional and Legal Limits," in Brown, N. (Ed.), pp. 33-47. The difficulty of reaching an agreement is seen in the discussion following his presentation (pp. 47-74) in which leading educators could not agree on a "correct" policy or approach.

¹⁵ Edington, A., "Bible Teaching Policies in the Public Schools," *PDK*, Vol. 31, No. 8 (April 1950), pp. 394-5.

¹⁶ Figures taken from Brown, F., p. 253 and Bower, W., p. 29. Also, Smith, H., *et al*, *Character Development Through Religious and Moral Education in the Public Schools of the United States* (Bloomington, Indiana: Bureau of Cooperative Research, Indiana University, 1937). For a survey of state court actions prior to *Engel* see "Note: A Daily Prayer in Public Schools," 7 *Catholic Lawyer* 334 (1961); "Note: School Prayer and the Becker Amendment," 53 *Georgetown Law Journal* 192 (1964/5).

¹⁷ Brown, F., p. 256.

¹⁸ Hunt, R., "Religion in Public Education," *PDK*, Vol. 36, No. 7 (April 1955), p. 243.

¹⁹ *Engel v. Vitale* 370 US 421 (1962).

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country.”²⁰ As part of the Regents’ “Statement on Moral and Spiritual Training in the Schools” the prayer, they alleged, was intended not as a religious exercise but as a spiritual one, pointing to its nondenominational character in support for their assertion. The use of the Regents’ Prayer was challenged by the parents of ten pupils of the school district as a violation of the Establishment Clause; rejecting the officials’ claim that this was an exercise designed purely to inculcate school children into the moral values of society, the parents alleged that this was a blatant example of state support for religious belief forbidden by the Establishment Clause. The Supreme Court agreed. In an opinion written by Justice Hugo Black, the Court stated, “the State of New York has adopted a practice wholly inconsistent with the Establishment Clause,” rejecting the claim that nondenominationalism made the prayer any less religious.²¹ In arguably the most famous passage from the opinion, the Court made clear the way it viewed the issues raised by *Engel*: “the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by the government.”²²

Black’s opinion for the six-Justice majority rested heavily on two basic principles: that prayer, whether sectarian or nondenominational, was an intrinsically religious activity and that the First Amendment at its most basic prevented government officials composing, conducting, or endorsing such religious exercises. The rest of the opinion was designed to reinforce these two fundamental points. On these the Justices showed a degree of consensus remarkable in the light of the deep divisions present on later Courts. For Justices Black, Felix Frankfurter, John Marshall Harlan, and Chief Justice Earl Warren, that the case involved prayer was virtually sufficient by itself, irrespective of the deity invoked, to violate the Constitution.²³ As far as religious exercises in public schools were concerned, the Court’s position was one of strict separation: “the State’s use of the Regents’ Prayer in its public school system breaches the constitutional wall of separation between Church and State,” wrote Black.²⁴ In this clarity of interpretation Black’s *Engel* opinion stands alone: in later cases, although the Court reinforced the principles laid down in *Engel*, it did so in the language of “neutrality,” a term which blurred the Court’s interpretations and motivations.²⁵ Black’s assertions that the Court and government

²⁰ Regents’ Prayer from *Engel v. Vitale* 370 US 421, 422 (1962). For a history of the Regents’ actions, see the testimony of William Daiker, attorney for the school board, before the House Committee on the Judiciary, Hearings on School Prayers, 88th Congress, 2nd Sess., 1964, pp. 1388-93 (see n. 98 for full reference).

²¹ *Engel v. Vitale* 370 US 421, 424-5 (1962).

²² *Engel v. Vitale* 370 US 421, 425 (1962).

²³ See *Engel* conference notes: William Brennan Papers, Box 1:61 Folder 1 (hereafter Brennan Papers); William Douglas Papers, Box 1276 (hereafter Douglas Papers). The conference notes of Justices Brennan and Douglas indicate a relative paucity of discussion about the case and a high level of congruence among the comments made by those present.

²⁴ *Engel v. Vitale* 370 US 421, 425 (1962). For definitions and a discussion of strict separation see Chapter 1.

²⁵ “Neutrality” implies something non-neutral about the alternatives, in this instance allowing claims of the Court’s hostility towards religion and its exercise.

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were not and should not be hostile to religion prefigured the Court's use of "neutrality," but his opinion, supported by five other Justices, rested firmly on the foundations of strict separation.

Equally firmly the majority placed the issue of religious exercises in public schools within the purview of the Establishment Clause.²⁶ The need to do so was created by the School Board's use of excusal remedies as a defence. Excusal remedies were not a new issue for the Court in 1962, however *Engel* was the first time they had been raised as a means of counteracting an alleged Establishment Clause violation.²⁷ Drawing heavily on free exercise cases, the School Board argued that as long as no child was compelled to participate in the activity, no establishment could be discovered. The Court rejected the argument. While the Religion Clauses of the First Amendment may both be aimed at protecting religious liberty within the United States, stated the Court, they do so in very different ways: the Free Exercise Clause operates by protecting the individual specifically, the Establishment Clause by acting as a restraint on government. While excusal remedies may protect the rights of the dissenting individual they cannot in any way act to limit the role of the government and therefore are insufficient against Establishment Clause challenges. This was a hugely significant argument: in dissent Justice Potter Stewart argued that *Engel* was really a free exercise issue, critics from outside the Court argued that it was a free exercise issue, and advocates have continued to maintain that school prayer is a free exercise issue, but Black and the majority made clear that they considered it an Establishment issue.²⁸ In doing so the Court established that certain rules now applied to similar cases: excusal remedies alone would not be sufficient to withstand a challenge and coercion to participate would not be a decisive test for unconstitutionality. Unless or until the Court chose to alter them these were the terms in which future challenges must be discussed; thus *Engel* constituted the basic framework for the analysis of future cases.

Bernard Schwartz has argued that in *Engel*, the Justices, "uncharacteristically overlooked the political and public implications" of the ruling, a conclusion easily reinforced by the shortness of the opinions rendered and the confused nature of the commentary that followed.²⁹ However, close reading of Black's opinion suggests a Justice, and a Court, aware of the reaction the case

²⁶ *Engel v. Vitale* 370 US 421, 430 (1962).

²⁷ See *West Virginia State Board of Education v. Barnette* 319 US 624 (1943) where the Court addressed the required participation of all students in a daily flag salute and recitation of the Pledge of Allegiance. No student was allowed to be excused from the ritual, regardless of religious objections.

²⁸ See *Engel v. Vitale* 370 US 421, 444-50 (Justice Stewart, dissenting). See Costanzo, J., "Prayer in Public Schools," 8 *Catholic Lawyer* 269 (1962); Rice, C., *The Supreme Court and Public Prayer: The Need for Restraint* (New York: Fordham University Press, 1964); Ferrera, P., *Religion and the Constitution: A Reinterpretation* (Washington, DC: Free Congress Research and Education Foundation, 1983). See also testimony of Bishop James Pike, Episcopal Bishop of California (p. 56, 65-6) and Representative Frank Becker (R-NY) before Senate Committee hearings in 1962 (full reference at n.60) and of Governor George Wallace of Alabama (p. 845) and Robert Cook of the National Association of Evangelicals (p. 968-9) before House hearings in 1964 (see reference at n.98).

²⁹ Schwartz, B., with S. Leshner, *Inside the Warren Court, 1953-1969* (Garden City, New York: Doubleday & Co., Inc., 1983), p. 181.

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would cause. Although criticised by Stewart and others, Black's extensive use of history served a dual purpose: in direct response to claims made by the Board of Regents that a recognition of God was part of the country's national heritage, it showed that such "recognition" had, throughout history, led to persecution of those who did not conform to the beliefs of the majority, and that the aims of the Framers of the Constitution were to prevent the continuation of this oppression in the new nation by separating the secular from the religious.³⁰ It also established that the values of toleration of dissenters and the prohibition of governmental support for religious exercises were equally long-standing American traditions. The Court was not simply creating new law but in fact following a long tradition, that of the Founding Fathers. By laying claim to such distinguished lineage, Black sought to assuage criticism by arguing that this ruling conformed to the best traditions of the nation, that of true freedom and choice.³¹ Equally important were Black's repeated assertions that neither the Supreme Court nor the ideas underpinning the ruling were hostile to religion or religious belief.³² Had the Court believed *Engel* would be easily accepted by the public these would have been unnecessary assertions to make, certainly with such frequency. However, the tone of earlier debates about school prayer or curriculum recognition of religion suggested that claims of anti-religious bigotry or at least of growing secularism might result from the striking down of the Regents' Prayer.³³ The contemporary debate surrounding government aid to religious schools had also resulted in similar claims.³⁴ Both made it likely that the *Engel* ruling would be interpreted in this manner by some groups. In these circumstances the frequency of Black's rejection of religious hostility on the part of the Court showed a clear awareness of these concerns by arguing that the striking down of school prayer should be interpreted only as a rejection of the practice itself and not as a rejection of the belief or beliefs held by those involved.

Black faced a difficult task in writing for the *Engel* majority. Aware of the political and social repercussions, he was denied recourse to legal tradition by the lack of controlling precedent in this area. Although lower courts had ruled in prayer cases since the nineteenth century such opinions were based on state law or state constitutions, not the First Amendment.³⁵ As such they

³⁰ For the argument of the Board of Regents see 370 US 421 *U.S. Records and Briefs*: Brief of Respondents, pp. 12-14.

³¹ *Engel v. Vitale* 370 US 421, 435 (1962). In doing so, Black's opinion provides support for the Rational Choice Model of Court activity.

³² See *Engel v. Vitale* 370 US 421, 432, 435 (1962). The sentiment was reinforced by Black's comments from the bench. After reading the opinion, he commented: "The prayer of each man from his soul must be his and his alone. That is the genius of the First Amendment ... If there is any one thing clear in the First Amendment it is that the right of people to pray in their own way is not to be controlled by the election returns." Quoted in Loren, J., *Engel v. Vitale: Prayer in the Public Schools* (San Diego, California: Lucent Books, 2001), p. 54.

³³ See, for example, the Statement by the Roman Catholic Bishops of the USA (1952) (reprinted in the *NYT*, November 16, 1952, A80) and "Letter to the Christian People of America" from the National Council of Churches in Christ (1952) (reprinted in *NYT*, December 13, 1952, A17).

³⁴ See Chapter 2.

³⁵ For example, see *Donahoe v. Richards* 38 Me. 379 (1854); *Spiller v. Inhabitants of Woburn* 94 Mass. (12 Allen) 127 (1866); *Moore v. Monroe* 64 Iowa 367, 20 NW 475 (1884); *Hackett v. School District* 120 Ky 608, 87 SW 792 (1905); *Church v. Bullock* 104 Tex. 1, 109 SW 115

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could provide support for a particular approach but not a definitive meaning of the Establishment Clause. Of the Court's Establishment rulings, *McCullum v. Board of Education* and *Zorach v. Clauson* were the closest precedents but released time programmes did not involve the schools and their staff to anything like the extent Black argued was involved in *Engel*.³⁶ While a weakness of the opinion, the omission of legal precedent in *Engel* was deliberately designed. Even accepting the limited range of legal precedent open to him, Black's use of history and sweeping language implied an argument that was broader than the law. Black conjured images of men searching for fundamental principles, a nation steeped in the tradition of tolerance, the positive good of belief, and the evil of its corruption in any form, thus turning the debate over school prayer into one of right and wrong, tolerance versus bigotry, an argument beyond law, about the very nature of the society in which Americans live.³⁷ Black thus sought to turn the weakness of limited precedent to his advantage, crafting a broad opinion that spoke to fundamental values and American traditions and applying them specifically to the Regents' Prayer. If the majority believed that a limited, narrow legal opinion would be unlikely to quell the dissatisfaction of the public with the ruling a broad, sweeping opinion would be unlikely to cause any greater criticism, and might win greater support.³⁸ Thus far from being unaware of the implications of *Engel*, both the structure and content of Black's majority opinion were designed with the consequences in mind.

However, the arguments made by Justices Harlan, William O. Douglas, and Potter Stewart inadvertently worked to undermine Black's efforts and brought out areas of disagreement that foreshadowed problems in future cases. Although troubled by the result, Harlan "reluctantly" joined the majority "in light of the direction the cases have taken."³⁹ Harlan's limited support for

(1908); *People v. Stanley* 81 Colo. 276, 255 Pac. 610 (1927) upholding prayer and Bible reading. For cases striking down similar practices see *Board of Education v. Minor* 23 Ohio St. 211 (1872); *State v. District Board of School District No. 8* 76 Wis. 177, 44 NW 967 (1890); *State v. Sheve* 65 Neb. 853, 91 NW 846 (1902); *Herold v. Parish Board of School Directors* 136 La. 1034, 60 So. 116 (1915); *Evans v. Selma Union High School District* 193 Cal. 54, 222 Pac. 801 (1924). But see Laubach, J., *School Prayers: Congress, the Courts and the Public* (Washington DC: Public Affairs Press, 1969), p. 24: "The pro's and con's of school religion already being well developed in state judicial reports, it merely remained for the Supreme Court to choose its options."

³⁶ *McCullum v. Board of Education* 333 US 203 (1948). Released time programmes allowed students to be excused from their normal classes during the school day to receive religious instruction with the permission of their parents. In *McCullum*, this instruction took place on public school grounds. In 1952, the Court upheld such programmes when conducted off school premises in *Zorach v. Clauson* 343 US 306 (1952), but the argument about "secular" public schools continued.

³⁷ Black's omission of legal principle was not simply an oversight since the Brief for Petitioners relied heavily on *McCullum*, while the Brief for Respondents made significant use of *Zorach* to support their respective arguments. See Brief for Petitioners, pp. 22-4; Brief for Respondents, pp. 14-16. Douglas made use of both in his concurrence, suggesting the absence of any reference to them in the majority opinion was designed to make a specific point.

³⁸ This approach had been employed by the Court in *Brown v. Board of Education of Topeka, Kansas* 347 US 483 (1954) when holding racially segregated schools unconstitutional.

³⁹ Douglas Papers, Box 1276; Brennan Papers, Box 1:61 Folder 1. Given the relative paucity of constitutional precedent for *Engel*, the cases could only have been *Everson*, *McCullum*, and

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the ruling in *Engel* reflected his concern for the specific facts of the case and the precise circumstances in which it had arisen: under different circumstances his position may have been different. As with at least two earlier opinions, Douglas, in concurrence, was primarily concerned with another issue very much on the political agenda at the time: public financing of religious schools.⁴⁰ Douglas' concern with the financial issue, however, broadened the scope of the debate beyond that addressed by Black for the majority. As such, Douglas' positions remained unanswered and the consequences of *Engel* for activities other than school prayer remained unclear. The suggestion that the Pledge of Allegiance and "In God We Trust" might be under threat raised subjects outside the scope of the case that Black had deliberately tailored narrowly to the facts and arguably intensified reaction to *Engel* by creating uncertainty. Stewart took the opposite direction to Harlan and Douglas and became the sole dissenter in *Engel*. That he was less sure of the result in the case than the others was obvious in conference where he commented that he was "not at peace" and "still in doubt."⁴¹ Ultimately for Stewart, the central issue before the Court was the free exercise rights of the majority: fairness required consideration of the views of the majority over a small minority of students whose rights were protected by the existence of excusal remedies.⁴² However, Stewart's interpretation served to confuse the Establishment and Free Exercise doctrine by suggesting that school prayer involved the free exercise rights of the majority rather than the establishment limitation on government. The argument provided ammunition to religious groups supporting school prayer and challenged the majority's insistence that it was clearly an Establishment issue. Stewart's dissent gave impetus to the argument about the relationship between the religion clauses of the First Amendment which the Court would be required to address in future cases.

The greatest weakness of *Engel v. Vitale* was that the Court failed to provide a clear definition of "establishment": Stewart denied it was relevant as an issue, Douglas argued that it involved government financing of religious activities, and Black suggested implicitly that the issue was one of coercion to believe. The lack of clarity on this issue rendered imperceptible the key tests for Establishment Clause violations which the Court would be likely to apply in the future, failing to provide clear guidelines either to those working to abide by the decision or those wishing to challenge existing practices, as to what beyond prayer was constitutional. Here lay at least part

Zorach. General principles to be drawn from these cases were that the state could not give direct aid to religion and that religious exercises could not be conducted on public school campuses. Since the Regents' Prayer was conducted during the school day, on campus, and was clearly an aid to religion, Harlan's respect for precedent led him to support the majority.

⁴⁰ The earlier opinions were in *Zorach v. Clauson* 343 US 306 (1952) and *McGowan v. Maryland* 366 US 420 (1961). See *Engel v. Vitale* 370 US 421, 437 (1962) (Justice Douglas, concurring). A memorandum to Black from Douglas, dated June 11, 1962, showed his concern: "I am inclined to reverse if we are prepared to disallow public property and public funds to be used to finance a religious exercise. If, however, we would strike down a New York requirement that public school teachers open each day with prayer, I think we could not consistently open each of our sessions with prayer. That's the kernel of my problem." Douglas Papers, Box 1276. See also Drafts 2 and 3, Box 1276.

⁴¹ Douglas Papers, Box 1276.

⁴² *Engel v. Vitale* 370 US 421, 445 (1962) (Justice Stewart, dissenting).

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of the problem of the misconception of *Engel*'s ruling and the widespread misinterpretation of its underlying principles. In the absence of a clear test, attention turned to what information was available within the opinions that could provide guidelines. Black's opinion, with its sweeping statements of principle and history, provided little in terms of concrete advice and so scrutiny was directed towards the concurrence and dissent. Stewart's interpretation of the majority's holding suggested that "state and federal governments are without constitutional power to prescribe any particular form of words to be recited by any group of the American people *on any subject touching religion*."⁴³ Following this with a discussion of religious references in the national anthem and the Pledge of Allegiance, Stewart argued by association that these things would now come within the purview of the Court's holding.⁴⁴ By suggesting that the prayer at issue in *Engel* involved unconstitutional state financial aid, then going on to equate the Regents' Prayer with the Pledge of Allegiance, congressional and military chaplains, "In God We Trust" on the nation's currency, and the Court's own invocation at opening, Douglas appeared to suggest all these things were unacceptable too. Although Black had explicitly refuted claims along these lines, he had done so only in a footnote near the end of the opinion, and it is not surprising that this was so easily overlooked, or deliberately ignored.⁴⁵ Thus, although the majority attempted to reassure the public that the Court was not hostile to religion and that the Constitution did not require hostility on the part of government, the lack of any clear test led many to exactly this conclusion.

Establishing Battle Lines: Reaction to *Engel*

The initial reaction to *Engel* was swift and overwhelmingly critical, although the Court was not without its supporters. Reverend Dr. Martin Luther King, Jr. called *Engel* "a sound and good decision reaffirming something that is basic in our Constitution, namely separation of church and state."⁴⁶ Leo Pfeffer, general counsel for the American Jewish Congress, stated: "I am highly gratified by the decision which I believe is consistent with the earlier position of the Supreme Court that the Constitution requires an absolute separation of church and state and a secular public school system."⁴⁷ Isaac Frank, executive director of the Jewish Community Council of Greater Washington, believed *Engel* "is good for religion, public education, and democracy," and the *Washington Post* praised the decision as, "an act of liberation. It frees school children from what was in effect a forced participation by rote in an act of worship that ought to be individual,

⁴³ *Engel v. Vitale* 370 US 421, 449 (1962) (Justice Stewart, dissenting) (emphasis added).

⁴⁴ *Engel v. Vitale* 370 US 421, 450 (Justice Stewart, dissenting). In reality this is a misreading of Stewart's opinion, taking no consideration of his fundamental view of judicial activity or the fact that he based his opinion so heavily on the Free Exercise Clause, both of which lead to a different interpretation of the meaning of these assertions than that provided by most commentators.

⁴⁵ See *Engel v. Vitale* 370 US 421, 435, n. 21 (1962).

⁴⁶ Quoted in Pfeffer, L., *Religion, State and the Burger Court* (Buffalo, New York: Prometheus Books, 1984), p. 85.

⁴⁷ Quoted in "Clerics, Politicians Hit Court Prayer Decision," *Washington Post*, June 26, 1962, A8.

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wholly voluntary, and devout.”⁴⁸ Support also came from the Baptist Joint Committee on Public Affairs, the United Church of Christ, and a group of Protestant leaders including the dean of Harvard Divinity School, in addition to the ACLU and Protestants and Other Americans United for the Separation of Church and State (Americans United). The dominant themes running throughout supporters’ reactions included support for the Court as having upheld fundamental constitutional principles and values, the importance of freedom of choice and voluntariness, and a strong belief that *Engel* protected religion. “When the positive content of faith has been bleached out of a prayer, I am not too concerned about retaining what is left,” stated Dr. Franklin Clark Fry, president of the Lutheran Church of America.⁴⁹

More common was the reaction of Senator Herman Talmadge (D-Ga) who denounced *Engel* as “unconscionable ... an outrageous edict,” and that of Representative Frank Cheef (D-Ky) who suggested the majority “ought to be ashamed and ought to resign.”⁵⁰ Representative John Bell Williams (D-Miss) insisted the decision constituted “a deliberate and carefully planned conspiracy to substitute materialism for spiritual values,” Senator John Sparkman (D-Ala) called it “a tragic mistake,” and Representative Frank Becker (R-NY), who would become the leader of the opposition to the Court on this issue, suggested *Engel* was “the most tragic decision in the history of the United States.”⁵¹ Among members of Congress, some of the most vocal of the Court’s critics, two themes dominated. First, any opposition to religious activities in the public schools was an attack upon religion and upon God Himself. Senator Eugene McCarthy (D-Minn) claimed the Court had promoted “not only a secularised government, but a secularised society,” Senator A. Willis Robertson (D-Va) considered it the most extreme ruling the Court had ever made in favour of atheists and agnostics, and Senator Robert Byrd (D-W.Va) argued, “somebody is tampering with America’s soul.”⁵² Second, the Court had opened the United States to attack by the Communists. “These men in robes are doing everything possible to help Khrushchev bury us,” argued Representative Alvin O’Kinski (R-Wis), while Representative William Colmer (D-Miss) asked, “is this another step toward the adoption of Communist philosophy?”⁵³ In addition, critics accused the Court of stepping beyond its legitimate bounds and the Justices of putting

⁴⁸ Frank, I., quoted in “Religious Exercises in Area Held in Doubt,” *Washington Post*, June 26, 1962, A1; “In Behalf of Education,” *Washington Post*, June 26, 1962, A12. See also Kik, J.M., *The Supreme Court and Prayer in the Public School* (Philadelphia: Presbyterian and Reformed Publishing Co., 1963).

⁴⁹ “The Court Decision and the School Prayer Furor,” *Newsweek*, July 9, 1962, p. 45.

⁵⁰ *Congressional Record* (hereafter *Cong. Rec.*), 108th Congress, June 26, 1962, p.11,675; *Washington Post*, June 29, 1962, A8. It is difficult to state conclusively whether these statements, and others like them, were the genuine views of the speakers or simply political manoeuvring. That many Congressmen who made statements shortly after *Engel* was handed down later retracted them or altered their stance on school prayer suggests they were at least made based on misleading, or limited, information about the Court’s stance. However, these were the reactions initially reported in the newspapers, shaping public reaction to the ruling, and herein lies their significance.

⁵¹ *Cong. Rec.*, 108th Congress, June 26, 1962, p. 11,719, 11,844.

⁵² *Cong. Rec.*, 108th Congress, June 26, 1962, pp. 11,844, 11,708 (for additional quotes, see 11,839-45 and 11,707-13); *Newsweek*, July 9, 1962, p. 43.

⁵³ *Cong. Rec.*, 108th Congress, June 29, 1962, p.A4590; *Washington Post*, June 26, 1962, A8.

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themselves above God. Shortly after *Engel* was handed down, twenty-two Senators and fifty-three Representatives had introduced constitutional amendments to overturn the Court's decision and "return God" to the nation's public schools.⁵⁴

Support for the idea that the Court had banished God from the classrooms came from a variety of religious groups and leading individuals, dominated by Catholics and a number of mainstream Protestant denominations. Francis Cardinal Spellman declared himself "shocked and frightened" by the decision, arguing, "the decision strikes at the very heart of the Godly tradition in which America's children have for so long been raised."⁵⁵ Cardinal Francis James McIntyre found the situation "positively shocking and scandalising ... it is not a decision according to law but a decision of licence," and the Roman Catholic Bishop of Dallas-Fort Worth predicted, "American public schools will have to start bootlegging religion into the classroom."⁵⁶ Reverend John Wesley North, Methodist Bishop of Washington, stated, "[I]t seems to me in this decision one of the ancient landmarks of our American culture and tradition is being removed," a sentiment echoed by his Georgia colleague, Reverend John Owen Smith, who said, "it's like taking a star or stripe off the flag."⁵⁷ Dr. Billy Graham, one of the nation's best known fundamentalist clergymen, claimed, "this is another step toward the secularisation of the United States." "Followed to its logical conclusion we will have to take the chaplains out of the armed forces, prayers cannot be said in Congress, and the president cannot put his hand on the Bible when he takes the oath of office," he argued, linking school prayers to other church-state interactions, stimulating fear for what the Court might do next, as well as fundamentally misinterpreting the majority's decision.⁵⁸ Evangelical Protestants and several other mainstream Protestant groups had actively supported school prayer activities; in the South and Mid-West where such practices were most common, these denominations were the prime beneficiaries. Several Catholic priests had formally intervened in *Engel* in defence of the Regents' Prayer and thus the Catholic response was expected. However, such reaction may, in part, explain the vehemence of congressional reaction: as representatives of some of the largest religious groups in the United States, Congressmen may well have considered the stance of Spellman, Graham, and others, to be representative of the views of the majority of the population. Concerned with the need for reelection in the 1962 mid-term elections, failure to be seen to "stand up for God" could have been political suicide. As one contemporary commentator noted, copies of anti-*Engel* statements mailed to constituents "will be worth their weight in ballots [in the South]."⁵⁹

⁵⁴ Beane, W. and E. Beiser, "Prayer and Politics: The Impact of *Engel* and *Schempp* on the Political Process," 13 *Journal of Public Law* 475, 479 (1964) (hereafter Beane and Beiser).

⁵⁵ Quoted in *Washington Post*, June 26, 1962, A8.

⁵⁶ "Court Edict on Prayer is Decried," *Washington Post*, June 27, 1962, A6; *Newsweek*, July 9, 1962, p. 44.

⁵⁷ *Washington Post*, June 27, 1962, A6; *Newsweek*, July 9, 1962, p. 43.

⁵⁸ Quoted in *Washington Post*, June 26, 1962, A8.

⁵⁹ "TRB from Washington", *The New Republic*, July 9, 1962 (Vol. 147, No. 2) p. 2.

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Political motivations also partially account for the severe misrepresentation of the meaning and consequences of Black's opinion. Equating *Engel's* supporters with agnostics, atheists, Communists, and other "un-American" ideas made for unambiguous soundbites that could be easily reported and which touched on concepts and fears already familiar to the American people. Such simplistic equations were also easier to communicate than the more complex, but more correct, concepts of separation of church and state, the dangers of coercion, and the benefit to religion of being free from state interference. In hearings undertaken by the Senate Judiciary Committee in late July and early August 1962, the misrepresentation continued. Written statements by groups including the ACLU, the Anti-Defamation League, American Ethical Union, American Jewish Congress, NAACP, and the Baptist Joint Committee, as well as a letter signed by 110 deans and professors of law and political science, were opposed by the near unanimous oral testimony criticising the Court's action.⁶⁰ No report was issued and no legislation proposed as a result of the hearings; they were little more than an opportunity for opponents to attack the Court on the record, achieving cheap political advantage, while not being required to take concrete action that might endanger political support.⁶¹

However, at least part of the reaction against the ruling was because it showed a level of judicial activism that was unexpected. There has been a great deal of misunderstanding surrounding the history of the Warren Court: typically associated with landmark decisions on reapportionment, criminal procedure and the rights of the accused, free speech, freedom of the press, and desegregation, it is frequently forgotten that the early years of Warren's tenure on the Court differed little from the moderate positions assumed by the Court under his predecessor, Fred Vinson. The legacy of *Brown v. Board of Education* has tended to skew legal commentary toward seeing what Lucas Powe, Jr. termed "history's Warren Court" from Warren's appointment to the Chief Justiceship.⁶² However, several years before Warren's appointment to the Court, journalist John Gunther wrote: "[he] is honest, likeable, and clean, [characterised by] decency, stability, sincerity, and a lack of genuine intellectual distinction. He will never set the world on fire or even make it smoke."⁶³ Although California's most popular Governor, little more was expected of him as Chief Justice than possibly bringing an order and decorum to the

⁶⁰ US Senate. Committee on the Judiciary. Hearings on Prayer in Public Schools and Other Matters, 87th Congress, 2nd Sess. (1962). Senators Philip Hart (D-Mich) and Roman Hruska (R-Neb) were the two notable exceptions to this trend (see especially pp. 23, 25-6, 28, 36-7, 47, 54, 59-60). It is worth noting that of the ten witnesses providing oral testimony at the hearings, not one spoke in favour of *Engel* and only one, Bishop James Pike of San Francisco, was a non-Congressman.

⁶¹ For an example of reasonable, dispassionate discussion of the subject, see "Storm Over the Supreme Court: The School Prayer Case," CBS broadcast, Wednesday March 13, 1963.

⁶² Powe, L., *The Warren Court and American Politics* (Cambridge, Massachusetts: Belknap Press, 2000), p. 209. Historians have tended to be more circumspect, dividing Warren's tenure in two, placing the turning point in the Court's jurisprudence between 1961 and 1963, just as *Engel* reached the Court. See Schwartz, B., *Inside the Warren Court* and McCloskey, R., *The Modern Supreme Court* (Cambridge, Massachusetts: Harvard University Press, 1972). Powe divides the Court into three periods: 1953-6, 1957-61, and 1961-9; however, he too sees the change occurring in 1961-2 and thus fits this profile.

⁶³ Quoted in Schwartz, B., p. 19.

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business of the Court that had been noticeably lacking.⁶⁴ The early years of Warren's tenure as Chief Justice did little to dispel the initial assessments of his influence on the Supreme Court: when interpreting the Constitution, at least through much of the 1950s, Warren's decisions were cautious and generally reflected mainstream values.⁶⁵ Writing in 1957, legal scholar Robert McCloskey observed: "The Supreme Court is in a period of transition and at the moment it is difficult to know whether it will continue along the path taken since 1937 of limited activism, or once again take on the role of bringing the central problems of American political life under close surveillance."⁶⁶ Against this background, the negative reaction to *Engel* is more understandable. First, the Court's intervention and application of the First Amendment to the states required a national approach to an issue that until *Engel* had been decided by communities themselves. Second, the issue of school prayer had not been a major part of political debate for several decades but fell at its first significant challenge, struck down by what was perceived to be a restrained, cautious Court. Both gave the impression of far greater judicial activism than was the case.

Despite the restrained approach to much of its constitutional jurisprudence, by the time the Court decided *Engel* in 1962, it had already developed a small but vocal and politically influential opposition willing to challenge what it considered to be the Court's overarching activism. The vast majority of this opposition consisted of southerners, alienated by the Court's opinion in *Brown* and subsequent rulings outlawing Jim Crow and insisting on desegregation. A series of internal security cases in which the Court upheld the rights of the individual over the rights of the state brought southerners allies in the form of national security conservatives and turned regional disaffection for the Justices into a national phenomenon, drawing northerners and westerners into the anti-Court camp.⁶⁷ In 1958 Congress entered the fray holding hearings on House Resolution 3 and the Senate equivalent, the Jenner Bill, designed to limit the influence of the Court in internal security cases. Both resolutions were quickly defeated but the challenge to the Court was unmistakable. By 1962, Walter Murphy observed that there was a "quiet but unmistakable undertone on Capitol Hill, a fear not only among conservatives but among

⁶⁴ The political divisions on the Court and the tense relationships between the Justices had become quite public by 1953. For a brief introduction see Cooper, P., *Battles on the Bench: Conflict Inside the Supreme Court* (Lawrence, Kansas: University Press of Kansas, 1995).

⁶⁵ *Brown* was the notable exception to this trend. Powe, L., p. 104, Simon, J., *The Center Holds: The Power Struggle Inside the Rehnquist Court* (New York: Simon & Schuster, 1995), pp. 62-3.

⁶⁶ McCloskey, R., p. 160.

⁶⁷ Powe, L., p. 85. On June 17, 1957, subsequently dubbed "Red Monday" by critics, the Court handed down four such cases: *Watkins v. US* 354 US 178 (Due Process Clause of Fifth Amendment violated by conviction under the Smith Act for refusing to answer questions about other persons involved in the American Communist Party); *Sweezy v. New Hampshire* 354 US 234 (charge of contempt for refusing to answer questions about other members of the state Progressive Party violated Due Process Clause of the Fourteenth Amendment); *Yates v. US* 354 US 298 (overturned convictions under the Smith Act of leaders of the Communist Party in California); *Service v. Dulles* 354 US 363 (questioned discharge of Foreign Service official as a "security risk" and for disloyalty). See also *Slochower v. Board of Education* (1955) (discharge of teacher for failure to answer questions about Communist Party membership violated Due Process Clause of Fourteenth Amendment).

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moderates as well as some liberals that the Justices had gone too far in protecting individual rights and in doing so had moved into the legislative domain."⁶⁸ The Court's decisions on segregation and internal security, in the words of one commentator, "turn[ed] the Court from a hero into a harridan, and its Chief Justice from prospective President to public pariah."⁶⁹

In the midst of the storm, in late 1962, the Supreme Court announced that it would hear argument in *Abington School District v. Schempp*. That it did so came as little surprise; it had been widely predicted over the intervening months during congressional hearings into the *Engel* ruling. But much had changed in the intervening year, both on and off the Court, that would impact on the Court's ruling and the positions of the individual Justices. If in 1962 the Court was less activist, less radical, and generally more circumspect than "history's Warren Court" suggests, by 1963 it was clear that the Court was moving toward the position for which it has so rightly been remembered, and within a few years a whole plethora of cases would expand civil rights and liberties beyond any imagining. A change of personnel on the Court both stimulated this development and added to the sense of shifting foundations. Felix Frankfurter, the Court's leading advocate of judicial restraint, retired from the Court in 1962. His ability to influence colleagues and secure majorities made him an influential figure on the Court and a key vote; with his retirement came the opportunity for other Justices to influence the outcome of cases. Frankfurter's replacement, Arthur Goldberg, told his wife before taking his seat that he intended to be a liberal Justice, and quickly settled in to provide the liberal bloc of Warren, Douglas, Brennan, and Black, with a majority-securing fifth vote.⁷⁰ Likewise, the moderate conservative Charles Whittaker was replaced by Kennedy nominee, Byron White in 1962 adding to the sense of change.⁷¹ Clark's shift to support the liberal majority in *Mapp v. Ohio* has been credited as signalling the collapse of the conservative bloc, and, although not quite so dramatic, it added to the growing sense of liberal activism on the Warren Court.⁷² Although this process was only beginning in 1963, it was already significant enough to affect not only the Justices of the Court, but also public perception of *Schempp*.

⁶⁸ Murphy, W., *Congress and the Court: A Case Study in the American Political Process* (Chicago: University of Chicago Press, 1962), p. 116. See, for example, comments of Representatives Davis (D-Ga), Flynt (D-Ga), Andrews (D-Ala), Jackson (R-Cal), Scherer (R-Ohio), *Cong. Rec.*, 85th Congress, 1st Sess, 1957, pp. 9887-96, 10,525-43. Also, "High Court Makes Treason Safe," *Santa Monica Evening Outlook*, June 21, 1957 (p. 10,540) and "National Whirligig," *Columbia (SC) State*, June 24, 1957 (p. 10,336).

⁶⁹ Schwartz, B., p. 104. Schwartz's comment may be overstated but Warren was sufficiently well-known to attract criticism. See comments by Representatives Davis (D-Ga), Flynt (D-Ga), and Andrews (D-Ala) (*Cong. Rec.*, 85th Congress, 1st Sess., pp. 9887-96). For earlier criticism, see *Cong. Rec.*, 83rd Congress, 2nd Sess. (1954), pp. 6742-50. However, in defence of Warren, see comments by Senators Neuberger (D-Ore), Clark (D-Penn), Morse (D-Ore), and Douglas (D-II), and editorials in the *NYT*, *Portland Oregonian*, and *Christian Science Monitor* (*Cong. Rec.*, 85th Congress, 1st Sess., pp. 10,295-7, 11,954, 12,072).

⁷⁰ Powe, L., p. 211.

⁷¹ White turned out to be a more conservative Justice than had been expected on his appointment. In 1962, however, his philosophy was unknown.

⁷² *Mapp v. Ohio* 367 US 643 (1961) extended to the states the Fourth Amendment exclusionary rule, forbidding the use at trial of evidence obtained in violation of the requirements for a proper search and seizure.

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Schempp consolidated two challenges to the daily practice of reading passages from the Bible, one from Pennsylvania and one from Maryland. Unitarians Edward Schempp and his family challenged the practice as violating the Establishment Clause on the grounds that it forced his children to participate in a ritual which contravened their religious belief. In *Murray v. Curlett*, the Maryland case, a similar law was challenged by atheist Madalyn Murray and her son who argued that equating moral and spiritual values with religion rendered alternative views suspect, alien, and sinister, and made outcasts of those holding them.⁷³ Potentially the impact of the case was more wide ranging than *Engel*: while school prayer was predominantly, although not exclusively, a southern phenomenon, Bible reading was practiced widely throughout the states.⁷⁴ Undeterred, the Court found no greater difficulty in *Schempp* than it had in *Engel*, striking down the practice with an 8:1 majority, stating, "We agree with the trial Court's findings as to the religious character of the exercises. Given that finding, the exercises and the law requiring them are in violation of the Establishment Clause."⁷⁵

Establishing the practice of Bible reading as a religious exercise and not simply a moral or spiritual one with religious overtones, was crucial to the opinion. Whereas the prayer challenged in *Engel* was a religious exercise and recognised as such by both parties, in *Schempp* attempts were made to suggest that the Bible was used for its "educational and moral value for the students."⁷⁶ *Engel* had appeared to rule that no religious exercises were permitted in the public schools and so defenders of the practice needed to show that Bible reading was not an inherently religious practice. The centrality of the issue was indicated by the parties' submissions to the Court: in *Schempp* and *Murray* opponents spent a combined twenty-two pages of their briefs addressing how and why the Bible and the Lord's Prayer were religious and sectarian documents.⁷⁷ In response, supporters argued that Bible reading had transcended its religious origins to become part of the traditional practices of the state and discussed perceived

⁷³ For a personal recollection of the background to the case see Murray, W., *Let Us Pray: A Plea for Prayer in Our Schools* (New York: William Morrow & Co. Inc., 1995), pp. 1-28.

⁷⁴ Only California, Illinois, Louisiana, Nebraska, South Dakota, Washington, and Wisconsin outlawed all forms of religious exercise in schools. A Delaware law required five verses of the Bible to be read daily with a fine of \$25 for a first failure and revocation of the teaching credentials of any teacher who refused to participate a second time. In Arkansas the Lord's Prayer, or any prayer, could be offered but failure to comply after two warnings was grounds for dismissal. In Alabama public funds could be withheld from a school if the teachers' reports failed to show daily Bible reading. Mitau, G.T., *Decade of Decision: The Supreme Court and the Constitutional Revolution, 1954-1964* (New York: Charles Scribner's Sons, 1967), pp. 119-20. A 1960 survey showed Bible reading occurring in 80% of Southern school districts, 62% of Eastern districts, 28% of Mid-Western districts, and 14% of Western districts. Quoted in Loren, J., p. 24.

⁷⁵ *Abington School District v. Schempp* 374 US 203, 223 (1963). Again, Stewart was the lone dissenter.

⁷⁶ 374 US 203 *Records and Briefs*: Brief for Appellants, testimony of Dr. Charles H. Boehm, Superintendent of Public Instruction of Pennsylvania, p. 19.

⁷⁷ This represented almost a third of their combined length. 374 US 203 *Records and Briefs*: *Murray v. Curlett*, Petitioners' Brief, pp. 11-18; *Abington School District v. Schempp*, Brief for Appellees, pp. 15-17, 23-33.

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pedagogical reasons for continuing the practice.⁷⁸ The Court gave short shrift to the argument. In his opinion for the majority, Clark quoted at length from testimony given at trial in *Schempp* concerning the religious and sectarian nature of the Bible before concluding, "in both cases the laws require religious exercises," thus bringing the case under the control of *Engel* and to all intents and purposes determining the outcome of the case.⁷⁹ In terms of the final ruling, the political furore surrounding the Court had no impact. The major points of Clark's opinion closely reflected those made by Black the previous year. The Justices' near consensus regarding the sectarian nature of the Bible reading practices challenged reflected their belief that *Engel* remained good law, and their commitment to the legal precedent there established, that remained unshaken by the broader political debate.⁸⁰

However, much about the *Schempp* opinions showed the Court was aware of the controversy surrounding *Engel* and took steps to address it. The legal principles of *Schempp* were the same but the tone and structure of the majority opinion were sufficiently different from the earlier case to show that the opinion was about more than simply establishing legal precedent.⁸¹ The most obvious difference was Clark's extensive use of legal references and analysis of the Court's previous holdings in Establishment cases.⁸² No explicit attempt was made to link this discussion to the issue in question, but it appeared to have several functions. First, Clark used the cases to illustrate that the Court had always recognised the importance of religion and its role in society, reinforcing arguments made elsewhere in the opinion and echoing Black's concern in *Engel*. Second, in light of criticism of Black specifically after *Engel*, and the Warren Court more generally, Clark revealed that the Court was aware of this legal history and was prepared to make use of it, challenging those who accused the Justices of being unscholarly. Third, and more significantly, the use of legal precedent returned the issue of religious exercises in public schools to the legal arena. Black's appeal to larger principles of tolerance and freedom convinced those who supported the ruling but opened the Court to criticism that it was imposing its own views on society and engaging in "judicial legislation." By returning the issue to purely legal foundations, Clark's opinion sought to narrow the discussion before the Court to those areas with which it was primarily concerned. In doing so, the opinion attempted to cut off the route for such criticism and return the Court, in the eyes of the public, to a position as a purely legal institution.

⁷⁸ *Schempp*, Brief for Appellants, pp. 15-19, 30, 32; *Murray*, Brief of Respondents, pp. 12-16.

⁷⁹ *Abington School District v. Schempp* 374 US 203, 209-211, 224 (1963).

⁸⁰ See comments by Warren and Stewart in *Murray v. Curlett* conference, Douglas Papers, Box 1281; Goldberg in *Schempp* conference, Douglas Papers, Box 1295.

⁸¹ Early drafts of the opinion reveal that Clark toyed with the idea of excluding the Murrays' atheism from discussion, possibly to avoid claims that the Court was "godless" or establishing "secularism" in American society. Although he ultimately did not exclude the Murrays, Clark's thinking shows his awareness of the potential controversy resulting from the case. Mengler, T., "Public Relations in the Supreme Court: Justice Tom Clark's Opinion in the School Prayer Case," 6 *Constitutional Commentary* 331, 340-1 (1989).

⁸² *Abington School District v. Schempp*, 374 US 203, 217-22 (1963). For a similar view see Pfeffer, L., pp. 103-4.

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Clark's authorship of the majority opinion also had broad political significance. It is unlikely that the assignment was given to Clark to keep him as part of the majority: the Justices knew *Schempp* would be controversial, but not so much so that it required a Court as close to unanimity as possible. Even without Clark's vote a majority existed to strike down the Pennsylvania and Maryland practices. Besides, Clark had voted with the majority in *Engel* the year before. But the Texan had two advantages for the Court: first, he was publicly identified as a conservative on the Court, in contrast to Black; second, Clark had felt so strongly about *Engel* that in the summer of 1962 he had publicly defended the ruling, and the Court, from the criticism it received.⁸³ It had seemed fitting that Black should write for the majority in *Engel*; as the Court's leading expounder of the theory of constitutional absolutes, *Engel* was a perfect fit for his personal philosophy. But a year later circumstances had changed. Avoiding the rigidity of *Engel*, Clark carefully skirted discussion of the "wall of separation" in favour of the language of neutrality. The result was the same but the tone was less strident and less confrontational.

Clark's opinion also sought to address two notable omissions from the *Engel* ruling that had opened the Court to criticism: clarifying the foundations of the opinion and providing a test for future cases. In *Schempp* the majority opinion was clearly based on the concept of neutrality.⁸⁴ That Clark himself firmly believed in this concept is illustrated by his assertion in conference on *Murray* that "it would be OK to open schoolrooms to all religious exercises by all religious groups," an assertion a strict separationist would never make.⁸⁵ In this light, his concentration at the beginning of the opinion on the sectarian nature of the Bible and Bible reading served to show that the practices at bar could not be considered neutral *between* religions, violating the Establishment Clause even before considering whether religion was favoured over nonreligion. The definition of neutrality found expression through Clark's two-part 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 ...there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."⁸⁶ With this the Court provided the structure and clarity that had been lacking in *Engel*, a window into the thinking of the Court and guidelines for future challenges.⁸⁷

⁸³ Remarks to the Commonwealth Club of San Francisco, August 3, 1962. See "Critics of Prayer Rule Misguided, Clark Says," *Washington Post*, August 4, 1962, A4. See Mengler, T., "Public Relations in the Supreme Court ..."

⁸⁴ *Abington School District v. Schempp* 374 US 203, 226 (1963). Clark used the term at least half a dozen times throughout the opinion, referring to it at one point as "wholesome neutrality." (at 222). Considering *Engel* had been written in the language of strict separation, the use of the term was significant. The papers of neither Douglas nor Brennan indicate any discussion among the Justices about the alteration in language suggesting it was either seen as unimportant or there was broad agreement on the change. Given the implications for Establishment Clause interpretation of a position of neutrality rather than strict separation, the former seems unlikely.

⁸⁵ *Murray* Conference, Douglas Papers, Box 1281.

⁸⁶ *Abington School District v. Schempp* 374 US 203, 222 (1963).

⁸⁷ Nevertheless, Clark's two-part test drew heavily on *Engel*. See *Abington School District v. Schempp* 374 US 203, 224-5 (1963). The two-part test did not end the Court's problems, however. Clark never clearly defined exactly what constituted an unconstitutional purpose or

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The significance of Clark's use of the language of neutrality was reinforced by the concurring opinion of Justices Goldberg and Harlan. In conference on *Schempp*, Goldberg had argued, "schools can't be opened to every sect – how about Black Muslims? How about screwball groups? You can't draw a line that is a viable one – it would mean drawing lines that would interfere with true exercise."⁸⁸ For Goldberg, as for Clark, the problem was not only that religious exercises were conducted in the public schools but that such exercises could not feasibly reflect all beliefs and all religious groups. As a result certain ideas, beliefs, or denominations were favoured over others, violating the principle of religious neutrality embodied in the First Amendment. However, Goldberg warned "untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that non-interference and non-involvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, even active, hostility to the religious."⁸⁹ Frequently used by advocates of school prayer and Bible reading to criticise the Court's holdings, this is a fundamental misunderstanding of Goldberg's argument. Concerned that neutrality should not become a cover for strict separation, Goldberg feared that the term "neutrality" had not been sufficiently clearly defined as to prevent individuals and groups in the future using it in ways the Court had not foreseen.⁹⁰ He also foresaw the possibility that the Court could become embroiled in a process of deciding what was "religious" and what had lost religious meaning and become part of the heritage of the nation, leading the Court to make tenuous distinctions and draw fine lines that could undermine the meaning of the First Amendment.⁹¹ In combination, the opinions of Goldberg and Clark challenged critics who accused the Court of being hostile to religion and its place in public life. The intent of the First Amendment and thus the aim of the Court was to protect church and state by ensuring one did not interfere with the other; the Court was not rejecting religion by barring Bible reading but preventing state interference with or endorsement of an inherently religious exercise. The same argument had been made in *Engel*; in *Schempp* the Justices made it clearer.

Engel and *Schempp* are interesting case studies for an understanding of how the Court works. In *Engel*, the lack of controlling precedent and the difficulties it caused, combined with the lack of consensus among the Justices as to how to apply key legal principles, reveal the weaknesses of the Legal Model in such circumstances. Yet the agreement among the majority of Justices that

effect, leaving them open to interpretation by future Courts. In 1971, Chief Justice Warren Burger added the entanglement prong to Clark's earlier test to create what became known as the *Lemon* test (*Lemon v. Kurtzman* 403 US 602 (1971)). See Chapter 2 for discussion related to problems of the *Lemon* test). Its significance in *Schempp*, however, was that the Court recognised the need for a clear test and sought to provide one.

⁸⁸ *Schempp* Conference, Douglas Papers, Box 1295.

⁸⁹ *Abington School District v. Schempp* 374 US 203, 306 (1963) (Justice Goldberg, with Justice Harlan, concurring).

⁹⁰ In this it is similar to an argument made by the respondents in *Murray*. See Brief for Respondents, p. 39, and for the argument see pp. 38-41.

⁹¹ See, for example, *McGowan v. Maryland* 366 US 420 (1961) on Sunday Closing Laws.

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prayer in public schools violated the Establishment Clause suggests a consensus about the central principles of the First Amendment that could be claimed as a form of original intent.⁹² Equally, the *Schempp* majority's clear commitment to *Engel* as precedent is a strong example of the Legal Model's assertion of the importance of *stare decisis*. As such, *Engel* and *Schempp* support and challenge the Legal Model. Central, however, to understanding the *Schempp* opinion, as distinct from the ruling, is the social and political context of the case. Public and congressional opposition are exactly the circumstances considered by the Rational Choice Model. While the *Schempp* ruling did not defer to such opposition, the structure and tone of the opinion clearly took this context into consideration.⁹³ While neither the accommodation predicted by equilibrium analysis nor the dialogue suggested by Louis Fisher, Clark's opinion for the Court has elements of both.⁹⁴ The Court recognised the opposition to *Engel* and sought to calm and inform the public as to the meaning and significance of both *Engel* and *Schempp*.⁹⁵ The cases thus also act as strong examples of the Rational Choice Model.

Congress, Constitutional Amendments and the Public: 1963-1980

As with *Engel*, the result in *Schempp* accounts for only part of its significance. Superficially, *Schempp* took the principles laid down in *Engel* and applied them to Bible reading with little or no regard for the political and legal debate which surrounded the case and the Court and did so with only one dissent. Closer consideration, however, reveals a Court clearly aware of the legal and political context and willing to address it, but not directly. In *Brown*, Warren had worked hard to ensure the Court's consensus, understanding that in such a controversial case the full force of the Court would be important in gaining acceptance of the ruling and enforcing compliance.⁹⁶ In *Schempp*, despite the heated nature of the surrounding political debate, unanimity was not discussed. In fact, more significant differences about the grounds for the decision appeared in *Schempp* than had been evident in *Engel*. Stewart continued to dissent, largely on free exercise grounds, Douglas again raised the issue of state financing as relevant to schooltime religious activities, while Brennan wrote a seventy-three page treatise on what was and was not permissible, a legal guidebook for those affected by *Engel* and *Schempp*.⁹⁷ Short of

⁹² In this sense, similar to that advocated by Ronald Dworkin. Dworkin, R., *Taking Rights Seriously* (London: Gerald Duckworth & Co. Ltd., 1977). See Chapter One.

⁹³ Black did a similar thing in *Engel* though seeking to pre-empt rather than respond to political and public reaction.

⁹⁴ See in particular Ferejohn, J., and B. Weingast, "A Positive Theory of Statutory Interpretation," 12 *International Review of Law and Economics* 263, 265 (1992) and Fisher, L., *Constitutional Dialogues: Interpretation as Political Process* (New Jersey: Princeton University Press, 1988).

⁹⁵ In this it also reflects Murphy's assertion that the Court can and should act to inform the public. See Murphy, W., *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964).

⁹⁶ Other instances where this was employed by the Court were *Cooper v. Aaron* 358 US 1 (1958) and *US v. Nixon* 418 US 683 (1974).

⁹⁷ The concurrences of Douglas, Brennan, and Goldberg created a nice, though inadvertent, symmetry that may have gone some way towards dispelling criticism: a Protestant, a Catholic, and a Jew respectively, all arguing against the practice of Bible reading implied that whatever

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explicitly rejecting the relevance of the political debate the Court could not have indicated more clearly how insignificant it was to the final ruling.

