

# Religion and Education: Whither the Establishment Clause?

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*[T]he problem to be considered and solved when the First Amendment was proposed was not one of hazy or comparative insignificance, but was one of blunt and stark reality, which had perplexed and plagued the nations of Western Civilization for some 14 centuries, and during that long period, the union of Church and State . . . had produced neither peace on earth, nor good will to man.<sup>1</sup>*

Religious concerns have been a powerful force in shaping the course of history; they have precipitated wars and the persecution of minority sects, served as the justification for dethroning or beheading rulers, and stimulated numerous migrations.<sup>2</sup> Amidst competing theories of state superiority over the church and church superiority over the government,<sup>3</sup> John Locke's philosophy that "the care of souls cannot belong to the civil magistrate"<sup>4</sup> eventually was embodied in the First Amendment to the United States Constitution. By including restrictions on federal governmental activity respecting an establishment of religion, the United States became unique among nations. However, support for the notion of keeping civil and sectarian affairs discrete was by no means universal at the time the Constitution was adopted.

The Framers' original intent in drafting the religion clauses of the First Amendment has generated substantial academic inquiry and debate. But given the sketchy record of deliberations when the amendment was written and adopted,<sup>5</sup> the original intent cannot be delineated with certainty. How the Framers meant for the religion clauses to apply to education controversies is an even greater mystery, because universal public education was not yet prevalent when the Bill of Rights was adopted. Indeed, the Framers likely gave little thought to the application of the amendments or other constitutional provisions to school children. While scholars will continue to explore the Framers' intentions, the seminal issue is how the

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1. *Horace Mann League of the U.S., Inc. v. Board of Pub. Works*, 220 A.2d 51, 60 (Md. 1966) (emphasis added).

2. For a more detailed discussion of the historical context, see MARTHA MCCARTHY, *A DELICATE BALANCE: CHURCH, STATE AND THE SCHOOLS* 1-7 (1983). Confrontations in the Middle East and Northern Ireland provide recent evidence that religious issues continue to be a major force in precipitating international conflicts.

3. Some claimed that religion should be used to advance state interests (Erastian theory), whereas others adhered to the theocratic theory that the church is superordinate and the state should be used to further ecclesiastical interests. See *id.* at 4-5.

4. JOHN LOCKE, *A LETTER CONCERNING TOLERATION* 19 (Mario Montuori ed., Martinus Nijhoff 1963) (1689). This quote oversimplifies Locke's views; for an analysis of Locke's premises regarding religious liberty, see STEVEN D. SMITH, *FOREORDAINED FAILURE* 63-67 (1995).

5. See Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clause of the First Amendment*, 52 U. PITT. L. REV. 75, 124-25 (1990).

Supreme Court interprets the U.S. Constitution, because the Court has the final word in constitutional interpretations.<sup>6</sup> Thus, the focus here is on judicial interpretations of the religion clauses and how these court-created principles are applied to school controversies.

Following a brief discussion of the rise and fall of separationist doctrine, this Article examines changing Establishment Clause doctrine in school controversies pertaining to devotional activities in public education and government aid to sectarian schools. The final Part explores implications of the more relaxed judicial interpretation of the Establishment Clause for church/state relations involving schools.

## I. THE MYTH OF SEPARATION BETWEEN CHURCH AND STATE

Determining the appropriate governmental relationship with religion has generated substantial controversy in our nation, and Establishment Clause litigation has been problematic since the mid-twentieth century. Courts often have stated that governmental neutrality toward religion is required, but "neutrality" has never been adequately defined.<sup>7</sup> Interpretations of this term have ranged across the separation/accommodation continuum, with "neutrality" championed both by those asserting that government involvement with religion is permissible and by those claiming that it is strictly prohibited.<sup>8</sup> According to John Valauri, the "definitional fuzziness blurs the seemingly bright line distinction between separation and accommodation to the extent that almost any position under one principle, given the appropriate definitional modifications, can also be expressed in terms of the other supposedly contrary principle."<sup>9</sup> Some commentators and Justices have voiced their frustration with Establishment Clause jurisprudence by referring to it as "chaotic,"<sup>10</sup> "doctrinal gridlock,"<sup>11</sup> a "legal quagmire,"<sup>12</sup> contradictory and unprincipled,<sup>13</sup> "ad hoc,"<sup>14</sup> "intuitive,"<sup>15</sup> and a "maze."<sup>16</sup> Steven Gey has asserted that the "internal

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6. The Supreme Court clarified early in our nation's history that it had ultimate authority in resolving conflicts over interpretations of the U.S. Constitution. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

7. See John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83 (1986).

8. Steven Smith has recognized the "semantic slipperiness" of the term, "neutrality." SMITH, *supra* note 4, at 78; see also Lisa W. Hanks, *Justice Souter: Defining "Substantive Neutrality" in an Age of Religious Politics*, 48 STAN. L. REV. 903, 908 (1996); Valauri, *supra* note 7, at 83.

9. Valauri, *supra* note 7, at 115.

10. Shahin Rezaei, *County of Allegheny v. ACLU: Evolution of Chaos in Establishment Clause Analysis*, 40 AM. U. L. REV. 503, 504 (1990).

11. John W. Huleatt, *Accommodation or Endorsement? Stark v. Independent School District: Caught in the Tangle of Establishment Clause Chaos*, 72 ST. JOHN'S L. REV. 657, 658 (1998).

12. *Id.*

13. See *Wallace v. Jaffree*, 472 U.S. 38, 110-11 (1985) (Rehnquist, J., dissenting).

14. Valauri, *supra* note 7, at 114.

15. *Id.*

16. *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting).

ambivalence” between the values of separation and accommodation “gives modern [E]stablishment [C]ause jurisprudence a schizoid quality” resulting in “a miasma of contradictory signals . . . robbed of any coherent theoretical substance.”<sup>17</sup> The Supreme Court has been faulted for creating principles to justify outcomes rather than using a consistent set of principles to guide its decisions, and the Court itself has acknowledged that it has “sacrifice[d] clarity and predictability for flexibility”<sup>18</sup> in Establishment Clause decisions to achieve specific results in certain cases.

Schools have provided the battleground for some of the most notable Establishment Clause disputes, which is not surprising, given the special concern for protecting children from religious establishments.<sup>19</sup> The primary thesis of this Article is that the Supreme Court is abandoning the separationist position that prevailed in school cases, at least in rhetoric, until the mid-1980s. While Establishment Clause jurisprudence remains plagued by inconsistencies, the Supreme Court seems to be adopting a more relaxed interpretation of this constitutional provision, allowing considerable government involvement with and support of religion in the education context as well as elsewhere.

#### A. *The Short-Lived Reign of Separationism*

In the first major Establishment Clause decision, *Everson v. Board of Education*,<sup>20</sup> the Supreme Court in 1947 reviewed the history of the First Amendment and concluded that the Establishment Clause (and its Fourteenth Amendment application to states)<sup>21</sup> means:

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 a state nor the Federal Government can, openly or secretly,

17. Gey, *supra* note 5, at 97, 104.

18. Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980); see Valauri, *supra* note 7, at 113. Steven Smith attributes the inconsistencies in Establishment Clause jurisprudence in part to the impossibility of devising a coherent theory of religious liberty. He contends that since those attempting to articulate such a theory are influenced by their beliefs and perspectives, the deliberations can never be context free or result in a truly “neutral” theory of religious liberty. See SMITH, *supra* note 4, at 77-97.

19. See *infra* text accompanying note 33.

20. 330 U.S. 1 (1947).

21. Because education is primarily a state function (the U.S. Constitution is silent on this topic), most church/state controversies involving schools have been initiated through the Fourteenth Amendment. The Supreme Court has recognized that the fundamental concept of “liberty” embodied in the Fourteenth Amendment incorporates First Amendment restrictions originally directed toward the federal government and applies them to state action as well. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Although still precedent, the incorporation doctrine has been faulted by some as misrepresenting congressional intent. See Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 481-83 (1991); William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1205-11 (1990).

participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."<sup>22</sup>

The *Everson* Court was unanimous in endorsing a posture of strict church/state separation, but five members of the Court did not find that New Jersey's program providing transportation services for nonpublic school children encroached on this separation.<sup>23</sup> Thus, the Justices appeared to be in agreement regarding the constitutional principle, but they held divergent views regarding how those principles should be applied.<sup>24</sup>

The "wall of separation" metaphor<sup>25</sup> was used widely by the federal judiciary for thirty years following *Everson*, even though this phrase does not appear in the First Amendment. Justice Douglas opined in 1952 that "[t]here cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. . . . [T]he separation must be complete and unequivocal."<sup>26</sup> Although judicial holdings never paralleled the separationist language, the Establishment Clause seemed to be accorded greater weight than the Free Exercise Clause during the 1960s and 1970s.<sup>27</sup>

In its most basic form, separationism reflects the sentiment that religious liberty will be enhanced by adhering to the principle that religion is not the concern of government. Several rationales have been proffered to support the separation of

22. *Everson*, 330 U.S. at 15-16 (emphasis omitted) (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

23. Justice Black, writing for the majority, took a strong separationist stand until the end when the challenged transportation program was upheld. This caused Justice Jackson to compare the majority opinion to "Julia who, according to Byron's reports, whispering 'I will ne'er consent,' consented." *Id.* at 19 (Jackson, J., dissenting). Jackson noted that the opinion advocated "complete and uncompromising separation of Church from State, [which was] utterly discordant with its conclusion yielding support to their commingling in educational matters." *Id.*

24. See Gey, *supra* note 5, at 80.

25. This metaphor is traced to a statement made by Thomas Jefferson in 1802 in a letter refusing a Baptist association's request for a day to be established for fasting and prayer in thanksgiving for the nation's welfare. See ROBERT M. HEALEY, *JEFFERSON ON RELIGION IN PUBLIC EDUCATION* 128-40 (1962). Referring to the "wall of separation" metaphor, Benjamin Cardozo observed that "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (quoting *Berkey v. Third Ave. R.R. Co.*, 155 N.E. 58, 61 (1926)), quoted in Thomas C. Marks, Jr. & Michael Bertolini, *Lemon Is a Lemon: Toward a Rational Interpretation of the Establishment Clause*, 12 *BYU J. PUB. L.* 1, 4 (1997). Chief Justice Rehnquist in 1985 asserted that the wall "is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned." *Wallace*, 472 U.S. at 107 (Rehnquist, J., dissenting).

26. *Zorach v. Clauson*, 343 U.S. 306, 312 (1952); see also *School Dist. v. Schempp*, 374 U.S. 203, 219 (1963).

27. Justice Clark stated for the Court majority in 1963 that "[t]he free exercise guarantee is not absolute but yields to the nonestablishment clause when it concerns the public good." *Schempp*, 374 U.S. 203, 225-26; see also Richard S. Vacca et al., Annotation, *Accommodation of Religion Without Establishment of Religion*, 115 *EDUC. L. REP.* 9 (1997).

church and state such as protecting churches against coercive governmental authority, protecting government autonomy from undue sectarian influences, and protecting the independence of both religious and government enterprises.<sup>28</sup>

There is considerable evidence that adherence to an absolute separation of church and state never has been universal in our nation (e.g., references to God on currency and in courtroom oaths). Indeed, the notion of separationism lost its vitality (if it ever had any) outside the school context long before it did in the K-12 arena. In the 1970s the Court allowed the use of public funds to aid sectarian universities through noncategorical grants and aid for facilities.<sup>29</sup> In a significant 1983 decision, *Marsh v. Chambers*,<sup>30</sup> the Court upheld a Nebraska law allowing public support of ministers to open legislative sessions with a prayer, sending a clear signal that it would not champion strict church/state separation outside the school domain.<sup>31</sup> The Court subsequently allowed use of municipal funds to erect religious holiday displays and the distribution of federal grants to religious organizations for counseling teenagers in reproduction matters.<sup>32</sup>

Traditionally, separationist doctrine received the most support in education cases, given the captive, impressionable audience. Children are compelled by the government to be educated, and for many this means attending a public school.<sup>33</sup> The Supreme Court has recognized that it "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools,"<sup>34</sup>

28. See John M. Bagyi, *Board of Education of Kiryas Joel v. Grumet: Misconstruing the Status Quo as a Neutral Baseline*, 60 ALB. L. REV. 541, 545 (1996); Rena M. Bila, *The Establishment Clause: A Constitutional Permission Slip for Religion in Public Education*, 60 BROOK. L. REV. 1535, 1535-44 (1995); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 319 (1996). The Supreme Court recognized in 1962 that the Establishment Clause's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion." *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

29. See *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971); *infra* note 183.

30. 463 U.S. 783 (1983).

31. *Id.* (relying primarily on "tradition" to uphold the practice). But the Sixth Circuit Court of Appeals in 1999 declined to use *Marsh* as authority in striking down a school board's practice of opening meetings with a prayer or a moment of silence. See *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999). The court reasoned that the practice was more akin to graduation prayer (since students often attended the board meetings) than to legislative prayer. See *id.* at 381. For a discussion of graduation prayer, see *infra* text accompanying note 110.

32. See *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (upholding display of a menorah and Christmas tree in front of a government building, but striking down display of the nativity scene with a religious banner in the county courthouse); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (upholding the Adolescent Family Life Act, which allows sectarian organizations to receive federal funds to counsel teenagers regarding sexuality and reproduction); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding use of municipal funds to erect a nativity scene in a private park); see also *infra* note 180 (discussing the *Bowen* case).

33. See Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 234 (1994).

34. *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987); see also Philip T. K. Daniel, *A*

and that “[i]n no activity of the State is it more vital to keep out divisive forces than in its schools.”<sup>35</sup> Ira Lupu has observed that “[a]lthough true and complete religious neutrality in the public schools might not have been possible even in separationism’s heyday, its regime nevertheless seemed to require such a posture, or at least to require the maximum effort toward that goal.”<sup>36</sup>

Separationist doctrine governed Establishment Clause litigation involving schools through the 1980s and was bolstered by applying the tripartite test articulated in *Lemon v. Kurtzman*.<sup>37</sup> To withstand scrutiny under the *Lemon* test, government action must: (1) have a secular purpose; (2) have a primary effect that neither advances nor impedes religion; and (3) avoid excessive government entanglement with religion. This three-part test was applied consistently in Establishment Clause cases involving school issues until 1992, even though general support for separationist doctrine had been fading for a decade.<sup>38</sup>

### B. The Demise of the Lemon Test

A majority of the current Justices has voiced dissatisfaction with the *Lemon* test,<sup>39</sup> and it has been noticeably absent in most of the Court’s recent Establishment Clause rulings.<sup>40</sup> In fact, only Justice Stevens on the Court currently seems to find the *Lemon*

*Comprehensive Analysis of Educational Choice; Can the Polemic of Legal Problems be Overcome?*, 43 DEPAUL L. REV. 1, 70-71 (1993).

35. *Edwards*, 482 U.S. at 584 (quoting *McCollum v. Board of Educ.*, 333 U.S. 203, 231 (1948)).

36. Lupu, *supra* note 33, at 231 n.3. The judicial concern with the appearance or perception of church/state separation, but not necessarily the substance, has been referred to as “symbolic neutrality.” SMITH, *supra* note 4, at 91. See *infra* text accompanying note 46 for a discussion of the endorsement standard that embodies this concept.

37. 403 U.S. 602 (1971). Prior to 1970 the Court had assessed the purpose and effect of challenged government action. The Court first added the entanglement prong in 1970 when it rejected an Establishment Clause challenge to the tax exempt status of church property in *Walz v. Tax Comm’n*, 397 U.S. 664 (1970). Douglas Laycock has observed that the Court has never taken the “inhibit” component of the second prong very seriously in connection with government aid for religious schools. Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 56 (1997).

38. See *Marsh v. Chambers*, 463 U.S. 783 (1983); *supra* text accompanying note 30.

39. See *Lee v. Weisman*, 505 U.S. 577, 644-45 (1992) (Scalia, J., joined by Thomas, J., dissenting); *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part); *Aguilar v. Felton*, 473 U.S. 402, 426-30 (1985) (O’Connor, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 108-13 (1985) (Rehnquist, J., dissenting). In *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), Justice Scalia, concurring, compared the *Lemon* standard to a “ghoul” that rises “after being repeatedly killed and buried.” *Id.* at 398.

40. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Lee v. Weisman*, 505 U.S. 577 (1992). Rena Bila has faulted the *Lemon* test because “no reliable method exists to determine whether a statute or government action constitutes an advancement or preference of religion.” Bila, *supra* note 28, at 1537.

test very useful.<sup>41</sup> One commentator has observed that “[t]he literal language of *Lemon* has remained intact but the meaning attached to each of the three test questions has fluctuated depending on which Justice wrote the Court’s decision.”<sup>42</sup> The Court did refer extensively to *Lemon* in a 1997 education case, *Agostini v. Felton*,<sup>43</sup> but primarily to highlight problems in the Court’s application of *Lemon* in two decisions rendered twelve years earlier.<sup>44</sup> Instead of reaffirming the three-part *Lemon* test in *Agostini*, the Court seemed to disavow using “excessive entanglement” as a separate analytical tool.<sup>45</sup>

With the discrediting of *Lemon*, support for separationist doctrine seems to have waned even in school cases—its last stronghold. Some current Justices, especially Justice O’Connor,<sup>46</sup> favor using an endorsement standard in reviewing Establishment Clause claims. Under this standard, challenged government action would be invalidated if it entails endorsement or disapproval of religion according to an objective observer.<sup>47</sup> Government action with some effect on religious practice, which might be invalidated under *Lemon*, would be constitutional under this test as long as religion is not endorsed or disapproved. The endorsement standard has drawn fire from commentators for its subjectivity and reliance on perceptions to determine constitutional infractions.<sup>48</sup>

There is some support for a type of coercion analysis, but a range of opinions exists regarding the type of coercion required to abridge the Establishment Clause. One view of unconstitutional coercion in the school context would require the government to force individuals to participate in religious exercises or compel them to support religious institutions.<sup>49</sup> Under this conception, most governmental accommodations of religion in connection with education would not entail unlawful

41. See Hanks, *supra* note 8, at 912.

42. Timothy V. Franklin, Annotation, *Squeezing the Juice out of the Lemon Test*, 72 EDUC. L. REP. 1, 2 (1992).

43. 521 U.S. 203 (1997).

44. *Id.* at 218-20 (overturning *Aguilar v. Felton*, 473 U.S. 402 (1985) and *School Dist. v. Ball*, 473 U.S. 373 (1985)). See *infra* text accompanying note 184.

45. See *Agostini*, 521 U.S. at 232-33. The Court observed that consideration of whether the challenged government program necessitates excessive government entanglement with religion is part of the assessment of whether the effects of the program primarily advance or impede religion, thus folding consideration of excessive entanglement back into the “effects test” where it was prior to *Lemon*. See, e.g., *School Dist. v. Schempp*, 374 U.S. 203 (1963). Even the *Agostini* dissenters seemed to share the disdain for using “excessive entanglement” as a separate standard. *Agostini*, 521 U.S. at 240 (Souter, J., dissenting).

46. See *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring).

47. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 609 (1992) (Souter, J., concurring); *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989).

48. See *Bila*, *supra* note 28, at 1567; *Gey*, *supra* note 5, at 112-16.

49. See, e.g., *Allegheny*, U.S. at 662 (Kennedy, J., concurring in judgment in part and dissenting in part); Kristin J. Graham, *The Supreme Court Comes Full Circle: Coercion as the Touchstone of an Establishment Clause Violation*, 42 BUFF. L. REV. 147, 170-72 (1994).

coercion. Another perspective would base a constitutional violation on evidence of psychological coercion, such as peer pressure to participate in religious activities in public schools, in the absence of a school requirement to do so.<sup>50</sup>

Several lower courts recently have attempted to cover all bases by reviewing challenged government action under multiple standards including the *Lemon* test as well as the endorsement standard and perhaps some variation of a coercion test.<sup>51</sup> Rather than replacing *Lemon* by another standard, the current Supreme Court seems to value flexibility in assessing Establishment Clause claims and eschew being bound by a single test. Thus, the *Lemon* test (or parts of it) can be used when deemed helpful, but *Lemon* can easily be disregarded if other criteria seem more appropriate in a given case.<sup>52</sup> Justice O'Connor has suggested that the Court no longer needs a single unified test and has called for a "less unitary approach."<sup>53</sup> Whatever standard emerges (if one does), separationist doctrine seems to have faded, even in rhetoric. As will be revisited in the final Part of this Article, the federal judiciary in Establishment Clause cases appears increasingly receptive to governmental accommodations toward religion.

## II. CHANGING JUDICIAL POSTURE TOWARD DEVOTIONAL ACTIVITIES IN PUBLIC SCHOOLS

The prevalence of Protestant observances in American public education was substantially curtailed in the early 1960s when the Supreme Court interpreted the Establishment Clause as barring daily prayer and Bible reading under the auspices of public schools.<sup>54</sup> According to the Court, the voluntary participation of students was irrelevant; the fact that such devotionals were sponsored by the public school abridged the First Amendment.

In the 1990s, however, by framing issues to focus on the *speech* aspect of devotional activities, the Supreme Court has seemed more likely to uphold student-

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50. See Justice Kennedy's majority opinion in *Lee v. Weisman*, 505 U.S. 577 (1992), and *infra* note 110.

51. See, e.g., *Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274 (5th Cir. 1999); *Stark v. Indep. Sch. Dist.*, No. 640, 123 F.3d 1068 (8th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998); *Hsu v. Roslyn Union Sch. Dist.*, No. 3, 85 F.3d 839 (2d Cir. 1996); *Ceniceros v. Board of Trustees of San Diego Unified Sch. Dist.*, 66 F.3d 1535 (9th Cir. 1995), *opinion withdrawn and superseded by* 106 F.3d 878 (9th Cir. 1997); *Chandler v. James*, 958 F. Supp. 1550 (M.D. Ala. 1997), *aff'd*, 180 F.3d 1254 (11th Cir. 1999); *Herdahl v. Pontotoc County Sch. Dist.*, 933 F. Supp. 582 (N.D. Miss. 1996).

52. See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring).

53. *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 721 (1994). Justice O'Connor proposed creating various tests, one would be used for government speech on religious topics, another would pertain to governmental "decisions about matters of religious doctrine and religious law." *Id.* at 720.

54. See *School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). These decisions thrust the concept of church/state separation squarely into the political sphere because of the widespread impact of these rulings and legislative reactions to them. See *Lupu*, *supra* note 33, at 234.



initiated religious activities than it was two decades ago. The Court has concluded that private (personal) religious and nonreligious expression should be treated the same under the Free Speech Clause. The "wall of separation" metaphor appears to have been replaced by the concept of nondiscrimination or equal treatment of religious and other personal speech. Moreover, the Court has expansively interpreted what constitutes protected private religious expression (in contrast to prohibited government-sponsored religious expression). Taken together, these developments have redefined the nature of permissible devotional activities in public schools.

#### *A. Equal Access for Personal Religious Expression*

The general presumption in the 1960s and 1970s was that the Establishment Clause required religious speech to be barred from governmental forums,<sup>55</sup> but more recently the Supreme Court has reasoned that singling out religious views from other private expression for differential treatment is unconstitutional viewpoint discrimination, which abridges the Free Speech Clause.<sup>56</sup> The Court started this trend in its 1981 decision, *Widmar v. Vincent*,<sup>57</sup> in which it found no Establishment Clause violation in allowing student religious groups to have access to a forum created for student expression on state-supported college campuses.<sup>58</sup> The Court concluded that by providing access to a range of student groups, public institutions of higher education advance a secular purpose and do not excessively entangle the state with religion.<sup>59</sup> The Court focused on the expressive aspect of the student devotional activities in *Widmar*, concluding that the university's ban on religious meetings would abridge students' free speech rights.<sup>60</sup>

#### I. Student Religious Meetings in Public Secondary Schools

It was assumed for several years after *Widmar*, however, that the Establishment Clause prohibited such student-initiated devotional meetings held on public school premises, because of the captive vulnerable audience who might view the meetings as representing the school.<sup>61</sup> Then in 1984, Congress enacted the Federal Equal

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55. See *infra* text accompanying note 109.

56. For a discussion of this concept, see *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 890-99 (1995) (Souter, J., dissenting); *Lamb's Chapel*, 508 U.S. 384.

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

58. *Id.* at 277.

59. See *id.* at 270-75.

60. *Id.* at 267-70.

61. Five federal appellate courts from 1980 to 1985 distinguished precollegiate schools from residential college campuses (e.g., age and impressionability of students, compulsory education, access to homes to hold religious meetings) and disallowed student-initiated devotional meetings held during noninstructional time in public schools. See *Bell v. Little Axe Indep. Sch. Dist. No. 70*, 766 F.2d 1391, 1404 (10th Cir. 1985); *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 548 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986); *Nartowicz v. Clayton County Sch. Dist.*, 736 F.2d 646, 649 (11th Cir. 1984); *Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist.*, 669 F.2d 1038, 1043-48 (5th Cir. 1982); *Brandon v. Board of Educ.*, 635 F.2d 971, 977-78 (2d Cir. 1980).

Access Act ("EAA"),<sup>62</sup> extending the *Widmar* reasoning to federally assisted secondary schools. In 1990, the Supreme Court rejected an Establishment Clause challenge to the EAA in *Board of Education v. Mergens*.<sup>63</sup> The Court declared that "even if a public secondary school allows only one 'noncurriculum related student group' to meet, the Act's obligations are triggered and the school may not deny other clubs, on the basis of the content of their speech, equal access to meet on school premises during noninstructional time."<sup>64</sup> Several federal appellate courts have broadly interpreted the protection of student religious expression under the EAA.<sup>65</sup> However, the law applies only to student groups that do *not* represent the public school; the school cannot sponsor a religious group.<sup>66</sup> Furthermore, public secondary schools can comply with the law by confining school access during noninstructional time to curriculum-related student groups, thus declining to establish a limited open forum for student expression.<sup>67</sup>

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62. This Act stipulates that if a federally assisted public secondary school provides a limited open forum for noncurriculum student groups to meet during noninstructional time, "equal access" to that forum cannot be denied based on the "religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C. § 4071(a) (1994). If the meetings have a religious orientation, school employees can attend only in a "nonparticipatory capacity" to maintain discipline. *Id.* § 4071(c)(3).

63. 496 U.S. 226 (1990); *see also* *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244, 1251-54 (3d Cir. 1993) (finding that the school district had created a limited forum because the Key Club—a service organization—was allowed to meet during noninstructional time).

64. *Mergens*, 496 U.S. at 236. The Court recognized the law's ambiguity as to the definition of "curriculum related," and concluded that student groups would be exempt from the Act's coverage only if they relate to subject matter that is currently, or soon would be, taught in the curriculum; if they relate to the body of courses as a whole; or if participation in the group is required as part of a course or awarded credit. *Id.* at 239-40. In contrast to this narrow definition of what is a curriculum-related activity that can be censored by school authorities under the EAA, *see Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) (broadly defining what is school-related expression that can be censored by school authorities under the Free Speech Clause of the First Amendment). Student expression in public schools may enjoy greater protection under the EAA than under the First Amendment. *See* MARTHA M. MCCARTHY ET AL., *PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS* 45, 120-22 (4th ed. 1998).

65. *See, e.g., Hsu v. Roslyn Union Free Sch. Dist.*, No. 3, 85 F.3d 839 (2d Cir. 1996) (finding no conflict with the school's nondiscrimination policy in a student-initiated Bible Club requiring several of its officers to be Christians; the EAA protects the club's right to safeguard the spiritual content of its meetings by having dedicated Christians as certain officers); *Ceniceros v. Board of Trustees*, 106 F.3d 878 (9th Cir. 1997); *infra* text accompanying note 80.

66. *See, e.g., Sease v. School Dist.*, 811 F. Supp. 183 (E.D. Pa. 1993) (holding that a gospel choir directed by the school secretary was not protected by the EAA; the court reasoned that the choir must become student-directed or hold its meetings off public school grounds).

67. For example, in 1996 the Salt Lake City School Board ended its policy of providing a limited forum for noncurriculum student groups in the district's high schools during noninstructional time. This action followed the Gay/Straight Alliance's request for school access. *See East High Gay/Straight Alliance v. Board of Educ. of Salt Lake City Sch. Dist.*, 30 F. Supp. 2d 1356 (D. Utah 1998) (rejecting the Alliance's assertion that because the National Honor Society and Future Business Leaders of America were allowed to meet during

In a significant case, *Garnett v. Renton School District No. 403*,<sup>68</sup> the Ninth Circuit Court of Appeals ruled in 1993 that a state cannot impair rights guaranteed by the EAA, even though the state's constitution imposes stricter anti-establishment restrictions than does the First Amendment.<sup>69</sup> Originally, the court of appeals had affirmed the district court's conclusion that the EAA did not apply to a Washington school district, because the school district had not created a forum for student expression during noninstructional time.<sup>70</sup> Even if such a forum had been created, as the district court had earlier reasoned, then the EAA did not preempt the Washington State Constitution, which prohibits student religious clubs from meeting in public schools.<sup>71</sup> After the Supreme Court remanded the case for reconsideration in light of *Mergens*, the court of appeals changed its position. In essence, the court held that expression rights afforded by the EAA prevail over a state's guarantee of greater separation of church and state than required by the Establishment Clause.<sup>72</sup> The court declared: "The EAA provides religious student groups a federal right. State law must therefore yield."<sup>73</sup>

The position taken by the Ninth Circuit Court of Appeals upon reconsidering *Garnett* is noteworthy. The Supreme Court and lower courts in other contexts have recognized that states can be more protective of individual rights and place additional restrictions on state action beyond federal constitutional minimums in such areas as school desegregation,<sup>74</sup> the rights of children with disabilities,<sup>75</sup> expression rights of student editors of high school publications,<sup>76</sup> and prohibitions on using public funds for religious purposes.<sup>77</sup> Thus, the federal district court had assumed that state action specifying greater separation of church and state than demanded by the Establishment Clause also would prevail, and the court of appeals initially agreed.<sup>78</sup> But upon rehearing the case after the Supreme Court upheld the

noninstructional time, the school district should be enjoined from barring Alliance meetings). Even if a limited open forum is created, school authorities still can curtail meetings that would disrupt educational activities. For a description of the various types of governmental forums recognized under the First Amendment, see *infra* note 93.

68. 987 F.2d 641 (9th Cir. 1993).

69. *Id.* at 646.

70. See *Garnett v. Renton Sch. Dist. No. 403*, 874 F.2d 608, 613-14 (9th Cir. 1989), *vacated and remanded*, 496 U.S. 914 (1990).

71. See *Garnett v. Renton Sch. Dist. No. 403*, 675 F. Supp. 1268, 1274 (W.D. Wash. 1987), *aff'd*, 874 F.2d 608 (9th Cir. 1989).

72. See *Garnett v. Renton Sch. Dist. No. 403*, 987 F.2d 641 (9th Cir. 1993).

73. *Id.* at 646.

74. See, e.g., *Crawford v. Board of Educ.*, 458 U.S. 527 (1982).

75. See, e.g., *David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411 (1st Cir. 1985).

76. Some states give students editorial rights over school publications beyond their First Amendment expression rights. See, e.g., CAL. EDUC. CODE § 48907 (West 1993); COLO. REV. STAT. ANN. § 22-1-120 (West 1998); IOWA CODE ANN. § 280.22 (West 1997); KAN. STAT. ANN. § 72-1506 (1992); MASS. GEN. LAWS ANN. ch. 71, § 82 (1991).

77. See *Witters v. Washington Comm'n for the Blind*, 771 P.2d 1119 (Wash. 1989) (using federal aid to support preparation for the ministry); *infra* note 220; see also *California Teachers' Ass'n v. Riles*, 632 P.2d 953 (Cal. 1981) (using state funds to provide textbooks for parochial school students); *infra* note 197.

