MARQUETTE LAW REVIEW

Volume 82 Fall 1998 Number 1

PUBLIC PURPOSE AND THE PUBLIC FUNDING OF SECTARIAN EDUCATIONAL INSTITUTIONS: A MORE RATIONAL APPROACH AFTER *ROSENBERGER* AND *AGOSTINI*

MICHAEL A. VACCARI*

I. INTRODUCTION

The mixing of religion and public life is common in our society. Government often cooperates with religious groups to address numerous social concerns of our complex society. These arrangements, like the host of similar government ventures with other private organizations, are justifiable when the government's program primarily serves a public purpose.

The effort to define the parameters of legitimate government activity when sectarian institutions or programs benefit from publicly funded programs is guided by the First Amendment. The First Amendment denies government the power to regulate purely private religious beliefs and practices. Through the Free Exercise Clause, it affirmatively protects the private practice of religion. The Establishment Clause complements that protection by prohibiting the state from establishing religion.[1] Government programs that benefit religious organizations raise the problem of how best to reconcile these two clauses. The Supreme Court has ruled on

* Adjunct Associate Professor of Law, Fordham University School of Law; Deputy Executive Director/General Counsel, New York State Metropolitan Transportation Authority; B.A., 1975; M.A., 1986 (Philosophy); J.D., 1978, Fordham University.

1. The First Amendment, in pertinent part, states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

this issue over thirty times in the last three decades.

The results of the Supreme Court's Establishment Clause jurisprudence[2] as applied to government funding programs has been overwhelmingly detrimental. Society has been forced to forego many public benefits that would accrue from activities clearly protected under the Free Exercise Clause. In addition to losing these opportunities, society has incurred many social costs that should be eliminated. These foregone public benefits and increased social costs strike particularly hard in the area of religiously affiliated education. The Court's decisions in this area portray a hostility to religion. One author has stated that the Court's Establishment Clause rulings "[seem] to assume that the Establishment Clause imposes a constitutional disability *on religion*—that it is an 'anti-religion' counterweight to the 'pro-religion' Free Exercise Clause."[3]

The genesis of this constitutional quagmire lies in the Supreme Court's three-part Establishment Clause test established in *Lemon v. Kurtzman*.[4] The requirements of *Lemon*—that the law have a secular purpose, that this purpose be its primary effect and that no excessive entanglement arise—are unique. They are not used in any other public funding context. As a result, Supreme Court decisions in this area arrive at results that lack consistency and coherency. One author has characterized *Lemon* as "possibly the most maligned constitutional standard the Court has ever produced."[5]

To correct this situation, the Court's Establishment Clause doctrine should be revised. It needs to be hauled in from its perch atop some isolated buoy and tied to an anchor of well-established legal principles. This task requires first that the body of law most useful and appropriate to resolving public funding conflicts be identified. This body of law is the pub-

2. The question of the public funding of sectarian educational institutions has received attention in the literature. *See, e.g.*, William Bentley Ball, *Economic Freedom of Parental Choice in Education: The Pennsylvania Constitution*, 101 DICK. L. REV. 261 (1997); Frank R. Kemerer, *The Constitutionality of School Vouchers*, 101 EDUC. L. REP. 17 (1995); Mark J. Beutler, *Public Funding of Sectarian Education: Establishment and Free Exercise Clause Implications*, 2 GEO. MASON INDEP. L. REV. 7 (1993); William D. Anderson, Jr., Note, *Religious Groups in the Educational Marketplace: Applying the Establishment Clause to School Privatization Programs*, 82 GEO. L. J. 1869 (1994). *See also* Richard John Neuhaus, *A New Order of Religious Freedom*, 60 GEO. WASH. L. REV. 620 (1992); Mark E. Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 GEO. WASH. L. REV. 645 (1992); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992).

3. Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795, 801 (1993).

4. 403 U.S. 602 (1971).

5. Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 468.

lic purpose doctrine. The public purpose doctrine deals with the expenditure of public money on public programs that provide public goods and also benefit private parties. Under this doctrine, the only justification for government programs that benefit private parties is that they primarily serve a public purpose. What activities serve a public purpose has been the subject of an extensive body of case law.

Under the public purpose approach, courts review governmental funding programs under a two-prong test: (1) does the program advance a valid secular or public purpose, and (2) does the program have the primary effect of advancing that purpose. An analysis of funding issues within the context of the public purpose doctrine puts us in a better position to address the specific concerns that First Amendment Establishment Clause principles bring to bear on public funding decisions. A more rational approach to reviewing public funding decisions that implicate Establishment Clause concerns requires tailoring the public purpose test to apply to government programs that benefit sectarian institutions.

The test proposed in this article would retain the first prong of *Lemon*, substantially revise the second prong, and eliminate *Lemon*'s third prong.[6] A government program which funds education and benefits sectarian educational institutions or organizations would be upheld if the program's primary effect is to aid secular education and the benefit to sectarian groups is incidental. A program should be treated as having the primary effect of benefiting secular education when aid is limited to secular purposes, is equally available to public and private schools or students (or, if the funding program is exclusively for nonpublic education, to sectarian and non-sectarian schools or students), and provides a substantial benefit to secular education as compared to the benefit to sectarian groups.

The Court has made significant strides in this direction. The last six years have witnessed a dramatic shift in the Supreme Court's Establishment Clause jurisprudence, a shift which makes the Court poised to adopt the approach advanced here. Under recent precedent, the Supreme Court has limited the applicability of *Lemon* in certain Establishment Clause areas.[7] In 1992, in *Lee v. Weisman,* the Court stated that *Lemon* is not a useful tool for all Establishment Clause purposes.[8] A year later, in

6. The Establishment Clause funding test proposed in this article is not necessarily applicable to Establishment Clause analysis in contexts other than funding, such as holiday displays, prayer or the creation of political districts.

7. *See, e.g.,* Lee v. Weisman, 505 U.S. 577 (1992).

8. *Id.* at 587.

Zobrest v. Catalina Foothills School District,[9] the Court, without once citing *Lemon*, upheld an Arizona program which provided a sign-language interpreter to accompany a deaf student to a Catholic school to sign his classes, including religion class.

In its two most recent Establishment Clause cases, *Rosenberger v. Rectors and Visitors of the University of Virginia*[10] and *Agostini v. Felton*,[11] the Court, while ostensibly following the *Lemon* model, revised it significantly. In *Agostini*, the Court stated that the test under the Establishment Clause should be "whether the government acted with the purpose of advancing or inhibiting religion . . . [and] whether the aid has the 'effect' of advancing or inhibiting religion."[12]

These developments are encouraging signs that the Court is restoring Establishment Clause jurisprudence to a firmer foundation; one that looks at a law's purpose and effect and approximates the traditional public purpose test. The purpose prong of Establishment Clause analysis has never been problematic; the Court has never invalidated a funding program that benefited sectarian education on this ground.[13] The area of significant confusion has been the second prong. The Court in *Agostini* acknowledged the progress it had made in the primary effect prong: "What has changed . . . is our understanding of the criteria used to assess whether aid to religion has an impermissible effect."[14]

While the Court's recent decisions lead to more socially beneficial results, the reasoning in *Rosenberger* and *Agostini* fails to provide a coherent analytical framework for future development. The opinions in *Rosenberger* and *Agostini* reveal that the shackles of *Lemon* and its progeny are still fastened to the Court's wrists, even though they have been loosened. The Court's opinions are still supported by criteria and cases that are inconsistent with the principles underlying the public purpose doctrine's two-prong test.

Three aspects of the Court's primary effect analysis need to be reconsidered. First, the analytical focus should be on whether the aid substantially supports education, rather than on whether the benefited institution is pervasively religious. Second, the implications of the Court's prior hostile presumptions about the nature of sectarian institutions need to be re-

9. 509 U.S. 1 (1993).
10. 515 U.S. 819 (1995).
11. 521 U.S. 203, 117 S. Ct. 1997 (1997).
12. *Id.* at ___, 117 S. Ct. at 2010.
13. See Appendix for a listing of funding cases.
14. *Agostini*, 521 U.S. at ___, 117 S. Ct. at 2010.

assessed in light of the new analytical framework. Third, the factors which help decide whether the primary effect of the aid is to advance education or religion need to be reevaluated in four ways: (i) the inquiry into the directness of aid should focus on which educational programs the subsidy supports rather than the formality of how the aid flows; (ii) the inquiry should focus on the aid's effect on education rather than on whether it relieves the school of other costs; (iii) the number of beneficiaries assisted should not be determinative of primary effect absent evidence that the aid has been unfairly disbursed to favor religious schools or their students; and (iv) the endorsement test should be abandoned as inconsistent with a coherent Establishment Clause jurisprudence. Each of these points is considered in further detail in Part III.

Education's importance to the well being of society makes these revisions imperative. A strong public and private educational system contributes immensely to the realization of essential societal goods. To the extent that religious schools provide public benefits, they represent simply one type of private participant in the education marketplace. As such, the ability of society to fund education, even when religious organizations benefit from such funding, should be subject to substantially the same test that is used when public funds finance housing provided by real estate developers, economic development which benefits private companies, or any other public good which also confers a private benefit.[15] As part of that test, impermissible benefits to religion would be excluded just as impermissible benefits to private interests are excluded when government subsidizes private industry.

Adoption of this approach will advance the public good of education at a time when, across the country, families and governments are seeking increased educational opportunities to supplement the essential but limited benefits offered by the public school system.

Part II discusses the limitations on educational opportunities that result from the application of the *Lemon* test and the efforts underway throughout the country to provide more meaningful school choice opportunities to parents. Part III analyzes the public purpose doctrine and its application to the funding of various public projects. Part IV describes *Lemon* and Establishment Clause funding cases since *Lemon*. Finally, Part V provides the theoretical foundations and specific components of a revised Establishment Clause approach to the public funding of sectarian educational institutions.

15. This basic test needs to be tailored to meet the specific concerns of the Establishment Clause. *See infra* Part IV(B).

II. LIMITATIONS ON EDUCATIONAL OPPORTUNITIES

Education is a public good. Everyone benefits from a well-educated citizenry. An educated populace enhances cultural and professional opportunities and assures the continued success of democratic institutions.[16] In *Brown v. Board of Education*, the United States Supreme Court described education's benefits to society:

> Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[17]

The public school system has long contributed to the advancement of educational efforts in the United States. From modest foundations in the eighteenth century to vastly rapid development in the nineteenth century, public schools have become a ubiquitous feature of the American landscape. Educational advancement in all sectors of the population has increased dramatically with the growth and expanded accessibility of public schools.[18]

Notwithstanding this impressive record, the picture is incomplete. Alongside the public schools have stood the private schools. Private schools have provided indispensable support to education in America.[19] Nearly one-quarter of elementary and secondary schools are private, with eighty-six percent of the students in those schools enrolled in sectarian

16. *See generally* United States v. Lopez, 514 U.S. 549 (1995) (Breyer, J., dissenting); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Brown v. Board of Educ., 347 U.S. 483 (1954).

17. *Brown*, 347 U.S. at 493.

18. *See* R. FREEMAN BUTTS & LAWRENCE A. CREMIN, A HISTORY OF EDUCATION IN AMERICAN CULTURE (1953).

19. *See* ANTHONY S. BRYK, ET AL., CATHOLIC SCHOOLS AND THE COMMON GOOD (1993); LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL 1825-1925 (1987).

schools. Approximately one-half of all colleges and universities are private, with seventy-eight percent being religiously affiliated.[20]

The Supreme Court has held that states are constitutionally required to free private school students from any public school attendance requirements.[21] Many claim that the presence, vitality and academic excellence associated with numerous private schools account for the success of many public schools.[22] These educators argue that the overall level of education in public schools would deteriorate significantly without competition from a robust private school system.[23] At a minimum, the burden on local governments and real property taxes would increase significantly if the public schools had to accommodate the students in the private school system.[24] The impact of this would fall disproportionately harder on poor children in urban centers, who tend to perform better in private schools.[25] The proponents of this view seek not to eliminate the public schools but to foster the healthy development of both educational systems.[26]

Many of the private schools are owned or operated by sectarian organizations.[27] The overall success of the sectarian schools and the inadequacy of many public schools have given rise to a movement for parental choice in education. Some have proposed a shift in public funding so as to subsidize the cost of private sectarian schools. These writers point out that most western democracies provide financial support to private schools, including religious institutions, on a basis roughly equivalent to

---

20. STEPHEN B. MONSMA, WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY 3, 9 (1996).

21. Pierce v. Society of the Sisters, 268 U.S. 510 (1925).

22. *See, e.g.*, NEW SCHOOLS FOR A NEW CENTURY: THE REDESIGN OF URBAN EDUCATION (Diane Ravitch and Joseph P. Viteritti eds., 1997); Theodore J. Forstmann and Bruce Kovner, *How to Energize Education*, N.Y. TIMES, Jan. 3, 1998, at A11.

23. *See supra* note 22.

24. *See* BRYK, *supra* note 19, at 340.

25. *Id.* at 218-220, 304. The conclusion that poor and minority children perform better at religious schools is verified over a wide range of benchmarks: test scores, dropout rates, college-going rates, and course taking. Diane Ravitch, *Testing Catholic Schools*, WALL ST. J., Oct. 1, 1996, at A22.

26. *See* BRYK, *supra* note 19, at 326; *see also* JOHN E. CHUBB AND TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS 219 (1990); Paul E. Peterson and Chad Noyes, *School Choice in Milwaukee*, *in* NEW SCHOOLS FOR A NEW CENTURY 123 (Diane Ravitch and Joseph P. Viteritti eds., 1997); Diane Ravitch, *Somebody's Children: Educational Opportunity for All American Children*, *in* NEW SCHOOLS FOR A NEW CENTURY 254 (Diane Ravitch and Joseph P. Viteritti eds., 1997).

27. *See* JAMES S. COLEMAN, AND THOMAS HOFFER, PUBLIC AND PRIVATE HIGH SCHOOLS: THE IMPACT OF COMMUNITIES (1987).

the support provided public schools.[28] The need for such assistance is particularly acute for inner-city education where private schools are struggling to survive.[29] Even an ardent proponent of strict separationism has acknowledged these benefits:

> And, those schools, their sectarian mission aside, serve community and nation by performing essential secular educational functions, by enormously reducing the tax burden for the operation of the public schools, and by providing a salutary competition. Diversity and pluralism, which those schools enhance, are quintessentially American.[30]

Opponents of such public funding appear intractable. In the words of one author, "no children's plight is severe enough, no public expenditure too wasteful, to justify the slightest chink in the wall they worship with all the fervor of a cargo cult."[31] The public costs associated with the inefficiency of the public school system alone should warrant a reevaluation of the use of public money for education. Recent studies show that the cost per child to educate a student in public school is $8,374 compared with a $1,364 (elementary) and $2,925 (high school) per child cost in sectarian school.[32] The cost to taxpayers would rise dramatically if the public schools had to accommodate the children currently in religious-affiliated schools were the financial pressures that now strain the economic viability of sectarian schools not alleviated. Further, in many localities, the public schools are simply inadequate. In some areas, the dropout rate has become so high and the testing levels so low, that private education becomes a necessary alternative.[33] In other areas, public schools are simply not affordable.[34]

---

28. *See* BRYK, *supra* note 19, at 342-343.

29. *Id.* at 338. The widespread support among minorities for school vouchers provides strong evidence of this need. *See* James Brooke, *Minorities Flock to Cause Of Vouchers for Schools*, N.Y. TIMES, Dec. 27, 1997, at A1.

30. LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 134 (1986).

31. Mary Ann Glendon, *The Supreme Court 1997: A Symposium*, 76 FIRST THINGS, Oct. 1997, at 20, 29.

32. *See* Diane Ravitch and Joseph P. Viteritti, *New York: The Obsolete Factory, in* NEW SCHOOLS FOR A NEW CENTURY 17, 32 (Diane Ravitch and Joseph P. Viteritti eds., 1997).