The Court's dismissal of the relevance of the surrounding political debate did not deter politicians and religious groups from continuing their campaigns to overturn the Court. Although the constitutional amendments introduced into Congress in 1962 came to nothing, in the aftermath of *Schempp* one hundred and forty-six prayer amendments in thirty-five forms were introduced during the 88th Congress, all but ensuring the committee hearings which ran from April 22 to June 3, 1964.⁹⁸ Additional support for the amendment came from ninety-seven congressmen led by Frank Becker; a number of evangelical Christian groups, including the National Association of Evangelicals and the International Council of Christian Churches; state officials including Governors Farris Bryant of Florida and George Wallace of Alabama; a range of interest groups from the American Legion, the Concerned Citizens' Committee, and the newly formed Constitutional Prayer Foundation, to the American Farm Bureau Federation and Project America. Opposition came from Protestant groups including the American Baptist Convention, the Baptist Joint Committee, and the General Council of Seventh Day Adventists; Jewish groups representing Orthodox, Conservative, and Reform Judaism from the Anti-Defamation League to the Rabbinical Assembly; and several secular groups including the ACLU, the American Humanist Association, Americans United; a joint statement issued by over two hundred constitutional law professors and legal practitioners; and four Congressmen.⁹⁹ Despite strong rhetoric at the opening of the hearings, it became clear Becker and his supporters could neither agree on the consequences of the amendment nor produce an effective substitute, while opponents methodically exposed the weaknesses of the proposed amendment. Becker's "one man crusade" thus ended in committee without ever reaching the floor of the House.¹⁰⁰

Despite its failure, testimony provided for and against the Becker Amendment revealed much about the nature of the political debate over school prayer and Bible reading, trends which shaped the debate for several years afterwards. Most significantly, the testimony of advocates illustrated the symbolism with which they were trying to associate the prayer issue. Becker opened the hearings with reference to a "fraternity of secularists" and "atheists and unbelievers," and concluded, "I find my enthusiasm increased by the nature and personnel of the opposition."¹⁰¹ Connecting supporters of the Court's rulings with atheism or Communism was

one's belief, the Constitution meant no religious exercises in the schools. See *NYT*, June 18, 1963, A1.

⁹⁸ See US House of Representatives. Committee on the Judiciary. Hearings on Proposed Amendments to the Constitution Relating to Prayers and Bible Reading in the Public Schools, 88th Congress, 2nd Sess. (1964) (hereafter Becker Hearings).

⁹⁹ They were: Robert Leggett (D-Cal) (pp. 1770-8), Abraham Multer (D-NY) (pp. 2069-88), B.F. Sisk (D-Cal) (pp. 533-45), and Robert Stephens (D-Ga) (pp. 2148-52).

¹⁰⁰ Both Leo Pfeffer (p. 92) and Beaney and Beiser (p.500) refer to this as Becker's "one man crusade". For an overview and discussion of the debates and proceedings of the House hearings see Laubach, J, *School Prayers*, pp. 47-97.

¹⁰¹ Quoted in Laubach, J., pp. 49-50. Also, Becker Hearings, pp. 212, 223-4.

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not a new means of attack but its continued employment in the face of testimony from a range of religious groups and individuals indicated how deeply ingrained the proposition was and how crucial an element to the pro-prayer movement. Other familiar arguments appeared repeatedly throughout the hearings.¹⁰² Defenders of school prayer sought to present themselves as advocates of the true American way, as defenders of morality and goodness, representatives of the majority voice, and protectors of real religious freedom. They were the good guys, defending Americanism from the immoral, the atheists, the unbelievers, and the Communists. That states' rights, local control, morality, and majority rule were issues unrelated to interpretation of the Establishment Clause suggested that ensuring the most accurate constitutional interpretation was not the primary concern of Becker's supporters. The political and electoral consequences of identification with these issues were, however, significant: politicians in particular sought to associate prayer with those electoral issues most significant in their constituencies. Thus the prayer debate was not just about prayer; it encompassed subtexts that varied depending on region and circumstance.

Equally significant was the testimony of opponents of the Becker Amendment and its impact on the Judiciary Committee. Slanting their campaign as "protecting the sanctity of the First Amendment," opponents' major aim was to mobilise religious leaders to make it "safe" and "respectable" for Congressmen to oppose the Becker Amendment.¹⁰³ Providing religious spokesmen who could present the case for the danger posed to faith from mandated school prayer helped to counteract the Becker forces' suggestion that they stood on the side of God and that anyone who opposed them must be Godless.¹⁰⁴ Throughout the hearings witnesses testified to the problems and dangers facing faith and religion should the amendment pass, a challenge Becker and others failed to meet.¹⁰⁵ By raising these issues, witnesses revealed that the simplicity of "returning God to America's classrooms" claimed by Becker was not simple at all, that the consequences of a national school prayer went far beyond anything acknowledged by

¹⁰² These included: the Court had misinterpreted the history of the Establishment Clause, *Engel* and *Schempp* denied the majority the free exercise of their religion, that the Becker Amendment would return control over schoolroom religious exercises to states and local communities, that religion promoted morality, and that since the majority of the public favoured school prayer the unelected Supreme Court should be overturned by the democratically elected representatives of the people. For an introduction to these arguments see Laubach, J., pp. 57-83. The arguments appear throughout the hearings and the number of references are beyond any practical representation here.

¹⁰³ Beaney and Beiser, pp. 496-500.

¹⁰⁴ In his study of the Becker Hearings, John Laubach noted that Reverend Dean Kelley was "surprised to discover how many Congressmen shared the views of the *ad hoc* group," he chaired and sought to provide them with sufficient "ammunition" during the hearings to challenge claims of Godlessness against them. See Laubach, J, pp. 48-9. The fear of appearing to oppose God was clearly a major factor in some support for Becker; the ability of the anti-Becker forces to provide an alternative interpretation was thus crucial in encouraging support to their side.

¹⁰⁵ These included: mandated prayers discriminated against the minority, prayer exercises were rarely truly voluntary, faith coerced was no faith at all, the blandness of a prayer that would offend no-one made it irrelevant as an expression of faith. They also challenged their opponents to show who would decide what prayer and Bible passages would be read and with what consequences in religiously diverse communities.

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Becker and his supporters.¹⁰⁶ Legal scholars and practitioners reinforced the sense of the issue's complexity. The danger, they asserted, was that by amending the Bill of Rights once the structure was so weakened that it would be unable to withstand future attacks.¹⁰⁷ The sentiment was reinforced on the final day of the hearings when a memorandum entitled "Our Most Precious Heritage" was submitted to the Committee signed by two hundred and twenty-three constitutional lawyers, including the deans of some of the nation's leading law schools.¹⁰⁸ The impact of the submission was summarised by one committee member who remarked, "we have just been hit by 223 bricks."¹⁰⁹ The methodical approach of analysing the consequences of the Becker Amendment used by its opponents worked to overcome the populist rhetoric employed by Becker and others. By rejecting easy soundbites which would sell well to the public through the media and focussing instead on detailed analysis addressed to the committee members, opponents illustrated the real, practical problems posed by the measure, turning it into an issue of pragmatism rather than emotion. The ultimate failure of the Becker Amendment to pass through the Committee was testament to the success of this approach.

Similar patterns of debate occurred in subsequent battles over prayer amendments to the Constitution: Senate Minority Leader Everett Dirksen's (R-Il.) 1966 amendment, Senator Howard Baker's (R-Tenn) proposed amendment in 1971, and Senator Jesse Helms' (R-NC) 1978 attempt to circumvent the unsuccessful amendment process by proposing a bill that would deny the Supreme Court jurisdiction to act on any state law, ordinance, rule, or regulation relating to voluntary prayer in public schools.¹¹⁰ Continued lack of success, frequently ensured by the measured, analytical testimony of lawyers, legal scholars, and religious representatives as seen in the Becker Hearings, did not stop repeated legislative attempts to overturn *Engel* and *Schempp*, but made each new attempt as unlikely to succeed. Politicians, however, continued to use the issue to gain maximum political exposure with the minimum amount of work. The guaranteed publicity and commentary surrounding each new proposal ensured politicians a high profile and the opportunity to win favour with the electorate or other party members but, since the bills were unlikely to pass, the politically difficult task of putting them into practice could be avoided.

Public opinion polls conducted several years after Becker's campaign indicated that politicians' concern to represent the popular will had strong foundations. In the Sixth Annual

¹⁰⁶ Committee members also raised similar issues, see Emanuel Celler (D-NY), James Corman (D-Cal), Don Edwards (D-Cal), and Roland Libonati (D-Il).

¹⁰⁷ Becker Hearings. See testimony of Paul Freund, pp. 1651-71; Wilbur Katz, pp. 813-9; Paul Kauper, pp. 1683-1704; Philip Kurland, pp. 2152-9; and Leo Pfeffer, p. 937.

¹⁰⁸ Becker Hearings, pp. 2483-4.

¹⁰⁹ Quoted anonymously in Laubach, J., p. 67.

¹¹⁰ For an overview and analysis of the 1966 and 1971 debates and their political context from someone sympathetic to the Supreme Court decisions, see Alley, R., *School Prayer: The Court, the Congress, and the First Amendment* (Buffalo, New York: Prometheus Books, 1994), especially pp. 106-91. See also US Senate. Subcommittee on Constitutional Amendments of the Committee on the Judiciary, Hearings on SJ Res. 148 Relating to Prayer in the Public Schools, 89th Congress, 2nd Sess. (1966) (Dirksen Hearings).

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Gallup Poll of Public Attitudes Towards Religion in 1974, the first to explicitly ask about school prayer, 77% of respondents favoured a constitutional amendment and 17% opposed one. Reflecting earlier divisions, Protestants and Catholics supported amendment more strongly than Jews and other denominations, while both Republicans and Democrats showed support above 75%.¹¹¹ Considering the Supreme Court had made no ruling on the issue for more than a decade and the last major Congressional attempt at amendment was three years previously, such high levels of support suggested strong feelings among the public on the issue of school prayer. However, the experiences of the House Judiciary Committee during the Becker Hearings suggests these figures do not reveal the whole truth. In April 1964, the *New York Times* reported, "it is conceded widely in Congress that Congressional mail on this issue has grown to flood proportions, exceeding the mail of the civil rights controversy."¹¹² Representative Lionel Van Deerlin (D-Cal) wrote that his colleagues "are being inundated with constituent mail, the great bulk of which favors such an amendment," and Representative Alec Olson (D-Minn) wrote to a constituent, "I have received correspondence which is at least 200 to 1 in favor of such an amendment."¹¹³ Had public pressure continued at this level it was unlikely that any Congressman seeking reelection would have jeopardised his campaign by opposing Becker.

However, as John Laubach's study of public reactions to the Becker Amendment indicated, the flow of mail reflected the strength of testimony given in the House hearings.¹¹⁴ Although initial public reaction was overwhelmingly in Becker's favour, as witnesses testified to the difficulties inherent in the proposal public correspondence shifted away from Becker towards his opponents. The week in which most legal scholars testified saw 840 pieces of mail opposing Becker to only 80 in support. Discounting printed cards provided by organised interest groups, the Judiciary Committee received 13,000 items of mail in relation to the Becker Amendment: 8000 in favour, 5000 against, hardly the "flood" in favour implied at the start of the hearings. Studies show that the strength of opposition testimony and detailed press coverage of the hearings led to a cooling of passions surrounding the hearings and a reassessment of the consequences of the amendment.¹¹⁵ As people learned more about the issues involved in the amendment and the complexities surrounding its potential application a re-evaluation occurred. The figures quoted in the 1974 Gallup poll, among others, reflect the pre-Becker situation: a simple response unrelated to the complexities of the issue. A poll asking questions about the consequences of school prayer, such as excusal remedies, or the use of the Koran, Torah or other

¹¹¹ Sixth Annual Gallup Poll of Public Attitudes Towards Religion, published in *PDK*, Vol. 56, No. 1 (September 1974), pp. 20-32. For prayer responses see pp. 25, 29-30. (Study conducted May 10-12, 1974, sample size: 1952 respondents).

¹¹² *NYT*, April 23, 1964, A14.

¹¹³ Quoted in Beaney and Beiser, p. 495.

¹¹⁴ See Appendix D, Table 1.

¹¹⁵ See Laubach, J., pp. 84-97 and Beaney and Beiser, pp. 499-503.

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religious texts, may have generated significantly different results. Any discussion of public opinion thus requires a differentiation between informed and uninformed responses.¹¹⁶

Although few detailed studies of compliance with *Engel* and *Schempp* were undertaken, those in existence support G. Theodore Mitau's 1967 conclusion that, "compliance with *Engel* and *Schempp* must be assessed presently as falling far short of the court-enunciated standards of religious freedom."¹¹⁷ William Muir, Jr.'s 1967 study of the Mid-West town he named "Midland" showed compliance only when "local adherents of the Supreme Court put their political influence on the line to make non-adherence more costly than compliance to the Court."¹¹⁸ In non-homogeneous communities or those where local officials were successful in placing responsibility with the Court, compliance occurred without too much difficulty, in other communities compliance was grudging or non-existent. A similar but less optimistic result was presented by Kenneth Dolbeare and Phillip Hammond in their 1971 study of four communities in the Mid-Western state of "Midway."¹¹⁹ Unwilling to cause upheaval in their communities, local officials frequently changed laws requiring prayer or Bible reading to allow decisions to be taken by individual schools or teachers: technically, communities were abiding by the law since there was no official policy, and unless complaints were received prayer activities could continue if supported by the local community. However, neither study provided detailed evidence relating to the extent of non-compliance in the areas studied and the fact that both were situated in the Mid-West raised questions of relevance to other areas of the country. The disguising of the locations, while apparently necessary to the authors, made verification equally difficult. Robert Birkby's 1966 study of Tennessee reactions to *Engel* and *Schempp* addressed both these problems and discovered similar patterns of local control and limited change.¹²⁰ However, even Birkby's study contained problems evident in other studies. Crucially, most showed an absence of state laws or local regulations banning outright the practice of prayer and Bible reading in schools. Of itself, such an absence does not establish non-compliance even if other states did pass laws of this type. Dolbeare and Hammond, Muir, and Birkby all provided some evidence of non-compliance but fall short of establishing it as "widespread."

A different approach provides an alternative view to that expressed by Dolbeare and Hammond, Muir, and Birkby. After *Schempp* the Supreme Court did not issue another major school prayer ruling until 1980, yet the issue remained a potent and controversial one. A

¹¹⁶ For a similar view, see testimony of Rev. Eugene Carson Blake, United Presbyterian Church, Becker Hearings, p. 730; Senator Danforth (R-MO), *Cong. Rec.*, 98th Congress, 2nd Sess, March 12, 1984, p. 5128 (in relation to the 1984 debate).

¹¹⁷ Mitau, G.T., p. 145. See also, McCarthy, M., *A Delicate Balance: Church, State and the Schools* (Bloomington, Indiana: Phi Delta Kappan Educational Foundation, 1983), p. 22.

¹¹⁸ Muir, Jr., W., *Prayer in the Public Schools* (London and Chicago: University of Chicago Press, 1967), p. 120.

¹¹⁹ Dolbeare, K. and Hammond, P., *The School Prayer Decisions: From Court Policy to Local Practice* (Chicago: University of Chicago Press, 1971).

¹²⁰ Birkby, R., "The Supreme Court and the Bible Belt: Tennessee Reaction to the *Schempp* Decision," *Midwest Journal of Political Science*, Vol. 10 (August 1966), pp. 304-15.

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consideration of the lower court rulings in such cases reveals at least part of the reason for the Supreme Court's silence: an overwhelming degree of compliance with the principles laid down in *Engel* and *Schempp*. In 1964, state supreme courts or lower federal courts heard cases in Delaware, Florida, Idaho, Massachusetts, Michigan, New Jersey, New York, and Pennsylvania. Only in *Chamberlain v. Dade County Board of Public Instruction* was the Supreme Court required to intervene to uphold *Engel* and *Schempp*.¹²¹ Although these cases provided evidence of non-compliance or opposition at local level, they also show the uniform support from lower courts for *Engel* and *Schempp* as constitutional law. As the primary interpreters of the application of the Supreme Court's rulings at state level, the state and lower federal courts played an integral part in forcing sometimes unwilling populations and school boards into compliance. Later cases reflected their success: in succeeding years cases arose increasingly from good faith attempts to comply with the Supreme Court's rulings while seeking to balance them with community demands.¹²² Thus, despite opposition to the ban on school mandated prayer and Bible reading, in instances where challenges reached the courts the ban was upheld repeatedly.

Courts were not the only governmental institutions upholding *Engel* and *Schempp*. In states including Maine, Massachusetts, New Jersey, and Pennsylvania, state attorneys general issued reports and guidelines in support of the Court's decisions, advising how best to remain within the limits imposed.¹²³ More significant, in symbolic if not practical terms, were the responses of the president of the United States. On June 28, 1962, President John Kennedy responded to a question about *Engel* in his press conference:

¹²¹ *Chamberlain v. Dade County Board of Public Instruction* 171 So. 2d 535 (1964), 377 US 402 (1964). The other cases were *Johns v. Allen* 231 F.Supp. 852 (1964); *Adams v. Engelking* 232 F.Supp. 666 (1964); *Attorney General v. School Committee of North Brookfield* 199 N.E. 2d 553 (1964); *Read v. Van Houten* 237 F. Supp. 48 (1965); *Sills v. Board of Education of Hawthorne* 200 A. 2d 615 (1964); *Stein v. Oshinsky* 382 US 957 (1964), 348 F.2d 999 (1965); *James N. Snavely et al v. Cornwall-Lebanon Suburban Joint School District*, Civil Action No. 8355, US District Court for the Middle District of Pennsylvania, Lewisburg, Pennsylvania (the case was eventually dismissed after the Board of Education agreed to end Bible reading and prayer activities in classrooms).

¹²² *DeSpain v. DeKalb County Community School District No. 428* 285 F.Supp. 655 (1966) (striking down a prayer from which all references to God had been removed); *Commissioner of Education v. School Committee of Leyden* 267 NE 2d 226 (Mass., 1971) and *State Board of Education v. Board of Education of Netcong* 270 A.2d 412 (NJ, 1970) (striking down student-initiated school prayer and prayer activities); *La Rocca v. Board of Education of Rye City School District* 406 NYS 2d 348 (App. Div., 1978); *Lynch v. Indiana State University Board of Trustees* 378 NE 2d 900 (Ind. App., 1978) *cert. denied* 441 US 946 (1979) (in which teachers violating the Court rulings were disciplined or dismissed). The Supreme Court's ability to convince lower courts of the validity of its legal reasoning is particularly important for Court success for Rational Choice Theorists since lower courts can challenge the Supreme Court. In this instance, however, they accepted the Court's reasoning and conclusions.

¹²³ "Bay State Governor Vetoes Bill Allowing School Prayer," *NYT*, August 4, 1973, A26. Note, however, that his veto was overridden by the Massachusetts House and the bill was ultimately upheld by the Supreme Court in 1979. The challenge in New Hampshire was dropped when the state attorney general said he would not take a direct role in the case because the state was not named in the suit. The New Hampshire attorney general in question was David Souter, now Justice Souter. For analysis of compliance in New York see Belmar, W., "School Prayer - Still an Unsettled Controversy," 1 *Columbia Journal of Law and Social Problems* 100 (1965).

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The Supreme Court has made its judgment, and a good many people will obviously disagree with it. Others will agree with it. But I think that it is important for us if we are going to maintain our constitutional principle that we support the Supreme Court decisions even when we may not agree with them. In addition, we have in this case a very easy remedy, and that is to pray ourselves and I would think it would be a very welcome reminder to every American family that we can pray a good deal more at home and attend our churches with a good more fidelity, and we can make the true meaning of prayer much more important in the lives of all our children.¹²⁴

Kennedy's measured response reached out to all. He recognised those who objected to the Court's ruling and did not challenge their response as unnecessary or irrational. However, his evident support for the Supreme Court and his enunciation of a feasible alternative to school prayer left no room for uncertainty about his position on this issue. Although he did not attack the Court's critics, Kennedy made clear he would not accept non-compliance. A similar response was elicited from President Jimmy Carter in response to Senator Helms' 1978 attempt to remove the Supreme Court's jurisdiction over school prayer cases. A born-again Christian who spoke publicly about the importance of his religious beliefs, Carter's religious credentials could not be doubted. Carter's position on school prayer was unequivocal. Responding to a direct question in a press conference in April 1979, he said:

My preference is that the Congress not get involved in the question of mandating prayer in schools. I am a Christian. I happen to be a Baptist. I believe that the subject of prayer in school ought to be decided between a person individually and privately and God. And the Supreme Court has ruled on this issue and I personally don't think that the Congress ought to pass any legislation requiring or permitting prayer being required or permitted in school.¹²⁵

Because of his religious background and his position as President, Carter's opposition to the Helms bill, expressed after its passage in the Senate, was a significant blow to Helms and his supporters. So much of the prayer debate had been discussed in terms of "believers" versus "secularists" that a prominent figure with strong religious beliefs opposing school prayer was sufficiently anomalous to gain attention; that the figure was the President ensured greater exposure.

Despite the common belief that non-compliance with *Engel* and *Schempp* was a widespread phenomenon there is little supporting evidence. Much public opinion regarding the Court's actions was unfavourable and on a local level individual teachers or school districts sought to ignore or circumvent the Court rulings. However this does not by itself make a case for the "widespread" nature of *actual* non-compliance. So much attention has been paid to the challenges by politicians and religious leaders to *Engel* and *Schempp* and the apparent lack of compliance with the decisions at school board and community level that it has too often been

¹²⁴ Press Conference proceedings reported in *Washington Post*, June 28, 1962, A18.

¹²⁵ Transcript of President Carter's press conference published in *NYT*, April 11, 1979, A16.

overlooked that government officials in many cases upheld the Supreme Court and did so unambiguously. Challengers such as Helms, Becker, and Billy Graham were vocal and colourful and so garnered significant attention, but the number of such overt challenges was small compared to the number of towns, cities, or states in the country where no challenges were laid, or where early action by government officials halted them. There may have been widespread dissatisfaction with *Engel* and *Schempp* but there was also compliance and adherence.

The Burger Court and the Reagan Administration

In 1980, the Supreme Court returned to the issue of school prayer. Since Warren Burger's appointment as Chief Justice in 1969 the Court's Establishment Clause cases had been dominated by the issue of federal aid to religious schools and in many ways the task facing the Burger Court on school prayer was much more difficult than that dealt with by Warren and his colleagues. *Engel* and *Schempp* moved the issue firmly into the political sphere and the Court's activism firmly linked it in the public mind with the leading political issues of the day. As a result, the Court's opinions became fodder for political debate while the Court became a prime target for political attack. In addition, the Burger Court's approach to school aid made both separationists and accommodationists suspicious of the Court's intentions, placing an even greater burden of expectation on the Court's first prayer case. The Burger Court also faced the task of "filling in the blanks" left by the Warren Court. If *Engel* and *Schempp* established the broad principle that religious exercises in the public schools were unconstitutional and that any element of state support or sponsorship of religious practice was equally so, the Burger Court had to define what exactly constituted a religious exercise and state sponsorship or support.¹²⁶ The issue was at least as controversial as that which had preceded it, if not more so. The Burger Court could provoke a reaction equal to or greater than that which met *Engel* and *Schempp*, while dealing with an issue of much greater technical complexity that would be far more difficult to explain to the public.

Stone v. Graham was thus significant not only as the Court's first prayer ruling in seventeen years but also as the first from the Burger Court.¹²⁷ *Stone* involved a challenge to a Kentucky statute requiring the posting of a copy of the Ten Commandments, purchased with private contributions, on the wall of each public classroom in the state. The State claimed that the posting had a valid secular purpose: as the foundation of much secular law posting the Decalogue encouraged students to contemplate and meditate upon legal rights and responsibilities and the nature of American society.¹²⁸ The Court, in a *per curiam*, or unsigned, opinion, firmly rejected

¹²⁶ That this would be necessary had been recognised by Brennan in his *Schempp* concurrence. See *Abington School District v. Schempp* 374 US 203, 892, 901 (1963). See also, letter to Mrs. C.G. Hickman, September 7, 1963. Brennan Papers, Box 1:89 Folder 2. This had, in fact, been part of the issue in *Schempp*, but had become far more explicit in the intervening years.

¹²⁷ *Stone v. Graham* 449 US 39 (1980). See also *Ring v. Grand Forks Public School District* 483 F.Supp. 272 (D.N.D., 1980).

¹²⁸ A notation at the bottom of the poster stated: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western

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the claim: "The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact."¹²⁹ Thus the Court gave warning that unless a challenged practice had a solely secular purpose and was not simply an alleged secularity to cover a blatantly religious purpose, the challenged activity would not be allowed to stand. Although neither creating new law nor exploring the boundaries of existing law, *Stone* was significant because it clearly reinforced the principles of *Engel* and *Schempp* despite the political debate of the intervening years. The Burger Court did, however, manifest a continued concern for the political and social implications of any prayer ruling much as the Warren Court had done. In particular, the Court's decision not to hear oral argument and the *per curiam* approach were pragmatic solutions to the problem posed by the case.¹³⁰ By avoiding oral argument the Court ensured the public focus remained only on those issues it wanted to discuss, the limited issues addressed in the *per curiam* opinion. By narrowing the focus to the question of the religiosity of the Decalogue, the Court dealt as sparsely as possible with the case, avoiding much of the opposition a broader opinion may have generated: the result stood and the Court avoided being publicly pilloried as Godless.

The Court's circumspection in *Stone* was justified by succeeding events. In the summer of 1980 the Republican Party included a pro-prayer plank in their party platform and the House Judiciary Subcommittee opened hearings on the Helms Amendment that had passed the Senate the year before.¹³¹ Both returned school prayer to a more prominent position on the political agenda than it had occupied for the previous few years. Despite the defeat of the Helms Amendment, throughout 1981 and 1982 a series of bills introduced into Congress sought to restrict or eliminate the Supreme Court's jurisdiction over a number of controversial issues, including abortion, school busing, a males-only draft, and state court rulings, as well as school prayer. The Senate also took action, denying the Justice Department the ability to use federal funds to "prevent the implementation of programs of voluntary prayer and meditation in the public schools."¹³² Support from the Reagan Administration, especially from Attorney General William French Smith, lent credibility to these activities and, by implication, to the attacks on the Court.¹³³ Leaders in supporting the Helms bill, representatives from groups such as Campus

Civilization and the Common Law of the United States." *Stone v. Graham* 449 US 39, 40 (1980).

¹²⁹ *Stone v. Graham* 449 US 39, 41 (1980).

¹³⁰ This approach elicited two procedural dissents, from Stewart and Burger. Justice Rehnquist's dissent was the only one to engage with the substantive issues raised. As with *Engel* and *Schempp*, this reveals elements of both the Legal Model and the Rational Choice Model in the Court's decision making.

¹³¹ Senator Jesse Helms (R-NC) introduced a bill into Congress that would abolish the jurisdiction of the US Supreme Court and all federal courts over state laws dealing with "voluntary prayers in public schools."

¹³² The action was largely symbolic since the Justice Department had almost no role in this issue. *Cong. Rec.*, 97th Congress, 1st Sess., especially pp. 27,488-96, 27,895-7.

¹³³ See *Cong. Rec.*, 97th Congress, 1st Sess., November 6, 1981, pp. 26,961-2; Taylor, Jr., S., "Bar Urged to Join Fight on Politics in the Courts," *NYT*, January 26, 1982, B8.

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Crusade for Christ, the Moral Majority, and the Religious Roundtable, as well as a number of television and radio evangelists, testified to the importance of returning prayer to schools. Opposing them were representatives of the forty-million member, thirty-two denomination National Council of Churches (NCC), the Baptist Joint Committee, and the B'nai B'rith Anti-Defamation League.¹³⁴ The schism between leaders of the traditional church denominations and the mainly conservative evangelical groups which had been developing for a little over a year politicised further the school prayer issue.¹³⁵

Throughout the national debates on school prayer, the Helms amendment, and the "court-stripping" bills, the issue continued to cause controversy at state level. Richard Dierenfield, who undertook several studies of the impact of *Engel* and *Schempp*, suggested "[p]rayer is creeping back into public schools rather sporadically ... We can't identify it exactly, but it seems to me they're trying it more and more."¹³⁶ Challenges were noted as far apart as Massachusetts, Minnesota, Missouri, New York, Tennessee, and Texas, ranging from moment of silence laws to graduation prayers to religious groups meeting on school premises out of school hours.¹³⁷ The sheer variety of issues raised under the banner of "prayer" can, in part, be traced to the limited scope of *Engel* and *Schempp* themselves. Issues that went beyond simply prayer or Bible reading were outside the scope of the Court's rulings and government officials were faced with the task of deciding how best to comply with the stated meaning of the First Amendment. Moment of silence statutes, overt prayer led by student volunteers, religious groups meeting before or after the school day without teacher involvement, and periods of "voluntary prayer" were among the most common practices challenged in state and lower federal courts.¹³⁸ Lack of coherence made it increasingly likely that the Supreme Court would have to revisit the subject, if only to clarify the line between permissible and impermissible activities.

¹³⁴ See Hunter, M., "Evangelist Calls for Restoration of Prayer in US Public Schools," *NYT*, July 31, 1980, A14 and "The Churches Are at Odds Over Yet Another School Prayer Bill," *NYT*, August 3, 1980, E20.

¹³⁵ See Alley, R., *School Prayer*, pp. 187-94. Also important was the shift of the Southern Baptist Convention, long an opponent of such measures, to support a school prayer amendment in 1982. See Austin, C., "Baptist Meeting Backs School Prayer Amendment," *NYT*, June 18, 1982, B8; Briggs, K., "Southern Baptists Assailed on School Prayer Vote," *NYT*, June 25, 1982, A10; Wicker, T., "The Baptist Switch," *NYT*, June 22, 1982, A27.

¹³⁶ Quoted in Henry, D., "Prayer: An Issue Without an Amen," *NYT*, April 20, 1980, Educ. 3. For Dierenfield's studies see: *Religion in American Public Schools* (Washington, DC: Public Affairs Press, 1962); "The Impact of the Supreme Court Decisions on Religion in Public Schools," *Religious Education*, Vol. 62, No. 5 (September-October 1967), pp. 445-51; "Religion in Public Schools: Its Current Status," *Religious Education*, Vol. 68, No. 1 (January-February 1973), pp. 96-114.

¹³⁷ See Henry, D., *NYT*, April 20, 1980, Educ. 3.

¹³⁸ See, for example, *Collins v. Chandler Unified School District* 470 F.Supp. 959 (D. Ariz., 1979) (student-initiated prayer in assemblies); *Kent v. Commissioner of Education* 402 N.E. 2d 1340 (Mass., 1980) (daily student-led prayers); *Bradon v. Board of Education of the Guilderland Central School District* (1981) (student-organised prayer groups before the school day); *Lubbock Civil Liberties Union v. Lubbock Independent School District* 669 F. 2d 1038 (5th Cir., 1982) (voluntary prayer); *May v. Cooperman* (1983) (New Jersey moment of silence statute).

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In this context, speeches at the August 1981 ABA meeting in New Orleans by Justices John Paul Stevens and Lewis Powell appear as attempts to deflect the political controversy over school prayer away from the Court and towards the legal interpretation of the issue. Quoting from *Barnette* and *Engel*, Stevens said that “symbolic gestures” of patriotism and religious faith such as saluting the flag and “voluntary prayer and reflection” are good things “on appropriate occasions,” stressing “the distinction between a compelled ritual and voluntary participation in a common exercise.” Asked after the speech whether he was intending to send a message to the Moral Majority and others attacking the Court’s prayer rulings, Stevens replied, “it speaks for itself.” Justice Powell reviewed 190 years of Court history in order to conclude that “the first duty of a Justice is to remove his or her own moral, philosophical, political, and religious beliefs,” refusing to be drawn on who his target was.¹³⁹ Stevens’ speech appeared to engage most directly with the prayer issue but in a way which drew heavily on the Court’s precedents which effectively reinforced publicly his support for the Court’s past holdings. Powell’s comment could be taken either as an attempt to show that the Justices based decisions on law rather than politics, or possibly as a response to the Religious Right’s claim that those who opposed school prayers were “anti-religion” by suggesting that this was an inaccurate interpretation of what the Court did. Regardless of their subtext, both speeches made pointed comments about issues on the political agenda. That they spoke at all was also significant: the relative rarity with which sitting Supreme Court Justices gave speeches at the time made the timing of these speeches significant, their taking place at all as important a comment on the debates as anything actually said.

Then, on May 7, 1982, saying he wanted to foster “faith in a Creator who alone has the power to bless America,” President Reagan announced that he would propose a constitutional amendment to allow “voluntary prayer” in public schools. Although anticipated, the announcement took the prayer debate in a new direction while there had not yet been a resolution on the “court-stripping” issue, drawing attention to a different approach. Making the announcement to a gathering of one hundred and twenty religious and conservative political leaders in the White House Rose Garden, Reagan stated:

Today prayer is still a powerful force in America, and our faith in God is a mighty source of strength. Our pledge of allegiance states that we are one nation under God, and our currency bears the motto “In God We Trust.” The morality and values such faith implies are deeply embedded in our national character. Our country embraces these principles by design, and we abandon them at our peril. Yet in recent years well-meaning Americans, in the name of freedom have taken freedom away ... How can we hope to retain our freedom through the generations if we fail to teach our young that our liberty springs from an abiding faith in our Creator?¹⁴⁰

¹³⁹ Justices Stevens and Powell quoted in Taylor, Jr., S., “Three High Court Justices Speak to Lawyers But Shun Controversy,” *NYT*, August 10, 1981, A10.

¹⁴⁰ Transcript of speech published in *NYT*, May 7, 1982, B10.

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Several things were notable about this crucial section of Reagan's speech. Suggesting the Supreme Court rulings were brought about by "well-meaning" people, including the Justices themselves, Reagan distanced himself from the attacks on the Court which had characterised the "court-stripping" bills, implying this amendment was not about attack but about restoring rights. His references to the Pledge and national motto were also significant since they were the symbols most frequently pointed to as next in line for challenge by critics of the Court's rulings; by mentioning them Reagan gave credence to the idea that they could be under attack. His implication that they still retained religious significance, however, contradicted arguments made by many who sought to defend their continued use by suggesting they were mere ceremonial references which had lost any religious meaning. Most importantly, Reagan couched his support in the language of the free exercise rights of the majority. The approach had been given legitimacy by the Court's discussion of free exercise rights in its opinions and various groups had used it as a defence for their pro-prayer position, but by including it in this speech Reagan forced opponents of the measure on to the defensive; they would now be forced to explain why they appeared to object to the right of the majority to pray if they so wished. It was a clever political move by Reagan even if its legal foundations were weak at best.

The Helms Amendment and Reagan's call for a prayer amendment showed the political ends to which the school prayer issue could be employed. Even if the Helms amendment had passed the Senate, the time restrictions made a vote in the House unlikely before the end of the session and so the issue would have to be reintroduced once the new Congress convened.¹⁴¹ Sponsors of the prayer bill demanded a recorded vote in the Senate, a measure that would provide conservatives with potent ammunition in the November elections, regardless of the reasons Senators had for opposing the bill. Drawing on widespread public misperceptions that the Helms amendment was a school prayer bill rather than a "court-stripping" bill, misperceptions Helms and his supporters had encouraged, they sought to force a vote on a complex issue in order to present it in a simplistic way to voters in order to gain greater support in the next Congress.

For Reagan, a school prayer amendment was an easy way to make overtures to the increasingly frustrated Religious Right, critical of Reagan's failure to advance the "social values" agenda he had campaigned so heavily on in 1980. Reagan's appointment of Sandra Day O'Connor to the Supreme Court in July 1981 and his withdrawal of approval from an Administration plan to give tax exemptions to segregated private schools led many to question Reagan's commitment to the far right of his party.¹⁴² The symbolism of the prayer issue was so

¹⁴¹ The prayer measure was defeated by a filibuster led by Senators Bob Packwood (R-Ore) and Lowell Weicker, Jr. (R-Conn). A move to end the filibuster was defeated 51-48 on September 24, the majority several votes short of the necessary two-thirds, and the prayer measure thus never came to a vote.

¹⁴² See Appendix D, Cartoon 1. For a sample of opinions on O'Connor's nomination see *Cong. Rec.*, 99th Congress, 1st Sess., September 9, 1981, pp. 20,008-10, including comments from Rev. Jerry Falwell, Phyllis Schafly, Senator Jesse Helms (R-NC), the Moral Majority, the Conservative Caucus, and others. Reagan's action on tax exemptions was determined by the

great that, irrespective of its chances of success in Congress, Reagan's support for such a measure could be used to show his fidelity to the Religious Right.¹⁴³ Reagan's activities after the moderate Democratic successes of the 1982 midterm elections showed continued attempts to placate the Religious Right by using the prayer issue. At a convention of Christian broadcast preachers in January 1983, he criticised the federal courts for "wrong" decisions on school prayer and abortion, announced he would sign a presidential proclamation making 1983 the "Year of the Bible," and urged the nation to "face the future with the Bible," assuring his audience that, "I am determined to bring that amendment back again and again and again and again, until we succeed in restoring religious freedom in the United States."¹⁴⁴ But hints of deep divisions among conservatives and the problems of the language employed, combined with past failures of similar amendments, made success unlikely.¹⁴⁵ Combined with Reagan's little more than tepid support for a proposal to provide tax credits to parents with children in private schools, a measure with equally small chances of success, and the decision by Attorney General Smith not to file an *amicus* brief in the case that would become *Wallace v. Jaffree*, the overall impression was that Reagan, despite his rhetoric, was more interested in scoring political points than in actually passing legislation. Thus the activities of Reagan, Helms, and the Religious Right inflamed debate about school prayer and further entangled it with issues unrelated to the Establishment Clause, such as public and private morality and national culture. The debates revealed little about the constitutionality of school prayer but showed how the issue was used for political ends. They also explain why the Court, although having to manage the resulting higher profile and volatility of the prayer issue, could comprehensively ignore the substance of the political debates.

Wallace v. Jaffree: Reaffirming the Warren Court

The case that would become *Wallace v. Jaffree*, the Burger Court's second and most significant prayer case, began in July 1982, right in the middle of the congressional debates about school prayer and "court-stripping." Alabama Governor Fob James approved a bill which allowed teachers to lead "willing students" in prayer, stating clearly that he saw it as a vehicle for Alabama to test the Supreme Court's prayer rulings.¹⁴⁶ At the same time, in New Jersey a similar

Supreme Court which upheld the IRS's withholding of tax-exempt status from religious schools which discriminated on racial grounds. See *Bob Jones University and Goldsboro Christian School v. US* 461 US 574 (1983).

¹⁴³ In addition, if Congress defeated the measure, Reagan could blame the failure on Congress without losing support for his Administration.

¹⁴⁴ Speech reprinted in *Cong. Rec.*, February 3, 1983, pp. 1646-8

¹⁴⁵ The amendment was eventually defeated 56:44, eleven votes short of a two-thirds majority, on March 20, 1984.

¹⁴⁶ "Alabama Governor Signs Bill on School Prayer," *NYT*, July 14, 1982, A16. The law replaced a statute permitting a moment of silence in the state's public schools. See also "Mobile Board Opposes School Prayer Lawsuit," *NYT*, August 2, 1982, A10; "US Judge Bars Alabama School Prayer Law," *NYT*, August 10, 1982, B11; "Alabama Governor Vows to Ignore Prayer Law," *NYT*, September 16, 1982, A18.

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debate began over the issue of moment of silence statutes.¹⁴⁷ The two debates ran parallel to one another; together they provided a case study of the practical application of the theories being debated at national level. Most notable was the pure emotionalism of the issue and the problems faced by individuals involved in the debates. While Senators dealt with insults, ordinary citizens often faced much worse. Testifying at the original trial, Jaffree told of the cost of his stand: "My children have experienced all types of abuse from neighbors. Some of the children in our neighborhood, which is mostly white, have stopped playing with my children, and other children laugh at them ... My future here in Mobile is going to be drastically altered because of this lawsuit. I'm perceived as an outsider that is disrupting Mobile's quiet tranquility."¹⁴⁸ Writing about his experiences several years later, Jaffree recalled that he received "nasty letters and ... nasty phone calls" and the black community of Mobile was "up in arms" that a black man had sought to "take God out of the public schools."¹⁴⁹ In Old Bridge, New Jersey, Thomas Cherney was called a "right-winger" and "a religious nut" and repeatedly asked if his school prayer proposal was politically motivated and if the Moral Majority was covertly supporting him.¹⁵⁰ The experiences of the two men illustrated the price frequently paid by those who sought to challenge the dominant views in their communities. As examples of how "community choice" laws similar to that suggested as a compromise amendment by Reagan would work, they were damning; as examples of how national debate can influence local concerns, the experiences of Jaffree and Cherney were equally illustrative.

Given a lack of consistency in the federal courts on moment of silence statutes as well as the continued debate surrounding school prayer, why did the Supreme Court refuse to revisit the issue for twenty-two years?¹⁵¹ First, despite numerous challenges, the large majority of practices that violated *Engel* and *Schempp* were struck down by courts, governors, or ultimately were not enacted at all: the Court had no need to intercede to defend its rulings because it was being done elsewhere. Second, the political controversy itself operated to keep the Court removed from the issue: several of the challenges to the Court were significant threats and the Court was unwilling to give the political branches additional ammunition with which to attack. Third, with the debate

¹⁴⁷ See *NYT* (1982): "Moment of Silence in Schools Approved by Jersey Legislature," October 19, A1, B2; "Kean Vetoes Bill on Silent Period in Public Schools," and "The Question of Silence Raises Voices," December 8, B2, 1, 4; "Old Bridge Tackles 'Silence'," December 12, NJ24, 25; "Moment of Silence in Schools is Voted in Jersey," December 17, A1, B4.

¹⁴⁸ Quoted in Irons, P., *The Courage of their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court* (New York: Penguin, 1990), p. 363.

¹⁴⁹ I. Jaffree in Irons, P., p. 375. For Jaffree's recollections of the entire case see pp. 368-378. Jaffree's experience was not unusual; for detailed and disturbing accounts of similar experiences from 1946 to 1996 see Alley, R., *Without A Prayer: Religious Expression in Public Schools* (Amherst, New York: Prometheus Books, 1996).

¹⁵⁰ Taken from Geist, W., "The Question of Silence Raises Voices," *NYT*, December 8, 1982, B1, 4. The case was eventually decided on a procedural issue by the Court without reaching the substantive issues in *Karcher v. May* 484 US 72 (1987).

¹⁵¹ Seventeen years if counting the time between *Schempp* and *Stone* rather than *Jaffree*. See *Gaines v. Anderson* 421 F.Supp. 337 (D. Mass, 1976) (upholding moments of silence); *Duffy v. Las Cruces Public Schools* 557 F.Supp. 1013 (1983), *Beck v. McElrath* 548 F.Supp. 1161 (1982), *May v. Cooperman* 572 F.Supp. 1561 (1983) (striking down moments of silence).

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raging, the impression was that “the people” through their representatives had not yet decided on a course and if the Court intervened it might be seen as engaging in judicial legislation, the very thing the moderate majority of the Burger Court was trying to avoid. But as twenty-five states continued to have moment of silence statutes on their books, it seemed likely even before the Supreme Court accepted *Jaffree* that the issue would eventually have to be addressed by the Court in order to determine the constitutionality of such laws.¹⁵²

Wallace v. Jaffree involved a challenge to the 1981 amendment of Alabama’s existing moment of silence law to allow for “meditation or voluntary prayer.”¹⁵³ The amendment was challenged by Ishmael Jaffree on behalf of his children as state support for religious activity and thus a violation of the Establishment Clause. Crucial to the Court’s opinion was the testimony of State Senator Donald Holmes, in which he stated that the amendment had been an “effort to return voluntary prayer to our public schools,” along with the Court’s finding that, “[t]he 1978 statute already protected that right, containing nothing that prevented any student from engaging in voluntary prayer during a silent minute of meditation.”¹⁵⁴ Thus, as in *Stone*, the Court found that the state’s sole purpose had been “endorsement of prayer activities for one minute at the beginning of each school day ... characteriz[ing] prayer as a favored practice,” thus violating the Establishment Clause.¹⁵⁵ Although the result reinforced the principles of *Engel*, *Schempp*, and *Stone*, the consensus in the Court’s opinions and the Justices’ private comments in the earlier cases had all but vanished; instead, *Jaffree* resulted in six separate opinions, including one that concurred only in result.¹⁵⁶ Although a majority still existed for adhering to the precedent of *Engel* and *Schempp*, the procedural divisions among the Justices evident in school aid cases made the majority narrower and far less certain.

Justice Stevens’ opinion for the Court was methodical, logical, and narrow, relying heavily on the specific facts of the case, laying out the argument point-by-point, and avoiding broad, sweeping statements of doctrine or philosophical principle. Stevens noted that prayers had been taking place in Mobile County schools in a constitutionally invalid manner irrespective of the facially valid statute. In doing so he provided the evidence of constitutional violation that Stewart had required in *Schempp* and the dissenters had demanded in *Stone*, but at the same time reinforced that *Jaffree* involved this specific statute and was not intended to be a broad statement about the constitutionality of similar laws and practices. The contrast with Black’s *Engel* opinion

¹⁵² In 1985, twenty-five states required or permitted moments of silence in class: Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, Tennessee, Virginia, and West Virginia. On the background to such laws see Drakeman, D., “Prayer in Schools: Is New Jersey’s Moment of Silence Constitutional?” 35 *Rutgers Law Review* 341 (1982/3).

¹⁵³ *Wallace v. Jaffree* 472 US 38 (1985). For text of the statute see 472 US 38, 40 (1985).

¹⁵⁴ *Wallace v. Jaffree* 472 US 38, 43, 59 (1985).

¹⁵⁵ *Wallace v. Jaffree* 472 US 38, 60 (1985).

¹⁵⁶ Justices Powell and O’Connor filed concurrences, O’Connor concurring only in the judgment. Dissents were filed by Justices Burger, White, and Rehnquist.

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was striking: where *Engel* spoke in broad terms, *Jaffree* was highly specific; where *Engel* skipped over precedent, *Jaffree* was firmly rooted in it. This was a function of the different circumstances in which the Justices of the majority found themselves: by keeping the opinion narrow and heavily fact-specific, Stevens avoided making unnecessary *dicta* which could have alienated members of the majority and opened the Court to greater attack from critics of the ruling.¹⁵⁷

Other aspects of Stevens' opinion, as the Rational Choice Model predicts, accommodated the views of other Justices to keep them within the majority. The clearest example was Stevens' use of "endorsement" within his discussion of *Lemon*'s "purpose" test. First proposed by O'Connor the previous year in *Lynch v. Donnelly*, it formed a significant part of her *Jaffree* concurrence.¹⁵⁸ Intended as a modification of the *Lemon* test, it advocated enquiring as to "whether government's actual purpose is to endorse or disapprove of religion," and if "the practice under review in fact conveys a message of endorsement or disapproval."¹⁵⁹ Twice within the opinion Stevens made reference to endorsement as though it was a long recognised form of analysis, which was not the case.¹⁶⁰ Stevens may have hoped to keep O'Connor within the majority, or at least encourage her to look favourably on the result by providing her test with an element of authority, placing it in a stronger position for future cases. That he included "endorsement" in his opinion suggests he and others in the majority felt it was necessary in order to ensure a strong position. Justice Powell was the second Justice whose views were accommodated by Stevens into the majority opinion. The change made was significant for the Court's reading of the "purpose" prong of the *Lemon* test. The language of *Schempp* implied that a purely secular purpose was required to pass constitutional scrutiny since anything else might "advance" religion, an argument supported by the *Stone per curiam* and at least implied in the early drafts of Stevens' opinion which emphasised that anything less than a completely secular motive for legislation was unlikely to pass constitutional scrutiny.¹⁶¹ But in response to an enquiry from Powell, Stevens wrote to the others in the majority to suggest a change to what became the final wording: "For even though a statute that is motivated *in part* by a religious purpose may satisfy the first criteria ... the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion."¹⁶² With this phrasing the emphasis changed: now a partly religious motivation

¹⁵⁷ Such fact-specific analysis was also part of Justice O'Connor's concurrence: *Wallace v. Jaffree* 472 US 38, 74 (1985) (Justice O'Connor, concurring in judgment).

¹⁵⁸ *Wallace v. Jaffree* 472 US 38, 67-84 (1985) (Justice O'Connor, concurring). *Lynch v. Donnelly* 465 US 688 (1984) involved a challenge to a city-sponsored display of a crèche as part of a more general Christmas display. The Court held that it did not violate the Establishment Clause.

¹⁵⁹ *Lynch v. Donnelly* 465 US 668, 690 (1984) (Justice O'Connor, concurring). In the increasingly complex area of Establishment Clause jurisprudence, "endorsement" has come to be known as O'Connor's personal contribution to the debate.

¹⁶⁰ *Wallace v. Jaffree* 472 US 38, 56, 60-1 (1985).

¹⁶¹ Undated draft of Stevens' opinion in Justice Thurgood Marshall Papers (hereafter Marshall Papers), Box 362, Folder 2.

¹⁶² *Wallace v. Jaffree* 472 US 48, 56 (1985) (internal references omitted; emphasis added). Letter from Justice Stevens to Justices Brennan, Marshall, and Blackmun, May 8, 1985, Marshall

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could be acceptable depending on the circumstances of the case, a significant shift in position with regards to “purpose” analysis. Although the change clarified some of the uncertainties of *Schempp* and *Lemon*, it also opened the Court to the possibility of new cases requiring definition of a religious, yet still sufficiently secular motivation.

This change, as with the inclusion of “endorsement,” served no other purpose than to gain the support of wavering Justices. Its significance was evident from communication among the Justices regarding *Jaffree* during the period of opinion writing. A memorandum from Burger to Stevens in February 1985 suggested Stevens did not have a majority.¹⁶³ Stevens’ letter to the others in the majority regarding Powell’s suggested change was sent to Brennan, Marshall, and Blackmun, with no mention of O’Connor, suggesting agreement among only four Justices: without either Powell or O’Connor the opinion would only be a plurality of the Court and would not be binding precedent.¹⁶⁴ Stevens’ suggested alteration might allow Powell to “change” his vote, suggesting he had originally voted with the dissenters, further weakening Stevens’ majority position.¹⁶⁵ The importance of Powell and O’Connor’s concurrences to the eventual majority opinion was indicated by the difficulty of finding a way for the two to agree. While O’Connor advocated altering *Lemon*, Powell issued a passionate defence of the test, the disagreement resting not on a fundamental difference about the place of religious exercises in public schools but on the method for determining constitutionality: a procedural rather than a substantive disagreement. That Stevens found a way to reconcile the Powell and O’Connor positions given the centrality of the “purpose” test to the case, even if only convincing the two to file concurrences rather than join the majority, was a significant achievement, and one which turned a potential 4:1:4 decision into a 6:3, or at least a 5:1:3 decision, and one with far greater weight. Thus the majority, barely, managed successfully with the prayer issue to negotiate through the problems and divisions causing so much trouble in other areas of Establishment Clause jurisprudence.

The debate over *Lemon* in *Jaffree* revealed the divisions among the Justices over procedural issues that had been increasingly evident in school aid cases. Burger and Rehnquist criticised the *Lemon* test in their dissents: Burger, *Lemon*’s author, included *Lemon* in a general attack on the Court’s use of tests, especially in Establishment cases, while Rehnquist suggested the test was undermining the Court as an institution by causing the Justices to “fracture into unworkable

Papers, Box 362, Folder 2. See 472 US 38 *Records and Briefs: Wallace v. Jaffree*, Brief of Appellant, pp. 10-15.

¹⁶³ Memorandum from Chief Justice Burger to Justice Stevens, February 28, 1985. Marshall Papers, Box 362, Folder 2.

¹⁶⁴ “Although there is nothing definite at this point,” wrote Stevens, “I think there is a strong possibility that this change would enable Lewis [Powell] to change his vote and to join our opinion.” Memorandum from Justice Stevens to Justices Brennan, Marshall, and Blackmun, May 8, 1985. Marshall Papers, Box 362, Folder 2.

¹⁶⁵ In his dissent, Justice Rehnquist wrote: “The purpose prong means little if it only requires the legislature to express any secular purpose and omit all sectarian references ...,” a position not that far from Powell’s on this issue. *Wallace v. Jaffree* 472 US 38, 108 (1985).

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plurality opinions.”¹⁶⁶ Stevens’ majority opinion was clearly a defence of the beleaguered test: he made very clear that the majority was using *Lemon* and that while only the first part of it was being used the majority still adhered to the rest of *Lemon*, effectively providing a vote of confidence in the test.¹⁶⁷ Yet it was Justice Powell’s concurrence which responded directly to criticisms of *Lemon* and provided a passionate defence of it, answering O’Connor and encouraging the majority to be more forceful. “It is the only coherent test a majority of the Court has ever adopted,” asserted Powell, continuing, “*Lemon* has not been overruled or its test modified ... [it] has been applied consistently in Establishment Clause cases since it was adopted in 1971. In a word, it has been the law. Respect for *stare decisis* should require us to follow *Lemon*.”¹⁶⁸ Combined, the majority opinion and Powell’s concurrence provided a defence of *Lemon* that was both theoretical and practical. The debate, however, revealed more clearly the growing divisions among the Justices and the controversy over the “proper” test to be used for judging Establishment Clause violations. Although not influencing the result in *Jaffree*, the divisions suggested difficulties for future cases.

Rehnquist’s dissent and O’Connor’s concurrence revealed two additional issues for consideration in future cases. A personable, highly intelligent man who has been described as “today’s equivalent of Hugo Black – only at the other end of the judicial spectrum,” Rehnquist brought a highly developed conservative philosophy to the Court, a technical mastery of the law, and a forceful writing style “which at times employs colorful, emotionally charged imagery to underscore distaste for the positions of his liberal colleagues.”¹⁶⁹ Unlike many on the Burger Court, Rehnquist was willing to return to first premises in his opinions and rethink doctrines in terms of his personal constitutional philosophy.¹⁷⁰ In *Jaffree* he did so by challenging Brennan’s interpretation of the history of church-state relations from *Schempp*.¹⁷¹ Reconsidering the history of the framing, ratification, and the actions of the First Congress, Rehnquist produced a concise accommodationist interpretation of the period, concluding, “[t]here is simply no historical foundation for the proposition that the Framers intended to build the “wall of separation” that was

¹⁶⁶ *Wallace v. Jaffree* 472 US 38, 110 (1985) (Justice Rehnquist, dissenting). Burger’s opposition was less to the *Lemon* test itself than the manner in which the Court employed it. He accused the majority of “a naïve preoccupation with an easy, bright-line approach,” that echoed his warnings in *Lemon* (See Chapter Two, n.74 and n.194). *Wallace v. Jaffree* 372 US 38, 86-7 (1985) (Chief Justice Burger, dissenting).

