

Justice Brennan, Catholicism, and the Establishment Clause

By RODNEY A. GRUNES AND JON VEEN*

BY EVERY STANDARD of measure, Justice Byron White was certainly correct when he observed that Justice William J. Brennan, Jr. “will surely be remembered as among the greatest Justices who have ever sat on the Supreme Court.”¹ An exceptionally prodigious and bright scholar, Brennan participated in more than one-quarter of the cases decided by the United States Supreme Court in the twentieth century. He wrote more eloquent and significant opinions than any other justice.² For almost thirty-four years, he was the High Court’s most articulate champion of freedom of expression,³ the rights of criminal defendants,⁴ and expanding equality for racial minorities,⁵ women,⁶

* Rodney A. Grunes, Ph.D., Professor of Political Science, Centenary College of Louisiana, Department of History and Political Science; B.A., Drew University (1963); M.A., Duke University (1967); Ph.D., Duke University (1972). Jon Veen, B.A., Centenary College of Louisiana (1998); J.D., Rutgers University School of Law (2001). The authors gratefully acknowledge the Centenary Alumni Association for providing a summer grant to help fund this research.

1. Byron W. White, *Tribute to the Honorable William J. Brennan, Jr.*, 100 YALE L.J. 1113, 1113 (1991).

2. See generally Rodney A. Grunes, *Justice William J. Brennan, Jr.*, in GREAT JUSTICES OF THE U.S. SUPREME COURT 279 (William O. Pederson & Norman J. Provizer eds., 1993) (noting that Justice Brennan “had an enormous impact on constitutional jurisprudence”). Indeed, some scholars have considered Justice Brennan “the most influential member of the [Supreme] Court in this century.” Nat Hentoff, *Profiles: The Constitutionalist*, NEW YORKER, Mar. 12, 1990, at 45.

3. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (noting that “debate on public issues should be uninhibited, robust, and wide-open”).

4. See, e.g., *Malloy v. Hogan*, 378 U.S. 1, 4 (1964) (refusing to reverse prior decisions holding that the Fifth Amendment privilege against self-incrimination is applicable against the states).

5. See, e.g., *Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968) (“The constitutional rights of Negro school children articulated in *Brown v. Board of Education*, 347 U.S. 483 (1954),] permit no less than” the elimination of racial discrimination “root and branch.”).

6. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

and the poor.⁷ A devout Catholic who attended mass every week,⁸ in the eyes of many scholars, Justice Brennan “became the high tribunal’s leading anti-establishmentarian.”⁹ In this role, Justice Brennan “represented his creed that under our Constitution the state must resolutely stay out of the church and the church must resolutely stay out of the state.”¹⁰

The Senate Judiciary Committee considered Justice Brennan’s Catholicism important during his confirmation process.¹¹ Responding to questions regarding the impact of his Catholicism on his jurisprudence, Brennan reassured the Senate Judiciary Committee that his responsibility as a justice was to interpret the Constitution, without regard to his own personal religious feelings. When asked a direct question about his Catholicism, Brennan replied:

[M]y answer to the question is categorically that in everything I have ever done, in every office I have held in my life or that I shall ever do in the future, what shall control me is the oath that I took to support the Constitution and laws of the United States and so act upon the cases that come before me for decision that it is that oath and that alone which governs.¹²

Brennan steadfastly held to this view during his tenure on the Court. As he explained to former law clerk Jeffrey T. Leeds, “[a]s a Roman Catholic I might do as a private citizen what a Roman Catholic does, and that is one thing, but to the extent that conflicts with what I think the Constitution means or requires, then my religious beliefs have to give way.”¹³

7. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 268–69 (1970) (holding that the Due Process Clause of the Fourteenth Amendment required a hearing before terminating an individual’s welfare benefits).

8. See KIM ISAAC EISLER, *A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA* 68 (1993). Indeed, many have considered Justice Brennan “the most devout member of the Court.” HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS* 268 (3d ed. 1992).