33. *Id.*

34. Until recently, publicly funded remedial programs were being conducted in trailers or converted school buses rather than inside the school building where the schools involved were parochial schools. Over one hundred million dollars in federal money has been used to support these programs. A significant amount of such money could be saved if the instruc-

In response to these realities, efforts to provide additional educational opportunities are being made throughout the country. For example, ninety towns and villages in Vermont are too small to support a local public high school. As a result, children travel to neighboring communities to attend public or private secular high schools; and the state pays the tuition. In many instances, these facilities are insufficient. So parents, and in one case, a local school board, are seeking to require the state to pay the tuition for private sectarian schools.[35]

Public officials around the country are desperately seeking creative alternatives to provide increased educational opportunities in their communities. New York City's Mayor Rudy Giuliani has appealed to business leaders to finance a plan to subsidize parochial school tuition.[36] Wisconsin and Ohio provided a school choice program that gave students vouchers to attend religious schools, but the programs were initially held to be unconstitutional. The lower court judge in Wisconsin lamented the "sad plight of the Milwaukee public schools system" but believed the plan violated Wisconsin's constitution.[37] Yet, the Chicago City Council voted to issue tax-exempt bonds to finance the expansion of a South Side Catholic high school.[38] The Chester County Industrial Development Authority issued bonds to finance the construction of a new 1,200-student Catholic high school in Dowington, Pennsylvania.[39]

Many of these proposals have been criticized as violating the First Amendment's separation of church and state.[40] Any proposal that uses public money to benefit a sectarian school is subjected to a rigorous and often fatal analysis developed by the Supreme Court in a series of funding

---

tion were provided inside the school building, just like in the public schools. Paul Crotty, *Remedial Classes*, N.Y. TIMES, Nov. 9, 1996, at A22. The Supreme Court recently overruled the decision that required this practice. *See infra* text accompanying notes 175-183.

35. Sally Johnson, *Vermont Parents Ask State to Pay Catholic School Tuition*, N.Y. TIMES, Oct. 30, 1996, at B9.

36. John Kamplain, *Plan by New York City to Issue Bonds For Parochial Schools Draws Criticism*, BOND BUYER, Oct. 21, 1994, at 5.

37. *Wisconsin School-Voucher Plan Is Struck Down*, N.Y. TIMES, Jan. 16, 1997, at A23; *Ohio Court Rules Against A School Voucher Plan*, N.Y. TIMES, May 2, 1997, at A26. Wisconsin's Supreme Court recently overturned this decision and upheld Milwaukee's voucher program. Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998); *see infra* test accompanying note 209.

38. Tammy Williamson, *Chicago Council Unanimously Votes to Issue Debt for Catholic School*, BOND BUYER, Feb. 25, 1997, at 3.

39. Michael Demenchuk, *Philadelphia Archdiocese Sells Rare Variable-Rate Debt for New High School*, BOND BUYER, June 18, 1997, at 8.

40. *See supra* notes 35-39.

cases.[41]

In order to gain a better appreciation of the evolution of the Court's Establishment Clause funding jurisprudence, and to provide a context within which the excesses and inconsistencies of that doctrine can be resolved, it is important to understand the legal principles generally applicable when the public sector finances public programs which also benefit private parties.

III. PUBLIC PURPOSE DOCTRINE

A. Background

The public purpose doctrine reflects one of the few fundamental principles that form the framework of legitimate government. This judge-made law is an outgrowth of the view prevalent in the eighteenth and nineteenth centuries that the authority of the legislative branch of government is inherently limited.

In public finance law, the public purpose doctrine imposes limitations on government action in three areas:[42] eminent domain, taxation, and the expenditure of public money. The doctrine requires that when the state imposes a tax, takes private property, or spends public money, it do so only for a public purpose.[43] As such, in these three areas, the doctrine re-

---

41. *See infra* Part IV.

42. The public purpose concept applies in other contexts as well. For example, under the Contract Clause, a state may impair a contractual obligation if, *inter alia*, necessary to serve an important public purpose. *See, e.g.*, United States Trust Co. v. New Jersey, 431 U.S. 1, 25 (1977).

43. The view that the legislative power is inherently limited to acting for a public purpose is found in the writings of various political philosophers. Chancellor Kent, in *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162, 166-67 (N.Y. Ch. 1816), cites Grotius, Puffendorf, Vattel and Blackstone for the proposition that private property may be taken only for a public purpose.

In addition, this position is contained *in* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 135 (1956), and THOMAS AQUINAS, SUMMA THEOLOGICA, I-II, q. 96, a. 1, where Aquinas states: "[T]he end of law is the common good, because as Isidore says, 'law should be framed, not for any private benefit, but for the common good of all the citizens.'" *See also* THOMAS AQUINAS, DE REGIMINE PRINCIPUM 1, 14, 15; THOMAS AQUINAS, SUMMA THEOLOGICA, I-II, q. 90, a. 2 and II-II, q. 58, a. 7. Aquinas defines tyranny as being rule for the private good of the ruler rather than the common good of the multitude. THOMAS AQUINAS, SUMMA THEOLOGICA, II-II, q. 42, a. 2.

The natural law tradition has a long history of defending the principle that the authority of the state is inherently limited. This tradition began with the theory of the two swords of Pope Gelasius I in the fifth century and continued with Pope Gregory VII in the eleventh century over the investiture controversy and Robert Bellarmine's doctrine of indirect power. *See* 1 R. W. CARLYLE AND A. J. CARLYLE, A HISTORY OF MEDIEVAL POLITICAL THEORY

quires the government to act for the common good and denies the government the authority to advance purely private interests.

The authority of the judiciary to invalidate legislation on public purpose grounds was firmly established in the nineteenth century.[44] In 1869, John Dillon, Chief Justice of the Iowa Supreme Court and one of the foremost authorities of the law of public bodies,[45] described the basis for this view:

> It is a well-settled principle of American constitutional law that an act of the legislature may be unconstitutional in two ways: first, because it assumes or seeks to confer power not legislative in its nature; or, second, because it violates some specific provision of the national or State Constitution.[46]

The most prominent legal scholars of the nineteenth century consistently taught that a law that lacked a public purpose conferred power not legislative in nature and was invalid.[47] Numerous judicial opinions dating

---

IN THE WEST 184-93 (1928); 5 R. W. CARLYLE AND A. J. CARLYLE, A HISTORY OF MEDIEVAL POLITICAL THEORY IN THE WEST 86-111, 355-373 (1928); HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 85-119 (1983); HENRICH A. ROMMEN, THE STATE IN CATHOLIC THOUGHT 306-358 (1945). The history of the public purpose requirement shows its affinity with the Establishment Clause and the struggle through the centuries to keep distinct the role of the state and the role of the church. *See* CHARLES HOWARD MCILWAIN, THE GROWTH OF POLITICAL THOUGHT IN THE WEST: FROM THE GREEKS TO THE END OF THE MIDDLE AGES (1932); BERMAN, *supra.*

44. One of the earliest cases to enunciate the doctrine is *Currie's Administrators v. Mutual Assurance Society*, 14 Va. (4 Hen. & M.) 900 (1809), where the court, reviewing the incorporation of an insurance company, stated:

> With respect to acts of incorporation, they ought never to be passed, but in consideration of services to be rendered to the public.... It may be often *convenient* for a set of associated individuals, to have the privileges of a corporation bestowed upon them; but if their object is merely *private* or selfish; if it is detrimental to, or not promotive of, the public good, they have no adequate claim upon the legislature for the privilege.

Id. at 911 (emphasis added). *See also* Sharpless v. Mayor of Philadelphia, 21 Pa. 147, 162, 168-69 (1853); Taylor v. Porter, 4 Hill 140, 143 (N.Y. 1843); People v. Morris, 13 Wend. 325, 328 (N.Y. 1835), *Newburgh*, 2 Johns. Ch. at 166-67.

45. *See* JOHN FORREST DILLON, THE LAW OF MUNICIPAL CORPORATIONS (1869).

46. Hanson v. Vernon, 27 Iowa 28, 51 (1869). It is historically interesting to note that Judge Dillon illustrates the public/private distinction by stating, in dicta, that "a state may levy a tax to support common schools" but not private schools. *Id.* at 57.

47. The views of John Dillon are discussed in the text. James Kent, *in* 2 COMMENTARIES ON AMERICAN LAW 275-76 (1st ed. 1827), discusses this limitation in the

back to the early 1800s reflect this view.[48]

Weismer v. Village of Douglas,[49] an 1876 case involving the expenditure of public money, contains one of the fullest expressions of the principle. The court argued that just as the legislature cannot take the property of *A* and give it to *B* "when there is no legal, equitable, just or moral obligation to render unto *B* one farthing,"[50] so too the legislature cannot tax *A* and distribute the tax revenues to others, for that "is only a way of taking" *A*'s property.[51] If the legislature cannot tax for a private purpose, the court reasoned, then the legislature cannot authorize the issuance of bonds for a private purpose when the bonds will be payable from tax revenues.[52]

---

taking context in a classic passage that is cited and paraphrased in numerous cases:

> [T]his principle in American constitutional jurisprudence, is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law.
>
> It undoubtedly must rest in the wisdom of the legislature to determine when public uses require the assumption of private property, and if they should take it for a purpose not of a public nature, as if the legislature should take the property of A., and give it to B., the law would be unconstitutional and void.

Numerous courts cite Kent's argument about taking *A*'s property and giving it to *B*. The earliest judicial formulation of the argument is in *Calder v. Bull*, 3 U.S. 386, 387 (1798). *See also* Citizens' Sav. & Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 455 (1875); Weismer v. Village of Douglas, 64 N.Y. 91 (1876).

Thomas Cooley, in A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 174-76, 211-13, 227, 487-95, 530-32 (1868), expounded thoroughly on the public purpose doctrine in the chapter regarding the bases upon which statutes may be declared unconstitutional and in the chapters regarding the authority of governments to spend money, tax, and exercise eminent domain powers.

48. *See* CHARLES GROVE HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 104-139 (1965); CHARLES FAIRMAN, 6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 927-1116 (1971); *see also supra* note 44.

49. 64 N.Y. 91 (1876). *See also* Bank of Rome v. Village of Rome, 18 N.Y. 38, 43 (1859) (holding that a municipal corporation can only act for a public purpose).

50. *Weismer*, 64 N.Y. at 99.

51. *Id.*

52. The court's conclusion is particularly strong in light of the then existing provision of the New York State Constitution which gave the State the authority to appropriate public money for a private purpose by a two-thirds vote. The court held that notwithstanding this provision, the legislature does not have authority to raise money by taxation for a private purpose. *Id.* at 104-05.

One of the significant aspects of *Weismer* is that the court invalidated legislation on the basis of a legal doctrine that does not expressly appear in the State's Constitution. New York's Constitution was amended in 1874 to require that public money be spent only on public purposes. But when the law considered in *Weismer* was enacted, no such provision existed.

In 1875, the United States Supreme Court explained the doctrine's basis in *Citizens' Savings & Loan Ass'n v. Topeka.*[53] In that case the Court held that City of Topeka bonds issued to induce a bridge company to locate in the city lacked a public purpose and were invalid. The briefs in the case cited over seventy references to the effect that the Court had no authority to set aside a statute on some general grounds without pointing to the particular provision of the Constitution being violated.[54] The Court responded in a now-classic passage:

> The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers.
>
> There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.[55]

The Court invalidated the bonds without citing any provision of the United States Constitution or the Constitution of Kansas.

In 1984, the United States Supreme Court reaffirmed the doctrine in *Hawaii Housing Authority v. Midkiff* and treated it as a component of the Fifth and Fourteenth Amendments' Due Process Clause.[56] *Midkiff* in-

---

Prohibitions against giving or lending the money of the state or a municipal corporation to a private party were added to the New York State Constitution in 1874. *See* N.Y. STATE CONSTITUTIONAL CONVENTION COMM., REPORT: PROBLEMS RELATING TO TAXATION AND FINANCE 112-114, 291 (1938) (hereinafter TAXATION AND FINANCE); William J. Quirk and Leon E. Wein, *A Short Constitutional History of Entities Commonly Known as Authorities*, 56 CORNELL L. REV. 521, 551 (1971). For a thorough discussion of the financial history of New York during this period, see DON C. SOWERS, THE FINANCIAL HISTORY OF NEW YORK STATE FROM 1789 TO 1912 (1969). The statute reviewed in *Weismer* was enacted in 1868.

53. 87 U.S. (20 Wall.) 455 (1875).

54. *See* FAIRMAN, *supra* note 48, at 1103-04.

55. *Citizens' Sav. & Loan Ass'n*, 87 U.S. (20 Wall.) at 461. For other early cases on public purpose see FAIRMAN, *supra* note 48, at 927-1116; ROBERT S. AMDURSKY & CLAYTON P. GILLETTE, MUNICIPAL DEBT FINANCE LAW: THEORY AND PRACTICE § 3.1.2 (1992); and HAINES, *supra* note 48, at 104-139.

56. 467 U.S. 229 (1984). This case builds upon the "starting point" of analysis in this area, *Berman v. Parker*, 348 U.S. 26 (1954), where the Court held that the public use clause is coterminous with the scope of a sovereign's police powers. *See also* Norfolk Fed'n of Bus. Dists. v. Department of Hous. and Urban Dev., 932 F. Supp. 730, 740-41 (E.D. Va. 1996) (considering whether the use of public tax funds to benefit private parties violated the Due

volved a Hawaii statute that compelled large landowners to break up their estates and transfer ownership to existing tenants. Under the plan, the State would condemn residential tracts and transfer title to existing lessees. The owners challenged the act as violative of the public use provision of the Fifth and Fourteenth Amendments which provide that "private property [shall not] be taken for public use, without just compensation."[57]

While the Court easily found a public purpose in Hawaii's need to reduce the social and economic evils associated with land oligopoly,[58] the Court in *Midkiff* also reaffirmed the foundational nature of the public purpose doctrine. In reaching its conclusion that the taking was justified because it was for a public purpose, the Court reiterated the corollary principle of the takings clause, namely, that private property could never be taken for a *private* use, even with compensation: "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."[59]

B. The Public Purpose Test

While the basic concept embodied in the public purpose doctrine is clear, courts have not developed a uniform test for applying the doctrine. Despite this lack of uniformity, two core components of the test are discernible. First, courts look at the end or purpose of legislation. Second, if a public purpose is found, courts then review the means used to accom-

---

Process Clause of the Fourteenth Amendment).

57. *Midkiff*, 467 U.S. at 231. The Court recognized that the judiciary's role in public use cases is extremely limited and that a legislative determination that a public use exists is entitled to great deference and would be invalidated only if it was "palpably without reasonable foundation." *Id.* at 241. The Court noted that while it had invalidated a compensated taking of property for lacking a justifying public purpose, it had never done so in the case of a compensated taking which was rationally related to a valid public purpose. *Id. See also* Missouri Pacific R.R. Co. v. Nebraska, 164 U.S. 403, 416 (1896).

58. The Court traced Hawaii's problems of land concentration to its long history of monarchical rule and even suggested that socioeconomic legislation of this type was so fundamental as to constitute an ongoing implementation of the principles of the American Revolution and its efforts to supplant monarchy with democracy. *Midkiff*, 467 U.S. at 241 n.5. In arriving at its conclusion, the Court offered a helpful clarification of the public purpose doctrine. The Court explained that government ownership of the land was not necessary to accomplish a public purpose. As long as the purpose of the government's action is legitimate, that the purpose is accomplished by transferring the property to private parties does not transform the action into a private purpose. The Court also held that the deference due to the legislative branch is the same whether Congress or a state legislature is involved. *Id.* at 244.

59. *Id.* at 245.

plish that end or purpose to determine whether a public benefit is actually conferred.