78. *Garnett v. Renton Sch. Dist. No. 403*, 675 F. Supp. 1268, 1274 (W.D. Wash. 1987),

EAA, the court of appeals ruled that a valid federal law protecting student expression overrides a state constitutional mandate that gives individuals greater protection against religious establishments than required by the First Amendment.<sup>79</sup>

Echoing the *Garnett* rationale, the Ninth Circuit Court of Appeals also found that the EAA superseded California's constitutional prohibition on government action entailing religious preferences, which is more potent than the Establishment Clause.<sup>80</sup> At issue was the right of a student-initiated religious group to meet in the public school during the lunch period. Reasoning that the rights contained in the EAA prevail over the state constitutional restriction, the court upheld the religious group's right to meet.<sup>81</sup> The court noted that the school's lunch period was not instructional time and that other noncurriculum student groups were allowed to meet during lunch, so the EAA governed the religious group's request.<sup>82</sup>

## 2. Distribution of Student Religious Literature

Similar to meetings of student-initiated religious groups, requests by students to distribute religious publications pit Free Speech Clause protections against Establishment Clause restrictions. Some courts recently have applied the "equal access" concept in concluding that the same legal principles govern students' distribution of religious materials as govern their distribution of nonreligious literature. To illustrate, a Colorado federal district court held that high school students had a free expression right to distribute a religious newsletter as long as the activity did not create a disturbance.<sup>83</sup> A Pennsylvania federal district court also found students' distribution of religious literature to be protected private speech and upheld their right to distribute sectarian material during noninstructional time.<sup>84</sup>

Distinguishing expression representing the school (which can be censored) from protected personal expression, the Seventh Circuit Court of Appeals in 1993 held that students in an Illinois school district could distribute a religious newspaper in

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*aff'd*, 874 F.2d 608 (9th Cir. 1989).

79. See Martha McCarthy, Annotation, *Free Speech Versus Anti-Establishment: Is There a Hierarchy of First Amendment Rights?*, 108 EDUC. L. REP. 475, 479 (1996). The court of appeals changed its mind in interpreting the EAA's stipulation that "otherwise unlawful" meetings are not covered by the act, concluding when it reheard the case in 1993 that meetings conflicting with the state constitution's anti-establishment prohibition are not excluded from coverage under the EAA. See also *Hoppock v. Twin Falls Sch. Dist.*, 772 F. Supp. 1160, 1162-64 (D. Idaho 1991) (holding that when a school district accepts federal aid it is bound by congressional mandates accompanying the aid as long as the federal laws do not violate any limitations on congressional power).

80. See *Ceniceros v. Board of Trustees*, 106 F.3d 878 (9th Cir. 1997).

81. See *id.* at 883.

82. See *id.*

83. *Rivera v. East Otero Sch. Dist. R-1*, 721 F. Supp. 1189 (D. Colo. 1989). In the 1970s, courts were more inclined to uphold prohibitions on student distribution of religious materials in public schools, favoring Establishment Clause considerations over free speech claims. See, e.g., *Hernandez v. Hanson*, 430 F. Supp. 1154 (D. Neb. 1977).

84. See *Thompson v. Waynesboro Area Sch. Dist.*, 673 F. Supp. 1379 (M.D. Pa. 1987); see also *Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280 (E.D. Pa. 1991).

the public school.<sup>85</sup> But the court upheld the part of the school district's policy restricting distribution of materials prepared by nonstudents to ten or fewer copies and imposing reasonable restrictions on how, when, and where the material was distributed (i.e., time, place, and manner regulations).<sup>86</sup>

In contrast to the judicial posture toward *student* distribution of religious literature, most courts have struck down school board policies allowing religions *sects* to distribute their materials in public schools.<sup>87</sup> The courts have reasoned that such distribution carries the stamp of school approval. However, in 1998 the Fourth Circuit Court of Appeals upheld public school access for religious groups to make Bibles available to students.<sup>88</sup> The school board traditionally had allowed various community groups (e.g., Little League, Boy Scouts, 4-H) to distribute literature but had barred distribution of religious or political materials. The board revised its policy in 1994 to designate a day for private groups to distribute religious or political literature in accessible locations (e.g., halls) but not in classrooms. Rejecting an Establishment Clause challenge to Bible distribution under the policy, the court of appeals reasoned that religious groups could not be discriminated against in terms of school access and that the private group's Bible distribution did not represent the public school.<sup>89</sup> The court of appeals narrowed what would be considered government sponsorship of religion, apparently viewing religious groups the same as students in applying free speech protections to their *private* religious expression

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85. See *Hedges v. Wauconda Community Unit Sch. Dist.*, 9 F.3d 1295 (7th Cir. 1993); see also *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530 (7th Cir. 1996) (recognizing a student's right to distribute invitations to a religious meeting during noninstructional time, but upholding the school code requiring prior review of any such distribution of nonschool literature and imposing reasonable time, place, and manner regulations that included a disclaimer of school sponsorship). But see *Perumal v. Saddleback Valley Unified Sch. Dist.*, 243 Cal. Rptr. 545 (Cal. Ct. App. 1988) (holding that a student religious club was not entitled to distribute its materials on the high school campus or advertise in the school's yearbook because the school had not created a limited forum for noncurriculum student groups, and even if it had, the Establishment Clause precludes using the prestige and authority of the school to advance religious causes).

86. See *Hedges*, 9 F.3d at 1295. The court of appeals also found that confining distribution to specified times at a table near the school's entrance was appropriate. *Id.*

87. See, e.g., *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995); *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160 (7th Cir. 1993). Also, the Fifth Circuit Court of Appeals recently struck down a school district's "clergy in the schools" program, under which members of the local clergy provided volunteer counseling to students during school hours. See *Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274 (5th Cir. 1999).

88. See *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274 (4th Cir. 1998). Also, an Illinois federal district court held that school authorities could not prohibit the distribution of Gideon Bibles on the school-owned sidewalk in front of a high school, because the walk was considered a public forum for use by the general public. See *Bacon v. Bradley-Bourbonnais High Sch. Dist. No. 307*, 707 F. Supp. 1005 (C.D. Ill. 1989); see also *Schanou v. Lancaster County Sch. Dist. No. 160*, 62 F.3d 1040 (8th Cir. 1995), *vacating* 863 F. Supp. 1048 (D. Neb. 1994) (instructing the lower court, which had upheld board policy allowing Bible distribution outside school, to dismiss the challenge to the policy and to the single incident of Bible distribution in the public school hallway in violation of the policy).

89. See *Peck*, 155 F.3d at 279.

in public schools. If this ruling represents the prevailing judicial posture, the scope of permissible religious activities initiated by sectarian organizations in public education could dramatically expand.

### 3. Public School Access for Community Groups

The recent line of cases addressing the use of public schools by community groups also reflects the judicial sentiment that religious speech and other private expression deserve equal treatment in public schools. This is distinct from, but often confused with, public school access for student-initiated groups during noninstructional time, which is governed by the EAA. When public schools are made available for community use, the school functions as a proprietor and does not supervise the activities as it does with student groups. In 1993, the Supreme Court held in *Lamb's Chapel v. Center Moriches Union Free School District*<sup>90</sup> that if other community groups are allowed to use the public school to address particular topics (i.e., family values, child rearing) from a secular perspective, meetings that include religious perspectives on these topics cannot be barred from the public school.<sup>91</sup> In essence, school districts run afoul of the Free Speech Clause if they enforce policies governing facility use that entail viewpoint discrimination against a religious group's message.<sup>92</sup>

Some courts have broadly interpreted the *Lamb's Chapel* principle that religious viewpoints cannot be singled out for differential treatment in a limited public forum.<sup>93</sup> For example, the Eighth Circuit Court of Appeals held that since scouts were allowed to meet at a public middle school after school hours, a parent-led

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90. 508 U.S. 384 (1993).

91. *Id.* at 393-94.

92. Ralph Mawdsley has stated that in *Lamb's Chapel* "a paradigm shift occurred because the Court, for the first time, brought religious expression within the full protection of the Free Speech Clause." Ralph D. Mawdsley, Commentary, *Extending the Limits of Permissible Government-Religion Interaction: Stark v. Independent School District No. 640*, 124 EDUC. L. REP. 499, 501 (1998); see also Kristine Kuenzli, *Opportunity Wasted: The Supreme Court's Failure to Clarify Religious Liberty Issues in Rosenberger v. Rector and Visitors of the University of Virginia*, 32 GONZ. L. REV. 85, 90 (1996).

93. Whether restrictions on expression offend the First Amendment depends in part on the type of forum created by the government. The Supreme Court has held that content-based restrictions on expression cannot be imposed in traditional public forums for assembly and communication (e.g., streets and parks) unless justified by a compelling governmental interest. See *Police Dep't v. Mosley*, 408 U.S. 92 (1972). At the other end of the continuum is a nonpublic forum (e.g., public school), where expression can be restricted to the governmental purpose of the property as long as viewpoint discrimination is not involved. See *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 799-800 (1985). The government can create a limited public forum for expression on public property that otherwise would be considered a nonpublic forum. A limited forum can be restricted to a certain class of speakers (e.g., students) and/or to specific categories of expression (e.g., noncommercial). Otherwise, expression in a limited forum enjoys the same protections that govern traditional public forums. See *id.* at 805-06; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983).

religious group could not be denied school access.<sup>94</sup> Unlike the community group in *Lamb's Chapel*, this group was organized by parents and involved children attending the middle school where the meetings were held. But the court of appeals relied on *Lamb's Chapel* in holding that it would be unconstitutional viewpoint discrimination to prohibit a group from addressing character development from a religious perspective, as this topic was treated from a secular standpoint by other community groups.<sup>95</sup>

In a Wyoming case, a federal district court also relied on *Lamb's Chapel* in ruling that a religious group could rent the high school gymnasium for a baccalaureate program because other community groups were allowed to use the school gym for various events. The court found no unconstitutional school involvement, even though the school band performed and the school's graduation announcements included the baccalaureate program.<sup>96</sup>

Some courts, however, have distinguished religious worship from the expression of religious viewpoints that was protected in *Lamb's Chapel*. In 1997 the Second Circuit Court of Appeals upheld a school district's prohibition of religious groups using the public school on a weekly basis for Sunday worship services, even though other community groups had access to the facilities.<sup>97</sup> The court of appeals reasoned that the prohibition on worship services was viewpoint neutral and appropriate in a limited forum.<sup>98</sup> Under the school district's policy, sectarian groups still could use school premises after school hours to discuss religious viewpoints on various topics and to distribute religious materials. In spite of the distinction drawn by this court, the line may not always be clear between religious worship, which can be barred from a limited forum, and religious expression, which must be allowed on any topic that is addressed in the forum from a secular perspective.

#### 4. Equal Treatment of Religious Expression Beyond Public Schools

There also are examples outside the K-12 context of judicial pronouncements that private religious speech deserves to be treated like any other personal expression instead of differently because of the Establishment Clause. In upholding the Ku Klux Klan's right to place an unattended cross inscribed with a citation to the Bible on the Ohio capital square during the Christmas season, the Supreme Court reasoned that

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94. See *Good News/Good Sports Club v. School Dist.*, 28 F.3d 1501 (8th Cir. 1994).

95. See *id.* at 1507.

96. See *Shumway v. Albany County Sch. Dist. No. One*, 826 F. Supp. 1320 (D. Wyo. 1993). To pass judicial scrutiny, baccalaureate services cannot be sponsored by the school, but students, churches, or other groups can rent space from the school district to conduct such programs. See, e.g., *Verbena United Methodist Church v. Chilton County Bd. of Educ.*, 765 F. Supp. 704, 712-13 (M.D. Ala. 1991) (holding that a school board must take all measures reasonably necessary to disassociate itself from a baccalaureate service sponsored by religious organizations and conducted in space rented from the school district).

97. See *Bronx Household of Faith v. Community Sch. Dist. No. 10*, 127 F.3d 207 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1517 (1998); see also *Full Gospel Tabernacle v. Community Sch. Dist. 27*, 979 F. Supp. 214 (S.D.N.Y. 1997), *aff'd*, 164 F.3d 829 (2d Cir. 1999).

98. See *Bronx Household of Faith*, 127 F.3d at 214-15.

private religious expression in a traditional public forum may be regulated only if necessary to serve a compelling state interest.<sup>99</sup> Notwithstanding the proximity of the cross to the seat of government, the Court concluded that the government was not sponsoring such private expression but merely making government property available to the public for speech purposes.<sup>100</sup>

In a 1995 higher education decision, *Rosenberger v. Rector & Visitors of the University of Virginia*,<sup>101</sup> the Supreme Court ruled that a public university could not withhold support from a student religious group seeking to use student activity funds to publish sectarian materials.<sup>102</sup> Concluding that religious content must be treated like other content in student-initiated publications, the majority denounced the university's attempt to deny support to the religious group as discriminating against religious viewpoints of private persons (i.e., students) whose speech it facilitates.<sup>103</sup> The majority reasoned that the University would not violate the Establishment Clause by providing secular printing services for religious and nonreligious student publications alike, and in fact, the Free Speech Clause demanded such equal treatment.<sup>104</sup> As in *Lamb's Chapel*, the Court recognized the distinction between legitimate restrictions on categories of *content* to preserve the purposes of a limited forum and impermissible discrimination against specific *viewpoints* on content that can be addressed in the forum.<sup>105</sup> Despite the logical appeal of this distinction, the Court seemed to blur it by virtually negating any circumstances that private religious expression would be considered a category of content that could be restricted in a limited forum.<sup>106</sup>

#### *B. Expanding the Category of Private Expression*

The Supreme Court declared in 1990 that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses

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99. *See* *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995). *But see* *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996) (holding that the display of a cross in city park violated the Establishment Clause).

100. *See* *Capitol Square*, 515 U.S. at 763.

101. 515 U.S. 819 (1995).

102. *Id.* at 845-46; *see also infra* text accompanying note 182.

103. *See id.* at 831.

104. *See id.* at 843-46.

105. *See id.* at 830-31. Justice Souter disagreed with the majority's conclusion that excluding both sides of the religious debate constituted viewpoint discrimination. He considered the university policy a legitimate content restriction in that it prohibited using university funds for the distribution of any religious materials, regardless of the views being promoted. *See id.* at 892-98 (Souter, J., dissenting). The majority conceded, however, that it is an "understatement to speak of religious thought and discussion as just a viewpoint . . . distinct from a comprehensive body of thought." *Id.* at 831. For a discussion of the types of governmental forums, *see supra* note 93.

106. *See* Arval A. Morris, Commentary, *Separation of Church and State? Remarks on Rosenberger v. University of Virginia*, 103 EDUC. L. REP. 553-71 (1995).



protect.”<sup>107</sup> The federal judiciary is creating fresh law by expansively interpreting what is considered personal in contrast to school-sponsored religious speech.<sup>108</sup> From the 1960s until the 1980s, student-initiated devotionals in voluntary student assemblies or other school-related activities were usually viewed as representing the public school and thus in violation of the Establishment Clause.<sup>109</sup> However, as discussed below, several federal courts in the 1990s seem more inclined to interpret broadly what belongs in the category of private expression that is *not* subject to Establishment Clause restrictions, which expands the circumstances under which devotional activities will be condoned in public education.

The topic of graduation prayer is illustrative of the current judicial uncertainty and the tendency for some courts to expand the category of personal religious expression when students are the speakers. Following the 1992 *Lee v. Weisman* decision striking down clergy-led devotionals in public school graduation ceremonies,<sup>110</sup> school boards sought creative ways to include prayers in graduation exercises.<sup>111</sup> A number of school districts began designating graduation ceremonies as a forum for student expression, with no administrative review of students’ speeches. Thus, if students elect to include devotional messages in their remarks, such devotionals are considered personal expression and not school-sponsored. In 1998 the Ninth Circuit Court of Appeals upheld an Idaho school district’s policy that barred school

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107. *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990).

108. *See Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274 (4th Cir.1998) (interpreting broadly what constitutes private expression in public schools in that Bible distribution by a religious group falls in this category and, thus, does not represent the school); *supra* text accompanying note 88.

109. *See, e.g., Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983), *aff’d mem. in part*, 466 U.S. 924 (1984); *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff’d mem.*, 455 U.S. 913 (1982); *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759 (9th Cir. 1981); *Brandon v. Board of Educ.*, 635 F.2d 971 (2d Cir. 1980); *supra* note 61.