9. ABRAHAM, *supra* note 8, at 268.

10. *Id.* at 264–65. This view is consistent with James Madison’s view of a perfect separation of church and state. See CONSTITUTIONAL LAW RESOURCE CENTER, *LAW, RELIGION & THE “SECULAR” STATE* 12 (1991). Under Madison’s view, both “government and religion could best achieve their respective purposes if each was left free from the interference within its own sphere of interest.” *Id.*

11. See *Nomination of William Joseph Brennan, Jr., of New Jersey, To Be Associate Justice of the Supreme Court: Hearings Before the Senate Comm. on the Judiciary, 85th Cong.* 32–34 (1957) [hereinafter *Brennan Hearings*]. Many of these questions arose because Brennan declared, in a speech made prior to his appointment to the Supreme Court, that he recognized the role “in important human affairs the superintending care and control of the great governor of the universe.” Hentoff, *supra* note 2, at 62.

12. *Brennan Hearings*, *supra* note 11, at 34.

13. Jeffrey T. Leeds, *A Life on the Court*, N.Y. TIMES MAG., Oct. 5, 1986, at 79.

Despite Justice Brennan's own views, at least one scholar has speculated that his strict separationist decisions were influenced by his upbringing as an Irish-American Catholic and two powerful twentieth century cultural beliefs: the melting pot theory and the need to "Americanize" Catholics for acceptance into the predominantly Protestant middle class.¹⁴ Other commentators, however, have suggested the contrary. They believe that Justice Brennan rejected his ethnic and religious roots.¹⁵ As Justice Brennan himself once observed, "I have been a disappointment to some Roman Catholics."¹⁶ "Father Andrew Greeley wrote a piece in which he said that if the Roman Catholics who played a role in Brennan's selection had had any idea he would turn out the way he did, he would never have been appointed."¹⁷

This Article examines whether Justice Brennan's contention that his objective legal approach to constitutional interpretation, and not his personal religious beliefs, influenced his resolution of church-state conflicts. Because he never wrote an article or published a speech about the separation of church and state, this analysis focuses on the twenty opinions (six majority, one plurality, five concurring, and ten dissenting, at least in part) authored by Justice Brennan in cases involving the Establishment Clause of the First Amendment.¹⁸ This Article concludes that Justice Brennan was not primarily influenced by traditional Catholic views in his decisions construing the Establishment Clause.

The analysis is divided into four parts. Part I provides a brief background of Justice Brennan's life prior to the time of his appointment. Part II discusses Justice Brennan's Establishment Clause jurisprudence. Specifically, Part II examines his jurisprudence in terms of the Warren Court (1956-69), the Burger Court and the *Lemon* test¹⁹ era (1970-82), and his presence as a strict separationist on an accommodationist Court (1983-90). Part III compares the official position

14. See Michael Arians, *On the Road of Good Intentions: Justice Brennan and the Religion Clauses*, 27 CAL. W. L. REV. 311, 312 (1991).

15. See Leeds, *supra* note 13, at 79.

16. *Id.* Indeed, Father William F. Davis noted that, upon Brennan's death, many in the Catholic Church did not want his body shown in the Washington Cathedral. See Interview with William F. Davis, O.S.F.S., Representative for Catholic Schools and Federal Assistance in the Department of Education of the United States Catholic Conference, in Washington, D.C. (Aug. 5, 1999).

17. Leeds, *supra* note 13, at 79.

18. See *infra* Part II.

19. The "*Lemon* test" was developed in and named for the decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), discussed *infra* Part II.B.

of the American Catholic Church, as determined by the National Conference of Catholic Bishops,²⁰ to Justice Brennan's interpretation of the Establishment Clause. This Part focuses primarily on school prayer and public assistance to parochial schools. Finally, Part III discusses these findings and suggests other possible explanations for Justice Brennan's Establishment Clause jurisprudence.

