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# STATE AID TO RELIGIOUS-AFFILIATED SCHOOLS: A POLITICAL ANALYSIS

MARK P. GIBNEY\*

## I. INTRODUCTION

[A] State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them non-reusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip. A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing "services" conducted by the State inside the sectarian school are forbidden, but the State may conduct speech and hearing diagnostic testing inside the sectarian school. Exceptional parochial school students may receive counseling, but it must take place outside of the parochial school, such as in a trailer parked down the street. A State may give cash to a parochial school to pay for the administration of State-written tests and state-ordered reporting services, but it may not provide funds for teacher-prepared tests on secular subjects. Religious instruction may not be given in public school, but the public school may release students during the day for religion classes elsewhere, and may enforce attendance at those classes with its truancy laws.<sup>1</sup>

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1. *Wallace v. Jaffree*, 105 S. Ct. 2479, 2518-19 (1985) (Rehnquist, J., dissenting) (citations and footnotes omitted).



No area of constitutional law is as muddled as that dealing with state aid to religious-affiliated schools. Justice Rehnquist's dissenting opinion in *Wallace v. Jaffree*, quoted above, points out the current confused state of the law. This Article does not attempt to explain how the law has reached its present state of affairs; that is, it does not try to reconcile the irreconcilable.<sup>2</sup> Instead, this Article provides a political analysis of this area of the law by focusing on the institutional relationship between the Supreme Court and other governmental actors.

Section II is an overview of the major cases concerning aid to parochial schools. Without attempting to explain the outcome of these cases, this overview focuses on questions involving institutional relationships and judicial capabilities.

One of the frequently espoused tenets of judicial review is that, absent special circumstances, the Court will pay deference to the actions of the states and the federal legislative body.<sup>3</sup> Although the Court has used the language of judicial deference, particularly when it applies the secular purpose prong of *Lemon v. Kurtzman*,<sup>4</sup> Section III establishes that its analysis in the aid to parochial school cases in fact has been quite searching.

Section IV examines the Supreme Court's review of lower federal courts in the context of parochial school cases. It focuses on the haphazard manner in which the Court accepts or rejects findings by lower federal courts. Section IV also discusses whether some of the standards that the Court has enunciated—in particular the two branches of the excessive entanglement prong and the notion of

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2. See Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PRR. L. REV. 673 (1980). Dean Choper comments: "Without cataloguing the school aid cases in detail, I think it is fair to say that application of the Court's three-prong test has generated ad hoc judgments which are incapable of being reconciled on any principled basis." *Id.* at 680.

3. See *Plyler v. Doe*, 457 U.S. 202, 216 (1982) ("A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill.").

4. 403 U.S. 602 (1971). Under the three-part *Lemon* test, the legislative act must have a secular purpose, the primary effect of the statute must be neither to advance nor inhibit religion, and the administration of the act must not foster an excessive entanglement between church and state. *Id.* at 612. See also *infra* note 22 and accompanying text.



parochial schools being "pervasively sectarian"—are judicially manageable standards.

Finally, Section V asserts that the Court might do well to modify or perhaps even abandon its three-part *Lemon* test. It suggests that the Court instead employ a standard of review similar to the standard it uses in equal protection cases. Under such a standard, the Court should generally pay deference to the actions of state legislative bodies, but factors such as whether a majority is promoting its own interests at the expense of a minority should influence its level of review.

## II. AN OVERVIEW OF AID TO PAROCHIAL SCHOOL CASES

*Everson v. Board of Education*<sup>5</sup> established an uncertain tone for the Supreme Court in dealing with aid to parochial school cases. *Everson* involved a New Jersey statute that allowed local school boards to reimburse parents of both public and parochial school students for transportation costs incurred in traveling to and from school.<sup>6</sup> Although Justice Black's majority opinion stressed the need for a "wall of separation between church and [s]tate,"<sup>7</sup> the Court upheld the statute in question as a valid general welfare provision.<sup>8</sup> Consciously or not, the Court opened a Pandora's box.<sup>9</sup>

Between *Everson* and *Board of Education v. Allen*<sup>10</sup> the Court decided a number of establishment clause cases,<sup>11</sup> but none of

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5. 330 U.S. 1 (1947).

6. *Id.* at 3.

7. *Id.* at 16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

8. *Id.* at 17-18.

9. In his dissent, Justice Rutledge noted: "Of course the cost of transportation promotes the general cause of education and the welfare of the individual. So does paying all the other items of educational expense." *Id.* at 50 (Rutledge, J., dissenting). The idea remains that the Court opened the floodgates of complicated and vexatious litigation by allowing some state aid. In a recently decided case, Justice Brennan likened trying to limit judicially the percentage of the religious-school day which can be subsidized by the public school system to letting "the genie out of the bottle." *Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216, 3230 (1985).

10. 392 U.S. 236 (1968).

11. In fact, some of the Court's most controversial decisions occurred during this period. See, e.g., *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (banning Bible reading in public schools); *Engel v. Vitale*, 370 U.S. 421 (1962) (banning official school prayer from public schools). The Court also reviewed two "released time programs" in which public



these cases dealt with aid to parochial schools. In *Allen*, however, the Court once again considered a case concerning parochial school aid. In that case it upheld a New York statute that required school districts to purchase and loan textbooks to nonpublic school students upon the request of such students.<sup>12</sup> The *Allen* decision thus opened the Pandora's box a little wider, and was largely responsible for increased state measures to aid parochial schools.

Although subsequent cases would portray parochial schools in a much different light, the Court in *Allen* was convinced that absent a contrary finding in a particular case, parochial schools could segment the secular from the sectarian. Justice White's majority opinion noted that "this Court has long recognized that religious schools pursue two goals, religious instruction and secular education."<sup>13</sup> Asserting that parochial schools have provided a "high quality education" to a substantial portion of the American public,<sup>14</sup> Justice White stated that against this impressive background the Court could not agree "either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion."<sup>15</sup>

Justice White also noted the lack of evidence in the record that any textbooks loaned by the school district had in fact been used by parochial schools to teach religion.<sup>16</sup> The Court portrayed the legislative scheme as a general welfare statute and concluded that *Everson* controlled.<sup>17</sup> Although the Court recognized that buses differ from books,<sup>18</sup> it maintained that the statute's exclusion of

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school students were released from regular class time to receive religious instruction. The Court declared the program unconstitutional in Illinois *ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948), whereas it upheld the program in *Zorach v. Clauson*, 343 U.S. 306 (1952). The difference in outcome can be explained largely by the fact that in *McCollum* the religious instruction occurred in the school, 333 U.S. at 205, while such instruction occurred away from school in *Zorach*. 343 U.S. at 309.

12. 392 U.S. 236, 238 (1968).

13. *Id.* at 245.

14. *Id.* at 247.

15. *Id.* at 248.

16. *Id.* (White stated, "[T]his case comes to us after summary judgment entered on the pleadings.").

17. *Id.* at 241-42.

18. *Id.* at 244.



religious books from the loan program and the requirement that each book loaned be approved by public school authorities<sup>19</sup> sufficiently ensured that the books would not be used for religious purposes.<sup>20</sup>

The Court in *Allen* relied upon a two-part test, first enunciated in *Everson*, in applying establishment clause standards: the statute in question must have a secular purpose, and its primary effect must be neither to advance nor inhibit religion.<sup>21</sup> Chief Justice Burger, in *Lemon v. Kurtzman*,<sup>22</sup> added a third requirement: the statute must not foster excessive government entanglement with religion.<sup>23</sup>

In *Lemon* the Court reviewed state statutes from Rhode Island and Pennsylvania. The Rhode Island statute required that the state pay a salary supplement directly to nonpublic school teachers.<sup>24</sup> The Pennsylvania statute allowed the Superintendent of Public Instruction to "purchase" specified "secular educational services" from nonpublic schools.<sup>25</sup> Under these contracts the state directly reimbursed nonpublic schools for expenditures for teachers' salaries, textbooks, and instructional material.<sup>26</sup> To receive reimbursement, the school had to maintain prescribed accounting procedures that identified the separate cost of the special educational service.<sup>27</sup>

In reviewing the Rhode Island statute, Chief Justice Burger's majority opinion noted that the district court concluded that parochial schools constituted an "integral part of the religious mission of the Catholic Church."<sup>28</sup> Although the Supreme Court accepted this particular finding, it dismissed rather summarily the district court's finding that "concern for religious values did not inevitably or necessarily intrude into the content of secular subjects."<sup>29</sup>

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19. *Id.* at 244-45.

20. *Id.* at 245.

21. *Id.* at 243.

22. 403 U.S. 602 (1971).

23. *Id.* at 613 (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)).

24. *Id.* at 607.

25. *Id.* at 609.

26. *Id.*

27. *Id.* at 609-10.