The New York Court of Appeals' discussion in *Weismer*[60] provides a helpful framework for understanding the public purpose test. In *Weismer* the court asked: "[W]hat is a public purpose" and quickly conceded that "the answer is not always ready, nor easily to be found."[61] The court described four characteristics of a public purpose:

(1) it must produce a "benefit or convenience to the public";

(2) the public may be the "whole commonwealth or of a circumscribed community";

(3) if a circumscribed community, "the benefit or convenience must be direct and immediate, . . . not collateral, remote or consequential"; and

(4) the benefit must be non-exclusive; that is, available to all, and one person's use of the good does not diminish or impair another's use of the same good.[62]

The analysis is complicated because private individuals or organizations always benefit from public goods. The task courts undertake is to judge whether the law provides a sufficient measure of public benefit so as to justify the legislature's expenditure of public resources (usually money, credit, or property).

Theoretically, however, the analysis is simple. If the legislation furthers solely private interests, the legislature is not justified in expending public money to achieve such a purpose. Conversely, if the ends of the legislation are overwhelmingly public, the law will be upheld.

However, the situation often involves a mixture of public and private benefits in ways that make the analysis more difficult. This complexity requires courts to balance the public and private benefits. To do this, courts have devised various standards to decide whether the expenditure of public money is justifiable. This balancing is performed in both the purpose and effect prongs of the analysis.

1. Purpose or End

Courts assess the public nature of the law's purpose by looking at the

60. 64 N.Y. 91 (1876).

61. *Id.* at 99.

62. *Id.* at 100. While this fourth characteristic is discussed in concept by the court, I have taken the liberty of expanding on it and formulating it using the terminology of public good theory. *See* RICHARD A. MUSGRAVE AND PEGGY B. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE, 70-81 (4th ed. 1984).

relationship between the expenditure and the benefit.[63] Historically, in the nineteenth century, when government played a more limited role, courts recognized that while almost every expenditure of a public resource had some public benefit, the public benefit had to be direct, not indirect or remote.[64] Yet, the same purposes that were rejected in the nineteenth century as being too indirect or remote are widely accepted today as valid reasons for expending public funds.

For example, in 1876, in *Weismer*,[65] the court reviewed a law that authorized a village to finance a Long Island manufacturing company's activities along the Delaware River. The legislature had concluded that the law advanced several public purposes. The Delaware River, at the time, was viewed as a highway where the public would transport lumber on rafts to various markets along the river. The financing would increase the village's prosperity, and the value of adjacent properties, provide for the cleansing of the river channel, and fund construction of docks and piers.

The court disagreed:

> [Whether done by an individual or a corporation], . . . [i]n either

---

63. *See, e.g.*, State v. City of Miami, 379 So. 2d 651 (Fla. 1980); Courtesy Sandwich Shop v. Port of New York, 190 N.E.2d 402 (N.Y. 1963).

64. *See, e.g.*, Weismer v. Village of Douglas, 64 N.Y. 91 (1876), where the court described this point as follows:

> There is not to be discovered . . . any public use or purpose, more than is found in the setting on foot of any business or industry in a community by private parties. Any such enterprise tends indirectly to the benefit of every citizen by the increase of general business activity, the greater facility of obtaining employment, the consequent increase of population, the enhancement in value of real estate and its readier sale, and the multiplication of conveniences. But these are not the direct and immediate public uses and purpose to which money taken by tax may be directed.

Id. at 103. The role of the state in economic development changed from one of fairly active involvement in the late eighteenth and early nineteenth centuries to one of increasing aversion during the second half of the nineteenth century. During the earlier period of more active public/private partnerships, the common theme seems to be a requirement that the governmental assistance given to private enterprise advance the public good. The movement away from this partnership is attributable in large measure to the economic burdens sustained by state governments when the private companies failed, particularly after the Panics of 1837 and 1857. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 109-114 (1977); DON SOWERS, THE FINANCIAL HISTORY OF NEW YORK STATE: FROM 1789 TO 1912 (1969); TAXATION AND FINANCE, *supra* note 52, at 106-109 (1939).

65. 64 N.Y. at 92-94.

> case it would be a private business, to be carried on for private profit, to be controlled by private rules, or even private caprice, into which the public or any member of it could not enter, the direct conveniences and benefits whereof neither the public nor any member of it could demand as of right.[66]

As people began to more favorably regard government's involvement in more and more areas of economic and social life, courts tended to find the benefits of expanded government programs to be more direct and immediate. For example, in the heyday of laissez-faire economic theory, laws regulating working hours, minimum wages, and child labor were viewed as inappropriate government interference with strictly private business relationships.[67] Today, courts routinely find that government programs designed to increase economic activity and job development satisfy a public purpose;[68] the public would view government as being in dereliction of its duty and demand congressional hearings if children were discovered working in sweat shops or unsafe and unsanitary factories.

By the time the "great society" arrived in the 1960s, the public's, and the courts', views as to what served a public purpose had expanded considerably. In 1969, a Wisconsin court expressed this concept as follows: "Essentially, public purpose depends upon what the people expect and want their government to do for the society as a whole and in this growth of expectation, that which often starts as hope ends as entitlement."[69]

Yet, as the cases discussed below show, courts continue to invalidate legislation for failing to advance a public purpose despite the fact that more and more activities are accepted as public. The more recent deci-

---

66. *Id.* at 101. The court then contrasted this to what a public purpose would be:

> It is not as a highway or as a public canal upon which any one may enter with his own vehicle or craft, nor as a public school or a public free-seated meeting-house, to which any one may go or send, nor even as a railroad upon which any one has a right to be carried.

Id. For additional examples of courts invalidating legislation on public purpose grounds, see Clayton P. Gillette, *Reinterpreting "Public Purpose": The Judiciary Strikes Back*, 6 MUN. FIN. J. 61 (1985). For a discussion of different approaches in the various states to the public purpose doctrine, see AMDURSKY AND GILLETTE, *supra* note 55, § 3.5.

67. *See, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525 (1923); Hammer v. Dagenhart, 247 U.S. 251 (1918); Lochner v. New York, 198 U.S. 45 (1905).

68. *See, e.g.*, Maready v. City of Winston-Salem, 467 S.E.2d 615 (N.C. 1996); Minnesota Energy and Econ. Dev. Auth. v. Printy, 351 N.W.2d 319 (Minn. 1984); State *ex rel.* Wagner v. St. Louis County Port Auth., 604 S.W.2d 592 (Mo. 1980).

69. State *ex rel.* Warren v. Reuter, 170 N.W.2d 790, 795 (Wis. 1969).

sions in *Baycol Inc. v. Downtown Development Authority*[70] and *State v. City of Orlando*[71] provide examples. When we later review the public purpose prong of the Establishment Clause test, we will see that the public purpose test has been applied, in certain jurisdictions, more strictly than the purpose prong under the Establishment Clause test.[72]

2. Effect

In addition to the requirement that the statute further a direct and immediate public purpose, the second prong of the test looks at the law's effect to determine the proportion between the public and the private benefit. The South Carolina case *State ex rel. McLeod v. Riley*[73] illustrates this component of the test. The court found the legislation to contain the legitimate public purpose of job development, but considered the amount of public benefit negligible.[74]

The South Carolina approach, however, is not the view of other courts. Different jurisdictions use different standards to measure proportionality: does the public benefit predominate, is the public purpose paramount, is the private benefit incidental, or is there a substantial public benefit even if it isn't predominant?[75] The cases discussed below give examples of how these different tests are applied in particular situations.

Courts' assessments of proportionality are influenced by the prevailing social and economic views. When government's role is viewed as limited, the activities which constitute a public purpose are more limited, and as government's role expands, so does the interpretation of what constitutes a public purpose.

Under the second prong, however, the judiciary should have less of a role than under the first prong.[76] The tradition of limited government assigns to the judiciary the role of determining that a particular legislative act is beyond the scope of legislative power. Our government structure does not abandon the people to a self-policing legislature; the judiciary is the umpire. Yet, once it is acknowledged that the end or purpose of the

---

70. 315 So. 2d 451 (Fla. 1975).

71. 576 So. 2d 1315 (Fla. 1991).

72. *See supra* text accompanying notes 63-72, and *infra* text accompanying notes 119-121.

73. 278 S.E.2d 612 (S.C. 1981).

74. *See infra* text accompanying notes 83-90.

75. *See infra* text accompanying notes 77-102.

76. *See, e.g.*, Eugene W. Harper, Jr., *The Fordham Symposium on the Local Finance Project of the Association of the Bar of The City of New York: An Introductory Essay*, 8 FORDHAM URB. L.J. 1, 6, 16 (1979).

legislation is within an area delegated to the legislature, the legislature is typically better equipped than the judiciary to make balancing decisions.

While courts consistently recite their obligation to give great deference to legislative determinations of public purpose, the judiciary's actual deference to these legislative findings has not been uniform. In the public purpose area, courts have viewed their proper role to include a review of the legislative judgment regarding proportionality. Some courts have invalidated legislation on public purpose grounds when they believed that the statute was inconsistent with their, or the public's, views of the proper role of government vis-a-vis the private sector.

C. Illustrative Cases From Three Jurisdictions

A clearer understanding of the general principles of the public purpose test can be gained by studying its application in particular contexts. The jurisdictions of Florida, South Carolina, and New York provide a fairly representative spectrum of approaches taken by courts throughout the country.

Florida courts, for example, have been somewhat less deferential to legislative determinations of public purpose than courts in other states. For example, in 1975 in *Baycol*,[77] the Florida Supreme Court reviewed a proposed Rouse Company development in downtown Miami. The plan called for the condemnation of land and the destruction of all buildings in the area to pave the way for the development of a shopping mall. The project called for financing a three-story building containing public parking on the ground floor and retail shops on the second and third floors.

Applying the predominant purpose standard, the court held that the proposed land condemnation did not further a public purpose, but rather was a mechanism for advancing the private development. In the court's view, once the condemnation occurred, there would be no buildings and no businesses in the area. As a result, the area had no need for public parking. The predominant purpose of the plan, according to the court, was the development of the shopping mall. The public parking garage was merely incidental to the predominantly private use.

Five years later, in 1980, the Florida Supreme Court distinguished *Baycol* to uphold the financing plan for the Miami Convention Center. In *State v. City of Miami*,[78] the court found a paramount public purpose in a development involving a convention center and garage together with a hotel and retail shopping area. Here, the garage served the parking needs

77. 315 So. 2d 451.
78. 379 So. 2d 651 (Fla. 1980).

of the convention center prior to and independent of the parking needs of the hotel and retail facilities.

Although some of the court's language indicates that the temporal relation between the public and private aspects of the development influenced its conclusion, the court also looked to factors which were probative of whether the public good was the legislature's primary motivation or whether the public good was merely a hook to further the private development.[79] On the one hand, in *City of Miami*, the court was convinced that the convention center was the primary motivating factor. On the other hand, in *Baycol*, the parking was justified on its own so long as there were businesses in the area, but could not serve as the basis for condemning an entire area so as to pave the way for a private development, which would then include a public garage.

In 1991, the Florida Supreme Court effectively overruled a decision rendered just three years earlier and declared that a proposed $500 million bond issue for arbitrage profit did not serve a valid public purpose.[80] In *State v. City of Orlando*, the court reviewed the City of Orlando's proposal to issue bonds, lend the proceeds to other localities at a rate higher than the rate on Orlando's bonds, and use the difference, or arbitrage profit, for unspecified municipal purposes.[81]

The court viewed the primary purpose of the bond issue as an investment, hopefully for a profit. However, according to the court, the use of the borrowing power primarily for investment was not a valid municipal purpose because it provided no service to the residents. Rather, it was more properly a function performed in the private sector by commercial banking and business entities.[82]

Using the incidental private benefit standard, the South Carolina Supreme Court invalidated legislation on public purpose grounds. During the oil crisis in 1980, the South Carolina legislature authorized the issuance of (1) general obligation bonds to promote alternatives to oil and (2) industrial development bonds to create jobs. The energy program authorized a state board to issue bonds to finance bank loans which, in

79. *See id.* at 653.

80. *See* State v. City of Orlando, 576 So. 2d 1315 (Fla. 1991), *overruling in part* State v. City of Panama City Beach, 529 So. 2d 250 (Fla. 1988).

81. The court stated that while the lack of specificity as to the ultimate use of the proceeds prevented the court from reviewing those uses under public purpose standards, this defect could be cured. *See id.* at 1317. *See also* State v. Florida Dev. Fin. Corp., 650 So. 2d 14 (Fla. 1995) (distinguishing *City of Orlando* and upholding the financing of capital projects through an investment mechanism).

82. *See City of Orlando*, 579 So. 2d at 1317.

turn, had been made to companies which either produced fuel components or constructed facilities to produce fuel grade alcohol. Notwithstanding the national oil crisis, the court in *State ex rel. McLeod v. Riley*[83] held the loan program unconstitutional.

The court noted that while the state constitution prohibited aid to private companies and made no distinction between incidental and primary public benefit, the state constitution prohibited the issuance of general obligation bonds if a private party is the primary beneficiary. The court held that the primary beneficiaries of the program were private companies and considered the public purpose of developing alternative fuel sources to be speculative and incidental, or indirect, at best.[84]

The court's discomfort with this part of the act seems to relate to the remoteness or intangibility of the public purpose. The aid was not conditioned on the creation of a certain number of jobs because the purpose of the law was alternative energy, not job development. Nor was the aid conditioned upon the financed companies producing a fuel product that was less expensive or more environmentally sound than the existing market alternative. In this sense, no direct, or measurable, public benefit accrued.

The court viewed the job development piece of the legislation as tangible, but struck it down as well by a three-to-two vote.[85] The law authorized industrial development bonds ("IDBs") to finance (1) computer and office facilities for manufacturing companies if at least one hundred jobs were created within one year and (2) shopping centers if leased to at least two tenants who would each employ sixty or more workers. The majority considered the public benefit tangible but negligible; the jobs created benefited too small a segment of the populace.[86] The real basis for the court's opinion, however, seems to be its view that the government's subsidization of private industry constituted an inappropriate interference with free enterprise.[87]

One of the case's more interesting aspects is that, at one point, the

---

83. 278 S.E.2d 612 (S.C. 1981). Other state courts have been more favorable to legislative efforts to develop alternative energy sources. *See* Minnesota Energy and Econ. Dev. Auth. v. Printy, 351 N.W.2d 319 (Minn. 1984), and State *ex rel.* Douglas v. Thone, 286 N.W.2d 249 (Neb. 1979).

84. *See Riley*, 278 S.E.2d at 615-16.

85. *See id.* at 617.

86. *See* Riley, 278 S.E.2d at 617.

87. *See id. Compare Riley*, 278 S.E.2d 612 *with* Basehore v. Hampden Indus. Dev. Auth., 248 A.2d 212 (Pa. 1968) (The Pennsylvania Supreme Court found a requirement to create one hundred jobs sufficient to establish a public purpose.).

dissenting opinion was the majority opinion.[88] The dissent is virtually word for word identical to the majority opinion on the job development issue until the following argument is made: "Only projects which quicken the overall pulse of local commercial activity, rather than merely displace established activity, would serve a valid public purpose. . . ."[89] The majority believed that the IDB program did not increase economic activity but merely preferred, through subsidies, one commercial enterprise to another.[90]

New York courts, in comparison, afford greater deference to legislative determinations of public benefit than most other states. Four New York cases subsequent to *Weismer*[91] provide examples of a judicial approach that is extremely reluctant to overturn a legislative determination in this area.

In 1897, in *Sun Printing and Publishing Ass'n v. New York*,[92] plaintiffs argued that the development of New York City's subway system lacked a public purpose. The court listed four characteristics of a public purpose: "the purpose must be necessary for the common good and general welfare of the people of the municipality, sanctioned by its citizens, public in character, and authorized by the legislature."[93] Analogizing railroads to common highways, the court found them to be public in character, even though owned by private corporations, because they were legally required to be available to the public on a non-exclusive basis.