I. William J. Brennan, Jr.: A Biographical Sketch

Traditionally, Supreme Court justices possess certain traits or characteristics that make them appear destined to sit on the nation's highest court. Some of these traits include lineage, participation on law review, a prestigious pre-judicial career, or a clerkship with the High Court itself. On the present Court, for example, Justice David Souter was a Rhodes Scholar, studying law and philosophy at Magdalen College, Oxford.²¹ Antonin Scalia served as note editor of the *Harvard Law Review*.²² Ruth Bader Ginsburg founded, in 1971, the Women's Rights Project of the American Civil Liberties Union and convinced the Supreme Court to use intermediate scrutiny for gender-based classifications.²³ Chief Justice William Rehnquist served as a law clerk to former Supreme Court Justice Robert Jackson.²⁴ Justice Brennan's background, on the other hand, differs from these traditional standards.

Born in Newark, New Jersey, in 1906, William J. Brennan, Jr. lacked the pedigree of Justice Souter, the journal experience of Justice Scalia, or the clerkship experience of Chief Justice Rehnquist. Indeed, "[h]e was not one of those men . . . who are marked for their brilliance early on, and who, even as they are finishing law school, are spoken about with an unnatural (and often undeserved) reverence as

20. The position of the National Conference of Catholic Bishops is expressed through the policy arm known as the United States Catholic Conference ("USCC"). See *National Conference of Catholic Bishops*, at <http://www.nccbuscc.org> (last visited Mar. 12, 2001).

21. See, e.g., Barbara A. Perry, *David Souter*, in *THE SUPREMES* 87, 89 (1999). His educational credentials led his classmates in college to include, in a scrapbook containing what they predicted for his future, the headline "David Souter Nominated to the Supreme Court." *Id.*

22. See Barbara A. Perry, *Antonin Scalia*, in *THE SUPREMES*, *supra* note 21, at 57, 59. Scalia also was valedictorian and graduated first at Georgetown in 1957. See *id.* at 58.

23. See Barbara A. Perry, *Ruth Bader Ginsburg*, in *THE SUPREMES*, *supra* note 21, at 115, 118. Ginsburg also has the unique distinction of serving on two ivy league law journals. See *id.* at 116.

24. See Barbara A. Perry, *William Rehnquist*, in *THE SUPREMES*, *supra* note 21, at 9, 11. Chief Justice Rehnquist and Sandra Day O'Connor were classmates at Stanford. See *id.*

future Supreme Court justices.”²⁵ Rather, William Brennan, known to his friends simply as Bill, merely worked his way from an ordinary beginning to become one of the most significant figures in American legal history.²⁶

Brennan’s father, William Brennan, Sr., immigrated to the United States as part of the third wave of Irish-Catholic immigrants in 1893.²⁷ Born in Frenchpark, Ireland, Bill, Sr. met his wife, Agnes McDermott, in the United States.²⁸ They married in Newark, New Jersey, in 1903 and had eight children, of whom Bill, Jr. was their second.²⁹

Bill, Sr. began his career as a laborer and worked his way up in the union hierarchy.³⁰ In 1908, he became a business manager of his union local.³¹ One year later, the Essex County Trades and Labor Council elected him president of the union.³² From this position, Bill, Sr. strived for better wages for trolley drivers by pushing for strikes.³³ It was in this position that he began his political career, “going from union hall to union hall advocating ‘unity and unionism,’ often with Agnes and young Bill Jr. at his side.”³⁴

Brennan’s father had a tremendous impact on him growing up. Indeed, Brennan once commented that “[e]verything I am . . . I am because of my father.”³⁵ Bill, Jr. watched as his father rose from the ranks of union leader to transformer of the city’s form of government.³⁶ Bill, Sr. continued his move up the ranks of politics, strengthening the local unions, until he became the city’s most important public official—the Commissioner of Public Safety.³⁷

25. David Halberstam, *The Common Man as Uncommon Man*, in REASON AND PASSION: JUSTICE BRENNAN’S ENDURING INFLUENCE 22, 22 (E. Joshua Rozenkranz & Bernard Schwartz eds., 1997).