110. 505 U.S. 577 (1992). The majority opinion, written by Justice Kennedy, stated that the policy had a coercive effect; students felt peer and public pressure to participate in the devotionals that were conducted at the school-sponsored graduation ceremony and they lacked genuine choice regarding graduation attendance. *See id.* at 590-94. However, four of the justices (Blackmun, O’Connor, Souter, and Stevens, JJ.) who joined the majority opinion also signed concurring opinions in which they asserted that coercion would be sufficient to abridge the Establishment Clause, but it is not a necessary prerequisite. *See id.* at 599 (Blackmun, J., concurring); *see id.* at 609-10 (Souter, J., concurring). Actually, the dissenting Justices in *Weisman* (Rehnquist, C.J., Scalia, Thomas, and White, JJ.) who would have upheld clergy-led graduation prayers, offered more support for a coercion standard than did those Justices who signed the majority opinion, although the dissenters would have required overt rather than psychological coercion to strike down the practice. *See id.* at 636-45 (Scalia, J., dissenting). For the application of *Weisman* to opening school board meetings with a prayer, *see supra* note 31.

111. Rather than precipitating a reduction in devotional activities in public school graduations, the Supreme Court’s decision has had an opposite impact. In a poll conducted by Phi Delta Kappa, superintendents from 71% of the national sample of school districts reported that some type of prayer was included in their high school graduation exercises in 1993. *See Larry Barber, Prayer at Public School Graduation: A Survey*, 75 PHI DELTA KAPPAN 125 (1993).

authorities from censoring students' graduation speeches and granted student speakers (selected by academic standing) discretion to deliver "an address, poem, reading, song, musical presentation, prayer, or any other pronouncement."<sup>112</sup> The court of appeals distinguished this policy that gave students autonomy in their speeches from the policy authorizing clergy-led prayers during the graduation ceremony that was struck down in *Weisman*.<sup>113</sup> Subsequently, the Seventh Circuit Court of Appeals upheld student-initiated recitation of the Lord's Prayer five minutes before the high school graduation ceremony began.<sup>114</sup> The court of appeals reasoned that this devotional activity instigated by students did not represent the school. Thus, it did not violate an injunction prohibiting school personnel from authorizing, conducting, sponsoring, or intentionally permitting prayers during the graduation ceremony.<sup>115</sup>

The most controversial post-*Weisman* strategy has been to allow students to decide by election whether to include student-led prayers in the graduation ceremony. The Fifth Circuit Court of Appeals upheld a school district's guidelines allowing this practice in *Jones v. Clear Creek Independent School District*,<sup>116</sup> but the Supreme Court remanded the case for reconsideration in light of *Weisman*.<sup>117</sup> After the court of appeals again upheld the practice in 1992,<sup>118</sup> the Supreme Court declined to review the appellate decision. The court of appeals reasoned that allowing students to decide by election whether to have nonsectarian and nonproselytizing invocations and benedictions in the graduation ceremony removed the school's sponsorship of the religious expression.<sup>119</sup> Emphasizing that students involved in the decision would fully understand that any religious references resulted from students' choices (not the school's), the court of appeals distinguished this practice involving private expression from devotionals directed by school authorities, which would abridge the Establishment Clause.<sup>120</sup>

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112. *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 834 (9th Cir. 1998), *vacated and remanded en banc*, 177 F.3d 789 (9th Cir. 1999). The appellate court en banc instructed the district court to dismiss the complaint for lack of standing and mootness, leaving the contested policy in force.

113. *See id.* at 836 (contrasting *Lee v. Weisman*, 505 U.S. 577 (1992)).

114. *See Goluba v. School Dist.*, 45 F.3d 1035 (7th Cir. 1995).

115. *See id.*; *see also Bauchman v. West High Sch.*, 900 F. Supp. 254 (D. Utah 1995), *aff'd*, 132 F.3d 542 (10th Cir. 1997) (upholding a public school choir's use of two religious songs during the graduation ceremony as the songs promoted friendship rather than religion).

116. 977 F.2d 963 (5th Cir. 1992).

117. *Jones v. Clear Creek Ind. Sch. Dist.*, 505 U.S. 1215 (1992); *see also Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997) (rejecting a challenge to invocation and benediction at a state university's commencement, reasoning that there is no coercion with adult students who have the maturity to choose among competing beliefs), *cert. denied*, 522 U.S. 814 (1997)).

118. *See Clear Creek*, 977 F.2d at 965.

119. *See id.* at 970.

120. *See id.* at 969. The appeals court concluded that "a majority of students can do what the State acting on its own cannot do to incorporate prayer in public high school graduation ceremonies." *Id.* at 972. The court applied the three-part *Lemon* test and the endorsement and coercion standards, thus using all five standards that have recently appeared in Establishment Clause decisions. *See id.* at 966-71.

The Third and Ninth Circuit Court of Appeals, however, reached an opposite conclusion as to the legality of students' electing to have graduation devotionals.<sup>121</sup> These courts were not convinced that the Establishment Clause could be satisfied by giving students control of devotional activities in the graduation ceremony, a school-sponsored event. Since the First Amendment prohibits public schools from sponsoring prayers, these appellate courts reasoned that school authorities cannot delegate to students decisions that the Establishment Clause forbids school districts from making in the first place. The Third Circuit Court of Appeals declared that "an impermissible practice cannot be transformed into a constitutionally acceptable one by putting a democratic process to an improper use."<sup>122</sup> Yet, the Supreme Court vacated the Ninth Circuit ruling and sent the case back to the federal district court with instructions to declare the case moot, presumably because the student plaintiff had graduated.<sup>123</sup>

School prayer advocates were encouraged by the Supreme Court's refusal to review the *Clear Creek* ruling and by its action in the Ninth Circuit case, but 1999 rulings have added more confusion to the legal status of student-initiated devotionals. For example, a panel of the Eleventh Circuit Court of Appeals struck down a Florida school district's policy that allowed the senior class to decide whether to have an opening and/or closing "message" in the graduation ceremony, not to exceed two minutes, prepared by a student volunteer and not monitored by school personnel.<sup>124</sup> The appellate court disagreed with the district court's conclusion that the graduation ceremony was a designated, limited public forum, reasoning that the policy at issue

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121. See *ACLU v. Blackhorse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996); *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th Cir. 1994), *vacated*, 515 U.S. 1154 (1995).

122. *Blackhorse Pike*, 84 F.3d at 1477. The Ninth Circuit Court of Appeals reiterated that there is "no meaningful distinction between school authorities actually organizing the religious activity and officials merely 'permitting' students to direct the exercises." *Harris*, 41 F.3d at 452 (quoting *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759, 761 (9th Cir. 1981)).

123. See *Harris*, 515 U.S. at 1154.

124. See *Adler v. Duval County Sch. Bd.*, 174 F.3d 1236 (11th Cir. 1999), *vacated pending reh'g en banc*, No. 98-2709, 1999 U.S. App. LEXIS 13190 (11th Cir. June 3, 1999). Courts have not yet ruled that students' graduation speeches *must* be considered a forum for student expression that is not subject to prior review, as asserted by some conservative groups. See *Jay Alan Sekalow & John D. Etheriedge, Lamb's Chapel v. Center Mariches Union Free Sch. Dist.: An End to Religious Segregation*, 1 LIBERTY, LIFE, AND FAMILY 179, 198 (1994). Indeed, several lower courts have upheld school authorities in censoring students' graduation speeches, where such speeches have not been designated a forum for student expression. See, e.g., *Brody v. Spang*, 957 F.2d 1108, 1120 (3d Cir. 1992) (stating that the graduation ceremony is not a forum for student expression unless created as such by school authorities); *Guidry v. Calcasieu Parish Sch. Bd.*, No. 87-2122 (E.D. La. Feb. 22, 1987) (upholding the school's rejection of a student's valedictory speech that included sectarian material, because such a speech given at a school-sponsored event would have the primary effect of advancing religion in violation of the Establishment Clause), *aff'd on alternative grounds*, 897 F.2d 181 (5th Cir. 1990).

was a ploy to circumvent the *Weisman* decision and return prayers to the graduation ceremony.<sup>125</sup> The panel decision recently was vacated by the full court of appeals, which has agreed to review this case.<sup>126</sup>

Although generally assumed that school authorities can, but are not obligated to, designate students' graduation speeches as a forum for expression with no prior review of the content, the Eleventh Circuit panel questioned this premise, adding ambiguity to the First Amendment issues in connection with public school graduations. It also remains unclear whether having students vote on what will be included in the ceremony eliminates governmental involvement. Until the Supreme Court provides definitive guidance, lower courts will likely continue to differ regarding the status of the graduation ceremony and whether a student election removes school sponsorship of student-initiated graduation devotionals.

This same dilemma over school-sponsored versus private expression also confronts the judiciary in connection with extracurricular activities. The judiciary has not clarified whether the rationale used by some courts to condone student devotionals in graduation ceremonies could be used to justify students' deciding by election to have student-led prayers in extracurricular activities. But courts have found Establishment Clause violations in prayers directed or condoned by school personnel during athletic contests, similar to the judicial stance in connection with graduation devotionals led by clergy or school personnel. For example, the Eleventh Circuit Court of Appeals invalidated a school district's plan under which any student, parent, school staff member, or representatives from school clubs and organizations could seek to deliver invocations prior to public high school football games.<sup>127</sup> The court reasoned that the school-sponsored plan had a religious purpose and the primary effect of advancing religion in violation of the First Amendment.<sup>128</sup>

In 1999 the Fifth Circuit Court of Appeals addressed student-led invocations before football games, striking down the school district's policy allowing this practice.<sup>129</sup> The court noted that the school board had removed from its policy the "nonsectarian, nonproselytizing" limitation that was an important consideration in its *Clear Creek* ruling.<sup>130</sup> Moreover, the court noted that even if this limitation were reinstated, student-led prayers at sporting events would abridge the Establishment Clause. Distinguishing these activities from high school graduations, the court noted that football games occur frequently, students are younger, and prayers are not used to solemnize the occasion.<sup>131</sup> Thus, according to this court, the mere fact that prayers

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125. See *Adler*, 174 F.3d at 1249-50.

126. *Adler v. Duval County Sch. Bd.*, No. 98-2709, 1999 U.S. App. LEXIS 13190, at \*1 (11th Cir. June 3, 1999).

127. See *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir. 1989), *cert. denied*, 490 U.S. 1090 (1989); see also *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995) (prohibiting a school district's employees from leading or encouraging prayers during curricular and extracurricular activities, but upholding the school choir's use of a religious song as its theme song because a majority of the appropriate pieces are religious in nature).

128. See *Jager*, 862 F.2d at 829-31.

129. See *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3079 (U.S. July 6, 1999).

130. See *id.* at 809.

131. See *id.* at 822-23.

in extracurricular activities are selected and led by students is not sufficient to ensure that they will be upheld. It remains to be seen whether other courts will make such a distinction between graduation prayers and devotionals at public school athletic events.

If the Supreme Court should conclude that the mere fact that devotionals are student-initiated and led removes governmental sponsorship (and thus any Establishment Clause issue), the implications would reach far beyond prayers during graduation ceremonies and extracurricular activities. Could not this same justification be used to condone students voting to have daily prayers and Bible reading in public schools? Perhaps more importantly, could decisions about other constitutional rights be delegated to students, thereby removing any school involvement?<sup>132</sup> The judicial position on this issue has significant ramifications indeed.

The next wave of Establishment Clause litigation in public schools may involve the instructional program, with plaintiffs expanding on the free expression arguments to justify religious content in student presentations and other assignments.<sup>133</sup> Although argued that the Establishment Clause is not implicated when students, rather than teachers or other state actors, initiate religious content in the classroom,<sup>134</sup> students have not yet been successful in asserting a First

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132. See *Yeo v. Lexington*, 131 F.3d 241 (1st Cir. 1997), *cert. denied*, 524 U.S. 904 (1998) (finding no state action in connection with the high school's yearbook and newspaper because students made editorial and staffing decisions, even though the school paid for faculty advisors and a substantial part of the newspaper's budget; the decision to decline to run an advertisement promoting abstinence in these student-run publications could not be attributed to the school).

133. It is interesting that conservative citizen groups have pressed for an expansive interpretation of the Establishment Clause in their efforts to get courts to bar materials from public schools that allegedly advance a nontraditional religious creed. These Establishment Clause suits claiming that various instructional programs (e.g., evolution, sex education) and materials (e.g., *Impressions* reading series) promote an antitheistic creed have not been successful. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373 (9th Cir. 1994); *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680 (7th Cir. 1994); *Smith v. Board of Sch. Comm'rs*, 827 F.2d 684 (11th Cir. 1987); *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1985); *Smith v. Ricci*, 446 A.2d 501 (N.J. 1982). For a discussion of these cases, see *McCARTHY ET AL.*, *supra* note 64, at 53-57. The same conservative groups have asserted that Free Speech Clause rights should trump Establishment Clause restrictions when they are arguing that activities promoting Christian tenets should be allowed in public schools. See *id.* at 46-47; *infra* note 135.

134. The judiciary has been consistent in striking down state policymakers' curriculum decisions that clearly advance Judeo-Christian tenets. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987) (invalidating a Louisiana law requiring equal emphasis on the Biblical theory of creation whenever evolution is taught, finding that the law was designed to advance Christian beliefs); *Freiler v. Tangipahoa Parish Bd. of Educ.*, 975 F. Supp. 819 (E.D. La. 1997), *aff'd*, Nos. 97-30879, 98-30132, 1999 WL 615172 (5th Cir. Aug. 13, 1999) (ruling that a Louisiana school board had gone too far in requiring teachers, when discussing the origin of life, to read to their classes a statement disclaiming endorsement of the theory of evolution: the resolution was adopted for sectarian reasons and had the effect of endorsing religion). Only one federal appellate court has ruled that a public school curricular offering

Amendment entitlement in this regard. Courts have reasoned that student projects can be censored to ensure that the school is not perceived as endorsing religious content.<sup>135</sup> Nonetheless, students increasingly are contending that religious views should be treated like other views in the classroom (as they are during noninstructional time), and such claims are likely to escalate if the federal judiciary becomes more accommodating toward personal religious speech in public schools.<sup>136</sup> The increased protection afforded sectarian expression under the First Amendment may ultimately affect controversies over the proper place of religion in the instructional program.

### C. Renewed Legislative Activity and Mixed Judicial Responses

Given the lack of a definitive Supreme Court statement regarding the legal status of student-initiated devotionals in public schools and the aborted attempts so far to amend the Constitution to authorize school prayer,<sup>137</sup> legislative activity pertaining to this topic has increased in the 1990s. Some laws have been an attempt to test the limits of what is constitutionally acceptable in light of the *Weisman* decision.<sup>138</sup> For example, a provision of the *Goals 2000: Educate America Act*, passed by Congress in 1994, stipulates that "no funds authorized to be appropriated under this chapter may be used by any state or local educational agency to adopt policies that prevent voluntary prayer and meditation in public schools."<sup>139</sup> In addition, several states

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(a module in transcendental meditation) abridged the Establishment Clause by advancing a nontraditional religious belief (the "Science of Creative Intelligence"). *See Mahnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979).

135. *See, e.g., Settle v. Dickson County Sch. Bd.*, 53 F.3d 152 (6th Cir. 1995) (upholding a teacher's decision to give a student a zero on a report because the student had cleared a different topic and then wrote the report on the life of Jesus Christ); *C.H. v. Oliva*, 990 F. Supp. 341 (D.N.J. 1997) (finding no abridgement of expression rights in removing and then relocating a student's poster depicting Jesus and not allowing the student to read from the *Beginner's Bible* to classmates; the court reasoned that the prominent display of the poster or the requested recitation would run afoul of the Establishment Clause), *aff'd*, 166 F.3d 1204 (3rd Cir. 1998); *DeNooyer v. Livonia Pub. Schs.*, 799 F. Supp. 744 (E.D. Mich. 1992) (upholding a school district's prohibition on an elementary school student showing a videotape of herself singing a proselytizing religious song as part of a class presentation), *aff'd sub nom. DeNooyer v. Merinelli*, 12 F.3d 211 (6th Cir. 1993).

136. *See Mawdsley, supra* note 92, at 501.