¹⁶⁷ See *Wallace v. Jaffree* 472 US 38, 55-6 (1985).

¹⁶⁸ *Wallace v. Jaffree* 472 US 38, 63, n. 3. (1985) (Justice Powell, concurring). Attitudinalists might claim this as evidence of rhetorical cover for preferred results. However, given the tenuous nature of the majority it seems more likely as Powell’s personal preference for *stare decisis* that could not be accommodated by Stevens for fear of losing that majority.

¹⁶⁹ Lewis, A., “Foreword” to Blasi, V. (Ed.), *The Burger Court: The Counter-Revolution That Wasn’t* (New Haven and London: Yale University Press, 1983), p. ix; Maltz, E., *The Chief Justiceship of Warren Burger, 1969-1986* (Columbia, South Carolina: University of South Carolina Press, 2000), p. 21.

¹⁷⁰ Lewis, A., p. ix. Rehnquist’s position in Establishment cases is generally close to that of the model Justice of the Attitudinal Model.

¹⁷¹ *Wallace v. Jaffree* 472 US 38, 92 (1985) (Justice Rehnquist, dissenting).

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constitutionalized in *Everson*.¹⁷² Rehnquist's historical interpretation has been widely criticised, indeed, Thurgood Marshall's opinion was unambiguously scribbled on the front of his copy of Rehnquist's first draft, but his willingness to address the issue at all indicated his far greater activism when compared with the Court's majority.¹⁷³ What was most significant about Rehnquist's dissent was that it staked out a position quite different from that of the centre or the liberals of the Court and signalled his future intentions, suggesting the beginning of a battle that would shape the Court's jurisprudence.

In her first few years on the Court, O'Connor was seen as a close ally of Justice Rehnquist, frequently voting with him and joining his opinions, and so placing herself on the political right of the Court. By the time *Jaffree* was heard, however, it appeared O'Connor was moving away from Rehnquist; while remaining slightly right of centre she increasingly found herself as the pivotal Justice in close cases. Her *Jaffree* concurrence was symbolic of that position: while she concurred in result, she refused to join any part of the majority's reasoning, staking out a clearly defined position of her own which could then be drawn on in later cases. In addition to her endorsement test O'Connor also drew heavily on Free Exercise concerns.¹⁷⁴ For O'Connor, the Court's traditional reliance on the language of neutrality threatened the continued vitality of accommodation of the religious beliefs of minorities under the Free Exercise Clause, and thus of the Free Exercise Clause itself. Her development of an "endorsement" analysis was a symptom of this concern: it modified the *Lemon* test to an extent sufficient to avoid a conflict between the clauses without rejecting the test outright.¹⁷⁵ As such, O'Connor believed "this "accommodation" analysis would help reconcile our Free Exercise and Establishment Clause standards."¹⁷⁶ The problem with such an approach, at least with respect to O'Connor's position, was that the need for a unified test was not widely accepted since the issue of the "clash" between the religion clauses was not widely accepted, and remains controversial. However, as the most likely swing vote in religion clause cases, O'Connor's position was central to the Court's vote.

In its two major prayer rulings, *Stone* and *Jaffree*, the Burger Court thus continued the legacy of the Warren Court. Both rejected the possibility of religious practices in the public schools; once it had been decided that the practices were religious, there was no doubt about the result. The controversy that surrounded *Engel* and *Schempp* and the increasing politicisation of the issue

¹⁷² *Wallace v. Jaffree* 472 US 38, 106 (1985) (Justice Rehnquist, dissenting); for the full historical debate see 91-106. For this interpretation Rehnquist drew heavily on information provided by James McClellan who argued the case in the District Court. See Irons, P., p. 364.

¹⁷³ Marshall's comment reads: "Unadulterated B.S.!!" Marshall Papers, Box 362, Folder 2. Like Rehnquist, Marshall's position in Establishment cases was also close to that of the Attitudinal Model. This clash can thus be seen as one of different preferred outcomes, as predicted by the Attitudinal Model. Although it does not impact on the final ruling, it does suggest the value of the Model in understanding the internal workings of the Court at this time, on this issue.

¹⁷⁴ *Wallace v. Jaffree* 472 US 38, 82 (1985) (Justice O'Connor, concurring in judgment).

¹⁷⁵ It is possible that these kinds of problems were the "inconsistencies" that Douglas saw might occur and warned against in his *Engel* concurrence.

¹⁷⁶ *Wallace v. Jaffree* 472 US 38, 83 (1985) (Justice O'Connor, concurring in judgment).

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of school prayer did not divert the Burger Court from the course laid out by the Warren Court. Thus the Court appeared, in this context, to be close to that of the Legal Model: although the central focus of the cases had shifted, the ultimate principle of separation of schools and religious exercises remained intact.¹⁷⁷ However, both cases were also examples of the dominant feature of Burger Court jurisprudence: the control of the centre. As such, the Court also showed elements of the Rational Choice approach. The influence of the liberal majority of *Schempp* and the later Warren Court was already waning by the time of Warren's retirement in 1969, but the loss of Warren along with the retirements of Hugo Black in 1971 and Douglas in 1975 further reduced the liberal wing. By *Stone*, the only Justices of the *Schempp* majority remaining on the Court were Brennan and White.¹⁷⁸ Harry Blackmun joined the Court in 1970 to replace Abe Fortas, and in 1972 Rehnquist was appointed by President Nixon to replace Harlan. The overall impact of the personnel change was a significant weakening of the liberal wing and an increase in the number of conservatives on the Court. However, despite the fears of Warren's supporters, this did not make the Burger Court a conservative Court, but rather a moderate, pragmatic one.

Three factors account for the pragmatism of the Burger Court. First, the backlash against the liberal activism of the 1960s appeared to be less a reaction against the liberalism than a reaction against the activism itself. As such, in the decade following Warren's retirement, conservative activism by the Court was unthinkable; the social and jurisprudential upheaval implicit in an overturning of Warren Court precedents would be as unwelcome as a rapid expansion of them. Second, the divisions among some of the Justices as to the "proper" test to be used in analysing Establishment violations worked to restrict the scope of any opinion. The variety of views held by the Justices of the Burger Court, revealed most clearly in the school aid cases, required decisions based on the narrowest grounds to ensure a workable majority. No procedural or philosophical approach commanded a majority of the Court and thus decisions remained moderate and pragmatic and closely tied to the specific facts of a case. Third, the men appointed to the Court by Presidents Nixon and Ford showed no interest in radical action. Coming after two embarrassing failed nominations, Nixon appointed Harry Blackmun believing his judicial philosophy advocated judicial restraint and strict construction of the Constitution.¹⁷⁹ Although initially allying with Burger on the right, Blackmun shifted toward the centre of the Court and closer to the positions of Brennan and Marshall.¹⁸⁰ Lewis Powell, appointed to the Court to replace Black, is widely considered to have been a crucial part of the centre dominating the

¹⁷⁷ The Court also remained attuned to the potential controversy resulting from the cases and took steps to reassure the public of the central place of religion in American life and to make explicitly clear the ruling of the Court. See *Stone v. Graham* 449 US 39, 42 (1980); *Wallace v. Jaffree* 472 US 38, 83 (1985) (Justice O'Connor, concurring) and 472 US 38, 67 (1985) (Justice Powell, concurring).

¹⁷⁸ Stewart, who dissented in *Schempp*, was also still on the Court in 1980 for *Stone*, where he again dissented, but he had retired by the time *Jaffree* was decided in 1985.

¹⁷⁹ Simon, J., pp. 143-6. See also *Newsweek*, April 27, 1970, p. 28.

¹⁸⁰ See, for example, Blackmun's opinion for the majority in *Roe v. Wade* 410 US 113 (1973).

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Burger Court.¹⁸¹ John Paul Stevens was appointed as Douglas' successor by President Ford with the expectation that he would take a moderate conservative position on the Court, similar to that of Ford himself. With White and Stewart, these men combined to form the major controlling influence on the Burger Court. Although appointed by conservative presidents, their individual tendencies were towards moderation and pragmatism, a trend clearly present in the Burger Court's prayer jurisprudence.

In *Jaffree*, the most striking evidence of this was Justice Stevens' authorship of the majority opinion despite the presence of renowned liberals Brennan, Marshall, and by this time, Blackmun. His willingness to make accommodations to the concerns of other Justices illustrated the difficulty of a pragmatic approach to judging: different people will attach different weight to certain facts and approaches. The narrowness of the case was emphasised by both Powell and O'Connor who used their concurrences to show why moment of silence statutes generally might be constitutional and why Alabama's was not, simultaneously reassuring the public that this was not an assault on the practice in general and ensuring it was not by providing limits to the majority opinion.¹⁸² Even the dissents of Burger and White avoided sweeping philosophical or doctrinal statements with regard to prayer. Both opinions took a balanced, limited approach, confining themselves to the facts of the case. Thus, despite higher levels of disagreement among the Justices than in earlier cases, the moderate, pragmatic approach of the centre found sufficient common ground in the result in *Jaffree* to formulate a workable majority.

"The Burger Court's activism ... has been generated as well as moderated by the pragmatic men of the center ... in the hands of the Burger Court judicial activism has become a centrist philosophy – dominant, transcending most ideological divisions, but essentially pragmatic in nature, lacking a central theme or an agenda."¹⁸³ Vincent Blasi's 1983 assessment of the Burger Court aptly described the results of the prayer cases of the era, even *Jaffree* which was decided two years after he wrote. Blasi termed the actions of the Burger Court "rootless activism" in that they were based not on any overriding philosophy but on a need to make reasoned, balanced, and logical decisions. The result, he asserted, was an increasingly fact-based analysis and result in Supreme Court jurisprudence, where a minor difference in the facts of a case could mean the difference between a reversal and an affirmance. This led to criticism of the Court for a lack of coherence. It is, however, an unfair analysis of the prayer cases, although aspects of it could be seen in the Justices' increasing reliance on factual specifics and procedural disputes. The Court may have been more divided on the issue than its predecessor, but the majority of the Justices made no attempt to overturn the precedent established by *Engel* and *Schempp*: despite significant political pressure to do so, they strengthened it with their rulings.

¹⁸¹ Schwartz, B., *A History of the Supreme Court* (New York and Oxford: Oxford University Press, 1993), p. 317; Maltz, E., p. 22.

¹⁸² *Wallace v. Jaffree* 472 US 38, 62, 65-6 (1985) (Justice Powell, concurring) and 72-9 (Justice O'Connor, concurring in judgment).

¹⁸³ Blasi, V. (Ed.), p. 211.

Passions Calmed: The Aftermath of *Jaffree*

Reaction to *Jaffree*, handed down on June 4, 1985, was muted. While, predictably, liberals claimed it preserved the freedoms of the Bill of Rights and conservatives denounced it as a rejection of religion the passion that had been so clear at earlier times and surrounding the recent congressional debates was almost entirely absent. In part, it was because for many the result was unsurprising: when granting *certiorari* the Court additionally struck down organised prayer in Alabama schools and reaffirmed its decisions in *Engel* and *Schempp*, indicating that a defence of the laws would not be an easy task.¹⁸⁴ Equally, however, both sides could claim a victory of sorts. For those who objected to moments of silence as “smokescreens” for school prayer, the Supreme Court’s recognition of an unconstitutional motive on the part of the legislature appeared to recognise their concerns and act upon them. For those who supported moment of silence legislation, the narrowness of the Court’s holding and the obvious implication in the concurrences by Powell and O’Connor that a majority existed to uphold some such laws offered hope that this was not the end of their campaign. Ishmael Jaffree offered the most telling conclusion on the situation upon hearing of the Court’s ruling: “For me the battle is over,” he said. “But prayer will go on in the schools. It just won’t go on in any of my children’s classes.”¹⁸⁵

For those who had been watching the Court closely, there was an element of the surprising in the *Jaffree* result. The Court’s holding in *Lynch v. Donnelly* in March 1984 that Pawtucket’s display of a crèche did not violate the Establishment Clause indicated for many a significant shift by the Court away from separation toward a greater accommodationist position.¹⁸⁶ This apparent shift in emphasis came at the same time commentators were beginning to note the increasing strength of the Court’s conservatives, while simultaneously the Court appeared to be reaching out for religion cases. Establishment cases had been a regular feature on the Court’s docket since the 1960s but in early 1984 the Court accepted an unprecedented number of cases for review. The sudden activity led some to wonder uncomfortably if the newly influential conservative bloc was attempting to overrule, or narrow, the Court’s unpopular past rulings.¹⁸⁷ In the *New York Times*,

¹⁸⁴ *Wallace v. Jaffree* 466 US 924 (1984).

¹⁸⁵ “Plaintiff in Prayer Suit Says the Suit Hurt His Children,” *NYT*, June 5, 1985, B5.

¹⁸⁶ *Lynch v. Donnelly* 465 US 668 (1984). See n.158.

¹⁸⁷ See Greenhouse, L., “High Court Rules Cities May Put Up Nativity Displays,” *NYT*, March 6, 1984, A1, B7; “Embracing Volatile Church-State Issues,” *NYT*, March 9, 1984, A16; “Church-State Issues to be Sharpened,” *NYT*, August 6, 1984, A16. See Cannon III, J., “First Amendment I,” 1984 *Annual Survey of American Law* 265; Levinson, R., “Separation of Church and State: And the Wall Came Tumbling Down,” 18 *Valparaiso Law Review* 707 (1984); Van Alstyne, W., “Trends in the Supreme Court: Mr. Jefferson’s Crumbling Wall – A Comment on *Lynch v. Donnelly*,” 1984 *Duke Law Journal* 770; Katz, N., “*Lynch v. Donnelly*: One Giant Step Over the Wall,” 5 *Pace Law Review* 91 (1984/5); “Leading Cases of the 1983 Term: Establishment of Religion,” 98 *Harvard Law Review* 174 (1984); Gordon, G., “*Lynch v. Donnelly*: Breaking Down the Barriers to Religious Displays,” 71 *Cornell Law Review* 185 (1985/6); Dorsen, N. and C. Simms, “The Nativity Scene Case: An Error of Judgment,” 1985 *University of Illinois Law*

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Linda Greenhouse called the Court's *Jaffree* decision "an unprecedented about-face in its approach to the relationship between church and state."¹⁸⁸ Although this was rather overstating the case it revealed the concern *Lynch* had stimulated about the Court's position on church-state relations.¹⁸⁹ With regard to prayer, *Jaffree* appeared to calm such fears and with the Senate's rejection of yet another Helms-sponsored bill to prevent federal court challenges to organised prayer in schools in September 1985 the issue appeared to have dissipated for the time being.

Between the handing down of *Jaffree* and the Court's acceptance of *Lee v. Weisman* for oral argument in March 1991, the issue of school prayer and all its attendant debates moved into the background of US politics. However, in a reprise of the 1981 debates over "court stripping" attention turned to divisions over the proper role of the court and judges in the American constitutional system.¹⁹⁰ Although criticism that the Supreme Court was ignoring the intent of the Founding Fathers and being "too activist" was not new, what made this debate unusual was that the Court, or the Justices, responded to the challenge publicly. In a speech at a seminar at Georgetown University in October 1985, Justice Brennan challenged the idea that original intent could prove useful to the Court in an argument with distinct echoes of his 1963 *Schempp* opinion. The speech was notable as the first by a member of the Court that appeared to take issue with the Reagan Administration's approach to constitutional law; although Brennan mentioned neither the Administration nor the Attorney General by name, his pointed comments were clearly directed at both. Original intent, he argued, "is a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact. But in truth it is little more than arrogance cloaked as humility. It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions."¹⁹¹ Less than two weeks later, Justice Stevens joined the debate with a speech that offered a point-by-point rebuttal of Meese's views on some major constitutional issues. If Brennan's speech had been significant, Stevens' was a greater challenge to the Administration: first, he challenged Meese by name, second, as a moderate on the Court his views could not be dismissed by staunch conservatives as misguided liberal philosophy. Making arguments that differed little from those offered by Brennan, Stevens suggested Meese's argument was "somewhat incomplete ... because its concentration on the original intention of the Framers of the Bill of Rights overlooks the importance of subsequent events in the development of our law."¹⁹² But in many ways the content of the speeches was less important than that the Justices gave them. The Court had remained silent during the repeated attacks upon it throughout the first

Review 837; Galloway, Jr., R., "The October 1984 Term: A Court Watcher's Perspective," 26 *Santa Clara Law Review* 355 (1986).

¹⁸⁸ Greenhouse, L., "The Court's New Line on Religion Isn't So New," *NYT*, June 9, 1985, E5.

¹⁸⁹ See Appendix D, Cartoon 2.

¹⁹⁰ See, for example, Attorney General Meese's 1985 speech to the ABA. Taylor, Jr., S., "Meese, in Bar Group Speech, Criticizes High Court," *NYT*, July 10, 1985, A13.

¹⁹¹ Text of Justice Brennan's speech published in *NYT*, October 13, 1985, A36.

¹⁹² In particular, he referred to the Civil War and the post-war amendments. Excerpts from Justice Stevens' speech published in *NYT*, October 26, 1985, A11.

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half of the decade; this new willingness to address certain issues reflected a new political reality. The power of the Administration to attack the Court had been weakened by the repeated failures of legislation designed to do just that, undermining the sense of threat to the institution and allowing the Justices freedom to respond to any perceived attack.

The political situation for Reagan and his supporters had changed in other ways too by the middle of his second term in office. The aftermath of the Iran-Contra affair and the return of the Senate to Democratic control in the 1986 midterm elections served to weaken his political influence more generally. In addition, despite his attempts to reshape the federal judiciary by appointing only judicial conservatives commentators were beginning to note the emergence of conservatives as the new judicial activists.¹⁹³ Although this may have been Reagan's intention all along, it contradicted his publicly stated objectives and thus appeared as another fundamental weakness in his programme. The defeat of Robert Bork, Reagan's nominee to replace the newly-retired Justice Powell, in October 1987 simply underscored Reagan's weakened position, both politically and with regards to his "social values" agenda. Aware that the Court was ideologically divided and finely balanced, the Senate was unwilling to replace the moderate, pragmatic Powell with someone viewed as an arch conservative and too far from the political mainstream. The threat to the Court, so strong in the early 1980s, had thus dissipated.

The late 1980s and early 1990s saw a reassessment of attitudes and reactions to *Engel* and *Schempp*. With the defeat of constitutional amendments in Congress, the weaker influence on national politics of the Religious Right, and the affirmation of precedent by the Supreme Court, the political atmosphere was more conducive to a reasoned, rational discussion about whether school officials had gone too far in trying to avoid breaches of the Constitution and, if so, how that should be remedied to create true "neutrality" towards religion. Despite also being a reaction to conservative evangelical groups who asserted that the Supreme Court's rulings had led to the endorsement of "secular humanism," the moves attracted significant bipartisan support. With echoes of the 1950s, one such development was a reassessment of the way schools dealt with religion in their curricula. In July 1987, a report commissioned by the nonpartisan professional Association for Supervision and Curriculum Development deplored the "benign neglect" of the

¹⁹³ See Taylor, Jr., S., "Newest Judicial Activists Come From the Right," *NYT*, February 8, 1985, E24; Noble, K., "Not Many Judges Practice What the President Preaches," *NYT*, November 29, 1987, E4; Skelly Wright, J., "The Judicial Right and the Rhetoric of Restraint: A Defense of Judicial Activism in an Age of Conservative Judges," 14 *Hastings Constitutional Law Quarterly* 487 (1986/7); Silverstein, M. and B. Ginsberg, "The Supreme Court and the New Politics of Judicial Power," *Political Science Quarterly*, Vol. 102, No. 3 (Autumn 1987), pp. 371-88; Maltz, E., "The Prospects for a Revival of Conservative Activism in Constitutional Jurisprudence," 24 *Georgia Law Review* 629 (1989/90); Glennon, R., "Will the Real Conservatives Please Stand Up?" 76 *American Bar Association Journal* 49 (August 1, 1990); Schwartz, H., "Is the Rehnquist Court Activist? Yes: A Definite Agenda," 76 *American Bar Association Journal* 32 (August 1, 1990); Smith, C., "The Supreme Court in Transition: Assessing the Legitimacy of the Legal Institution," 79 *Kentucky Law Journal* 317 (1990/1). But see Tomasi, T. and J. Veloria, "All the President's Men? A Study of Ronald Reagan's Appointments to the US Courts of Appeals," 87 *Columbia Law Review* 766 (1987).

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role of religion in shaping American and world history. It criticised “bland” textbooks that it said “virtually ignore religion” and asserted that educators must move beyond the mistaken notion “that matters of religion are simply too hot to handle in public schools.”¹⁹⁴ This followed reports issued by People for the American Way, a liberal lobby group, as well as Americans United, suggesting large numbers of textbooks slighted religion, either by ignoring it entirely or by misrepresenting its role. Following such criticisms, attempts were made to remedy the situation. In October 1988, the Williamsburg Charter Foundation, a newly formed group of scholars and educators, announced the development of a curriculum which, they argued, taught religion without promoting a faith. In August of the same year, the Arizona Board of Education adopted an outline of “social studies essential skills” for its elementary and secondary schools that required teaching the religious roots of ethical convictions and religious differences, and in January 1989, the North Carolina Board of Education ordered that the state’s outline of social studies courses be revised to include religious topics in history, government, economics, world cultures, and other subjects.¹⁹⁵ The beginning of attempts to implement what had, after all, been explicitly mentioned as acceptable in *Engel* and *Schempp* by 1989-90 reflected the declining volatility of the issue of religion in schools.

Attempts to define the boundary between churches and the state, or more blatant challenges to the Supreme Court’s rulings also continued, although not with the frequency of earlier periods. Clashes in Benicia (Cal), Hartford (Conn), Dallas (Tex), and Atlanta (Ga) showed that in some places under certain circumstances school prayer and related issues maintained the ability to divide the public and inspire political controversy.¹⁹⁶ The issue of prayer in the schools continued to invite comment, criticism, and exploration, especially in areas outside the traditional classroom environment discussed in the Supreme Court’s opinions, where precedents were few and those which did exist were contradictory. Then in March 1991, the Supreme Court granted *certiorari* in a case involving one of these “grey” areas: graduation prayers.

All Change?: The Rehnquist Court and School Prayer

Until *Lee v. Weisman* there had been very little litigation surrounding prayer at graduation ceremonies. In the few cases that had reached the courts, the judiciary was more receptive than to schoolday prayer activities. As infrequent activities containing no instructional element,

¹⁹⁴ “Educators Urge Turn to Studies About Religion,” *NYT*, July 2, 1987, A16.

¹⁹⁵ In Steinfelds, P., “Trend Gaining in Public Schools to Add Teaching About Religion,” *NYT*, March 19, 1989, A1, 30.

¹⁹⁶ See Bishop, K., “Bible and Constitution Clash in a Liberal Land,” *NYT*, August 27, 1990, A12; “Professors Seek End to Prayers at Ceremonies,” *NYT*, December 2, 1990, A60, 62; “Religion Notes,” *NYT*, September 21, 1991, A8; Schwartz, J., “Student Gains in Fight to Bar Pregame Prayer,” *NYT*, January 8, 1989, A16; Applebome, P., “Football Prayer Ban Stirring Anger in South,” *NYT*, September 2, 1989, A1, 8.

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graduation exercises did not raise the same concerns considered in *Engel* and *Schempp*.¹⁹⁷ However, such positions conflicted with principles announced in other Establishment Clause cases. The voluntariness of participation, rejected as a basis for justification in *Engel* and *Schempp*, was significant in defending graduation exercises. Equally, in disallowing student religious groups from meeting in public school facilities courts had held that even the "hint" of state approval of sectarian activities violated the Establishment Clause: prayers at school-organised graduation ceremonies implied more than a hint.¹⁹⁸ Such untested arguments made it increasingly likely that the Court would intervene, although it was unclear whether it would simply decide the issue or address the procedural confusion which had led to the different rulings, in other words, whether it would clarify the status of *Lemon*. It was possible the Court might be encouraged to revoke the *Lemon* test entirely by the 1991 Term, despite the majority's assertions in *Jaffree* that it remained good law: between the two cases, four Justices had retired from the bench, three of whom had been part of the *Jaffree* majority.¹⁹⁹ The personnel change gave *Lee* added significance: it would be the first major ruling on the prayer issue from a Court that, while considered more politically conservative than its predecessor, was comprised of Justices whose position on the Establishment Clause was relatively unknown. While it seemed likely that the Court's conservative bloc of Chief Justice Rehnquist and Justices Antonin Scalia and Clarence Thomas would vote together, joined by Justice White, most likely in favour of graduation prayer, and Blackmun and Stevens would be likely, based on past opinions, to vote against, the balance of the Court was held by O'Connor and two of the Court's most junior members, Justices Anthony Kennedy and David Souter, who had little record in the area.²⁰⁰ For the Bush Administration and many pro-prayer advocates, *Lee* presented the possibility of success in challenging both the *Lemon* test and the unpopular school prayer decisions.²⁰¹

¹⁹⁷ See, for example, *Weist v. Mount Lebanon School District* 320 A.2d 362 (Pa., 1974) cert. denied 419 US 967 (1974) (upholding invocation and benediction at graduation ceremonies); *Grossburg v. Deusebio* 380 F.Supp. 285 (E.D. Va., 1974) (prayer at graduation); *Goodwin v. Cross County School District* 394 F.Supp. 417 (E.D. Ark., 1973) and *Chamberlain v. Dade County Board of Public Instruction* 160 So. 2d 97 (Fla., 1964) (upholding baccalaureate services); *Miller v. Cooper* 244 P.2d 520 (N.M., 1952) (allowing commencement activities to take place in a church).

¹⁹⁸ McCarthy, M., p. 41.

¹⁹⁹ Justices Brennan, Marshall, and Powell were the three from the *Jaffree* majority who had retired by the time *Lee* reached the Court. The fourth retiree was Chief Justice Burger. The significance of the case can be seen in the fact that thirty-five religious, political, and educational organisations filed or joined *amicus* briefs in the case.

²⁰⁰ Lawyers for the Bush Administration were searching for a case which might attract Souter into Kennedy's camp before he had the chance to cast a vote in a religion case which might put him on record as favouring the continued validity of a precedent. Greenhouse, L., *NYT*, March 19, 1991, A16 and "The Fight Over God's Place in America's Legacy," *NYT*, November 1, 1991, B10.

²⁰¹ However, it should be noted that in oral argument Starr agreed that classroom prayers would be unconstitutional because of the element of coercion present, distinguishing the graduation prayers at issue from such an environment. This was a huge compromise towards those who opposed all school prayer and fundamentally accepted the premise of *Engel* and *Schempp*. Transcript of oral argument of *Lee v. Weisman*, November 6, 1991.

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Lee v. Weisman arose from a challenge by Daniel Weisman to the inclusion of an invocation and benediction at his daughter, Deborah's, middle school graduation ceremony. School principals in Providence, Rhode Island, were permitted to invite clergymen to offer such prayers on these occasions, although it was not required and many did not do so. In response to an earlier challenge by Weisman to graduation prayers, Robert E. Lee, the school principal, invited Rabbi Leslie Gutterman to deliver the prayers. Having accepted, Gutterman agreed with Lee that the invocation and benediction should be "non-sectarian" and should conform to the "Guidelines for Civic Occasions" prepared by the National Conference of Christians and Jews. The case rested on several key issues. First, whether this was a religious exercise as envisioned under the Establishment Clause and if it was, to what extent the state was involved. Second was the issue of coercion that had caused such confusion in earlier cases: did the nature of the graduation ceremony coerce either attendance or participation in the prayer activity and if it did was that sufficient to declare the practice invalid. Finally, the Court was required to decide what relevance, if any, its decision in *Marsh v. Chambers* held.²⁰² For defenders of the prayers the activity was an attempt to solemnify an important rite of passage, conformed to the desire of a majority of the community for such exercises, coerced no-one to participate since attendance was voluntary, and was a practice with such long standing and historical support that there could be no Establishment Clause violation. No religion was "established" by the exercises. For the Weismans, however, the prayers were state-sponsored religious exercises at a ceremony that, to all intents and purposes, was compulsory for their daughter to attend. The state "endorsed" religion when the principal invited clergymen to recite prayers at the ceremony and required attendees to participate by virtue of their attendance, the very basis of "establishment". The Court agreed, in an opinion written unexpectedly by Justice Kennedy. Writing for a bare majority, Kennedy quoted from *Engel* that "it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government," and held, "that is what the school officials attempted to do."²⁰³ "The Constitution," wrote Kennedy, "forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Constitution commands."²⁰⁴

The tone and structure of the Court's opinion in *Lee* were the result of the unusual way in which the case was decided. Initial voting in conference confirmed strict separationists' worst fears: a bare majority supported reversing the Court of Appeals and holding graduation prayers did not violate the Constitution. Kennedy was assigned to write the opinion. However, in late March Kennedy wrote to Blackmun, the most senior Justice in the minority, that "my draft looked quite wrong," informing Blackmun that he had now written an opinion upholding the

²⁰² *Marsh v. Chambers* 463 US 783 (1983) (upholding the opening of state legislative sessions with a prayer based on the long history and traditional nature of the practice). The vote was 6:3 with Justices Brennan, Marshall, and Stevens dissenting.

²⁰³ *Engel v. Vitale* 370 US 421, 425 (1962) quoted in *Lee v. Weisman* 505 US 577, 588 (1992).

²⁰⁴ *Lee v. Weisman* 505 US 577, 596 (1992).

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lower court.²⁰⁵ Kennedy's switch altered the outcome of the case. Given the narrowness of the majority and the divisions on the Court, avoiding sweeping philosophical and doctrinal statements and including explicit links to accepted, established precedent was the safest course to ensure the majority held. The need to secure agreement between five Justices with quite different approaches to prayer cases meant writing on the narrowest possible grounds.²⁰⁶

Kennedy sought to maintain his tenuous majority by avoiding the issues that had caused most division on the Court and appealing to the Court's first principles in Establishment cases. Kennedy avoided discussion of *Lemon*, and thus the danger of getting caught in the same kind of procedural debate that dominated *Jaffree*, and drew directly on the principles established in *Engel* and *Schempp*.²⁰⁷ For the majority, the invocation and benediction at this graduation ceremony was a religious exercise supported by the state: the principal decided that the prayers should be given, provided the rabbi with guidelines as to the nature and scope of the prayers, and the school provided the forum for their expression. This was sufficiently close to the prayer in *Engel*, even to the point of being "non-sectarian," to bring *Lee* under its auspices and invalidate the practice. Kennedy's concern for issues of the school environment, school culture, social pressure, and the combination of coercion and free exercise issues also echoed *Engel* and *Schempp*.²⁰⁸ The importance of graduation as a rite of passage, the very reason supporters advocated prayers in the first place, was, for the Court, the exact reason why prayers must be excluded: the practice forced Deborah Weisman to choose between her religious belief and attending the ceremony, a choice the Court had consistently held invalid.²⁰⁹ Kennedy's attention to voluntary attendance, however, reflected more than concern for fidelity to precedent; it addressed the existence of so-called "equal access" cases in which questions of speech and free exercise were more central concerns.²¹⁰ Kennedy needed, in Establishment Clause terms, to distinguish the graduation ceremony in *Lee* from the meetings of religious groups on school property in order to justify his use of the Court's traditional prayer case analysis, and the issue of "voluntary attendance" was the clearest way to do so. Although in comparison to the compelled flag salute of *Barnette* or the

²⁰⁵ Memorandum from Justice Kennedy to Justice Blackmun, March 30, 1992. See also a memo from Kennedy to Rehnquist confirming the situation to him, also March 30, 1992. Blackmun Papers, Box 586, Folder 6. This was Kennedy's only explanation for his shift. It suggests that he was influenced by *stare decisis* and the strength of the Court's earlier rulings, and thus gives support to the validity of the Legal Model. This implies that despite vocal opposition to the Court's prayer rulings, the principles they embodied had been broadly accepted.

²⁰⁶ See Memorandum from Justice Kennedy to Justice Blackmun, March 30, 1992. Also, *Lee v. Weisman* 505 US 577, 596-8 (1992). Thus, the Rational Choice Model also provides insight into the difficulties faced by the majority in *Lee*.

²⁰⁷ It was also a way of overlooking Kennedy's dissent in *Allegheny* in which he had been critical of the *Lemon* test. By ignoring *Lemon*, Kennedy was free to consider *Lee* on its merits rather than procedural issues which allowed him to shift from his apparent accommodationist stance in the earlier case. Kennedy's only mention of *Lemon* was to note that the Court was not overturning it although the opinion made no explicit use of the test.

²⁰⁸ See in particular *Lee v. Weisman* 505 US 577, 595 (1992).

²⁰⁹ See, for example, *West Virginia Board of Education v. Barnette* (1943) and *Sherbert v. Verner* 374 US 398 (1963).

²¹⁰ See Chapter 4.

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required prayer recitation in *Engel*, the graduation prayers appeared to involve little coercion, when compared to weekly student group meetings on campus the greater symbolic nature of graduation and the indirect pressure to attend as a result reinforced Kennedy's point about coercion to attend. The distinction was important to protect the viability of "equal access" analysis. Since the Court had recognised previously that schools must make certain accommodations to religion and the beliefs of religious students, Kennedy needed to show that graduation prayer was significantly different in nature: the atmosphere of the graduation ceremony was the clearest way to do this. Repeated references to, and echoes of, *Engel* and *Schempp* also ensured the majority opinion could make clear that the decision was based firmly on Establishment grounds and in no way undermined the validity of equal access cases. Thus by avoiding the most contentious issues in the Court's Establishment Clause jurisprudence, writing on the narrowest grounds, and drawing on the Court's first prayer cases, Kennedy managed to hold his new majority

"It must not be forgotten, then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference."²¹¹ The sentiment was also similar to that of *Engel* and *Schempp*, the idea that the Establishment Clause was not just about protecting the individual but about protecting religion. Kennedy went so far as to note that accommodation may make the danger to religion worse, echoing Brennan's earlier concerns about a "common core" religion that was devoid of true religious sentiment.²¹² But the manner in which the argument was made was noticeably different from that of the Warren Court cases. In *Engel* and *Schempp*, the Justices had argued that the Establishment Clause was designed to protect religion as a way to defend themselves and the Court against attacks that suggested they were Communists and atheists intent on secularising and destroying American society. In *Lee*, Kennedy's point was that the case involved more than simply damage to a single family, that it involved protecting the fundamental strength of religion as a whole, and as such was making a positive rather than a defensive statement. In *Lee*, the Court did not attempt to reassure the public about the central place of religion in American life in the same way the Justices believed it necessary to do in *Engel* and *Schempp*; the Court appeared to assume that the public would understand this decision and that further explanation was unnecessary.

The concurrences filed in *Lee*, by Blackmun and Souter, both joined by Stevens and O'Connor, added little to the debate. Blackmun's opinion appeared to do little more than reinforce the argument made by the majority. Souter's opinion was significant less for what it contained than for what it said implicitly about the Justice himself. By the summer of 1992, based in part on his opinion in *Lee*, commentators were beginning to see Souter as active in the

²¹¹ *Lee v. Weisman* 505 US 577, 589 (1992).

²¹² See *Lee v. Weisman* 505 US 577, 589-90 (1992). *Abington School District v. Schempp* 374 US 203, 284-7 (1963) (Justice Brennan, concurring).

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search for the Court's "lost" centre.²¹³ His *Lee* concurrence showed evidence of judicial caution, although combined with a willingness to take on the more "ideological" members of the Court on their own ground. Souter's overall conclusion was that nothing in this case provided sufficient evidence or merit to justify overturning the Court's established precedent.²¹⁴ Challenging Rehnquist's reading of history in *Jaffree*, Souter concluded that a "more powerful argument supporting the Court's jurisprudence" could be found in the long history of requiring adherence to a position of neutrality, reinforcing in the process the majority's argument that a prayer is a prayer, regardless of whether it is nondenominational or sectarian.²¹⁵ In methodically reiterating points that were not new to the Court's Establishment Clause jurisprudence and simply applying them to the situation in *Lee*, Souter reinforced those arguments. While not adding anything new to the debate, Souter's opinion indicated his views on the issue and served notice to others on the Court that his was a position which must be taken into consideration in future cases.²¹⁶

In contrast to Souter's concurrence was the sharp, sarcastic dissent from Justice Antonin Scalia. Well-known for his harsh, biting language, Scalia accused the majority of ignoring history, tradition, and the Court's past reliance on both. His most significant attack was on the Court's use of coercion analysis which, arguably, had been part of the Court's Establishment Clause jurisprudence since *Everson* in 1947, and which was so crucial to the majority's holding. "As its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion," claimed Scalia, continuing:

I find it a sufficient embarrassment that our Establishment Clause jurisprudence regarding holiday displays ... has come to "require[] scrutiny more commonly associated with interior decorators than with the judiciary" ... But interior decorating is a rock-hard science when compared with psychology practiced by amateurs. A few citations of "[r]esearch in psychology" that have no particular bearing on the precise issue here ... cannot disguise the fact that the Court has gone beyond the realm where judges know what they are doing.²¹⁷

For Scalia, and Rehnquist, White, and Thomas who joined him, nothing could justify the striking down of a practice which had the support of history and common sense.²¹⁸ The virtue of

²¹³ See Reverend L. McCausland, quoted in Butterfield, F., "Unchanged But Growing as a Justice," *NYT*, July 3, 1992, A16. Greenhouse, L., "Souter Anchoring the Court's New Center," *NYT*, July 3, 1992, A1, 16.

²¹⁴ *Lee v. Weisman* 505 US 577, 611 (1992) (Justice Souter, concurring) (discussing precedent) and 612 (discussing the "nonpreferentialist" position).

²¹⁵ *Lee v. Weisman* 505 US 572, 612, especially n. 3 (1992) (Justice Souter, concurring).

²¹⁶ This was Souter's intent. In a memorandum to Justice Kennedy, he wrote: "I'm happy to join your opinion. Since this is my first Establishment case, I expect to follow my original plan of filing a separate opinion to show where I stand on some, though hardly all, of the points on which such cases turn." April 15, 1995. Blackmun Papers, Box 586, Folder 6.

²¹⁷ *Lee v. Weisman* 505 US 577, 636 (1992) (Justice Scalia, dissenting – internal references omitted).

²¹⁸ Kennedy's approach reflected both the Legal and Rational Choice Models, while the dissenters in *Lee* fell into the category described by the Attitudinal Model.

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maintaining respect for the beliefs of others and the role of prayer as a social unifier were too important for the dissenters to be sundered on as seemingly inconsequential a foundation as “coercion.” The argument reflected both Scalia’s deep personal religious convictions and his political conservatism that saw nothing wrong in educating America’s children in the moral and religious values of society, especially when no-one could possibly be coerced into participating. The dissenters’ additional criticisms, that the ruling did not comport with history, that there was no meaningful state intervention or involvement, and that *Lemon* should be abandoned, were little more than repetition of arguments made in other cases, albeit in Scalia’s distinctive style. What marked the dissent out was its tone and the biting sarcasm, clearly indicating the depths of the divisions among the Justices and indicating to anyone watching that a majority-in-waiting existed to hand down a different result, if the facts of the case were amenable to one or more of the centrist Justices. The narrowness of Kennedy’s opinion reinforced this perception and made it seem likely that the prayer issue would return to the Court.²¹⁹

As with all the previous prayer cases, *Lee* both supports and challenges the political science models of Court decision making. In his switch of position and constant reference to, and echoes of, *Engel* and *Schempp*, Kennedy’s actions have elements of the Legal Model’s concern for *stare decisis*. The result in *Lee* also supports this. Yet the narrowness of Kennedy’s opinion and its reliance on precedent is also evidence of the situation posited by the Rational Choice Model: the need for bargaining and compromise. Given Kennedy’s past disagreements with Blackmun in particular, the narrow opinion was a necessity to hold the majority.²²⁰ The two concurrences filed also suggest the majority opinion did not go quite far enough in its defence of *Engel* and *Schempp* for Blackmun, Souter, and O’Connor, but presented a basic compromise they could all accept in order to produce a binding decision. Yet neither model explains the position of the dissenters. For Rehnquist, Scalia, and Thomas, in particular, the Attitudinal Model is far more useful. Across all Establishment Clause cases, these three consistently supported greater accommodation between church and state: Scalia’s opinion in *Lee* was a clear statement of disagreement based on the outcome of the case. Thus all three models provide partial explanations for the Court’s activities in this case; consideration of all the issues raised by them helps provide a clearer picture of the meaning and significance of *Lee v. Weisman*.

In the fifteen months between granting *certiorari* and issuing an opinion in *Lee*, the Court had postponed action on every new appeal which raised the issue of interpreting the Establishment

²¹⁹ It soon became clear that *Lee* had not definitively answered the question of student prayer at graduation ceremonies. Lower courts divided on the constitutionality of student-initiated prayer. See *Jones v. Clear Creek Independent School District* 930 F2d 416 (5th Cir., 1991) and *Adler v. Duvall County School Board* 206 F3d 1070 (11th Cir., 2000), 250 F3d 1330 (11th Cir., 2001) (finding such prayers constitutional). But see *Doe v. Santa Fe Independent School District* 930 F2d 806 (5th Cir., 1999), *ACLU of New Jersey v. Black Horse Pike Regional Board of Education* 84 F3d 1471 (3rd Cir., 1996), and *Harris v. Joint School District* 41 F3d 447 (9th Cir., 1994) (holding prayers unconstitutional).

²²⁰ As Kennedy himself noted in his approach to Blackmun.

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Clause. The cases involved issues ranging from the display of a privately owned Hannukah menorah in a city park, the designation of Good Friday as a public holiday, a judge's personal religious invocation at the start of each court session, and the use of religious imagery on town seals. The narrowness of the opinion in *Lee* suggested the Court might be willing to turn to many of these issues to review them with the same fact-based analysis. However, five days after *Lee*, the Court turned down a dozen appeals in such cases, indicating that, for now, the Justices had said all they intended to on the issue.²²¹ But the combination of discussions about *Lee* and the increasing political success of conservative Republicans in a backlash against the first year of the Clinton Administration served to stimulate another round of challenges to the school prayer ban. In a misleading article in the *New York Times* in November 1994, Peter Applebome declared, "Prayer in Public Schools? It's Nothing New For Many."²²² The headline suggested a large-scale flouting of the prayer ban, playing on the fears of many strict separationists. A closer reading of the article, however, indicated that "[m]uch of the activity is private and voluntary and within constitutional guidelines," such as moments of silence or student-initiated lunchtime or after-school activities which did not involve school officials. After a relatively quiet few years, there were a number of high profile debates about school prayer in some states, but, as with earlier periods, the most frequent reaction was compliance.²²³

In a typical election year tactic, Congress had already begun to discuss school prayer again in February 1994, in terms that would have little practical impact but would send a symbolic message, many hoped, to the electorate.²²⁴ Fairly low key and unemotional, what was almost certainly unexpected by Republicans and Democrats alike was that shortly after the election President Clinton hinted at his willingness to work with Congress to pass a constitutional

²²¹ Among others, the Court rejected appeals in *Roberts v. Madigan* 921 F.2d 1047 (10th Cir., 1990) (5th grade teacher in Denver could not keep a Bible on his desk and read it during recess and during students' fifteen minute silent-reading periods); *Village of Crestwood v. Doe* 917 F.2d 1476 (7th Cir., 1990) (Illinois town that sponsored an Italian-language mass as part of an Italian cultural festival violated the Establishment Clause); *Bishop v. Delchamps* 926 F.2d 1066 (11th Cir., 1991) (University of Alabama could warn a professor to stop telling students about his religious beliefs, including the assertion that the human body was designed by God); *Chabad-Lubavitch et al. v. City of Burlington* 936 F.2d 109 (2nd Cir., 1991) (display of a menorah in a public park in Vermont violated the Constitution because it could not be viewed with other, secular, displays); *Cammack et al. v. Waihee* 944 F.2d 466 (9th Cir., 1991) (twelve states' decision to hold Good Friday as a public holiday did not violate the Constitution); *Costangy v. North Carolina Civil Liberties Union* 947 F.2d 1145 (4th Cir., 1991) (judge in Richmond, Virginia could not issue his own religious invocation at the start of each session).

²²² Applebome, P., "Prayer in Public Schools? It's Nothing New For Many," *NYT*, November 22, 1994, A1, 21.

²²³ Challenges included graduation prayers in Illinois, advocated by Pat Robertson; prayer over the school intercom at the beginning of the day in Jackson, Mississippi, where the dismissal of the school principal led to mass student walk-outs, prayer protests, and demonstrations outside the state Capitol; a Virginia attempt to use the Bible to teach grammar, history, and literature; graduation prayers in New Jersey; and moments of silence in Georgia.

²²⁴ In debate on February 3, 1994, Senator Dale Bumpers (D-Ark) argued: "Everyone knows what these amendments are about. They are designed for political embarrassment to everybody who votes no, so the next time their opponents can say, he voted against voluntary prayer in schools." *Cong. Rec.*, 103rd Congress, 2nd Sess., p. 1093.

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amendment guaranteeing a right to prayer in public schools.²²⁵ A week later, saying his earlier remarks had been “over-read,” Clinton stated: “I do not believe that we should have a constitutional amendment to carve out and legalize teacher- or student-led prayer in the classroom,” going on to oppose the leading prayer amendment offered by House Republicans.²²⁶ The episode showed that school prayer continued to have a powerful influence as a symbolic issue that individuals could use to make broader points about their personal beliefs and political positions. Clinton had always been outspoken about his faith, more than many Democratic leaders, and in a vein similar to Carter he sprinkled his speeches with Biblical references and openly discussed his frequent reading of the Bible, a characteristic that certainly did not harm his attempts to break the dominance of conservative Christians over religious discourse in politics. Clinton had also espoused the idea of bipartisanship in politics and the prayer issue provided a powerful opportunity to continue the two. Believing that school prayer could be used to symbolise his commitment to social values, to avoid being outflanked by what Clinton himself called, “this whole values debate” which he predicted would “intensify in the next year,” Clinton adhered to a common view that the majority of the American people perceived it as a moral issue, a view rarely challenged and even more infrequently investigated.²²⁷ When, however, it became clear that the move was not popular with a wide variety of groups with a long history of defending social and moral values, Clinton shifted his position, suggesting it was the symbolism of the amendment rather than the amendment itself to which he was dedicated.²²⁸

Attempts to pass a constitutional amendment on school prayer began again in June 1995 and continued until 1998 when a 224 to 203 vote in the House, 61 votes short of the required two-thirds majority, signalled the end of debate on school prayer for the 105th Congress. There had been nothing remarkable about any of the debates which echoed those of earlier congresses. Whether, like Clinton, the Republicans who pushed for the measure were more interested in making political points with the debates rather than actually achieving passage of the amendment was unclear from the debates themselves but seemed likely in light of events of 1995. In July, President Clinton sought to end debates about religious exercises in public schools, to clarify the misunderstandings and misperceptions that surrounded the school prayer issue, and find a way to ensure balance between the rights of students to express their religious beliefs while in school and the need to abide by the provisions of the Constitution. Critics of the prayer decisions had,

²²⁵ Saying he did not want issues such as school prayer to become the subject of partisan wrangling, Clinton commented, “I want to see what the details are ... I certainly wouldn’t rule it out.” Jehl, D., “Clinton Reaches Out to G.O.P on School Prayer Amendment,” *NYT*, November 16, 1994, A1, 16. See also Devroy, A., “Clinton: ‘There is Room to Pray’ in Public School,” *Washington Post*, November 16, 1994, A1, 4.

²²⁶ Wines, M., “Clinton Backs off School Prayer Proposal,” *NYT*, November 23, 1994, A18.

²²⁷ Quoted in Jehl, D., “Clinton Reaches Out to G.O.P on School Prayer Amendment,” *NYT*, November 16, 1994, A1, 16.

²²⁸ See reactions from groups including the ACLU, People for the American Way, and the United Methodist Church in Devroy, A., “Clinton May Seek Neutral Solution,” *Washington Post*, November 17, 1994, A1, 10; Mangold, C., “Some on Right See Tactical Misstep on School Prayer,” *NYT*, November 19, 1994, A1, 10; Wines, M., “Clinton Backs Off School Prayer Proposal,” *NYT*, November 23, 1994, A18.

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for at least two decades, argued that overreaction by school officials to the Supreme Court's rulings and an oversensitivity to the possibility of lawsuits had led to situations in which the rights of children to hold and express religious beliefs in school had been denied. Attempts in the late 1980s to restore to schools teaching about the role of religion in history and society had been a tacit recognition of exactly this problem, and any number of examples of individual cases could be recited by those who challenged the rulings.²²⁹ Clinton argued that the guidelines, drawn up by Attorney General Janet Reno and Education Secretary Richard Riley, clarified the situation regarding religious expression and activity in the public schools to restore educators' confidence in their own ability to judge what activities were permissible within their schools.²³⁰ The guidelines were comprehensive and put forward in a clear, dispassionate manner, something which had been lacking outside of Supreme Court opinions for several decades. The guidelines drew support from both left and right, as well as neutral organisations of educators. Representatives from the ACLU said they were "heartened" and "guardedly optimistic" about them, while some Republicans and conservative religious groups praised the Administration for recognising discrimination against students, chief counsel for the American Center for Law and Justice, Jay Sekulow, commenting, "it's a clear signal that what we have been talking about has not been issues that we've made up."²³¹ Criticism was also bipartisan. Reverend Lou Sheldon, chairman of the church-lobbying organisation, the Traditional Values Coalition, called Clinton's statements "too little, too late," while a number of secular lobby groups expressed concern that the guidelines would be insufficient to prevent continued abuses of the Establishment Clause.

Additional criticism came from those who accused Clinton of using the guidelines as a tool for electioneering. In light of the amendment fiasco the previous year the criticism was not entirely without foundation, although Clinton's aides made no attempt to disguise that the guidelines and the speeches Clinton gave on the subject were part of an effort to portray Clinton's ideas as a moderate alternative to more extreme positions on the issue.²³² Belief in the importance of religion and respect for church-state separation were evident in Clinton's attempt to clarify church-state relations in the United States, but Clinton also knew that certain political advantages would come from this move. Critics suggested this weakened the guidelines, made them suspect, a conclusion which was remarkably unfair. Clinton's Memorandum was the first attempt by any federal government official to issue detailed guidelines as to what kinds of

²²⁹ See, for example, the lists provided by Senator Helms in debate on January 23, 1992 (*Cong. Rec.*, 102nd Congress, 2nd Sess., pp. 353-4) and July 27, 1994 (*Cong. Rec.*, 103rd Congress, 2nd Sess., pp. 18,223-4).

²³⁰ For the full text of the guidelines, see Appendix D, Document 1. See also Clinton's Memorandum on Religious Expression in the Schools published in *NYT*, July 13, 1995, B10.

²³¹ Purdum, T., "President Defends a Place for Religion in the Schools," *NYT*, July 13, 1995, A1, B10; Holmes, S., "Clinton Defines Religion's Role in US Schools," *NYT*, August 26, 1995, A1, 8; Harris, J., "Clinton Says Schools Can't Bar Religion," *Washington Post*, July 13, 1995, A1, 16.

²³² See "School Prayer Anxieties," *NYT*, July 13, 1995, A22 and Holmes, S., *NYT*, August 26, 1995, A1, 8. For Clinton's own views see Clinton, Bill, *My Life* (London: Hutchinson, 2004), pp. 558-9.

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religious activities public schools could allow under the current law.²³³ In an area that had become so confused, emotional, and dependent on minor differences in fact, any attempt to clarify the situation was laudable. That Clinton may have had ulterior motives for doing so should not serve to negate the importance of the action itself.²³⁴ For the first time a clear, unambiguous statement of permissible and impermissible activities existed that could be accessed by all interested individuals summarising the current position of constitutional law. After decades of uncertainty and political game-playing, the Memorandum sought to remove both from school prayer debates. Regardless of its success the attempt showed willingness to bring political debate closer to that of the Supreme Court.

Conclusion

“We are a religious people ...,” stated Justice Douglas in *Zorach v. Claiborn* in 1952, acknowledging the important place of faith in the lives of many Americans. The school prayer debates of the second half of the twentieth century reflected attempts to reconcile this faith with the constitutional proscription against religious establishments. The role of the Supreme Court was crucial: as chief interpreter of the Constitution, the Court was required to find the balance between these two aspects of American life. Most important in understanding the Court’s role is its consistency: since *Engel* and *Schempp* the Court has refused to allow religious activities of any kind to occur on public school grounds where any suggestion exists of coercion or state or school involvement.²³⁵ Despite personnel changes, a highly vocal opposition, political attacks on the Court, and attempts at amending the Constitution, the Court has remained committed to the principles laid down by the Warren Court in 1962 and 1963. This does not, however, mean the Justices have been unaware of the surrounding political debate in school prayer and related cases. In authorship and structure of opinions, arguments made, and comments deleted from early drafts the Court revealed a sensitivity to the social and political context of its decisions too often overlooked. Clark’s authorship of *Schempp*, the *per curiam* in *Stone*, and myriad comments made about the importance of religion to society, respect for faith, and the contribution of religion to American social and political development were all ways in which the Court responded to the broader debate.²³⁶ The Court does not and cannot exist in a vacuum: the political debate did not affect the outcome of the prayer cases but it did influence the manner in which the Court responded.