28. *Id.*

29. *Id.* at 616. Justice White responded:



The district court's findings in *Lemon* largely reflected the Supreme Court's depiction of parochial schools in *Allen*, at least to the extent that both reflected a belief that parochial schools could keep the secular and the sectarian separate. With the Supreme Court's opinion in *Lemon*, however, a much different view of parochial elementary and secondary schools began to emerge.<sup>30</sup> After describing the general religious administration and supervision of these schools<sup>31</sup> and quoting from the "Handbook of School Regulations," which describes the religious mission of Rhode Island parochial schools and the teachers' role in this mission,<sup>32</sup> the Court concluded, contrary to *Allen*, that parochial school teachers would have "great difficulty in remaining religiously neutral."<sup>33</sup> Furthermore, the Court concluded that even with the best intentions, such teachers "would find it hard to make a total separation between secular teaching and religious doctrine."<sup>34</sup> The Court did not say that a teacher could not possibly make this distinction<sup>35</sup> but instead held that the state must be "certain" that state-paid teachers did not "inculcate religion."<sup>36</sup> In order to make such a determination, the Court said that the state must employ "comprehensive,

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Accepting the District Court's observation in *DiCenso* that education is an integral part of the religious mission of the Catholic Church . . . the majority then interposes findings and conclusions that the District Court expressly abjured, namely, that nuns, clerics, and dedicated Catholic laymen unavoidably pose a grave risk in that they might not be able to put aside their religion in the secular classroom.

*Id.* at 666 (White, J., concurring in the judgment in *Lemon* and dissenting in *DiCenso*). *DiCenso*, a Rhode Island district court case, struck down the school aid statute. *DiCenso v. Robinson*, 316 F. Supp. 112 (D.R.I. 1970), *aff'd*, 403 U.S. 602 (1971).

30. Certainly Chief Justice Burger mixes the irrelevant with the relevant. For example, the majority opinion noted that church schools are close to parish churches, thereby permitting "convenient access for religious exercises." 403 U.S. at 615. The opinion pointed out that although on average only one-half hour of religious instruction per day occurs in these schools (an irrelevant fact if one believes that religion permeates the school from the start), "religiously oriented extracurricular activities" do take place. *Id.* The Court's analysis—if it may be so denominated—continues at some length in this vein. *Id.* at 615-20.

31. *Id.* at 617.

32. *Id.* at 618. The Handbook has "the force of synodal law in the diocese." *Id.*

33. *Id.*

34. *Id.*

35. The Court virtually ignored the testimony of several teachers that "they did not inject religion into their secular classes" on the grounds that "what has been recounted suggests the potential if not actual hazards of this form of state aid." *Id.* at 618.

36. *Id.* at 619.



discriminating and continuing state surveillance.”<sup>37</sup> The price that is paid for undertaking this surveillance, however—the “insoluble paradox,” to use Justice White’s term<sup>38</sup>—is the necessary violation of the excessive entanglement prong created in *Lemon*.<sup>39</sup>

After striking down both the Rhode Island and Pennsylvania statutes on these “administrative entanglement” grounds,<sup>40</sup> the Court discussed another branch of its new excessive entanglement element—a political divisiveness rationale.<sup>41</sup> Ignoring the fact that the Court itself, because of its opinions in *Everson* and *Allen*, was at least partly responsible for the increasing efforts by the states to aid parochial schools, the Chief Justice displayed great concern that aid to religiously affiliated schools would begin to divide the polity, and policy makers, along religious lines. The Chief Justice suggested that the first amendment was designed to protect against such an evil.<sup>42</sup> Although the Chief Justice offered no substantiation for his fears, he speculated that those who are of a particular religion would take a very hard stand politically in favor of providing aid to parochial schools of their denomination, and those of other religions would oppose such measures just as vehemently.<sup>43</sup>

In *Tilton v. Richardson*,<sup>44</sup> a companion case to *Lemon*, the Court upheld a provision in Title I of the Higher Education Facilities Act of 1963 that provided aid for the construction of purely secular buildings and facilities on public and private college campuses. As in *Lemon*, Chief Justice Burger’s plurality opinion in *Tilton* once again relied upon the district court’s conclusion that none of the four church-based institutions that were the subject of the lawsuit had previously violated the statutory restriction to secular use.<sup>45</sup> The appellants sought to buttress their argument that religious-affiliated schools were generally sectarian in nature by presenting a

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37. *Id.*

38. *Id.* at 668 (White, J., concurring in the judgment in *Lemon* and dissenting in *DiCenso*).

39. *Id.* at 619.

40. *Id.* at 620-22.

41. *Id.* at 622-25.

42. *Id.* at 622.

43. *Id.* at 622-23.

44. 403 U.S. 672 (1971) (plurality opinion).

45. *Id.* at 680.



profile of the "typical sectarian institution of higher education."<sup>46</sup> Although the Court in *Lemon* had relied on a composite of the parochial elementary and secondary schools in Rhode Island,<sup>47</sup> in *Tilton* Chief Justice Burger refused to rely on a "hypothetical profile,"<sup>48</sup> or so he claimed.

The Chief Justice's opinion in *Tilton* attempted to differentiate the facts of the case from those of *Lemon*. In order to do so the Chief Justice resorted to some very general statements about college students and religious-affiliated universities and colleges. He speculated that "common observation" finds that college students are less susceptible to religious indoctrination than both elementary and secondary school students.<sup>49</sup> Moreover, the skepticism of the college student is "not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations."<sup>50</sup>

Not only are college students different from their younger counterparts, but the image of parochial colleges differs sharply from the "pervasively sectarian" portrayal given to all religious-affiliated elementary and secondary schools. Burger wrote that "by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines."<sup>51</sup> Furthermore, he added, "many" church-related institutions of higher education are characterized by a high degree of academic freedom, and these schools "seek to evoke free and critical responses from their students."<sup>52</sup>

One variable in Supreme Court aid to parochial school cases, therefore, is how certain it requires a state to be that religion is not being inculcated in the schools. In *Lemon* the Court demanded ab-

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46. Such a "composite" institution "imposes religious restrictions on admissions, requires attendance at religious activities, compels obedience to the doctrines and dogmas of the faith, requires instruction in theology and doctrine, and does everything it can to propagate a particular religion." *Id.* at 682.

47. 403 U.S. 602, 615.

48. 403 U.S. 672, 682.

49. *Id.* at 686.

50. *Id.* Justice White's response to this argument is substantial. White's position is that the selective perception of college students, by itself, cannot save this scheme. 403 U.S. 602, 668 (White, J., concurring in the judgment in both *Lemon* and *Tilton*).

51. *Tilton*, 403 U.S. at 686 (plurality opinion).

52. *Id.*



solute certainty; however, in *Tilton* Chief Justice Burger lowered the standard and was willing to accept certain risks that religion might be advanced.<sup>53</sup> Because the risk of religious advancement was lower—and acceptable—in *Tilton*, given the nature of the college and universities, “the necessity for intensive government surveillance is diminished and the resulting entanglement between government and religion lessened.”<sup>54</sup> The Chief Justice then stated that although inspections of the buildings paid for by federal funds “may be necessary,” these inspections apparently would be minimal.<sup>55</sup> Oddly enough, the opinion likened these inspections to those in parochial grammar schools under compulsory education laws.<sup>56</sup>

This Article does not focus on the “college” cases; however, some further consideration of what the Court has done in this area is warranted. As noted above, in *Tilton* Chief Justice Burger allowed a risk that religion might be inculcated because of the nature of colleges and college students. Given the “skepticism” of college students, however, the Court might accept not only a risk of religious promotion, but also a great deal of religious activity in public-sponsored programs or activities.

The Court has in fact arrived at this position. In *Widmar v. Vincent*,<sup>57</sup> the Court refused to allow a public university to deny school space to religious organizations when an equal-access policy existed at the university. *Widmar* is particularly noteworthy because the religious groups bringing the lawsuit acknowledged that

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53. *Id.* at 687. Chief Justice Burger commented:

Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood . . . that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities.

*Id.*

54. *Id.* Two other “college cases” extended the principle of *Tilton*. In *Hunt v. McNair*, 413 U.S. 734 (1973), the Baptist College of Charleston had received aid from revenue bonds issued pursuant to state authority. The Court upheld the validity of this state aid because the assistance was limited to “secular aspects” of the college. *Id.* at 749. *Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736 (1976), involved state aid to private colleges through annual noncategorical grants. The authorizing statute required grant recipients to file annual reports with a state agency and gave the agency authority to audit the colleges, if necessary, to verify that the funds were not used for sectarian purposes. The Court upheld this program, too. *Id.* at 766-67.

55. *Tilton*, 403 U.S. at 687 (plurality opinion).

56. *Id.*

57. 454 U.S. 263 (1981).



they might perform religious worship in the granted school space.<sup>58</sup> This fact, however, apparently had no bearing on the Court's decision.