137. Since the 1960s, school prayer advocates regularly have attempted to amend the U.S. Constitution to authorize some type of devotional activities in public education. Rep. Ernest Istook, R-Okla, was the architect of the Religious Freedom Amendment, proposed in 1997, to allow student-initiated organized prayer in public school graduation ceremonies and other school events. *See David Boyer, School Prayer Amendment Again Before House Panel*, EDUC. DAILY, July 23, 1997, at 1; *see also School Prayer Amendment Approved by House Panel*, SCH. L. NEWS, Mar. 6, 1998, at 1; *School Prayer Amendment Rekindles House Debate*, SCH. L. NEWS, July 26, 1996, at 1.

138. *Lee v. Weisman*, 505 U.S. 577 (1992); *supra* text accompanying note 110.

139. *Goals 2000: Educate America Act*, 20 U.S.C. § 6061 (1994).

(e.g., Alabama, Georgia, Louisiana, Mississippi, Tennessee, Virginia) have adopted laws authorizing student-initiated devotional activities at high school graduations and other extracurricular events.<sup>140</sup>

The Alabama and Mississippi laws, allowing student-initiated prayers in all compulsory and noncompulsory public school-related events, were challenged as unconstitutionally advancing religion.<sup>141</sup> The Fifth Circuit Court of Appeals concluded that the Mississippi law swept too broadly by permitting prayers at virtually all school-related activities.<sup>142</sup> Only the portion of the law permitting student-led graduation prayers was upheld (given the *Clear Creek* precedent in the Fifth Circuit).<sup>143</sup> The district court had noted that “[b]y granting prayer an exalted status over other types of speech” in assemblies, athletic events, and other school activities, “the state runs the grave risk of favoring one religion over another or favoring religion over irreligion” in violation of the Establishment Clause.<sup>144</sup>

Subsequently, a federal district court struck down the 1993 Alabama law.<sup>145</sup> In addition to invalidating the law on its face because it failed all three parts of the *Lemon* test, the court reasoned that it coerced public school students to participate in religious activities and endorsed religion in violation of the Establishment Clause.<sup>146</sup> In a later order, the court permanently enjoined enforcement of the law

140. See GA. CODE ANN. § 20-2-1050 (1996) (authorizing quiet reflection in public schools and stipulating that the provision shall not prevent student-initiated voluntary prayers at school or school related events); LA. REV. STAT. ANN. § 17:2115.1 (1998) (stipulating that when a voluntary, student-initiated, student-led prayer is offered, it shall be done in accordance with the religious views of the student offering the prayer); TENN. CODE ANN. § 49-6-1004(c) (1998) (authorizing nonsectarian and nonproselytizing student-initiated and led prayers in school assemblies, sporting events, and commencement ceremonies); VA. CODE ANN. § 22.1-203.1 (Michie 1998) (specifying that consistent with constitutional principles of freedom of religion and separation of church and state, students in the public schools may voluntarily engage in student-initiated prayer).

141. See *Chandler v. James*, 958 F. Supp. 1550 (M.D. Ala. 1997), *aff'd*, 180 F.3d 1254 (11th Cir. 1999); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 864 F. Supp. 1473 (S.D. Miss. 1994), *aff'd*, 88 F.3d 274 (5th Cir. 1996); see also ALA. CODE § 16-1-20.3 (1995); 1994 Miss. CODE ANN. §§ 37-13-4 to -4.1 (1999).

142. See *Ingebretsen*, 88 F.3d at 274. The Mississippi law was inspired by public anger over dismissal of a high school principal for allowing students to say prayers over the school's public address system. The Mississippi Senate even passed a resolution in 1994 commending the principal's effort to return prayer to public schools, and ultimately, the school board did not ratify the termination. See *Board of Trustees v. Knox*, 638 So. 2d 1278 (Miss. 1994); *Jackson, Mississippi School Board Reinstates Principal Who Allowed Prayer*, SCHOOL BOARD NEWS, Dec. 28, 1993, at 3-4.

143. *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992); see *supra* text accompanying note 116.

144. *Ingebretsen*, 864 F. Supp. at 1490; see also *Herdahl v. Pontotoc County Sch. Dist.*, 933 F. Supp. 582 (N.D. Miss. 1996) (permanently enjoining several activities including organized prayer in elementary classrooms prior to lunch, student-initiated prayers broadcast over the high school's intercom, and Bible study classes designed to instill religious beliefs).

145. See *Chandler*, 958 F. Supp. at 1567-68.

146. See *id.*; see also *Committee for Voluntary Prayer v. Wimberly*, 704 A.2d 1199 (D.C. 1997) (upholding preelection review of voluntary school prayer proposal and finding the

and barred school officials in Dekalb County, Alabama from supporting unconstitutional religious activities in public schools, such as student-initiated devotionals in classrooms, athletic events, and student assemblies. In 1998, Alabama Governor James asked the Supreme Court to bypass the Eleventh Circuit Court of Appeals and lift the injunction, but the high court declined to do so.<sup>147</sup> However, in 1999 the Eleventh Circuit Court of Appeals instructed the lower court to lift the part of the injunction that prohibited purely private religious speech. The appeals court declared: "The suppression of student-initiated religious speech is neither necessary to, nor does it achieve, constitutional neutrality towards religion. For that reason, the Constitution does not permit its suppression."<sup>148</sup>

Courts can avoid the difficult task of specifying whether Free Speech Clause protectious or Establishment Clause restrictions should prevail by concluding in a given case that the Establishment Clause is not implicated at all. This strategy seems to be gaining popularity among federal courts, and it allows them to narrow the reach of the Establishment Clause without an overt ruling to that effect.

To illustrate, in 1992 the Seventh Circuit Court of Appeals found that the Establishment Clause was not impaired by an Illinois law requiring the daily recitation of the Pledge of Allegiance to the American flag in public schools.<sup>149</sup> The court reasoned that the phrase "Under God" in the Pledge did not change this patriotic observance into a prayer, so the daily recitation of the Pledge did not abridge the Establishment Clause.<sup>150</sup> The appellate court concluded that in this observance, the "'ceremonial deism[]' . . . [has] lost through rote repetition any significant religious content."<sup>151</sup> Whether the court meant to limit this justification to observances that are patriotic or at least primarily secular in nature was not clear. In its broadest interpretation, "ceremonial deism" might be used to justify the daily recital of other religious materials used in a rote manner in public schools.<sup>152</sup>

More recently, the Eleventh Circuit Court of Appeals found no Establishment Clause violation in a Georgia law that requires a moment for silent reflection at the

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initiative improper for the ballot because it violates the Establishment Clause).

147. See *In re James*, 524 U.S. 936 (1998).

148. *Chandler v. James*, 180 F.3d 1254, 1261 (11th Cir. 1999).

149. See *Sherman v. Community Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992).

150. *Id.* at 445. The court interpreted the law in question as requiring "willing" students to participate; students offended by the reference to the deity would not have to say the Pledge. *Id.* at 442.

151. *Id.* at 447 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984)) (second alteration in original). Courts have also rejected Establishment Clause challenges to religious holiday observances and the inclusion of religious holidays on school calendars. See *Florey v. Sioux Falls Sch. Dist.*, 49-5, 619 F.2d 1311 (8th Cir. 1980) (upholding the prudent and objective observance of Christmas by singing religious carols and temporarily displaying the nativity scene); *Clever v. Cherry Hill Township Bd. of Educ.*, 838 F. Supp. 929 (D.N.J. 1993) (upholding the inclusion of religious holidays on school district calendars to broaden students' sensitivity toward religious diversity).

152. But it seems unlikely that federal courts will accept this argument and treat material with a clear religious purpose, such as prayers over the school intercom, like a patriotic observance that includes a single religious reference.



beginning of the school day in all classrooms.<sup>153</sup> After a teacher was terminated for refusing to obey the law, the court rejected the teacher's challenge to the constitutionality of the provision. The court distinguished the Georgia statute from an earlier Alabama law, authorizing a moment for silent meditation or prayer in public schools, that was struck down by the Supreme Court in 1985.<sup>154</sup> The Court had found a religious purpose in the legislature's decision to amend the Alabama law by adding the phrase "or prayer" to a provision that already authorized silent meditation.<sup>155</sup> In contrast, the Georgia law was amended in the opposite direction in that its authorization of silent prayer was removed. The amended Georgia law calls for a period not to exceed one minute at the beginning of each school day for quiet reflection and specifies that the minute is not to be a religious observance (although students, of course, can choose to pray silently).<sup>156</sup> The most controversial part of the amended Georgia law is the section stipulating that nothing in the law will be construed to interfere with permissible voluntary student devotional activities.<sup>157</sup> This was challenged as authorizing voluntary prayer, but the court reasoned that it actually authorizes nothing. The appeals court held that this provision simply stipulates that other parts of the law should not be interpreted as prohibiting such voluntary prayer.<sup>158</sup>

Other states are considering measures that test the limits of Establishment Clause prohibitions in public schools. Most of the provisions focus on student-initiated religious activities, which advocates contend are beyond the reach of the Establishment Clause. As noted previously, ultimate resolution of the constitutionality of such student-initiated devotionals could have a profound impact on public school practices.

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153. *See Bown v. Gwinnett County Sch. Dist.*, 112 F.3d 1464 (11th Cir. 1997).

154. *See id.* at 1469-73 (distinguishing the statute at issue in *Wallace v. Jaffree*, 472 U.S. 38 (1985)).

155. *Wallace*, 472 U.S. at 57-59.

156. *See* GA. CODE ANN. § 20-2-1050(a)-(b) (1996).

157. *See id.* § 20-2-1050(c).

158. *See Bown*, 112 F.3d at 1470. Lower courts have rendered mixed opinions regarding the dismissal of public schools for religious holidays. In 1997 a federal district court found no Establishment Clause violation in a Maryland school district's decision to create a public school holiday on the Friday before and the Monday after Easter. Applying the three-part *Lemon* test as well as the endorsement standard, the court reasoned that the intent was to provide a spring break surrounding a highly secularized holiday. *See Koenick v. Felton*, 973 F. Supp. 522, 526-27 (D. Md. 1997). Several years earlier, the Ninth Circuit Court of Appeals upheld a Hawaii law making Good Friday a holiday, noting that as long as a law has a sincere secular purpose, it can satisfy the *Lemon* test, even though its purpose is not entirely secular. *See Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991). In contrast, the Seventh Circuit Court of Appeals concluded that a law recognizing Good Friday as a school holiday conveyed an unconstitutional message that Christianity is favored over other religions; there was no legitimate educational or fiscal justification for the law. *See Metz v. Leininger*, 57 F.3d 618, 623 (7th Cir. 1995).

## III. GOVERNMENT AID TO PAROCHIAL SCHOOLS

Like the judicial trend regarding devotional activities in public education, Establishment Clause litigation pertaining to government aid to religious schools also reflects considerable recent movement away from separationist doctrine. Despite strong language in numerous state constitutions prohibiting support of religion or the use of public funds for private purposes, about three-fourths of the states provide public aid to private (85% parochial) school students. The aid is primarily for transportation services, the loan of textbooks, state-required testing programs, special education for children with disabilities, and counseling services.<sup>159</sup> Some of the most significant Supreme Court decisions interpreting the Establishment Clause have pertained to the use of public funds for students in sectarian schools.

In early cases, the Supreme Court used the child benefit rationale to justify state-aid to nonpublic schools in the form of transportation<sup>160</sup> and loaning of textbooks.<sup>161</sup> The Court concluded that such government assistance primarily benefitted children attending religious schools and not the religious institutions themselves.

*A. From Lemon to Agostini*

In the 1970s, the Supreme Court applied the *Lemon* test in striking down several types of state-aid that directly subsidized religious schools or excessively entangled the state with sectarian affairs because of the monitoring required to ensure that only secular activities were supported. Among the state practices struck down were attempts to aid private schools in terms of teachers' salaries or salary supplements for secular courses,<sup>162</sup> grants for the maintenance and repair of private school facilities,<sup>163</sup> tuition reimbursements to parents of nonpublic school pupils,<sup>164</sup> the

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159. Ironically, most states that provide aid to students in parochial schools (e.g., textbooks, transportation, state testing programs) have state constitutional prohibitions on aid to religious institutions. More than three-fifths of the states specifically prohibit the use of public funds for sectarian purposes. See Christopher L. Markwood, *State Constitutions and State Aid to Sectarian Education*, 22 RELIGION & EDUC. 31-47 (1995).

160. See *Everson v. Board of Educ.*, 330 U.S. 1 (1947); see also *Board of Educ. v. State Bd. of Educ.*, 709 A.2d 510 (Conn. 1998) (holding that provision of transportation to nonpublic school students regardless of whether public schools are in session does not abridge the Establishment Clause or Connecticut Constitution).

161. See *Board of Educ. v. Allen*, 392 U.S. 236 (1968); *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930) (resolved under the Fourteenth Amendment as the First Amendment had not yet been applied to state action).

162. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

163. See *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 774-80 (1973).

164. See *id.* at 780-89.

direct loan of instructional materials and audiovisual equipment to nonpublic schools,<sup>165</sup> the provision of auxiliary programs on private school premises,<sup>166</sup> and state-aid for field trip transportation.<sup>167</sup>

The Court took a strong separationist stance regarding government aid to sectarian schools in two decisions rendered in 1985. In *School District v. Ball*,<sup>168</sup> the Court invalidated a program in which a Michigan school district rented space from forty parochial schools and one independent private school for public school personnel to offer a variety of enrichment and remedial courses to students who were enrolled in the private schools for the remainder of their instruction.<sup>169</sup> The Court concluded that using state-aid to provide instructional services in the parochial school building inescapably has the primary effect of substantially advancing the sectarian enterprise.<sup>170</sup>

The second case, *Aguilar v. Felton*,<sup>171</sup> resulted from more than a decade of litigation involving New York City's use of federal funds to provide services for private school students under Title I of the Elementary and Secondary Education Act of 1965.<sup>172</sup> Title I provides funds for compensatory education programs in school districts with high concentrations of low-income families. To receive these funds, local education agencies must meet certain requirements, including the provision of comparable services for eligible students in private schools. In *Aguilar*, the Supreme Court ruled that the use of publicly funded instructors to teach Title I classes composed exclusively of private school students in private school buildings advanced religion and created excessive government entanglement between church and state.<sup>173</sup>

165. See *Meek v. Pittenger*, 421 U.S. 349, 362-66 (1975).

166. See *Wolman v. Walter*, 433 U.S. 229, 244-48 (1977); *Meek*, 421 U.S. at 367-72.

167. See *Wolman*, 433 U.S. at 252-55.

168. 473 U.S. 373 (1985).

169. See *id.* at 397-98. Also struck down was a community education program offered at the close of the regular school day in classrooms leased from the private schools; virtually all the teachers were otherwise employed by the private schools where the community education classes were taught. See *id.* at 386-87.

170. See *id.* at 393 (citing *Wolman*, 433 U.S. at 250).

171. 473 U.S. 402 (1985).

172. See *id.* at 404 (interpreting the comparability requirement in 20 U.S.C. § 6301 (1994)).

173. The Court has never been asked to assess whether the law itself abridges the Establishment Clause by mandating the use of public funds to provide comparable Title I services for children attending private schools. The Court in *Aguilar* only addressed one method of providing such services. In response to this decision, congressional hearings were held regarding acceptable strategies, such as using federal funds to purchase vans and mobile classrooms (placed near private school property) to provide services for private school students. SUBCOMM. ON ELEMENTARY, SECONDARY, AND VOCATIONAL EDUC. OF THE COMM. ON EDUC. AND LABOR, 99TH CONG., 2D SESS., AFTER *AGUILAR V. FELTON*: CHAPTER 1 SERVICES TO NONPUBLIC SCHOOLCHILDREN (Comm. Print 1986). The resulting expenses would be taken off the top of a state's Title I basic grants before allocating the remainder to serve public and private school pupils. See *id.* at 30. The hearings also discussed a "bypass" provision, whereby federal funds could be distributed directly to private schools rather than through state and local education agencies in states with restrictions on the use of public funds for private purposes. See *id.* at 31. For cases reaching conclusions supportive of the hearing's

A New York school district's attempts to comply with *Aguilar* generated a subsequent Supreme Court decision. The district's initial response to *Aguilar* was to stop providing special education services for Satmar Hasidic children at their religious school and to segregate these children in a separate class within the public school.<sup>174</sup> After this strategy was judicially invalidated as unconstitutionally segregating students along religious lines,<sup>175</sup> the state created a special school district that operated programs only for Satmar children with disabilities. In *Board of Education of Kiryas Joel Village School District v. Grumet*,<sup>176</sup> the Supreme Court concluded in 1994 that the creation of a school district for religious reasons "crosse[d] the line from permissible accommodation to impermissible establishment" of religion.<sup>177</sup> Without mentioning the *Lemon* test, the majority reasoned that by delegating the state's authority over public schools to a group defined by its common religion, the law fused governmental and religious functions.<sup>178</sup> Even though the Court struck down the separate school district for one religious sect, a majority of the Justices also voiced displeasure with the 1985 decision that precipitated creation of the special school district in the first place. Thus, the stage was set to reconsider the *Aguilar* ruling.