²³³ Groups such as the ACLU and Americans United had periodically issued their own guidelines.

²³⁴ Clinton’s personal pride in his achievement was obvious in his memoirs. See Clinton, Bill, p. 661.

²³⁵ Following *Lee*, in 2000 the Court struck down prayer before varsity football games. *Santa Fe Independent School District v. Doe* 530 US 290 (2000). Arguably more than in any other area of Establishment Clause jurisprudence, the Legal Model has most relevance in the debates over school prayer.

²³⁶ As such, the external Rational Choice Model is also helpful in understanding this area of jurisprudence. However, it cannot explain the result in these cases; its influence is in understanding the shape and tone of the opinions handed down.

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Two factors account for the limited impact of political debate on the cases' outcomes. First, unlike state financial aid to religious schools or allowing religious groups to meet on school grounds, both instances where the Court paid particular attention to circumstances and public opinion, prayer and Bible reading were unquestionably religious activities. Religious exercises conducted by the state or state officials was one of the evils the Founding Fathers sought to prevent with the First Amendment and thus the outcome was clear. Whether because the state should remain strictly separate from involvement with religion, as Black argued in *Engel*, or because such activities could not feasibly be opened to all, as Clark argued in *Schempp*, school day religious activities could not be allowed on public school grounds. The principle held even in *Stone* and *Jaffree*: once the challenged activities were defined as religiously-motivated they fell within the boundaries of *Engel* and *Schempp* and suffered a similar fate. Second, the nature of the political debate held little relevance for the constitutional issue of Establishment Clause interpretation. From the earliest reactions to *Engel*, politicians and some religious groups portrayed the issue as being for or against God, in absolutist terms that had little to do with the Court's opinions. Symbolically, prayer was linked with broader issues of morality, values, patriotism, respect, and the place of religious belief in American life outside the school environment, all highly emotive issues that could be used for political gain but which had little relevance to the Court's role of constitutional interpretation. Outside of law reviews and court opinions, prayer in schools became important not for what it was but for what it symbolised. Politicians who wanted to portray themselves as defenders of traditional values, or their opponents as lacking a personal moral code, drew on school prayer as a campaign issue. Challenges were brought by politicians, school officials, and, in rare cases, judges, who claimed they wanted to challenge the Supreme Court, return God to the schools, encourage moral behaviour in students, or just return the US to the God-fearing, religious nation it had been in some glorified past age. Even presidents submitted to the temptation, Reagan most notably, especially at times when he was facing harshest criticism from the Religious Right, but even Clinton used the subject to make overtures to the conservatives dominant in Congress, and then to challenge their electoral power. Thirty years of political debate about school prayer revealed very little that was new or different about its constitutionality but a great deal about the way religion and religious belief was viewed by Americans.

The Supreme Court's prayer cases also show the inner workings of the Court and the institutional factors that play a role in shaping opinions, sometimes to an extent equal to the cases themselves. In each case the personal philosophies and approaches of individual Justices played a role in shaping opinions. Stevens' actions in *Jaffree* to ensure the support of Powell and O'Connor and Kennedy's overtures to Blackmun in *Lee* reveal most clearly the bargaining and compromise that occurs during the opinion writing process, making majority opinions a collective product not an individual one.²³⁷ To a lesser degree, Douglas' position on funding issues, Stewart's concern for questions of free exercise, O'Connor and endorsement, and

²³⁷ This again reveals the usefulness of the Rational Choice Model.

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Rehnquist's interpretation of American history all shaped in some way the opinions handed down by the Court, either by influencing the majority opinion or by viewing it in an alternative light.²³⁸ The true meaning of *Engel*, *Schempp*, *Stone*, *Jaffree*, and *Lee* cannot be fully understood without understanding these institutional and personal factors, factors which clearly shaped the final opinions.

Although public and political opposition to the Court was vocal and passionate, the most common response across the country was compliance. The number of court cases involving instances of direct defiance of the Supreme Court was relatively small; the vast majority involved good-faith attempts to accommodate both community opinion and Establishment Clause jurisprudence. Because *Engel* and *Schempp* laid down broad principles but did not address school-religion interactions outside of prayer and Bible reading further cases challenging new and alternative arrangements were bound to arise. Their existence should, in most instances, be viewed as the working out of the broader implications of *Engel* and *Schempp* and not as open defiance of them. Lower levels of rhetoric and greater concern to identify the key legal principles embodied in the Supreme Court's decisions characterise these cases. In some communities and areas of the country non-compliance was clearly a factor, but such instances were neither as widespread nor influential as has been assumed. The dominant image presented of the Court's prayer cases has been that the Court banned all recognition of religion from public schools and that opposition to these rulings was widespread. Just as the first is wrong, so is the second. Individuals, school boards, courts, and state attorneys general all supported the Supreme Court's rulings in *Engel* and *Schempp*. Non-compliance was clearly a factor in some communities and areas of the country, but such instances were relatively few: the principles established by the Supreme Court in 1962 have largely found support and acceptance and remain the Court's controlling precedent in such cases.

²³⁸ The Attitudinal Model has some value in this area of jurisprudence, but because of the strength of the central legal principles involved in school prayer debates, it is less useful than in other areas of Establishment Clause debate.

Chapter Four: Equal Access

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A group of high school students from similar religious backgrounds wish to meet on a regular basis to share and practice their faith. The most convenient place for them to do so is in the school building that they attend every day. Should the school allow the group to meet before or after the school day or during the lunch break? This and similar questions are raised by the series of cases referred to as “equal access” cases. In the aftermath of the school prayer cases, *Engel v. Vitale* and *Abington School District v. Schempp* in the early 1960s, many came to believe the decisions required the complete absence of religion from public school grounds, either because of the widespread perception that the Court had required complete secularization or because school boards excluded religion for fear of litigation.¹ However, the First Amendment also protects freedom of assembly, freedom of speech, and the free exercise of religion, principles with which the “secularization” theory was in direct conflict. Equal access cases thus raised the question of how these ideas and practices could and should be reconciled. In 1984 Congress passed and President Reagan signed the Equal Access Act, an attempt to provide guidance to school boards about correct and acceptable practices, and to prevent what many saw as infringements of students’ rights perpetuated by misunderstandings of *Engel* and *Schempp*. Although the Act did not end the debate over what constituted equal access it did go some way to correcting the perception that schools were to be entirely free from religion.

With the principles of equal access enshrined in federal legislation and a noticeable lack of controversy surrounding the issue, especially when compared with the reaction to school prayer and school aid cases, questions surround the significance of the Supreme Court’s equal access jurisprudence. The Court established the principle in *Widmar v. Vincent*, a case dealing with university students, and upheld the constitutionality of the Equal Access Act as it applied to high school students in *Board of Education of the Westside Community Schools v. Mergens*: at first glance this is the extent of the significance of equal access jurisprudence. However, familiar divisions on the Court appeared behind the apparent consensus; in fact, the general consensus on results in all but the most recent case makes those divisions clearer.² The interplay of free speech and Establishment concerns in equal access cases also reveals significant aspects of the Justices’ approach to Establishment issues and these cases reveal much about the internal divisions on the Court and help complete our understanding of the Court’s Establishment Clause jurisprudence.

The First Case: *Widmar v. Vincent*

In October 1981, the Supreme Court heard oral argument in *Widmar v. Vincent*, a challenge to the University of Missouri at Kansas City’s (UMKC) regulation prohibiting the use of university buildings or grounds “for purposes of religious worship or religious teaching.” Between 1973 and 1977, Cornerstone, an organisation of evangelical Christian students from various

¹ *Engel v. Vitale* 370 US 421 (1962); *Abington School District v. Schempp* 374 US 203 (1963). See Chapter 3 for discussion of both cases and these interpretations of their implications.

² *Rosenberger v. the Rector and Visitors of the University of Virginia* 515 US 819 (1995). See discussion below.

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denominational backgrounds, had been granted permission to meet in university buildings, as had more than one hundred other political, philosophical, and nonreligious student groups. In 1977, however, their request was denied, the University administration asserting that the requirements of the Establishment Clause mandated the refusal.³ Eleven members of Cornerstone challenged the restriction claiming it violated their rights to equal protection under the Fourteenth Amendment and equally their rights to free exercise of religion and freedom of speech under the First Amendment. The Court, in an 8:1 opinion, agreed, holding, “we are unable to recognise the State’s interest as sufficiently “compelling” to justify content-based discrimination against respondents’ religious speech.”⁴

At first glance *Widmar* raised the difficult issue of how to resolve a clash between competing constitutional rights: the free speech and free exercise of students versus the Establishment Clause prohibition of state involvement with religion. The Court ducked the issue entirely, deciding the case solely on free speech grounds.⁵ The intent to treat *Widmar* as a free speech case was evident early in the opinion: Justice Lewis Powell’s first argument after establishing the case’s history was that the University had created a “forum generally open for use by student groups,” and that having done so, “the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms.”⁶ Drawing on the Court’s cases protecting the free speech rights of students on the grounds of public educational facilities, the State was required to show that the regulation served a compelling state interest and was narrowly drawn to achieve that end.⁷ By beginning in such a way, Powell ensured that his

³ The record reveals no clear reason for the University’s change in policy regarding Cornerstone since the regulation relied on was passed in 1972. Both sides, however, found support in lower federal court cases: *Keegan v. University of Delaware* 349 A.2d 14 (Del., 1975) favoured Cornerstone’s position, *Dittman v. Western Washington University* no. C79-1189V (W.D. Wash., 1980) and *Johnson v. Huntington Beach Union High School District* 68 Cal. App. 3d 1 *cert. denied* 434 US 877 (1977) favoured that of the University.

⁴ *Widmar v. Vincent* 454 US 264, 276 (1981). Although the result was 8:1, with Justice White dissenting, Justice Stevens wrote a separate concurrence in which he agreed with the result but disputed what he saw as unnecessary federal intrusion into the University’s right to make decisions governing the use of its own facilities. For information on *Widmar* and all other equal access cases here discussed, see Appendix A, Table 3.

⁵ *Widmar v. Vincent* 454 US 264, 273 n.13 (1981). Justice Harry Blackmun commented on Justice Powell’s explicit refusal to address the Constitutional clash: “Well, he tightrope walks fairly well.” Justice Harry Blackmun Papers, Box 342, Folder 6 (first draft, November 1981) (hereafter Blackmun Papers).

⁶ *Widmar v. Vincent* 454 US 264, 267 (1981).

⁷ The “public forum” concept was written into constitutional law by Justice Roberts in *Hague v. Committee for Industrial Organisations (CIO)* 307 US 496 (1937) and extended to university campuses in *Cox v. Louisiana* 379 US 563 (1965); *Police Department of Chicago v. Mosely* 408 US 92 (1972); and *Healy v. James* 408 US 169 (1972). However, the Court has allowed for “time, place, and manner” restrictions when public spaces are being used, see *Cox v. New Hampshire* 312 US 569 (1941); *Heffron v. International Society for Krishna Consciousness* 455 US 252 (1981); and *Ward v. Rock Against Racism* 491 US 781 (1989). For Court protection of students’ free speech rights on school grounds see *West Virginia State Board of Education v. Barnette* 319 US 624 (1943) (students may not be required to salute the flag) and *Tinker v. Des Moines* 393 US 503 (1969) (students permitted to wear black armbands in protest against the Vietnam War).

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subsequent argument fell within the framework of free speech analysis, significant in light of the University's Establishment Clause defence in ensuring the case avoided establishing one constitutional protection as more dominant than others.⁸

Despite its free speech foundations, *Widmar* proved significant for Establishment Clause jurisprudence too.⁹ Drawing on the three-part *Lemon* test, the majority held that since the University neither endorsed nor promoted any group, religious or secular, or the ideas they expressed in the forum, there was no unconstitutional purpose behind the policy. The Court also agreed with the Eighth Circuit that simply allowing a religious group access to a broad forum did not entangle the state with religion. Significantly it asserted the University would risk greater entanglement by trying to exclude religion since such exclusion would require a definition of the "religion" to be excluded.¹⁰ Having expressly denied to the state the right to make such judgments about what constituted "religion," most frequently in conscientious-objector cases, forbidding UMKC the right in this instance maintained consistency across the Court's jurisprudence.¹¹ However, it was in the discussion of the effects test that the Court provided most guidance for Establishment Clause analysis of equal access policies. "We are satisfied," Powell wrote, "that any religious benefits of an open forum at UMKC would be "incidental" within the meaning of our cases."¹² First, the University had created a truly open forum and disassociated itself from any views, aims, policies, or ideas expressed there. Second, because the forum was available to a broad range of religious and nonreligious groups, the involvement of the former could not be taken to be a primary benefit to religion and thus did not violate the second prong of the *Lemon* test.¹³ As with the Court's school aid cases, the majority was willing to allow incidental benefits to religion, here the right to participation in a public forum, so long as such benefits were the result of a neutral programme involving a broad range of actors. Although structured as a denial of UMKC's claim that the Establishment Clause provided a compelling interest to justify content-based discrimination in its limited forum, Powell's opinion for the Court in *Widmar* provided a strong case for the constitutionality of equal access programmes so long as they met the criteria discussed.

⁸ See *Widmar v. Vincent* 454 US 264, 272 (1981).

⁹ *Widmar v. Vincent* 454 US 264, 271 (1981).

¹⁰ *Widmar v. Vincent* 454 US 264, 272 n. 11 (1981). For the Eighth Circuit opinion see *Chess v. Widmar* 635 F.2d 1310, 1318 (CA8, 1980). See Leparulo, L., "The Rights of Student Religious Groups Under the First Amendment to Hold Religious Meetings on the Public University Campus," 33 *Rutgers Law Review* 1008, 1039-40 (1980/1).

¹¹ See *US v. Seeger* 380 US 163 (1965) and *Welsh v. United States* 398 US 333 (1970). Also, *US v. Ballard* 322 US 78 (1944) (the truth or falsity of religious beliefs may not be judged by a jury at trial).

¹² *Widmar v. Vincent* 454 US 264, 274 (1981).

¹³ Although Powell narrowed the scope of this later in the opinion: "At least in the absence of empirical evidence that religious groups will dominate UMKC's forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's primary effect". *Widmar v. Vincent* 454 US 264, 275 (1981). Should religious groups constitute a larger proportion of those using the forum, this ruling could be in doubt.

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In December 1981 when the Court handed down *Widmar*, it was a relatively uncontroversial and unremarkable case: under the Free Speech and Free Exercise Clauses the Court had protected the rights of religious groups and individuals before and *Widmar* seemed little different.¹⁴ No one, even the staunchest defenders of strict separation, disputed the right of religious groups and individuals to freedom of speech. Equally, *Widmar* involved university students, who, as adults, the Court had previously recognised were in need of less protection from state coercion or endorsement of religious beliefs than students of a younger age.¹⁵ However, several factors about *Widmar* should be noted. Significantly, the case revealed a high degree of consensus among the Justices. In the Court's most recent school aid case, *Wolman v. Walter* in 1977, the Court had fractured, while in *Stone v. Graham*, the Ten Commandments case heard the year before *Widmar*, the Court had split 5:4.¹⁶ Yet in *Widmar*, Powell commanded a majority of seven with an additional concurrence from Justice John Paul Stevens and the lone dissent from Byron White. In conference, at least five Justices had agreed the case involved freedom of speech and at least three held that the Establishment Clause was of little, or less, relevance to the case.¹⁷ Only White argued that the case raised a conflict between the Religion Clauses of the First Amendment and that the state's concern to comply with the Establishment Clause might justify the restrictions imposed on Cornerstone by UMKC and even he noted in conference that he was "out of line in the Religion cases."¹⁸ Despite such consensus, however, the majority opinion was narrow, announced no sweeping principles, and stuck closely to the specific situation present at UMKC. Powell was forced to accommodate changes to his opinion from Justices Blackmun, Brennan, O'Connor, and Rehnquist, dealing with issues from style and structure to the use of the Free Exercise Clause, in order to secure his majority.¹⁹ Although not unusual, the nature of the changes and the tone of the memos suggests the majority's consensus on the results did not extend to the method for deciding the case. While minor disagreements in *Widmar* that were accommodated by a willing Powell, their existence suggests the narrowness of the opinion was not simply Powell's preference but a necessity to hold the majority. Twice Powell explicitly noted the limited scope of the opinion, reinforced by the majority's refusal to address a potential

¹⁴ See, for example, *Cantwell v. Connecticut* 310 US 296 (1940); *Murdock v. Commonwealth of Pennsylvania* 319 US 105 (1943); and *Martin v. Struthers* 319 US 141 (1943) all dealing with the rights of Jehovah's Witnesses. Also, *Nietmotko v. Maryland* 340 US 268 (1951); *Sherbert v. Verner* 374 US 398 (1963); and *Thomas v. Review Board of Indiana Employment Security Division* 450 US 707 (1981).

¹⁵ See, for example, *Tilton v. Richardson* 403 US 672 (1971). In *Widmar* the Court expressly refused to address the applicability of their ruling to high school students.

¹⁶ See Chapter 2 for discussion of *Wolman* and Chapter 3 for discussion of *Stone*.

¹⁷ Chief Justice Burger and Justices Marshall, Rehnquist, Stevens, and Powell clearly argued for a free speech analysis in conference, while Brennan and O'Connor raised it in conjunction with other issues. Comments regarding Establishment were made by Burger, O'Connor, and Stevens. Blackmun Papers Box 342, Folder 6.

¹⁸ *Widmar v. Vincent* 454 US 264, 282-9 (1981) (Justice White, dissenting); Blackmun Papers Box 342, Folder 6. However, White's argument that religious speech is substantially different from secular speech because of its content, a fact recognised, he claimed, by the Establishment Clause, foreshadowed the debate in *Rosenberger* fourteen years later.

¹⁹ See Blackmun Papers, Box 342, Folder 6. In this, *Widmar* most closely embodies the Rational Choice Model: Powell's willingness to accommodate different views about what the opinion should include ensured a strong majority.

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constitutional clash and the possible applicability to public schools.²⁰ Nothing in the opinion was intended to address situations other than that at issue in *Widmar*: the Justices neither saw nor intended this case to be a new area of jurisprudence. Within two years, however, circumstances conspired to turn *Widmar* into the founding statement of equal access principles.

Congress and the Equal Access Act

In 1982, President Ronald Reagan announced his support for a renewed attempt to overturn the Supreme Court's school prayer rulings by constitutional amendment. Hearings in Congress and debates outside it throughout 1982 and 1983 divided politicians, religious groups, and civil liberties organisations over a range of related issues, including the rights of students to voluntarily assemble for religious purposes.²¹ In February 1983, Senator Jeremiah Denton (R-Ala) proposed "a new approach to the school prayer issue that recognises the reservations that several of my colleagues voiced during the last Congress," when he introduced an equal access bill into the Senate.²² Denton's bill proposed to make it unlawful for schools or school boards to deny student religious groups access to their facilities if those facilities were already available to secular student groups, effectively extending the *Widmar* principle to high school students. By concentrating on groups meeting voluntarily during noncurricular hours, Denton's bill sought to address the two major concerns of school prayer opponents: that the machinery of the school would be used to require participation and that the schools would be perceived as endorsing the religious practice concerned. A second, similar bill was introduced in March 1983 by Senator Mark Hatfield (R-Ore.), a long-time opponent of the school prayer amendment, all but ensuring committee hearings. The following month, Representative Trent Lott (R-Miss) introduced HR.2732 to the House, a bill with similar provisions to those of the two Senate bills, and exhorted the House: "The religious liberties of our children are too important to be neglected by this Congress."²³ Despite House and Senate hearings between April and October 1983 the Senate took no immediate action on the bills and the House defeated the equal access proposal before it on May 15, 1984.²⁴ However, on June 27, 1984, the Senate debated and approved an equal access amendment to a bill to improve the quality of science and maths teaching in public schools. Similar in structure to earlier bills, the wording of the Denton-Hatfield amendment nevertheless

²⁰ *Widmar v. Vincent* 454 US 264, 276 ("We limit the holding to the case before us"), 277 ("The basis for our decision is narrow"), 271 n.10, 273 n.13 (1981).

²¹ See Chapter 3 for further discussion.

²² *Congressional Record*, 98th Congress, 1st Sess., 1983, p. 1645 (hereafter *Cong. Rec.*). The bill was S.425. In April, Denton introduced S.1059, a bill similar to the earlier one except providing recourse to the judicial system rather than a cut off of federal funds in instances of violation as proposed in the earlier bill.

²³ *Cong. Rec.*, 98th Congress, 1st Sess., 1983, p. 9811.

²⁴ Hearings were held by the Senate Committee on the Judiciary on April 28 and August 3, 1983 (hereafter Senate Hearings). House hearings took place on June 16 and October 18-20, 1983, and March 28, 1984 before the Subcommittee on Elementary, Secondary, and Vocational Education (hereafter House Hearings). HR.5345, the version of the bill amended after the committee hearings, was supported in the House 270-151. However, debate was heard under suspension of the rules and a two-thirds majority was required for passage: HR.5345 was eleven votes short.

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reflected concerns raised in both House and Senate hearings and debates.²⁵ The specific wording, however, was never explained, nor was the writing process ever publicly discussed. As Senator Hatfield noted, the bill was a compromise among the various interested groups and individuals, "some kind of coalition" to obtain the most effective bill to remedy "the situation now of having the rights of students violated."²⁶ Passed 88-11 by the Senate, the provision was approved by the House 337-77 on July 25 and signed into law by Reagan the following month.

The irony of the equal access debate was that legislation should have been unnecessary. Truly voluntary student meetings for religious purposes had never been limited by the Supreme Court. In both *Engel* and *Schempp* the majority had stated that the opinions related to school-sponsored or school-organised prayer and Bible reading activities but that students' right to pray individually or in small groups whether before school or in a lunch break was not affected.²⁷ Neither did the Court address the use of school facilities outside of the regular school day and thus had not restricted them. Yet the loudest outcry after *Engel* and *Schempp* had implied that the Court had secularised the schools completely and made any mention of God inside the classroom unconstitutional.²⁸ As the most common message provided by politicians, religious leaders, and the media it was unsurprising that school officials and, equally importantly, parents who might bring expensive lawsuits, should be persuaded that any religious activity on school grounds was constitutionally suspect. Since the Court had not specifically addressed equal access in high schools, lower courts appeared to stand on weak precedent when trying to uphold such policies, particularly in the light of the *Lemon* test and its concern about church-state entanglement. In this respect the problems that equal access supporters claimed the legislation was needed to correct were, in part, caused by the misinformed overreaction of some of the same groups and individuals in 1962 and 1963. As Dr. James Dunn of the Baptist Joint Committee on Public Affairs testified in March 1984:

Religious leaders have failed to educate their people regarding the Court decisions and have failed to do their homework as to the positive, constructive opportunities for religious expression within the law. Reporters have flunked Journalism I by continuing to report that prayer has been banned, as if that were possible. Some politicians have played games with the most sacred aspects of public and private life for gain at the ballot box. Public school officials have been left in a most unfair and untenable position regarding the role of religion in public education.²⁹

In this context, however, congressional debates over equal access provide an insight into the motives of those involved and explain, albeit indirectly, many of the provisions of the Equal

²⁵ For debate see *Cong. Rec.*, 98th Congress, 2nd Sess., 1984, pp. 19,211-52.

²⁶ *Cong. Rec.*, 98th Congress, 2nd Sess., 1984, p. 19,225.

²⁷ See *Engel v. Vitale* 370 US 421, 435-6 (1962) and *Abington School District v. Schempp* 374 US 203, 224-6 (1963).

²⁸ For discussion of this, and of the flaws in the argument, see Chapter 3.

²⁹ House Hearings (1984), p. 35. Traditionally a separationist organisation, the Baptist Joint Committee supported a carefully drawn measure that would ensure equal access for truly voluntary student groups.

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Access Act. The debates also reveal both the similarities between equal access and school prayer issues in particular, and some important differences that ultimately resulted in greater legislative success.

Debates over equal access legislation in the House and Senate committees in 1983 and 1984 revealed many similarities to the debates over school prayer: conservative religious groups, especially those associated with the Religious Right, and individuals sympathetic to their position, supported the legislation, liberal religious groups and secular organisations such as the ACLU opposed it. Advocates asserted the rights of the majority, opponents responded with the danger to dissenting individuals. For many of the former there was little difference between the two issues. The National Association of Evangelicals (NAE), Campus Crusade for Christ, Rutherford Institute, and the Freedom Council, among others, were groups testifying in favour of equal access which had also supported school prayer. It is "a just and creative approach to the school prayer issue," testified Ted Pantaleo for the Freedom Council before raising the spectre of "spiritually hungry students" being denied their views by "a ruthless clawing and deep-seated anti-God conviction ... perpetrated by humanists."³⁰ Carl Perkins (D-Ky), Chair of the House subcommittee, opened his comments by relating his school experience of prayer, concluding, "it's a mighty good habit to open the classroom with a prayer in my view. So I see nothing wrong with it."³¹ Senator Denton (R-Ala), sponsor of S.1059, frequently implied that God had been banished from schoolrooms, and Patrick Monaghan of the Catholic League for Religious and Civil Rights harangued the Supreme Court for every poor decision it had made from *Plessy v. Ferguson* in 1896 and *Lochner v. New York* in 1905 to the prayer decisions of 1962 and 1963.³² Such statements, combined with the rhetoric of the school prayer amendment hearings of 1982 and 1983 gave credence to opponents' fears that equal access might provide the legislative foundation to circumvent *Engel* and *Schempp* that critics of the decisions had previously lacked. The ACLU, People for the American Way, Americans United for the Separation of Church and State (Americans United), the National Education Association (NEA), American Jewish Congress (AJC), Anti-Defamation League, and the Unitarian Universalist Association of Churches, all of whom had actively opposed the prayer amendment, challenged the philosophy and practicality of equal access. Early versions of the bill protected activities "that involve prayer, religious discussion, or silent meditation" and prevented discrimination "against any meeting of students on the basis of the religious content of the speech."³³ Although couched in negative language, opponents feared it could be used as a positive demand for religion on public

³⁰ Senate Hearings, pp. 238, 242-3.

³¹ House Hearings, pp. 5-6. Perkins made similar comments throughout the hearings, making clear his opinion that while equal access was acceptable, there was nothing wrong with school prayer either.

³² House Hearings, pp. 189-97; Senate Hearings pp. 125-30. For Denton's comments, see Senate Hearings pp. 2, 29-30, 68. *Plessy v. Ferguson* 163 US 537 (1896); *Lochner v. New York* 198 US 45 (1905); *Engel v. Vitale* 370 US 421 (1962); *Abington School District v. Schempp* 374 US 203 (1963).

³³ The first version was found in HR.2732 and S.1079, the second in S.815. For the relevant text of the proposed bills and the text of the Equal Access Act as enacted see Appendix E.

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school grounds. Although overstated, Representative Don Edwards' (D-Cal) statement that, "This bill licences, authorizes, encourages, religious services, prayer meetings, revival meetings in high school classrooms," contained a sentiment shared by many of the bill's opponents.³⁴ The parallels between equal access and school prayer debates were thus made explicit by those on both sides of the issue.

A further similarity came with opponents' claims of the danger posed to religion, and particularly students of minority faiths, by equal access legislation.³⁵ One of the most compelling arguments made against school prayer had been that it could not include all; nondenominational prayers offended those with strong faith as watering down their communion with God, while rotating systems of prayers or readings from different religious texts often overlooked those of minority faiths. Equal access raised the problem of schools with limited resources allowing groups with larger numbers to meet, thus favouring the dominant religious groups in a community to the detriment of others. This would not be equal access but distinctly "unequal access" based on majority status.³⁶ This danger was reinforced by a discussion in the House hearings about what schools could do in instances of limited resources that implied schools might be allowed to set minimum numbers of students to qualify a group to use the school facilities.³⁷ While a sensible, pragmatic idea in theory, in practice it might lead to the exclusion of minority faiths. Equally, argued Senator Howard Metzenbaum (D-Ohio), "religious activities at schools would encourage some students to tease and ridicule others who do not attend religious meetings before or after school ... Let us remember that our children are susceptible to peer pressure."³⁸ This presented a danger to all students but particularly those of minority faiths who might be made to feel embarrassed or ashamed of their faith, something the First Amendment was clearly intended to prevent. Just as prayer and Bible reading involved the danger of deliberate or inadvertent favouring of the majority faith in a community, so too might equal access policies in their practical form, argued opponents.

³⁴ *Cong. Rec.*, 98th Congress, 2nd Sess., May 15, 1984, p. 12,216. See also statements by Representatives William Lehman (D-Fl) and Gary Ackerman (D-NY), p. 22,219. Once again politicians proved unable to debate the issue of religion without recourse to rhetoric. While the tone of the hearings was mostly moderate and thoughtful, in the House debates one of the most common arguments made against the bill was that it would allow "cults" in schools. Mentioned by name were the Moonies, Hare Krishnas, Satanists, the Ku Klux Klan, witches, pagans, Charles Manson, and voodoo. See, for example, comments by Representatives John Weber (R-Minn.) p. 12,062; Sala Burton (D-Cal.) p. 12,216; Don Edwards (D-Cal.) p. 20,937; Parren Mitchell (D-Md) p. 12,217; Gary Ackerman (D-NY) p. 22,219. See also Mahon, J.P., "Mergens: Is the Equal Access Issue Settled?" 19 *Journal of Law and Education* 543 (1990). Ackerman further stated: "This bill opens the door so wide that not only prayer but the entire church could be moved inside" (p. 22,219).

³⁵ See, in particular, testimony from Marc Pearl for the AJC, House Hearings, p. 18. Also Senate Hearings, pp. 255-7.

³⁶ "The Unequal Access Bill," *Washington Post*, April 6, 1984 reprinted in *Cong. Rec.*, 98th Congress, 2nd Sess., April 11, 1984, p. 9045.

³⁷ House Hearings, especially pp. 9-11, 85.

³⁸ *Cong. Rec.*, 98th Congress, 2nd Sess., June 27, 1984, p. 19,227. See also testimony from the NEA before the Senate committee, pp. 201-2. But also see discussion below related to Bonnie Bailey's testimony (see n.44 and n.45 and accompanying text).

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Yet vocal as the Religious Right and their supporters were, alone they could not force congressional action on legislation in their favour: the school prayer debates had illustrated that. Successful passage of the Equal Access Act required more than just the support of those dedicated to returning organised prayer to public schools: advocates would need allies among those who had opposed them in earlier debates. Significantly, equal access involved principles on which groups such as the National Council of Churches (NCC) and individuals including Senator Hatfield who had actively opposed Reagan's school prayer amendment could agree with school prayer advocates. Whereas the prayer amendment had involved potential coercion and school officials' participation, a true equal access policy, they argued, would do little more than protect the religious rights of students as guaranteed by the Free Exercise Clause of the First Amendment by allowing religious groups organised and run by students the same access to facilities as schools provided for secular, nonreligious groups. Recognising and accommodating students' wishes to discuss religion and pray together outside of class hours and without school participation did not support or advance religion so much as protect the rights of religious students to express their beliefs.³⁹ If properly adhered to, equal access thus would not violate the Constitution: an argument with which those on both sides of the prayer debate could agree.

Other significant differences separated the equal access debates from those over school prayer. Rhetoric was less fiery, the views of Perkins and Denton were clearly in the minority, and among many participants was a clear concern about the perceived overreaching attempts by schools to abide by *Engel* and *Schempp* that ultimately violated the Free Exercise Clause. Before the Senate Judiciary Committee seven students testified to their personal experiences of school administrators' actions with regard to student religious groups.⁴⁰ Stuart Kennedy, a 9th grade student from College Park, Georgia, discussed how a mini-concert by a performer who told jokes, played instruments, and sang songs, including religious songs, was barred by the school after a challenge by the ACLU, and how after eleven years the Youth for Christ club had been stopped from meeting on school premises after hours.⁴¹ Other instances raised in testimony included: a 4th grade student in Minnesota reprimanded for lowering her head in prayer before a meal; a Boulder policy that two or more students may not sit together for purposes of religious or spiritual discussion; an Indianapolis policy that students may not be picked up at the end of the day by a youth worker or youth pastor; students in Philadelphia reprimanded for sharing a booklet of Bible verses with other students; a Minnesota student told he could not write a research article on the resurrection of Christ; and the refusal of a school newspaper to print a letter from a Christian student challenging the paper's coverage of church-state issues as one-

³⁹ See, in particular, testimony by Dean Kelley on behalf of the NCC, pp. 96-7 and Senator Hatfield, p. 2 (House Hearings (1984)). See also Laycock, D., "Equal Access and Moments of Silence: The Equal Status of Religious Speech By Private Speakers," 81 *Northwestern Law Review* 1 (1986).

⁴⁰ Senate Hearings, pp. 38-83.

⁴¹ Senate Hearings, pp. 56-7.

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sided.⁴² None of these activities, advocates argued, violated the Supreme Court's rulings in *Engel* and *Schempp* since there was no school involvement and all were student-initiated. The frequency with which these and other examples were raised and the tone and manner in which they were discussed made clear that participants' concern was neither entirely about the political benefit they could gain from passage of equal access legislation nor about political point-scoring by embarrassing their opponents, but reflected a genuine concern that the religious rights of students were being abridged.

Evidence that students wished to pray and be involved in Bible clubs or other religious groups was provided by testimony from several students in both House and Senate hearings.⁴³ Quoted most frequently was the testimony of Bonnie Bailey, a graduate of Monterey High School in Lubbock, Texas, and one of the students involved in *Lubbock Independent School District v. Lubbock Civil Liberties Union*, an equal access case from the Fifth Circuit widely criticised throughout the testimony: "I can decide if I want an abortion, or if I want to use contraceptives," she argued, "but I can't decide if I want to come to a meeting to talk about religious matters before or after school."⁴⁴ Although taken by conservative Christians as evidence of the lack of morality in public schools and used by politicians decrying religious discrimination, what Bailey's comment most clearly revealed was the difficulty of the claim that high school students were not sufficiently mature to withstand the pressure that might come with allowing religious groups on campus: students made fundamental decisions about other aspects of their lives and were granted the right to do so, they argued, so why not allow them the choice to attend prayer or Bible clubs outside of school hours so long as no school advocacy or involvement was present? The State must abide by the Establishment Clause and schools and teachers should not dictate or demand a particular belief or practice but, Bailey's statement suggested, concern to avoid this had arguably gone so far as to exclude voluntary student religious activity.⁴⁵

One major reason for such activities by school boards became clear during House and Senate hearings. High school principals C. Luke Thornton and Richard Ocker both noted that they had taken action with regard to student religious clubs without full certainty as to the scope of the law, while several students recalled being told by school officials that while they were sympathetic to the students' wishes, uncertainty as to the law and the potential for lawsuits led to the rejection of

⁴² See Senate Hearings, pp. 38-83, 148-51, 212-3.

⁴³ House Hearings, pp. 35-9; Senate Hearings, pp. 38-83. In fact, no student who opposed equal access testified before either committee: whether this was because none were called or simply that none were willing to testify is unclear from the record.

⁴⁴ Senate Hearings, p.38. She made a similar argument in the House Hearings, see p. 39. *Lubbock Independent School District v. Lubbock Civil Liberties Union* 669 F.2d 1038 (1982) (holding that high school was not a public forum and stating "[w]hile students have First Amendment rights to political speech in public school, sensitive Establishment Clause considerations limit their right to air religious doctrines," at 1048).

⁴⁵ See also testimony of Secretary of Education Terrel Bell, Senate Hearings, pp. 26-32.

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their applications to meet on campus.⁴⁶ “While there are undoubtedly some persons who merely seek loopholes through which they may reassert school-sponsored religious activities, the vast majority of school officials wish to comply with the law but are uncertain as to its current scope of protection of student religious speech,” commented one witness before the Senate committee.⁴⁷ Such claims deserve a degree of scepticism. Suggesting a lack of clarity in the law enables those unhappy with a court decision to argue that the issue needs revisiting in the hope that a new case before a new court might result in a different outcome. Such an approach had been employed in the South as a challenge to the Civil Rights movement and sympathetic Court rulings. Yet the situation revealed strong support for claims of lack of guidance. Shortly before congressional hearings had begun, equal access policies had been rejected as unconstitutional in *Brandon v. Board of Education* and *Lubbock Independent School District v. Lubbock Civil Liberties Union* but upheld in *Bender v. Williamsport Area School District*.⁴⁸ The Supreme Court provided no answer either: equal access had not been addressed in either *Engel* or *Schempp* and in *Widmar* the majority had specifically reserved the question of applicability to high schools and elementary schools. The Court’s refusal to accept *certiorari* in *Lubbock* despite the urging of 24 US Senators as *amici*, left school officials in a perceived grey area of law.⁴⁹ In passing equal access legislation, Congress could provide the guidance and legal foundation required by school officials, administrators, and lawyers and ensure that the rights of religious students were protected.

A further significant difference from the prayer hearings was a tendency among many participants in the equal access debates to avoid absolute statements and a willingness to discuss the potential consequences of equal access legislation. Testimony from groups such as the NCC and the American Lutheran Council not only criticized the proposed legislation but suggested ways in which it might be altered to accommodate their concerns.⁵⁰ The general support for genuine equal access meant there was room for discussion and compromise. For example, the ACLU, AJC, and Americans United forcefully challenged the suggestion that the principles of

⁴⁶ For testimony of Thornton see House Hearings, pp. 39-40. For Ocker see House Hearings, pp. 16-17 and Senate Hearings, pp. 51-5. See also testimony of Bonnie Bailey, Lisa Bender, and Sarah Scanlon, Senate Hearings, pp. 38-50, 62-5.

⁴⁷ L. Buzzard on behalf of the Christian Legal Society and Center for Law and Religious Freedom, Senate Hearings, p. 111.

⁴⁸ *Brandon v. Board of Education* 635 F.2d 971 (2nd Cir., 1980) (holding the Establishment Clause justified the school’s refusal to allow groups to meet and the school did not operate an open forum); *Lubbock Independent School District v. Lubbock Civil Liberties Union* 669 F.2d 1068 (1982) (holding a long history of defiance of the Supreme Court’s prayer rulings indicated an unconstitutional purpose behind the equal access policy); *Bender v. Williamsport Area School District* (M.D.Pa, May 12, 1983, slip op. 82-0697) (equal access did not violate the Establishment Clause).

⁴⁹ Although there is no direct evidence in the House or Senate hearings, school officials’ actions may also have been influenced by concern to avoid expensive lawsuits brought by parents with a misunderstanding of the scope and application of *Engel* and *Schempp*, aided by lawyers looking to challenge the Court’s rulings. Officials may have seen their actions or policies as attempts to avoid both unnecessary expense and the community division that was portrayed as extensive after the prayer cases. Claims of “confusion” were just as likely to have been a cover for such concerns as for attempts to obtain a new ruling from the courts.

⁵⁰ See House Hearings, pp. 95-7 (NCC) and pp. 169-88 (American Lutheran Council).

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Widmar should simply be extended to younger students. The broad range of political and philosophical groups meeting on the UMKC campus was, they argued, a far different situation to that of high schools or elementary schools where clubs were most frequently related to academic or curricular pursuits, were faculty-initiated not student-initiated, often required a staff sponsor, advisor, or monitor, and rarely involved the kinds of subject matter a religious group might discuss.⁵¹ Although lengthy discussions of these issues did not fully resolve all of the problems, the original proposals were modified to ensure the Equal Access Act applied only to high schools, excluding the very youngest students, and statements from participants suggested schools must be careful about the way their extra-curricular activities programmes operated if religious groups were allowed to meet.⁵² A second major change made as a result of congressional hearings involved a provision protecting the “religious content” of speech or “prayer, religious discussion, or silent meditation.” Such language, opponents argued, might give religion a preferred status in a way that violated the Establishment Clause.⁵³ In *Widmar* the Supreme Court had ruled the student group should be allowed to meet because other political and philosophical groups were also present in the forum. Excluding or overlooking this kind of speech might lead school officials to discriminate on grounds other than religion, which should be equally forbidden. The Equal Access Act prohibits discrimination on the grounds of “religious, political, philosophical, or other content” of speech. These discussions and others, including what groups constituted school-related activities and which were extracurricular, how many extracurricular groups were necessary for equal access to become applicable, what kinds of controls schools would maintain over use of their own property, what schools with limited resources could do to avoid violating any equal access legislation, how schools might establish neutral criteria for use of facilities when those resources were limited, and whether equal access would allow outside speakers to address student groups showed a willingness to discuss these broader issues that had often been lacking in the prayer amendment hearings. A greater open-mindedness about equal access legislation permeated the hearings in a way that suggested for most advocates this was not a back door attempt to force religion into schools but a genuine desire to right perceived wrongs committed against some students due to misunderstandings or insufficient information.⁵⁴ Committee

⁵¹ House Hearings, pp. 17-18, 20-1 (AJC), pp. 42-3 (Americans United), pp. 161-3 (ACLU), Senate Hearings, p. 260 (AJC), pp. 87-90 (ACLU).

⁵² See especially House Hearings, pp. 199-220 and testimony of Marc Pearl (AJC), pp. 20-3. Also, testimony of Jack Novick (ACLU), Senate Hearings, pp. 87-92. Although such statements hold no legal significance, they provide an insight into the thinking and intention of those involved in creating the Equal Access Act which is available to anyone wishing to interpret its meaning. Such statements are the type of evidence McNollgast argued could be taken into account when seeking to understand original intent. McNollgast, “Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation,” 57 *Law and Contemporary Problems* 3 (1994). See Chapter One.

⁵³ See especially testimony of Professor Laurence Tribe, House Hearings (1984), pp. 45-52.

⁵⁴ Even the ACLU, one of the staunchest defenders of the Establishment Clause, conceded that on its face the final bill was essentially neutral. Barry Lynn, executive director, wrote: “it is a very significant improvement over earlier proposals, both in its sensitivity to potential establishment clause problems with religious meetings in public schools and its new protections for a variety of non-religious student groups.” Letter to Senator Hatfield reprinted in *Cong. Rec.*, 98th Congress,

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members were willing to listen to and address the concerns of equal access opponents to ensure that such protection was not granted at the expense of religious minorities, the non-religious, and others. In doing so, they ensured a broad base of support that resulted in legislative success.

The Equal Access Act as signed into law by Reagan in August 1984 was not extensively discussed by Congress, either in committee or by the House or Senate. Two interpretations of this relative silence are possible. First, politicians and religious groups had already gained the necessary political capital from the issue as a result of the committee hearings; further debate brought no additional political advantage. Some politicians, Denton for example, used the hearings as a platform to express views they had long held and were mindful of the broader audience they were addressing. But, compared to the prayer hearings, equal access garnered less extensive and less detailed press coverage that might benefit the politicians. The electorate, the broader audience, were thus less likely to be aware of who took which position; those reading the publications by groups or organisations involved in the debate which might contain such detailed information were, most likely, already sympathetic to the position taken by the group and its supporters.⁵⁵ Political grandstanding in equal access hearings brought far less reward than it might have done in prayer hearings. Instead the compromise should be regarded as a desire on the part of interested groups and individuals to find a remedy for the situation discussed before the committees: advocates ensured protection for the right of students to express religious views and participate in religious activities, opponents ensured the correct safeguards were in place to protect minority groups, ensured activities remained voluntary, and limited the involvement of school officials. Comparison of the wording of the Act to the concerns raised in committee suggests the former was significantly influenced by the latter. The compromise engineered by Hatfield and Denton thus brought concrete results for all involved in the debate, results far more politically beneficial than simple speechmaking. While for a limited few equal access was about political point-scoring in the same manner as school prayer, the significant differences in tone, rhetoric levels, and detailed discussion before the committees revealed a genuine concern for the rights of students and a perceived need for greater clarity about the scope and application of *Engel* and *Schempp*. Agreement on these issues allowed for the assembling of a broad coalition of groups and individuals which resulted in the legislative success denied to the smaller, more divisive group advocating school prayer.

2nd Sess., June 27, 1984, p. 19,232. Although not supporting the bill, and reserving the right to challenge specific applications of it, the ACLU did not actively oppose the Equal Access Act.

⁵⁵ As such, compromise might lead to more criticism, not less, as those with strong views on equal access might interpret compromise as "selling out."

The Court United and Divided

Although Congress had extended students' right of equal access to school facilities, the practical consequences of that decision had not been fully discussed.⁵⁶ It thus seemed likely that the issue would, in some form, return to the courts for clarification. In January 1990 the Supreme Court heard oral argument in *Board of Education of the Westside Community Schools v. Mergens*, a challenge to the constitutionality of the Equal Access Act and its applicability to Westside High School.⁵⁷ In January 1985, Bridget Mergens had requested permission from her high school principal to form a Christian club for students to read and discuss the Bible, have fellowship, and pray together. Membership would be voluntary and open to all students regardless of religious affiliation. The principal and the school superintendent denied the request on the grounds that it would violate the Establishment Clause. In response to Mergens' claim that the denial violated the Equal Access Act, school officials held that it did not apply to Westside High School because it did not operate a limited open forum as defined by the Act. They further asserted that even if the school did operate such a forum, the Equal Access Act violated the Establishment Clause and thus any action in compliance with it would be similarly violative. The case thus raised two key questions: whether the Equal Access Act was, in fact, constitutional, and what exactly was meant by a limited public forum.

Mergens revealed that the divisions on the Court over school aid were also present in other areas of Establishment Clause jurisprudence. Eight Justices agreed that the Equal Access Act applied to Westside High School but only six agreed that the Act did not violate the Establishment Clause.⁵⁸ Of the six, Justices Anthony Kennedy and Antonin Scalia objected to O'Connor's use of the *Lemon* and endorsement tests in her opinion for the Court and offered their own reasoning for constitutionality, leaving O'Connor to speak for a plurality of four. Justices Thurgood Marshall and William Brennan concluded that while the Act as applied to Westside *could* withstand Establishment Clause scrutiny it would depend on the totality of the circumstances, while Stevens in dissent argued that it was unnecessary to address the issue of constitutionality at all since, in his view, Westside had not created a limited open forum and so the Act did not apply. Consequently, although the result in *Mergens* affirmed the

⁵⁶ Not least that in the twelve states of the Second, Third, Fifth, and Eleventh Circuits, school districts ran the risk of violating court orders if they attempted to implement the statute. See n. 48 for cases, plus *Nartowicz v. Clayton County School District* 736 F2d. 646 (11th Cir., 1984).

⁵⁷ *Board of Education of the Westside Community Schools v. Mergens* 496 US 226 (1990). This was not the first case to challenge the constitutionality of the Act. In 1986 the Court heard argument in *Bender v. Williamsport* 475 US 534 (1986) but ultimately rejected the case for lack of standing, never reaching the substantive issues raised.

⁵⁸ O'Connor, Rehnquist, White, and Blackmun formed the plurality in favour of constitutionality, joined in concurrence by Kennedy and Scalia. Marshall and Brennan agreed the Act could be constitutional within certain limits. In dissent, Stevens addressed the issue briefly but asserted that as he decided the case on statutory grounds it was unnecessary to reach the constitutional issue. For the argument that the Act violates the Constitution see Green, S., "The Misnomer of Equality Under the Equal Access Act," 14 *Vermont Law Review* 369 (1989/90).

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constitutionality of the Equal Access Act and allowed *Mergens* and others to establish their religious club, it did so on very narrow grounds and without a clear foundation.⁵⁹ Although the agreement on the result reflected a continuation of the consensus in *Widmar*, the divisions seen in other Establishment cases as to the reasoning and tests were far more visible.

In assessing the constitutionality of the Equal Access Act, O'Connor drew heavily on the *Lemon* test. Although her finding of a secular purpose was relatively uncontroversial, O'Connor's interpretation of "effect" divided the Court. "We think that secondary school students are mature enough and likely to understand that a school does not *endorse or support* student speech that it merely permits on a non-discriminatory basis," she argued.⁶⁰ The principle made sense but in approaching the issue this way O'Connor substituted her preferred "endorsement" test for the more traditional effects analysis which garnered a sharp response from Kennedy and Scalia. "The word endorsement," Kennedy wrote, "has insufficient content to be dispositive ... [and] its literal application may result in neutrality in name but hostility in fact when the question is the government's proper relation to those who express some religious preference."⁶¹ The better test would be whether the benefit provided was direct or indirect and whether there was present any element of coercion to participate, Kennedy asserted. In using these criteria Kennedy avoided explicit use of the *Lemon* test of which he had previously been so critical, but drew on the criteria that had developed in the school aid cases: since the Equal Access Act coerced no-one into participating in religious activities and any benefit to religion was incidental, Kennedy agreed with O'Connor that it did not violate the Establishment Clause. This division between the plurality and Kennedy and Scalia over the proper way to analyse the effect of a challenged programme added further confusion to the debate over the *Lemon* test and limited the guidance *Mergens* provided to those in similar situations. Equally, the division further underscored what was becoming clear in the school aid cases: the battle on the Court was not simply between the separationists and those favouring accommodation but was also a battle over the correct way to analyse attempts at accommodation.

Justice Marshall's opinion, concurring in judgment, also revealed the limits to the consensus on equal access that had been present in *Widmar*. Both Marshall and Brennan, who joined the opinion, had been long-standing defenders of the separationist position on the Court: Marshall's concern, similar to Stevens in dissent, was that when a school has a religious club but no other political or ideological organisations students may be led to believe that the school endorses the group and its views, especially if other student groups are supported by the school. In *Widmar* the presence of a broad range of political and ideological organisations made it unlikely that any

⁵⁹ The vote on constitutionality was 6:2:1 with Justices Marshall and Brennan concurring only in the result and Justice Stevens in dissent; on applicability the vote was 8:1, again with Stevens in dissent.

⁶⁰ *Board of Education of the Westside Community Schools v. Mergens* 496 US 226, 250 (1990). See also Laycock, D., pp. 15-9.

⁶¹ *Board of Education of the Westside Community Schools v. Mergens* 496 US 226, 261 (1990) (Justice Kennedy, with Justice Scalia, concurring in part and in judgment).

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implication of support for a single group would be perceived; in a school where the religious group is the only such group that may not be the case.⁶² “Westside must redefine its relationship to its club program,” argued Marshall, to ensure that the school did not inadvertently imply support for the religious group the Equal Access Act allowed to meet.⁶³ Marshall’s opinion reflected his position on church-state issues: genuine equal access did not support or hinder religion and religious groups but it should not be used as a cover for allowing religion in public schools or other unconstitutional benefits. If such aid was provided, the activity would be unconstitutional. With no clear majority for any approach to Establishment Clause analysis of the Equal Access Act, Marshall’s opinion provided an additional perspective to consider, one far narrower than that of either the plurality or Kennedy’s concurrence.

The second issue raised in *Mergens*, the applicability of the Act to Westside High School, illustrated the accommodationists’ growing influence on the Court. Outlining the provisions of the Act, O’Connor noted the key phrase in assessing applicability was “noncurriculum related student group” and its meaning. “The difficult question,” she wrote, “is the degree of “unrelatedness to the curriculum” required for the group to be considered “noncurriculum related.”⁶⁴ The ambiguity of the phrase itself and the lack of specific guidance provided by congressional debate made the task more difficult. However, analysis of congressional discussion revealed for O’Connor that “the Act was intended to address perceived widespread discrimination against religious speech in public schools.”⁶⁵ The breadth of this aim, combined with Congress’ “intent to provide a low threshold for triggering the Act’s requirements,” led the majority to conclude that the term noncurriculum related student group “is best interpreted broadly to mean any student group that does not *directly* relate to the body of courses offered by the school.”⁶⁶ In conference and in dissent, Justice Stevens offered an alternative definition. Stevens’ main concern was that the implication of the majority’s definition might force schools to open to religious clubs simply because they allowed a chess club or scuba diving club, groups “no more controversial than a grilled cheese sandwich.”⁶⁷ Advocacy groups, whether religious, political, or philosophical, he suggested, were substantially different to activities groups most

⁶² “Thus the underlying difference between this case and *Widmar* is not that college and high school students have varying capacities to perceive the subtle differences between toleration and endorsement, but rather that the University of Missouri and Westside actually choose to define their respective missions in different ways.” *Board of Education of the Westside Community Schools v. Mergens* 496 US 226, 267 (1990) (Justice Marshall, with Justice Brennan, concurring in judgment).

⁶³ A school disclaimer of support for any student groups allowed to meet has been argued as sufficient to overcome students’ misperceptions of school policy by several commentators. See, for example, Laycock, D.; Grossman, T., “The Constitutionality of Student Initiated Religious Meetings on Public School Grounds,” 50 *University of Cincinnati Law Review* 740 (1981).

⁶⁴ *Board of Education of the Westside Community Schools v. Mergens* 496 US 226, 237 (1990). See Laycock, D., pp. 36-41.

⁶⁵ *Board of Education of the Westside Community Schools v. Mergens* 496 US 226, 239 (1990).

⁶⁶ *Board of Education of the Westside Community Schools v. Mergens* 496 US 226, 240, 239 (1990) (emphasis in original).

⁶⁷ *Board of Education of the Westside Community Schools v. Mergens* 496 US 226, 276 (1990) (Justice Stevens, dissenting).

commonly found in the nation's high schools: to suggest that the presence of such noncontroversial groups would require schools automatically to allow similar access to more controversial groups not only removed the traditional authority of schools to manage their own facilities but was blatantly absurd. A better understanding of the phrase, he argued, would be if a group "has as its purpose (or part of its purpose) the advocacy of partisan theological, political, or ethical views," understanding "noncurriculum" to mean "either subjects that are "not a part of the current curriculum" or the subjects "that cannot properly be included in a public school curriculum"."⁶⁸ For Stevens, the category of organisations about which the Court was concerned was far narrower than for the majority.