26. See Bernard Schwartz, *How Justice Brennan Changed America*, in REASON AND PASSION, *supra* note 25, at 31, 31.

27. See HUNTER R. CLARK, JUSTICE BRENNAN: THE GREAT CONCILIATOR 13 (1995).

28. See *id.*

29. See *id.* at 14–15.

30. See *id.* at 14.

31. See *id.* at 15.

32. See *id.*

33. See *id.*

34. *Id.*

35. Leeds, *supra* note 13, at 26 (quoting Justice Brennan during an interview with Jeffrey Leeds).

36. See CLARK, *supra* note 27, at 15–16. Newark had a mayor-alderman form of government. See *id.* at 15. However, Bill, Sr. eventually transformed it into a mayor-council form. See *id.* at 16.

37. See *id.* at 16.

Bill, Sr.'s influence extended beyond teaching his son the value of unions. Indeed, "the elder Brennan was determined to see his children take full advantage of the opportunities America offered."³⁸ Not only did he teach his son the value of an education,³⁹ he also inculcated in Bill, Jr. "an uncompromising work ethic."⁴⁰ From the age of eleven, Bill, Jr. contributed to the family income, "working every kind of job in the world."⁴¹ These jobs included such things as delivering milk, delivering newspapers, and running up and down the aisles of the trolley ensuring that everyone had exact change.⁴²

Bill, Sr. also gave his son a strong sense of his Irish Catholic heritage. According to Brennan, "[b]ack when I was growing up . . . there were any number of Irish associations, and Irish affairs that my mother and dad used to go to all the time."⁴³ Moreover, his father kept him "well aware of not only the Friendly Sons but the Ancient Order of Hibernians."⁴⁴ St. Patrick's Day was a huge holiday around the Brennan household.⁴⁵

Brennan's father was also empathetic to the plight of others.⁴⁶ Although Brennan attended Catholic schools as a youngster, he went to public schools when parochial schools were not available.⁴⁷ After graduating from public high school, Brennan attended the University of Pennsylvania's Wharton School of Finance and Commerce.⁴⁸ He graduated from Wharton in 1928 with honors and a degree in economics.⁴⁹

Brennan then attended Harvard Law School, where he "struggled at first to find his niche."⁵⁰ As a result of this struggle, Brennan was not named to the *Harvard Law Review*.⁵¹ However, "although he was

38. *Id.*

39. According to the Justice himself, Bill, Sr. did not tolerate a lack of academic excellence. *See id.* at 19–20. He expected his children to do well. *See id.* Indeed, he told a young Bill that he would be a lawyer. *See id.* at 20. When his son was a law student at Harvard, it was not uncommon for him to send telegrams to Bill, Jr. seeking information about grades. *See id.* at 17.

40. *Id.* at 16.

41. *Id.*

42. *See id.*

43. *Id.*

44. *Id.*

45. *See id.*

46. *See id.*

47. *See id.* at 20.

48. *See id.*

49. *See id.*

50. *Id.* at 23.

51. *See id.*

not the brightest star,” Brennan joined the Harvard Legal Aid Society.⁵²

Brennan’s participation in the Legal Aid Society had a profound impact on him. As a member, Brennan “handle[d] actual cases and practice[d] in court representing indigent clients in divorce, bankruptcy, landlord-tenant, and other civil matters.”⁵³ The Legal Aid Society provided Brennan with experience in “client counseling, negotiating, and crafting litigation strategy.”⁵⁴ The experience enabled Brennan, at an early age, to combine the theoretical education taught by Harvard with his experience dealing with the real problems faced by the indigent.⁵⁵