Actually, the die was probably cast for the Supreme Court to revisit *Aguilar* the year before when it rendered *Zobrest v. Catalina Foothills School District*,<sup>179</sup> rejecting an Establishment Clause challenge to the use of public funds to provide sign language interpreters for hearing-impaired parochial school students.<sup>180</sup> The

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interpretations, see *Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449 (9th Cir. 1995); *Board of Educ. v. Alexander*, 983 F.2d 745 (7th Cir. 1992); *Barnes v. Cavazos*, 966 F.2d 1056 (6th Cir. 1992); *Pulido v. Cavazos*, 934 F.2d 912 (8th Cir. 1991).

174. Satmar Hasidism is a strict form of Judaism, and its followers believe that their children cannot be educated with non-Satmars.

175. See *Parents Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235 (2d Cir. 1986) (upholding a preliminary injunction halting separate instruction).

176. 512 U.S. 687 (1994).

177. *Id.* at 710. The state responded to the Supreme Court's ruling with legislation allowing separate school districts to be formed in communities with specified characteristics. While couched as having general application, only a few villages fit the criteria, and the law was struck down. See *Grumet v. Cuomo*, 647 N.Y.S.2d 565 (N.Y. App. Div. 1996) (finding that the law had the nonneutral effect of allowing one religious group, but not others, to create its own school district), *rev'g* 625 N.Y.S.2d 1000 (Sup. Ct. 1995), *aff'd*, 659 N.Y.S.2d 173 (N.Y. 1997) (*Kiryas Joel II*). The legislature attempted again to design a religion-neutral law by including certain changes to broaden its application, but the revised law again was found to abridge the Establishment Clause. See *Grumet v. Pataki*, 675 N.Y.S.2d 662 (N.Y. App. Div. 1998), *aff'd*, No. 38, 1999 N.Y. LEXIS 1144 (N.Y. May 11, 1999), *cert. denied*, 1999 WL 373211 (U.S. Oct. 12, 1999). Of course, given the holding in *Agostini*, the original reason for creating the separate school district has been eliminated.

178. See *Kiryas Joel*, 512 U.S. at 702.

179. 509 U.S. 1 (1993).

180. See *id.* at 8-14. Actually, the Court was exhibiting such accommodation tendencies prior to *Zobrest*. In 1988, the Court upheld the Adolescent Family Life Act, 42 U.S.C. § 300z (1994), in *Bowen v. Kendrick*, 487 U.S. 589 (1988). This federal law, adopted in 1981, provides grants to public and nonprofit organizations for services and research in the area of premarital adolescent sexual relations and pregnancy. Among activities that may be funded

Court concluded that the child is the primary beneficiary and the school receives only an incidental benefit, because the aid reaches the child as part of a general government program that distributes benefits neutrally to qualifying children. Disavowing the notion that the Establishment Clause lays down an “absolute bar to the placing of a public employee in a sectarian school,” the Court reasoned that unlike a teacher or counselor, an interpreter merely conveys material that is presented and neither adds to nor subtracts from the sectarian school’s environment.<sup>181</sup>

As discussed previously, the Supreme Court also espoused a relaxed interpretation of the Establishment Clause in the 1995 *Rosenberger* higher education decision, in

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are counseling and educational services, and grantees cannot promote abortions. The Court reasoned that although some grantees had institutional ties to religious organizations, on its face the law satisfied all prongs of the *Lemon* test. The case was remanded to ascertain if any specific grantees were “pervasively sectarian,” which might have the effect of advancing religion. *Id.* at 621.

181. *Zobrest*, 509 U.S. at 13. It remains controversial whether school districts *must* provide such services in parochial schools. Conflicting rulings regarding obligations under the Individuals With Disabilities Education Act (“IDEA”) were rendered between 1993 and 1997, but the 1997 IDEA Amendments, 20 U.S.C. § 1412(a)(10)(C)(i) (Supp. III 1997), stipulate that if a child’s parents select a private school, the local education agency is not required to pay educational costs, including special education and related services, other than a proportionate share of the federal funds allocated for the state’s children with disabilities. *See, e.g.,* *Foley v. Special Sch. Dist.*, 153 F.3d 863 (8th Cir. 1998) (holding that a disabled child voluntarily attending a private school had no right to special education services as long as a free appropriate public education had been made available for the child); *Cefalu v. East Baton Rouge Parish Sch. Bd.*, 117 F.3d 231 (5th Cir. 1997) (finding that the school board was not required to provide a sign language interpreter to a student attending a private school after the student was offered a free appropriate education at the public school); *Russman v. Sobol*, 85 F.3d 1050 (2d Cir. 1996), *vacated and remanded*, 519 U.S. 1106 (1997) (ordering reconsideration in light of the IDEA Amendments), *rev’d and remanded*, 150 F.3d 219 (2d Cir. 1997) (holding that a local education agency was not required to provide on-site special education services for a child whose parents voluntarily enrolled her in a private school). But state law still could obligate local school districts to provide services to children voluntarily attending private schools. *See, e.g.,* *Fowler v. Unified Sch. Dist. No. 259*, 107 F.3d 797 (10th Cir. 1997), *vacated and remanded*, 521 U.S. 1115 (1997) (ordering reconsideration in light of the IDEA Amendments), *on remand*, 128 F.3d 1431 (10th Cir. 1997) (holding that under Kansas law, the school district must support a sign language interpreter for a child voluntarily attending a parochial school as long as the cost does not exceed the average cost of providing the same service to hearing-impaired students in public schools). Lower courts have not yet supported a First Amendment entitlement for such services to be provided in religious schools to respect the free exercise rights of children with disabilities, and the Supreme Court has not addressed this issue. *See* *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998) (holding that the Free Exercise Clause prohibits religious discrimination in the government’s provision of services in private schools, but noting the judicial hesitancy to rule that private school students have a constitutional entitlement to the same benefits as public school students); *K.R. v. Anderson Community Sch. Corp.*, 125 F.3d 1017 (7th Cir. 1997) (finding no First Amendment violation in a school’s provision of related services at a public site for a child attending a parochial school; the child was not constitutionally entitled to public support for an instructional assistant at the private school), *cert. denied*, 118 S. Ct. 1360 (1998).

which the clash between Establishment Clause prohibitions on governmental support of religious activities and Free Speech Clause prohibitions on viewpoint discrimination was resolved in favor of free speech guarantees.<sup>182</sup> Although the Supreme Court traditionally has been more receptive to government aid to sectarian institutions of higher education than to parochial elementary and secondary schools,<sup>183</sup> no prior postsecondary decision involved direct support for student-initiated proselytization activities.

In a seminal 1997 ruling, *Agostini v. Felton*,<sup>184</sup> the Supreme Court overruled the separationist decision it had rendered twelve years earlier in *Aguilar*.<sup>185</sup> The Court removed the permanent injunction in New York City that prohibited public school teachers from providing remedial education to disadvantaged children on the premises of parochial schools.<sup>186</sup> The Court majority reasoned that the injunction should be lifted because of significant changes since 1985 in the judicial understanding of criteria to assess whether government aid has the impermissible effect of advancing or inhibiting religion.<sup>187</sup> The Court rejected its prior position that

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182. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (ruling that a state university could not deny a student religious organization access to student activities funds to pay an outside contractor to print its religious publications). Justice Souter, dissenting, asserted that “[u]sing 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.” *Id.* at 868 (Souter, J., dissenting). The dissent asserted that the majority’s rationale could be used to allow public support of churches as long as the aid went directly to the churches’ vendors. *See id.* For a discussion of this case, see *supra* text accompanying note 101.

183. *See, e.g.,* *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (upholding noncategorical grants to private colleges and universities); *Hunt v. McNair*, 413 U.S. 734 (1973) (approving the use of state revenue bonds to finance private college and university construction); *Tilton v. Richardson*, 403 U.S. 672 (1971) (allowing federal grants for private college and university construction); *see also* Martha McCarthy, Annotation, *The Road to Agostini and Beyond*, 124 EDUC. L. REP. 771 (1998).

184. 521 U.S. 203 (1997).

185. *Id.* at 209.

186. *Id.* at 234-35. The Court also overturned the portion of *School Dist. v. Ball*, 473 U.S. 373 (1985), in which it had invalidated the provision of enrichment and remedial instructional services by public school personnel in parochial schools. *See Agostini*, 521 U.S. at 235.

187. *See id.* at 234-35. The lower courts had concluded that *Aguilar* was still good law, thus precluding a decision on the merits of the claim, but the Supreme Court disagreed. Basing its decision on changes in Establishment Clause law, the Court did not justify the relief on any significant modification in factual conditions (recognizing that in 1985 there was evidence of the additional costs associated with providing the Title I services at neutral sites). The Court rejected the argument that *stare decisis* and the “law of the case doctrine” precluded reviewing the permanent injunction issued in *Aguilar*. The Court noted that the *stare decisis* doctrine is not an inflexible command and “does not prevent [the Court] from overruling a previous decision where there has been a significant change in, or subsequent development of our constitutional law.” *Id.* at 235-36. Declaring that *Aguilar* would be decided differently under current Establishment Clause analysis, the Court reasoned that the “law of the case doctrine” (issues decided in earlier stages of the same litigation should not be reopened) does not apply if the Court is convinced that its prior decision was clearly erroneous and would work a manifest injustice. *Id.* at 236. (The Court emphasized, however, that the *criteria* for

public employees placed in parochial schools would create a symbolic union between government and religion, reasoning that the use of government funds to aid the educational function of parochial schools is not always invalid.<sup>188</sup> The Court recognized that Title I aid is allocated on a neutral basis and is available to all children who meet the law's criteria regardless of their religion or where they attend school.<sup>189</sup>

In 1985, the *Aguilar* Court had found that New York City's Title I program entailed excessive government entanglement with religion because of the administrative cooperation required between the school board and parochial schools, the program's potential to increase political divisiveness, and the pervasive monitoring required to ensure that Title I employees would not inculcate religion.<sup>190</sup> In contrast, the Court majority in *Agostini* reasoned that under the current understanding of the Establishment Clause, the first two grounds are insufficient to create excessive entanglement as they are present regardless of where Title I services are offered.<sup>191</sup> Further, the Court held that the third ground has been undermined by *Zobrest* in that the presumption has been abandoned that public employees on parochial school grounds will be tempted to inculcate religion.<sup>192</sup>

The Court held that the provision of Title I services "is indistinguishable from the provision of sign-language interpreters," which was upheld in *Zobrest*.<sup>193</sup> The majority noted that an absolute bar to placing public employees in sectarian schools "smack[s] of antiquated notions of 'taint,'[and] would indeed exalt form over substance."<sup>194</sup> Furthermore, the Court majority found the preoccupation with *locale* to be neither "sensible nor sound."<sup>195</sup> The Court recognized that government aid for remedial services for parochial students does not encourage public school personnel to undertake religious indoctrination, provide an incentive for parents to choose religious schools, define recipients by reference to religion, or create excessive governmental entanglement with religion. Also, such a program cannot be viewed as an endorsement of religion. *Agostini* appears to be a major departure from prior

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assessing Establishment Clause claims had changed and not the general *principle* that government action with the primary effect of advancing religion is impermissible. *See id.* at 222-23.) Dissenting, Justice Ginsburg argued that the Court's rules did not permit it to rehear *Aguilar* and that the Court should have waited for the appeal of a more appropriate case. She declared that "nothing can disguise the reality that until today, *Aguilar* had not been overruled. Good or bad, it was in fact the law." *Id.* at 259 (Ginsburg, J., dissenting).

188. *See id.* at 223-25, 227.

189. *See id.* at 228, 231-32.

190. *Aguilar v. Felton*, 473 U.S. 402 (1985). The Court's emphasis on the *Lemon* test in *Agostini* was primarily to refute the reasoning used in *Aguilar*. *See supra* text accompanying note 44.

191. *Agostini*, 521 U.S. at 223-24.

192. *See id.*

193. *Id.* at 228.

194. *Id.* at 223-24 (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13 (1993)).

195. *Id.* at 227-28. For a discussion of why the focus on *locale* is misplaced and obscures the more important issue of the law's effect, see McCarthy, *supra* note 183, at 780-81.

Establishment Clause rulings, but the Court majority emphasized that it was the *Zobrest* decision rendered four years before, rather than *Agostini*, that created new law.<sup>196</sup>

*B. Implications of Doctrine Changes for State-Aid to Sectarian Schools*

It appears that in the 1990s the Supreme Court is reviving and perhaps expanding the "child benefit" rationale to uphold government aid to sectarian schools. As noted previously, this justification traditionally was used to condone state-aid for transportation services and the loan of textbooks to sectarian school students, because the children rather than religious institutions were the primary beneficiaries.<sup>197</sup> Relying in part on the child-benefit notion, the Supreme Court concluded that other types of aid for nonpublic school students also are constitutionally permissible, such as loaning reusable workbooks and manuals to private schools, providing diagnostic services in nonpublic schools,<sup>198</sup> and reimbursing private schools for the costs of record-keeping and testing services mandated by the state.<sup>199</sup> However, throughout the 1980s the child-benefit justification was not prevalent in Establishment Clause cases.

Now, a refurbished child benefit doctrine seems to be gaining favor again. In *Zobrest* and *Agostini* the Court expanded the child benefit rationale to encompass public school personnel providing secular remedial and related services to children in sectarian schools.<sup>200</sup> Thus, a free speech claim is not necessary for the judiciary to abandon separationist doctrine. The Supreme Court seems more inclined to uphold various types of government assistance to parochial schools than was true a quarter

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196. *Agostini*, 521 U.S. at 225. The majority did not address the distinction drawn in *Zobrest* between an interpreter, who serves only as a conduit for instruction, and a teacher who delivers the content. See *Zobrest*, 509 U.S. at 13.

197. See *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (textbooks); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (transportation). The Court's interpretation of the Establishment Clause as allowing public aid for such purposes does not place any obligation on states to provide transportation or textbooks for sectarian school students. Indeed, the California Supreme Court called the child-benefit doctrine "logically indefensible" in striking down a state law that provided for the loan of textbooks to nonpublic school students. *California Teachers' Ass'n v. Riles*, 632 P.2d 953, 962 (Cal. 1981); see also MCCARTHY, *supra* note 64, at 61-62. Even if these types of aid do not violate state law, school districts are not obligated to provide such assistance unless mandated to do so by the legislature. See *State ex. rel. Cooper v. Board of Educ.*, 478 S.E.2d 341 (W. Va. 1996) (holding that county school boards may provide transportation services for parochial school students, but they are not required to do so; terminating such services in light of extreme financial difficulties is not arbitrary or capricious).

198. See *Wolman v. Walter*, 433 U.S. 229 (1977); see also *Meek v. Pittenger*, 421 U.S. 349 (1975).

199. *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980). The Court distinguished this decision from its 1973 ruling in which it struck down a New York law that provided state-aid for teacher-developed tests as well as standardized tests. See *id.* at 653; see also *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973).

200. See *supra* text accompanying notes 179, 184.



of a century ago. In light of *Zobrest* and *Agostini*, states are likely to enact laws that provide additional public financial assistance to religious school students and to probe how far they can go using the child-benefit justification.