The Court opinion and Stevens' dissent proposed alternative definitions of the Equal Access Act: a broad interpretation which followed legislative intent or a narrower version concerned more with the pragmatic implications of the language used. In following the latter, Stevens returned to the concerns about schools' control over their own property that he had expressed in *Widmar* nearly a decade earlier.⁶⁹ In following the former, O'Connor and the majority deferred to legislative intent and took a position more compatible with other Establishment Clause cases than that of Stevens. In *Witters v. Washington Department of Services for the Blind* in 1986, the majority had allowed a disabled student to use federal disability grants to attend a seminary because the aid was neutral and not provided on the basis of religious criteria, a trend continued in *Zobrest v. Catalina Hills Independent School District* in 1993, three years after *Mergens*.⁷⁰ In *Mergens*, O'Connor's broader definition of "noncurriculum related" remained facially neutral and avoided religious criteria while ensuring the law applied broadly, as Congress had intended. By standing in contrast, Stevens' dissent more clearly highlighted the majority's position of accommodating religion and religious belief so long as it could be done on a neutral basis, without unconstitutionally favouring the religious over the nonreligious.⁷¹ The result in *Mergens* was that because the school allowed, among others, a chess club and a scuba diving club to meet on campus they had created a limited public forum and therefore could not, according to the majority, deny access to a religious group. However, while the result in *Mergens* was clear, the route to that result remained debatable.

⁶⁸ *Board of Education of the Westside Community Schools v. Mergens* 496 US 226, 276, 291 (1990) (Justice Stevens, dissenting).

⁶⁹ But see O'Connor's comment at 496 US 226, 241 (1990): "Congress clearly sought to prohibit schools from discriminating on the basis of the content of a student group's speech, and that obligation is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups."

⁷⁰ *Witters v. Washington Department of Service for the Blind* 474 US 481 (1986); *Zobrest v. Catalina Hills School District* 509 US 1 (1993) (sign language interpreter for deaf student attending religious school).

⁷¹ The need to ensure religion was not favoured was one of the biggest concerns of the concurrence by Marshall and Brennan, see 496 US 226, 262-70 (1990) (Justice Marshall, with Justice Brennan, concurring).

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Similar divisions wracked the Court two years later in *Lamb's Chapel v. Center Moriches Union Free School District*.⁷² Lamb's Chapel, an evangelical church, applied twice to the school district for permission to show a six-part film dealing with family and child-rearing issues from a religious perspective. In both instances permission was denied on the grounds that the film "appear[s] to be church related."⁷³ The Court found little difficulty in holding that the denial violated the free speech rights of Lamb's Chapel. Finding no "indication in the record before us that the application to exhibit the particular film series involved here was, or would have been, denied for any reason other than the fact that the presentation would have been from a religious perspective," Justice Byron White for the Court held this was viewpoint discrimination in a vein similar to that in *Widmar*. The Court agreed that the school district could maintain control over the way in which its property was used but only if "the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."⁷⁴ Since the school's facilities had been used in the past for discussions of family and child-rearing issues the only ground for the denial was the religious nature of the film which amounted to unacceptable viewpoint discrimination, an argument concurred in by all nine Justices. The Court's decision was extremely narrow and intended to apply only to the specific factual circumstances in Center Moriches: the opinion had little value as a guide for other equal access cases. However, the significance of *Lamb's Chapel* lay less in its result than in what the opinions revealed about the battle within the Court over the proper grounds for deciding Establishment Clause cases.⁷⁵

The division occurred over two different but related issues. The first was the *Lemon* test. White mentioned *Lemon* only briefly near the end of his opinion when discussing why allowing Lamb's Chapel's film showing did not violate the Establishment Clause. There was no lengthy discussion of the test or its specific application to the case under discussion. However, even this brief reference was enough to upset Justices Scalia and Thomas, both of whom had called for the abandonment of the test. In characteristically sharp language, Scalia commented:

Like some ghoul in a late night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District ... The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will ... Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.⁷⁶

⁷² *Lamb's Chapel v. Center Moriches Union Free School District* 508 US 384 (1993) (hereafter *Lamb's Chapel v. Center Moriches* ...).

⁷³ *Lamb's Chapel v. Center Moriches* ... 508 US 384, 389 (1993).

⁷⁴ *Lamb's Chapel v. Center Moriches* ... 508 US 384, 393-4, 392-3 (1993).

⁷⁵ In fact, since the case was ostensibly decided on free speech grounds the result alone has little value for a study of the Establishment Clause.

⁷⁶ *Lamb's Chapel v. Center Moriches* ... 508 US 384, 398-9 (1993) (Justice Scalia, with Justice Thomas, concurring in judgment). White's response to Scalia in footnote 7 read: "While we are somewhat diverted by Justice Scalia's evening at the cinema ... we return to the reality that there

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Scalia's comments and the response they engendered from White were simply a new exchange in a long battle. For several years the *Lemon* test had withstood increasing criticism from legal scholars and Supreme Court Justices, including Kennedy, O'Connor, Rehnquist, Scalia, and Thomas. The year before *Lamb's Chapel* in *Lee v. Weisman*, Kennedy had completely ignored the *Lemon* test when holding prayers at high school graduation ceremonies unconstitutional, leading many to proclaim the final demise of the test.⁷⁷ White's passing mention of *Lemon* and Scalia's response showed that the debate over the three-part test was not settled but remained a central part of the Court's jurisprudence and that *Lemon* remained a valid, but controversial, precedent.

The second debate concerned Justice Scalia's assertion that the Establishment Clause prevents only government favouritism of a single group or denomination, not government favouritism of religion more broadly. The Court stated: "Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or the Church would have been no more than incidental."⁷⁸ The implication of this statement was that to pass constitutional muster, a statute must neither provide direct benefits to nor involve government endorsement of religion, both with precedent in the Court's earlier Establishment cases. This position limited more strictly the kinds of relationship between church and state that could be deemed constitutional than Scalia's accommodationist stance, with which Thomas and Kennedy were both broadly sympathetic. In the concurrences filed, both Kennedy and Scalia noted their disagreement with the Court with brief discussions of their reasoning. Their brevity, however, concealed a much deeper disagreement which had sparked a sharp exchange between Justices Scalia and Stevens during opinion writing.⁷⁹ The division was crucial to Establishment Clause interpretation. White's analysis recognised, as the Court had before, that church and state were likely to interact, and sought to ensure that such contact was within acceptable limits; Scalia's position suggested

is a proper way to inter an established decision and *Lemon*, however frightening it may be to some has not been overruled." (at 395).

⁷⁷ See Chapter 2 for discussion of criticism of *Lemon*, but see Chapter 3 for discussion of Kennedy's reasons for omitting the test from *Lee v. Weisman* 505 US 577 (1992).

⁷⁸ *Lamb's Chapel v. Center Moriches ...* 508 US 384, 395 (1993).

⁷⁹ Scalia wrote to White on May 6, 1993: "I could not disagree more with John's [Stevens] assertion that it is "settled law" that the endorsement of "religion in general" violates the Establishment Clause. Old dicta may say that, but recent cases hold to the contrary." Stevens replied to Scalia the same day: "You may not agree with the reasoning in *Wallace v. Jaffree ...* (1985) but I do not think it is fairly characterised as "old dicta"." Blackmun Papers, Box 618, Folder 5. The significance of the exchange was brought to the attention of Justice Blackmun by his law clerk who wrote: "I had not thought it important for you to join the fray, but Justice Souter's clerk asked me to convey to you Justice Souter's concern that Justice White may give in to the Scalia/Thomas/Kennedy position. Your joinder would give Justice White a court and make him far less likely to accept changes." Similar concerns had clearly been expressed to Justice O'Connor as on May 10 both she and Blackmun wrote to White expressing support for the existing language, even though O'Connor had already joined the majority opinion. This gave White the majority he needed.

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that the only limitation on the relationship should be the favouring of one religious group over another. White's approach reflected the balancing of concerns seen in earlier cases; Scalia's approach suggested that if at some future point he found a sympathetic majority the Court's Establishment Clause jurisprudence would become far more accommodationist. This debate over what Kennedy referred to as "a subsidiary point," in the context of *Lamb's Chapel*, as well as the more public discussion about *Lemon*, suggested White's opinion was drawn narrowly to avoid exactly this disagreement, not simply to avoid making sweeping statements on equal access. Equally, this disagreement on method clashed with the broad consensus on the result in the case unlike the school aid cases in which the Justices were divided over both. In school aid cases these divisions had been apparent for some time, in equal access cases however, the disagreement had more often been obscured by the consensus on the result and by the Court's tendency to address equal access cases on free speech rather than Establishment grounds. The consensus on results was thus built on tenuous foundations. A case that raised a clearer conflict between the guarantees of the First Amendment might shatter the Court so that no single view could command a majority, as seen in the school aid cases of the early Burger Court.

Mergens and *Lamb's Chapel* provide a challenge for models of Court behaviour since elements of all three appear to be present. In both cases, the majority opinions made substantial use of precedent: O'Connor used *Lemon*, *Witters*, and *Zobrest* in *Mergens*, while White's opinion in *Lamb's Chapel* was closely tied to *Widmar*. In addition, O'Connor's use of congressional debates to determine the meaning of "noncurriculum-related student group" is similar to McNollgast's theory for determining original intent.⁸⁰ At first glance, then, the Legal Model appears to be of use in these cases. However, the divisions within the Court over *Lemon* and over which precedents were most useful echo in the Attitudinal Model. Brennan and Marshall's reluctance to endorse generally equal access in *Mergens* and Stevens' rejection of congressional debates in defining the student groups involved reflected their preference for separationist decisions, as Scalia's discussion in *Lamb's Chapel* of government favouritism reflected his accommodationism. In both cases the debates reveal the differences of opinion between separationists, moderate accommodationists such as O'Connor, and determined accommodationists such as Scalia, Thomas, and Rehnquist: a clear illustration of the Attitudinal Model. Yet the broad agreement on the results in these cases, despite deep divisions over the method for reaching them, suggests a degree of bargaining and compromise that are central to the Rational Choice Model. While Attitudinalists would challenge the use of precedent as merely rhetorical cover for personal policy making, in *Mergens* and *Lamb's Chapel* it appears more as a place of compromise, the narrowest grounds, or possibly the only grounds, on which all could agree in order to get the "right" result. As Rational Choice suggests, the need to gain a majority to render a decision forces sometimes tenuous alliances, a description clearly applicable to both cases. Thus, once again, these Establishment cases provide support for all three models of Court behaviour but also simultaneously challenge them.

⁸⁰ See McNollgast, "Legislative Intent ...".

A Clash of Principles? Speech or Money

Such a case reached the Court in its 1994 Term. The University of Virginia (UVa) operated a Student Activities Fund (SAF) paid into by all students through a mandatory \$14 per semester fee which could be accessed by a variety of student groups to fund their activities. Wide Awake Productions (WAP), a Christian group operating at the university, applied to the SAF for funds to pay an outside printer for the cost of printing their newspaper, *Wide Awake: A Christian Perspective at the University of Virginia*. Their application was refused on the ground that WAP's newspaper "primarily promotes or manifests a particular belief in or about a deity or ultimate reality" as prohibited by the SAF guidelines. WAP challenged the refusal of funds as a denial of their right to free speech, contending that as other student newspapers were funded, denying similar resources to *Wide Awake* discriminated against them based solely on their point of view. UVa contended that funding such a religious newspaper was forbidden by their existing guidelines and by the requirements of the Establishment Clause. Although the District Court and the Fourth Circuit disagreed over the presence of viewpoint discrimination, both agreed that the Establishment Clause provided a reasonable foundation for the University's denial of funds to WAP.⁸¹ In *Rosenberger v. the Rector and Visitors of the University of Virginia*, the Supreme Court in a 5:4 decision disagreed.⁸² In an opinion based heavily on freedom of speech rather than Establishment grounds, Justice Anthony Kennedy for the Court held, "it was not necessary for the University to deny eligibility to student publications because of their viewpoint. The neutrality commanded of the State by the separate clauses of the 1st Amendment was compromised by the University's course of action."⁸³

Rosenberger represents a microcosm of the Establishment Clause debate as it stood in the mid-1990s. The case presented the Court with a dilemma similar to that sidestepped in *Widmar* fourteen years earlier: the clash of rights enumerated in the First Amendment. Free speech analysis places the burden of proof on those wishing to restrict the speech, Establishment analysis places that burden on those wishing to speak or receive funds: one is arguably more permissive, the other more restrictive, and in the context of *Rosenberger* represented opposite approaches.⁸⁴ The approaches taken by the majority and the dissent revealed the growing accommodationist-separationist divide on the Rehnquist Court that had been increasingly evident

⁸¹ See 795 F.Supp. 175, 181-2 (WD Va, 1992) (District Court) and 18 F.3d 269, 279-81 (1994) (Fourth Circuit). For early speculation on how such a case might be handled see Howarth, D., and W. Connell, "Students' Rights to Organise and Meet for Religious Purposes in the University Context," 16 *Valparaiso Law Review* 103, 141-3 (1981).

⁸² *Rosenberger v. the Rector and Visitors of the University of Virginia* 515 US 819 (1995) (hereafter *Rosenberger v. ...University of Virginia*).

⁸³ *Rosenberger v. ...University of Virginia* 515 US 819, 845 (1995).

⁸⁴ However, of the four filed opinions in the case, only Justice O'Connor in concurrence accepted that *Rosenberger* represented such a clash, arguably making hers the stronger, and more honest, of the opinions. See *Rosenberger v. ...University of Virginia* 515 US 819, 847 (1995) (Justice O'Connor, concurring).

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in school aid cases: Kennedy, Rehnquist, Scalia, and Thomas in the former, Breyer, Ginsburg, Stevens, and Souter in the latter, with O'Connor in the centre.⁸⁵

Kennedy's opinion for the majority took a clearly accommodationist approach. By concentrating on the free speech approach of earlier equal access cases despite the clear involvement of a financial issue, Kennedy chose the more permissive standard of review, placing the burden of proof on UVa to show why WAP should be excluded from access to the SAF. While the University, or any forum moderator, could legitimately restrict the topics of acceptable discussion within the forum to maintain its intent and scope, the University could not prevent an individual or group discussing a permitted topic from a particular perspective. Because UVa did not restrict religion as a subject matter it could not prevent discussion of other topics from a religious perspective.⁸⁶ Ignoring the dissent's claim that *Wide Awake* did not teach about religion so much as teach religious precepts, Kennedy made one of the most sweeping claims found in the Court's Establishment Clause jurisprudence: "Vital First Amendment speech principles are at stake here," he argued, suggesting UVa's actions amounted to government censorship of speech with a "chilling effect" on individual thought and expression. Such an approach, he suggested, would lead to the exclusion of articles by hypothetical student contributors Plato, Spinoza, Descartes, Marx, Bertrand Russell, and Sartre.⁸⁷ Overstating the case, Kennedy's opinion sought to make UVa's decision seem like an overreaction based on misunderstood principles and the Court's approach appear as a reasonable reaction to the facts of the case. As Black in *Everson v. Board of Education* sought to distinguish the New Jersey bus statute from eighteenth century meanings of establishment, Kennedy sought to distinguish the protection of WAP's speech from Establishment Clause issues. Such obvious overstatement served only to weaken the impact of the argument and detract from the briefer Establishment Clause arguments put forward later in the opinion.

Central to the Court's rejection of UVa's position was the breadth of the programme and the intent behind it, arguments familiar from *Witters* and *Zobrest*.⁸⁸ Since a wide spectrum of groups used the University's facilities, including the SAF, UVa could not be considered to favour *Wide Awake* by granting it funds on the same basis as others.⁸⁹ Equally important to the analysis was

⁸⁵ *Rosenberger* is also a clear example of the implications of the Attitudinal Model. In this case, the accommodationists and the separationists divided clearly and the accommodationists, with greater numbers, were successful. This is exactly the situation the Attitudinal Model describes.

⁸⁶ *Rosenberger v. ...University of Virginia* 515 US 819, 830-2 (1995). Kennedy's approach had implications for the Court's free speech jurisprudence that are beyond the scope of this inquiry. For an introduction see Waring, R., "Wide Awake or Half Asleep? Revelations from Judicial Tailings Found in *Rosenberger v. University of Virginia*," 17 *Northern Illinois University Law Review* 223 (1997).

⁸⁷ *Rosenberger v. ...University of Virginia* 515 US 819, 835, 838-9 (1995). This chapter takes no position on the argument over whether *Wide Awake* involved discussions of religion or the teaching of its precepts. A copy of the first issue of the magazine, reprinted from *US Records and Briefs* 515 US 819 (1995) is included in Appendix F.

⁸⁸ See Chapter 2.

⁸⁹ *Rosenberger v. ...University of Virginia* 515 US 819, 842 (1995).

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the similarly familiar argument that WAP received an indirect benefit, and a non-financial one. Since SAF funds went directly to the printer and not WAP, the majority claimed, the net effect was no different to allowing the group to use the University's printers to produce the newspaper themselves. Thus SAF was no different in principle to the school hall at issue in *Lamb's Chapel*.⁹⁰ Derided by the dissenters, the majority's focus on indirect benefits and facially neutral eligibility criteria restated the themes dominant in the Court's school aid analysis that two years after *Rosenberger* would result in *Agostini v. Felton*.⁹¹

Why did Kennedy choose to emphasise the speech elements if the Establishment arguments alone were sufficient to defend the majority's decision? First, it drew attention away from the financial issue, the fact that the forum concerned was not a hall, street, or park, but a fund to which contribution was mandatory. The SAF issue placed the benefit far closer to that ruled unconstitutional by the Court in school aid cases and made the Establishment argument more complicated than it had been in equal access cases; Kennedy's approach simply ignored the issue and thus sidestepped the problem.⁹² Second, because of the speech element implicit in equal access analysis the burden of proof had always rested more heavily on those denying the aid or use of facilities, providing greater opportunity for religious groups. This made it easier to achieve a more accommodationist result without dealing directly with the implications for school aid cases, something, given O'Connor's status as a swing vote, Kennedy may not have had five votes to achieve.

This, however, did not stop the dissenters discussing the implications in an opinion, written by Justice David Souter, firmly rooted in separationist principles that would have been familiar to the *Everson* dissenters in 1947. For Souter, Stevens, Ginsburg, and Breyer, this was clearly an Establishment case: it involved the transfer of money to a religious group espousing a clearly religious message:

The subject is not the discourse of the scholar's study or the seminar room, but of the evangelist's mission station and the pulpit. It is nothing other than the preaching of the word, which (along with the sacraments) is what most branches of Christianity offer those called to the religious life. Using public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money.⁹³

⁹⁰ *Rosenberger v. ...University of Virginia* 515 US 819, 840, 842-4 (1995).

⁹¹ *Agostini v. Felton* 521 US 203 (1997) (upholding remedial education services to religious school students on religious school grounds).

⁹² It also made it possible for the Court to sidestep, again, the issue of a clash between First Amendment principles by focussing on one to the exclusion of the other. See Bycroft, H., "Ready - Aim - Fire! The Supreme Court Continues its Assault on the Wall of Separation in *Rosenberger*," 31 *Tulsa Law Journal* 533 (1996) (criticising this approach).

⁹³ *Rosenberger v. ...University of Virginia* 515 US 819, 868 (1995) (Justice Souter *et al*, dissenting). The distinction between secular speech and religious speech had earlier been raised by White in dissent in *Widmar*.

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Wide Awake was a religious magazine, the SAF was public money controlled by the University, thus under the Court's Establishment Clause jurisprudence UVa's decision not to fund *Wide Awake* was legitimate.⁹⁴ The facial validity of the regulations governing the SAF were irrelevant, argued the dissenters, since neutrality was a necessary condition, but not a dispositive one. Funding all religious groups would be as unacceptable as only funding *Wide Awake*, therefore other issues needed to be addressed. The more important principle established in prior cases was that any benefit to religion must be indirect and incidental and in this instance, "there is no third-party standing between the government and the ultimate religious beneficiary to break down the circuit."⁹⁵ Although arguing this was the controlling principle in all the Court's prior cases, the dissenters' need to make their case so forcefully suggested that in fact *Witters* and *Zobrest* had changed the emphasis in the Court's school aid cases and that facially neutral eligibility criteria had become the Court's main focus. The dissenters' arguments suggested they were attempting to reassert the principles of cases such as *Everson*, *Lemon*, and *Aguilar* and their concern with the relationship between the provider and beneficiary of the aid or benefit.⁹⁶ The *Rosenberger* dissent thus showed that while a bare majority of the Court may have moved to a more accommodationist position on church-state issues, the separationist argument continued to have its supporters on the bench.

Conclusion

Equal access is an unusual element of the Supreme Court's Establishment Clause jurisprudence. Although the Justices divided over the tests to be used and the principles to be applied, until *Rosenberger* introduced a financial element into the debate, the Justices remained broadly unified in supporting the idea of equal access. The principle that religious individuals or groups should not be discriminated against in their use of public spaces and facilities simply because they hold or espouse religious beliefs is difficult to dispute in a nation that protects "free exercise" at the same time as preventing an "establishment" of religion. It is, perhaps, the widespread agreement on this principle that accounts for the relative lack of controversy that has surrounded the Court's equal access jurisprudence. Unlike *Engel*, *Schempp*, *Aguilar* or others, the Court's decisions in *Widmar*, *Mergens*, *Lamb's Chapel*, and, to a lesser extent, *Rosenberger*, did not spur public demonstrations, rebukes from politicians, or letter writing campaigns on a

⁹⁴ See *Rosenberger v. ...University of Virginia* 515 US 819, 865-76 (1995). See Brown, B., "A Jeffersonian Nightmare: The Supreme Court Launches a Confused Attack on the Establishment Clause," 31 *Harvard Civil Rights and Civil Liberties Law Review* 257 (1996); Nault, C., "Bridging the Separation of Church and State: How *Rosenberger* Threatens Religious Liberty," 70 *Southern California Law Review* 1049 (1997).

⁹⁵ *Rosenberger v. ...University of Virginia* 515 US 819, 886 (1995) (Justice Souter *et al*, dissenting). Unlike the majority, the dissenters did not consider payment to the printer to be a break in the chain between state and religion since the funds were specifically for printing *Wide Awake* and could not be used for any alternative purpose unlike, for example, the tax deduction in *Mueller*. See 880-9, also rejecting the claim that the SAF was like a public forum or street corner since dollars, unlike street corners, are not available to all.

⁹⁶ See Bycroft, H., pp. 533-5, 555-7. See Chapter 2 for discussion of these cases and the changes wrought by *Witters* and *Zobrest* on the Court's school aid jurisprudence.

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massive scale.⁹⁷ The kind of anti-Court sentiment expressed after most school prayer and several school aid decisions was notable by its absence after equal access cases.⁹⁸ Although a lack of evidence for these non-occurrences makes it difficult to definitively account for the lack of public and political reaction in equal access cases, three factors seem likely to have had an influence.

First, the Court upheld the principle of equal access in the cases before it, unlike the prayer cases and several school aid practices. Those who had been most critical of the Court's holdings in the latter cases had nothing to oppose: the Court had handed down the result they advocated. Groups from the Religious Right and others who advocated accommodation of religion under the Establishment Clause had no foundation upon which to challenge the Court: the only criticism came from some who believed the Court had not gone far enough.⁹⁹ On the other side of the debate, groups who had traditionally taken a strong separationist stand did not challenge the principle of genuine equal access for religious groups. The ACLU did not oppose the Equal Access Act for this reason and in 1993 filed an *amicus* brief in favour of Lamb's Chapel's right to use public facilities to show its film. Thus the ACLU and others only challenged practices that occurred under the auspices of equal access, as they did in *Mergens* and *Rosenberger*, when they perceived that the activities went beyond the limits of equal access into the realm of aid or benefit. Support for the general principle but opposition to specific instances of its application limited the scope of opponents' challenges: their dislike of the situation in *Mergens*, for example, did not necessarily threaten other equal access policies. The scope of any dispute was thus restricted, unlike school prayer and school aid challenges. Second, the actions of the Supreme Court also ensured debates and conflict would be limited. In each of the four equal access cases, the Court's opinions were narrowly written and tailored to the specific facts of the case. They provided only limited guidance on equal access generally, deciding only the controversy before the Court. As such, the Court's acceptance of one particular practice did not imply acceptance of them all, just as a rejection did not suggest abandonment of the principle generally. The narrowness of the opinions further restricted debate to individual cases and thus limited the

⁹⁷ In Justice Black's Papers at the Library of Congress, the files on *Engel* contain five boxes of letters sent to the Justice in response to the case (Boxes 354-8). Justice Blackmun's Papers include two boxes of heavily critical responses to the Court's decision in *Lee* despite the fact he did not write the opinion (Boxes 586-7). In equal access cases there is barely a handful of responses to the rulings.

⁹⁸ This is not to suggest that there was no opposition to the Court's rulings. The Anti-Defamation League and the American Jewish Congress opposed Reagan's signing of the Equal Access Act: Theodore Mann, president of the AJC, pledged to bring a lawsuit if the Act became law (see "Senate Backs Religious Meetings in High Schools," *NYT*, June 28, 1984, A13); both groups and the ACLU filed *amicus* briefs in *Mergens* supporting the school; and many strict separationist groups spoke out about the ruling in *Rosenberger* (see Greenhouse, L., "Ruling on Religion," *NYT*, June 30, 1995, A1, 24 and Niebuhr, G., "Victory on Religion Rulings Was Limited, Groups Say," *NYT*, July 1, 1995, A7), but none of it was of the scale and scope of opposition to school prayer and school aid decisions.

⁹⁹ See Niebuhr, G., *NYT*, July 1, 1995, A7. For example, Jay Sekulow, legal counsel for the conservative American Center for Law and Justice, argued that the Court should have provided more specific protections for religious activities by students.

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nature of public reaction. Finally, the terms of the Equal Access Act itself limits its application. The Act applies only to schools with a limited open forum; if the school does not operate such a forum, the Act does not apply. As with the Court's decisions, the specific circumstances are crucial: one school's violation of the terms of the Act does not imply all with equal access policies do so. In combination, all these factors have served to restrict public, political, and legal debate to specific instances and practices ensuring the broad, divisive debates over school prayer and school aid were not replicated.

Equal access cases have more in common with the Supreme Court's freedom of speech cases than Establishment Clause cases. The question of whether groups or individuals should have the right to speak or meet seems far removed from the Establishment debates of school prayer and school aid, and the Court's predominant use free speech principles in such cases strengthens this impression. However, the questions raised by school aid in particular about the "proper" relationship between church and state apply equally when the question is whether religious groups and individuals should be allowed to make use of space or property that belongs to the state. It was this situation that the Court faced in *Widmar v. Vincent* in 1981 and has sought to negotiate since. The Court's approach since *Widmar*, relying heavily on free speech principles, does not, however, reduce their importance for understanding the Court's Establishment Clause jurisprudence.

The greatest value of equal access cases to an understanding of the Court's Establishment Clause jurisprudence is that they revealed the deepening divisions between the Justices. In school aid cases, philosophical differences have often been obscured by disagreement on the results of a case.¹⁰⁰ In equal access cases the greater consensus on the results brings into sharp focus these deeper disagreements. The single exception, *Rosenberger*, reinforced this perception: the difference in the findings of the majority and dissent lay in a fundamental difference of approach to the issues raised. In allowing student religious groups to meet in *Widmar* and *Mergens*, the Court reinforced its long-held position that a complete separation of church and state is neither necessary nor desirable. Similar sentiments were expressed in *Everson*, *Allen*, *Nyquist*, and other school aid cases, as well as in *Engel* and *Schempp*. However, the elements brought in to Establishment Clause jurisprudence by the free speech implications of equal access, particularly neutral eligibility criteria and the greater burden of proof placed on those wishing to restrict speech, have spread into other areas of Establishment Clause analysis. The majority's approach in *Rosenberger* prefigured the same majority's approach in *Agostini* three years later in its emphasis on neutral eligibility criteria.¹⁰¹ However, the public and private debates in *Lamb's Chapel* and *Rosenberger* showed divisions between the Justices who saw government accommodation as limited to instances where the benefits provided are no greater than those

¹⁰⁰ Admittedly the results may have been the consequence of the Justices' philosophical positions but the results generally receive most attention and thus divert attention away from the reasoning.

¹⁰¹ See Chapter Two for discussion of *Agostini*.

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available to secular groups and others, particularly Scalia and Thomas, who consider accommodation to prevent government favouritism of particular groups or denominations but not government preference of religion. The divisions between these groups, combined with the more separationist views of Breyer, Ginsburg, Souter, and Stevens, suggest a clear definition of the meaning of the Establishment Clause, with regards to equal access, remains as elusive and controversial as it has been since 1947.

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Religion is a quare thing. Be itself it's all right. But sprinkle a little pollyticks into it an' dinnymit is bran flour compared with it. Alone it prepares man f'r a better life. Combined with pollyticks it hurries him to it.¹

In 1947 when the Supreme Court heard oral argument in *Everson v. Board of Education* it is unlikely the Justices knew or realised the scope and nature of the debate they had begun.² By holding the Establishment Clause applicable to the states as well as the federal government, the Court became an arbiter of the line which governs church-state relations in the United States. Unwittingly or not, in *Everson* the Court accepted the task of defining the boundaries of the relationship between the institutions of church and state, a task that has continued and expanded for sixty years. Several factors complicated this task. The increasing size, scope, and responsibilities undertaken by the federal and state governments brought the institutions of church and state into closer proximity in the second half of the twentieth century than at any other time. Equally, religious groups both old and new became more active and more politically-orientated in the twentieth century. The rise of the Religious Right in the late 1970s and the response of liberal religious groups and secular civil liberties groups in opposition, when coupled with government's expanded role, brought religion and politics together in ways not seen for generations. However, the Court also helped move religion into the political sphere. The Court is a legal institution but it is also a political one; constitutional decisions have political consequences and the Court's Establishment Clause decisions were no different. More than any other decisions, the Court's prayer cases, *Engel v. Vitale* and *Abington School District v. Schempp*, brought Establishment issues into the political realm; the growing sense of judicial activism by the Warren Court throughout the 1960s ensured they would stay there long after members of the Warren Court left the bench.³ In addition, the Court's incorporation of the Free Exercise Clause and the Establishment Clause separately implied they were separate provisions that might, in certain circumstances, conflict with one another: challenges to one might be brought by relying on the other.⁴ After incorporating the Establishment Clause, however, the Court became responsible for drawing the line between the permissible and the unconstitutional in church-state relations. How and how well it has done so remains open for debate.

The Court has consistently refused to adhere to any of the three theories of Establishment Clause interpretation. Strict separation, neutrality, and accommodation echoed in many of the opinions from the Court and individual Justices but at no point did the Court endorse broad acceptance of one approach over others. The Justices recognised the existence of the three

¹ Mr. Dooley, created by Finlay Peter Dunne, quoted in Levy, L., *The Establishment Clause: Religion and the First Amendment* (London and Chapel Hill: University of North Carolina Press, 2nd Ed., revised, 1994), p. xiv.

² *Everson v. Board of Education* 330 US 1 (1947).

³ *Engel v. Vitale* 370 US 421 (1962) (striking down school-sponsored prayers in public schools); *Abington School District v. Schempp* 374 US 203 (1963) (striking down school-sponsored Bible reading in public schools).

⁴ *Cantwell v. Connecticut* 310 US 296 (1940).

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theories and their academic and scholarly value in interpreting the meaning of the Establishment Clause. However, the Court also recognised that adherence to any individual theory was not practical when addressing real life cases. The facts of the cases heard by the Court did not lend themselves to a single philosophical approach even if the Justices had favoured one over the others. Separationism, neutrality, and accommodationism are thus useful tools in understanding the debates surrounding the Establishment Clause but they cannot alone explain the Court's jurisprudence.

If the traditional legal approach, with its emphasis on the legal theories of separation, accommodation, and neutrality cannot fully explain the Court's behaviour in Establishment Clause cases, the models of political science theory offer alternative approaches with a broader understanding of the Court. *Stare decisis* and the role of precedent, as advocated by the Legal Model, influenced individual Justices in particular cases and has particular relevance for the Court's prayer cases. The enduring nature of the principles established in *Engel* and *Schempp* is most clearly revealed in Justice Kennedy's switch in *Lee v. Weisman*, an opinion at odds with Kennedy's more accommodationist position in school aid and equal access cases. The Attitudinal Model, with its emphasis on the significance of Justices' personal preferences, is particularly useful in understanding the emergence of blocs on the Court. Justices Rutledge and Jackson in dissent in *Everson* clearly favoured strict separation, as did Justices Brennan and Marshall throughout their careers on the Court. The liberal bloc on the Rehnquist Court, Justices Breyer, Ginsburg, Souter, and Stevens, continued to espouse separationist sentiments in opposition to a majority more favourable to accommodation, espoused particularly by Chief Justice Rehnquist and Justices Scalia and Thomas. The Justices forming these blocs, their responses to cases, and the positions they took epitomised the Justice of the Attitudinal Model. Yet while these blocs arguably account for the outcome in *Rosenberger v. the Rector and Visitors of the University of Virginia*, for most of the period 1947-1997 no group dominated the Court and the Court's opinions reflected both compromise between those of differing philosophical positions and the influence of the pragmatists on the Court who frequently held the balance between opposing groups. The negotiation and compromise among Justices posited by the internal Rational Choice Model is seen most clearly in the influence of the centre on the Burger Court. The influence of Justices Blackmun, Powell, and Stewart in forming majorities and shaping opinions is crucial for understanding the Burger Court. Justice O'Connor played a similar role on the Rehnquist Court. Their approach to cases, concern for the practical implications of challenged policies, consideration of the political and social context, including government positions, and a familiarity with precedent without unquestioning reliance upon it, echo concerns posited by the external Rational Choice Model. Thus all three Models help broaden our understanding of the Court's Establishment Clause jurisprudence. Although no single theory fully accounts for the behaviour of all the Justices or for the Court as a whole during the period 1947-1997, in combination they reveal different aspects of Justices' and Court

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behaviour that gives a fuller, deeper understanding of the Court and its jurisprudence than that provided by traditional legal theories.

The Court's earliest decisions, *Everson*, *McCollum v. Board of Education*, *Zorach v. Clauson*, *Engel*, *Schempp*, and *Board of Education v. Allen* showed the Justices working out approaches to and the requirements of Establishment Clause cases.⁵ Although some Justices favoured certain results or approaches, the *Everson* dissenters' strict separationist argument or Justice Douglas' position on funds for religious activities in public schools for example, the Court itself did not settle on the questions to be asked or the issues raised when assessing constitutionality. In *McCollum* and *Engel* the majorities spoke in terms of strict separation, in *Zorach*, *Schempp*, and *Allen* the concept of neutrality was more prominent. In *Everson* and *Allen* the focus was on the aid to individual students or parents and the indirect nature of the benefit to religious schools, in *McCollum*, *Engel*, and *Schempp* the Court was more focussed on the nature of the school environment and the context of the challenged activities. In *Everson*, *Engel*, and *Zorach* the Court spoke in broad, sweeping language, the other cases were more narrowly focussed on the specific facts of the case. These variations in the approaches, reflected in the Court's conference discussions, reflected the sense of the Court finding its way in this infrequently addressed area of constitutional jurisprudence.⁶

Several general principles, however, emerged from these cases. Most significant was the Court's unwillingness to accept strict separation as an approach to Establishment Clause interpretation. In *Everson*, *Zorach*, *Schempp*, and *Allen* the Court refused to invalidate all interactions between the spheres of church and state without further investigation, recognising that in the modern United States the two may come into contact.⁷ Even in *McCollum* and *Engel*, the majority opinions most strongly influenced by strict separation, the Court noted that it was the type of activity undertaken and the context of that activity which resulted in the invalidation of on-campus released time and school prayer activities rather than an unqualified adherence to separationism.⁸ However, in *Engel* and *Schempp* the Court also made clear that overtly religious exercises initiated, sponsored, or conducted by schools and their staff were not acceptable under any interpretation of the Establishment Clause. Whether it was because the exercises were

⁵ *McCollum v. Board of Education* 333 US 203 (1948) (holding released time programmes on public school grounds unconstitutional); *Zorach v. Clauson* 343 US 306 (1952) (holding released time programmes off school grounds constitutional); *Board of Education v. Allen* 392 US 236 (1968) (allowing loans of secular textbooks to religious school students).

⁶ Specifically, compare Justice Black's majority opinion in *Everson* (330 US 1 (1947)) with his dissent in *Allen* (392 US 236, 250 (1968)) and compare both to Justice White's majority opinion in *Board of Education v. Allen* 392 US 236 (1968). Also see *Board of Education v. Allen* where five separate opinions were filed.

⁷ See *Everson v. Board of Education* 330 US 1, 17-18 (1947); *Zorach v. Clauson* 343 US 306, 312-4 (1952); *Abington School District v. Schempp* 374 US 203, 225 (1963); *Board of Education v. Allen* 392 US 236, 242, 248 (1968). Although, in *Everson*, Justice Black employed the language of strict separation to uphold the aid in question.

⁸ *McCollum v. Board of Education* 333 US 203, 209-10 (1948); *Engel v. Vitale* 370 US 421, 424, 429, 435-6 (1962).

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religious, as Black argued in *Engel*, or because such activities risked excluding minority groups, as Clark asserted in *Schempp*, the basic principle remained.⁹ Where activities fell short of state direction or encouragement of religious activities, the Court considered the broader context of the case, including similar activities in other states and the actions of lower courts, in addition to the operation of the challenged programme before assessing constitutionality.¹⁰ The Court enshrined this approach in the two-part test expounded in *Schempp*: “there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.”¹¹ This test showed the Justices beginning to agree on the grounds for assessing Establishment Clause violations and codifying those principles in order to provide some guidance to lower courts.

The end of this first period of Establishment Clause interpretation which began with *Everson* came with Earl Warren’s retirement, the appointment of Warren Burger as Chief Justice, and a number of additional personnel changes. The Burger Court faced a different situation to that of the Vinson and Warren Courts. The Court had laid down precedent in Establishment cases and although no strong agreement on all the key factors for judging constitutionality in Establishment cases had been reached by earlier Courts, the cases themselves established certain principles and Clark’s *Schempp* test provided fixed elements that would need to be applied. Also, the Warren Court was known as an activist Court in this area. The Warren Court’s landmark decisions in areas as diverse as race, due process and defendants’ rights, election practices, and free speech had broad social and political consequences; the Court’s activities became fodder for political debate to an unprecedented extent and any constitutional decision in such areas met extensive political scrutiny.¹² Combined with the hostility that had developed in the aftermath of the school prayer decisions, the Burger Court faced a far different political landscape to that of the early Warren Court.

Pragmatism dominated the Burger Court’s Establishment Clause jurisprudence from *Lemon v. Kurtzman* in 1971 to *Witters v. Washington Department of Services for the Blind* in 1986.¹³ While partly a recognition of the political context in which the Court was operating, the Court’s approach was fundamentally influenced by new personnel. In six years Justices Fortas, Black, Harlan, and Douglas were replaced by Justices Blackmun, Powell, Rehnquist, and Stevens, in

⁹ Only one Justice objected to this: Justice Stewart dissented in both *Engel* and *Schempp*.

¹⁰ See *Everson* 330 US 1, 6-7 (1947) (“Changing local conditions create new local problems ...”) and *Allen* 392 US 236, 247-8 (1968) (“... the continued willingness to rely on private school systems ... strongly suggests that a wide segment of informed opinion ... has found that those schools do an acceptable job of providing secular education to their students.”). Concern for such factors is posited by the Rational Choice Model.

¹¹ *Abington School District v. Schempp* 374 US 203, 222 (1963).

¹² In addition, growing opposition to student demonstrations and anti-war protests and the election of Richard Nixon in November 1968 indicated that the country was becoming more conservative and moving away from the liberalism of the decade.

¹³ *Lemon v. Kurtzman* 403 US 602 (1971); *Witters v. Washington Department of Service for the Blind* 474 US 481 (1986). For a good description of this applied to the Burger Court generally see Blasi, V., “The Rootless Activism of the Burger Court” in Blasi, V. (Ed.), *The Burger Court: The Counter-Revolution That Wasn't* (New Haven and London: Yale University Press, 1983).

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addition to Burger's replacement of Warren as Chief Justice.¹⁴ Most significantly, the Court's liberals lost Warren, Black, and Douglas while Powell and Blackmun joined Justice Stewart at the Court's centre. Less sympathetic than their colleagues to particular philosophies of Establishment Clause interpretation, these three Justices sought the most appropriate result in each case based on the particular factual circumstances.¹⁵ The importance of this moderate group is clear from the cases decided: they wrote the majority opinion or held the balance of the majority in 5:4 decisions in *Stone v. Graham*, the Ten Commandments case, *Widmar v. Vincent* on equal access, and all the school aid cases except *Mueller v. Allen*.¹⁶ They influenced all aspects of the Court's Establishment Clause jurisprudence. As with the Vinson and Warren Courts no single philosophy of Establishment Clause jurisprudence attracted a majority of Justices; however, while during Warren's tenure the resulting pragmatism was a result of the Court trying to find its way, under Burger pragmatism was a deliberate consequence of the balance of power held by the Justices of the centre bloc.

This control of the centre and the pragmatic approach to cases that followed influenced the Court's Establishment Clause jurisprudence in several key ways. First, the factual circumstances of each case became particularly significant; the constitutionality of an activity rested on the context specific to each case. Although important in *all* Court cases, the frequency of the Court's concentration on factual similarities and differences between cases, especially school aid cases, revealed their particular importance. When the activity concerned was not overtly religious, the Justices were willing to consider the cumulative impact of the situation addressed. This led the Court into detailed analysis of schools, aid programmes, communities, local history, and the social and political context of the case.¹⁷ Second, to analyse these factors, the Court developed a

¹⁴ Blackmun took his seat on the Court in 1970, Powell and Rehnquist in 1972, and Stevens in 1975. Burger became Chief Justice in 1969.

¹⁵ Justices Rehnquist and White and Chief Justice Burger were sympathetic to accommodationist ideas; Justices Brennan, Marshall, and Stevens advocated separationism. This left Justices Blackmun, Powell, and Stewart in the centre.

¹⁶ *Stone v. Graham* 449 US 39 (1980) (holding unconstitutional the posting in Kentucky classrooms of the Ten Commandments); *Widmar v. Vincent* 454 US 264 (1981) (right of religious student groups to meet on university campus); *Mueller v. Allen* 463 US 388 (1983) (holding tax deductions for school expenses did not violate the Establishment Clause). Powell wrote for the majority in *CPEARL v. Nyquist* 413 US 756, 774 (1973) (constitutionality of tuition reimbursement to parents of religious school students and maintenance and repair grants to religious schools) and *Widmar*, Stewart in *Meek v. Pittenger* 421 US 349 (1975) (textbook loans, loans of instructional materials, provision of auxiliary services, and the loan of instructional equipment to religious schools and their students), and Blackmun in *Wolman v. Walter* 433 US 229, 244 (1977) (textbook loans, testing and scoring services, diagnostic, therapeutic, guidance, and remedial services, loans of instructional materials and equipment, and reimbursement for the cost of field trips). In *Stone*, *Lemon v. Kurtzman* 403 US 602 (1971) (salary reimbursement and purchase of secular services programmes), *Aguilar v. Felton* 473 US 402 (1985) (remedial education services to religious school students) and *Grand Rapids School District v. Ball* 473 US 373 (1985) (remedial and enrichment classes held on religious school grounds) the three voted together to guarantee the majority. In *Mueller*, Powell supported the tax deduction while Blackmun opposed it.

¹⁷ See almost any of the Burger Court's school aid cases and *Widmar v. Vincent* 454 US 264 (1981) for the Court's discussion of the significance of the age of the students and the balance of

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series of informal, flexible concerns that were loosely codified by Burger in *Lemon* in 1971 and became central to the Court's Establishment Clause analysis: on-campus or off-campus aid, financial or non-financial benefits, the direct or indirect nature of the benefit, the breadth of the programme, and facial neutrality of statutes or policy guidelines were all regularly addressed by the Justices.¹⁸ These questions were considered as often in dissent as by the majority, revealing a broad consensus on the issues to be addressed despite the frequent lack of consensus about which issues were raised by particular cases. The third key influence of the control of the centre was more divided Courts and an increased number of concurrences and dissents.¹⁹ Despite agreement on the questions to be asked, the Justices frequently disagreed on their relative importance in a particular case and on the factors involved in the implementation and operation of a programme or policy. Such disagreement was the result of the pragmatic approach of the Court's centrists and their rejection of a "one size fits all" philosophy of Establishment Clause interpretation.²⁰

The Court's approach to Establishment Clause cases changed in the early years of the Rehnquist Court, beginning a third period of Establishment Clause interpretation. With the exception of *Lee v. Weisman*, the 1992 school prayer case, the Court after 1986 showed itself increasingly willing to accept greater interaction between church and state.²¹ The change was, once again, partly a function of the change of personnel on the Court. Most significant was Justice Kennedy's appointment in 1988 and his alliance with Justice O'Connor at the Court's centre on Establishment issues.²² Kennedy and O'Connor, despite forming the balance between the Court's liberals and conservatives, were willing to allow greater church-state interaction than the centre Justices of the Burger Court but would not allow as much interaction as the Court's conservatives advocated. They were the centre, but a different one to that of the Burger Court. Their impact, however, was not immediately obvious as the type of cases initially heard by the Rehnquist Court resulted in opinions that echoed the Burger Court's jurisprudence.²³ It was thus

religious and secular groups on the University campus. This approach also continued the Court's refusal to accept strict separation: under that approach, no such analysis would have been required.

¹⁸ The on-campus/off-campus debate was particularly important in school aid cases where the Justices were always mindful of the religious nature of the schools receiving the aid. The idea of religious schools as "pervasively sectarian" was expressed frequently in these cases.

¹⁹ See in particular *CPERL v. Nyquist* 413 US 756 (1973) and *Wolman v. Walter* 433 US 229 (1977).

²⁰ All of these factors are addressed by the Rational Choice Model suggesting its usefulness this period of the Court's Establishment Clause jurisprudence.

²¹ *Lee v. Weisman* 505 US 577 (1992).

²² Although six Justices left the Court between 1986 and 1994, the political balance remained largely unchanged. Conservatives Burger and White were replaced by Thomas and Scalia who joined Chief Justice Rehnquist; liberals Breyer, Ginsburg, and Souter replaced Blackmun, Brennan, and Marshall, joining Stevens.

²³ In his 1995 study of the Rehnquist Court, James Simon noted that, "The conservatives' spirited efforts to change the direction of Establishment Clause jurisprudence ... appeared by the mid-1990s to have failed." Simon, J., *The Center Holds: The Power Struggle Inside the Rehnquist Court* (New York: Simon & Schuster, 1995), p. 294. See *Witters v. Washington Department of Service for the Blind* 474 US 481 (1986) (held to be such a limited, indirect benefit to the seminary chosen by Larry Witters that no violation occurred); *Board of Education of the*

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easy to conclude that little on the Court had changed. However, the principles employed in equal access cases provided the foundation for a more accommodationist approach to church-state relations in aid cases. Equal treatment of religious and secular groups unless a good reason exists not to and a more lenient standard of review which placed the burden of proof on those demanding different treatment, resulted in a different approach to school aid issues than that traditionally employed by the Court. In addition, the Justices placed greater emphasis on neutral eligibility criteria: it had been a concern of the Burger Court and thus showed continuity with the past but whereas before the Court had employed it as a threshold issue, the Rehnquist Court gradually developed it as a factor in a programme's favour. The effect of these changes, although evident in limited form in *Zobrest* and *Lamb's Chapel*, became clearer in *Rosenberger* and *Agostini*.²⁴ These were significant changes in the Court's approach to Establishment Clause issues and this was reflected in the Court's rulings: the Rehnquist Court moved the Court closer to accepting full accommodationism than at any time in the Court's history.

The Rehnquist Court's acceptance of accommodationism was not, however, total. Two factors prevented its acceptance in full. The first was Justice Kennedy's switch in *Lee*. Graduation prayers had existed in a grey area of constitutional law for forty years and, as the school board asserted, if any activity was of minimal harm, it was these prayers. The original conference vote suggested a bare majority of the Justices agreed and the Court seemed close to stepping away from the strict application of the principles laid down in *Engel* and *Schempp* and followed by the Burger Court. Kennedy's late switch turned a majority for upholding such prayers into a majority for striking them down. Kennedy's assertion that his original opinion "looked quite wrong" was, however, testament to the strength of the principles established in

Westside Community Schools v. Mergens 496 US 226 (1990) (upholding the constitutionality of the Equal Access Act and holding that as Westside operated a limited open forum the school must allow a religious group to meet under the same conditions. By upholding federal legislation in the Equal Access Act, the Court appeared to do little more than defer to congressional decision-making); *Lee v. Weisman* 505 US 577 (1992) (holding prayers at high school graduation ceremony unconstitutional).

²⁴ *Zobrest v. Catalina Hills School District* 509 US 1 (1993) (upholding provision of a sign-language interpreter for a deaf student attending a religious school); *Lamb's Chapel v. Center Moriches Union Free School District* 508 US 384 (1993) (religious group allowed to meet on school premises after school hours); *Rosenberger v. the Rector and Visitors of the University of Virginia* 515 US 819 (1995) (religious student group allowed to receive money from communal funds to pay for publishing a religious newspaper. Here the majority chose to ignore the presence of a financial issue which placed the case closer to traditional school aid debates in favour of a pure equal access and free speech analysis); *Agostini v. Felton* 521 US 203 (1997) (remedial educational services to religious school students in New York City. Here the same majority as in *Rosenberger*, rejected the idea that religious schools were particularly suspect in Establishment cases and relied heavily on the equal treatment and child benefit theories). As on the Burger Court, central to both *Rosenberger* and *Agostini* were the two swing votes: Justice Kennedy wrote for the majority in *Rosenberger*, Justice O'Connor in *Agostini*. Despite their importance, however, the greater influence of blocs in this period suggests that the Attitudinal Model is of particular significance in this period of the Court's jurisprudence.

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Engel and *Schempp*.²⁵ More than any other area of Establishment Clause jurisprudence the prayer cases, and *Lee* in particular, illustrate the importance of *stare decisis*: the principles laid down in 1962 and 1963 of no school-sponsored religious activity on public school grounds have endured despite the philosophical changes wrought by personnel changes in the intervening years. *Schempp*, *Stone*, and *Jaffree* may have all rested more heavily on the principle of neutrality than the strict separationism of *Engel* but their existence worked to limit the activity of the accommodationists on the Court.

Second, the growing philosophical divisions on the Court worked to restrict the scope of the accommodationists. Rehnquist, Scalia, and Thomas were more than ably opposed by Justices Breyer, Ginsburg, Souter, and Stevens, all four committed to a separationist approach. Equally, although Kennedy and O'Connor as swing votes were more disposed towards accommodation than the centrist Justices of the Burger Court, they did not accept it unquestioningly. As *Lee* and *Agostini* demonstrated, Kennedy and O'Connor were key votes who could be won to *either* side if the argument was strong and the circumstances right. Aware of needing *both* swing votes for a majority, Rehnquist, Scalia, and Thomas were forced to temper the breadth and tone of their opinions to hold a majority.²⁶ This became increasingly important as the philosophical divisions resulted, for the first time, in disagreements over the proper way to approach Establishment Clause cases. The Justices of the Burger Court disagreed on the relative importance and significance of certain principles in particular cases but rarely questioned their use. The increasingly harsh criticism of the *Lemon* test under Rehnquist revealed divisions over these basic principles that reflected the broader philosophical disagreements. Compromise became more difficult, requiring more concentration on the few areas of agreement between the Justices seeking a majority. The Rehnquist Court gave a very different interpretation to the Establishment Clause, and the limitations on aid to religion were substantially reduced. However, the relationship between church and state was not completely unrestricted and limitations remained in place, reinforced in particular by Justice O'Connor; the relationship was freer but it is not free.

Thus the Court's Establishment Clause jurisprudence was influenced by the Justices, their philosophical differences, and their approaches to interpreting church-state relations. Also important were the different kinds of activity challenged: school aid, school prayer, and equal access involve different kinds of activity and, despite similarities in approach, the Court treated the three types of cases quite differently. In school prayer cases the single fundamental principle established by *Engel* and *Schempp* dominated the Court's jurisprudence: no school-sponsored religious exercises were permitted on school grounds during school hours; if a practice or activity

²⁵ Memorandum from Justice Kennedy to Justice Blackmun, March 30, 1992. See also a memo from Kennedy to Rehnquist confirming the situation to him, also March 30, 1992. Blackmun Papers, Box 586, Folder 6. See Chapter 3.

²⁶ This seems especially likely in light of Scalia's sharp dissent in *Lee* (505 US 577, 631-46): it is unlikely such language would have been present in a majority opinion. This is the essence of the internal Rational Choice Model.