Brennan’s father died in 1930, leaving his family little money.⁵⁶ After receiving his law degree in 1931, Brennan sought to provide for his mother, wife, and younger siblings by taking a position with the firm of Pitney, Hardin & Skinner.⁵⁷ Ironically, Brennan represented management in issues that were “on the cutting edge of the New Deal.”⁵⁸ Brennan then served a brief stint as an ordnance officer in the United States Army.⁵⁹ Enlisting with the rank of major, Brennan’s main responsibility was dealing with labor resources.⁶⁰ In 1943, he became the chief of the Army’s Ordnance Department Civilian Personnel Division.⁶¹

Brennan’s Army experiences led to his introduction to congressional testimony. In 1945, he was called to testify about problems in the national defense program before the Mead Committee of the United States Senate, established to investigate the national defense program.⁶² Here, then Lieutenant Colonel Brennan was forced to answer questions about denying furloughs to certain individuals and about shifting labor personnel to a questionable arms manufacturer.⁶³

52. *Id.*

53. *Id.* at 23–24.

54. *Id.* at 24.

55. *See id.*

56. *See id.* at 24–25.

57. *See id.* at 26–27.

58. *Id.* at 28.

59. *See id.* at 29–30. The Ordnance Department had the task of procuring munitions for the Army. *See id.* at 29.

60. *See id.* at 30.

61. *See id.* at 31. The Civilian Personnel Division, in charge of discharges and furloughs, handled requests from industry for release of trained servicemen to handle personnel needs. *See id.* at 29.

62. *See id.*

63. *See id.*

Brennan exculpated himself by sharing transcripts of phone conversations he had recorded.⁶⁴ When asked about this wiretapping, Brennan replied: "It was just recording a telephone conversation. It served many useful purposes."⁶⁵

Brennan then returned to Pitney, Hardin.⁶⁶ After the deaths of the two main partners, Shelton Pitney and John Ralph Hardin, Brennan became the major "rainmaker" at the firm, also wearing the hat of "ditch digger."⁶⁷ Initially, he functioned in both roles with confidence.⁶⁸ Indeed, he continued to represent management in labor negotiations so well that he impressed his opponents.⁶⁹ Wearing two hats, however, eventually tired the young Brennan.⁷⁰

While he was still at Pitney, Hardin,⁷¹ Brennan's career turned toward assisting New Jersey Supreme Court Chief Justice Arthur Vanderbilt and Associate Justice, and former Harvard classmate, Nathan Jacobs, in reforming the state's court system.⁷² Brennan helped create a system that, according to the future justice himself, "borrowed from industry and commerce one of America's greatest contributions, namely, the principles of business management which have done so much to advance this nation to the place of the world's greatest productive economy."⁷³ Under the new system, which became a model judicial system for the rest of the nation, New Jersey adopted the Federal Rules of Civil and Criminal Procedure.⁷⁴ The new rules created an administrative system designed to keep track of the cases that developed through the system⁷⁵ and to hasten settlement.⁷⁶

Once the state implemented Vanderbilt's reforms, Brennan, at Vanderbilt's urging, left his lucrative private practice at Pitney, Hardin

64. *See id.*

65. *Id.*

66. *See id.* at 35.

67. *See id.* at 36. "Ditch digger" was a term used to describe lawyers who put in "long hours of grunt labor." *Id.* at 28.

68. *See id.* at 36.

69. *See id.* Ironically, although the leaders at the time did not look at Brennan as necessarily a heavy hitter with a tremendous future, his union opponents viewed him as someone "'who had the look of a guy who was really on his way up the ladder.'" *Id.* (quoting Tom Dunn, future mayor of Elizabeth, New Jersey).

70. *See id.* at 43.

71. *See id.* at 45.