Several factors influenced the court. The city's population had grown from three hundred thousand to over a million and a half, travel on its existing railroads had increased threefold in the preceding twenty years, and the city had attempted in vain to persuade private industry to finance and build the railroad. The court concluded that while the construction and operation of railroads were ordinarily private functions, the pressing public needs caused by overcrowding and congestion in the City of New York justified the legislation.[94]

In 1921, in *People v. Westchester County National Bank*,[95] the court

88. *See Riley*, 278 S.E.2d at 617 (Harwell, J., concurring in part and dissenting in part).

89. *Id.* at 620-21.

90. *See id.* at 617.

91. *See infra* text accompanying notes 92-101.

92. 46 N.E. 499 (N.Y. 1897).

93. *Id.* at 500.

94. *See id.* The court also held that the statute's provision for leasing the system to private industry after construction did not violate the loan of credit provision recently added to the New York State Constitution in 1874. *Id.* at 501-02.

95. 132 N.E. 241 (N.Y. 1921).

considered an act authorizing the issuance of state bonds to finance the payment of bonuses to World War I veterans. While the court found that the act violated the constitution's gift of credit provision, it found the legislation to further a public purpose.

The court followed two criteria in analyzing the public purpose question: (1) tradition—is the purpose one customarily performed by government and (2) purpose—is the purpose necessary to the support of the public good.[96] Arguing that the legislature's determination that the payments furthered the public good of patriotism and encouraged national defense was reasonable, the court refused to invalidate "what long custom and usage has sanctioned."[97]

In 1963, using the incidental private benefit standard in *Courtesy Sandwich Shop v. Port of New York*,[98] the court upheld legislation which paved the way for the development of the World Trade Center by condemnation of the private businesses on a thirteen-square-block site in lower Manhattan. An overwhelming majority of the businesses that would occupy the World Trade Center would be private and commercial. The court reviewed the history of great ports and, analogizing to cases upholding developments which furthered slum clearance, held that the law advanced a valid public purpose in the development of trade and international commerce. The court found that the involvement of private

---

96. *See id.*

97. *See id.* at 243. The court stated: "Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to a public use...." *Id.* at 242. Although one might not be so bold as to question whether patriotism and national defense are public goods, even the timid might inquire why they are state goods rather than national goods. Judge Cardozo, in a characteristically delightful dissent on the loan of credit issue, responded:

> We are told that requital, if due at all, is due, not from the state, but from the nation, which summoned the host to service. I find myself unable to define by bounds so artificial the claims of equity and honor. The service that preserved the life and safety of the nation preserved at the same time the life and safety of the states.

Westchester County Nat'l Bank, 132 N.E. at 248. After the court invalidated the bonuses, the legislature passed, and the people approved, an amendment to the constitution to authorize the issuance of the proposed bonds. *See* TAXATION & FINANCE, *supra* note 52, at 115.

The court invalidated the legislation because the means employed to accomplish this public purpose constituted a prohibited gift of the state's credit. The court concluded that the payments would be made not to satisfy any legal or moral obligation, but rather, as a gratuity. As such, it constituted a gift to private individuals. The court argued that while the federal government might recognize a claim in equity to veterans, the benefit of their service to New York State was incidental, and could not provide a foundation for a claim of obligation. *Id.* at 246.

98. 190 N.E.2d 402 (N.Y. 1963).

enterprise to produce revenue through rental income as a means of financing the activities of the center was incidental to the main purpose being achieved.[99]

The dissent argued strenuously that the court's opinion was so broad and deferential that the rights of private property had been eviscerated. The dissent maintained that the trade center project had no unique attributes other than the combination in one location of various commercial enterprises, some with an international flavor, and a smattering of governmental offices. The project was indistinguishable from other office buildings in New York, such as the Pan Am building, which had similar traits but were privately financed.[100]

The New York court relied on the *Courtesy Sandwich Shop* precedent in 1978 to uphold a creative museum financing under a substantial public benefit standard. In *Hotel Dorset Co. v. Trust for Cultural Resources,*[101] the court reviewed legislation that authorized a public authority to issue bonds to finance the construction of a fifty-story combined-use building. The first six floors would constitute the Museum of Modern Art's west wing expansion, and the top forty-four floors would be luxury condominiums. The rents from the housing portion would support the debt service, thereby enabling the museum portion to be financed.

The court held that the primary purpose of the legislation, the preservation of cultural institutions, was a valid public purpose and that the private commercial benefit was incidental. According to the court, the private benefit can be incidental even though the public use does not outweigh the private use. The court cited as instructive the lack of proportionality between uses in *Courtesy Sandwich Shop.*[102]

IV. PUBLIC FUNDING OF SECTARIAN INSTITUTIONS: *LEMON* AND ITS PROGENY

A. Background

As we have seen, public purpose cases analyzed the validity of government funding in light of its public purpose and the public and private benefits which accrued as a result of the program. Until 1971, the Establishment Clause analysis employed to review government programs funding sectarian institutions followed essentially the same pattern. Prior

99. *See id.* at 405.
100. *See id.* at 408 (Van Voorhis, J., dissenting).
101. 385 N.E.2d 1284 (N.Y. 1978).
102. *See id.* at 1290.

to 1971, the Court permitted publicly funded materials and services to be made available to sectarian school students on substantially the same terms as they were made available to public school students.[103]

For example, before the Establishment Clause was held applicable to the states,[104] a Louisiana statute which funded the purchase of school books and provided them free of charge to all school children in the state was attacked as violating the takings clause of the Fourteenth Amendment. The plaintiffs argued that the law was an unconstitutional taking because it used tax revenues for a private purpose. In *Cochran v. Louisiana State Board of Education*,[105] the Court upheld the statute on the ground that it furthered a public purpose in that the program benefited the school children and the state. In the Court's view, the schools were not the beneficiaries of the state's aid.[106]

The Court also considered whether this result should be different when the children assisted attended sectarian schools. According to the Court, the religious nature of the school did not change the law's public purpose. The goal of the law, and its effect, was to aid education. There was no purpose on the state's part "to furnish religious books for the use of such children. . . ."[107]

Everson v. Board of Education,[108] the landmark case that applied the Establishment Clause to the states, exemplifies the pre-*Lemon* public purpose approach to church/state funding issues. *Everson* involved a New Jersey statute that reimbursed parents for the costs of transportation for children attending parochial schools. Both the majority and the dissenting opinions in this 5-4 decision framed the issues in the same way. The majority concluded the following: "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose."[109]

Justice Jackson, in dissent, agreed as to the substance of the relevant question while disagreeing with the conclusion:

---

103. *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1 (1947) (public transportation); Board of Educ. v. Allen, 392 U.S. 236 (1968) (textbooks for secular subjects) *See also* Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113, 127-131 (1996).

104. *See Everson*, 330 U.S. 1 (making the religion clauses of the First Amendment applicable to the states through the Fourteenth Amendment).

105. 281 U.S. 370 (1930).

106. *See id.* at 375.

107. *Id.*

108. 330 U.S. 1 (1947).

109. *Id.* at 7.

> I agree that this Court has left, and always should leave to each state, great latitude in deciding for itself, in the light of its own conditions, what shall be public purposes. . . . It may socialize utilities and economic enterprises and make taxpayers' business out of what conventionally had been private business. . . . But it cannot make public business of religious worship or instruction, or of attendance at religious institutions of any character.[110]

Justice Rutledge, in dissent, expressed a similar view:

> [W]e are told that the New Jersey statute is valid in its present application because the appropriation is for a public, not a private purpose, namely, the promotion of education. . . .
>
> The [First] Amendment has removed this form of promoting the public welfare from legislative and judicial competence to make a public function. It is exclusively a private affair.[111]

B. Lemon *and* Tilton

Beginning in 1971, the Court radically changed Establishment Clause law by interpreting the elements of the analysis to have the effect of invalidating aid to institutions that retained their religious character. While the seeds of the Court's new interpretation were planted in earlier Establishment Clause cases,[112] the Court's new theory of the Establishment Clause represented a radical departure from well-established legal principles.

The announcement of the Court's new theory came in two cases, *Lemon v. Kurtzman*[113] and *Tilton v. Richardson,*[114] both decided June 28, 1971. In those cases, the Supreme Court established a three-part test for

---

110. *Id.* at 25.

111. *Id.* at 49. *See also* Schade v. Allegheny County Inst. Dist., 126 A.2d 911 (Pa. 1956) (upholding a state program funding the support, care, and maintenance of delinquent, neglected, or dependent children placed in sectarian facilities arguing that the payment benefited the children, not the institutions). *But see* Swart v. South Burlington Town Sch. Dist., 167 A.2d 514 (Vt. 1961) (holding unconstitutional Vermont's statute which authorized school districts without schools to send children to schools out of the district and to pay their tuition when such payments went to parochial schools).

112. *See, e.g., Everson*, 330 U.S. 1; *Allen*, 392 U.S. 236.

113. 403 U.S. 602.

114. 403 U.S. 672.

analyzing the public funding of sectarian educational institutions.[115]

In *Lemon* and *Tilton* the Court reviewed the constitutionality of funding plans where the aid went not to *students* who attended religious schools, but to the religious schools themselves.[116] The Rhode Island and Pennsylvania programs considered in *Lemon* subsidized the cost to religious elementary schools associated with instructional materials and teachers' salaries. One program authorized the state to pay directly to the religious schoolteacher an amount not in excess of 15% of the teacher's salary for teaching certain secular subjects also taught in public schools. The programs also reimbursed the costs of textbooks and instructional materials used for secular subjects and approved by public officials. Reimbursement for any religious program was expressly prohibited and teachers had to certify in writing that they would not teach any religion course while receiving a salary supplement.[117]

Tilton involved the use of Title I grant money under the Higher Education Facilities Act of 1963[118] to provide one-time construction grants and loans to religious institutions to finance buildings and facilities used exclusively for secular purposes. The act specifically prohibited any of the funds from being used for sectarian instruction or religious worship.[119]

The Court articulated its now famous three-part test in *Lemon*:

> Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster "an excessive government entanglement with religion."[120]

1. Secular Purpose

In both *Lemon* and *Tilton* the Court held that the statutes advanced the legitimate secular purpose of enhancing education. These cases hold

---

115. *Lemon v. Kurtzman* involved two cases—*Lemon*, which considered a Pennsylvania statute, and a companion case, *Earley v. DiCenso*, 403 U.S. 602 (1971), which considered a Rhode Island statute. Both statutes are discussed in the text as part of *Lemon*. For a recent review of cases in this area, see William Bentley Ball, *Supreme Court Review: Church/State Jurisprudence*, 36 CATH. LAW. 233 (1996).

116. These cases do not represent the first time that government subsidies directly benefited religious schools. In *Walz v. Tax Commission*, 397 U.S. 664 (1970), the Court upheld granting real property tax exemptions to religious institutions.

117. *See Lemon*, 403 U.S. at 607-08.

118. 20 U.S.C. §§ 711-721 (1963) (repealed 1972).

119. *See Lemon*, 403 U.S. at 675.

120. *Id.* at 612-13 (citations omitted).

that government funding of the separate function of education at a sectarian school is compatible with the First Amendment. It did not escape the Court's notice that the provision of funds for secular purposes frees up other funds to be used to further the schools' religious ends: "That religion may indirectly benefit from governmental aid to the secular activities of churches does not convert that aid into an impermissible establishment of religion."[121]

The Court acknowledged that the provision of government aid offered substantial benefits to the sectarian institutions and, perhaps, even enabled them to maintain their existence or expand.[122] Given the overriding importance and separable nature of the goal being financed, the aid operated within the requirements of the First Amendment.

Under the Court's new theory, the first prong of the test remained essentially unchanged from the pre-*Lemon* era. The Court could not dispute that the primary purpose of the government programs it reviewed was to further secular education. The Court has never invalidated a funding statute under *Lemon's* first prong.[123]

2. Primary Effect

The Court in *Lemon* declined to analyze the funding plans under the primary effect prong because it invalidated the programs under the third prong.[124] The Court's revision of the primary effect prong began in *Tilton* where the Court held that the federal statute did not have the primary effect of advancing religion.[125] The statute at issue in *Tilton* expressly prohibited any facility financed with federal funds from being used for sectarian instruction or worship or for programs of a divinity school. The

121. *Id.* at 664 (White, J., dissenting).

122. *See Tilton*, 403 U.S. at 679; *see also* Roemer v. Board of Public Works, 426 U.S. 736, 747 (1976); Hunt v. McNair, 413 U.S. 734, 743 (1973).

123. The Court has invalidated government action for lacking a legitimate secular purpose in *Edwards v. Aguillard*, 482 U.S. 578 (1987) (a law requiring the teaching of creationism in public schools), *Wallace v. Jaffree*, 472 U.S. 38 (1985) (statute authorizing moment of silence in public schools) and *Stone v. Graham*, 449 U.S. 39 (1980) (display of the Ten Commandments on the walls of public classrooms).

If the "endorsement" test is viewed as an alternate formulation of the first prong, then *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (holiday displays) provides an additional example. See Appendix for a categorization of Establishment Clause cases.

124. *See Lemon*, 403 U.S. at 613-14.

125. *See Tilton*, 403 U.S. at 679-82. The Court also concluded that the provision of the act limiting the restrictions on religious use to a twenty-year period, rather than for the useful life of the facilities, violated the Establishment Clause. *See id.* at 683-84.

facilities to be financed were two libraries, a music, drama and arts building, a science building, and a language lab at four church-related Connecticut colleges and universities.[126]

While the Court upheld the particular funding program involved in *Tilton*, the case's significance lies in the critical shift made by the Court in how it would determine conformity with the primary effect component of the analysis. To assure compliance with the second prong, the Court began to review the characteristics of the benefited institutions. The Court concluded that the federally financed facilities would not host religious services, would contain no religious symbols, and would be used solely for secular purposes. The Court found these buildings to be indistinguishable from a typical state university facility.[127]

The Court also sought to determine whether religion so pervaded the schools' academic environment that it might "seep" into the programs conducted in the federally funded facilities. The record before the Court showed that the schools did not restrict the books acquired by the library, did not enforce restrictions on what could be taught, subscribed to the recognized principles on academic freedom, did not require attendance at religious activities, did not impose restrictions on admissions, did not compel obedience to religious teachings, and did not require instruction in theology. On the basis of these facts, the Court concluded that an atmosphere of academic freedom rather than religious indoctrination characterized the schools and that the program did not have the primary effect of advancing religion.[128]

As discussed later, based on this new paradigm which focused on whether religiously affiliated schools were too religious, *Lemon's* second prong evolved significantly in subsequent decisions with fatal results for numerous funding plans.[129]

3. Excessive Entanglement

The third prong of *Lemon's* analysis was excessive entanglement.

---

126. *See id.* at 676.

127. *See id.* at 680. For an extensive analysis of the steps taken by religious universities to restructure their religious persona to qualify for government funding, see GEORGE M. MARSDEN, THE SOUL OF THE AMERICAN UNIVERSITY: FROM PROTESTANT ESTABLISHMENT TO ESTABLISHED NONBELIEF (1994). For a discussion of the role of academic freedom in sectarian institutions, see Michael W. McConnell, *Academic Freedom in Religious Colleges and Universities*, 53 LAW & CONTEMP. PROB. 303 (1990).

128. *See Tilton*, 403 U.S. at 681-82.

129. *See infra* text accompanying notes 138-69 and Appendix for a listing of funding plans invalidated under the second prong.

Lemon and *Tilton* reached different results under this prong. One critical reason for this difference is that *Lemon* involved funding plans for elementary schools whereas *Tilton* involved a financing program for institutions of higher education. Under the third prong the Court hardened its ideological shift by again examining the character and purposes of the benefited institution, this time in conjunction with the nature of the government aid and the resulting relationships between the government and the religious authority.[130]

In *Lemon*, several factors led the Court to conclude that the entanglement was excessive. Primary among these factors was the Court's belief that a substantial danger existed in Catholic elementary schools that religious school teachers whose salaries were subsidized would allow religion to intrude into the content of secular subjects. The Court's fear of this danger was so strong that it disregarded the uncontroverted findings of the District Court that such "intrusions" did not occur and that the teachers were sufficiently astute to be able to teach geography in geography class and grammar in English class. But, the Court pointed out, a teacher is not a textbook. One can quickly tell the difference between the Bible and an American history book. A teacher requires extensive monitoring to assure that the teacher doesn't use the multiplication tables as a pretext for discussing God's creation of the world in seven days.