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was religious in nature and operated with any element of school support it was constitutionally invalid. The only question to be asked was whether a challenged practice or activity was religious; if the answer was yes, the activity was struck down, as with the posting of the Ten Commandments in Kentucky schoolrooms, Alabama's moment of silence statute, and graduation prayers.²⁷ Justice Kennedy's switch in *Lee* was testament to the strength of this principle. By striking down graduation prayers the Court reaffirmed that the context of the activity was irrelevant to the question of constitutionality, the only concern was the nature of the challenged activity itself. By contrast, context was crucial to the Court's analysis of equal access cases. Although striking down *school*-sponsored religious activities, the Court's prayer cases did not address the question of *student*-initiated religious exercises and activities on school grounds or the use of school facilities outside school hours. In upholding the right of Cornerstone to use university facilities in *Widmar v. Vincent*, the Court relied heavily on Cornerstone being only one group among many allowed to meet on university grounds.²⁸ Religion was not being favoured by the University, the Court asserted, just treated equally, thus there was no unconstitutional benefit. The approach was also influenced by the involvement of free speech principles in such cases which demanded that all groups be treated equally unless a compelling reason existed to do otherwise. Without a clearly unconstitutional benefit accruing to religious groups as a result of being allowed to meet, the Court held, there was no compelling reason to exclude religious groups simply because they were religious. The only way to tell if religion had unconstitutionally benefited was to consider the context in which the group was allowed to meet. In applying the 1984 Equal Access Act, that enshrined the *Widmar* principles in law and applied them to high schools, the Court showed particular concern with the school environment and the context of the requested meetings in *Mergens* and *Lamb's Chapel*. Even in *Rosenberger*, both the majority and the dissent considered the context in detail to construct their arguments.²⁹ The nature of equal access and the questions it raised thus required a different approach to that employed in prayer cases.

The Court's approach to school aid cases was similar to equal access cases in its focus on the context of the challenged programme, although without the free speech implications. In allowing reimbursement to parents of the cost of transporting their children to religious schools in *Everson* and the loan of secular textbooks to religious school students in *Board of Education v. Allen* the Court rejected strict separation and allowed benefits to flow to students attending religious schools which indirectly benefited the schools themselves. The child benefit rationale and indirect benefit test relied on in these cases were codified with a series of other concerns, including on-campus/off-campus aid and financial/non-financial benefits, by Chief Justice Burger

²⁷ *Stone v. Graham* 449 US 39 (1980); *Wallace v. Jaffree* 472 US 38 (1985); *Lee v. Weisman* 505 US 577 (1992). The Justices' approaches to the prayer cases are closer to that of the Legal Model, especially the importance of precedence in this area. The clarity of the principles established in *Engel* and *Schempp* account for at least part of this continued deference.

²⁸ *Widmar v. Vincent* 454 US 264 (1981). See Chapter 4.

²⁹ *Rosenberger v. the Rector and Visitors of the University of Virginia* 515 US 819 (1995).

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in *Lemon v. Kurtzman* in 1971.³⁰ The *Lemon* test, that aid must have a secular purpose, an effect that neither advances nor inhibits religion, and must not result in excessive entanglement between church and state, is crucial for understanding the Court's school aid cases. It is essentially a balancing test, concerned to ensure there is no establishment of religion while at the same time protecting religious individuals and groups from discrimination based on their religious status. Unlike the clear pronouncement of principle in the prayer cases, the Court's approach to school aid challenges required careful analysis of the specific facts of the situation and the rulings became heavily context-dependent. Although the Court employed uncodified guidelines in analysing these cases, the manner in which they were employed and their relative importance varied. As personnel changed on the Court, school aid cases became increasingly dominated by debates among the Justices over these guidelines and the proper way to analyse Establishment Clause violations. The division in *Witters* in 1986 is almost entirely explained by disagreement over the proper test to be used and the status of *Mueller v. Allen* as precedent.³¹ All nine Justices agreed the benefit did not violate the Establishment Clause but the Court divided 5:4 on the method for deciding the case. The disagreement over the status of a sign-language interpreter at issue in *Zobrest* in 1993 revealed similar divisions.³² As the majority on the Court shifted away from the pragmatic balancing of interests espoused by the centre of the Burger Court towards the accommodationists on the Rehnquist Court the Court's jurisprudence was shaped significantly by the different priorities placed on particular facts and tests by the various groups. The balancing approach to school aid issues taken by the Vinson and Warren Courts allowed such debates to develop. The clash of traditional school aid issues with equal access principles in *Rosenberger* showed the significance of different types of cases to the Court's approach: the majority relied heavily on equal access, the dissent on school aid, each representing fundamentally different interpretations of the case.³³ In addition, the Court's continued objection to school-sponsored religious exercises on public school grounds at the same time as developing more lenient standards of review in school aid cases arises because they raise different issues: the cases are not contradictory because they require a different analysis. Thus recognition of the differences between the school aid, school prayer, and equal access issues that influenced the Court's analysis and decisions allows a clearer understanding of the Court's Establishment Clause jurisprudence.

School aid cases have been the focus of much of the criticism of the Court's Establishment Clause jurisprudence that claims the Court has been inconsistent in its application of the Clause.³⁴ Critics point particularly to the cases of the Burger Court to support such claims. Upholding

³⁰ *Lemon v. Kurtzman* 403 US 602, (1971).

³¹ *Witters v. Washington Department of Service for the Blind* 474 US 481 (1986). See Chapter 2.

³² *Zobrest v. Catalina Hills School District* 509 US 1 (1993). See Chapter 2.

³³ *Rosenberger v. the Rector and Visitors of the University of Virginia* 515 US 819 (1995). See Chapter 4 (esp. pp. 198-201). *Rosenberger* is arguably the clearest example of the Attitudinal Model in the Court's Establishment Clause jurisprudence.

³⁴ But see the Attitudinal and Rational Choice Models' criticism of the need for consistency. See Chapter One (esp. pp. 43-57).

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textbook loans but striking down the loans of other instructional equipment, allowing tax deductions for school expenses but not reimbursement for the same costs, and upholding diagnostic services but not the therapeutic services resulting from them appears, at first glance, to be entirely inconsistent. Yet such focus on the results overlooks the key interest of the Court: the operation of each individual programme. Focussing on the results does not allow consideration of to whom the instructional materials were loaned, who was entitled to receive the reimbursement of school costs and claim tax deductions, and where the auxiliary services took place. Without this context the Court's opinions appear inconsistent; within that context they reflect the Court's approach to school aid issues.³⁵ Understanding the Court's Establishment Clause jurisprudence thus requires consideration, not just of the results in cases, but the context from which they developed and against which they were decided. This is not, however, to claim that the Burger Court was entirely consistent. Rehnquist's opinion for the Court in *Mueller*, upholding tax deductions for parents, was thinly disguised accommodationism that only barely managed to justify a result different to that in *Nyquist*. Although the Court provided some explanation for the differences between textbook loans and loans of other instructional equipment, without close examination the foundation was weak and, from a commonsense perspective, practically inexplicable. However, these problems were neither as widespread nor pervasive as critics have claimed. Critics have also pointed to the Court's overturning of precedent in *Agostini* to claim inconsistency by the Rehnquist Court. This argument has a stronger foundation. *Rosenberger* and *Agostini*, in particular, represented a significant shift in the Court's jurisprudence from the pragmatism of the Burger era toward greater accommodationism. However, while the Court has not been entirely consistent in its cases, claims of inconsistency need to be made after consideration of more than simply the results in particular cases.

The Court's opinions provide some evidence that Mr. Dooley's famous comment, that "the Supreme Court follows the election returns," is applicable to the first half century of Establishment Clause jurisprudence.³⁶ The prayer cases, particularly *Engel* and *Schempp*, resulted in the most vocal and sustained opposition to any of the Court's Establishment Clause rulings. Several attempts were made to overturn the Court's rulings, the most prominent in the 1960s and again in the 1980s, although without success. Politicians and some religious leaders lambasted the Court for being anti-God and hastening the progress of secularization in the United States. The Court did not directly address these critics but analysis of the Court's opinions reveals signs that it did respond in more subtle ways. In *Schempp*, Justice Clark was assigned to write the majority opinion. Publicly identified as a conservative on the Court, in contrast to Black who wrote for the Court in *Engel*, Clark also avoided the rigidity of constitutional absolutes that characterised Black's jurisprudence. Although upholding the principles established in *Engel*, Clark was a less controversial figure, suggesting the Justices hoped to make *Schempp*

³⁵ See discussion in Chapter Two, esp. pp. 85-95.

³⁶ Dunne, F.P., "The Supreme Court Decision," in *Mr. Dooley's Opinions* (London: Heineman, 1902), p. 26.

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less inflammatory. Also seeking to avoid, or at least limit, controversy, the Court eschewed oral argument and offered a *per curiam* opinion in *Stone v. Graham* in 1980.³⁷ This approach limited the discussion of the case to those issues the Court dealt with directly in its opinion, thus restricting the number of issues available for potentially divisive political debate. In addition, frequent comments about the importance of religion in American life and the Court's respect for the place of faith in people's lives held little relevance for the Court's legal reasoning. In light of criticisms directed at the Court after *Engel* they should be viewed as challenges to the claims that the Court was godless and anti-religion and that *Engel* and *Schempp* were threats to religious faith. Although indirect evidence, these actions are nevertheless evidence that the Court's opinions in prayer cases were, in part, shaped by the political reaction to them.

However, if the Court accommodated the political situation in terms of the tone and structure of opinions, its rulings were not so influenced. The nature of the political debate itself made the Court's steadfastness easy. Almost all the political debates involving school prayer, both in the 1960s and again in the 1980s, were fuelled by misinformed overreaction, deliberately skewed presentation of the Court's rulings and other "facts" of school prayer, or by politicians pandering to their perception of the demands of the electorate. In the 1960s the idea that the Court had made schools religion-free zones was challenged by the opinions themselves and by testimony given during the Becker hearings. In the 1980s, while Reagan and Congress debated whether religious exercises should be "returned" to public schools by constitutional amendment, the Court was considering what religious exercises beyond prayer and Bible reading should also be excluded: the legal debate had moved on, the political debate had not. The debates revealed a pattern of activity used by conservatives over more than twenty years as political theatre: school prayer became a substitute or shorthand for other issues. Public and private morality, the "decline" of moral standards in modern society, the power of the Supreme Court, and the intrusion of federal government into the lives of the people all resonated in the school prayer debates. Cardinal Spellman, the Religious Right, President Reagan, and a range of other religious and secular groups actively encouraged, or at least perpetuated, this practice. The continued failure of Congress to pass a prayer amendment and the lack of any real activity by politicians on behalf of the campaign to "restore religion to America" beyond symbolism and rhetoric suggested that for many, although not all, the debate about religion in American life was about politics and symbolism rather than genuine concern for faith. The substance of these debates thus had little bearing on the issue of constitutionality and played no part in the Court's deliberations. However, the debates are important for understanding the Court's opinions, their structure and their tone.

In school aid cases there is also evidence to suggest that the public and political debate influenced the tone and structure of the Court's opinions and their rulings. The Vinson and Warren Courts faced the legacy of religious division after the school aid debates of the 1940s and

³⁷ *Stone v. Graham* 449 US 39 (1980).

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1950s. Opposition to federal aid to education was considered by many Catholics and supporters of federal intervention to be motivated by anti-Catholic bias, while opponents portrayed the move for federal aid as an attempt by the Catholic Church to gain control of increasing numbers of students. In *Everson*, Black and Rutledge's approaches and arguments suggest both were sensitive to the religious divisions that might be fuelled by the case. Both undertook changes in structure and wording that ensured their opinions could not be associated with one denomination or religious group.³⁸ Yet, simultaneously, Black drew on similar activities in other states and favourable opinions in lower courts to find New Jersey's bus transportation programme constitutional. The potential for religious division did not deter the Court from its final opinion but the particular care Black, for the Court, and Rutledge in dissent, took over the tone and structure of their opinions shows an unwillingness to influence to a debate they were aware existed.

By the time the Burger Court addressed school aid, religious division had become a less prominent issue. Vatican II had opened up the Catholic Church, a Catholic had been president of the United States, the Cold War had encouraged all of faith to unite against a common enemy, and the 1965 Elementary and Secondary Education Act allowed limited forms of federal aid to flow to religious school students. All helped calm the fractiousness of the previous twenty years. However, the Court faced new debates about education policy that affected the school aid issue. Financial difficulties of the 1970s combined with a growing sense of failure in the urban public schools to move the focus to the educational role of religious schools which reportedly had better discipline and educated students at a lower per pupil cost. A number of states, including New York, Pennsylvania, and Rhode Island, sought to provide benefits to religious school students or initiated programmes to aid the secular functions of religious schools in an attempt to ease the burden of both schools and parents. Such debates involved pedagogical issues, not constitutional ones, issues the Court could avoid as outside of its jurisdiction. However, as with the prayer cases, the Court's approaches and analyses suggest that the Court was aware of these issues, although not responding to them directly. The Court's unwillingness to strike down all aid programmes intended to address the educational and financial problems faced by schools without examining the specifics of each programme showed not only the influence of the Court's pragmatists but also suggested deference to legislative decision-making regarding issues outside the Court's expertise.³⁹ In *Mueller v. Allen*, Justice Rehnquist's opinion for the Court revealed his opinions about the Reagan Administration's plan to provide tax credits to parents of religious school students, a new battle in the debate begun in the 1970s.⁴⁰ In addition, Justice O'Connor's comments for the Court in *Agostini v. Felton* regarding the inconvenience and expense of mobile

³⁸ See Chapter 2 for detailed discussion.

³⁹ This is especially clear when considering that the Court never found an unconstitutional purpose behind a challenged school aid programme even when striking down the same programme because of an unconstitutional effect.

⁴⁰ *Mueller v. Allen* 463 US 388 (1983) (upholding constitutionality of tax deductions for school expenses for parents of all school-aged children). See Chapter Two (esp. pp. 93-4).

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classrooms and the numbers of students disadvantaged by the Court's own restrictions showed the Court's continued awareness of new and old educational problems.⁴¹ Although less clear than in the school prayer cases, the Court's school aid cases thus provide indications, albeit small ones, that the Court was aware of the broader debates that resulted in the cases it heard. Even though the Court's rulings were more significantly influenced by the *Lemon* test and the context particular to each case, a full understanding of the Court's opinions and arguments in school aid jurisprudence requires awareness of the national political and educational debates that resulted in the activities and programmes challenged in the Court's cases.

Despite significant criticism, the Supreme Court's Establishment Clause jurisprudence as applied to schools has had positive results. As a result of the Court's rulings no student is required to participate in any religious activity conducted during school hours and schools and their staff are forbidden from conducting such exercises. If such events occur students have access to the courts, a legal remedy, and a mandate from the Supreme Court as to what is and is not acceptable. Students of minority faiths should no longer be made to feel religious outsiders within the school environment. As the United States becomes ever more religiously diverse, the Court is committed to ensuring students of all faiths are accepted. Students are, however, allowed to meet voluntarily on school premises for religious meetings, either before or after the school day or during free time if the school allows other groups to meet. This is not an absolute right: its existence depends on a variety of circumstances, including the school, the age of the students, the type of clubs allowed to meet, and any history of conflict over religious issues, among others, to ensure students' right to free exercise of religion and protection against forced religious observance are maintained. Students have legal recourse to the courts under Supreme Court precedent and the Equal Access Act. Although the rights of students are given greater weight, schools have been able to defend their actions in court with success.⁴² Equal access, if fairly applied, helps to secure the rights of students damaged by some of the misrepresentations of *Engel* and *Schempp* while maintaining schools' control over their facilities. Although open to abuse, equal access is a reasonable balance between the need to avoid school sponsorship of religious activities and the desire of religious students to communally practice their faith during non-school hours. In school aid cases, the strength of the *Lemon* test lies in its ability to allow flexibility to local circumstances. Burger established a test for constitutionality that laid out the guidelines to be followed, not the absolute result. Combined with the pragmatic approach to aid cases taken by the dominant centre bloc of Justices, the consequence was decisions that applied only to particular factual situations, leaving open the possibility of flexibility to local circumstances. This is reinforced by the Court's view that federal school aid decisions do not supercede state Blaine Amendments that are more restrictive of the church-state relationship: the Court's decisions established the boundaries of the church-state relationship, not the absolute

⁴¹ *Agostini v. Felton* 521 US 203 (1997) (overturning *Aguilar v. Felton*).

⁴² See *Clark v. Dallas Independent School District* 806 F.Supp. 116 (N.D. Texas 1992); *Sease v. School District of Philadelphia* 811 F.Supp. 183 (E.D. Pa 1993); *Bronx Household of Faith v. Community School District No. 10* 127 F3d 207 (2d Cir. 1997).

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requirements. The Court's concern to consider all the circumstances of a particular relationship allows states to find their own approach to school aid issues while ensuring the principles of the Establishment Clause are not violated.

As Justice Lewis Powell noted in 1977, the Court's decisions, "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 ... is entirely tolerable."⁴³ The Court's jurisprudence between *Everson* and *Agostini* is best understood as creating neither an inflexible wall nor a "blurred, indistinct, and variable barrier" between the activities of church and state but as a series of pragmatic decisions based on all the circumstances of each individual case.⁴⁴ Given this, traditional scholarship which aims to understand the Court's jurisprudence by considering only the results in cases is severely limited. Claims of inconsistency by the Court based only on the results in cases fail to understand what the Court was seeking to do. Consistency in *results* was not a concern of the Court; consistency in *approach* was. Understanding the Court's Establishment Clause jurisprudence requires understanding the Court's methodology, the questions asked, the issues considered most important, the operation and use of the *Lemon* test, and the alliances and disagreements among the Justices. Understanding how the Court's key principles developed after 1947 and how, in the latter part of the period here discussed, these principles were challenged and criticised, explains the Court's jurisprudence over fifty years. Placing cases in their legal, social, and political context is crucial, since such context was central to the Court's analysis. Viewed from this perspective, far from being an inconsistent, incoherent jurisprudence that needs to be corrected, the Supreme Court's Establishment Clause jurisprudence is instead one consistently concerned with method, context, and a fair application of existing principles to specific circumstances raised in particular cases that has upheld the Establishment Clause and adapted it to modern circumstances, thus ensuring its continued relevance.

⁴³ *Wolman v. Walter* 433 US 229, 263 (1977) (Justice Powell, concurring in part and dissenting in part).

⁴⁴ *Lemon v. Kurtzman* 403 US 602, 614 (1971).

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Appendices

Appendix A

Table 1 – School Aid Cases: Dates, Rulings, Authors

Table 2 – School Prayer Cases: Dates, Rulings, Authors

Table 3 – Equal Access Cases: Dates, Rulings, Authors

Year	Case	Court Holding	Vote	Author	Concurrences (Author in bold)	Dissents (Author in bold)
1947	<i>Everson v. Board of Education of Ewing Township</i> 330 US 1	New Jersey policy of reimbursing parents for cost of sending children to religious schools did not violate the Constitution. (Affirmed the New Jersey Court of Errors and Appeals).	5:4	Black		Jackson with Frankfurter Rutledge with Frankfurter, Burton, Jackson
1948	<i>McCullum v. Board of Education</i> 333 US 203	Released time for religious instruction on public school grounds unconstitutional. (Overturned Illinois Supreme Court ruling that programme did not violate the Constitution).	8:1	Black	Frankfurter with Rutledge, Burton, Jackson Jackson	Reed
1952	<i>Zorach v. Clauson</i> 343 US 306	Released time for religious instruction conducted off public school campuses does not violate the Constitution. (Affirmed New York Court of Appeals ruling on similar grounds).	6:3	Douglas		Black Frankfurter Jackson
1968	<i>Board of Education v. Allen</i> 392 US 236	Loan of secular textbooks to students attending religious schools constitutional. (Affirmed New York Court of Appeals' ruling that textbook loan was neutral with respect to religion and therefore did not violate the Establishment Clause).	6:3	White	Harlan	Black Douglas Fortas
1970	<i>Walz v. Tax Commission of the City of New York</i> 397 US 664	Tax exemptions for property owned by churches do not violate the Establishment Clause. (Affirmed ruling of New York Court of Appeals).	7:1	Burger	Brennan Harlan	Douglas

Appendix A – Table 1
School Aid Cases: Dates, Rulings, Authors

Year	Case	Court Holding	Vote	Author	Concurrences (Author in bold)	Dissents (Author in bold)
1971	<i>Lemon v. Kurtzman</i> (including <i>Earley v. Di Censo</i> and <i>Robinson v. DiCenso</i> 403 US 602	Pennsylvania's reimbursement of religious schools for cost of secular books, instructional materials, and teachers' salaries violated the Constitution (<i>Lemon</i>). Rhode Island policy of supplementing religious school teachers' salaries by up to 15% for those teaching secular subjects also found unconstitutional (<i>Earley</i> and <i>Robinson</i>). (Marshall does not participate in case). (Overturned District Court ruling in <i>Lemon</i> that found no constitutional violation; affirmed District Court finding of unconstitutionality in <i>DiCenso</i>)	8:0 (<i>Lemon</i>) 7:1 (<i>Di Censo</i>)	Burger	White (in <i>Lemon</i>) Douglas with Black Brennan	White (in <i>Di Censo</i>)
1973	<i>Committee for Public Education and Religious Liberty (CPERL) v. Nyquist</i> 413 US 756	Striking down a New York statute providing maintenance and repair costs to religious schools. (Affirmed decision of District Court). Striking down a New York statute providing tuition reimbursement and tax deduction for parents of children attending non-public schools. (Overturned District Court's ruling that such programmes did not violate the Constitution).	8:1 6:3	Powell Powell	Rehnquist with Burger and White Burger with White and Rehnquist	White Rehnquist with Burger and White Burger with White and Rehnquist

Appendix A – Table 1
School Aid Cases: Dates, Rulings, Authors

Year	Case	Court Holding	Vote	Author	Concurrences (Author in bold)	Dissents (Author in bold)
1975	<i>Meek v. Pittenger</i> 421 US 349	Upholding loan of secular textbooks to students attending religious schools. (Affirmed ruling of District Court).	6:3	Stewart	Burger Rehnquist with White	Brennan with Douglas and Marshall
		Striking down loan of instructional materials, including maps, tape recorders, and overhead projectors to religious schools. Also holding unconstitutional remedial education, guidance counselling, and hearing and speech therapy services provided on religious school grounds. (Affirmed District Court with regards to instructional materials and overturned ruling regarding auxiliary services).	6:3	Stewart	Brennan with Douglas and Marshall	Burger Rehnquist with White
1977	<i>Wolman v. Walter</i> 433 US 229	Ohio programme of aid to religious schools and their students challenged with regard to six separate programmes (all programmes held not to violate the Constitution by the Ohio District Court):				
		Loan of secular textbooks to religious school students held constitutional.	6:3	Blackmun		Marshall Brennan Stevens
		Provision of funds to cover costs of standardised tests and scoring services required by the state held to not violate the Constitution.	6:3	Blackmun		Marshall Brennan Stevens

Appendix A – Table 1
School Aid Cases: Dates, Rulings, Authors

Year	Case	Court Holding	Vote	Author	Concurrences (Author in bold)	Dissents (Author in bold)
1977	<i>Wolman v. Walter</i> 433 US 229 (cont.)	Provision of diagnostic speech and hearing services on religious school grounds held constitutional.	8:1	Blackmun	Marshall Stevens	Brennan
		Therapeutic, guidance, and remedial services provided by state employees at neutral locations or on public school grounds for public and religious school students held not to violate the Constitution.	7:2	Blackmun	Stevens	Marshall Brennan
		Loans of instructional materials (other than books) to non-public school students held unconstitutional.	6:3	Blackmun	Marshall Stevens Powell (in judgment only)	Burger Rehnquist White
		Payment of cost of field trips and transportation held unconstitutional.	5:4	Blackmun	Marshall Stevens	Burger Powell White Rehnquist
1983	<i>Mueller v. Allen</i> 463 US 388	Upholding Minnesota law allowing parents to make tax deductions for cost of tuition, textbooks, and transportation for their children regardless of whether attending public or religious schools. (Affirmed Eight Circuit ruling that statute was facially neutral and thus did not violate the Establishment Clause).	5:4	Rehnquist		Marshall with Brannan, Blackmun, and Stevens

Appendix A – Table 1
School Aid Cases: Dates, Rulings, Authors

Year	Case	Court Holding	Vote	Author	Concurrences (Author in bold)	Dissents (Author in bold)
1985	<i>Grand Rapids School District v. Ball</i> 473 US 373	Shared Time programmes providing remedial and enrichment classes to religious school students on religious school grounds taught by public school teachers and Community Education programmes providing classes for pupils and adults after school hours on religious school grounds taught by religious school teachers both found to violate the Establishment Clause. (Affirmed Sixth Circuit ruling finding an unconstitutional effect and entanglement).	7:2 (Community Education) 5:4 (Shared Time)	Brennan Brennan	Burger O'Connor	Rehnquist White Burger O'Connor Rehnquist White
1985	<i>Aguilar v. Felton</i> 473 US 402	New York's Title I funded programme to provide remedial education services to children of poor families during school hours and on religious school grounds held unconstitutional. (Upholding Second Circuit finding that the Court's prior cases established an insurmountable barrier between state funds and religious schools).	5:4	Brennan	Powell	Burger Rehnquist White O'Connor with Rehnquist
1986	<i>Witters v. Washington Department of Services for the Blind</i> 474 US 481	State disability assistance provided to a blind student could be used for student to attend a Christian college. (Overturned Washington State Supreme Court ruling that provision of aid in such circumstances would have the primary effect of aiding religion).	9:0	Marshall	White O'Connor Powell with Burger and Rehnquist	

Appendix A – Table 1
School Aid Cases: Dates, Rulings, Authors

Year	Case	Court Holding	Vote	Author	Concurrences (Author in bold)	Dissents (Author in bold)
1993	<i>Zobrest v. Catalina Hills School District</i> 509 US 1	Holding state provision of a sign language interpreter for a deaf student did not violate the Establishment Clause when that student attended a religious school. (Overturned a Ninth Circuit ruling that such provision would result in state promotion of the religious development of the student, in violation of the Constitution).	5:4	Rehnquist		Blackmun with Souter O'Connor with Stevens
1997	<i>Agostini v. Felton</i> 521 US 203	New York's Title I funded programme to provide remedial education services to children of poor families can take place on religious school grounds without violating the Establishment Clause (overturns <i>Aguilar</i>). (Overturned Second Circuit ruling that the Supreme Court had not yet overruled <i>Aguilar</i> and therefore the principles established in the earlier case still applied).	5:4	O'Connor		Souter with Stevens and Ginsburg Ginsburg with Stevens, Souter, and Breyer

Appendix A – Table 1
School Aid Cases: Dates, Rulings, Authors

Year	Case	Court Holding	Vote	Author	Concurrences (Author in Bold)	Dissenters (Author in bold)
1962	<i>Engel v. Vitale</i> 370 US 421	Struck down a twenty-two word non-denominational prayer written for daily use in New York public schools. The Court held that school-sponsored prayers violated the Establishment Clause. (Justices Frankfurter and White did not participate in the case). (Overturned New York Court of Appeals' ruling that, so long as no student was required to participate, the use of the prayer did not violate the Constitution).	6:1	Black	Douglas	Stewart
1963	<i>Abington School District v. Schempp</i> (including <i>Murray v. Curlett</i>) 374 US 203	School-sponsored Bible reading and recitation of the Lord's Prayer in public schools held unconstitutional. (Affirmed District Court ruling in <i>Schempp</i> ; in <i>Murray</i> , overturned Maryland Court of Appeals, which held no constitutional violation occurred).	8:1	Clark	Douglas Brennan Goldberg with Harlan	Stewart
1980	<i>Stone v. Graham</i> 449 US 39	Kentucky law requiring posting of the Ten Commandments in public classrooms held unconstitutional. (Dissents filed on procedural grounds, not addressing the substantive issues). (Overturned Kentucky Supreme Court ruling that posting was secular and therefore did not violate the Constitution).	5:4	<i>Per curiam</i>		Burger with Blackmun Stewart Rehnquist
1985	<i>Wallace v. Jaffree</i> 472 US 38	Alabama's moment-of-silence statute ruled unconstitutional. (District Court held law did not violate the Establishment Clause since the Clause permitted states to establish religion. Eleventh Circuit overruled and Supreme Court affirmed).	6:3	Stevens	Powell O'Connor (in judgment only)	Burger White Rehnquist
1992	<i>Lee v. Weisman</i> 505 US 577	School-sponsored prayers at graduation ceremonies held unconstitutional. (Affirmed First Circuit's finding of unconstitutionality).	5:4	Kennedy	Blackmun with Stevens and O'Connor Souter with Stevens and O'Connor	Scalia with Rehnquist, Thomas, and White

Appendix A – Table 2
School Prayer Cases: Dates, Rulings, Authors

Year	Case	Court Holding	Vote	Author	Concurrences (Author in Bold)	Dissenters (Author in Bold)
1981	<i>Widmar v. Vincent</i> 454 US 264	Religious student group permitted to use public university facilities to hold religious meetings and discussions. (Affirmed Eighth Circuit ruling that equal access does not violate Constitution and that denial of access to facilities was content-based discrimination).	8:1	Powell	Stevens (in judgment only)	White
1990	<i>Board of Education of the Westside Community Schools v. Mergens</i> 496 US 226	Religious student group allowed to use public school facilities to hold meetings during lunchbreaks and after school hours. Equal Access Act held constitutional. (Affirmed Eighth Circuit ruling on similar grounds).	8:1	O'Connor	Kennedy with Scalia Marshall with Brennan (in judgment only)	Stevens
1993	<i>Lamb's Chapel v. Center Moriches Union Free School District</i> 508 US 384	Public schools that provide after-hours access to secular groups may not deny similar access to religious groups. (Overturned Second Circuit ruling that school did not operate an open forum and thus could deny access to facilities since reason for denial was reasonable and viewpoint neutral)	9:0	White	Kennedy Scalia with Thomas	
1995	<i>Rosenberger v. the Rector and Visitors of the University of Virginia</i> 515 US 819	University of Virginia's policy of denying religious student groups access to activities funds denied groups' freedom of speech; provision of funds to religious groups in these circumstances did not violate the Establishment Clause. (Agreed with Fourth Circuit that denial of funds was viewpoint discrimination but overturned ruling that the Establishment Clause justified the denial).	5:4	Kennedy	O'Connor Thomas	Souter with Stevens, Ginsburg, and Breyer

Appendix 1 – Table 3
Equal Access Cases: Dates, Rulings, Authors

Appendix B

The Nationalisation of the Bill of Rights

Guarantee/ Right	Amendment	Year	Case
Public use and just compensation provisions regarding the taking of private property by the government	5	1896	<i>Missouri Pacific Railway Co. v. Nebraska</i> 164 US 403 <i>Chicago, Burlington, & Quincy Railway Co. v. Chicago</i> 166 US 226
Freedom of Speech	1	1925 1927	<i>Gitlow v. New York</i> 268 US 652 (in dictum) <i>Fiske v. Kansas</i> 274 US 380
Freedom of the Press	1	1931	<i>Near v. Minnesota</i> 283 US 697
Fair trial and right to counsel in capital cases	6	1932	<i>Powell v. Alabama</i> 287 US 45
Freedom of Assembly	1	1937	<i>DeJong v. Oregon</i> 299 US 353
Free Exercise of Religion	1	1940	<i>Cantwell v. Connecticut</i> 310 US 296
Establishment Clause	1	1947	<i>Everson v. Board of Education</i> 330 US 1
Right to a public trial	6	1948	<i>In re Oliver</i> 333 US 257
Right against unreasonable searches and seizures	4	1949	<i>Wolf v. Colorado</i> 338 US 25
Freedom of Association	1	1958	<i>NAACP v. Alabama</i> 357 US 449
Exclusionary Rule	4	1961	<i>Mapp v. Ohio</i> 367 US 643
Ban against cruel and unusual punishments	8	1962	<i>Robinson v. California</i> 370 US 660
Right to counsel in all felony cases	6	1963	<i>Gideon v. Wainwright</i> 372 US 335
Right against self-incrimination	5	1964	<i>Malloy v. Hogan</i> 378 US 1
Right to confront witnesses	6	1965	<i>Pointer v. Texas</i> 380 US 400
Right to privacy	Penumbra of 1,3,4, 5, and 9	1965	<i>Griswold v. Connecticut</i> 381 US 479
Right to an impartial jury	6	1966	<i>Parker v. Gladden</i> 385 US 363
Right to a speedy trial	6	1967	<i>Klopfer v. North Carolina</i> 386 US 213
Right to compulsory process for obtaining witnesses	6	1967	<i>Washington v. Texas</i> 388 US 14
Right to jury trial in nonpetty cases	6	1968	<i>Duncan v. Louisiana</i> 391 US 145
Right against double jeopardy	5	1969	<i>Benton v. Maryland</i> 395 US 784
Right to counsel in all criminal cases involving a jail term	6	1972	<i>Argersinger v. Hamlin</i> 407 US 25

APPENDIX B

The Nationalisation of the Bill of Rights

(adapted from O'Brien, D., *Constitutional Law and Politics, Volume Two: Civil Rights and Liberties* (New York: W.W. Norton & Company, 3rd Ed., 1991), p. 296-7)

Appendix C

Newspaper Campaigns Against the Religious Right

THE GOSPEL ACCORDING TO FOUR RELIGIOUS LEADERS:

Outrageous as they may sound, these words are being preached as gospel to millions of Americans.

Through the power of mass media, Jerry Falwell and other electronic preachers are attacking your religious and constitutional freedoms.

Cherishing religious beliefs is an American tradition. Forcing them on other Americans is not.

Yet right now, the moral majoritarians are on a crusade to impose their beliefs on everyone. No matter who you are. No matter where you live.

If you're a woman, they want to keep you "in your place."

They racially segregate private schools, and want to use your tax money to do it.

They want to weaken child-abuse protections. And they have already succeeded in Indiana.

They want to involve the government in your decision to have children. Or not to.

They want to deny homosexuals the right to vote.

They ban all new dictionaries in Texas and burn classic books across the country.

They want to deny you Social Security benefits, calling them inconsistent with the Bible.

They want to keep you from going to court to protect your civil rights and personal liberties.

In all, they want to force you to practice their particular religious beliefs. By law.

One of your most precious possessions is being threatened: freedom. That's why Norman Lear, Bishop James Mathews, Congresswoman Barbara Jordan and 40 religious, civic and other national leaders started a project called People For The American Way.

The American Way is the freedom to hold your own opinions and practice your own beliefs. Not someone else's. People For The American Way is mounting a major defense of that freedom. On television, radio and in newspapers. And in classrooms, libraries and meeting halls all over America.

Fill out the People For The American Way coupon. Give as generously as you possibly can. You can do something to fight for your freedom.

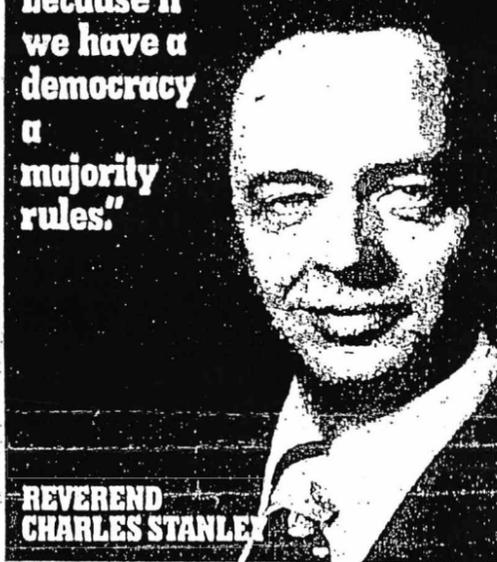
The most dangerous thing you can do right now is nothing.

"Freedom of speech has never been right. We never have had freedom of speech in this country and we never should have."



REVEREND RICH ANGIN

"We do not want a democracy in this land because if we have a democracy a majority rules."



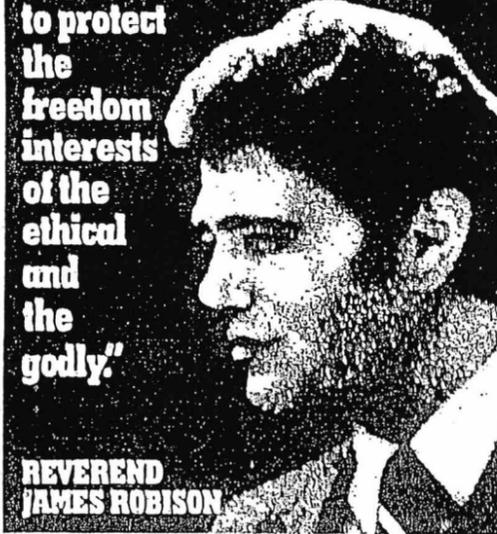
REVEREND CHARLES STANLEY

"The idea of religion and politics don't mix was invented by the Devil to keep Christians from running their own country."



REVEREND JERRY FALWELL

"If necessary, God would raise up a tyrant, a man who might not have the best ethics, to protect the freedom interests of the ethical and the godly."



REVEREND JAMES ROBISON

PEOPLE FOR THE AMERICAN WAY. NOW IS NOT THE TIME TO TAKE FREEDOM FOR GRANTED.

People For The American Way
1015 18th Street N.W., Suite 300, Washington D.C. 20036

I want to help defend our individual freedoms now under attack. Here is my tax-deductible contribution in the amount of \$ _____

I want to know more about these issues. Please send me your Special Report on the "Pro-Family" Network's Crusade and add me to your mailing list.

NAME: _____

ADDRESS: _____

CITY/STATE/ZIP: _____

TELEPHONE (DAY) _____ (EVE) _____

People For The American Way is a project of Citizens For Constitutional Concerns, Inc. © 1982 People For The American Way

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FOR HEAVEN'S SAKE DON'T LEGISLATE IN THE NAME OF GOD.

Cherishing your own personal religious beliefs is an American tradition. Forcing them on other Americans is not.

Yet right now, through the power of mass media, Jerry Falwell, other electronic preachers and their allies seem determined to impose their kind of beliefs on everyone. All in the name of God.

And if you disagree with them, they label you ungodly or immoral.

What's more, the moral majoritarians have begun to succeed in pressuring government to pass laws and regulations which enforce one narrow religious viewpoint. Theirs.

It's a crusade that threatens your constitutional freedoms. No matter who you are. No matter where you live.

If you're a woman, they want to keep you "in your place."

They racially segregate private schools, and want to use your tax money to do it.

They want to weaken child-abuse protections. And they have already succeeded in Indiana.

They want to involve the government in your decision to have children. Or not to.

They want to deny homosexuals the right to vote.

They ban all new dictionaries in Texas and burn classic books across the country.

They want to deny you Social Security benefits, calling them inconsistent with the Bible.

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The most dangerous thing you can do right now is nothing.



PEOPLE FOR THE AMERICAN WAY. NOW IS NOT THE TIME TO TAKE FREEDOM FOR GRANTED.

People For The American Way

1015 18th Street N.W., Suite 300, Washington D.C. 20036

- I want to help defend our individual freedoms now under attack. Here is my tax-deductible contribution in the amount of \$ _____.
- I want to know more about these issues. Please send me your Special Report on the Crusade against the Courts and add me to your mailing list.

NAME _____

ADDRESS _____

CITY/STATE/ZIP _____

TELEPHONE (DAY) _____ (EVE) _____

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Appendix D

Table 1: Communications Regarding the Becker
Amendment

Cartoon 1: Commentary on Justice O'Connor's nomination
to the Court

Cartoon 2: Commentary on the Court's position on
church/state issues (1985)

Document 1: President Clinton's Guidelines on Religious
Expression in Public Schools (1995)

Table 1

TABLE 1
COMMUNICATIONS EXPRESSING PERSONAL VIEWS ON THE
BECKER AMENDMENT

<i>Key Witnesses</i>	<i>Week of†</i>	<i>Number Pro-Becker</i>	<i>Cumulative Pro*</i>	<i>Number Anti-Becker</i>	<i>Cumulative Anti</i>
Anti: Tuller, Blake, Pfeffer	April 27	790	3415	860	2360
Pro: Sheen, Wallace					
Anti: Creighton, Mosley, Schiotz, Kenealy, Littell	May 4	480	3895	400	2760
Pro: Bacopolous, Daiker					
Anti: Eisendrath, Fordham, Braden, Temme, Feuer- stein, Freund, Kauper, Fiers, Marty	May 11	1200	5095	120	2880
Pro: McIntire, Poling, Jory					
Anti: Carcich, Prinz, Heckel, Antieau	May 18	960	6055	150	3030
Pro: O'Connor					
Anti: Lord, Carlson, Kurland	May 25	80	6135	840	3870

* The cumulative figures include communications dispatched prior to the week of April 27. The figures constitute "rough counts."

† The dates are those of mailing rather than receipt.

Taken from Laubach, J., *School Prayers: Congress, the Courts and the Public* (Washington DC: Public Affairs Press, 1969), p. 86.

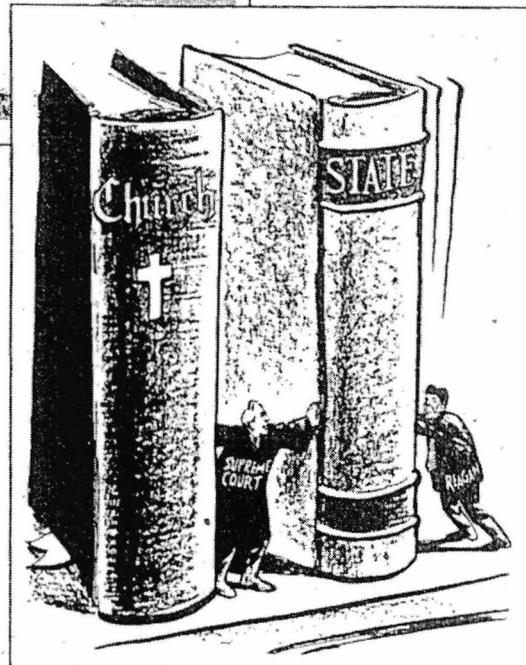
1



Bob Englehart
The Hartford Courant

Published in the *New York Times*, September 20, 1981, E5

2



Bill Mauldin
Chicago Sun-Times
News America Syndicate

Published in the *New York Times*, July 7, 1985, E5

Document 1 – President Clinton’s Guidelines on Religious Expression in Public Schools

Dear American Educator,

Almost three years ago, President Clinton directed me, as U.S. Secretary of Education, in consultation with the Attorney General, to provide every public school district in America with a statement of principles addressing the extent to which religious expression and activity are permitted in our public schools. In accordance with the President's directive, I sent every school superintendent in the country guidelines on Religious Expression in Public Schools in August of 1995.

The purpose of promulgating these presidential guidelines was to end much of the confusion regarding religious expression in our nation's public schools that had developed over more than thirty years since the U.S. Supreme Court decision in 1962 regarding state sponsored school prayer. I believe that these guidelines have helped school officials, teachers, students and parents find a new common ground on the important issue of religious freedom consistent with constitutional requirements.

In July of 1996, for example, the Saint Louis School Board adopted a district wide policy using these guidelines. While the school district had previously allowed certain religious activities, it had never spelled them out before, resulting in a lawsuit over the right of a student to pray before lunch in the cafeteria. The creation of a clearly defined policy using the guidelines allowed the school board and the family of the student to arrive at a mutually satisfactory settlement.

In a case decided last year in a United States District Court in Alabama, (Chandler v. James) involving student initiated prayer at school related events, the court instructed the DeKalb County School District to maintain for circulation in the library of each school a copy of the presidential guidelines.

The great advantage of the presidential guidelines, however, is that they allow school districts to avoid contentious disputes by developing a common understanding among students, teachers, parents and the broader community that the First Amendment does in fact provide ample room for religious expression by students while at the same time maintaining freedom from government sponsored religion.

The development and use of these presidential guidelines were not and are not isolated activities. Rather, these guidelines are part of an ongoing and growing effort by educators and America's religious community to find a new common ground. In April of 1995, for example, thirty-five religious groups issued "Religion in the Public Schools: A Joint Statement of Current Law" that the Department drew from in developing its own guidelines. Following the release of the presidential guidelines, the National PTA and the Freedom Forum jointly published in 1996 "A Parent's Guide to Religion in the Public Schools" which put the guidelines into an easily understandable question and answer format.

In the last two years, I have held three religious-education summits to inform faith communities and educators about the guidelines and to encourage continued dialogue and cooperation within constitutional limits. Many religious communities have contacted local schools and school systems to offer their assistance because of the clarity provided by the guidelines. The United Methodist Church has provided reading tutors to many schools, and Hadassah and the Women's League for Conservative Judaism have both been extremely active in providing local schools with support for summer reading programs.

The guidelines we are releasing today are the same as originally issued in 1995, except that changes have been made in the sections on religious excusals and student garb to reflect the Supreme Court decision in Boerne v. Flores declaring the Religious Freedom Restoration Act unconstitutional as applied to actions of state and local governments.

These guidelines continue to reflect two basic and equally important obligations imposed on public school officials by the First Amendment. First, schools may not forbid students acting on their own from expressing their personal religious views or beliefs solely because they are of a religious nature. Schools may not discriminate against private religious expression by students, but must instead give students the same right to engage in religious activity and discussion as they have to engage in other comparable activity. Generally, this means that students may pray in a nondisruptive manner during the school day when they are not engaged in school activities and instruction, subject to the same rules of order that apply to other student speech.

At the same time, schools may not endorse religious activity or doctrine, nor may they coerce participation in religious activity. Among other things, of course, school administrators and teachers may not organize or encourage prayer exercises in the classroom. Teachers, coaches and other school officials who act as advisors to student groups must remain mindful that they cannot engage in or lead the religious activities of students.

And the right of religious expression in school does not include the right to have a "captive audience" listen, or to compel other students to participate. School officials should not permit student religious speech to turn into religious harassment aimed at a student or a small group of students. Students do not have the right to make repeated invitations to other students to participate in religious activity in the face of a request to stop.

The statement of principles set forth below derives from the First Amendment. Implementation of these principles, of course, will depend on specific factual contexts and will require careful consideration in particular cases.

In issuing these revised guidelines I encourage every school district to make sure that principals, teachers, students and parents are familiar with their content. To that end I offer three suggestions:

First, school districts should use these guidelines to revise or develop their own district wide policy regarding religious expression. In developing such a policy,

school officials can engage parents, teachers, the various faith communities and the broader community in a positive dialogue to define a common ground that gives all parties the assurance that when questions do arise regarding religious expression the community is well prepared to apply these guidelines to specific cases. The Davis County School District in Farmington, Utah, is an example of a school district that has taken the affirmative step of developing such a policy.

At a time of increasing religious diversity in our country such a proactive step can help school districts create a framework of civility that reaffirms and strengthens the community consensus regarding religious liberty. School districts that do not make the effort to develop their own policy may find themselves unprepared for the intensity of the debate that can engage a community when positions harden around a live controversy involving religious expression in public schools.

Second, I encourage principals and administrators to take the additional step of making sure that teachers, so often on the front line of any dispute regarding religious expression, are fully informed about the guidelines. The Gwinnett County School system in Georgia, for example, begins every school year with workshops for teachers that include the distribution of these presidential guidelines. Our nation's schools of education can also do their part by ensuring that prospective teachers are knowledgeable about religious expression in the classroom.

Third, I encourage schools to actively take steps to inform parents and students about religious expression in school using these guidelines. The Carter County School District in Elizabethton, Tennessee, included the subject of religious expression in a character education program that it developed in the fall of 1997. This effort included sending home to every parent a copy of the "Parent's Guide to Religion in the Public Schools."

Help is available for those school districts that seek to develop policies on religious expression. I have enclosed a list of associations and groups that can provide information to school districts and parents who seek to learn more about religious expression in our nation's public schools.

In addition, citizens can turn to the U.S. Department of Education web site (<http://www.ed.gov>) for information about the guidelines and other activities of the Department that support the growing effort of educators and religious communities to support the education of our nation's children.

Finally, I encourage teachers and principals to see the First Amendment as something more than a piece of dry, old parchment locked away in the national attic gathering dust. It is a vital living principle, a call to action, and a demand that each generation reaffirm its connection to the basic idea that is America -- that we are a free people who protect our freedoms by respecting the freedom of others who differ from us.

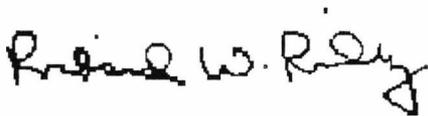
Our history as a nation reflects the history of the Puritan, the Quaker, the Baptist, the Catholic, the Jew and many others fleeing persecution to find religious freedom in America. The United States remains the most successful experiment in religious freedom that the world has ever known because the First Amendment uniquely

balances freedom of private religious belief and expression with freedom from state-imposed religious expression.

Public schools can neither foster religion nor preclude it. Our public schools must treat religion with fairness and respect and vigorously protect religious expression as well as the freedom of conscience of all other students. In so doing our public schools reaffirm the First Amendment and enrich the lives of their students.

I encourage you to share this information widely and in the most appropriate manner with your school community. Please accept my sincere thanks for your continuing work on behalf of all of America's children.

Sincerely,

A handwritten signature in black ink that reads "Richard W. Riley". The signature is written in a cursive style with a prominent loop at the end of the last name.

Richard W. Riley
U.S. Secretary of Education

RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS

Student prayer and religious discussion: The Establishment Clause of the First Amendment does not prohibit purely private religious speech by students. Students therefore have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activity. For example, students may read their Bibles or other scriptures, say grace before meals, and pray before tests to the same extent they may engage in comparable nondisruptive activities. Local school authorities possess substantial discretion to impose rules of order and other pedagogical restrictions on student activities, but they may not structure or administer such rules to discriminate against religious activity or speech.

Generally, students may pray in a nondisruptive manner when not engaged in school activities or instruction, and subject to the rules that normally pertain in the applicable setting. Specifically, students in informal settings, such as cafeterias and hallways, may pray and discuss their religious views with each other, subject to the same rules of order as apply to other student activities and speech. Students may also speak to, and attempt to persuade, their peers about religious topics just as they do with regard to political topics. School officials, however, should intercede to stop student speech that constitutes harassment aimed at a student or a group of students.

Students may also participate in before or after school events with religious content, such as "see you at the flag pole" gatherings, on the same terms as they may participate in other noncurriculum activities on school premises. School officials may neither discourage nor encourage participation in such an event.

The right to engage in voluntary prayer or religious discussion free from discrimination does not include the right to have a captive audience listen, or to compel other students to participate. Teachers and school administrators should ensure that no student is in any way coerced to participate in religious activity.

Graduation prayer and baccalaureates: Under current Supreme Court decisions, school officials may not mandate or organize prayer at graduation, nor organize religious baccalaureate ceremonies. If a school generally opens its facilities to private groups, it must make its facilities available on the same terms to organizers of privately sponsored religious baccalaureate services. A school may not extend preferential treatment to baccalaureate ceremonies and may in some instances be obliged to disclaim official endorsement of such ceremonies.

Official neutrality regarding religious activity: Teachers and school administrators, when acting in those capacities, are representatives of the state and are prohibited by the establishment clause from soliciting or encouraging religious activity, and from participating in such activity with students. Teachers and administrators also are prohibited from discouraging activity because of its religious content, and from soliciting or encouraging antireligious activity.

Teaching about religion: Public schools may not provide religious instruction, but they may teach about religion, including the Bible or other scripture: the history of religion, comparative religion, the Bible (or other scripture)-as-literature, and the role

of religion in the history of the United States and other countries all are permissible public school subjects. Similarly, it is permissible to consider religious influences on art, music, literature, and social studies. Although public schools may teach about religious holidays, including their religious aspects, and may celebrate the secular aspects of holidays, schools may not observe holidays as religious events or promote such observance by students.

Student assignments: Students may express their beliefs about religion in the form of homework, artwork, and other written and oral assignments free of discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance, and against other legitimate pedagogical concerns identified by the school.

Religious literature: Students have a right to distribute religious literature to their schoolmates on the same terms as they are permitted to distribute other literature that is unrelated to school curriculum or activities. Schools may impose the same reasonable time, place, and manner or other constitutional restrictions on distribution of religious literature as they do on nonschool literature generally, but they may not single out religious literature for special regulation.

Religious excusals: Subject to applicable State laws, schools enjoy substantial discretion to excuse individual students from lessons that are objectionable to the student or the students' parents on religious or other conscientious grounds. However, students generally do not have a Federal right to be excused from lessons that may be inconsistent with their religious beliefs or practices. School officials may neither encourage nor discourage students from availing themselves of an excusal option.

Released time: Subject to applicable State laws, schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation or penalize those who do not attend. Schools may not allow religious instruction by outsiders on school premises during the school day.

Teaching values: Though schools must be neutral with respect to religion, they may play an active role with respect to teaching civic values and virtue, and the moral code that holds us together as a community. The fact that some of these values are held also by religions does not make it unlawful to teach them in school.

Student garb: Schools enjoy substantial discretion in adopting policies relating to student dress and school uniforms. Students generally have no Federal right to be exempted from religiously-neutral and generally applicable school dress rules based on their religious beliefs or practices; however, schools may not single out religious attire in general, or attire of a particular religion, for prohibition or regulation. Students may display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages. Religious messages may not be singled out for suppression, but rather are subject to the same rules as generally apply to comparable messages.

THE EQUAL ACCESS ACT

The Equal Access Act is designed to ensure that, consistent with the First Amendment, student religious activities are accorded the same access to public school facilities as are student secular activities. Based on decisions of the Federal courts, as well as its interpretations of the Act, the Department of Justice has advised that the Act should be interpreted as providing, among other things, that:

General provisions: Student religious groups at public secondary schools have the same right of access to school facilities as is enjoyed by other comparable student groups. Under the Equal Access Act, a school receiving Federal funds that allows one or more student noncurriculum-related clubs to meet on its premises during noninstructional time may not refuse access to student religious groups.