In terms of universities and colleges, then, the Court has gone well beyond a mere risk of religious promotion or inculcation under public support. It has mandated the use of state buildings even when these buildings will in fact be used for religious worship. When the Court is speaking of elementary and secondary schools, however, it has generally demanded absolute certainty that no religious promotion or inculcation will ever occur.<sup>59</sup>

Returning to elementary and secondary school cases, the multifaceted statutory aid provisions in *Committee for Public Education and Religious Liberty v. Nyquist*<sup>60</sup> indicate the route that the states appear to be pursuing. The aid in *Nyquist* involved: 1) direct money to a school for maintenance and repair of school facilities and for equipment to ensure the health, welfare, and safety of enrolled pupils;<sup>61</sup> 2) tuition reimbursements for low-income parents;<sup>62</sup> and 3) tax credits on tuition payments for parents not eligible for reimbursements.<sup>63</sup> The Court struck down all three provisions as violative of the effects prong of the *Lemon* test.<sup>64</sup> The Court also relied on *Tilton* to strike down the maintenance and repair provision, pointing out that nothing in the law limited such work to those parts of the building that would be used for secular purposes.<sup>65</sup> The Court distinguished the tuition reimbursements

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58. Justice White's dissent stressed this matter: "The regulation was applied to respondents' religious group, Cornerstone, only after the group explicitly informed the University that it sought facilities for the purpose of offering prayer, singing hymns, reading scripture, and teaching biblical principles." *Id.* at 283 (White, J., dissenting).

59. The one exception is *Committee for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646 (1980). See *infra* notes 111-17 and accompanying text.

60. 413 U.S. 756 (1973).

61. *Id.* at 762.

62. *Id.* at 764.

63. *Id.* at 765-66.

64. *Id.* at 798. In his dissent, Justice White argued that "the test is one of 'primary effect' not *any* effect. The Court makes no attempt at that ultimate judgment necessarily entailed by the standard heretofore fashioned in our cases." *Id.* at 823 (White, J., dissenting). Justice White also criticized the majority for striking down these statutes "on their face," given the Court's recognition that many parochial schools do not fit the profile upon which the Court based its analysis. *Id.* at 824.

65. *Id.* at 776-77.



and tax credits from both *Everson* and *Allen*, pointing out that in those two cases all parents benefited from the public provision, while in *Nyquist* only the parents of parochial school children so benefited.<sup>66</sup>

In *Meek v. Pittenger*,<sup>67</sup> the Court continued to strike down state efforts to provide various forms of aid to parochial school students and parochial schools themselves. *Meek* involved: 1) auxiliary services such as counseling and testing by public school employees in the nonpublic school for remedial students and the educationally deprived;<sup>68</sup> 2) loans of secular textbooks to children in nonpublic schools;<sup>69</sup> and 3) loans of instructional material and equipment.<sup>70</sup> The Court struck down all of these provisions except the textbook loans portion. The Court considered the equipment to be a "large volume of direct aid"<sup>71</sup> given to these pervasively sectarian institutions, and under those circumstances a violation of the effects prong of the *Lemon* test.<sup>72</sup>

The Court found the auxiliary services to be violative of the establishment clause on excessive entanglement grounds. Although the Court recognized that the likelihood of the inadvertent fostering of religion in something like an arithmetic class was slight,<sup>73</sup> it nonetheless held that "a diminished probability of impermissible conduct is not sufficient."<sup>74</sup> The Court then speculated that the

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66. *Id.* at 781.

67. 421 U.S. 349 (1975).

68. *Id.* at 352-53.

69. *Id.* at 353-54.

70. *Id.* at 354-55.

71. *Id.* at 365.

72. *Id.* at 366. In his dissent, Justice Rehnquist commented:

One need look no further than to the majority opinion for a demonstration of the arbitrariness of the percentage approach to primary effect. In determining the constitutionality of the textbook loan program . . . the plurality views the program in the context of the State's "well-established policy of lending textbooks free of charge to elementary and secondary students." But when it comes time to consider the same Act's instructional materials and equipment program, which is not alleged to make available to private schools any materials and equipment that are not provided to public schools, the majority strikes down this program because more than 75% of the nonpublic schools are church related or religiously affiliated.

*Id.* at 389 (Rehnquist, J., dissenting) (citations and footnotes omitted).

73. *Id.* at 370-71.

74. *Id.* at 371.



surveillance necessary to ensure the absence of religious inculcation from auxiliary service classes would violate the excessive entanglement prong.<sup>75</sup>

In addition to treating this part of excessive entanglement, the Court also perceived a violation of the political divisiveness branch of this element because continuing appropriations were involved.<sup>76</sup> Interestingly enough, Chief Justice Burger, the author of the excessive entanglement prong,<sup>77</sup> argued in dissent that the rejection of such aid might cause as much political divisiveness as granting aid would.<sup>78</sup>

In another dissenting opinion, Justice Rehnquist questioned the basis for the Court's conclusion that the dangers presented by a state-subsidized guidance counselor were the same as those presented by a state-subsidized chemistry teacher.<sup>79</sup> Justice Rehnquist labeled such findings by the Court "ex cathedra pronouncements"<sup>80</sup> and noted that the district court found the facts to be exactly the opposite.<sup>81</sup> Rehnquist then added that the Court's propensity to disregard findings of fact by district courts in establishment clause cases was at variance with "the established division of responsibilities between trial and appellate courts in the federal system."<sup>82</sup>

Two years after *Meek*, the Court continued with its searching and often speculative analysis of state attempts to aid parochial schools. In *Wolman v. Walter*<sup>83</sup> the Court addressed a rather imaginative effort by Ohio to provide aid through the following: 1) loaned secular books;<sup>84</sup> 2) payment for testing and scoring certain state required tests;<sup>85</sup> 3) provision of certain types of therapeutic services on public school grounds;<sup>86</sup> 4) loaned instructional materi-

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75. *Id.* at 372.

76. *Id.* at 372.

77. See *supra* note 23 and accompanying text; see also Choper, *supra* note 2, at 684.

78. *Meek*, 421 U.S. at 386.

79. *Id.* at 392 (Rehnquist, J., dissenting).

80. *Id.*

81. *Id.*

82. *Id.* (citing FED. R. CIV. P. 52(a)).

83. 433 U.S. 229 (1977).

84. *Id.* at 236-37.

85. *Id.* at 238-39.

86. *Id.* at 244-45.



als and equipment;<sup>87</sup> and 5) authorized payment for school field trips.<sup>88</sup> A three-judge district court panel held the statute constitutional in all respects.<sup>89</sup> The Supreme Court affirmed as to the books, testing and scoring, diagnostic services, and therapeutic services.<sup>90</sup> The Court struck down the statutory provisions for loaning instructional materials and equipment and for field trips, however.<sup>91</sup>

The Court's treatment of the instructional materials contributes to the present analysis of the institutional relationship between the Court and the states. In *Wolman*, the state sought to distinguish its statute from the one in *Meek*, in terms of the equipment issue, by arguing that in Ohio the equipment was to be loaned to the students, a situation thus presumably governed by *Allen*, while in *Meek* the instructional materials were to be loaned directly to the schools.<sup>92</sup> The Court pointed out that Ohio previously had loaned instructional materials directly to schools, but had revised the statute after the Court's decision in *Meek*.<sup>93</sup> It ruled that to uphold the later statute in light of such changes "would exalt form over substance."<sup>94</sup> Why the Court took this opportunity to disallow statutory tailoring based on judicial precedents is puzzling. Certainly *Wolman* is not the first instance of such tailoring,<sup>95</sup> nor will it be the last. Moreover, the Court in *Wolman* criticized a state for attempting to follow the Court through this labyrinth.

The Court's discussion of state funding of field trips by parochial schools illustrates the speculative nature of the Court's analysis in this area and raises a very valid question about judicial competence, particularly at the Supreme Court level, to make certain

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87. *Id.* at 248-49.

88. *Id.* at 252-53.

89. *Wolman v. Essex*, 417 F. Supp. 1113 (S.D. Ohio 1976), *rev'd in part sub nom. Wolman v. Walter*, 433 U.S. 229 (1977).

90. 433 U.S. at 255.

91. *Id.* One irony in this opinion is that the majority took special pains to point out that the district court had found the dangers of providing diagnostic services to be insubstantial, *id.* at 242, while simultaneously ignoring, in large part, the district court's finding of insubstantial dangers in *all* of the statutory schemes. 417 F. Supp. at 1125.

92. 433 U.S. at 250.

93. *Id.*

94. *Id.*

95. *See, e.g., Committee for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646 (1980). For a discussion of this case, see generally *infra* notes 111-17 accompanying text.



determinations. Once again refusing to accept the findings of the district court,<sup>96</sup> Justice Blackmun's majority opinion differentiated field trips from the bus trips in *Everson* because in *Everson* the schools had no control over such trips, while in *Wolman* the schools controlled the timing, frequency, and destination of field trips.<sup>97</sup> As a result, the Court treated the schools, not the students, as the direct beneficiaries of the state aid,<sup>98</sup> thus violating the effects prong. In addition, the Court found an excessive entanglement violation. In the Court's view, it is the school teacher who makes field trips "meaningful."<sup>99</sup> The Court described field trips in this detail: "The experience begins with the study and discussion of the place to be visited; it continues on location with the teacher pointing out items of interest and stimulating the imagination; and it ends with a discussion of the experience."<sup>100</sup> The Court concluded that because the public school authorities could not adequately ensure "secular use of the field trip funds without close supervision,"<sup>101</sup> an excessive entanglement between church and state would result.