When it came to *Tilton*, the Court decided otherwise. Teachers in Catholic colleges and universities, although also subject to religious direction and discipline, would be presumed to be faithful to their subjects. In the event that teachers strayed from the syllabus and ventured into religious matters, the greater sophistication and independence of college students made the risk of indoctrination considerably less. The Court viewed higher education's predominant mission as providing a secular education whereas the Court considered inculcation of religion as dominant in religious elementary schools.[131]

The Court's other reason for finding excessive entanglement is difficult to explain without suggesting complete hostility to religion on the Court's part. The Court argued that to allow government aid to elementary schools would cause such a flurry of political lobbying to secure funds for one parochial school over another that the integrity and functioning of the political process would be jeopardized. The legislature's time and effort would be so preoccupied with the question of funding sectarian schools that it would be diverted from attending to more pressing prob-

130. *See Lemon*, 403 U.S. at 615.

131. *See Tilton*, 403 U.S. at 685-87.

lems. According to the Court, the First Amendment protected against these evils.[132]

As noted by Justice White,[133] the Court's excessive entanglement analysis presents a vicious circle. The First Amendment requires that government aid not be used to foster religion. When the government attempts to enforce this restriction by monitoring the secular programs or services funded, it violates the First Amendment by becoming excessively entangled with the religious institution. *Lemon*'s third prong presents an inescapable trap for public funding efforts and its application often proves fatal to legislative attempts to fund secular education at sectarian institutions.[134]

C. Lemon*'s Progeny*

Since *Lemon* and *Tilton* numerous cases have reviewed funding plans using *Lemon's* three-part test.[135] The first and third prongs have remained essentially the same since *Lemon*. The second prong, however, became more onerous in two notable ways. First, the Court consistently presumes that religion is pervasive in elementary and secondary religious schools and that secular aid cannot be effectively segregated. The only exception involves the lending of textbooks to students.[136] Second, the Court's analysis focuses on the nature of the benefited institution. The Court will invalidate aid, even for institutions of higher education, if the institution retains its religious character in any significant degree.[137]

Several cases after *Lemon* reveal the developments that occurred in the second prong. In *Meek v. Pittinger*[138] the Court reviewed two Pennsylvania statutes which sought to provide financial assistance along the lines outlined in *Lemon*. The statute provided for (1) the loan of textbooks to children, (2) the provision of auxiliary services such as counseling, testing

---

132. *See Lemon*, 403 U.S. at 622-23. The persistent reliance in subsequent cases on the political strife rationale gives credence to the view that the majority of the Court during this period simply did not approve of state funding of sectarian education. *See, e.g.*, Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Meek v. Pittenger, 421 U.S. 349 (1975).

133. *See Lemon*, 403 U.S. at 668 (White, J., dissenting).

134. See Appendix for a listing of cases invalidating legislation under the third prong.

135. In 1992, in *Lee v. Weisman*, 505 U.S. 577, 602 n.4 (1992) (Blackmun, J., concurring), Justice Blackmun counted thirty-one Supreme Court Establishment Clause cases. I count six cases since then. Of these thirty-seven cases, twenty-two have involved funding plans. See Appendix for a listing and categorization of these cases.

136. *See infra* text accompanying notes 138-43.

137. *See, e.g., McNair*, 413 U.S. at 743.

138. 421 U.S. 349 (1975).

services and instruction for remedial students and the educationally disadvantaged, and (3) instructional materials and equipment such as maps, charts, films and laboratory equipment. In each case the aid was to consist of "secular, neutral, non-ideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children."[139] Public school employees would provide the teaching and services.

The Court upheld the loan of textbooks[140] and invalidated all other provisions. The reasons for upholding the textbook lending provision are as unpersuasive as the reasons for invalidating the other provisions. According to the Court, the textbook loan program was valid because it provided assistance to the pupils rather than to the schools and because the program's financial benefits accrued to the parents and not to the schools.

A review of the program undercuts the Court's conclusion that the schools did not benefit from the textbook loan program.[141] All the elements of the program, including its title, namely, "textbooks loaned to the nonpublic schools," support the dissent's characterization of the program as the more accurate one: "[I]t is pure fantasy to treat the textbook program as a loan to students.... [V]irtually the entire loan transaction is ... conducted between officials of the non-public school ... and officers of the State...."[142]

The program undeniably benefited the religious schools. Prior to the program the parents had to purchase the textbooks.[143] Relieving the parents of this financial burden made the load of private school tuition easier to bear. This state subsidy contributed to the financial well being of the schools by facilitating the parents' ability to send their children to private school. Undoubtedly the students benefited as well. But the Court's myopia consists in viewing the state program in a vacuum. In reality, funding textbooks doesn't further education because Huckleberry Finn picks up his free history book at the state capitol and then sits in the for-

139. *Id.* at 353.

140. *See id.* at 362.

141. The textbook program worked as follows: the private school would submit a list of desired books to the Pennsylvania Department of Education, the Department would approve only those books previously approved by Pennsylvania school officials, textbooks would be assigned by the school, students would request the books from the school, the school would collect the requests and forward them to the public officials and the textbooks would be sent to, stored at and distributed by the schools. The guidelines for implementing the statute describe the transaction under the heading "Textbooks loaned to the nonpublic schools." *Id.* at 361, 380.

142. *Id.* at 379-80 (Brennan, J., concurring in part and dissenting in part).

143. *See id.* at 361 n.10.

est all day smoking his pipe and studying history. In reality, funding textbooks supports education because the school's mission is subsidized and, through the school, the education of the student is advanced.

When it came to instructional materials and equipment, the Court's analysis strained to find differences where none existed. Presaging its analysis in *Roemer v. Maryland Board of Public Works*,[144] the Court lamented that public school officials were not required to inquire into the religious characteristics of the nonpublic schools requesting aid. The Court noted that such inquiry was not required "even though [the school's] dominant purpose was the inculcation of religious values, even if [the school] imposed religious restrictions on admissions or on faculty appointments, and even if it required attendance at classes in theology or at religious services."[145] These not unexpected and somewhat customary attributes of private religious schools so upset the Court that it sought to distinguish the instructional materials and equipment from the textbooks and to find that this part of the program impermissibly aided the schools.

Unfortunately, no distinguishing characteristics existed in either the type of aid provided or the aid beneficiary. The Court acknowledged that the "maps, charts, and laboratory equipment . . . are 'self-polic(ing), in that secular, nonideological and neutral, they will not change in use.'"[146] And, certainly, the beneficiary schools were the same.

Despite these similarities, the Court concluded that the instructional materials and equipment primarily benefited the schools, not the children: "[I]t would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by [sectarian schools]. . . ."[147] Added to this reality was the Court's view that the amount of the financial assistance for materials and equipment was "massive." Almost $12 million was involved. The Court did not discuss, however, what percentage $12 million was of the private schools' budgets, or of Pennsylvania's budget for public school education. The Court offered no guidance or standards for deciding when financial aid becomes massive. Nor did the Court explain why, if the program's defect lay in the nature of the beneficiary, a "massive" amount of *admittedly secular* aid was constitutionally significant.

Perhaps the true defect related to the concern expressed in *Lemon* that religious schoolteachers would attempt to indoctrinate students.

144. 426 U.S. 736 (1976).
145. 421 U.S. at 364.
146. *Id.* at 365.
147. *Id.*

Pennsylvania sought to obviate that concern by requiring public school employees to provide the secular services. However, the Court invalidated the provision of secular, nonideological, neutral auxiliary services provided by public school employees on nonpublic school premises. While the Court recognized that there was a "diminished probability of impermissible conduct" by the public employee,[148] something in the "atmosphere" of the nonpublic school made it likely that "a state-subsidized chemistry teacher [would] fail on occasion to separate religious instruction . . . from his secular educational responsibilities."[149] The Court reached this conclusion notwithstanding the lower court's finding that it was "not supported by any evidence."[150] As such, the efforts that would be required to ensure that teachers adhered to their subjects would necessarily involve "a constitutionally intolerable degree of entanglement between church and state."[151]

One year later, in *Roemer v. Maryland Board of Public Works*,[152] the Court confirmed that its analysis had shifted to focus on the nature of the recipient institution rather than on the type of government aid. The Court stated: "To answer the question whether an institution is so 'pervasively sectarian' that it may receive no direct state aid of any kind, it is necessary to paint a general picture of the institution. . . ."[153]

The Court then accepted the lower court's conclusion that the colleges and universities involved were not "so permeated by religion that the secular side cannot be separated from the sectarian."[154] The Court inquired as to whether the aid in fact went to the secular side and concluded that it did because the statute prohibited the use of the funds for sectarian purposes and that prohibition was enforced by a federal administrative agency.[155]

---

148. *Id.* at 371.

149. *Id.*

150. *Id.* at 392 (Rehnquist, J., concurring in the judgment and dissenting in part).

151. *Id.* at 370. To make their disdain for state funding of private schools clear, the Court also concluded that the potential for political strife in the Pennsylvania legislature due to the recurrent nature of the appropriation process violates the Establishment Clause. *Id.* at 372.

152. 426 U.S. 736 (1976).

153. *Id.* at 758.

154. *Id.*

155. *See id.* at 762. The Court also looked to the "character of the aided institutions" in conducting the third prong. But, because of the lack of pervasive sectarianism, the Court accepted at face value that the secular activities would remain secular. As such, the need for close supervision or on-site inspection was reduced or eliminated. *Id.* The Court previously upheld a state plan to finance the construction of secular facilities at a Baptist college where it found the institution not to be pervasively sectarian. *See* Hunt v. McNair, 413 U.S. 734

In 1977 the Court made clear that the distinction it advanced in *Meek* between textbooks and instructional materials and equipment was untenable. In response to *Meek*, the Ohio legislature authorized loans of instructional materials and equipment directly to students rather than to the schools. In *Wolman v. Walter*[156] the Court invalidated the program stating that textbooks are unique and that the Court would "decline to extend that presumption of neutrality to other items in the lower school setting."[157]

In 1980 the Court made a minor concession to legislative efforts to aid sectarian schools. In *Committee for Public Education & Religious Liberty v. Regan*,[158] the Court upheld New York's reimbursement to nonpublic schools of the costs of state-mandated tests and administrative functions where public school officials prepared the tests' contents. And, in *Mueller v. Allen*,[159] the Court sustained a Minnesota law that allowed parents a state income tax deduction for the cost of their children's tuition, textbooks and transportation. Although the Minnesota law had the same economic consequences as a New York law previously invalidated,[160] the Court distinguished the Minnesota statute on the ground that it applied to all parents, not just parents of nonpublic school students.[161]

Mueller signaled two new realizations that influenced the Court's later Establishment Clause holdings. First, the Court acknowledged that Minnesota's program sought to assist parochial schools and that the program's economic benefit was the same whether the aid was paid directly to the school or to the parents. However, the Court reiterated the view that its Establishment Clause concerns are significantly mitigated when the aid flows directly to parents.[162] Second, the Court highlighted the nonpublic schools' contributions to society and the financial burden borne by parents who send their children to these schools.[163]

While *Mueller* marked the beginning of a more sensible Establishment Clause jurisprudence, the Court quickly reverted to its former self

---

(1973).

156. 433 U.S. 229 (1977).

157. *Id.* at 251 n.18.

158. 444 U.S. 646 (1980).

159. 463 U.S. 388 (1983).

160. *See Nyquist*, 413 U.S. 756.

161. *See Mueller*, 463 U.S. at 396 n.6, 398-99.

162. *See id.* at 399.

163. *See id.* at 401-02. The Court in *Mueller* began to distance itself from the "rather elusive inquiry" posed by the "divisive political potential" analysis conducted in prior cases under *Lemon's* third prong. *Id.* at 403 n.11.

in 1985. In *School Districts of Grand Rapids v. Ball*,[164] the Court, beginning "with a consideration of the nature of the institutions,"[165] invalidated Michigan programs which provided remedial and enrichment classes to primarily sectarian elementary school children where the services were performed in the nonpublic schools.[166]

Yet, the next year, in *Witters v. Washington Department of Services*,[167] the Court upheld a vocational tuition grant to a blind person to attend a Christian college to study to become a pastor. And, in 1993, in *Zobrest v. Catalina Foothills School District*,[168] the Court upheld the provision of financial assistance to a deaf student who sought to bring a state-employed sign language interpreter to his Catholic school to sign the content of his courses, including religion class.

The Court's analysis and conclusions in *Mueller, Witters* and *Zobrest* laid the foundation for the Court's reform, in the last two terms, of its Establishment Clause jurisprudence. While both *Mueller* and *Witters* utilized *Lemon's* three-part test, the Court's Establishment Clause focus in these three cases shifted. The analysis began to concentrate on whether the governmental aid was neutral, available to a broad class of beneficiaries and in furtherance of valid, secular objectives, notwithstanding that sectarian institutions might also receive some incidental financial benefit.[169]

The seeds planted in *Mueller*, *Witters* and *Zobrest* bore fruit in the Court's most recent Establishment Clause cases. In 1995, in *Rosenberger v. Rectors and Visitors of the University of Virginia*,[170] the Court, in a 5-4 decision, confirmed that the *Lemon* test was not appropriate for all Establishment Clause purposes. Without any mention of *Lemon*, the Court in *Rosenberger* provided a revised framework for analyzing government

164. 473 U.S. 373 (1985).

165. *Id.* at 384.

166. *See id.* at 397-98. In *Aguilar v. Felton*, 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 521 U.S. __, 117 S. Ct. 1997 (1997), the Court invalidated a federal program which provided financial assistance for secular services, such as remedial reading, remedial mathematics and English as a second language, for educationally deprived children from low-income families. The New York officials tried to distinguish their program from the program invalidated in *Ball* on the ground that they had developed a system for monitoring the publicly funded services to assure that religion did not seep in. Demonstrating the firmness of the vise the Court had created by the *Lemon* test, the Court invalidated the program on the ground that the monitoring constituted excessive entanglement under the third prong.

167. 474 U.S. 481 (1986).

168. 509 U.S. 1 (1993).

169. *See Zobrest*, 509 U.S. at 10-12.

170. 515 U.S. 819 (1995).

funding plans under the Establishment Clause.[171] The Court upheld payments by the University of Virginia ("UVA"), a public corporation, to a printer for the costs of printing a newspaper of a religious student group called Wide Awake Productions ("WAP"). The Court analyzed the Establishment Clause issues by making two inquiries: what is the purpose or object of the state program and what are the practical details of the program's operation.[172]

Applying this test, the Court found UVA's student activity fund program to further the legitimate secular purpose of promoting educational opportunities in that it had a large and diverse student activities program which addressed a broad range of social, moral and religious issues.[173]

Given this legitimate purpose, the Court looked to the program's operation to see if it had the effect of advancing religion. Several features of the program convinced the Court that the program neither impermissibly advanced nor aided religion, but rather, was neutral toward religion: fees were dispersed to student groups based on neutral criteria and even-handed policies; the funded groups represented a broad array of diverse viewpoints, including religious and anti-religious ones; and the funds were disbursed to private contractors. Additionally, UVA acted to underscore the program's neutrality by disassociating itself from the student activities to avoid any impression that UVA endorsed the group's religious publications.[174]

The Court stressed the importance of the fact that no payments went directly to groups involved in religious activities. Yet, this is the least convincing aspect of the Court's analysis.[175] Far more significant than whether the payment went to the printer directly, or indirectly through WAP, is the conclusion that any benefit to the religious group is *incidental* to the legitimate purposes of a generally available program: "Any benefit to religion is incidental to the government's provision of secular services for secular purposes on a religion-neutral basis. Printing is a routine,

171. *See id.* at 838-39.