Prayer services and worship exercises covered: A meeting, as defined and protected by the Equal Access Act, may include a prayer service, Bible reading, or other worship exercise.

Equal access to means of publicizing meetings: A school receiving Federal funds must allow student groups meeting under the Act to use the school media -- including the public address system, the school newspaper, and the school bulletin board -- to announce their meetings on the same terms as other noncurriculum-related student groups are allowed to use the school media. Any policy concerning the use of school media must be applied to all noncurriculum-related student groups in a nondiscriminatory matter. Schools, however, may inform students that certain groups are not school sponsored.

Lunch-time and recess covered: A school creates a limited open forum under the Equal Access Act, triggering equal access rights for religious groups, when it allows students to meet during their lunch periods or other noninstructional time during the school day, as well as when it allows students to meet before and after the school day.

Revised May 1998

Available from US Department of Education website:
(<http://www.ed.gov/Speeches/08-1995/religion.html>)

Appendix E

Text of Proposed Equal Access Bills

Text of Proposed Equal Access Bills heard by Congress

S.815

Section 3:

It shall be unlawful for a public secondary school receiving Federal financial assistance, which generally allows groups of students to meet during noninstructional periods, to discriminate against any meeting of students on the basis of religious content of the speech at such meeting, if (1) the meeting is voluntary and orderly, and (2) no activity which is in and of itself unlawful is permitted.

Section 4:

Nothing in this Act shall be construed to permit the United States or any State or political subdivision thereof to (1) influence the form or content of any prayer or other religious activity, or (2) require any person to participate in prayer or other religious activity.

S.1059

Section 3:

It shall be unlawful for any State or local educational agency or any public institution of higher education to implement any policy or practice which permits students or faculty, or both, or groups of students, groups of faculty, or both, to engage in voluntary extracurricular activities on school premises of a public elementary or secondary school or a public institution of higher education during noninstructional periods, but denies equal access and opportunity to, or discriminates against, students or faculty or both, or groups of students, groups of faculty members, or both, that seeks to engage in voluntary extracurricular activities that involve prayer, religious discussion, or silent meditation on school or institution premises during noninstructional periods.

HR.4996

Section 2:

No funds appropriated to the Department of Education to provide financial assistance to State or local educational agencies may be obligated or expended to and State or local educational agency, if the State or local educational agency, or any public secondary school for which the State or local educational agency is responsible, violates the prohibition described in section 3.

Section 3:

It shall be a policy subject to the penalties in section 2 for a public secondary school receiving Federal financial assistance, which generally allows non-school-sponsored groups of students to meet, to discriminate on the basis of the religious content of the speech at such meetings if –

- (1) the meeting is voluntary and student initiated,
- (2) there is no sponsorship of the meeting by the School, government, or its agents or employees, and
- (3) no activity which is in and of itself unlawful is permitted.

Section 4:

Nothing in this Act shall be construed to permit the United States or any State or political subdivision thereof to –

- (1) influence the form or content of any prayer or other religious activity;
- (2) require any person to participate in prayer or other religious activity; or
- (3) expend public funds beyond the cost of providing the meeting space for student initiated meetings.

HR.2732

Section 2(a)(1):

No funds appropriated to the Department of Education to provide financial assistance to State or local educational agencies may be obligated or expended to any State educational agency or local educational agency, if the State or local educational agency, or any public elementary or secondary school for which the state or local educational agency is responsible, has a policy or practice described in subsection (b).

Section 2(a)(2):

No funds appropriated to the Department of Education to provide financial assistance to institutions of higher education may be obligated or expended to any public institution of higher education if such institution has a policy or practice described in subsection (b).

Section 2(b):

The policy or practice referred to in subsection (a) permits students or faculty members, or both, or groups of students, groups of faculty members, or both, to engage in voluntary extracurricular activities on school premises of a public elementary or secondary school or a public institution of higher education during noninstructional periods, but denies equal access and opportunity to, or discriminates against, students or faculty members or both, or groups of students, groups of faculty members, or both, that seek to engage in voluntary extracurricular activities that involve prayer, religious discussion, or silent meditation on school or institution premises during noninstructional periods.

20 US 4071 – The Equal Access Act

Section (a):

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

Section (b):

A public secondary school has a limited open forum whenever such school grants on offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

Section (c):

Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that –

- (1) the meeting is voluntary and student-initiated;
- (2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;
- (3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;
- (4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and
- (5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

Section (d):

Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof –

- (1) to influence the form or content of any prayer or other religious activity;
- (2) to require any person to participate in prayer or other religious activity;
- (3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;
- (4) to compel an agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;
- (5) to sanction meetings that are otherwise unlawful;

- (6) to limit the rights of groups of students which are not of a specified numerical size; or
- (7) to abridge the constitutional rights of any person.

Section (e):

Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this subchapter shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

Section (f):

Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students is voluntary.

Appendix F

First Edition of *Wide Awake*

LODGING WIDE AWAKE

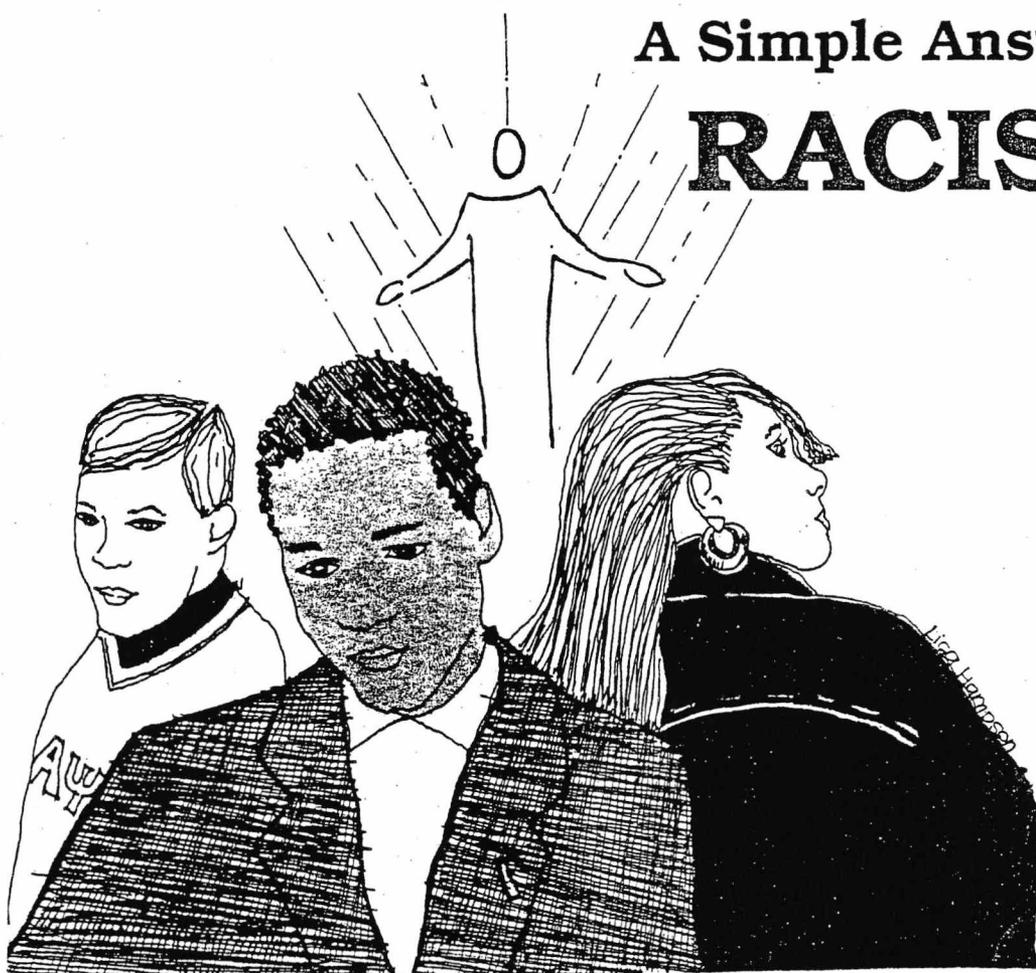
Christian Perspective at the University of Virginia

CIRCULATION 5,000

NOVEMBER/DECEMBER 1990

A Simple Answer to

RACISM



Inside. . .

- A Loving Home for Unwed Mothers
- Professor Elzinga Speaks Out
- C.S. Lewis on Free Will & Moral Responsibility
- Books, Music, Poetry and more

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219
3

WIDE AWAKE

A Christian Perspective at the University of Virginia

The hour has come for you to awake from your slumber, because our salvation is nearer now than when we first believed.

— Romans 13:11

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LETTER FROM THE EDITOR

Welcome!

Dear Readers,
Welcome to the first issue of *WIDE AWAKE*. *WIDE AWAKE* offers a Christian perspective on both personal and community issues, especially those relevant to college students at the University of Virginia. Last Spring we realized that none of the fifteen student-run publications at the University provided a forum for Christian expression, and we decided to fill that void.

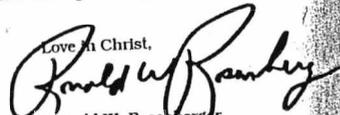
Our mission is twofold: to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means. College is a time to pursue knowledge; an understanding of one's religious beliefs should not be neglected, but should rather constitute the heart of that quest.

Christianity is not a spectator sport — It is a vital relationship with our Creator, the One who knows us intimately and loves us infinitely. Jesus calls us to be active players in life. In Matthew 5:13-14, Jesus says "You are the salt of the earth. . . You are the light of the world. A city on a hill cannot be hidden." Christians are called to lead exemplary lives by walking in Jesus's footsteps.

In this issue, we will explore how Christian principles for living can have an impact on our personal lives, our attitudes towards others, and our relationship to people in need. Economics professor Ken Elzinga shares how Christ has influenced his role as a teacher. In our cover story, we examine how the Bible offers tenable solutions to racism, a disease that has plagued society for centuries. Finally, we look at a Christian home for unwed mothers as a concrete example of Christian love in action.

We hope that the articles in this issue will inspire you to consider how the Bible applies to your own life today. We would like to extend a special thanks to the Center for Christian Study for the use of their office and the encouragement they gave us. We would also like to thank those who made this magazine possible through their prayers and financial support.

Love in Christ,



Ronald W. Rosenberger
Editor-in-Chief

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MUSINGS

A Love/Hate Relationship

by Greg Mourad & Rob Prince

Christ's admonition, "Judge not, lest you be judged," (Matthew 7:1) has often been misinterpreted. Many people, Christian and non-Christian alike, believe the phrase to command blind acceptance of all behavior. Christians who make this mistake are negligent in their responsibility towards their fellow men.

Christians are called to love all people. The importance of love is stressed throughout the New Testament. Christ said, "A new command I give you: love one another. As I have loved you, so you must love one another." (John 13:34)

Carrying out this command is a challenging task because Christ loved all equally, including prostitutes, tax collectors, adulterers, and other sinners. Although it often seems difficult to love sinners, they are the ones who need love most. As Christ said, "There will be more joy in Heaven over one sinner who repents than over ninety-nine righteous persons who need no repentance." (Luke 15:7)

An important part of loving people is desiring what is best for them. The Bible tells us that salvation is "an eternal weight of glory far beyond all comparison."

(2 Corinthians 4:17) If eternal life with God is the best possible consequence of life on earth, then the Christian attitude towards others ought to be geared toward achieving their salvation.

This attitude often leads to friction between Christians and non-Christians, as most people resent being told when they are doing wrong. In our society, the line between sin and sinner has been erased, so that non-Christians often believe Christians are intolerant or hateful, and many Christians believe that in order to love a sinner they must ignore, not hate, his immorality.

Christ taught differently: "If your brother sins, rebuke him; and if he repents, forgive him." (Luke 17:3) The only way to salvation through Him is by confessing and repenting of sin. It is the Christian's duty to make sinners aware of their need for salvation. Thus, Christians must confront and condemn sin, or else they fall in their duty of love.

"Love the sinner but hate the sin" contains two crucial ideas; Christians must not allow themselves to forget either one. Indeed, Christians cannot truly love the sinner without hating the sin. †

The Plane Truth

by Stephanie Ace

Most people avoid thinking about death until confronted by it in some personal experience. But while we are alive, we must prepare ourselves for death, the passage to the afterlife.

Dying is like going through an airport. When you first arrive, you must check your luggage. When you die, you can not take material or physical goods with you. The only things that will go through the security booth are the beliefs in your soul, perhaps some intellectual thoughts, and the fruits of the Spirit (be they withered or plump and juicy). Money won't pass, fame on earth won't pass, and excuses won't pass either.

All of the spiritual accessories will be detailed on your flight ticket. When you get to the final gate, the Lord will be handing out boarding passes, and He will examine your ticket. If, in your lifetime, you did not request a seat on His Friendly Skies Flyer by trusting Him and asking Him to be your pilot, then you will not be on His list of reserved seats (and the Lord will know you not). You will not be able to buy a ticket then;

no amount of money or desire will do the trick. You will be met by your chosen pilot and flown straight to Hell on an express jet (without air conditioning or toilets, of course).

Death is not an end in itself, but rather a changeover from one plane of reality to another. Now, while you have the chance, confirm your reservation on the Friendly Skies.

If you are unsure how to go about this, consult your handy Traveler's Guide immediately. It is brimming with the latest schedule information and clear examples illustrating the one and only way to Heaven — through Jesus Christ. Divinely inspired and communicated, this Guide can even help you get to know the Pilot before you come close to the airport. Read it for yourself and tell all of your friends about it. You don't want them to be left behind, do you?

Remember, someday, when you least expect it, you are going to reach that airport to catch a flight out of this life. You'd better be sure you are flying with the right pilot, because it's going to be a long trip. †

A Place to Call Home

by Jason Craddock

Two thousand years ago, a young carpenter in Israel discovered that his fiancée was pregnant. Common practice during this period was to stone women who found themselves in this predicament. Happily, due to the divine intervention of the angel of the Lord, Joseph decided to wed Mary anyway. Although stoning was abandoned years ago, society still ostracizes unwed mothers. Today, Emmaus With Child comes to the aid of these women in crisis just as the Lord's angel helped Mary.

Emmaus With Child was founded upon a principle of addressing the spiritual and physical needs of women in crisis. Theresa Radford, the director and founder of Emmaus With Child, believes that these are inseparable mandates: "You cannot address physical needs without addressing spiritual needs, and vice versa." On this principal, she founded Emmaus With Child to meet these needs of women. Crises can vary from unplanned pregnancy to lack of support during the difficulties of pregnancy, childbirth and child raising.

Theresa Radford began working as a Labor and Delivery nurse at the University hospital in 1981. Growing within her and other nurses over the next two years were ethical and moral objections to the hospital's policy at the time which required nurses to assist with second trimester abortions. She was moved to tears, prayer, and protest upon seeing the aborted children. She felt that the hospital was denying her ethical values with this policy, and subsequently wrote a letter of protest to the administration, signed by other nurses, requesting that these abortions be performed "somewhere besides Labor and Delivery." She is pleased with the hospital's new system, which does not allow for second trimester abortions, except in cases of rape, extreme fetal abnormality, or endangered life of the mother.

Upon leaving the hospital in 1983, Radford, in the midst of a search for full time work as a registered nurse, followed her desire to start a home for women seeking an alternative to abortion, believing that "you have to pay attention to the unborn child, but you must equally address the mother's needs." In 1984, she realized this dream with the opening of Emmaus With Child in a small house in Hatton Ferry, which only had five bedrooms. In 1987, Emmaus moved to a larger space which formerly housed the Trousdale Home for Boys in



"We would like it to be more of a home than a shelter or institution."

—Theresa Radford

Keene, VA, twenty miles south of Charlottesville.

Radford opened Emmaus With Child under the auspices of a sister organization in King George called Emmaus. This organization, managed by Radford's mother, was founded to help delinquent teenagers. Radford notes that Emmaus With Child currently remains "under the umbrella" of her mother's organization, and is "trying to become an independent entity." Emmaus With Child is now in a transitional stage of acquiring this financial and legal independence.

Presently, a "family" of four women and a social worker/counselor live in this homey, family-like envi-

ronment. These women share an environment of genuine love and care which may have been foreign to them before. "We would like it to be more of a home than a shelter or institution," Radford said.

In addition, these women are given the hope, encouragement, guidance and resources necessary for independence. It is a goal, or ideal, of Emmaus With Child to "enable women to end dependency on others or the state via educational or vocational training," according to Radford.

As evidence of this, there was a young woman who came to Emmaus With Child a cocaine addict, and after going through the program, graduated from Piedmont Community College Magna Cum Laude, and went on to become a full time nurse at the University hospital. While attending school she participated in Aid to Mothers with Dependent Children, a government assistance program. Radford appreciates this temporary use of government assistance: "That's how I think the system should work. It should help women while they are striving to achieve independence." She continues: "There is nothing more sad to me than for a woman to come to Emmaus With Child and deliver her baby, and then become dependent on the welfare system due to a lack of resources."

This nurse was the first woman to complete college as a member of Emmaus With Child's college program. Their program allows up to four bedrooms out of a total of ten for women who want to attend college following delivery. The women must demonstrate maturity, responsibility, and intellectual ability. Though most residents are permitted to stay up to eight weeks after delivery, those residents in the college program can stay indefinitely. All residents, except those with mitigating circumstances, are expected to pursue employ-

"You have to pay attention to the unborn child, but you must equally address the mother's needs"

ment outside the home or some kind of educational or vocational training.

Central to this ministry is enabling women to "have healthy pregnancies and deliver healthy children," Radford said. The staff provides pre-natal exercise and childbirth classes as well as personal counseling, which helps the women to decide for themselves such issues as whether to keep their child or place it for adoption. Residents and their children also receive excellent health care and free clothing.

In addition, there are regular discussions on issues like relationships, parenting, Christian sexuality

and management of work and home. "It's a rehabilitative process," Radford states. "A major problem with social or Christian agencies is that we tend to deal with crisis pregnancies in a short term mindset. We need to offer long term assistance to these women, which addresses the holistic views of individuals, psychosocial and spiritual."

As a long term goal, Radford said that she would like to increase the amount of available space and lengthen the amount of time that residents are allowed to stay. "A crisis does not end six weeks after delivery,"

"You cannot address physical needs without addressing spiritual needs, and vice versa."

she explains. The "hurt and broken spirits" of these mothers remain long after the child is born.

Additional funding is desperately needed. Few if any of these women have the financial resources necessary for survival when they come to Emmaus With Child. Currently, the ministry operates on a \$40,000 yearly budget, most of which comes from private donations. With a higher budget, Radford would like to place more emphasis on vocational and educational training for the women. In addition, she would like to make transportation more readily available, to help residents seeking employment and educational opportunities. While more money is certainly an urgent prayer of Radford's, she is thankful for the progress made since the ministry's first year, when the budget stood at a mere \$19,000.

Another aspect of this ministry is its adoption policy. When a woman wishes to place her child for adoption, Emmaus With Child sends referrals to Christian adoption agencies across Virginia.

Interdenominational in faith, Emmaus With Child ministers with love to its residents and prays that they would come to know Christ and accept Him as their Lord and Savior, according to Radford. While sharing Christ's gospel with the women, and requiring them to attend weekly church services and Bible studies, the ministry wishes to show them a "more loving approach" to Christ, instead of "bombarding" them with "doctrine."

Radford would like to see this approach more often in the pro-life movement. She seeks a compassionate movement which reflects Christ's love for both mothers and children. She also notes that women need to be more in the forefront in this movement. "People who have strong pro-choice beliefs should not be threatened by our ministry, as we offer compassionate help and options for women in crisis pregnancies." †

Willing to be Free?

by Jeff Buterbaugh

For centuries, Christian scholars have pondered the dilemma of evil in a world made by the Perfect Being, and these scholars have arrived at the same conclusion: evil exists because of man's prideful misuse of God's gift of free will. C.S. Lewis makes this case throughout his works.

One of the great philosophical and theological questions man has wrestled with throughout his history is the problem of free will. How much control do we really have over our lives? C. S. Lewis discussed this point extensively in his writings. As he stated in *Perelandra*, "Either something or nothing must depend on individual choices." Lewis himself had struggled with this question since he was a schoolboy: In *Surprised by Joy*, he recalled a conversation with schoolmates over "whether the future was like a line you can't see or like a line that is not yet drawn." The stance Lewis eventually chose has profound implications on our moral responsibilities to ourselves, to our Lord, and to our fellow men.

Many people reject Christianity on the grounds that a just God would declare his presence openly and directly to everyone. Upon investigation, however, it is obvious that such a scenario would turn us into mere robots and slaves. According to Lewis, God has endowed individuals with the ability to choose to love Him. Our love for God is therefore volitional and real. God allows unbelief to remain a plausible alternative to ensure that those who would not choose Him voluntarily will not feel compelled to do so to preserve intellectual integrity.

Here one seems to encounter a difficulty. The Bible says that God "works out everything in conformity with the purpose of His will." (Ephesians 1:11) It is also stressed throughout God's Word that he loves everyone and desires "all men to be saved and to come to a knowledge of the truth." (1 Timothy 2:4) If God wants everyone to love Him, how can man's rejection of God be

in accordance with His will? Here again Lewis provides some insight as to how something could be in accordance with His will in one way and not in another. In *Mere Christianity*, Lewis outlines a scenario in which a mother, in an attempt to develop a sense of responsibility in her children, tells them that she will not force them to clean their rooms every night. She would prefer that they keep their rooms clean, of course, but if she returns to find the room in a shambles it is not against her will. She gives them the freedom to choose, although she hopes they will choose to be tidy. It is a similar situation with God. He wants us to turn to Him and follow his Word, but He has given us free will to decide for ourselves.

Lewis presents a God unrestricted by logistics of time, and personally available to those who desire His intercession. Man's attempts to equate God's omniscience with the demise of free will are placing God back into the space-time continuum. Time is not an ultimate reality; God sees the entire span in an "unbounded Now." (*The Screwtape Letters*) In *Miracles*, Lewis clarifies this concept with an excellent illustration. He compares a man's life to a wavy line on a sheet of paper. The man is conscious of only one point on his line at a time, but God sees the whole page. The man chooses his own path, but regardless of what he chooses, God will be able to bring other lines (events, people, etc.) into contact with his at various points so as to fit His design. The man can even ask God to arrange the lines in a certain manner at particular point. Lewis asserts that it is merely a matter of the Designer's skill, not impossibility, to coordinate all

the lines into a satisfactory pattern. In some cases the intersecting lines might affect parts of the page that existed before the man was born or after he died; nothing is impossible for God.

Life is a series of causes and effects that are all the result of God's infinite design. As Ransom observed in *Perelandra*:

The whole distinction between things accidental and things designed, like the distinction between fact and myth, was purely terrestrial. The pattern is so large that within the little frame of earthly experience there appear pieces of it between which we can see no connection, and other pieces between which we can. Hence we rightly, for our use, distinguish the accidental from the essential. But step outside that frame and the distinction drops down into the void, fluttering useless wings.

What difference does this bit of knowledge make? All the difference in the world! If the Lord is personally interested in our lives, and wants us to help Him "paint

His picture," it only makes sense that we should try to cooperate and communicate with the Artist holding the pen. In fact, accepting Lewis's perspective forces us to rethink our attitudes towards ourselves (our line), God (the Artist), and other people (the other lines). In assuming this position, we acquire certain responsibilities, which Lewis characterized as morality in *Mere Christianity*:

Morality, then, seems to be concerned with three things. Firstly, with fair play and harmony between individuals. Secondly, with what might be called tidying up or harmonizing the things inside each individual. Thirdly, with the general purpose of human life as a whole: what man was made for; what course the whole fleet ought to be on; what tune the conductor wants it to play.

"Creatures, I give you yourselves," declared the strong, happy voice of Aslan." (*The Magician's Nephew*) What attitude does the Lord want us to have about ourselves? Many people today would echo the Big Ghost

in *The Great Divorce*: "I never asked for anything that wasn't mine by rights . . . I'm asking for nothing but my rights . . . I got to have my rights same as you, see?"

Modern Americans hold out for their personal rights as a matter of course. Lewis compared this obsession with the sociology of Hell:

We must picture Hell as a state where everyone is perpetually concerned about his own dignity and advancement, where everyone has a grievance, and where everyone lives the deadly serious passions of envy, self-importance, and resentment. (The Screwtape Letters)

Later in the book, Lewis elucidated some of the repercussions of this attitude:

Men are not angered by mere misfortune, but by misfortune conceived as injury. And the sense of injury depends on the feeling that a legitimate claim has been denied. The more claims on life, therefore, that your patient can be induced to make, the more often he will feel injured and, as a result, ill-tempered.

It would be ludicrous for a Christian to hold this view. If Jesus were to appear before a believer in bodily form and ask for a day of sacrificial service, he would gladly assent. Personal agendas and privileges would be happily tossed aside for such an opportunity to serve the Lord. Lewis astutely pointed out that this is the constant privilege of all Christians.

The Bible reveals the correct view of the self in Psalm 51:17, "The sacrifices of God are a broken spirit; a broken and contrite heart." Lewis recognized this and asserted that pride was the root of all sin. "Pride leads to every other vice: it is the complete anti-God state of mind." (*Mere Christianity*) Pride by its very nature corrupts the other areas of morality.

What are the implications of Lewis's stance on our relationship with God? From a Christian viewpoint man was created to be a derivative being, not independent for the pursuit of his own designs. This new, humble,

Lewis compared the American obsession with individual rights to the sociology of Hell.

perception of oneself logically leads to a new, obedient, relationship towards God. As Lewis points out in *Mere Christianity*, "if somebody else made me, for His own purposes, then I shall have a lot of duties which I should not have if I belonged to myself."

Lewis had little sympathy for the concept of an impersonal, disinterested "creative force":

One reason why people find Creative Evolution so attractive is that it gives one much of the emotional comfort of believing in God and none of the less pleasant consequences. When you are feeling fit and the sun is

We can hate the offender's unpleasant actions, but we must love the offender.

shining and you do not want to believe that the whole universe is a mere mechanical dance of atoms, it is nice to be able to think of this great mysterious Force rolling on through the centuries and carrying you on its crest. If, on the other hand, you want to do something rather shabby, the Life-Force, being only a blind force, with no morals and no mind, will never interfere with you like that troublesome God we learned about when we were children. The Life-Force is a sort of tame God. You can switch it on when you want, but it will not bother you. All the thrills of religion and none of the cost. Is the Life-Force the greatest achievement of wishful thinking the world has ever seen? (Mere Christianity)

Christ, according to Lewis, is to be obeyed for the simple reason that he is God. He has both *de facto* and *de jure* authority. Not only does God have power over all of His creation, but His very being demands our obedience.

God is such that if (per impossible) His power could vanish and His other attributes remain, so that the supreme right were forever robbed of the supreme might, we should still owe Him precisely the same kind and degree of allegiance as we now do. (Surprised by Joy)

This leads directly to Lewis's claim in *Mere Christianity* that

if what you call your 'faith' in Christ does not involve taking the slightest notice of what He says, then it is not Faith at all—not faith or trust in Him, but only intellectual acceptance of some theory about Him.

One of the benefits of a true love for God is that it automatically readjusts the third area of our morality, our relationship with other people, to its proper orientation. As Lewis states in *Mere Christianity*, "If you are right with Him you will inevitably be right with all your fellow-creatures."

Far beyond an abstract pursuit of "the advance-

ment of mankind", true love is a mere reflection, or transmission, of the love we have received from God. This is why Lewis said

I may repeat "Do as you would be done by" till I am black in the face, but I cannot really carry it out (till I love my neighbour as myself: and I cannot learn to love my neighbour as myself till I learn to love God: and I cannot learn to love God except by learning to obey Him. (Mere Christianity)

Again our responsibilities penetrate beyond the surface, forcing us to align our entire lives with the purposes of God. The same is true of forgiveness. Lewis tears to shreds the notion of "forgiving but not forgetting." When Christ forgives our sins he wipes them away as if we have never committed them. In the same way, we are called to "wish for the good" of everyone we come in contact with. We can hate the offender's unpleasant actions, but we must love the offender. Lewis points out that this concept is not as radical as it seems. Often we do not like the things we do in our own life, yet we continue to love ourselves.

The wonderful result of this love is that while

The worldly man treats certain people kindly because he 'likes' them; the Christian, trying to treat everyone kindly, finds himself liking more and more people as he goes on — including people he could not even have imagined himself liking at the beginning. (Mere Christianity)

The issue of free will, therefore, is fundamental in shaping and defining the very meaning of man's existence. If Lewis's explanation of the concept is true, man is confronted simultaneously with incredible power and numerous responsibilities. His prayers can alter the very fabric of history, yet his life must be patterned after the earthly life of his Creator. Lewis saw this surrender to God as the only way to obtain true freedom:

The consequences of parting with our last claim

"To walk out of His will is to walk into nowhere."

—C.S. Lewis

to intrinsic freedom, power, or worth, are real freedom, power and worth, really ours just because God gives them and because we know them to be (in another sense) not 'ours'. (The Four Loves)

We can therefore conclude that man is free to draw his line on the paper in any direction he wants, but if he wants his line to remain uncerated in God's "Great Painting", he must surrender himself to Christ, for as the Green Lady so accurately stated in *Perelandra*, "To walk out of His will is to walk into nowhere." †

WIDE AWAKE

FACE TO FACE

Kenneth Elzinga

Economy-sized Love

interviewed by Karen Barnes & Kenneth Liu

Kenneth Elzinga is one of the most popular professors at the University, teaching microeconomics to nearly a thousand students each year. He is also an Elder at Trinity Presbyterian Church.

WIDE AWAKE: Please tell us about your background — let's start with where you were born.

Kenneth Elzinga: I was born in a small town no one in Virginia probably has ever encountered: Coopersville, Michigan. The only famous person from Coopersville that I know of is Del Shannon, the rock and roll singer. He was a good friend of my older brother, back when Del Shannon was called Chuckie Westover.

WIDE AWAKE: Where were you educated?

Mr. Elzinga: I went to public schools in Kalamazoo, then went to Kalamazoo College, a private liberal arts college in my home town, and then to Michigan State University for my graduate work.

WIDE AWAKE: What were the most formative events in your growing up, as you look back on those years?

Mr. Elzinga: I would cite three things. First, I think I had a fairly secure family life. My two brothers were quite a bit older, so they moved away when I was young. But my parents were home a great deal, and I think now that was important to me.

Second, we were not a wealthy family. I started working when I was 14, on my birthday, as soon as I could get a work permit. I worked in a sporting goods store all the way through junior high, high school, and college. I was a townie when I went to Kalamazoo College and I kept my part time job at this store. My employer taught me a great deal during those years — and I learned skills that later would be helpful to me in college and later college teaching. Working as a clerk in a sporting goods store is a great leveler: you had to wait on people who range from the president of the Upjohn Company to a little boy who just wants to buy some fishing hooks.



photo courtesy of Trinity Press

"Being a Christian gives a purpose to my life, and it gives me a hope for the future. It also provides an anchor to the past."

—Kenneth Elzinga

The third formative event was the death of my mother to cancer while I was in college. This was a very sad time, because my mom and I were very close. She had a lot of wisdom and a great sense of humor. I still miss her, and her death helped me grow up probably a lot faster than otherwise would have been the case.

WIDE AWAKE: How did you decide to become a college teacher?

Mr. Elzinga: I went to college on a tennis scholarship, and most people saw me as a tennis player, without a lot of academic potential. I think I saw myself that way. But an economics professor, Dr. Cleland, whose class I took my second year, treated me as though I had something intelligent to say in the classroom. I wanted to live up to his expectations. He was the one who suggested I apply for a Woodrow Wilson Fellowship to graduate school, a fellowship designed to encourage people to be professors. I was fortunate to receive this fellowship. At that time, I had been looking forward to a career selling fishing tackle for the Shakespeare Company. I even had a sales territory picked out. Dr. Cleland

had quite an effect on me, though I still consider selling fishing tackle an honorable profession.

WIDE AWAKE: How did you come to accept Jesus Christ as your personal Savior?

Mr. Elzinga: My mother was a committed Christian and I am sure her influence was important in what happened in my life after her death. When I was in graduate school I lived with my best friend, also a graduate student in economics, who was an atheist. I thought his atheism was an untenable position and I encouraged my friend to attend church. In three of the churches we attended, we heard the gospel of Christ presented in a very compelling and intelligible way. I came to realize that while I believed a lot of orthodox things about Jesus Christ, to my knowledge I had never invited Jesus into my life to be both the One who redeems me from my sins, and the

One who seeks to be the Lord of my life. At the time Jesus affected my behavior on Sunday morning; He had not been particularly relevant to me on Saturday night, or Monday morning.

The sermons I heard, and coming to read some material by John Stott and C.S. Lewis, persuaded me that I no longer could put Jesus in a comfortable compartment of my life. If He was the Son of God, as He claimed, and which I came to believe, then the only tenable and appropriate thing to do was to invite Him into my life.

I did this one Saturday night. I went back to my apartment wondering how I was going to share this news with my best friend.

I realized my becoming a Christian might well put a wedge between us, though I also knew he was considering seriously the claims of Christ himself — based on what he had been experiencing in church and his own reading of the Bible. We met about midnight that night, hemmed and hawed about our evening, and then discovered to our mutual amazement that each of us had accepted Christ that evening. It was as if God was having a cosmic laugh in the midst of our salvation.

Let me add that my friend continues to be a dear friend, and continues to walk with Christ.

WIDE AWAKE: What impact has Christ had on your life?

Mr. Elzinga: That is difficult to answer briefly, but I'll try. Being a Christian gives a purpose to my life, and it gives me a hope for the future. It also provides an anchor to the past. That may sound like a rather pat answer, but it happens to be an accurate one for me. The Bible tells me I am constructed in God's image. That can be very helpful to a person like me who tends to be insecure, because it reminds me that in God's sight I am

important. The purpose comes from realizing that God, in His sovereignty, has elected to accomplish His purposes through people — that even I can be a part of His plans for the world. Now for some people that might give them a swelled head. To me that is a very sobering and very challenging proposition: that what I do with my life is to be in accord with His purposes. That means I should be a person of prayer, and have an understanding of the Bible, and seek the counsel of other Christians to try and discern what priorities should be mine. Prayer and Bible study do not come easily to me — so I cannot commend the Christian life to someone because it is easy. I would commend it because I believe it is true.

WIDE AWAKE: Do you face any conflicts being a Christian professor at a secular institution?

Mr. Elzinga: Some, but it would be easy to exaggerate them. Jesus said His followers were to be salt and light in the world, so He expected His followers to be in the world. And for me, UVA and other places I travel are the world. But teaching here is different for me than if I were teaching at, say, Wheaton College or Hope College. Sometimes I think it would be pleasant to begin a class in prayer, to really pray for my students. Of course, I can do this, and do, before going into class. But

it would be inappropriate to pray before class at a secular institution.

Most of what I teach, I teach the same here as I would at a Christian college. The law of demand is the same law at UVA as it is at Wheaton or Hope. But sometimes I do long to be able to ask students what Biblical principles there might be about, say, income redistribution, or the work-leisure tradeoff. In a very real sense, I think faculty at Christian colleges have more liberty than faculty here — a wider range of issues can be on the table, so to speak.

WIDE AWAKE: How does your Christianity affect your teaching style and your relationship with your students?

Mr. Elzinga: I think my teaching style is mostly a function of the influence of other teachers I have had — and most of these were not believers. My Christianity probably affects my sense of humor more than anything in the classroom. Becoming a Christian affected what I find funny and what I do not find funny. I think being a Christian does affect my relationship with students because, like so many things in life, the Bible turns things upside down. The Biblical principle of leadership is servanthood. If you want to be first, you line up last, so to speak. So I believe that if I am to lead a class, this means I am to be the servant. The image of Jesus, the King of Kings and Lord of Lords, actually washing the feet

of His disciples comes to mind. This is a very sobering image to me. I am not really comfortable with the prospect of washing my students' feet. But comfort or not, the Christian principle, which is a hard teaching, is that I am to serve my students.

C.S. Lewis titled his autobiography *Surprised by Joy*. In a different sense, I can relate to that title. One thing I find is there can be joy in service. Trying to serve students, even imperfectly and in a flawed way, paradoxically has caused me to like students far better than I probably would if I were an unbeliever. That is not to say that professors who are not Christians do not like their students. I can only speak from my experience: wanting to serve Christ has meant wanting at times to serve my students. And in this service affection and even joy at times have been the consequence. One of the richest blessings of my life has been students that God, in His graciousness, has turned into friends.

WIDE AWAKE: How does your Christian faith affect your views as an economist?

Mr. Elzinga: That is one of the hardest questions you can put to me. If, as an economist, I attempt to measure the demand elasticity for beer, I'd like to believe I would do it the same way as a non-Christian. So one answer to your question would be: not a whole lot. But that would not be the whole answer. There is an area of scholarly inquiry about the relationship between economics and the Christian faith. And I have dabbled, only dabbled in this area. If I were at a Christian college, I suspect it would be a main item on my research agenda. And at times I have thought of concentrating on this and developing a class on economics and the Christian faith. I don't think my own department would be interested in my teaching the class, but perhaps the Department of Religious Studies would let me teach it there. But I would have to do a lot of preparation, because a lot has been written on the subject, including a lot I have not read.

"I cannot commend the Christian life to someone because it is easy. I would commend it because I believe it is true."

The main way the Christian faith has impacted upon my life as an economist is in the area of personal economics. The Christian faith makes me wrestle with questions of being a good steward.

I do not want to be shackled to possessions. I once was with a Rhodes Scholar who became a Christian at Oxford University and this young man was telling a Christian professor at Oxford how this professor's generosity in sharing his home was seen by this student as

an example of the love of Christ.

The Oxford don had a remarkable reply. He said he really did not think of his house as his house; technically he held title to it, but the house really was the Lord's house, and only this Oxford professor's to share. I was taken by this. I also aspire to be the kind of giver that Jesus commended: a cheerful one. To some extent, I now can give cheerfully. This itself is a miracle, for the

"One of the richest blessings of my life has been students that God, in his graciousness, has turned into friends."

Lord to take an economist, and one of Dutch extraction at that, and cause him actually to enjoy the act of giving.

WIDE AWAKE: Do you have any favorite Christian authors, thinkers, or artists?

Mr. Elzinga: Like many Christians of this age, I have a debt to C.S. Lewis. I also have benefitted from some of the writings of Francis Schaeffer. I am afraid I am not much of a fan of contemporary Christian music, but I do enjoy singing Scripture songs and a lot of what might be called, for lack of a better term, "Baptist hymns" that I learned as a new Christian.

WIDE AWAKE: What advice do you have for Christian students at the University?

Mr. Elzinga: Christians in the United States try to follow Christ but often we end up merely copying contemporary culture. I think the greatest temptation Christian students face in our culture is materialism. It is easy in our culture to think I am going to make a lot of money, be a big success, and then think how important I'll be to the Lord — and how people will be drawn to Christ because I am rich, powerful, and successful. What may be behind all this is simply vanity and self-will. I also would encourage Christian students here to make one or two truly close friends while you are here. Not friends that, ten years from now, you only know well enough to send a Christmas card. But someone who, even with distance separating you, will be committed to you and you to that friend. Third, the Bible says we are to be a witness to a world badly in need of the gospel. The Bible says we are to be ready to "give a defense of the hope that is within us, doing so with gentleness and reverence." I love to see students who take this command seriously, including the method of witness that the Scriptures counsel.

WIDE AWAKE: Thank you, Mr. Elzinga, for sharing these thoughts with us.

Mr. Elzinga: It was my pleasure. †

"Eracing" Mistakes

by Kenneth Liu & the Editors

Since the beginning of recorded history, there has been hatred, discord, and jealousy; dissensions, factions, and envy; all the symptoms of human pride made manifest in racism and bigotry. In the Old Testament book of Numbers chapter 12, even Moses suffers from racist attitudes. When Moses married a Cushite, a woman of color, his sister Miriam and the high priest Aaron spoke against him. God became so angry because they were speaking against Moses that He smote Miriam with leprosy for seven days. Indeed, the very enslavement of the Jewish peoples first by Egypt and later by the Babylonians attests to racism in the ancient world. And the countless examples of racism witnessed by modern history come to mind all too quickly.

Many people fail to understand why racism persists, especially in light of the radical changes brought about by the civil rights movement. The past three decades have witnessed the demise of the Jim Crow laws, a great deal of civil rights legislation, and an enormous increase in education. Yet, the problem remains. While racist policies within political and social institutions must be addressed and corrected, they are merely external symptoms of a deeper problem. The search for answers must begin elsewhere.

Psychologists, sociologists, and others who have studied racism see it as the result of environmental and hereditary factors and seek social and political solutions

by altering these factors. Christians, on the other hand, while not denying the power these factors may have, believe man to be born a spiritual being as well, a being free to overcome these physical forces. Kyle Haselden, in his book *The Racial Problem in Christian Perspective*, says, "[Man] comes equipped with a self which has a capacity for love and a proclivity for hatred. Whether he become an apostle of love or a disciple of hate, or vacillate all his life between the two, depends, in the Christian view, not solely upon the socializing forces, but much more upon his acceptance or denial of the grace of God."

Racial prejudice is nothing more than a manifestation of human pride, albeit a particularly ugly and damaging form. The sin of pride is to place oneself at the

center of reality, relegating God and others to the periphery of one's life. One begins to see oneself, and those similar to oneself, as superior, at times even god-like. One attempts to justify this perception by calling attention to differences between oneself and others, such as race, sex, nationality, and religious belief.

These external differences are insignificant, because we are all created in the image of God. God lov-

ingly created us and cares for each of us individually. Furthermore, all men have the same origins: "From one blood He made every nation of men, that they should inhabit the whole earth." (Acts 17:26) The same blood courses through the veins of people of all races. In fact,

**"If anyone says
'I love God,' yet
hates his brother,
he is a liar."**

—1 John 4:20

all human blood is equally impure in God's sight. "All our righteousness is as filthy rags." (Isalah 64:6) Only the blood of Jesus, was shed for humanity at the cross, is pure. It makes no difference at all what nation one is from: "God does not show favoritism, but accepts men from all nations who fear Him and do what is right." (Acts 10:35)

Jesus Christ set forth a perfect example of loving everyone and not favouring one group over another. He did not discriminate against people because of external factors. Rather, He befriended everyone from tax collectors to prostitutes, and even a woman from Samaria, a nation hated by most Jews. Christ accepts everyone: "You are all sons of God through faith in Jesus Christ, for all of you who were baptized into Christ have clothed yourselves with Christ. There is neither Jew nor Greek, slave nor free, male nor female, for you are all one in Christ Jesus." (Galatians 3:26-28)

Jesus Himself led the way in breaking down racial barriers. In John chapter 4, Jesus meets a Samaritan woman drawing water from a well. Even though Jesus was a Jew, He asked the woman for a drink. By even speaking to her, He was breaking a traditional taboo. But Jesus looked beyond her physical characteristics and saw a soul in need of love, which He promised

**"Man comes equipped
with a self which has a
capacity for love and a
proclivity for hatred"**

to provide eternally.

In this way, we are called upon to follow His example and His teachings. The ethic of Jesus fulfills and goes beyond attempts to end discrimination and pleas for equality by demanding that we not only treat each other with respect, but that we love one another. He commands, "Love your neighbor as yourself." (Luke 10:27) But there is an even greater command than this. In the same verse, it says, "Love your God with all your heart, with all your soul, with all your strength, and all your mind." It is only when we put God above all else that all prejudices will be removed.

Human pride is natural to us when we are ruled by environmental and hereditary factors. But when we receive Christ into our lives and put God at the center of our lives, we are made new. "So from now on we regard no one from a worldly point of view. . . Therefore, if anyone is in Christ, he is a new creation; the old has gone, the new has come!" (2 Corinthians 5:16-17)

Many people, such as members of the Ku Klux Klan, claim to be Christian, while harboring racial hatred. However, 1 John 4:20, states that "if anyone says, 'I love God,' yet hates his brother, he is a liar." While these perpetrators of racism are not living accord-

ing to Christian principles, they are to be pitied rather than hated. Obviously, they have not experienced the renewing power of Christ's universal love in their own lives. One must condemn bigotry, but is called by Christ



to love the bigot who is enslaved by his sinful thinking and prideful heart. Luckily, the condition is not hopeless, for if one confesses and repents of one's sin, God is faithful and

just, and will forgive one, removing all the prejudices from one's heart.

As the oft-quoted Lord Acton said, "Power tends to corrupt; absolute power corrupts absolutely." While the racist is corrupted, and thus victimized by his own sin, those who are hurt the most are the targets of his hate. The Christian author John C. Raines noted, "But powerlessness also corrupts. The terrible temptation for the powerless is to believe what the oppressors say about them - to think of themselves as 'dumb,' 'weak,' 'lazy.' The corruption of powerlessness is that the oppressed may come to envy and seek to emulate the oppressor, dreaming of someday taking the oppressor's place." The victim, who often feels powerless over his situation, can easily fall into a cycle of polarization, either suffering from despair or the other extreme of over-zealous pride. Instead, one should find solace in Christ and should turn one's suffering into something positive. Jesus said, "Come unto me all who are weak, weary, and heavy laden. . . and you shall find rest for your souls." Victims of racial prejudice can regain their self-esteem by focusing on their Creator. God created each person unique, with special gifts and talents, and has a special role for each person to play in His universe.

Martin Luther King Jr. said in 1960, in his *Letter*

**"The spirit of revenge is
easy, not as easy, perhaps,
as the spirit of abject sur-
render. But reconciliation
takes real courage."**

from *Birmingham Jail*, "As my sufferings mounted I soon realized that there were two ways that I could respond to my situation: either to react with bitterness or see to transform the suffering into a creative force. I decided to follow the latter course." A victim of racism must make

a decision: Is he going to react with bitterness and retaliate, or is he going to return his hurt with love and work to remedy the ill? The natural human reaction is, of course, to return hatred with hatred. But that leads to a vicious cycle that only intensifies the hatred. Raines says, "The spirit of revenge is easy, not as easy, perhaps, as the spirit of the abject surrender. But reconciliation takes real courage."

In Luke 6:27-29, Jesus commands, "Love your enemies, do good to those who hate you, bless those who curse you, pray for those who mistreat you. Whoever hits you on the cheek, offer him the other also." It is probably the hardest thing to do. But then, racism is not an easy problem to defeat. Jesus himself was a victim of hatred. He was scorned, ridiculed, tortured, and nailed to the cross like a criminal. Instead of damning His persecutors to Hell, He cried out "Father, forgive them, for they know not what they do." (Luke 23:34) It is necessary for us to pray for our enemies and to ask God to change the hearts of those who persecute us.

Our society has done much in the past few decades to eliminate institutional forms of discrimination. It has even eliminated many social prejudices. But that is not enough. To truly eliminate racism, we must replace the deep-seated distrust, dislikes, and tensions among different peoples with love. We must work for not only equality and harmony, but love. It is not enough that we all receive the same salary; we must also work together and form new bonds. God calls us to take the risks of voluntarily stepping out of our comfort zones and to take joy in the whole richness of our inheritance in the body of Christ. We must share the love we receive from God and share it with all peoples of the world.

Racism is a disease of the heart, soul, and mind, and only when it is extirpated from the individual consciousness and replaced with the love and peace of God will true personal and communal healing begin. As the song sung in Sunday schools across the country proclaims, "Jesus loves the little children, All the children of the world. Red and yellow, black and white, They are precious in His sight. Jesus loves the children of the world." †

Heather Winter & Crystal M. Dobson contributed to this article.

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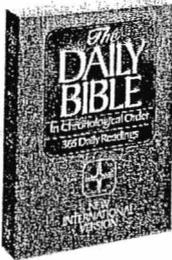
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Stress Fractures by Charles Swindoll

Dealing with Stress

reviewed by Stephanie Ace

"**B**reaks in bones are painful, but can they match the ache of a fractured spirit... or a broken heart? Perhaps you've felt that kind of pain recently... A pain that haunts you through the day and throbs into the night." So Charles Swindoll introduces his latest book, *Stress Fractures: Biblical Splints For Everyday Pressures*. He explains that there is an alternative to the rat race: "You don't have to push yourself until something snaps." God's Word is the source of our strength in times of everyday stress and deepest sorrow. Swindoll's book organizes various stress-causing issues into a cohesive and readable format, directly quoting applicable scripture.

Stress Fractures is divided into two main parts: "Intensive Care" and "Spiritual Therapy," consisting of many chapters published separately in booklet form by Multnomah Press. Swindoll ties each chapter together with a brief, personal message citing his relevant experiences and his own purpose for the section. Scriptural quotes and wisdom fill each chapter, and Swindoll relates them to an historical as well as a modern context. A careful study of the main scriptural message of each chapter includes a look at archaic and timely definitions of the actual words in the passage. This intensive search draws meanings from the Biblical text that have been lost through translation from their original languages, supplementing Swindoll's message. Each chapter closes with a concluding prayer which focuses on the personal relevance of God's Word and encourages the reader to take advantage of His promises. These prayers, meant to be said aloud, also give the reader the opportunity to voice his personal concerns and his newly strengthened resolve to trust in the Lord to "make straight our paths."

When reading this book, take time to savor each scripture message and application. Swindoll encour-

Worrying takes away faith in God's ability to deliver His children.

God's Word is the source of our strength in times of everyday stress and deepest sorrow.

ages everyone to lean on the Rock when weary and to claim the fullness of life with Him. Read a little every week, taking time to live out newly strengthened faith in the Lord. *Stress Fractures* is a timely message of reassurance and faith in God's everlasting grace. The chapter entitled, "When Your Comfort Zone Gets the Squeeze," is especially helpful in fighting feelings of doubt and loneliness which attack in moments of crisis. Another chapter, "Moral Purity," reveals the worthlessness of sin when compared to the majesty of the Lord our God. Swindoll includes several practical ways to avoid increasing the temptation to sin. Most importantly, the chapter "Life Assurance" offers Biblical proof of our everlasting salvation and the power of Jesus Christ to completely fulfill our every need. Worrying about any situation takes away faith in God's ability and willingness to deliver His children. He promises that He loves us and will take care of our every need. Since God cannot lie, we learn day by day how to physically, intellectually, emotionally, and spiritually rest in the Lord. For anyone seeking that kind of rest and salvation, Charles Swindoll's *Stress Fractures* is a good place to start.

Charles Swindoll is also known for his internationally broadcast radio show, *Insight For Living*. The senior pastor of the First Evangelical Free Church in Fullerton, California, he has written several other books on Christian living. Some of his other works include *Growing Strong in the Seasons of Life*, *Growing Deep*, *Come Before Winter*, and *The Quest for Character*. Regardless of the medium, Charles Swindoll adeptly drives home a powerful and worthy message. †

Stress Fractures: Biblical Splints for Everyday Pressures written by Charles Swindoll. Published by Multnomah Press, 1990. 273 pages. \$10.95 soft copy.

Fortress by Matthew Ward

A Mighty Fortress

reviewed by Michelle Carpick

One of the most recognizable voices in contemporary Christian music belongs to Matthew Ward, who has been making records—first as part of the pioneer Christian pop-rock group 2nd Chapter of Acts, then as a solo performer—since he was thirteen years old. Ward has matured since that time, both as a writer and as a singer, and his fourth solo release, *Fortress*, is for the most part a clear reflection of that maturity.

Although he has written and co-written many songs throughout his 19-year career, Ward has always been known primarily as a vocalist. He did, however, prove that he was a promising writer on his last album, *Fade To White*, collaborating on such hits as "Perfect Union" and "You Alone." With this project, Ward stretches himself even further artistically, providing some of the best lyrics of his career.

Among the best songs lyrically are the driving rock numbers "You" and "God Of All." The former is a simple, all-out jubilant praise song, recognizing God as the source of all comfort and fulfillment in words that are both original and sincere. Such phrases as "You have a love that is an open book/That can never be closed" and "You're the end to all my means" serve to remind listeners of the faithfulness and sovereignty of God in an infectious, enthusiastic manner. In contrast to the pure joy of "You," the focus of "God Of All" is a hard-hitting message against superficial judgement. In this song, Ward does not point the accusing finger at others, but at himself. By presenting a situation with which Christians can identify, Ward communicates his message with

striking effectiveness.

In contrast to the simple, to-the-point lyrics, the music on *Fortress* reflects an apparent desire on the part of Ward and his collaborators to create a sound that is complex and innovative. Unfortunately, the most musically unusual songs are also among the most unsatisfying. An instrumental piece called "Psalm 33:3" has a pleasing blues sound, but it suffers from an overly polished performance and a somewhat "cutesy" ending. Also, the title track, a reworking of Martin Luther's hymn "A Mighty Fortress", is cluttered with too many shifting vocal arrangements, despite a wonderful guitar solo by James Dillingham.

Surprisingly, the best songs musically are the ones that sound more or less traditional, such as the ballads "Since I Found You" and "Mixed Emotions," and the rockers "You" and "God Of All." Throughout all of these songs, Ward's vocal delivery is pleasing, but lacks some of the passion it exhibited on such recent albums as 2nd Chapter's *Far Away Places*.

This is the second album that Ward has produced himself, and perhaps another producer would be able to help push Ward to his artistic limits both vocally and as a writer. Despite its minor flaws, however, this album is a fine statement of musical maturity from Matthew Ward. †

Fortress recorded by Matthew Ward; produced by Matthew Ward, Live Oak Records; \$12.98 compact disc, \$9.98 cassette.