72. *See id.*

73. Jack Alexander, *Mr. Justice from New Jersey*, SATURDAY EVENING POST, Sept. 28, 1957, at 130.

74. *See CLARK, supra note 27, at 47.*

75. *See id.*

76. *See id.* at 47-48.

to serve in the judiciary.⁷⁷ In 1949, he became a judge in Hudson County,⁷⁸ one of the most litigious and corrupt counties in New Jersey at the time.⁷⁹ Just as he did as a practicing attorney, Brennan worked late into the night.⁸⁰ In fact, Brennan “[heard] trials in the afternoon and then h[eld] court sessions at night” to ease the burden on the trial calendar.⁸¹ Eighteen months later, after “cleaning up” Hudson County, Brennan was elevated by the governor to New Jersey’s intermediate court, the appellate division.⁸²

As an appellate judge, Brennan did not make any groundbreaking decisions and heard no case that raised church-state issues.⁸³ Nonetheless, Brennan did provide a preview of his penchant for protecting the rights of defendants and underdogs.⁸⁴ In *Palestroni v. Jacobs*,⁸⁵ for example, Judge Brennan held that a judge erred, contrary to well-established judicial practice, in allowing a juror to look up the word “wainscot” in the dictionary.⁸⁶ According to Brennan, “[t]he use . . . by a jury of a dictionary has an obvious potentiality for harmful influence The danger is ever present [if] it may be employed to ascertain meanings not just of one but of many words used in the court’s charge.”⁸⁷ *Palestroni* was probably Brennan’s most noteworthy opinion while on the appellate division.⁸⁸

In 1952, Republican Governor Alfred Driscoll appointed Brennan to the New Jersey Supreme Court.⁸⁹ Joining his former colleagues, Chief Justice Arthur Vanderbilt and Associate Justice Nathan Jacobs, Brennan continued to be “more interested in improving the court system than in crusading for the underprivileged.”⁹⁰ Rather than focus on the dignity of the individual under the New Jersey Con-

77. See *id.* at 49–50.

78. See *id.* at 50, 52.

79. See EISLER, *supra* note 8, at 68.

80. See *id.* at 69.

81. *Id.*

82. See *id.*

83. See *id.*

84. See *id.* at 70–71.

85. 77 A.2d 183 (N.J. 1950).

86. See *id.* at 184–85; see also CLARK, *supra* note 27, at 53.

87. *Palestroni*, 77 A.2d at 186. See also EISLER, *supra* note 8, at 70.

88. He did, however, write an opinion that seemed opposite to his upbringing. In *Wilford v. Sigmund Eisner Co.*, 80 A.2d 222 (N.J. 1951), Brennan dismissed a claim by a coalminer that his long-term exposure to coal gave him lung problems. See *id.* at 226. Brennan rejected the miner’s claim, noting that “[o]ur careful examination of the transcripts leads us to conclude that it is more than doubtful that he had a meritorious claim.” *Id.*

89. See EISLER, *supra* note 8, at 71.

90. *Id.* at 78.

stitution, Brennan "worked on reforms to shorten the time it took to get a case to trial,"⁹¹ an important cause to Chief Justice Vanderbilt.⁹²

Brennan's position on individual rights began to change in 1953 when the court heard *New Jersey v. Tune*.⁹³ In *Tune*, the defendant signed a confession.⁹⁴ At trial, his attorney requested a copy of the signed confession as well as other statements in the hands of the prosecutors.⁹⁵ The trial judge allowed the attorney access to the confession, but did not allow him to examine the defendant's other statements.⁹⁶

The New Jersey Supreme Court not only sustained the trial court's conviction, but also held that the defendant could not view his own confession.⁹⁷ Writing for the four-justice majority, Chief Justice Vanderbilt noted that "we should remember that the people of this State must also be protected. In weighing the rights of the individual and those of the State we must not be carried away . . . to such an extent that the safety of the public is jeopardized."⁹⁸ Moreover, according to Vanderbilt, "[t]o grant a defendant the unqualified right to inspect his confession before trial would be to give him an opportunity to . . . commit perjury at the expense of society."⁹⁹