Also, states increasingly are allowing aid to flow to religious schools through charter school legislation, and several are considering or implementing voucher programs under which parents can use state-funded vouchers in parochial schools.<sup>201</sup> Already, parents are asserting that their free exercise rights to select private schooling for their children entitle them to special services (e.g., Title I remediation, special education) funded by the government in those schools,<sup>202</sup> and perhaps they will even contend that the government should support all secular instruction provided in religious schools.<sup>203</sup>

Reflecting the Supreme Court's more relaxed interpretation of the Establishment Clause, several federal appellate courts have rendered decisions that allow more government involvement with religion. In a significant decision pressing the limits of permissible accommodations under the Establishment Clause, the Eighth Circuit Court of Appeals held that a rural Minnesota school district could respond to the Brethren sect's request to reopen a one-class school and modify its instructional program (e.g., eliminating use of technology).<sup>204</sup> Finding that the practice satisfied the three-part *Lemon* test as well as the endorsement test, the appellate court reasoned that the decision to reopen the school was based on several secular purposes including efficient space utilization, reduction of transportation costs, and provision of an additional instructional option (i.e., a multi-age classroom).<sup>205</sup> Thus, the religious motivation for the action did not constitute an Establishment Clause violation as long as the separate school could be justified by a secular purpose. The court distinguished this school, that was open to non-Brethren students (although none elected to attend), from the special school district in *Kiryas Joel*, where the Satmar students were segregated and taught primarily in Yiddish.<sup>206</sup> In the Minnesota case, the court declared that the challenged action "is well within the boundaries" of acceptable "government programs that neutrally provide benefits to

201. Since 1991 three-fourths of the states have enacted laws authorizing charter schools that operate outside many state regulations on the basis of a charter granted by the state or local board of education or other entities. In most states, charters can be granted to existing public or private schools or to groups starting new schools. See Mark Buechler, *Out On Their Own*, 5 *TECHNOS*, Fall 1996, at 30, 30-32; *Charters: Laws Passed As Unionization Plan Defeated*, *SCH. L. NEWS*, June 11, 1999, at 4; Frank Kemerer, Annotation, *State Constitutions and School Vouchers*, 120 *EDUC. L. REP.* 1 (1997); see also *infra* text accompanying notes 213-236, for a discussion of voucher programs.

202. See *supra* note 181.

203. See McCarthy, *supra* note 183; see also *infra* text accompanying note 259.

204. See *Stark v. Independent Sch. Dist. No. 640*, 123 F.3d 1068 (8th Cir. 1997), *rev'g* 938 F. Supp. 544 (D. Minn. 1996), *cert. denied*, 523 U.S. 1094 (1998); see also *supra* text accompanying notes 88, 94, 149, 153 (discussing other federal appellate decisions espousing a relaxed interpretation of the Establishment Clause).

205. See *Stark*, 123 F.3d at 1073.

206. See *id.* at 1075-77 (noting differences in *Board of Educ. v. Grumet*, 512 U.S. 687 (1994)).

a broad class of citizens defined without reference to religion.”<sup>207</sup> The court suggested that requests from other religious sects would be similarly accommodated, causing Ralph Mawdsley to observe that “[i]f the Establishment Clause now means only that government must treat all religions in an evenhanded manner, we have come a long way from the days when public life was to be largely sanitized from religious influences.”<sup>208</sup>

In 1998, the Fifth Circuit Court of Appeals applied what it called the “post-*Agostini Lemon* test” with a secular purpose requirement plus a “re-tooled effects prong” that asks if the aid: (1) results in governmental indoctrination, (2) defines its recipients by reference to religion, or (3) creates excessive entanglement.<sup>209</sup> The central challenge in *Helms v. Picard* focused on a Louisiana statute requiring school districts to provide free, appropriate, publicly supported education to every exceptional child in residence (including those attending parochial schools). Upholding this law, the court reasoned that the statute does not confer benefits based on the children’s religion and does not provide an incentive for parents to send their children to religious schools.<sup>210</sup>

However, the appeals court in *Helms* struck down direct aid to sectarian schools in the form of block grants for instructional materials and equipment under a provision of the Elementary and Secondary Education Act and comparable state legislation.<sup>211</sup> This conflicts with a ruling of the Ninth Circuit Court of Appeals in which the appellate court concluded that the state’s loaning of secular equipment and instructional materials to parochial schools does not abridge the Establishment Clause.<sup>212</sup> The Supreme Court is expected to resolve the conflict between these federal appellate courts when it reviews the *Helms* case as it has agreed to do.

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207. *Id.* at 1076 (quoting *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993)). The court of appeals in part relied on Minnesota’s law requiring public school districts to establish procedures that allow parents to review the content of instructional materials provided to their children, and if parents object, to make reasonable arrangements for alternative instruction. See MINN. STAT. ANN. § 120B.20 (West Supp. 1998) (formerly MINN. STAT. ANN. § 126.699 (West 1998)). The law specifically authorizes religious exemptions and the provision of alternative activities where the objectionable class or activity is part of the required curriculum. See *id.* The court further found that the Minnesota Constitution, which contains more restrictive limitations than those imposed by the First Amendment, was also satisfied. See *Stark*, 123 F.3d at 1077.

208. Mawdsley, *supra* note 92, at 519.

209. *Helms v. Picard*, 151 F.3d 347, 362 (5th Cir. 1998) (referring to *Agostini v. Felton*, 521 U.S. 203 (1997)), *cert. granted sub nom.* *Mitchell v. Helms*, 119 S.Ct. 2336 (1999); see *supra* text accompanying note 184.

210. See *Helms*, 151 F.3d at 363.

211. *Id.* at 367. At issue in this part of the case were Chapter 2 (current version at Subchapter VI) of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 7301-7373 (1994), and LA. REV. STAT. ANN. §§ 17:351 to 52 (West 1982 & Supp. 1998). The court relied on earlier Supreme Court decisions striking down such aid under the Establishment Clause, *Wolman v. Walter*, 433 U.S. 229 (1977), and *Meek v. Pittenger*, 421 U.S. 349 (1975), rejecting the contention that these decisions were no longer good law.

212. See *Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449, 1465 (9th Cir. 1995) (reasoning that the “loaning of neutral, secular equipment[,] and instructional materials to parochial schools does not have the primary or principal effect of advancing religion”).

There is some sentiment that *Zobrest* and *Agostini* will be used to uphold voucher systems under which parents can use state-funded vouchers to enroll their children in public or private schools. Proposals to fund education through vouchers have been introduced in Congress and about half of the state legislatures. Florida recently adopted a statewide voucher plan that includes religious schools.<sup>213</sup> Under the Florida program, students attending public schools that are rated as deficient (based on test scores, attendance, graduation rates, and other factors) are entitled to state vouchers that can be used in qualified public or private schools of their choice.

Questions have been raised about involvement of religious schools in such voucher programs, but proponents are encouraged by recent Supreme Court decisions. The *Zobrest* majority emphasized that the government aid in the form of a sign language interpreter flowed to the sectarian school “only as a result of the private decisions of individual parents.”<sup>214</sup> Citing *Zobrest* with approval, the *Agostini* majority recognized that Title I benefits are neutrally distributed to eligible children irrespective of the schools their parents have chosen for them to attend.<sup>215</sup> A voucher proposal might also be viewed as religiously neutral legislation that allows state-aid to religious schools only through parental—not governmental—choices.

Even prior to these recent decisions, the Supreme Court hinted that government aid benefitting public and private school patrons based on individual choices would survive an Establishment Clause challenge. Some support, for example, can be gleaned from the Supreme Court’s 1983 decision upholding a Minnesota tax-benefit program allowing parents of public or private school students to claim a limited state income tax deduction for educational expenses incurred for each elementary or secondary school dependent. The Court majority in *Mueller v. Allen*<sup>216</sup> found the Minnesota law “vitaly different” from an earlier New York provision that bestowed benefits *only* on private school patrons in violation of the Establishment Clause.<sup>217</sup> The majority declared that Minnesota’s “decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable.”<sup>218</sup> The majority opined that such state assistance to public and nonpublic schools alike flows to religious institutions indirectly through parents and differs significantly from the direct transmission of public funds to parochial schools.<sup>219</sup>

213. See Jessica L. Sandham, *Florida OKs 1st Statewide Voucher Plan*, EDUC. WK., May 5, 1999, at 1. Eric Hirsch of the National Conference of State Legislatures asserted that, in addition to Florida, Pennsylvania, and Texas ““seem to have the right political context”” for statewide vouchers for targeted populations to become realities. Jessica L. Sandham, *Vouchers Front and Center in Fla. Legislature*, EDUC. WK., Mar. 24, 1999, at 17.

214. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993); see also *supra* text accompanying note 179.

215. *Agostini v. Felton*, 521 U.S. 203, 232 (1997); see also *supra* text accompanying note 184.

216. 463 U.S. 388 (1983).

217. *Id.* at 390-91 (contrasting *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)).

218. *Id.* at 395.

219. See *id.*

In 1986, a unanimous Supreme Court held that an individual with a visual impairment could receive vocational rehabilitation aid to use for ministerial education.<sup>220</sup> The Court ruled that since the aid went directly to the individual, who then transmitted the funds to the educational institution of his choice, there was no advancement of sectarian education.<sup>221</sup> Possibly, the Court will use this justification to uphold state voucher proposals at the precollegiate level.

To date, however, the few school choice plans that include sectarian schools have generated mixed lower court rulings. The Wisconsin Supreme Court deadlocked in 1996 on the constitutionality of an expansion of Milwaukee's limited voucher plan for disadvantaged students to include religious schools.<sup>222</sup> After a state appeals court affirmed the lower court's ruling that the amended plan violated the state's constitutional prohibition on using state funds to benefit religious institutions, the Wisconsin Supreme Court again reviewed the case, this time upholding the inclusion of parochial schools in the publicly funded voucher program.<sup>223</sup> The court reasoned that the state assistance program was lawful as it provided aid to both secular and sectarian institutions based on neutral criteria and only as a result of private choices.<sup>224</sup>

The Ohio Supreme Court subsequently invalidated a pilot voucher program including parochial schools in Cleveland because it was attached to the state appropriations bill instead of enacted as a separate provision with its own allocation.<sup>225</sup> However, the state high court rejected the appeals court's conclusion that the program provided direct and substantial government aid to sectarian schools in violation of the Establishment Clause.<sup>226</sup> The state appellate court had found that the program's primary effect was to advance religion, noting that no public schools participated in the scholarship program, but the Ohio Supreme Court disagreed.

The Ohio legislature subsequently enacted a law reinstating the voucher program, but this time it was included in the education budget to remedy the technical defect

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220. See *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986). However, on remand, the state supreme court held that the Washington Constitution prohibited such aid that flows to religious institutions. See *Witters v. Washington Comm'n for the Blind*, 771 P.2d 1119, 1121-22 (Wash. 1989).

221. See *Witters*, 474 U.S. at 487-89.

222. See *State ex. rel. Thompson v. Jackson*, 546 N.W.2d 140, 142 (Wis. 1996) (per curiam) (Bradley, J., did not participate). Previously, the Wisconsin Supreme Court had upheld legislation providing vouchers of \$2500 to enable up to 1000 disadvantaged students in Milwaukee to attend *nonsectarian* private schools. See *Davis v. Grover*, 480 N.W.2d 460 (Wis. 1992). See also *Miller v. Benson*, 68 F.3d 163, 165 (7th Cir. 1995) (per curiam) (noting that legislative repeal of "nonsectarian" language from the statute mooted the students' free exercise challenge to the law's exclusion of religious schools).

223. See *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), *rev'g* 570 N.W.2d 407 (Wis. App. 1997), *cert. denied*, 119 S. Ct. 466 (1998); see also *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) (upholding an Arizona law allowing a state tax credit of up to \$500 for donations to "school tuition organizations" for scholarships to enable students to attend private schools), *cert. denied*, 1999 U.S. LEXIS 6553 (Oct. 4, 1999).

224. See *Jackson*, 578 N.W.2d at 604.

225. See *Simmons-Harris v. Goff*, 711 N.E.2d 203, 214-16 (Ohio 1999).

226. See *id.* at 207-12.

of the earlier provision that was in the budget package covering all state functions.<sup>227</sup> This measure was immediately challenged in federal court as advancing religion. The federal district court imposed a preliminary injunction, noting the plaintiffs' likely success on the merits of their Establishment Clause claim, but three days later granted a partial stay for one semester because of the education disruption for students already enrolled in parochial schools under the pilot program.<sup>228</sup>

In contrast to the Ohio and Wisconsin Supreme Courts, the First Circuit Court of Appeals reflected a separationist stance in 1999 when it upheld Maine legislation that excluded religious schools from a program allowing local school districts without secondary schools to reimburse parents a specified amount for high school tuition in nonsectarian schools.<sup>229</sup> Parents unsuccessfully asserted that they should be able to use the tuition funds at parochial schools. The court of appeals found that the differential treatment of sectarian schools did not abridge the Establishment, Free Exercise, Equal Protection, or Due Process Clauses.<sup>230</sup> Furthermore, the court indicated that inclusion of religious schools in the state-aid program would constitute direct support of sectarian education in violation of the Establishment Clause.<sup>231</sup> A few years earlier, the Puerto Rico Supreme Court struck down a voucher program allowing government funds to flow to religious schools, reasoning that the program conflicted with Puerto Rico's constitutional ban on the use of public funds to support private education.<sup>232</sup>

The legality of vouchers also remains controversial in Vermont. As in several other New England states, informal voucher programs have operated in Vermont for years in towns that cannot support their own high schools. The town provides funds equal to tuition at a public high school for students to attend a public or private school of their choice outside the town. In 1961, the Vermont Supreme Court held that it was unconstitutional for the South Burlington Town School District to pay tuition for its students to attend sectarian schools.<sup>233</sup> More recently, the state high court reached an opposite conclusion, reasoning that the Establishment Clause allows a Vermont town that does not operate a high school to reimburse a parent for tuition paid to an out-of-state sectarian school.<sup>234</sup> The court found only an indirect and incidental benefit to sectarian schools as the town simply reimburses parents and no funds flow directly to religious institutions. But in 1999, the Vermont Supreme Court used state grounds to strike down a school district's policy of allowing tuition

227. See H.R. 117, 121st Leg., Reg. Sess. (Ohio 1995).

228. See *Simmons-Harris v. Zelman*, 54 F. Supp. 2d 725 (N.D. Ohio 1999).

229. See *Strout v. Albanese*, 178 F.3d 57, 66 (1st Cir.), *cert. denied*, 1999 U.S. LEXIS 6618 (Oct. 12, 1999); see also *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 147 (Me.) (rejecting challenges under the Free Exercise, Establishment, and Equal Protection Clauses to the exclusion of sectarian schools and finding that if religious schools were included in the tuition reimbursement program, they would receive a direct government benefit in violation of the Establishment Clause), *cert. denied*, 1999 U.S. LEXIS 6845 (Oct. 12, 1999).

230. See *Strout*, 178 F.3d at 60-66.

231. See *id.* at 62-64.

232. See *Asociacion de Maestros v. Torres*, No. AC-94-371, AC-94-326, 1994 WL 780744, at \*9-\*12 (P.R. Nov. 30, 1994).

233. See *Swart v. South Burlington Town Sch. Dist.*, 167 A.2d 514, 517-20 (Vt. 1961).

234. See *Campbell v. Manchester Bd. of Sch. Dirs.*, 641 A.2d 352, 356-61 (Vt. 1994).

payments for parents to send their children to pervasively sectarian high schools.<sup>235</sup> Whereas the lower court had found an Establishment Clause violation, the state's high court concluded that the practice abridged the state constitutional prohibition against compelling citizens to support religious worship.<sup>236</sup>

Given the number of states currently considering some type of voucher proposal and the range of lower court decisions, it is probable that the Supreme Court eventually will address the constitutionality of such plans. In light of its recent Establishment Clause rulings, the Court may be more supportive of aid that flows to individual families through vouchers and is designed to encourage educational choice than it has been toward aid that directly supports student services in parochial schools.

#### IV. A KINDER, MORE GENTLE ESTABLISHMENT CLAUSE

The more lenient judicial interpretation of the Establishment Clause is not likely to result in adoption of a single standard to replace the *Lemon* test.<sup>237</sup> As noted in this Article's introduction, the Supreme Court appears leery about using a rigid standard that must be applied under all circumstances, preferring to select among various criteria in evaluating Establishment Clause claims on a case-by-case basis. But whether the Court employs a new standard or multiple criteria (including the *Lemon* test under certain circumstances) may be somewhat academic. Regardless of the label given to the Court's assessment of Establishment Clause disputes, there has been an ideological shift in the Court's reasoning. The Court seems increasingly accommodationist, that is, inclined to condone more governmental consideration of or involvement with religion than it was in the 1960s and 1970s. This represents a significant change in Establishment Clause jurisprudence involving schools, irrespective of whether a new test emerges. In short, litigation addressed in this Article reveals that the Supreme Court is interpreting the Establishment Clause as posing fewer constraints on religious activities in public schools and government aid to parochial schools than it was assumed to do several decades ago.