172. *See id.*

173. *See id.* at 840-41.

174. The University's guidelines for student organization funding require that all funds be disbursed directly to third-party vendors, that no funds be paid to the student organization and that student groups which are "Contracted Independent Organizations," such as WAP, include in all written materials a disclaimer that the group is independent of the University. *Id.* at 823, 841.

175. The Court in *Agostini* also found this factor significant. In *Agostini* the Title I funds were disbursed to a public agency that dispenses services directly to eligible students and were not disbursed directly to the parochial school. *See Agostini*, 521 U.S. at ___, 117 S.Ct. at 2013.

secular, and recurring attribute of student life."[176]

By focusing on the nature of the program being funded, the Court elevated Establishment Clause analysis and began the process of restoring it to its proper focus. The Court seems to have abandoned its prior approach that introduced elements adverse to religion, such as focusing on the nature of the aid recipient and whether its activities are pervasively religious. The Court pointed out that religious free exercise would be inhibited if the provision of generally available public services, like police and fire protection, student activity fees and remedial services, constituted an Establishment Clause violation when religious groups sought to avail themselves of these goods and services on the same terms as all other groups in society.[177]

Last year the Court solidified its reform of Establishment Clause analysis in *Agostini v. Felton*.[178] In *Agostini*, the Court, in another 5-4 decision, overruled *Aguillar v. Felton*[179] and its companion case *School Districts of Grand Rapids v. Ball*[180] and upheld New York City's Title I program authorizing public school teachers to provide remedial services on sectarian school premises. In doing so *Agostini* substantially reworked the second prong of the *Lemon* test and eliminated the third prong as a separate test.[181]

Agostini evaluated governmental aid under the Establishment Clause by a two-part test. First, the Court reaffirmed the importance of the inquiry into the statute's purpose and found that the statute advanced the legitimate secular purpose of education.

Second, the Court reaffirmed the significance of the effect component of the test but repudiated some of the hostile assumptions added to the effect prong. The Court noted in *Agostini* that a change had occurred in the "effect" prong in the Court's "understanding of the criteria used to assess whether aid to religion has an impermissible effect."[182] The purpose of the criteria used for identifying the aid's beneficiary, according to *Agostini*, is twofold: to enable the Court "to evaluate whether the pro-

176. *Rosenberger*, 515 U.S. 843-44.

177. The Court handled the excessive entanglement prong of Lemon *sub silentio* by arguing that imposing a requirement for UVA officials to scrutinize the content of WAP's writings for religious content would imperil free speech rights and itself impermissibly entangle the State with religion. *See id.*

178. 521 U.S. 203, 117 S. Ct. 1997 (1997).

179. 473 U.S. 402 (1985).

180. 473 U.S. 373 (1985).

181. *See Agostini*, 521 U.S. at ___, 117 S. Ct. at 2010-2016.

182. *Id.* at ___, 117 S. Ct. at 2010.

gram subsidizes religion" and to determine whether the criteria themselves "have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination."[183]

In other words, the Court examined whether the program subsidizes religion by assessing whether the aid is used to indoctrinate religion in a way that could be attributed to the state.[184] In conducting this review the Court abandoned certain paternalistic and demeaning presumptions made in earlier funding cases, namely, that a public employee in a parochial school building will be irresistibly tempted to inculcate religion, that the teacher's presence creates an impermissible symbolic union between church and state and that, as a result, the government program impermissibly finances religious indoctrination. Rather, after *Agostini*, the Court will assume, absent evidence to the contrary (none of which was present in the case), that a teacher can be trusted to teach his or her specific subject, whether in the school building or in a trailer across the street from the school, and that the presence of the public employee in the religious school no more symbolizes the state's endorsement of religion than does the presence of the police officer or firefighter.

The Court next considered whether the criteria themselves have the effect of advancing religion by creating a financial incentive to indoctrinate. However, the Court found the financial incentive not present where the "aid 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."[185]

Finally, the Court rejected the excessive entanglement component of *Lemon* as a separate test and treated it as an aspect of the inquiry into the statute's effect. The Court adopted this approach because "the factors we use to assess whether an entanglement is 'excessive' are similar to the factors we use to examine 'effect.'"[186] The Court considered three ways in which the entanglement could be excessive: the need for pervasive monitoring; the need for administrative cooperation; and the dangers of political divisiveness. It rejected the last two as insufficient bases, standing alone, to create excessive entanglement. And the Court discarded the first reason because it was based on the now abandoned premise that teachers cannot be trusted to teach only their assigned subject in a religious school setting.

183. *Id.* at ___, 117 S. Ct. at 2014.
184. *See id.*
185. *Id.*
186. *Id.* at ___, 117 S. Ct. at 2015.

The Establishment Clause analysis used in *Rosenberger* and *Agostini* reflects a significant deviation from the traditional test. Presumably, the Court is now poised to expressly overrule *Lemon* in an appropriate case. To do that it should be prepared to articulate a reasonable and workable alternative. Part V of this article proposes such a test.

V. PUBLIC PURPOSE AND SECTARIAN INSTITUTIONS

In public purpose cases, courts exercise judgment as to whether a law advances a public purpose and apply different standards to determine whether the effect of the law sufficiently promotes public benefits as compared with private benefits. While this approach has not yielded clear-cut formulas or uniform standards, neither has the *Lemon* test. Questions as to whether religion is pervasive, whether the aid is massive, or whether the entanglement is excessive are certainly no less liable to subjective determination and the predilections of individual judges than the components of the public purpose test, which also require judges to make balancing decisions.

Yet, since judgment will be a necessary component of any test, analysis should focus on which test is more appropriate. If the appropriate standard is the one that produces greater public benefits, then the public purpose test should prevail over the *Lemon* test. The public purpose test better serves this goal because it focuses more clearly on the nature of the public benefit received. On balance, the public purpose test yields results that generally defer to legislative judgments of public benefit while also checking legislative choices that provide excessive benefits to private parties. Contrarily, the *Lemon* test, on balance, more readily repudiates legislative judgments regarding the best way to support secular education when sectarian institutions are the beneficiaries of public resources. While reasonable disagreement may exist as to which balance is more appropriate from a policy perspective, it is indisputable that the test designed for educational institutions is a unique fabrication of the Supreme Court. In all other areas involving public funding, including the public funding of sectarian institutions in the health care and social welfare contexts, courts have consistently endeavored to apply the central principles of the public purpose doctrine with results that have not received the widespread criticism targeted at the *Lemon* test.

This Part proposes a workable Establishment Clause funding jurisprudence built upon the insights of the public purpose doctrine as tailored

to reflect the ends of the Establishment Clause.[187] This union of tests stems from the similarity of goals shared by the Establishment Clause and the public purpose doctrine. Each provision acknowledges a fundamental limitation inherent in our form of government. The Establishment Clause restricts the state's authority in areas relating to religion and reflects the view that matters of religious belief are not, in themselves, legitimate concerns of the state. The public purpose doctrine restricts the state's authority in areas relating to the purely private interests, usually financial, of individuals and organizations and reflects the view that the financial well being of private parties, standing alone, is not a legitimate concern of the state.

Neither doctrine addresses clearly delineated activities. In both areas the private and public dimensions often overlap. In the area of religion, when a particular denomination teaches its adherents to "turn the other cheek" because that is what Jesus taught, the state has no legitimate interest in penalizing those who deny this teaching. However, when a member of that denomination claims an exemption from military service on the basis of this tenet, his private religious beliefs becomes a matter of societal concern. When IBM seeks to compensate its executives by acquiring a luxury office building to house upper management, the state has no legitimate interest in subsidizing the purchase. However, the state may be justified in subsidizing IBM if it agrees to build a plant in a depressed area where it might not otherwise locate and commits to creating one hundred new jobs.

The area of activity that the state is barred from is not characterized by illegality, baseness, or immorality. Teaching adherents to turn the other cheek and rewarding IBM executives may be laudable. The state does not refrain from involvement in these matters because they are evil, but rather, because they do not involve matters of common concern. Until the effects of these beliefs or actions spill over and impact the well being of the community, they are immune from state regulation or legislation.

However, to say that these private areas do not involve matters of common concern is not entirely accurate. The law of this country has long recognized that the free exercise of religion is essential to the furtherance of the common good.[188] The First Amendment's religion clauses

187. The question of the public funding of sectarian education has received considerable attention in the literature. *See, e.g., supra* note 2.

188. *See* U.S. CONST. amend. I; Zorach v. Clauson, 343 U.S. 306 (1952). As one author has pointed out, the Constitution requires not mere neutrality but accommodation of religion. *See* McConnell, *supra* note 2.

enshrine the free exercise of religion as one of the fundamental rights of individuals. Far from being an evil, the private practice of religion holds a protected status in American law. Activities based on religious beliefs may be protected even, at times, if contrary to general societal norms.[189]

In the current milieu, where the state as an institution has grown dramatically, fewer and fewer areas can be characterized as purely private. The boundaries between the public and private sectors shift in tandem with societal views of the role of the state and the scope of its legitimate activities. Given the broad role of the modern state and the preferential status of religious activity, fewer and fewer funding plans involving sectarian institutions should be invalidated on the grounds that these activities do not benefit the common good.

Yet, the opposite has occurred. As the role of the state expanded beginning in the 1960s, courts increasingly struck down financing plans assisting sectarian institutions. This contrasts with judicial developments involving funding plans subsidizing private enterprises. As legislatures expanded funding of numerous economic activities once viewed as related solely to the private sector, such as job development, housing, commerce and transportation, the judiciary increasingly deferred.

A parallel development should have occurred in response to legislative efforts to fund sectarian institutions that provide a public benefit. Instead of viewing sectarian educational institutions as offering a public benefit (by increasing educational opportunities and standards throughout society), with a concomitant incidental benefit to the religious mission of the sponsoring institutions, the courts conjured up an unholy specter. In their view, funding of sectarian schools risked wholesale religious conversions that would empower "reborn religious" to take over state legislatures and Congress and establish a state or national religion.

The judicial vehicle used to invalidate numerous funding programs benefiting sectarian institutions is the *Lemon* test. Given the similarity of purpose between the public purpose doctrine and the Establishment

189. This view is consistent with the law prior to *Employment Div. v. Smith*, 494 U.S. 872 (1990), and views that decision as bad law. See Justice O'Connor's opinion in City of Boerne v. Flores, 117 S.Ct. 2157, 2176 (1997) (O'Connor, J., dissenting). Adoption of a "lower" Free Exercise standard under Smith raises a serious concern to those who urge a "lower" Establishment Clause standard. The danger is that the courts will adopt a deferential view under both clauses with the result that deference is given even to legislative enactments that, in the past, would have been invalidated under the Free Exercise Clause as constituting undue state interference in religious matters. *See* Marc Stern, *The Supreme Court 1997: A Symposium*, 76 FIRST THINGS 34, 34-35 (1997); *cf.* Michael W. McConnell, *in id.*, at 33 (expressing the view that the Court almost always rules in favor of the government under the Free Exercise Clause).

Clause, it is not surprising that the *Lemon* test and the public purpose test share common features. The two-part test proposed here combines features of *Lemon* with the elements of traditional public purpose analysis. Under this test, funding programs would be valid if they seek to further a public purpose and if the primary effect of the program is the actual advancement of that public purpose.

A. The First Prong—Public Purpose

The first prong of both public purpose and Establishment Clause analyses is essentially the same. Both tests look to the purpose or end of the legislation under review. To be valid, the legislation must identify a public or secular purpose. Unlike the application of the purpose prong in the public purpose arena where courts have struck down a legislative purpose as violating the public purpose doctrine, it would be unusual for legislation funding education to be invalidated under the first prong of Establishment Clause analysis since education has been acknowledged to serve a public or secular purpose.[190]

B. The Second Prong—Effect

Under the second prong, legislation would be valid if it resulted in the actual advancement of the public purpose to the requisite degree. What the requisite degree is would depend on which standard courts adopt among the different measures used to assess the proportionality of public and private benefit. The variations in the benchmarks were discussed earlier—is the public benefit predominant, dominant, substantial or paramount and is the private benefit incidental. The approaches range from the more expansive reading of the New York court in the Museum of Modern Art case to the more restrictive reading of the South Carolina court in the *Riley* case.[191]

In assessing whether the public purpose is primarily advanced, the concerns underlying the Establishment Clause impose an additional requirement. The application of this prong of the test to government aid to sectarian educational institutions should differ from the application of the test to government funding of private educational institutions or other private, secular enterprises. The very existence of the Establishment

190. See Appendix for a list of cases invalidating actions under the first prong.

191. *See supra* notes 83-87, 101-102, 173-74. Because of the critical importance of education and the overwhelming need for financial assistance in this area in modern times, society would benefit most by the Court adopting the more expansive approach of the New York court.

Clause announces that a heightened level of scrutiny is warranted when religious institutions are beneficiaries of public resources. The First Amendment declares that the establishment of religion by the government is never, under any circumstance, a public purpose in this country. Sectarian beneficiaries have two characteristics that cannot form the predicate for a public purpose: they are private and they are sectarian. As such, when applying the test in the Establishment Clause area, religious facilities or programs should not be funded from public sources.

Under the proposed test the effect prong should be structured around the following inquiry: Is the benefit to religion incidental to the government subsidy. Indicia of whether the benefit to religion is incidental are the following:

(1) Is the program by its terms neutral towards religion, that is, (a) does the program make aid available without regard to public/private distinctions or, if the program is exclusively for nonpublic education, without regard to sectarian/non-sectarian distinctions and (b) as to the beneficiaries, is the aid disbursed evenhandedly?

(2) Is the benefit to education indirect, intangible, negligible, or remote?

(3) Is there a requisite degree of proportionality between the public purpose and the private benefit; that is, is the benefit to education substantial, dominant, or predominant?

(4) Is the aid to be used for sectarian purposes, that is, does the program require appropriate certifications and contain adequate parameters to assure that the secular and religious aspects of the curriculum are kept separate?

Other inquiries are irrelevant in funding cases for Establishment Clause purposes. The Court's approach under the second prong, even after *Rosenberger* and *Agostini*, identifies various factors which have been used in reviewing primary effect but fails to delineate which factors contribute to the analysis and which detract from it. By focusing its analysis on the aid's effect on education, dropping its hostile presumptions, and assessing only pertinent indicia of primary effect, the Court could organize these factors into a coherent and principled analytical framework. The second prong of the public purpose test, as modified in the Establishment Clause context, would be different from the second prong of *Lemon* in three ways.

1. Focus on Financial Assistance and Analyze Aid's Effect on Education

The Court should focus on the benefit conferred; that is, whether the

aid supports a secular aspect of the educational institution's curriculum or activities rather than a religious aspect. Beginning with *Roemer*, the Court shifted its focus from looking at the use of the financial subsidy to reviewing the nature of the recipient institution. This shift virtually assured a negative outcome. Asking whether the benefited *religious* institution conducts religious activities is like asking the surgeon if surgery is recommended.

Under the proposal, the second prong would operate like the effect prong of the public purpose test. Under that test, the court does not review how extensively the philosophy of the private company permeates the plant being subsidized, whether the IBM logo is prominently displayed on the plant wall, whether the government will be viewed as endorsing IBM over Apple, whether the company offers lectures on Karl Marx or Adam Smith during lunch hour, or whether the training sessions for new employees include commentary about the superiority of IBM computers over all rival brands. The state no more establishes religion when it funds secular activities in sectarian schools than it abolishes private enterprise and capitalism when it subsidizes an IBM plant.