Waiting for My Ride to Come by Annie Herring

All Aboard

reviewed by Michelle Carpick

Many people who are familiar with the ministry of 2nd Chapter of Acts know that Matthew Ward is not the only member of his family with musical talent. Annie Herring, Ward's older sister and another former 2nd Chapter member, has also released her fourth solo album, entitled *Waiting for My Ride to Come* and, although so far it is not as successful commercially as her brother's album, it proves to be extremely successful on an artistic level.

Unlike her brother, Herring has been known

throughout the ministry of 2nd Chapter primarily for her ability as a songwriter (or "song-receiver," as she calls herself). She has written such classics as "Easter Song" and "Mansion Builder" and the vast majority of 2nd Chapter's recorded material, and her pen is as potent as ever on *Waiting for My Ride to Come*. In fact, Herring steps out on her own on this release even more than before, writing music and lyrics for all but one song.

As usual with Herring, the emphasis of these songs is on the message rather than commercial hooks

and gimmicks. In fact, she often uses original ways of communicating old ideas in order to call attention to the importance of their messages. In the title track, she takes a familiar situation, a conversion experience, and describes it from the point of view of a lonely person waiting for a ride in what appears to be a bus line. In other songs, such as "Hold My Heart," the focus is more inward, as Herring presents situations that are familiar to most Christians in the context of her own personal experiences. This song stands out as a new way to handle the tender subject of praying for victims of child abuse. "Help me break/Without falling apart" she sings, making the point that it is often difficult for sensitive people to pray for such heartbreaking situations while acknowledging the importance of obeying God in prayer for such needy groups of people.

Musically, the album is more than satisfying, running the gamut of styles from soft, ethereal ballads to sometimes bouncy, sometimes hard-driving, rock-tinged pop. Among the special musical touches are the otherworldly echo-chamber effects on "I Cry for Mercy," the tight backup harmonies on "Too Many Times," and the bagpipe-like instrumentals on "Waiting for My Ride to

Come." Herring's husband and longtime producer Buck Herring has assembled a top-notch cast of musicians and backup singers, including keyboardist-arranger Smitty Price, whose smooth, expert arrangements add spark to an already solid project.

Herring's well-trained, versatile soprano punctuates every song with heartfelt conviction. With her soulful expressiveness in the softer moments and passionate conviction in the more intense places, Herring proves herself to be a formidable vocalist not only by singing well, but by proving she means what she sings, and that is the distinguishing mark of any good message-oriented album.

This well-produced, well-performed, well-rounded project is Herring's best since the breakup of 2nd Chapter in 1988. Of course, the release is not perfect, but it is a very solid, moving album that was apparently produced with much care and prayer, making it more than worth the cost of purchase. †

Waiting for My Ride to Come recorded by Annie Herring; produced by Buck Herring, Live Oak Records; \$12.98 compact disc, \$9.98 cassette.

Beyond Belief by Petra

Petra-fied

reviewed by Fred Hopkins

Hey fans, Petra has a new album out and it's *Beyond Belief*. Since *On Fire*, the band has put out a praise album and a "greatest hits" album; *Beyond Belief* however is a collection of entirely new Petra songs. They're back, and stronger than ever.

Like *On Fire*, this album kicks off hard and rarely slows down. The first song, "Armed and Dangerous," is quintessential Petra, characterized by hard driving chord progressions, bright guitar licks, sympathetic keyboards, and spirit-filled vocals. The shouted-out refrain is very reminiscent of "Stand in the Gap." This familiar Petra-style rock persists throughout the album. "Underground," "Seen and Not Heard," and "Last Daze" also carry these traits.

A change from the Petra norm sets off the title song, "Beyond Belief." Here the straight-up approach is more controlled and the rough sound has been refined. For example, Bob Hartman's guitar intro uses little distortion, and John Schilit's vocal's are noticeably toned down. Whatever the song lacks in raw energy is compensated for by its channeled enthusiasm. The same is also true of other songs, but to a lesser degree. In this regard, it is the greatest accomplishment on the album.

As with past Petra albums, the lyrics are based on the scriptures, and the key verses are printed

with them. The lyrics cover a wide range of issues that are of great importance in today's world. "Love," based on 1 Corinthians 13, gives insight into the true meaning of love, and dispels the fallacies of worldly definitions. "Seen and Not Heard" stresses the importance of acting in accordance with our beliefs, which is a common struggle for all Christians. "Beyond Belief" speaks about stepping out in faith, and the glory that can be achieved through God. The message is summed up neatly in a biblical allusion, "Waters never part until our feet get wet."

Beyond Belief is a success both musically and lyrically. It displays not only high voltage rock and spiritually uplifting ballads, but it shows refinement and maturity as well. It is a landmark in the band's journey from classic rock in the early seventies to their more recent hard rock sound. Despite changing band members and changing sound, Petra has remained constant in their unwavering focus upon Christ and the Word of God. They have once again proven themselves to be a prominent rock band in Christian Music. †

Beyond Belief recorded by Petra; produced by John and Dino Elefante, Dayspring Records; \$12.98 compact disc, \$9.98 cassette.

I Have Started Searching for Apollo

I have started searching for Apollo
 in the hills and valleys of my life
 in the small, round seeds and (even though I
 have seen, in this world, souls that are thin
 and grey) I will know a love
 that tastes like violets, after a
 clear, blue rain.

So let me believe in chariots
 and horses and a sun drawn from morning
 into night, for science and self have pounded
 our mysteries into hydrogen and fusion and

I miss the dryads

and the God who kissed
 the soil awake.

So that I can watch the tree nymphs laugh
 their small, round seeds, and (even though I
 have seen, in this world, souls that are thin
 and grey) I will know a love
 that tastes like violets, after a
 clear, blue rain.

—Vivian Macpherson

Untitled

You had called me for so long
 With silent whispers to my heart
 While the clamor of this world
 Confused my ears with empty noise

There were times when achingly
 Led me, buzzed, to death
 And though I still hear your voice
 You brought me to this year

While I stumbled in the dark—
 With all my darkness piercing you—
 You lavished your grace upon my soul
 And spoke to me the truth.

You told me you loved me and took my place—
 The torture I deserved on the cross
 You paid the price and cancelled my debt

A Psalm

There is no God but You,
 You alone know Your secrets,
 In You alone
 Can we find our refuge
 and refuge
 from deception,
 when we open our hearts to You;
 You speak to them
 and guide them
 and protect them
 from evil and falsehood.
 You alone are God;
 You alone are love;
 You alone are in me;
 You alone forgive my debts.
 Thank Ye the Lord;
 Praise Ye the Lord.

—Jason Craddock

This Fire Has Root

Listen, light, when I speak
 As evening wraps its hands in the dark
 and morning brings back the dawn
 I know that I can no longer be imprisoned
 when the timber within me
 burns long and deep and rich
 like songs rolling from steam-filled throats
 into a century chanting of night.

There must be more
 than the security of clocks and stones
 inside. I know the steam of a slow breath
 shows the way to the light.

Colossians 1:1-14

Abundant Life

by Jeff Buterbaugh

Throughout the history of the Christian Church, a life of faithful obedience to God has been defined in a variety of ways. Some have chosen to completely detach themselves from the world and live in ascetic self-denial. Others have elected to serve as moral policemen, in an attempt to found a new theocracy. Still others tell us that to be a Christian is to forsake alcohol, rock music and dancing, and faithfully attend church every Sunday. Is this what Jesus intended? What does the Bible say? Jesus proclaimed in John 10:10 that he came into the world so that we might have life and have it abundantly. What is this abundant life? Can it be characterized? What would a life in harmony with the will of God look like? The apostle Paul, in his epistle to the believers in Colosse, gives us insight into some of the essential elements of the abundant life Jesus promised.

The first aspect of a healthy Christian life is "bearing fruit." Essentially this means living a life of significance. All of us yearn to have an impact in the world that will outlive us. The Bible tells us of three things that will endure forever: God, His Word, and human souls. When we devote time, energy, and resources to these things we are making investments that will yield eternal dividends. A zealous Christian is often warned "not to get too involved in 'religious' activities" and cautioned to lead a "more balanced life." If one follows Christ diligently this is bound to happen. Most people who give such counsel believe they have others best interests in mind. Often they are parents, friends, or advisers. To them, one's Christianity is a good thing, as far as it provides a basic code of morals and healthy social release, but as the focus of one's life, it is a waste of time — unless perhaps one wants to be a minister in a nice church. Jesus did not agree. To Him, a life completely centered around Him was the key to a life of eternal significance.

In the fifteenth chapter of John's gospel Jesus declares, "I am the vine; you are the branches. If a man remains in me and I in him, he will bear much fruit; apart from me you can do nothing. . . . This is to my Father's

glory, that you bear much fruit, showing yourselves to be my disciples." (Verses 5 & 8) What is this "fruit" of which Jesus speaks? We could speculate, but it would be far better to allow the Bible to serve as its own commentary. In Galatians 5:22-23 Paul tells us that "the fruit of the Spirit is love, joy, peace, patience, kindness, goodness, faithfulness, gentleness and self-control." As a Christian abides in Jesus and yields to the influence of the Holy Spirit, his life will be transformed to reflect these qualities. When this occurs, we will glorify God, and He will use us to have a positive impact on other people.

The second characteristic Paul gives of the abundant life is "growing in the knowledge of God." Notice that he specifies knowledge "of," not "about" God. Christianity is not a static religion. It is a dynamic, growing relationship with the God of the universe. Academic knowledge about the Bible can help facilitate a

relationship with Christ, but it is not enough on its own. One could memorize the entire Bible without it changing one's life. In a marriage relationship, for example, it is not enough to merely know information about one's spouse. Getting to know one's spouse is a lifelong adventure. It is the same in our relationship with God. We cannot even begin to know Him completely.

A third facet of a vital walk with Jesus is that it is empowered by the Holy Spirit. The Christian life is not a phase that will wear off when we run out of emotional highs. A life lived in close relationship to Jesus will not burn out because it is fueled by an unbounded source. Paul tells us that great endurance and patience are products of trusting in the power of God. (Colossians 1:11) In a similar prayer for the Ephesian church Paul declares that this "power is like the working of His mighty strength, which He exerted in Christ when He raised Him from the dead and seated Him at His right hand in the heavenly realms." (Ephesians 1:19-20) This is not to say, of course, that Christians will not experience temporary fatigue, depression or discouragement. Under our own power the ideal Christian life is unattainable,

Christianity is not a static religion, but a dynamic, growing relationship with the God of the universe.

but when we return to the Lord and look to Him for our strength, we are renewed.

The fourth element Paul lists of a life pleasing to God is a spirit of thankfulness and humility. When we as Christians live in light of the truth that God "has qualified us to share in the inheritance of the saints in the kingdom of light" and that "He has rescued us from the dominion of darkness and brought us into the kingdom of the Son he loves, in whom we have redemption, the forgiveness of sins" we are protected from bitterness, self-pity and despair. (Colossians 1:12-14) If we have a real appreciation for "what God has done, how awesome his works in man's behalf," (Psalm 66:5) our lives will exhibit joyful satisfaction and we will be content regardless of our circumstances. (Philippians 4:11-13) We will have a new perspective on life based on a past that has been taken care of and a future that is secure. As Paul says in verses 4 and 5 of the first chapter of Colossians, our faith and love will spring from the hope that we have in Christ Jesus.

It is important to note that Paul was not asking God to give the Colossians these four ingredients of abundant life individually. A life of significance, knowledge of God, supernatural empowerment and an attitude of thanksgiving are all products of "being filled with the knowledge of God's will through all spiritual wisdom and understanding." (Colossians 1:9) This is the crucial catalyst for Christian growth. Paul tells us in Colossians 2:2-3 that this understanding is to be found in Jesus Christ, "in whom are hidden all the treasures of wisdom and knowledge." It is impossible to live in accordance

with God's will without having a vital relationship with Christ. When a group of people approached Jesus and asked "What must we do to do the works God requires?" Jesus replied, "The work of God is this: to believe in the one he has sent." (John 6:28-29) This is the essential precondition to pleasing God.

Christians, where do we look for our wisdom? Will we find it in our classes, our circumstances or by intuition? We spend several hours each week absorbing the world's wisdom. Is a half-hour sermon every Sunday enough to offset this? Romans 12:2 says "Do not conform any longer to the pattern of this world, but be transformed by the renewing of your mind. Only then will you be able to test and approve what God's will is — His good, pleasing and perfect will."

Our minds are renewed when we really delve into the Word of God, and ask His Holy Spirit to transform us. Hebrews 4:12 informs us that "the Word of God is living and active. Sharper than any double-edged sword, it penetrates even to dividing soul and spirit, joints and marrow; it judges the thoughts and attitudes of the heart." Paul exhorts us in Colossians 3:16 to "let the Word of Christ dwell in us richly." As university students, we need to be in God's word daily. We are called to love God with all of our minds. Our Bibles deserve our sincere study even more than our textbooks. God's Word should be the integration point for all that we learn. As we learn, it provides the framework for the world-view we construct. The psalmist claimed to have more insight than any of his teachers. Why? Because he meditated on God's statutes. †

Philippians 1:3-11

Thanksgiving and Prayer

by Rod Early

Paul wrote the Philippians to thank them for a gift, encourage them, inform them of his current imprisonment (1:12-14) and its effect on his ministry, and to thank them for their financial support (4:14-16). Paul also used the letter to warn them against being prideful (3:1-11) and to advise them to live holy lives in fellowship and unity (1:27-2:11). After the opening, Paul goes before God in prayer to thank Him for the Philippians, express his heartfelt desire for their continued growth, and to ask God to increase their love and knowledge of God.

1. Read Philippians 1:3-11 three times, at least one time out loud.

2. Why is Paul thankful for their "partnership in the gospel?"

3. Paul is confident in "a good work." What is that "good work?" Hint: verse 11. What happens when it is complete? When is it completed?

4. Paul prays that their love may grow "in knowledge and depth of insight." How can we grow in knowledge? How is knowledge different from insight?

5. How can God's Word help us to determine what's best and help keep us pure? See other passages referring to God's Word (Psalm 119:97-112, 2 Timothy 3:16-17).

6. What is the "fruit of righteousness?" See Galatians 5:22. Can you find other verses referring to the fruit of righteousness or the Holy Spirit?

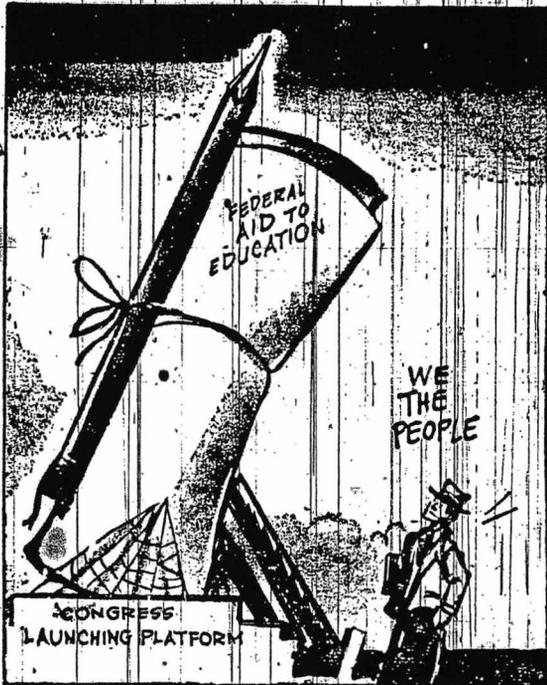
7. Paul prays for others, especially for their growth in the faith. Do you often pray for others specifically in terms of their spiritual growth?

8. Put this into practice. Begin right now by praying verses 3 through 11 for a fellow Christian. Replace all the "you's" in the passage with that person's name. Find other prayers (Colossians 1, for instance) and try it again. †

Appendix G

Cartoon Commentary on Religious Issues before the Court

FOUR COMMENTS ON THE STATE OF U. S. EDUCATION



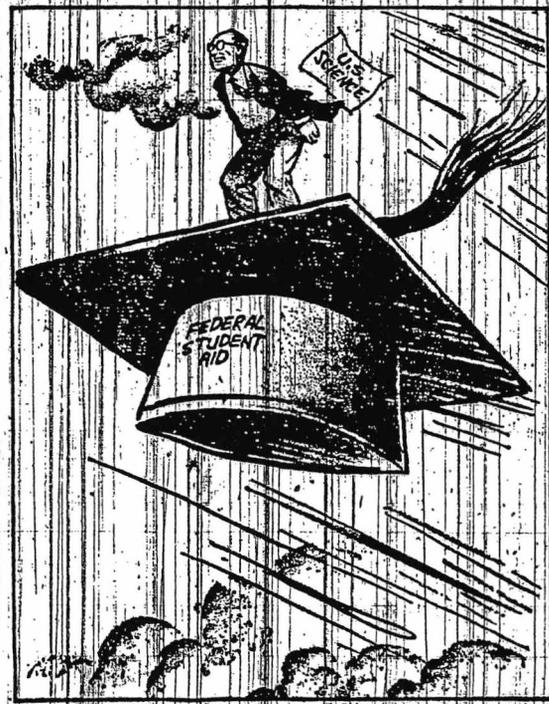
Partymiller in The York (Pa.) Gazette and Daily
 "A chance to gain prestige at home."



Hutton in The Philadelphia Inquirer
 "We can do better than that!"



Crockett in The Washington Star



Jensen in The Chicago Daily News

2



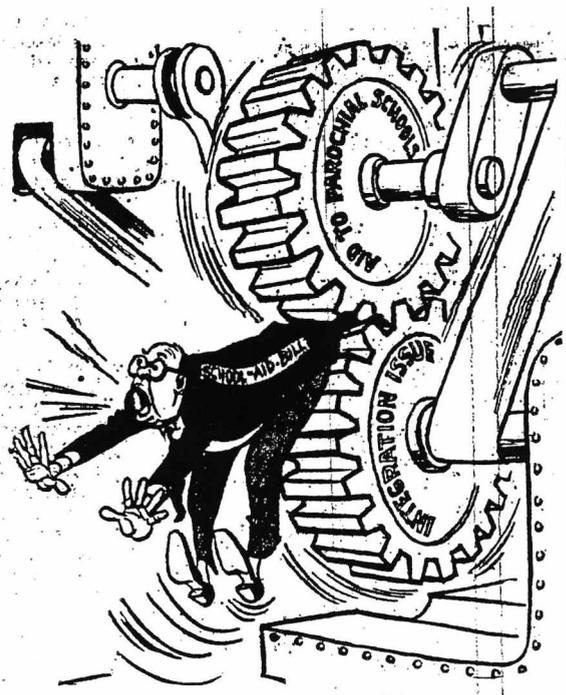
Long in The Minneapolis Tribune
"Stowaway."

3

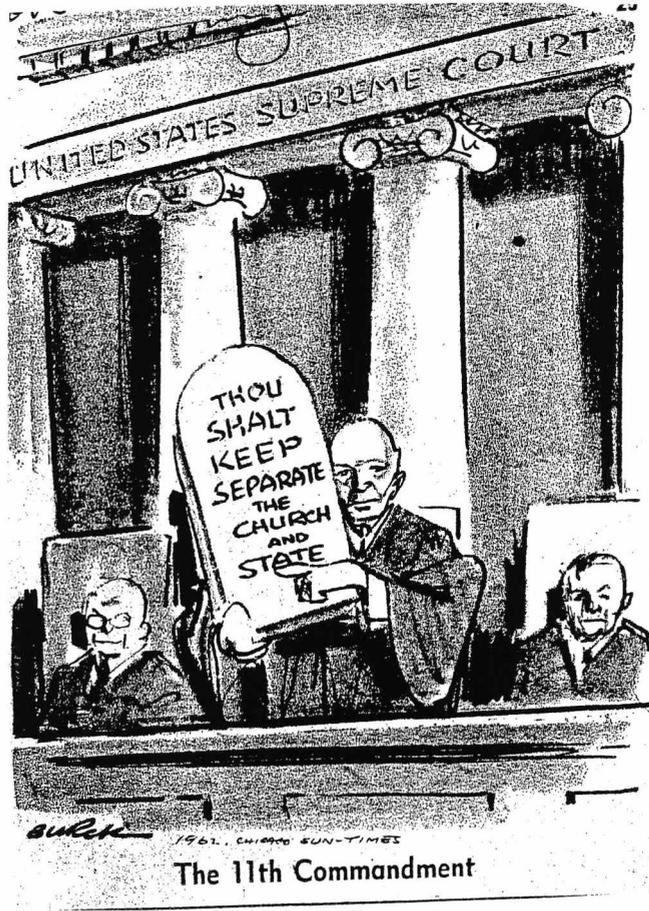


Baldy in The Atlanta Constitution
"Second meeting."

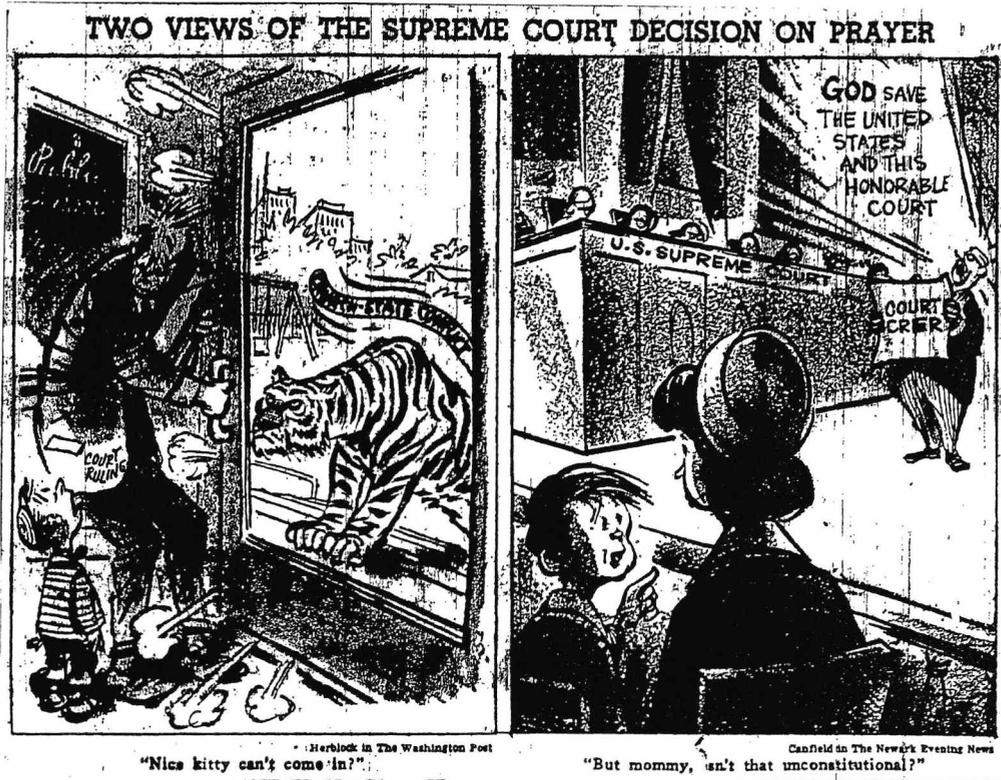
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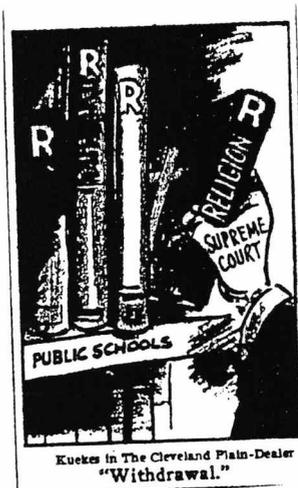
Valtman in The Hartford Times
"Help! Help!"



5



6





Canfield - SUPREME COURT TO REVIEW USE OF LORDS PRAYER AND BIBLE IN PUBLIC SCHOOLS

Canfield in The Newark Evening News. "Good luck."

10



Poinier in The Detroit News. "No court's gonna interfere with my kid's religion!"

THE SUPREME COURT DECISION ON PRAYER.



White in The Akron Beacon-Journal

12



Sanders in The Greenboro Daily News

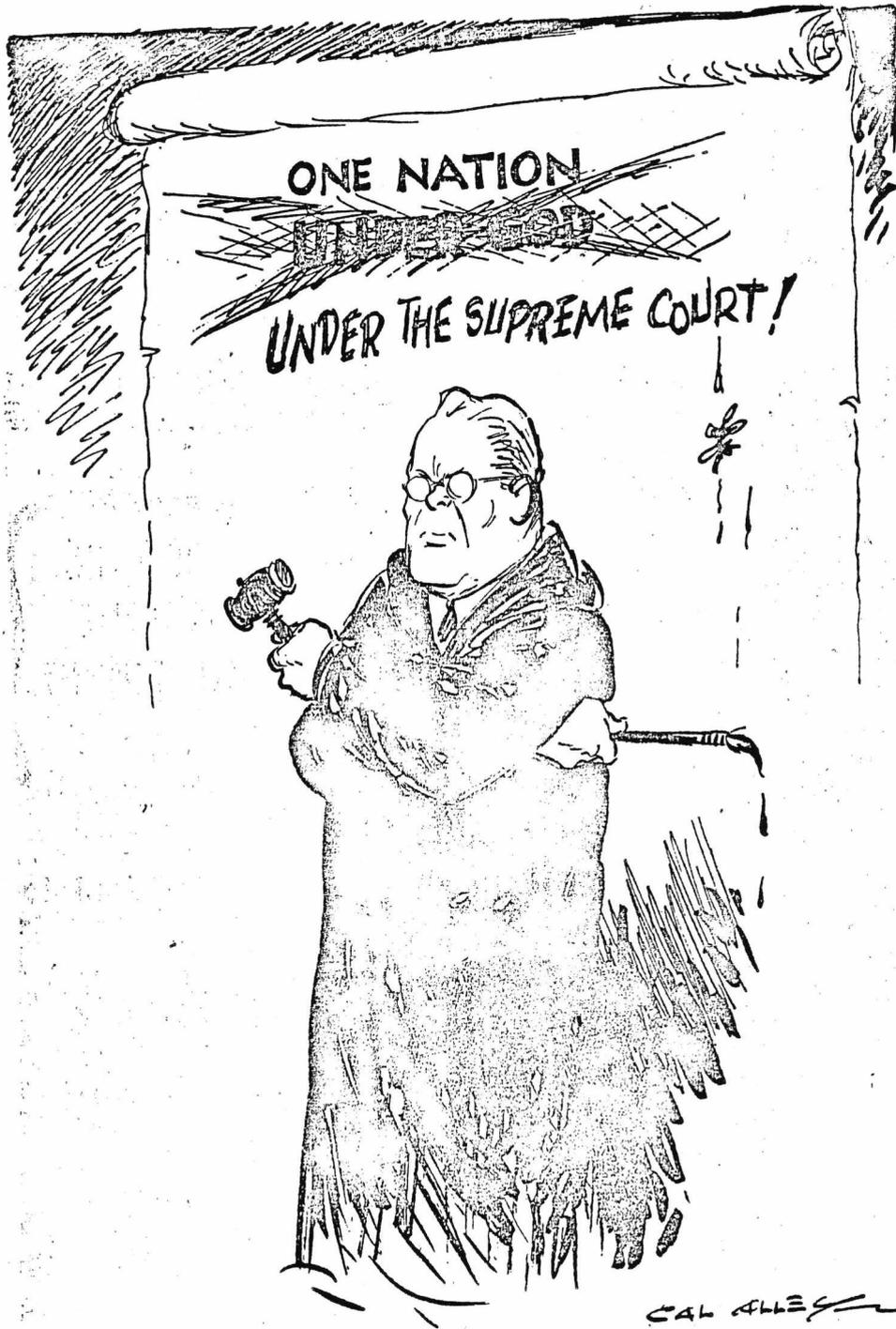
"The following prayer is extemporaneous, and any relationship to governments past or present is purely coincidental."



Shanks in The Buffalo Evening News.

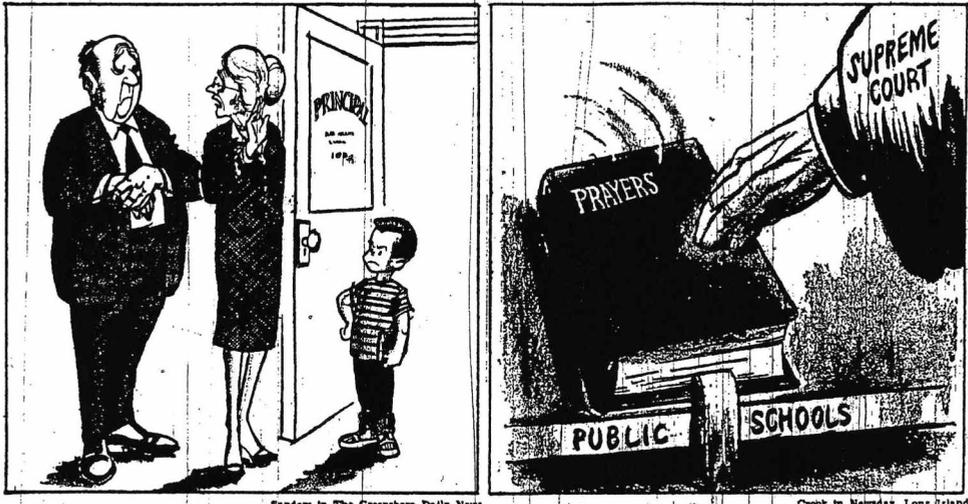
"... and if it isn't unconstitutional."

Lord And Master





THE SUPREME COURT DECISION ON PRAYER



Senders in The Greensboro Daily News
"He's going to ask the Supreme Court for his daily prayer."

Crook in Newsday, Long Island
"Closed book."

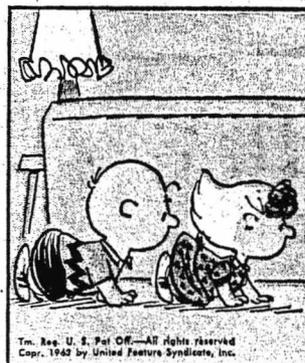
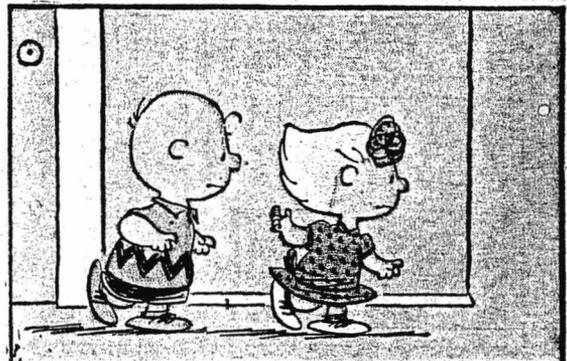
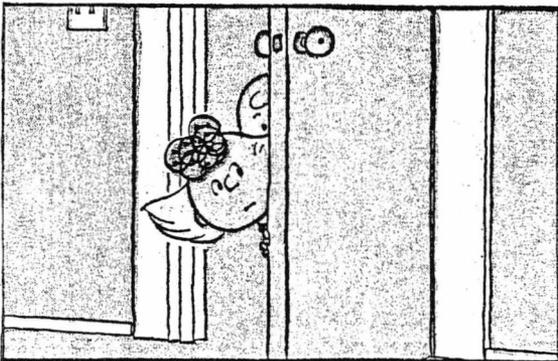
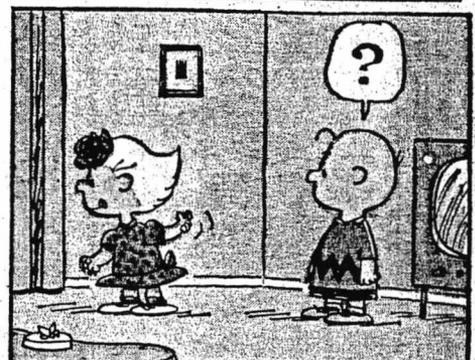


Herblock in The Washington Post
"What do they want us to do—listen to them pray at home?"

COMICS

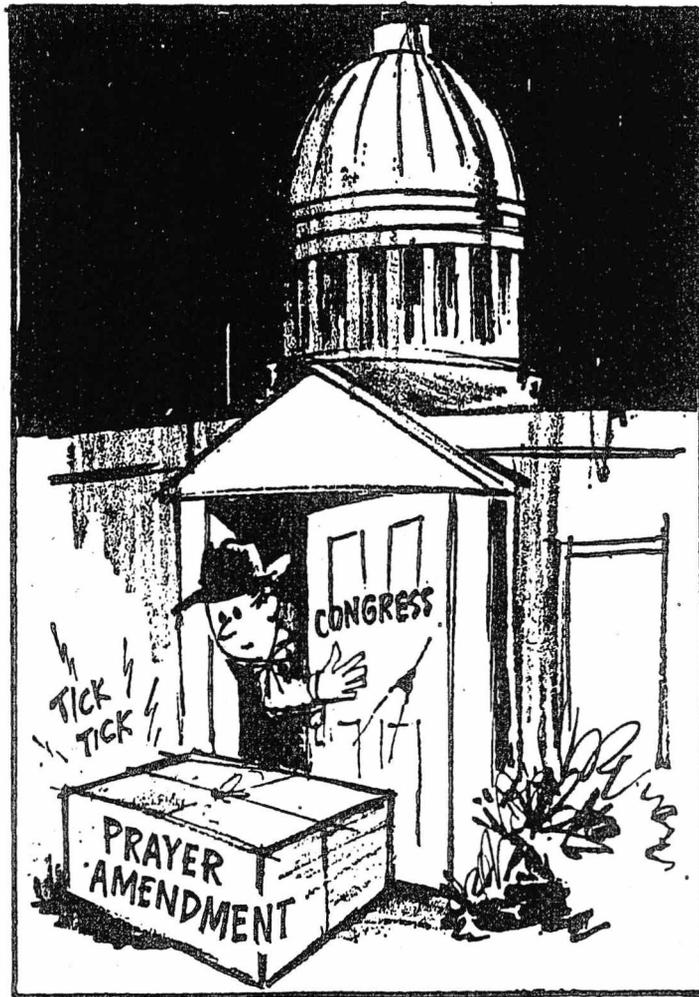
San Francisco
Sunday Chronicle
 OCTOBER 20,
 1963

PEANUTS by SCHULZ



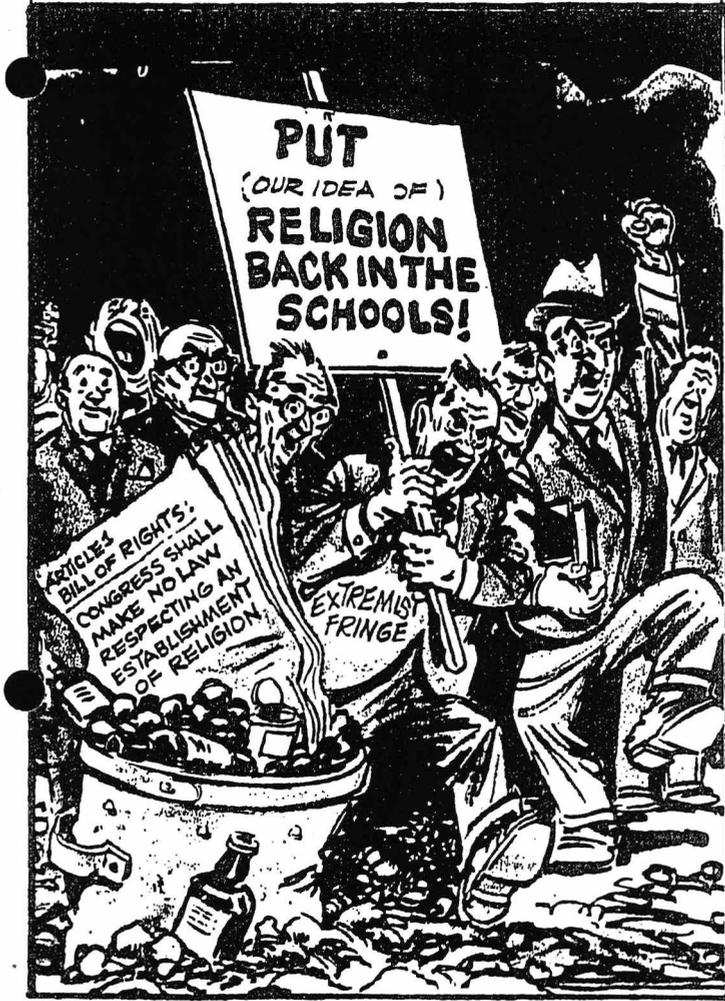
Another of Those ^{Fool} Rulings



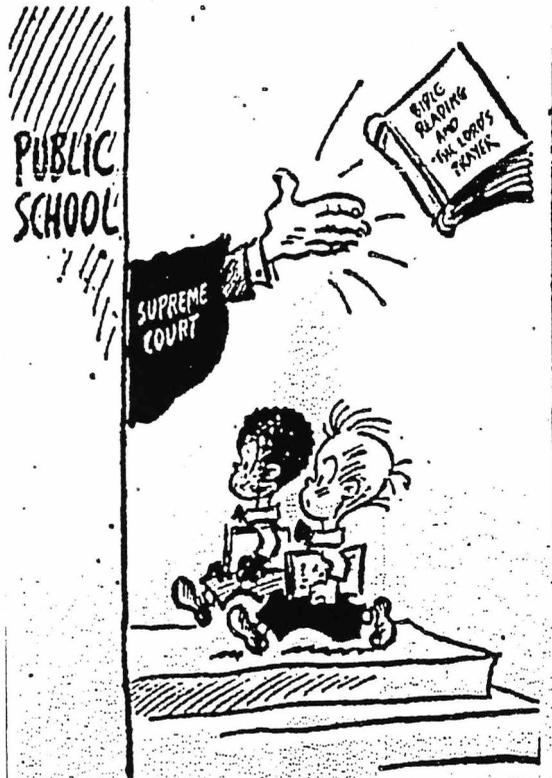


19

Gray in The Catholic Telegraph-Register
"Explosive issue."



Pointer in The Detroit News
"Who cares what the founding fathers said?"

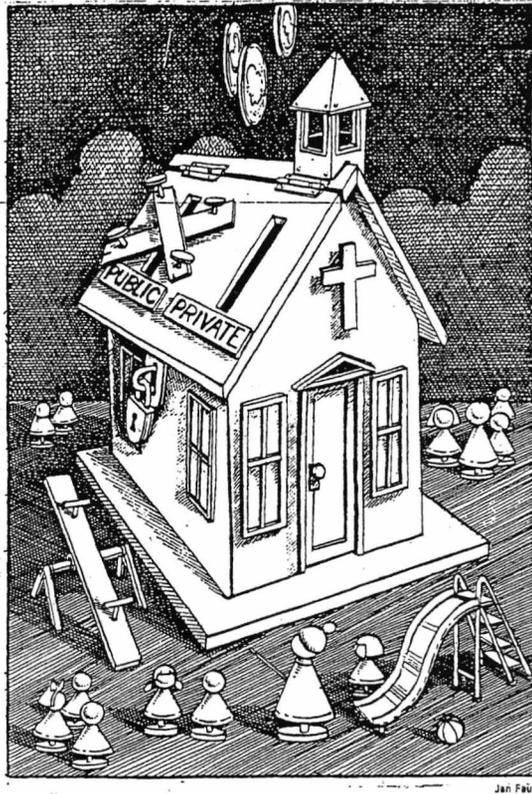


Hungerford in The Pittsburgh Post-Gazette
"No prayerful integration."



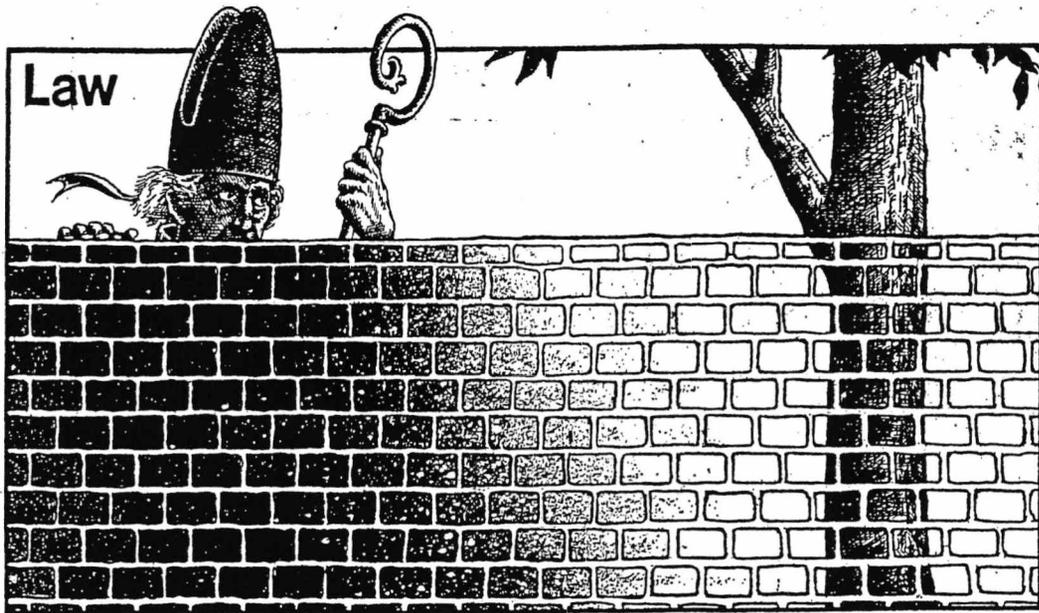
Bassett—Cincinnati Post-Times Star

"Don't despair . . . I'll pray for you in church."



23

24



291

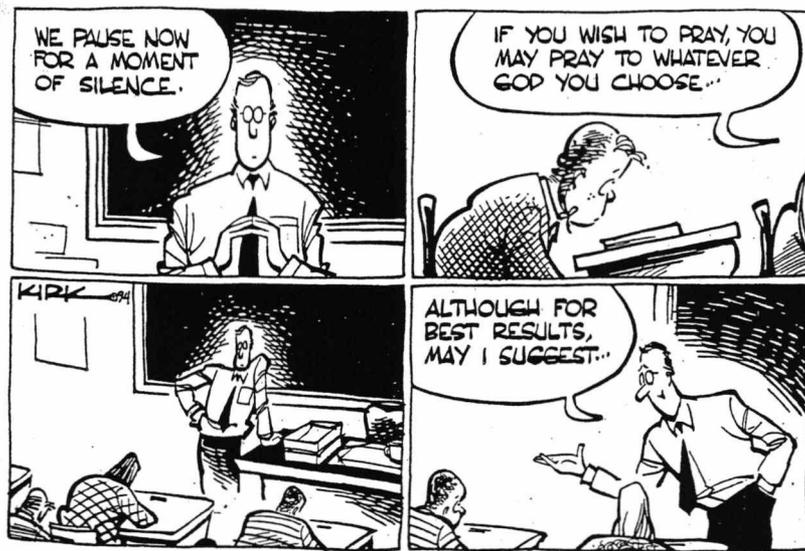
Ben Sargent
The Austin American-Statesman
United Feature Syndicate

25



26

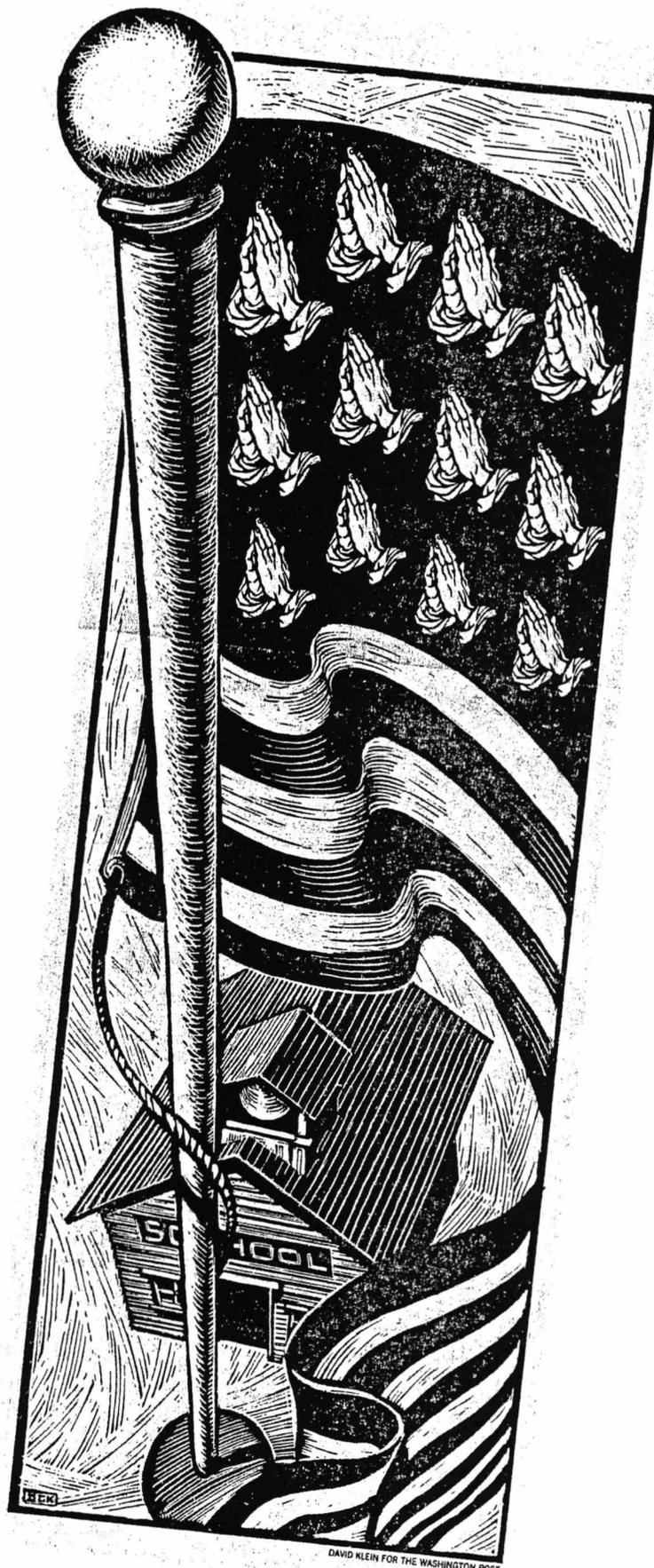
Len Boro
The Phoenix Gazette
Rothco



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Flash: The U.S. Supreme Court removed D, G and O from the alphabet because when arranged in a certain way they foster religion.



DAVID KLEIN FOR THE WASHINGTON POST

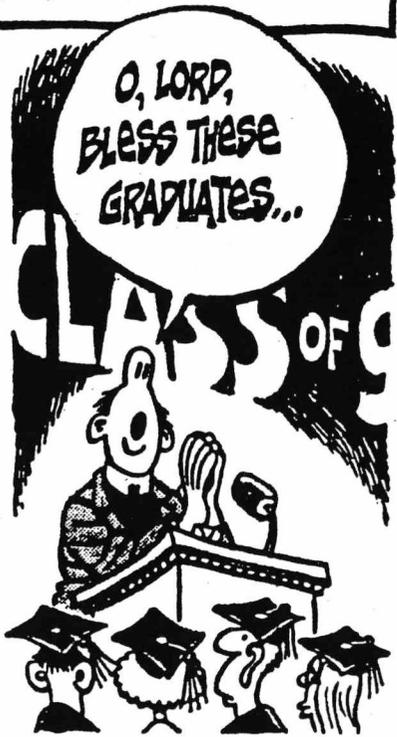
"NOW, IN WHOM DO WE TRUST?"



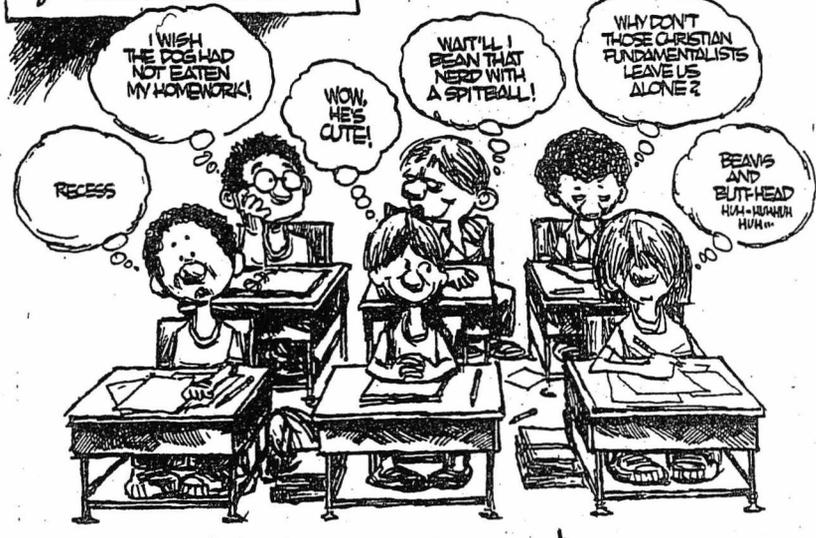


ACCORDING TO JOHN TREVER:

GUESS WHICH FORM OF EXPRESSION THE SUPREME COURT CONSIDERS HARMFUL:



Pausing for a moment of SILENT MEDITATION



Jim Morin
The Miami Herald
King Features Syndicate



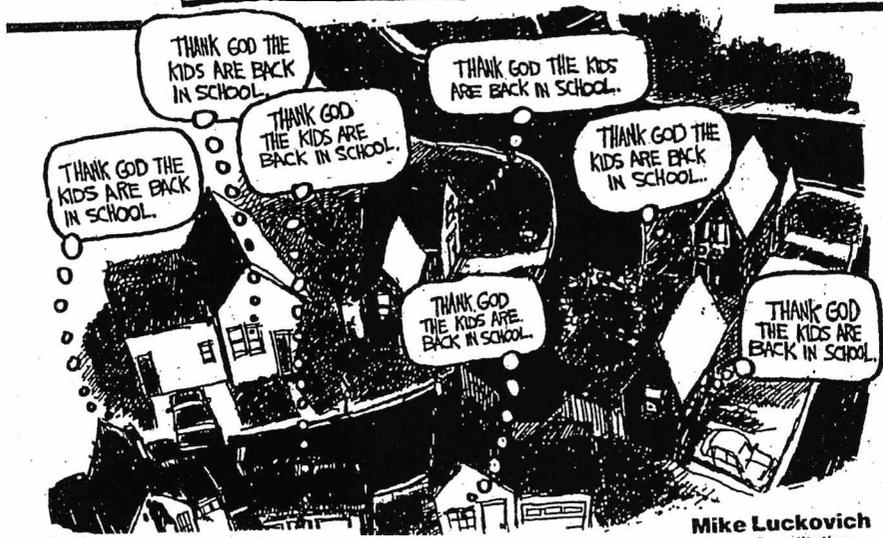
Tom Meyer
San Francisco Chronicle

WRITING THE SCHOOL PRAYER



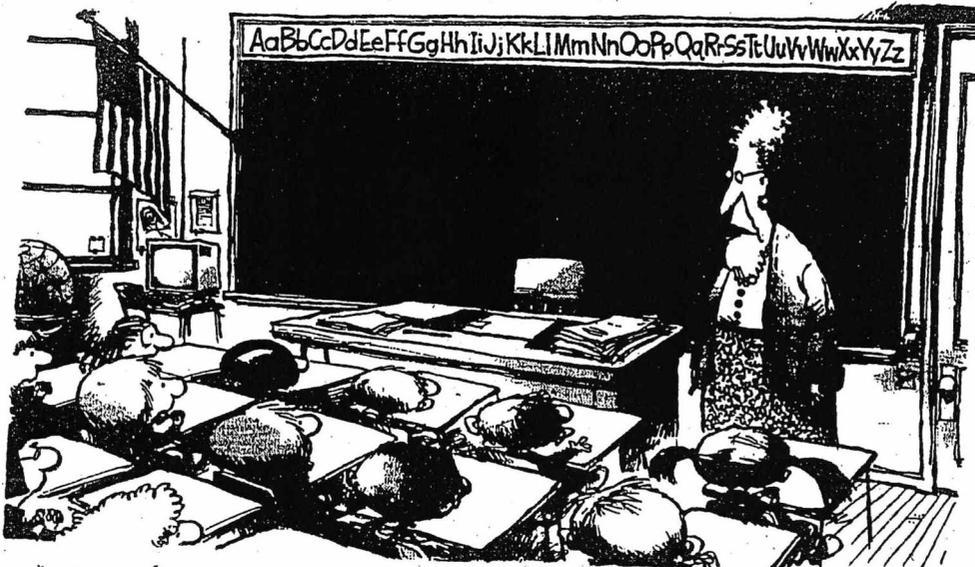
Sighe Wilkinson
Philadelphia Daily News
Cartoonists & Writers Syndicate

MOMENT OF SILENT PRAYER AT BEGINNING OF CLASS.



Mike Luckovich
Atlanta Constitution
Creators Syndicate

Jim Borgman
The Cincinnati Enquirer
King Features Syndicate



"... And now, class, a moment of silent prayer before we begin our masturbation lesson."

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8. *Ibid.*
9. *New York Times*, July 1, 1962, E10.
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35. *Ibid.*
36. *New York Times*, September 4, 1994, E4.
37. *New York Times*, December 18, 1994, E4.