The recent expansion of permissible governmental accommodations toward religion under the Establishment Clause has far more significant implications for church/state relations in schools than does the scope of religious accommodations allowed, or perhaps even demanded, by the Free Exercise Clause, where the accommodation concept originated.<sup>238</sup> Accommodations to respect free exercise rights in public education (e.g., exemptions from specific school observances, activities, and assignments) affect only the individuals treated differently, and

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235. See *Chittenden Town Sch. Dist. v. Vermont Dep't of Educ.*, No. 97-275, 1999 Vt. LEXIS 98, at \*1 (Vt. 1999).

236. See *Chittenden Town Sch. Dist.*, 1999 Vt. LEXIS 98, at \*1.

237. See *supra* text accompanying notes 39-53.

238. In the classic Free Exercise Clause decision involving education, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Supreme Court found no compelling justification for requiring Amish children to attend school beyond eighth grade in violation of their religious tenets. Acknowledging the structured vocational program for Amish teenagers, the Court reasoned that the state's interest in ensuring an educated citizenry was satisfied by formal schooling through eighth grade. See *id.* at 225-29.

secular school programs or activities are not altered.<sup>239</sup> The stakes are higher with accommodations permitted under the Establishment Clause. For example, accommodations in terms of student-initiated devotionals in a public school touch the entire student body. Moreover, accommodations that encourage parents to select parochial schools for their children (e.g., voucher plans) potentially affect *all* students.

The contention that the Establishment Clause allows governmental accommodations is not actually new. In *Zorach v. Clauson*,<sup>240</sup> rendered in 1952, the Supreme Court held that public schools do not violate the Establishment Clause by allowing the release of students for religious instruction provided off public school grounds during the school day.<sup>241</sup> Writing for the majority, Justice Douglas asserted that “[w]hen 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.”<sup>242</sup>

But the Court espoused separationist doctrine and tended to be protective of Establishment Clause restrictions through the mid-1980s in school cases, even though it still was not giving clear guidance as to the line of demarcation between legitimate accommodations and unconstitutional establishments.<sup>243</sup> Some strict separationists have argued that the government’s decision to accommodate at all rejects separationism, and that *any* religious accommodation, such as the government conferring tax benefits on religious organizations or allowing religious groups to distribute materials in public schools, promotes religion over nonreligion.<sup>244</sup> They maintain that the size of the accommodation is irrelevant,

239. Courts traditionally held that the Free Exercise Clause demands some religious exemptions from government policies, but this was tempered in 1990 when the Supreme Court ruled that criminal laws of general applicability apply to all citizens regardless of an incidental burden on the exercise of religious beliefs. *See Employment Div. v. Smith*, 494 U.S. 872, 876-82 (1990). Thus, no compelling governmental interest is required to defend a criminal law that incidentally burdens religious practices. Congress attempted to resurrect the compelling interest requirement by enacting the Religious Freedom Restoration Act in 1993, 42 U.S.C. § 2000bb (1994), which stipulated that government agencies may not substantially burden a person’s religious exercise: (1) without a compelling justification and (2) if less restrictive means are available to advance the governmental interest. The Supreme Court struck down this law in 1997 as exceeding congressional authority by intruding into the states’ reserved powers and into the federal judiciary’s authority to interpret the U.S. Constitution. *See City of Boerne v. Flores*, 521 U.S. 507, 529-36 (1997).

240. 343 U.S. 306 (1952).

241. *Id.* at 315; David J. Felsen, *Developments in Approaches to Establishment Clause Analysis: Consistency for the Future*, 38 AM. U. L. REV. 395, 402 (1989).

242. *Zorach*, 343 U.S. at 313-14. The Court recognized that the government must not advance religion, but also must not be hostile toward religion. *See id.*

243. Steven Gey has asserted that the Supreme Court has followed a “meandering path” since *Zorach* in addressing accommodations under the Establishment Clause. Gey, *supra* note 5, at 96.

244. *See id.* at 82 n.25; *see also Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606, 1639-41 (1987); Rezai, *supra* note 10, at 516.

because even the smallest breach undermines the Establishment Clause; nominal accommodations will lead to larger ones, eventually leaving the Establishment Clause impotent.<sup>245</sup>

Cases addressed in this Article provide evidence that the separationist view does not prevail today in connection with devotional activities in public schools and government aid to religious schools. Increasingly, courts are taking an accommodationist stance, reasoning that incidental government benefits that flow to religious groups do not nullify the legitimacy of accommodations, as long as religious and secular groups are treated in an evenhanded manner and individuals are not induced to adopt the beliefs accommodated.<sup>246</sup> Justice O'Connor stated for the Supreme Court majority in 1997 that governmental aid is not likely to have the effect of advancing religion if it is "allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."<sup>247</sup> Under this conception, a program of general application that provides benefits to broad classes without reference to religion (e.g., allowing all noncurriculum student groups to meet during noninstructional time or providing state support for remedial services for all eligible students regardless of where they attend school) would not abridge the Establishment Clause.<sup>248</sup>

This nondiscrimination notion embodied in equal access for and equal treatment of religious groups and speech, discussed throughout this Article, provides a central justification for the accommodationist judicial posture. Daniel Conkle has asserted that the prohibition of classifications that benefit or burden religion, labeled "formal neutrality" by Douglas Laycock,<sup>249</sup> currently is "the dominant theme under both the Free Exercise and the Establishment Clauses."<sup>250</sup> While this standard might be viewed as disadvantaging sectarian interests under the Free Exercise Clause by reducing religious accommodations, it advantages religion under the Establishment

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245. See, e.g., Rezai, *supra* note 10, at 508.

246. See Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 700 (1992). He contends that the distinction between a permissible accommodation and prohibited establishment "is that the former merely removes obstacles to the exercise of a religious conviction adopted for reasons independent of the government's action, while the latter creates an incentive or inducement (in the strong form, a compulsion) to adopt that practice or conviction." *Id.* at 686.

247. *Agostini v. Felton*, 521 U.S. 203, 231 (1997).

248. See Bila, *supra* note 28, at 1549. Some would support a nonpreferentialist position, asserting that the Establishment Clause prohibits only the establishment of a national religion or promotion of one religious ideology over others. See, e.g., Huleatt, *supra* note 11, at 659; Peter J. Weishaar, *School Choice Vouchers and the Establishment Clause*, 58 ALB. L. REV. 543, 545 (1994).

249. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999 (1996).

250. Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 10 (2000). He has further observed that Congress has supported formal neutrality in terms of anti-establishment but has not favored this doctrine in connection with exemptions to respect the free exercise of religion. See *id.* at 6-24, 25.



Clause by expanding evenhanded treatment of sectarian and secular concerns. In essence, programs that have the effect of advancing religion may be upheld as long as religion is not singled out for differential consideration.

The nondiscrimination rationale is particularly powerful if the challenge involves religious expression.<sup>251</sup> Whereas Free Exercise Clause protections traditionally have not prevailed over Establishment Clause restrictions when the two have collided, the Free Speech Clause is a more imposing foe against anti-establishment, given the long history of scrupulous protection of expression rights. For example, it is argued that private expression of religious views, including student-initiated devotionals, not only is permissible in public schools under the Establishment Clause, but also must be allowed to promote pluralism and protect the marketplace of ideas under the Free Speech Clause.<sup>252</sup> Ralph Mawdsley has asserted that "student religious activities in schools that would never have been imaginable 20 years ago are now routine,"<sup>253</sup> and this change is primarily because of the equal treatment of religious expression and the distinction between the government versus a private individual as the speaker.

Although the Establishment Clause seemed to demand differential treatment of religious and other private expression in government forums in the 1960s and 1970s, free speech considerations appear to prohibit such distinctions now. Thus, without so stating, the federal judiciary seems to have adopted a hierarchy of First Amendment rights; Free Speech Clause protections are dominant over Establishment Clause restrictions.<sup>254</sup> Consequently, religious influences in public education seem destined to increase, and public school programs may again reflect the religious preferences of the local community as was prevalent prior to the mid-twentieth century.

In addition to the nondiscrimination model, another key justification for the movement from separation toward religious accommodation in school cases that has been explored in this Article is the legitimacy of *private* choices (in contrast to government mandates) that result in the promotion of religious views and/or benefits to religious institutions. Private decisions to express religious ideology in public schools have been upheld on the rationale that such expression does not represent the government, and the circumstances under which religious expression is considered

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251. See Ralph D. Mawdsley, Commentary, *Agostini v. Felton: Is Establishment of Religion Moving Toward a Nondiscrimination Model?*, 127 EDUC. L. REP. 13, 31 (1998). John Valauri has recognized the conflict between the Establishment Clause requirements of governmental noninvolvement with religion and governmental impartiality toward religion. See Valauri, *supra* note 7, at 98-102. It appears that the notion of impartiality is prevailing today.

252. See *supra* text accompanying note 56.

253. Ralph D. Mawdsley, *Religion in the Schools: Walking a Fine Legal Line*, SCH. BUS. AFF., May 1997, at 5, 5-6.

254. See McCarthy, *supra* note 79; see also *supra* text accompanying notes 56-86. As noted previously, the federal courts can uphold religious practices and skillfully avoid a direct confrontation between the Free Speech and Establishment Clauses by focusing on the speech component of devotional activities rather than on their sectarian nature. See *supra* text accompanying notes 108-132.

"private" are expanding. As discussed, one federal court of appeals even found a religious sect's distribution of Bibles in public schools to be private action that did not bear the public school's stamp of approval.<sup>255</sup>

Also included under the "private actor" rationale is the judicial receptivity toward incidental government aid flowing to religious schools because of private decisions of parents regarding where their children will be educated.<sup>256</sup> The Supreme Court has distinguished aid that is an impermissible "direct subsidy" from a permissible "transfer" similar to a state employee donating part of his or her salary to the church.<sup>257</sup> The revitalized child benefit doctrine coupled with the legitimacy of aid flowing to religious entities based on personal choices ensures greater government assistance to religious schools in the future.

The Supreme Court has recognized that the government cannot condition benefits on the relinquishment of constitutional rights,<sup>258</sup> but it has not gone so far yet as to hold that the government must subsidize the exercise of such rights. If it did, then parents could assert not only a right to select private education for their children, but also an entitlement to the same services for their children attending religious schools as provided by the government for public school students.<sup>259</sup> The next logical step from permitting evenhanded treatment of sectarian and secular enterprises would be to require it, using the nondiscrimination and private actor rationales to argue that religious organizations must be treated the same as secular entities in terms of *all* government advantages.<sup>260</sup> Actually, in the 1995 *Rosenberger* decision the Supreme Court seemed to support such nondiscrimination. Justice Kennedy noted for the Court plurality: "We have held that the guarantee of neutrality is respected, not offended, when government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."<sup>261</sup> Expanding the nondiscrimination principle to protect all religious claims against differential treatment, perhaps paralleling protections afforded on the basis of gender or race,<sup>262</sup> is not as much of a doctrinal leap as it would have appeared to be two decades ago. Perhaps the ambiguity in Establishment Clause jurisprudence ultimately will be reduced in the direction of a more relaxed

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255. See *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 288-89 (4th Cir. 1998); see also *supra* text accompanying note 88.

256. See *supra* text accompanying notes 179, 184.

257. See *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 486-87 (1986); see also *supra* text accompanying note 220.

258. See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 196 (1991); *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984); *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

259. See *Peter v. Wedl*, 155 F.3d 992, 1001-02 (8th Cir. 1998); see also *supra* note 181 and text accompanying note 203.

260. See *Mawdsley*, *supra* note 251, at 25-31.

261. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 839 (1995).

262. See *Mawdsley*, *supra* note 251, at 34. Under this broad interpretation of nondiscrimination, students might assert a right to use proselytizing materials in class presentations if secular treatment of the subjects is allowed. See *supra* text accompanying note 136.

interpretation of Establishment Clause restrictions on government action, but the doctrinal consistency may end up being quite different from what strict separationists have been seeking.

#### V. CONCLUSION

When the First Amendment was adopted, the United States embarked on a unique experiment by prohibiting government action that respects an establishment of religion, but the continued vitality of this prohibition may be in peril. The “wall of separation between church and state” metaphor has disappeared from recent Establishment Clause decisions, which seem to favor the individual’s interests over safeguarding society from harm that results from commingling government with religion.<sup>263</sup> The consequence is that Establishment Clause jurisprudence involving schools has been revised in significant ways in recent years.<sup>264</sup> William Marshall has argued in this Symposium that despite some ferment around the edges of Establishment Clause jurisprudence, there has been relative stability at the core during the past half century.<sup>265</sup> It appears that the turbulence is moving closer to the center—toward the essence of Establishment Clause restrictions on government action. In short, the federal judiciary is becoming less inclined to find Establishment Clause violations and more receptive to government accommodations toward religion. This change certainly is evident in the school context, the last bastion of separationism, and has stimulated legislative efforts calling for more church/state involvement in the education arena, testing the limits of Establishment Clause restrictions.

The accommodationist trend in school controversies will grow stronger if courts continue (a) to emphasize the expressive aspect of school devotionals, enlarging the category of private religious expression, and (b) to condone religious activities in public education and state-aid to sectarian schools that emanate from private decisions. The federal judiciary appears to be on a course of expanding the reach of the nondiscrimination model and reducing the perceived governmental role associated with devotional activities in public schools and the use of public funds in religious schools. Yet, it must be noted that as soon as a trend in Establishment Clause jurisprudence seems evident, a contrary federal appellate decision is rendered. And if the Supreme Court continues to decline to review decisions on particular topics (e.g., student-initiated graduation prayer, school voucher programs), mixed judicial signals will likely persist.

One is tempted to dismiss as insignificant the controversy over student-initiated devotional activities in public education and incidental aid to parochial schools. After all, a brief student-led prayer in a public school graduation ceremony is not likely to influence students’ religious beliefs, and the provision of remedial services in parochial schools does not present a serious threat of advancing the sectarian enterprise. But these small inroads in accommodating religious groups by allowing

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263. See Lupu, *supra* note 33, at 240–41.

264. See Morris, *supra* note 106.

265. See William Marshall, *What Is the Matter With Equality?*, 75 *IND. L.J.* 193, 193–196 (2000).

such sectarian observances in public schools or aid to parochial schools can eventually lead to religious establishments in education. If the Supreme Court ultimately agrees that the Establishment Clause is not implicated as long as students make the decision to conduct devotionals in school-related events and that representatives of religious sects are private individuals when functioning within the public school, most proselytizing religious activities would seem permissible in public education. Similarly, if the federal judiciary continues down the path of upholding government aid that flows to religious schools because of parents' decisions to select parochial education for their children, reasoning that the funds merely follow the child, most types of government aid to religious schools could be justified under this umbrella.

Although we are not likely to adopt a constitutional amendment to authorize school prayer and neutralize the Establishment Clause (despite efforts in this regard), we do seem to be taking incremental steps to strip this clause of any independent meaning. The current focus on nondiscrimination in assessing claims seems to be eliminating the unique protections of the Establishment Clause beyond those embodied in the Equal Protection Clause. There appears to be increasing sentiment that the specific dangers the Establishment Clause was intended to address in terms of commingling government and sectarian affairs are no longer a threat in our nation, even though such dangers are painfully apparent elsewhere in the world.

Justice Souter noted in 1997 that "[t]he human tendency . . . is to forget the hard lessons [anguish, hardship, and bitter strife] and to overlook the history of governmental partnership with religion when a cause is worthy . . . . That tendency to forget is the reason for having the Establishment Clause . . . ." <sup>266</sup> We would be wise to take Justice Souter's caution seriously, as recent church/state developments have significant implications for the education of our youth and for religious liberty in our nation.

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266. *Agostini v. Felton*, 521 U.S. 203, 244 (1997) (Souter, J., dissenting).