How can the Court accurately describe school field trips with any authority? The Court's "finding" concerning field trips alone might not seem completely outrageous, but when coupled with a host of other similarly unsubstantiated findings in this area, it raises serious questions about the Court's treatment of these cases. The Court has taken extended liberties in its analysis of the aid to parochial school cases generally. Its "common observations" about colleges and students at such institutions, its perceptions about the pervasively sectarian nature of Rhode Island's parochial schools, and its description of a teacher's role on a field trip illustrate this point.

In 1970 the New York legislature appropriated public funds to reimburse church-affiliated and secular nonpublic schools for performing various mandated services, including the administration, the grading, and the compiling and reporting of the results of

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96. 433 U.S. at 253.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 253-54.

101. *Id.* at 254-55.



tests.<sup>102</sup> These tests were both state-prepared and teacher-prepared. The legislature stipulated that no funds were to be provided for religious worship and instruction,<sup>103</sup> but the statute lacked a provision requiring an audit of school financial records. In *Levitt v. Committee for Public Education and Religious Liberty*,<sup>104</sup> the Court struck down this statute due to the lack of assurances that internally prepared tests would be free of religious instructions.<sup>105</sup>

In 1974 the New York legislature again tried to provide aid to nonpublic schools, tailoring the new statute to meet the constitutional shortcomings found in *Levitt*. Under the new statutory scheme, the state would not pay for the preparation, administration, or grading of teacher-prepared tests.<sup>106</sup> In addition, the statute included an auditing provision.<sup>107</sup> Despite these changes, a federal district court held this statute unconstitutional on the basis of *Meek*.<sup>108</sup> On appeal to the Supreme Court, the Court vacated the district court's decision and remanded the case for further consideration in light of the Court's more recent holding in *Wolman*.<sup>109</sup> On remand the district court upheld the statute.<sup>110</sup> In a novel fashion, the Supreme Court affirmed this decision in *Committee for Public Education and Religious Liberty v. Regan*,<sup>111</sup> which provides an extended history of the persistent state efforts to provide aid to parochial schools.

In terms of "certainty" that a state-sponsored program will not inculcate religious values, *Regan* represents a retreat from cases such as *Lemon*. In *Regan* the Court noted that while most of the questions on these exams would be multiple-choice, some might be

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102. 1970 N.Y. LAWS ch. 3, § 2.

103. *Id.* at § 8.

104. 413 U.S. 472 (1973).

105. *Id.* at 480.

106. 1974 N.Y. LAWS ch. 507, § 3. Instead, the state reimbursed nonpublic schools for "state prepared examinations and reporting procedures." *Id.* (emphasis added).

107. *Id.* at § 7.

108. *Committee for Pub. Educ. and Religious Liberty v. Levitt*, 414 F. Supp. 1174 (S.D.N.Y. 1976), *vacated*, 433 U.S. 902 (1977).

109. *Levitt v. Committee for Pub. Educ. and Religious Liberty*, 433 U.S. 902 (1977). See *supra* notes 83-101 and accompanying text.

110. 461 F. Supp. 1123, 1131 (S.D.N.Y. 1978), *aff'd sub nom. Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980).

111. 444 U.S. 646 (1980).



in essay form<sup>112</sup> and thus open to the possibility that religious considerations would influence the parochial teacher's grading policy. The Court relied on the findings of the district court, however, and found this risk to be "'minimal,' especially in light of the 'complete' state procedures designed to guard against serious inconsistencies in grading and any misuse of essay questions."<sup>113</sup> The Court held that "[t]he District Court was correct in concluding that there was no substantial risk that the examinations could be used for religious educational purposes."<sup>114</sup>

In *Regan*, the Court also displayed a rather novel approach to the administrative branch of the excessive entanglement prong. The Court directly quoted the district court's description of the record-keeping and the state auditing procedure, which described a series of contacts between church and state.<sup>115</sup> Past precedent would have dictated a conclusion that a clear violation of the excessive entanglement prong had occurred. The Court, however, relied on the district court's findings that the "services for which the private schools would be reimbursed are discrete and clearly iden-

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112. *Id.* at 655-56.

113. *Id.* at 656 (quoting *Committee for Pub. Educ. & Religious Liberty v. Levitt*, 461 F. Supp. 1123, 1128-29 (S.D.N.Y. 1978)).

114. *Id.*

115. The portion of the district court's opinion quoted by the Supreme Court is as follows:

Schools which seek reimbursement must "maintain a separate account or system of accounts for the expenses incurred in rendering" the reimbursement services, and they must submit to the N.Y. State Commissioner of Education an application for reimbursement with additional reports and documents prescribed by the Commissioner. . . . Reimbursable costs include proportionate shares of the teachers' salaries and fringe benefits attributable to administration of the examination and reporting of State-required data on pupil attendance and performance, plus the cost of supplies and other contractual expenditures such as data processing services. Applications for reimbursement cannot be approved until the Commissioner audits vouchers or other documents submitted by the schools to substantiate their claims . . . . The Statute further provides that the State Department of Audit and Control shall from time to time inspect the accounts of recipient schools in order to verify the cost to the schools of rendering the reimbursable services. If the audit reveals that a school has received an amount in excess of its actual costs, the excess must be returned to the state immediately.

*Id.* at 659-60 (quoting 1974 N.Y. Laws, ch. 507, § 5).



tifiable.”<sup>116</sup> Furthermore, the Court concluded that the reimbursement process was “straightforward and susceptible to the routinization that characterizes most reimbursement schemes.”<sup>117</sup>

*Mueller v. Allen*<sup>118</sup> continued the trend toward deference in aid to parochial school cases shown in *Regan*. In *Mueller*, the Court considered Minnesota’s policy of allowing taxpayers to take deductions on their state income taxes for tuition, textbooks, and transportation for schooling.<sup>119</sup> The Court upheld this provision, noting that these deductions were only one of many deductions available to taxpayers, and that the Court historically has given deference to state statutory schemes.<sup>120</sup> Despite this purported historical deference, the Court was forced to distinguish *Nyquist*, which had invalidated a similar taxing scheme. The Court did so by explaining that *Nyquist* was not a part of a “genuine” system of tax laws.<sup>121</sup> The Court also reverted back to the direct benefit test,<sup>122</sup> which posits that state aid is constitutional if parents and not schools receive such aid, even though the Court had accorded this doctrine rough treatment in *Wolman*.<sup>123</sup> Finally, despite the fact that only one class of taxpayers would truly stand to benefit from these deductions—parents of nonpublic schoolchildren—the Court refused to consider “the extent to which various classes of private citizens claimed benefits under the law.”<sup>124</sup>

The deference displayed in *Regan* and *Mueller* was short-lived. In its 1985 term the Court decided two cases that once again have frustrated state efforts to provide assistance to parochial schools and their students. In *Grand Rapids School District v. Ball*,<sup>125</sup> the Court addressed the constitutionality of two teaching programs held in parochial schools. One program, Shared Time, sent public

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116. *Id.* at 660 (quoting *Committee for Pub. Educ. and Religious Liberty v. Levitt*, 461 F. Supp. 1123, 1131 (S.D.N.Y. 1978), *aff’d sub nom.* *Committee for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646 (1980)).

117. 444 U.S. at 660.

118. 463 U.S. 388 (1983).

119. *Id.* at 391.

120. *Id.* at 396.

121. *Id.* at 396 n.6.

122. *Id.* at 397-99.

123. *See supra* notes 83-101 and accompanying text.

124. 463 U.S. at 401.

125. 105 S. Ct. 3216 (1985).



school teachers to various parochial schools to teach remedial courses. The second program, Community Education, entailed teaching secular courses after school. Nonpublic school teachers usually taught these classes.<sup>126</sup>

The notion of parochial schools being "pervasively sectarian," which had enjoyed a hiatus of sorts in *Regan* and *Mueller*, played an important role in the Court's decision striking down the *Grand Rapids* scheme. The Court quoted from the Parent Handbook of one Catholic school that stated that the goal of a Catholic education was "[a] God oriented environment which permeates the total educational program."<sup>127</sup> The Court also quoted from a policy statement of the Christian schools that "it is not sufficient that the teachings of Christianity be a separate subject in the curriculum, but the Word of God must be an all-pervading force in the educational program."<sup>128</sup> The Court affirmed the district court's finding that these institutions were "pervasively sectarian."<sup>129</sup>

Justice Brennan's majority opinion treated the lack of evidence of religious inculcation in an interesting fashion. He began this analysis by stating in an odd fashion that "[t]he Court of Appeals of course recognized that respondents adduced no evidence of specific incidents of religious indoctrination."<sup>130</sup> Brennan then added the following caveat: "But the absence of proof of specific incidents is not dispositive."<sup>131</sup> He then examined the operation of the incentive structure and concluded that no party had any reason to recognize religious inculcation if it existed, nor did anyone have the motive to report it to the proper authorities if inculcation did in fact occur. In fact, the Court found that even the authorities lacked a motive to obey the Constitution.<sup>132</sup> Presumably this lack

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126. *Id.* at 3218-19.

127. *Id.* at 3220 (emphasis in opinion). Note that the Court does not indicate whether all of the other Catholic schools had such a handbook, or whether what was in this handbook had any semblance to reality.