Rather, the focus is on whether the aid, not the recipient, is used in programs that benefit secular purposes such as jobs, economic development, or housing. If the aid is for school transportation, hearing aids, secular textbooks, or even a library (which may include books on religious subjects), the aid should be allowed. Each of these functions furthers the state's interest in education and advances the well being of society by providing for a better-educated citizenry. The aid should be disallowed as having the effect of primarily advancing religion if, for example, it is for a divinity school, a chapel, religious instruction books, or religious symbols or garments.[192]

2. Discard Hostile Presumptions

The hostile presumptions made by the Court about sectarian educational institutions would be abandoned. The Court correctly rejected

192. The difficulty some point to in separating the religious and secular aspects of education in a sectarian school do not seem insurmountable in other contexts. For example, in a recent New York case, the court indicated that it was capable of determining, and was required to determine, whether an employee was fired from a Catholic school for religious or non-religious reasons. The court noted its duty to protect unionized teachers from unlawful discharge. A discharge would not be unlawful if it was for religious reasons, such as, being "an inappropriate role model" or for "unchristian behavior." According to the court, "[the First Amendment] . . . does not per se prohibit appropriate governmental regulation of secular aspects of a religious school's labor relations operations." New York State Employment Relations Bd. v. Christ the King Regional High Sch., 682 N.E.2d 960, 966-67 (1997).

these presumptions in *Agostini*.

These presumptions effectively precluded aid from flowing to elementary and secondary schools or to any higher educational institution that retained its religious character. These presumptions have been discussed earlier: the inability of teachers to stick to their subject matter, that the public school teacher's presence in the religious school creates an impermissible symbolic union between church and state, the impressionable nature of grade and high school students versus college students, the non-academic character of schools with an active religious mission, the increase in lobbying and the resulting disruption to the legislative process.

These presumptions would become relevant to primary effect analysis where evidence existed that these activities occurred. In that event, the court would review whether this activity resulted from a defect in the aid program or a failure to adhere to the conditions of the aid. Depending on the outcome of that review, an appropriate corrective response should be fashioned.

3. Indicia of Primary Effect

Review of the indicia of primary effect would focus on the benefits provided by the aid. In *Rosenberger* and *Agostini*, the Court looked at four factors as indicative of whether the aid had the primary effect of advancing religion. However, the Court's analysis of these factors at times clouded the appropriate focus. The four factors reviewed were:[193] (a) is the aid paid directly to the sectarian schools or does the benefit accrue to the sectarian school only as a result of individual private choices;[194] (b) does the aid impermissibly finance religious indoctrination or is it part of a supplemental program;[195] (c) are the aid's beneficiaries primarily sectarian school students;[196] (d) is the aid used to indoctrinate religion in a way that could be attributable to the state or does the program endorse religion or create a symbolic union between church and state?[197]

193. *See Rosenberger*, 515 U.S. at 839; *Agostini*, 521 U.S. at ___, 117 S.Ct. at 2010-2014.

194. *See Agostini*, 521 U.S. at ___, 117 S.Ct. at 2013; *Rosenberger*, 515 U.S. at 841-42. Prior cases had emphasized the importance of state aid payments not going directly to the religious institution. *See, e.g.*, Mueller v. Allen, 463 U.S. 388 (1983) (state income tax deductions for tuition versus cash payments), *Rosenberger*, 515 U.S. 819 (payments to the school for educational materials or reimbursement to parents, payment to a printer or directly to a religious student group), Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (providing a sign language interpreter rather than money to the school to hire an interpreter).

195. *See Agostini*, 521 U.S. at ___, 117 S.Ct. at 2013.

196. *See id.*

197. *See id.* at ___, 117 S. Ct. at 2012, 2014; *Rosenberger*, 515 U.S. at 841.

a. Direct/Indirect

Under its analysis prior to *Rosenberger* and *Agostini*, the focus was "whether the effect of the proffered aid is 'direct and substantial, . . . or indirect and incidental."[198] The direct/indirect component of the analysis arose because the Court found that the secular and sectarian aspects of a religious school's programs could not be separated.[199] But this conclusion was based on the hostile presumptions now rejected by the Court. With the Court's rejection of these presumptions, the Court should no longer inquire as to whether the aid flows directly to the school, but should focus on whether the aid is substantial or incidental.

The Court has done this in part. In *Agostini* the Court states that "we have departed from the rule relied on in *Ball* that all government aid that directly aids the educational function of religious schools is invalid."[200] The Court rejects the substance of *Ball* but adheres to the form. In both *Rosenberger* and *Agostini*, the Court thought it important that the aid did not flow directly to the religious group. In *Rosenberger*, for example, Justice Souter carefully reviewed prior Establishment Clause cases to show that, under those cases, the indirect nature of the funding was critical to the Court's conclusions.[201] And, in *Agostini*, Justice Souter argued that the Title I program was distinguishable from the sign language interpreter approved in *Zobrest* because Title I aid flowed directly to the school in the form of classes and programs.[202] In both cases the majority adhered to the view that the aid to religion was indirect.[203] In *Rosenberger*, the Court confirmed the importance of the distinction:

> [The dissent is] correct to extract from our decisions the principle that we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions. . . . The error is not in identifying the principle but in believing that it controls this case.[204]

Rosenberger and *Agostini* represent missed opportunities for the

198. School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 394 (1985), *overruled by* Agostini v, Felton, 521 U.S. ___, 117 S. Ct. 1997 (1997).

199. *See id.* at 394 n.12.

200. *Agostini*, 521 U.S. at ___, 117 S. Ct. at 2011 (citing Witters v. Washington Dept. of Services for Blind, 474 U.S. 481 (1986)).

201. *See Rosenberger*, 515 U.S. at 873-84 (Souter, J., dissenting).

202. *See Agostini*, 521 U.S. at ___, 117 S. Ct. at 2021 (Souter, J., dissenting).

203. *See id.* at ___, 117 S. Ct. at 2013; *Rosenberger*, 515 U.S. at 842.

204. *Rosenberger*, 515 U.S. at 842.

Court. Instead of merely resting on the shift in Establishment Clause law made by *Zobrest*,[205] the Court could have advanced Establishment Clause analysis by acknowledging the irrelevance of the direct/indirect distinction with respect to the "flow" of the aid.[206]

The important element is whether the subsidy primarily benefits education or religion. Payments to a religious school to hire a sign language interpreter for the physically impaired provide, to the school, the exact same benefit as payments to a sign language interpreter to work in a religious school. Establishment Clause analysis is not furthered by looking at the name of the payee on the check. The weakness of the Court's distinction will be exposed if the Court reviews the Cleveland program.[207] There, the aid was paid directly to the sectarian school, but only if parents chose to enroll their children in such schools.[208]

On June 10, 1998, the Wisconsin Supreme Court upheld the Milwaukee voucher program. There, the state sent checks directly to sectarian schools previously designated by parents. The checks were made payable to the parents and could be cashed only for the cost of the student's tuition. The court, analyzing the program under both *Lemon* and the cases culminating in *Agostini*, found the direct payments to the schools to be legitimate because the payments were made as a result of the choices of

---

205. *See supra* text accompanying notes 168-69.

206. Justice O'Connor stated: "No Title I funds ever reach the coffers of religious schools" and then cited *Committee for Public Ed. & Religious Liberty v. Regan*, 444 U.S. 646, 657-59 (1979), for support. *Agostini*, 521 U.S. at ___, 117 S.Ct. at 2013. *See also* Meek v. Pittenger, 421 U.S. 349 (1975) (sustaining a law loaning secular textbooks to students but invalidating portions of the law lending secular instructional materials directly to schools as having the primary effect of advancing religion). In *Roemer v. Board of Public Works*, 426 U.S. 736 (1976), the Court upheld annual subsidies paid directly to the schools. The Court should have taken the next step and overruled *Regan* and the later portion of *Meek* to the extent that the decisions in those cases rest on the fact that the subsidy went directly to the religious schools and then reassess the programs involved to determine if the *programs* advance the state's interest in education.

207. For a description of the Cleveland program, see Simmons-Harris v. Goff, Nos. 96APE08-982, 96APE08-991, 1997 WL 217583 (Ohio Ct. App. May 1, 1997). This case offers an excellent vehicle for the Court's final reformation of the *Lemon* test. The Ohio court invalidated the Cleveland program based on a reading of *Rosenberger* that failed to discern the Court's direction. The opinion was rendered one month prior to *Agostini* and employed, in many regards, the arguments used in Justice Souter's dissent in *Agostini*. The opinion is characteristic of the views of those who would invalidate aid to children if sectarian schools are involved regardless of the dire plight of the public school "alternative" in the community. The Cleveland program was enacted "in response to an educational and fiscal crisis in the Cleveland City School District so severe that on March 3, 1995, the United States District Court for the Northern District of Ohio ordered the state to take over the administration of the district." *Id.* at *1.

208. *See id.* at *10.

individual parents. As the court stated: "In our assessment, the importance of our inquiry here is not to ascertain the path upon which public funds travel under the amended program, but rather to determine who ultimately chooses that path."[209]

The Cleveland and Milwaukee programs should force the Court to realize that public funds go "directly" to religious institutions in various settings (e.g., hospitals, social service agencies) without violating the Establishment Clause and that education should not be treated differently.[210] If the Court is ever to emerge from under the mantle of irrelevant distinctions of its Establishment Clause cases,[211] it needs to consistently concentrate its focus on the aid's effect on education. The critical question under the Establishment Clause in *Zobrest*, for example, would be this: Does the publicly funded sign language interpreter program primarily advance educational opportunities for the physically disabled even when the interpreter provided these services to a child who attended a religious school?

While inquiry into whether the aid flows directly to the institution is irrelevant, inquiry into whether the *use* of the subsidy is for religious or secular education is relevant to Establishment Clause concerns. If the subsidy directly funds a religious program, the aid should be invalid. More typically, the aid is for an educational purpose or program and the question becomes whether the benefit to religion is the primary effect of the aid or whether that benefit is incidental. In this context, "indirect" is used to mean intangible, remote, or negligible. A program designed to finance the costs of religious programs of a divinity school could not be upheld on the ground that an increase in graduate school opportunities would produce a more highly educated citizenry generally. The aid to secular education here should be considered remote, intangible, and negligible.

Notions of whether the benefit is tangible, direct, and substantial require judgments about which reasonable people may differ and which may evolve depending on society's view of government's role. In the public purpose cases considered in Part III, the South Carolina Supreme

209. Jackson v. Benson, 578 N.W.2d 602, 618 (Wis. 1998). The Wisconsin opinion is significant for its analysis under *Lemon* and the subsequent cases. It may turn out to be the vehicle used by the United States Supreme Court to reevaluate its Establishment Clause finding jurisprudence.

210. *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589 (1988) (funds under the Adolescent Family Life Act were paid directly to religious organizations); Bradfield v. Roberts, 175 U.S. 291 (1899) (payments were made directly to Catholic hospitals). *See* MONSMA, *supra* note 20 (discussing the various ways in which governmental entities make direct payments to sectarian organizations).

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

Court considered the creation of one hundred jobs as too negligible for establishing a public purpose but the New York Court of Appeals considered a six-story museum expansion not an indirect benefit as compared with the forty-four floors of luxury condominiums above the museum wing.[212]

Another aspect of the direct/indirect question involves whether the aid to the school's secular program frees up money that can be used for religious education. This is the "all green dollars" theory, that is, as long as money flows to the school, the school benefits because money is fungible. Beginning in *Hunt v. McNair*,[213] the Court acknowledged this by-product and has consistently concluded that this benefit to religion is incidental. This type of benefit occurs any time a subsidy is paid or a public service is provided. The availability of municipal fire and police services to sectarian schools relieves them of the burden of contracting privately for these services. The Court has recognized that even if subsidies enable a religious school to continue to operate they do not constitute the government's establishment of religion:

> The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends. If this were impermissible, however, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way.[214]

b. Supplemental Aid

The Court also has looked to whether the aid is supplemental, that is, does the aid relieve the school of a cost it would otherwise be required to bear or is the aid provided for an activity that is supplemental to the regular curriculum.

In *Agostini* the Court considered whether, as required by Title I, the aid was supplemental to the regular curriculum. The Court rejected Justice Souter's speculation that it is impossible to distinguish between supplemental and general education services. In the absence of any evidence to the contrary, the Court will not presume that Title I services supplant,

---

212. *See supra* text accompanying notes 83-86, 101-102 and 187-88. The existence of these differences should not detract from the appropriateness of the inquiry.

213. 413 U.S. 734 (1973).

214. Roemer v. Board of Public Works, 426 U.S. 736, 747 (1976).

rather than supplement, the remedial instruction and guidance counseling services already provided by sectarian schools.[215]

The Court considered this issue as an aspect of whether the Title I program "impermissibly finances" religious indoctrination.[216] This analytical framework should be reconsidered. Under the second prong, the inquiry should always be whether the subsidy program has the effect of using public resources to promote religion. The inquiry is relevant whether the public resource is in the form of taxation, tax-exempt financing, one shot or annual grants, or the exercise of eminent domain powers.

The inquiry into financing, analytically, is a subcategory of the inquiry into incidental. The question—"Does the program impermissibly finance religion?"—does not explore a separate or independent area of inquiry; it is merely another way of asking if the program has the primary effect of promoting religion. For example, if the government financed the construction of a religious school and paid all the school's operating costs other than the proportionate share directly attributable to the teaching of religion, the program would be invalid because the public benefit would be incidental. Why didn't the governmental unit simply build a public school where religion isn't taught?

In this regard, Justice Souter's analysis is correct. The line between supplemental and general education may be unclear. His conclusion, however, misses the mark. The Court has sustained programs that provide aid for the general or core components of the curriculum if they are provided to students rather than to the school[217] or to non-pervasively sectarian colleges and universities.[218]

While a program that supplants a religious school's general educational requirements could, in extreme cases, have the primary effect of advancing religion, public funding should not be conditioned on the program being supplemental. Rather, whether the aid is supplemental should be one factor in analyzing whether the aid incidentally benefits the school's religious mission. And, as the Court acknowledges, this is a question of degree.[219]

---

215. *See Agostini*, 521 U.S. at ___, 117 S. Ct. at 2012-2013.

216. *Id.* at ___, 117 S. Ct. at 2012.

217. *See* Meek v. Pittenger, 421 U.S. 349 (1975) (textbooks loaned directly to students).

218. *See McNair*, 413 U.S. 734; *Roemer*, 426 U.S. 736.

219. *See Ball*, 473 U.S. at 394 (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)). Also, to the extent that a program is designed primarily to advance religion, the program would also be vulnerable under the first prong for failing to have a valid public purpose. *See* Stone v. Graham, 449 U.S. 39 (1984).

c. Number of Beneficiaries

Courts look to whether the beneficiaries of generally available aid are predominantly sectarian school students. For example, in *Agostini,* Justice Souter argued: "Instead of aiding isolated individuals within a school system, New York City's Title I program . . . served about 22,000 private school students, all but 52 of whom attended religious schools."[220]

When the providers of nonpublic education are overwhelmingly sectarian organizations, one can expect that the program's beneficiaries will be sectarian schools and sectarian school students. This result reflects the fact that the public purpose involved is not education in general, but rather, nonpublic education. This purpose stems from the legislative determination that support of nonpublic educational institutions is critically important to the well being of society. As early as *Hunt v. McNair,*[221] and consistently thereafter,[222] the Court acknowledged that the student beneficiaries will reflect the population. In *Hunt,* the percentage of Baptist students in the school population approximated the percentage of Baptists in South Carolina. Absent evidence that non-sectarian schools or non-religious students are unfairly excluded, the Court should not invalidate a neutral program of generally available aid simply because many of the beneficiaries are religious.

d. Endorsement or Symbolic Union

Another way to analyze primary effect has been to look at whether the government program gives the appearance of endorsing religion or signaling a symbolic union between church and state. The so-called "endorsement" test was added to the primary effect analysis at the urging of Justice O'Connor. Shortly after she joined the Court, Justice O'Connor attempted to reform the Establishment Clause's effect prong.[223] Her analysis appeared to have influenced other members of the Court. In the year following her introduction of the argument, the Court relied on the endorsement concept as one of the grounds for invalidating the program in *School Districts of Grand Rapids v. Ball.*[224] And, as lately as *Agostini,* Justice Souter would have invalidated the program in that case because it

220. *Agostini,* 521 U.S. at ___, 117 S. Ct. at 2024. *See also Goff,* 1997 WL 217583. Also, in *Goff* the Ohio court invalidated Cleveland's program on the ground, *inter alia,* that the beneficiaries were primarily sectarian schools.