128. *Id.* (emphasis in opinion).

129. *Id.* The district court decision is *Americans United for the Separation of Church and State v. School Dist.*, 546 F. Supp. 1071 (1982), *aff'd*, 718 F.2d 1389 (6th Cir. 1983), *aff'd sub nom. Grand Rapids School Dist. v. Ball*, 105 S. Ct. 2479 (1985).

130. 105 S. Ct. 3216, 3225 (1985) (emphasis added).

131. *Id.*

132. *Id.* at 3225-26. The Court commented:



of motivation could extend to all public officials in Grand Rapids and elsewhere.

In *Aguilar v. Felton*,<sup>133</sup> the companion case to *Grand Rapids*, the Court reviewed a challenge to New York City's expenditure of Title I money for remedial teaching of underprivileged students in public and nonpublic schools. The Court's opinion relied quite heavily on the circuit court's finding that the parochial schools were pervasively sectarian,<sup>134</sup> although the Court did not point to any specific indices of this as it had in *Grand Rapids*. Given the conclusion that these schools were pervasively sectarian, the Court's reasoning was rather routine: the need for comprehensive state surveillance to prevent religious inculcation in turn would create excessive entanglement.<sup>135</sup> The court of appeals had in fact found that these schools were pervasively sectarian, but the Supreme Court ignored the fact that the district court reached the opposite conclusion.<sup>136</sup>

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When conducting a supposedly secular class in the pervasively sectarian environment of a religious school, a teacher may knowingly or unwillingly tailor the content of the course to fit the school's announced goals. If so, there is no reason to believe that this kind of ideological influence would be detected or reported by students, by their parents, or by the school system itself. The students are presumably attending religious schools precisely in order to receive religious instruction. After spending the balance of their school day in classes heavily influenced by a religious perspective, they would have little motivation or ability to discern improper ideological content that may creep into a Shared Time or Community Education course. Neither their parents nor the parochial schools would have cause to complain if the effect of the publicly-supported instruction were to advance the school's sectarian mission. And the public school system itself has no incentive to detect or report any specific incidents of improper state-sponsored indoctrination. Thus, the lack of evidence of specific incidents of indoctrination is of little significance.

*Id.*

133. 105 S. Ct. 3232 (1985).

134. *Id.* at 3238. The court of appeals decision was *Felton v. Secretary*, 739 F.2d 48 (2d Cir. 1984), *aff'd sub nom. Aguilar v. Felton*, 105 S. Ct. 3232 (1985). A unanimous panel of the Second Circuit held that "[t]he Establishment Clause . . . constitutes an insurmountable barrier to the use of federal funds . . . to provide . . . services of the sort at issue here." *Id.* at 49-50.

135. 105 S. Ct. at 3236-38.

136. *National Coalition for Pub. Educ. and Religious Liberty v. Harris*, 489 F. Supp. 1248 (S.D.N.Y. 1980), *rev'd sub nom. Felton v. Secretary*, 739 F.2d 48 (2d Cir. 1984), *aff'd sub nom. Aguilar v. Felton*, 105 S. Ct. 3232 (1985). The district court stated:

The record before the Court includes uncontroverted evidence from . . . schools where Title I services are provided that demonstrates that these insti-



The Court treated the appellants' argument that the degree of sectarianism will differ from school to school in a footnote. The majority quoted from Judge Friendly's opinion for the Second Circuit that "[i]f any significant number of the Title I schools create the risks described in *Meek*, *Meek* applies."<sup>137</sup> Neither the court of appeals nor the Supreme Court defined "significant number" or the extent to which the risks identified in *Meek* would have to be present.

Justice O'Connor's dissent in *Aguilar* focused on yet another district court finding that the majority ignored—the fact that for 14 years, as of 1980, the program in question had operated without a single complaint of religious inculcation.<sup>138</sup> Justice O'Connor's opinion also pointed out that the majority's concern for comprehensive surveillance of the public school teachers was greatly exaggerated.<sup>139</sup> Again, she relied on the New York City experience: the administrators found minimal surveillance of the program to be sufficient.<sup>140</sup>

*Aguilar* is the most recent of the major Supreme Court cases dealing with aid to religiously affiliated schools. As noted earlier, no effort has been made to reconcile these cases; Justice Rehnquist's depiction of the law as it now stands seems to capture fully the Supreme Court's uncertain path. The following sections examine some rationales for this confusion.

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tutions do not have the characteristics of the pervasively sectarian schools described by the Supreme Court. The evidence shows that those nonpublic schools (1) do not restrict the admission of students on religious grounds; (2) do not restrict the hiring of teachers on religious grounds; (3) do not attempt to compel their students to accept or obey the doctrines of the sponsoring church or religious organization; (4) offer separate programs of secular and religious instruction and do not impose religious restrictions on the content of the instruction offered. Furthermore, the numerous affidavits of Title I teachers and professionals show that these public employees do not perceive a 'dominant sectarian mission' and have not been subject to religious pressures or influences in the parochial schools in which they work.

*Id.* at 1262-63 (citations to affidavits omitted).

137. 105 S. Ct. at 3238 n.8 (quoting *Felton v. Secretary*, 739 F.2d 48, 70 (2d Cir. 1984), *aff'd sub nom. Aguilar v. Felton*, 105 S. Ct. 3232 (1985)).

138. *Id.* at 3244-45 (O'Connor, J., dissenting) (citing 489 F. Supp. 1248, 1265 (S.D.N.Y. 1980), *rev'd sub nom. Felton v. Secretary*, 739 F.2d 48 (2d Cir. 1984), *aff'd sub nom. Aguilar v. Felton*, 105 S. Ct. 3232 (1985)).

139. 105 S. Ct. 3232, 3246 (O'Connor, J., dissenting).

140. *Id.* at 3247 (O'Connor, J., dissenting).



### III. JUDICIAL OVERREACHING IN AID TO PAROCHIAL SCHOOL CASES

Many instances of judicial overreaching mark this area of state aid to religious-affiliated schools. Although some state efforts have been upheld, the great majority have not. Seldom has the Court made such minimal efforts to uphold the constitutionality of state statutes than in the aid to religious-affiliated school cases. If the Court had been more consistent in its holdings, or if it had not praised the state for pursuing proper secular efforts while systematically striking down these efforts, talk about a government by judiciary in this area might seem more natural.

On one level the Court gives great deference to the actions of state legislative bodies when reviewing attempts to aid parochial schools and their students. When applying the three-part *Lemon* test, the Court has been very quick to find valid secular purposes that would otherwise justify the legislative enactment. The Court thus ostensibly pays deference to the legislative bodies that have enacted the law. In *Mueller*,<sup>141</sup> Justice Rehnquist explained this approach by arguing that the Court needed to spend little time examining whether a secular purpose existed because the Court was reluctant to attribute unconstitutional motives to the states.<sup>142</sup>

This very deferential application of the secular purpose prong has allowed the Court to appear as if it is not attributing unconstitutional motives to the states. Its very searching analysis under the other two parts of the *Lemon* test, however, indicate that the Court does exactly the opposite. Moreover, the deference accorded under the secular purpose prong has served to mask the Court's very intrusive efforts under the effects and excessive entanglement prongs.

One way that the Court has failed to defer to the states is that it has treated all parochial schools together, even though the Court itself has recognized that not all schools within a given jurisdiction are similar.<sup>143</sup> If the Court truly wanted to review the actions of the state in the most positive light, it would differentiate between schools, saving as much of the state's efforts as possible by such methods as becoming sensitive to differences in schools and school

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141. 463 U.S. 388 (1983).

142. *Id.* at 394.

143. *See supra* note 137 and accompanying text.



programs. Instead, the Court has relied on a very general profile of sectarian schools. Such reliance is problematic for several reasons. First, profiles themselves do not always reflect the facts of particular cases. Second, the profile that the Court has used is fifteen years old and based on "facts" from a school system in a state that is overwhelmingly Roman Catholic. The "Sister Mary Ignatius"<sup>144</sup> profile that the Court used in *Lemon* has continued to be the profile used in subsequent cases.<sup>145</sup> The use of this profile is largely responsible for the Court's tendency to view the schools in question as "pervasively sectarian." In *Grand Rapids School District*,<sup>146</sup> for example, the Court made several references to a parent handbook from one of the Catholic schools in the city. The handbook stated that the objective was to have religion permeate the entire school situation in a Catholic education. By categorizing all Catholic schools on the basis of a purported characterization of one school, the Court does little to save the constitutionality of a state educational scheme. Moreover, as many in the education field can undoubtedly attest, school catalogues are not always the most reliable sources of information about school policies.

Given this blanket treatment of all Roman Catholic schools in *Grand Rapids*, the Court's attempt at differentiation between schools in *Aguilar*<sup>147</sup> seems surprising. As noted earlier, the Court's reliance on Judge Friendly's opinion regarding the application of *Meek*<sup>148</sup> may indicate a more deferential standard, perhaps even a school-by-school approach. This result seems unlikely, however, even though any serious effort to uphold the constitutionality of state schemes should attempt to differentiate between the schools

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144. The reference here, of course, is to Christopher Durang's irreverent play, "Sister Mary Ignatius Explains It All For You," which depicts a crazed nun's interpretation of the universe through Catholic dogma. It also offers a very wicked picture of life (and death) in a Catholic grammar school.