221. 413 U.S. 734 (1973).

222. *See Roemer,* 426 U.S. 736.

223. *See* Lynch v. Donnelly, 465 U.S. 668, 691-94 (1984) (O'Connor, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 69-70 (1985) (O'Connor, J., concurring).

224. 473 U.S. 373, 389-92 (1985).

had the effect of creating an impermissible symbolic union between church and state.[225]

Under Justice O'Connor's approach government aid which "in fact causes, even as a primary effect, advancement . . . of religion" should not be invalidated.[226] Rather, to be invalid the government program must have the effect of communicating a message of government endorsement of religion.[227] Under this test, the Court must discern whether the program gives the impression that the government favors religion or whether nonadherents would be made to feel like outsiders.

The major defect with the endorsement test is that it fails to recognize that government should, and consistently does, endorse religion. As Justice Kennedy stated in *Allegheny County v. ACLU*: "Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage. . . . [T]he Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society."[228] Among many other examples since the beginning of our history, Justice Kennedy pointed to several provisions of the United States Code which constitute a "straightforward endorsement of the concept of 'turn[ing] to God in prayer.'"[229]

At a minimum the test should be abandoned in the public funding context. As *Agostini* recognized, "where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion"[230] any implication that the state is impermissibly endorsing religion is unwarranted. To find an endorsement under these circumstances is a vestige of the anti-religious bias manifested by prior Court opinions that saw an establishment whenever a public employee set foot in a sectarian school. The state no more establishes religion by a generally available secular education aid program than it does when the fireman conducts a fire drill or the police officer directs traffic at the religious school.

---

225. *See Agostini*, 521 U.S. at ___, 117 S.Ct. at 2023 (Souter, J., dissenting).

226. *Lynch*, 465 U.S. at 691-92.

227. *See id.*

228. 492 U.S. 573, 657(1989) (Kennedy, J., concurring in the judgment and dissenting in part).

229. *Id.* at 672. It is difficult to reconcile Justice O'Connor's view that the government not favor religion with presidential Thanksgiving Day proclamations. President Clinton's latest such proclamation serves as a sufficient example: "I encourage all Americans to assemble in their homes, places of worship, or community centers . . . to express heartfelt thanks to God for the many blessings He has bestowed upon us. . . ." N.Y. TIMES, Nov. 27, 1997, at A32.

230. *Agostini*, 521 U.S. at ___, 117 S.Ct. at 2014.

C. The Third Prong—Excessive Entanglement

The excessive entanglement prong should be eliminated. It has no corresponding analog in public purpose analysis and has the effect of invalidating many funding plans involving institutions that retain their religious identity. The test flows from the presumptions made by the Court under the second prong. The shift in the Court's analytical focus of its analysis to the nature of the benefited institution necessitated that the Court become embroiled in reviewing initially, and on an on-going basis, how religious the institutions and their programs were. The excessive entanglement approach effectively discourages religion. It makes otherwise generally available financial assistance available to religious institutions only if they suppress their religious identity.[231]

It's a two-edged sword. If the school is doing a good job in furthering its religious mission and the religious commitment of the school permeates the administration and faculty, then the aid is invalidated because it arguably cannot be provided in a way that funds solely secular activities. If the school is able to target the aid to a clearly secular program, but the school is highly religious in general, then extensive monitoring is required to insure that the religious and secular programs are kept separate. Once the monitoring is required, the aid is invalidated because the secular authorities have become excessively entangled with the school's administration. If, on the other hand, the school has been sufficiently secularized so that it has become virtually indistinguishable from any state university, the aid is allowed. Ulysses' voyage through the Strait of Messina, navigating between Scylla and Charybdis, comes to mind, but without his success.

In *Agostini*, the Court appropriately abandoned the excessive entanglement component of *Lemon* as a separate prong and folded it into the effect analysis. According to the Court, excessive entanglement is merely another way of assessing whether the aid has the primary effect of advancing religion. Since the Court has reformulated how that analysis should be conducted in the future, the excessive entanglement component no longer performs an independent function.[232]

VI. CONCLUSION

Society can make no more worthwhile investment than in education.

---

231. For an analysis of the effect of the Court's Establishment Clause approach on the religious character of colleges and universities, see MARSDEN, *supra* note 127.

232. *See supra* text accompanying note 182.

The education of the public, or public education, is enhanced when schools and universities are academically competitive and financially viable. The public benefits conferred when these conditions exist are just as real and salutary when private sectarian schools provide the education as when public schools do. And, in many cases, private religious schools provide this benefit at lower cost and in greater measure.

Yet, a skewed interpretation of the Establishment Clause has operated for nearly three decades to impair society's ability to reap these benefits. *Lemon*'s three-part test has failed because it is based on the philosophy that religion has no role in public life. The effort to fabricate a "naked public square" is, among other things, pragmatically shortsighted. It fails to take advantage of the opportunities a public/private partnership can offer for the educational well being of society.

This failure is all the more disappointing because it is unnecessary. Government provides public goods in numerous cooperative ventures with private parties. Oftentimes, these private parties are religious organizations, particularly in the areas of health care and social services. Education should be no different. The exact same sectarian groups are involved. Just as these sectarian groups are genuinely devoted to the physical and social well being of the people served in their hospitals and welfare centers, these groups are sincerely dedicated to the secular education of those who attend their schools. In this regard, the public and private interests harmoniously intersect.

Adoption of the public funding test proposed in this article will enhance educational opportunities, prevent public money from inappropriately being used to advance the religious interests of sectarian organizations, and will protect against the financial burden that would arise from a collapse of the private educational system.

APPENDIX—ESTABLISHMENT CLAUSE CASES

The following schematic characterizes Establishment Clause funding and non-funding cases, beginning with *Lemon*, according to those in which the program or statute was invalidated and those where it was upheld. Where the program was invalidated, the list categorizes those cases according to the prong in *Lemon* violated. A listing follows of Establishment Clause cases where the *Lemon* analysis was not used. A brief description of each case follows the list.

Program Invalidated

first prong

funding cases: None

non-funding cases: Allegheny County v. Pittsburgh ACLU
(arguably a first prong case)
Edwards v. Aguillard (creationism)
Stone v. Graham (10 Commandments)
Wallace v. Jaffree (moment of silence)

second prong

funding cases: Committee for Public Education v. Nyquist
Levitt v. Committee for Public Education
Meek v. Pittinger
(all provisions except textbooks)
New York v. Cathedral Academy
Public Funds for Public Schools v. Marburger
School Districts of Grand Rapids v. Ball
(overruled by Agostini)
Sloan v. Lemon
Wolman v. Walter
(instructional materials and equipment)

non-funding cases: Estate of Thornton v. Caldor, Inc.
Larkin v. Grendel's Den, Inc.
Larson v. Valente
(arguably a second prong case)

third prong

funding cases:
Aguilar v. Felton (overruled by Agostini)
Earley v. DiCenso
Lemon v. Kurtzman
Meek v. Pittinger
(all provisions except textbooks)
Public Funds for Public Schools v. Marburger
New York v. Cathedral Academy
Wolman v. Walter (buses for field trips)

non-funding cases: None

Program Upheld

funding cases:
Agostini v. Felton
Bowen v. Kendrick
Committee for Public Education & Religious
Liberty v. Regan
Hunt v. McNair
Meek v. Pittinger (textbooks only)
Mueller v. Allen
Roemer v. Board of Public Works
Rosenberger v. Rectors and Visitors of the
University of Virginia
Tilton v. Richardson
Witters v. Washington Dep't of Services
Wolman v. Walter
(textbooks, remedial instruction & guidance
at site away from nonpublic school)
Zobrest v. Catalina Foothills School District

non funding cases:
Board of Ed. v. Mergens
Capitol Square Review & Advisory Bd. v.
Pinette
Lamb's Chapel v. Center Moriches Union
Free School District
Lynch v. Donnelly
Marsh v. Chambers

Widmar v. Vincent

Lemon analysis not used:

Board of Ed. of Kiryas Joel v. Grumet
(statute invalidated)
Lee v. Weisman (action invalidated)
Rosenberger v. Rectors and Visitors of the
University of Virginia (aid upheld)
Zobrest v. Catalina Foothills School District
(aid upheld)

Brief Description of Cases

Agostini v. Felton, 521 U.S. 203, 117 S.Ct. 1997 (1997)—Title I services sending public school teachers into parochial schools to provide remedial instruction upheld

Aguilar v. Felton, 473 U.S. 402 (1985)—Title I services sending public school teachers into parochial schools during school hours to provide remedial instruction and guidance services invalid as excessive entanglement, program requires extensive monitoring

Allegheny County v. Pittsburgh ACLU, 492 U.S. 573 (1989)—Creche violates Establishment Clause as improper endorsement but menorah valid as secular (seems to be viewed by Court as part of *Lemon's* first prong)

Board of Ed. of Kiryas Joel v. Grumet, 512 U.S. 687 (1994)—Creation of special school district based on religious characteristics of members prefers religion in violation of the Establishment Clause; *Lemon* not used

Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens, 496 U.S. 226 (1990)—Permitting secondary school students to join groups and hold club meetings on school premises, including a Christian club, has valid secular purpose

Bowen v. Kendrick, 487 U.S. 589 (1988)—Adolescent Family Life Act had valid secular purpose, *Lemon* test used

Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753 (1995)—KKK display of a large cross in a statehouse plaza does not violate the Establishment Clause; *Lemon* not used

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973)—Aid to elementary and secondary sectarian schools in the form of direct subsi-

dies for maintenance and repair of buildings and reimbursement of parents for tuition paid to nonpublic schools invalid as impermissible primary effect of establishing religion. Building aid could be used for upkeep of chapel; reimbursement and tax benefits could be used to support religious activities. Aid contained no restrictions requiring it be used only for secular purposes

Committee for Public Ed. & Religious Liberty v. Regan, 444 U.S. 646 (1980)—Direct cash reimbursement to religious schools for performing certain state-mandated tasks valid where nonpublic schools had no control over content of tests and statute provided for schools seeking reimbursement to substantiate their claims (considers revised *Levitt* statute)

Earley v. DiCenso, 403 U.S. 602 (1971)—Companion case to *Lemon*; salary supplements to teachers of secular subjects invalid on entanglement grounds

Edwards v. Aguillard, 482 U.S. 578 (1987)—Louisiana law requiring that creationism be taught in public schools lacked legitimate secular purpose

Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985)—Connecticut statute providing for day off from work on one's Sabbath violated Establishment Clause under *Lemon* as having more than incidental or remote effect of advancing religion

Hunt v. McNair, 413 U.S. 734 (1973)—Revenue bonds for Baptist College for secular buildings valid where institution not pervasively sectarian

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993)—Permitting district property to be used to exhibit a religious film not an Establishment Clause violation under *Lemon*

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982)—Massachusetts law giving churches and schools power to veto applications for liquor licenses violates Establishment Clause as having primary effect of advancing religion

Larson v. Valente, 456 U.S. 228 (1982)—Minnesota law exempting from certain registration and reporting requirements certain religious organizations violates Establishment Clause by preferring certain denominations over others (probable effect violation)

Lee v. Weisman, 505 U.S. 577 (1992)—Official prayer at high school graduation violates Establishment Clause; *Lemon* not used

Lemon v. Kurtzman, 403 U.S. 602 (1971)—Funding of sectarian schools' costs associated with instructional materials and teachers' salaries related to secular subjects constitutes impermissible excessive entangle-

ment

Levitt v. Committee for Public Education, 413 U.S. 472 (1973)—Grants to elementary and secondary sectarian schools in the form of reimbursement for the schools' testing and record keeping expenses invalidated where nonpublic schools prepared the tests. Tests could be drafted to inculcate religion! Court doesn't assume that parochial school teachers will violate the statute, but the potential for conflict inheres in the situation and aid to secular functions not identifiable or separable from aid to sectarian institutions

Lynch v. Donnelly, 465 U.S. 668 (1984)—Creche display upheld

Marsh v. Chambers, 463 U.S. 783 (1983)—State legislative practice of opening each day with a prayer by a chaplain paid by the state upheld; *Lemon* test not used

Meek v. Pittinger, 421 U.S. 349 (1975)—Pennsylvania program lending textbooks to students upheld; provision of auxiliary services by public employees, such as remedial and accelerated instruction, guidance counseling, testing, speech and hearing services, to nonpublic school children at their schools invalidated on entanglement grounds because religion pervasive, secular and religious education inextricably intertwined that substantial aid to educational function of school necessarily results in aid for sectarian school enterprise, massive aid neither indirect nor incidental

Mueller v. Allen, 463 U.S. 388 (1983)—Minnesota law allowing all parents to deduct actual cost of tuition, textbooks and transportation from state tax returns upheld

New York v. Cathedral Academy, 434 U.S. 125 (1977)—Fixed payments to nonpublic schools as reimbursement for cost of certain required record keeping and testing services violates Establishment Clause under *Lemon* as having primary effect of advancing religion or as excessive entanglement

Public Funds for Public Schools v. Marburger, 358 F. Supp. 29 (NJ 1973), *aff'd*, 417 U.S. 961 (1974)—Instructional material and equipment to nonpublic schools invalidated as having primary effect of advancing religion and excessive entanglement from policing use of materials and equipment

Roemer v. Maryland Board of Public Works, 426 U.S. 736 (1976)—Noncategorical grants to colleges and universities upheld, institutions not permeated by religion

Rosenberger v. Rectors and Visitors of the University of Virginia, 515 U.S. 819, 115 S.Ct. 2510 (1995)—Payments to printer for Christian oriented student newspaper do not violate Establishment Clause

School Districts of Grand Rapids v. Ball, 473 U.S. 373 (1985)—Local school district program providing remedial and enrichment classes in private schools (40/41 schools were sectarian) had impermissible effect of advancing religion due to inadequate monitoring: (1) teachers may be tempted to inculcate religious beliefs, (2) symbolic union of church and state, (3) religious mission of institutions primarily subsidized (follows Meek)

Sloan v. Lemon, 413 U.S. 825 (1973)—Reimbursement of nonpublic schools for teachers' salaries, textbooks and instructional materials invalid as having primary effect of advancing religion under *Lemon*

Stone v. Graham, 449 U.S. 39 (1980)—Posting of 10 Commandments on public classroom walls invalid under *Lemon's* purpose prong

Tilton v. Richardson, 403 U.S. 672 (1971)—One-time grants to sectarian institutions upheld ongoing supervision not required

Wallace v. Jaffree, 472 U.S. 38 (1985)—Statute authorizing moment of silence in public schools violates Establishment Clause under *Lemon* as lacking a secular purpose

Wheeler v. Barrera, 417 U.S. 402 (1974)—Question of whether Title I requires public school teachers to enter parochial schools not yet ripe

Widmar v. Vincent, 454 U.S. 263 (1981)—Equal access policy would not violate Establishment Clause under *Lemon* for university students (less impressionable than younger students)

Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481 (1986)—Vocational tuition grant to blind person to attend Christian college and become pastor upheld

Wolman v. Walter, 433 U.S. 229 (1977)—Loan of instructional materials and equipment directly to parents has primary effect of benefiting sectarian education, impossible to separate secular and sectarian instruction, relies on Meek; loan of textbooks, provision of health services for speech and hearing diagnostic services on nonpublic school premises, reimbursement for cost of state prepared tests and using public employees to provide therapeutic services, remedial instruction and guidance counseling at sites away from nonpublic school upheld; provision of funding buses for field trips for parochial schools provides impermissible direct aid to sectarian education, state supervision would be too onerous, entanglement

Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993)—Aid for a deaf student to bring state-employed sign language interpreter to his Catholic school upheld; temptation and symbolic union link arguments rejected