145. For example, in *Meek* the Court used this type of analysis, and stated:

The church-related elementary and secondary schools that are the primary beneficiaries . . . typify such religion-pervasive institutions. The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief.

421 U.S. at 366.

146. 105 S. Ct. 3216 (1985). See *supra* notes 125-29 and accompanying text.

147. 105 S. Ct. 3232 (1985). See *supra* notes 133-37 and accompanying text.

148. See *supra* note 137 and accompanying text.



affected. The Supreme Court has not attempted such differentiation. Instead, it imputes an unconstitutional scheme, either from a brochure from one school or, more generally, from an outdated perception of Roman Catholic education.

A related shortcoming in the Court's analysis is the blunt dividing line it has drawn between colleges on the one hand, and primary and secondary schools on the other. The Court generally has depicted the latter as "pervasively sectarian" and the former as secular.<sup>149</sup> The Court also frequently uses a blunt categorization in comparing students. Employing "common observation," a high school senior is likely to have much more in common with a college freshman than with a first grader in terms of impressionability, skepticism, and so on. The Court's analysis, however, treats primary and secondary school students identically and treats college students completely differently. The end result is a very counter-intuitive depiction of young people. If the Supreme Court seriously sought to uphold state actions in this area, it might well employ a continuum based on the impressionability of students at various age levels. Instead, the Court presumes that college students are more skeptical than other students and thus permits only college students to be exposed to a higher risk of religious inculcation.

The Court has virtually ignored any evidence submitted by administrators and legislators alike pertaining to their educational objectives. This fact further indicates that the Court pays little deference to state efforts. In *Aguilar*,<sup>150</sup> for example, the record contained uncontroverted testimony by program administrators and educators that no religious inculcation ever occurred. In addition, the record showed that for 19 years no complaints that religion had crept into the programs were ever received.<sup>151</sup> Although the Court should not merely follow what state actors say about their own policies and actions, such input at least deserves some judicial consideration. In the aid to parochial school cases, however, the Court has accorded little weight to the evidence and findings presented by the state. The Court has dismissed summarily the testimony of city and state officials and the absence of com-

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149. See *supra* notes 49-52 and accompanying text.

150. 105 S. Ct. 3232 (1985).

151. *Id.* at 3244-45 (O'Connor, J., dissenting).



plaints about religious inculcation. The Court assumes that state actors have neither the ability nor the motivation to recognize and report religious inculcation.<sup>152</sup> Imagine the Court applying this kind of analysis to an area of constitutional law such as racial discrimination; under the kind of analysis used in the aid to parochial school cases, the Court could decide otherwise-difficult cases like *Palmer v. Thompson*<sup>153</sup> and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*<sup>154</sup> rather easily. It could simply state that racial discrimination surely existed and refuse to hear contrary evidence presented by city officials because city officials had neither the motivation nor the ability to detect discrimination.

This lack of deference given to state efforts emerges as a striking feature of the aid to parochial school cases. The Court makes minimal efforts to portray state actions in a favorable light. Its concern about preventing constitutional violations does not explain adequately the cursory treatment accorded state schemes to aid parochial schools. The Court displays an implicit distrust of the states in aid to parochial schools issues. The Court seems to perceive legislators as unable or unwilling to turn a deaf ear to those clamoring for aid to parochial schools.<sup>155</sup> The Court seems to think that rather than resist the efforts of parochial school lobbyists, legislators will instead pass constitutionally infirm measures. Perhaps the Court thinks that legislators want the Court to take the political heat on this matter.<sup>156</sup> If not, then perhaps the Court is being quite

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152. See *supra* note 132.

153. 403 U.S. 217 (1971). In *Palmer*, the city of Jackson, Mississippi, was ordered to desegregate its public parks, auditoriums, golf course, city zoo, and public pool. The city agreed to desegregate all but the pool, and in fact the city council closed the pool, claiming high operating costs. The Court found no unlawful discrimination in the city's actions. *Id.* at 218-19.

154. 429 U.S. 252 (1977). In *Arlington Heights*, the Village Plan Commission declined to re-zone land from single-family units to multiple-family dwellings. A group of blacks characterized the commission's decision as racially motivated. The Supreme Court, however, ruled that no proof of racial discrimination existed. *Id.* at 254-55.

155. See *Nyquist*, 413 U.S. at 797 n.55 (1973) ("As some 20% of the total school population in New York attends private and parochial schools, the constituent base supporting these programs is not insignificant.").

156. See *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 487 (1979) ("Indeed, there is reason to believe that some legislative bodies have welcomed judicial activism with respect



sensitive to the rise and volatility of single-issue interest groups.<sup>157</sup> Whatever the reason, if the Court does not trust state actors in this area it should say so, as it has in analogous situations, by applying a strict scrutiny standard. The present analysis not only adds little to the logical progression of the law, but it also poisons relations between the states and the Court. That a much greater political backlash against the Court has not occurred to date is remarkable.

#### IV. THE SUPREME COURT'S RELATIONSHIP WITH LOWER FEDERAL COURTS

A review of the aid to parochial school cases reveals a rather haphazard relationship between lower federal courts and the Supreme Court.<sup>158</sup> Two recent cases exemplify this relationship. In *Grand Rapids*,<sup>159</sup> the Court accepted the district court's findings that the schools in question were pervasively sectarian and stressed the importance of such findings by the lower court. In *Aguilar*,<sup>160</sup> the companion case to *Grand Rapids*, the Court completely ignored the findings of the district court, which had concluded that

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to a subject so inherently difficult and so politically sensitive that the prospect of others confronting it seems inviting.").

157. Many political scientists have noted this trend of the rising power of single-issue interest groups. See T. LOWI, *THE END OF LIBERALISM* (2d. ed. 1979). The "older" view of interest group influence downplayed the power of interest groups. See R. BAUER, I. DE SOLA POOL, & L. DEXTER, *AMERICAN BUSINESS AND PUBLIC POLICY* (1963). Now the dominant thought is that legislators are often held hostage to a myriad of single-issue interest groups, which will attempt to make or break a legislator on the basis of only one issue, or perhaps even one vote. Most political scientists concur that the rise of single-issue interest groups has changed completely the nature of American politics. The rise in political influence of religious organizations is also a noteworthy phenomenon in the political scene. Perhaps the Supreme Court is simply adapting its review to protect legislators from their constituents, but the Court has treated the actions of state legislators much differently—and with much less deference—in this area of aid to religious affiliated schools.

158. See Serritella, *Tangling With Entanglement: Toward a Constitutional Evaluation of Church-State Contacts*, 44 *LAW & CONTEMP. PROBS.* 143, 147 (1981) ("Although *Lemon* requires a broad evaluation, it has resulted in lower court holdings that are nearly as variable as the facts being considered.").

159. 105 S. Ct. 3216 (1985).

160. 105 S. Ct. 3232 (1985).



the schools in question were not pervasively sectarian.<sup>161</sup> The Court relied instead on the fact that the court of appeals had found these schools to be pervasively sectarian.<sup>162</sup> Justice Rehnquist has complained that the Court has systematically ignored the findings of lower federal courts in establishment clause cases,<sup>163</sup> but this is an overstatement of what the Court has done. In reality, the Court has accepted some lower court findings and has dismissed others, a result even harder to comprehend or justify.<sup>164</sup>

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161. *National Coalition for Pub. Educ. and Religious Liberty v. Harris*, 489 F. Supp. 1248, 1262 (S.D.N.Y. 1980), *rev'd sub nom. Felton v. Secretary*, 739 F.2d 48 (2d Cir. 1984), *aff'd sub nom. Aguilar v. Felton*, 105 S. Ct. 3232 (1985).

162. *Aguilar*, 105 S. Ct. at 3238.

163. *Meek v. Pittenger*, 421 U.S. 349, 392 (1975) (Rehnquist, J., dissenting). *See supra* notes 80-82 and accompanying text.

164. In her concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O'Connor, J., concurring), Justice O'Connor attempted to fashion a different role for district courts to play in the establishment clause area. One of the premises of O'Connor's argument was that the effect prong does not "require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion." *Id.* at 691. Instead, O'Connor argued that "[w]hat is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion." *Id.* at 692. O'Connor seems to be saying that appearance supercedes reality. With this as background, O'Connor then turned to what the district court had found as facts:

that the creche has a religious content, that it would not be seen as an insignificant part of the display, that its religious content is not neutralized by the setting, that the display is celebratory and not instructional and that the city did not seek to counteract any possible religious message. These findings do not imply that the creche communicates government approval of Christianity.

*Id.* at 693. O'Connor then pointed out, however, that the district court had found that the government was understood to place its imprimatur on the religious content of the creche. Justice O'Connor responded:

But whether a government activity communicates endorsement of religion is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts. The District Court's conclusion concerning the effect of Pawtucket's display of its creche was in error as a matter of law.

*Id.*



The tests that the Supreme Court has employed,<sup>165</sup> particularly in terms of defining "pervasively sectarian,"<sup>166</sup> offer one possible explanation for this confusion in the treatment of lower court findings. *Lemon v. Kurtzman*<sup>167</sup> first introduced the characterization of a school as pervasively sectarian. In *Lemon*, the Court relied on several different factors in determining that these particular schools were pervasively sectarian.<sup>168</sup> Since *Lemon*, the Court has treated all elementary and secondary parochial schools exactly as if they were the schools scrutinized in Rhode Island in 1971.<sup>169</sup> In *Meek*,<sup>170</sup> the Court noted the standards that the appellants sought to apply to determine if the schools were pervasively sectarian.<sup>171</sup> In *Aguilar*, however, the Court rejected the district court's attempt to employ *Meek*.<sup>172</sup> As a result of these conflicting rulings, lower courts are left with very little guidance. They must determine whether parochial schools are pervasively sectarian, yet the Supreme Court has given them virtually no standards to apply. The

165. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court set forth these guidelines for determining administrative excessive entanglement: 1) the character and purpose of the institutions that are benefited, 2) the nature of the aid that the State provides and 3) the resulting relationship between the government and the religious authority. *Id.* at 615.

166. This discussion is not meant to exclude a discussion of other unworkable Court standards. For example, if the Court had taken the primary effect prong more literally, similar problems would arise in determining what was a primary effect as opposed to a secondary effect.

167. 403 U.S. 602 (1971).

168. See *supra* notes 30-34 and accompanying text.

169. See *supra* notes 144-45 and accompanying text.

170. 421 U.S. 349 (1975).

171. The appellants claimed that state money was being provided to religious schools that:

- (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and (10) impose religious restrictions on what the faculty may teach.

*Id.* at 356.

172. 105 S. Ct. 3232, 3236 (1985). The Court added to the confusion, however, by indicating that the standards in *Meek* are somehow applicable without explaining how. *Id.* at 3238 n.8; see also *supra* notes 136-37 and accompanying text.



safest course for a lower federal court is to treat all parochial schools from grades one through twelve as "pervasively sectarian," notwithstanding the special circumstances of a particular case. Most lower courts have made such determinations because of the Supreme Court's selectivity in upholding lower court findings on this question. The test of whether a school is "pervasively sectarian" is thus not really a standard.<sup>173</sup> Instead, it is a conclusory label describing almost all religious-affiliated schools below the college level. Whether a workable standard for making such determinations could be employed is beyond the scope of this Article. The foregoing discussion merely illustrates the marked deficiency in the present standard.

Similar problems arise under other Court standards in this area. Exactly what constitutes administrative excessive entanglement is by no means clear; again, the Supreme Court has offered little guidance to lower courts.<sup>174</sup> In some respects, *Committee for Public Education and Religious Liberty v. Regan*<sup>175</sup> is the exception. Before *Regan* the Court portrayed state surveillance of pervasively sectarian schools as automatic excessive entanglement. In *Regan* the Court labeled the services for which the private schools would be reimbursed "discrete and clearly identifiable."<sup>176</sup> The Court described the reimbursement scheme itself as "straightforward and susceptible to the routinization that characterizes most reimburse-

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173. A further problem exists in terms of judicial capacity to make such determinations. Unless a judge actually spent some time in a religious-affiliated school, his finding as a matter of fact that a certain school was pervasively sectarian should be obviously suspect. The "objective" criteria (the number of crosses, the number of religious teachers, and so on) seem to offer little. For a discussion of judicial capacity see generally D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977).

174. See Ripple, *The Entanglement Test of the Religion Clauses-A Ten Year Assessment*, 27 UCLA L. REV. 1195 (1980). Judge Ripple stated:

The degree of entanglement deemed 'excessive' often appears to be the product of personal judgments about certain religions and their institutions by a decision-maker who may or may not have any real exposure to the particular sect in question. The Justices have often based their conclusions on factual assumptions upon which the record is either silent or to the contrary.

*Id.* at 1218.

175. 444 U.S. 646 (1980).

176. *Id.* at 660 (quoting *Committee for Pub. Educ. and Religious Liberty v. Levitt*, 461 F. Supp. 1123, 1131 (S.D.N.Y. 1978), *aff'd sub nom.* *Committee for Pub. Educ. and Religious Liberty v. Regan*, 445 U.S. 646 (1980)).



ment schemes.”<sup>177</sup> Such descriptions are not standards, however, but only conclusions.

The amount of risk of religious inculcation that the Court will tolerate further complicates the analysis. If the state can take a risk that religion may be inculcated—that is, if a religious-affiliated college is involved—then the Court may not find an excessive entanglement. Conversely, if the Court mandates absolute certainty—that is, if a religious-affiliated grammar school or high school is involved—then a finding of an excessive entanglement is quite likely to ensue. *Regan* again surfaces as the difficult exception.<sup>178</sup> Before *Regan* the Court seemed to indicate that absolutely no risk of religious inculcation could occur in a state-funded activity, at least if the activity involved elementary and secondary schools.<sup>179</sup> Now, some risk seems constitutionally permissible, at least for certain activities.<sup>180</sup> Questions, however, persist: what activities? what kind of surveillance? and what standards must courts apply?

The political divisiveness branch of the excessive entanglement prong has recently come under attack,<sup>181</sup> but for the wrong reasons. Political divisiveness is not a meaningful judicial standard, either. Moreover, courts are not in an appropriate position to make these kinds of determinations. The Court has stated correctly that the mere filing of a lawsuit does not constitute political divisiveness,<sup>182</sup> but it has set no further standards. In addition, the Court has assumed that divisiveness will occur along religious lines without presenting substantiating empirical evidence for such a statement.<sup>183</sup>

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177. 444 U.S. at 660.

178. 444 U.S. 646 (1980).

179. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 618 (1971).

180. See *supra* notes 111-14 and accompanying text.

181. “Guessing the potential for political divisiveness inherent in a government practice is simply too speculative an enterprise.” *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring). Justice Brennan also noted in dissent in *Donnelly*: “Of course, the Court is correct to note that we have never held that the potential for divisiveness alone is sufficient to invalidate a challenged governmental practice. . . .” *Id.* at 703 (Brennan, J., dissenting).

182. “A litigant cannot, by the very act of commencing a lawsuit, however, create the appearance of divisiveness and then exploit it as evidence of entanglement.” *Lynch*, 465 U.S. at 684.

183. *Id.*



In summary, lower federal courts are in an undesirable position in deciding aid to parochial school cases. The Supreme Court has set forth certain standards—administrative excessive entanglement, political divisiveness, pervasively sectarian—without explaining to lower courts or administrators what these standards mean or how they should be applied. In a number of instances the Court has ignored certain findings of fact without an adequate explanation. In terms of institutional relationships, this area of aid to religious-affiliated schools is fraught with perils. The Supreme Court has run roughshod over both lower courts and political actors. Section V considers possible solutions to these problems.

## V. SUGGESTED SOLUTIONS

Members of the Court are obviously dissatisfied with the three-part *Lemon* test,<sup>184</sup> but apparently not enough to call for its demise. The Court could take one of three different directions in these aid to parochial school cases. On one extreme it could heed Justice Stevens' cry for sanity and attempt to patch up or perhaps completely rebuild the wall of separation between church and state.<sup>185</sup> The other extreme position is implicit in Justice Rehnquist's dissenting opinion in *Wallace*.<sup>186</sup> Under a valid reading of that opinion, a state constitutionally could promote religion in schools in a wide variety of ways.<sup>187</sup> This Article argues for the third possible approach: a new position between these two extremes.

Under this new position the Court should pay due respect to the efforts of the states but also should provide a searching analysis of the states' actions if the circumstances warrant. The closest analogy is the Court's analysis in the equal protection area, even though the Court's analysis in that area is not the model of clarity. In addition to two clearly established standards, rational basis and strict scrutiny, some members of the Court have recognized a mid-

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184. See, e.g., *id.*

185. Committee for Pub. Educ. and Religious Liberty v. Regan 444 U.S. 646, 671 (1980) (Stevens, J., dissenting).

186. *Wallace v. Jaffree*, 105 S. Ct. 2479, 2518-19 (1985) (Rehnquist, J., dissenting).

187. The thrust of Justice Rehnquist's novel opinion is that the actions of the early framers actually evince a desire to promote religion in a number of aspects of public life. *Id.*



dle level of scrutiny.<sup>188</sup> Justice Marshall also has suggested that the Court has on occasion employed a sliding scale analysis.<sup>189</sup>

When deciding aid to parochial school cases, the Court should pay more than lip service deference to the states. If the state claims that its actions do not aid or promote religion, then the Court generally should accept these findings, absent proof to the contrary. Exactly what would constitute such proof to the contrary is difficult to say in the abstract.<sup>190</sup> This is not meant to allow the three-part *Lemon* test<sup>191</sup> to come in through the back door, however. Legislative findings that a state's actions do not violate the establishment clause generally should be accepted by the judiciary, again, subject to evidence to the contrary.<sup>192</sup>

Thus far, however, this Article does not fully detail the role the Court should play in aid to parochial school cases. As in the equal protection area, the Court should be sensitive to special circumstances and fashion its scrutiny accordingly. In the area of equal protection analysis, this sensitivity has meant that the Court will apply a strict scrutiny standard to legislation that involves a fundamental right,<sup>193</sup> or a quasi-fundamental right,<sup>194</sup> or that has a detrimental effect on a suspect class<sup>195</sup>—or a quasi-suspect class.<sup>196</sup>

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188. See, e.g., *Craig v. Boren*, 429 U.S. 190, 210 (1976) (Powell, J., concurring).

189. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 102-110 (1973) (Marshall, J., dissenting).

190. Although this Article suggests that the Court abandon its three-part test, in all likelihood this will not occur. The Court must therefore make serious attempts to consider such matters as whether use of an outdated and biased profile of parochial schools should be continued, whether individual schools should be treated separately, and whether current Court standards are workable at all.

191. See *supra* notes 21-23 and accompanying text.

192. In outlining his own version of a desirable establishment clause standard, James Serritella argues that one must first determine whether an activity is "religious." Serritella, *supra* note 158, at 155. Serritella would have the institutions themselves make the determination whether a particular activity is religious, however. *Id.* at 155.

Serritella's position is problematic. Enough of a potential problem of foxes guarding chicken coops already exists, yet Serritella's proposal takes this to an extreme. The principle proposed by this Article, allowing the legislature to make such determinations, is far sounder.

193. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (applying strict scrutiny to the right to travel interstate).

194. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 244 (1982) (Burger, C.J., dissenting).

195. See, e.g., *Graham v. Richardson*, 403 U.S. 365 (1971) (applying strict scrutiny to classifications according to alienage).

196. See, e.g., *Plyler*, 457 U.S. at 244 (Burger, C.J., dissenting).



In the area of providing aid to parochial schools, the Court should develop a similar type of analysis. It should look at whether an analogously suspect class exists. More particularly, it should determine whether the majority is providing aid to the majority, or whether the majority is providing aid to a minority. If the majority is benefiting itself, then a heightened scrutiny is appropriate. If, however, the majority is providing purportedly secular aid to a religious minority, then the Court's level of scrutiny should be similar to the rational basis test.<sup>197</sup>

Consider this example: In State *X*, twenty percent of the population is Roman Catholic, seventy percent is made up of various Protestant denominations,<sup>198</sup> Jews constitute nine percent of the population, and Moslems one percent. Five percent of the students in the state are educated at nonpublic schools, all of which are Roman Catholic. The state legislature in *X* provides certain kinds of aid to parochial schools for purportedly secular purposes. Under the scheme presented here, the Court should apply an analysis akin to a rational basis test when reviewing the state's actions. If the state maintains that it provides support for educational services and not for religious purposes, then absent special circum-

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197. John Hart Ely has taken a comparable position in arguing for a more deferential Court review of affirmative action programs. He states:

There is no danger that the coalition that makes up the white majority in our society is going to deny whites generally their right to equal concern and respect. Whites are not going to discriminate against all whites for reasons of racial prejudice, and neither will they be tempted generally to underestimate the needs and deserts of whites relative to those, say, of blacks or to overestimate the costs of devising a more finely tuned classification system that would extend to certain whites the advantages they are extending to blacks . . . . The argument does not work the other way around, however: similar reasoning supports no insistence that our representatives cannot hurt themselves, or the majority on whose support they depend, without at the same time hurting others as well. Whether or not it is more blessed to give than to receive, it is surely less suspicious.

J. ELY, *DEMOCRACY AND DISTRUST* 170 (1980).

198. This example is not meant to overlook the fact that Roman Catholics might constitute a majority under some standards because Protestant sects are divided. In other words, calling Protestants a majority when the largest sect might have fewer members than the Catholic Church may be misleading. On the other hand, considering Catholics a majority when they comprise twenty percent of the population of a state and Protestants comprise seventy percent seems even more misleading, even if the largest Protestant sect has fewer members than the Catholic Church.



stances—such as direct and convincing evidence to the contrary or a majority singling out its own religion for special treatment—the Supreme Court should not overrule this determination. The Court should not act because aid is not going to a religious, and probably political, majority, but to a religious minority—Roman Catholics in this instance.<sup>199</sup> The argument is based on the premise the majority can be trusted not to promote the religion of a religious minority.

The argument would be different, and the Court's analysis similarly changed, if some facts were different. For example, if Roman Catholics constituted a majority, or almost a majority, of the population of X, aid that benefited Roman Catholics should be subject to a higher degree of scrutiny. Likewise, if all of the schools in X were Catholic except for one that was Moslem, and the aid was tailored so that only Catholic schools benefited, a higher judicial scrutiny would again be appropriate.

One might criticize this majority-minority distinction, arguing that legislators might easily succumb to the pressures of parochial school lobbyists or that the state legislature, containing few nonbelievers, might seek to promote religion in general. These arguments, however, imply that whenever the possibility of a constitutional violation and the possibility of legislators succumbing to interest group pressure exist, the Court should employ the widely varying and questionable analysis that it has used in the parochial school cases over any other type of constitutional analysis. Opponents of a different analysis should note that the choice is not between a test which "politicizes" the protections of the first amendment and one which absolutely guarantees those protections. The choice is between a test developed in a contradictory line of decisions and one which is more in tune with the Court's other, more acceptable analysis.

Although the Court seems wedded to its three-pronged *Lemon* standard,<sup>200</sup> several recent opinions indicate that this rigidity might be subject to change. For example, in *Larson v. Valente*,<sup>201</sup> a

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199. In fact, this approach aids in deciphering cases like *Everson*, *Allen*, and *Mueller*. The fact that all parents purportedly benefit indicates that no preference for either the majority or the minority exists.

200. See, e.g., *Aguilar v. Felton*, 105 S. Ct. 3232, 3236-38 (1985).

201. 456 U.S. 228 (1982).



case dealing with a state determination of which religious organizations were subject to state reporting requirements, the Court employed a strict scrutiny analysis and then the *Lemon* test.<sup>202</sup> Likewise, Justice O'Connor's concurrence in *Lynch v. Donnelly*<sup>203</sup> used an equal protection analysis.<sup>204</sup> Finally, the Court's recent decision on silent prayer, *Wallace v. Jaffree*,<sup>205</sup> is noteworthy for this analysis. Although the Court struck down Alabama's efforts to institute a moment of silence in the schools, presumably a majority of the Court would uphold a state statute where prayer was not such an evident intention of the legislative body. Justices O'Connor and Powell both referred to striking down "sham" statutes, those that masked a religious intention;<sup>206</sup> but a majority of the Court also indicated a willingness to give deference to the states in such legislative endeavors.<sup>207</sup>

The analysis thus far essentially concerns the Court's relationship with state legislative bodies and state executive officers. Attempting to remedy the Supreme Court's relationship with lower federal courts in this area depends on a serious re-working of the *Lemon* standards. As previously discussed, the Supreme Court has both ignored findings of fact by lower courts and enunciated unworkable standards. In many respects the Court's actions are traceable to the *Lemon* standards themselves. Without a change in these standards, the inconsistent relationship between levels of the judicial branch will remain.

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202. The Court found that the state's requirement that religious organizations soliciting more than fifty percent of their funds from non-members was gerrymandered to strike at the Unification Church. *Id.* at 254.

203. 465 U.S. 668, 687 (1984) (O'Connor, J., concurring). This case involved the constitutionality of Pawtucket, Rhode Island's, nativity scene. *Id.* at 670-71. Although the Court employed the *Lemon* test, it did so in a very loose manner, which allowed the Court to uphold this longstanding city practice. *Id.* at 687.

204. Justice O'Connor stated:

The *Larson* standard, I believe, may be assimilated to the *Lemon* test in the clarified version I propose. Plain intentional discrimination should give rise to a presumption, which may be overcome by a showing of compelling purpose and close fit, that the challenged government conduct constitutes an endorsement of the favored religion or a disapproval of the disfavored.

*Id.* at 684 n.1 (O'Connor, J., concurring).

205. 105 S. Ct. 2479 (1985).

206. 105 S. Ct. at 2494 (Powell, J., concurring); *Id.* at 2500 (O'Connor, J., concurring).

207. *Id.* at 2490.



## VI. CONCLUSION

That area of constitutional law concerning the question of permissible state aid to parochial schools is clearly in a shambles. This Article has not attempted to explain the Supreme Court's decisions in this area, but instead has sought to highlight the perceived shortcomings in the institutional relationships between the Supreme Court and the states and between the Supreme Court and lower courts. In spite of the Supreme Court's deferential review under the secular purpose prong of the *Lemon* test, the Court actually has paid very little deference to the states. In terms of the Court's relationship with lower courts, two observations emerge from a review of the cases in this area: 1) the Court's inconsistent use of lower court findings; and 2) the enunciation of standards that seem beyond judicial capabilities, particularly in their present form. It is suggested that the Court employ an analysis in this area akin to what the Court employs in equal protection cases. Because a religious majority is unlikely to subsidize the promotion of the religious efforts of a religious minority, the Court should generally, absent special circumstances, pay deference to the actions of the states in this area.