Justice Brennan, however, was uncomfortable with Vanderbilt's position.¹⁰⁰ Foreshadowing his later opinions as a Supreme Court Justice, Brennan stated in his dissent that "[i]t shocks my sense of justice that in these [circumstances], counsel for an accused facing a possible death sentence should be denied inspection of his confession which, were this a civil case, could not be denied."¹⁰¹ Moreover, Brennan wrote, "[t]o shackle counsel so that they cannot effectively seek out the truth and afford the accused the representation which is not his privilege but his absolute right seriously imperils our bedrock presumption of innocence."¹⁰² Although even his friend Nathan Jacobs thought he went too far, Brennan wrote, over the course of the next

91. *Id.*

92. *See id.*

93. 98 A.2d 881 (N.J. 1953).

94. *See id.* at 883.

95. *See id.*

96. *See id.*

97. *See id.* at 886, 892-93.

98. *Id.* at 888.

99. *Id.* at 893.

100. *See id.* at 894-98 (Brennan, J., dissenting).

101. *Id.* at 896 (Brennan, J., dissenting).

102. *Id.* at 897 (Brennan, J., dissenting).

several years, opinions reflecting a “found-again liberal social consciousness.”¹⁰³

Brennan began to display his new liberal thinking publicly. On St. Patrick’s Day in 1954, before the Charitable Irish Society in Boston, Brennan spoke out against Senator Joseph McCarthy’s communist “witch hunts.”¹⁰⁴ Brennan’s speech revealed “the cornerstones of . . . his philosophy” as well as many of his views.¹⁰⁵ He began by noting that his father had taught him that “it was the Irish ‘love of individual liberty’ that was one of the cornerstones of American freedom.”¹⁰⁶ Brennan compared the House Unamerican Activities Committee hearings to the Salem witch trials.¹⁰⁷ He implied that Senator Joseph McCarthy “‘deludes himself if he thinks he detects in some practices in the contemporary scene, reminiscent of the Salem witch hunts, any sign that our courage has failed us and that fear has palsied our hard won concept of justice and fair play.’”¹⁰⁸

Six months later, speaking at the Rotary Club in Monmouth, New Jersey, Brennan continued his attack on McCarthyism and his advocacy of civil liberties when he said: “‘A system of inquisition on mere suspicion or gossip without independent proofs tending to show guilt is innately abhorrent to us.’”¹⁰⁹ He further noted that “‘[t]he simple and peaceful process of questioning breeds a readiness to resort to bullying and even to physical force and torture.’”¹¹⁰ These views also seem consistent with those lessons, taught to him by his father, concerning the struggles of the Irish-Catholic people for freedom.¹¹¹

Brennan’s newly found liberalism, however, did not make him lose favor in the eyes of Chief Justice Vanderbilt.¹¹² In 1956, a representative to Attorney General Herbert Brownell asked the Chief Justice to speak about the New Jersey court reforms at a Justice Department meeting.¹¹³ Vanderbilt, however, became ill and asked

103. EISLER, *supra* note 8, at 80.

104. *See id.* at 81. Ironically, Massachusetts was actually having a real witch hunt of their own: that year the state senate upheld Ann Pudeator’s 1692 conviction for witchcraft. *See id.*

105. *Id.*

106. *Id.*

107. *See id.*

108. *Id.* (quoting Brennan’s address to the Charitable Irish Society in Boston).

109. *Id.* at 82 (quoting Brennan’s address to the Monmouth Rotary Club).

110. *Id.* (quoting Brennan’s address to the Monmouth Rotary Club).

111. *See id.* at 81.

112. *See id.* at 82. This may be due, however, in part, to Brennan not being involved in significant First Amendment cases while on the New Jersey Supreme Court.

113. *See id.* at 83.

Brennan to deliver the speech.¹¹⁴ Brennan did so and “spoke convincingly about the need for court reform, particularly for processes such as pretrial depositions that would speed litigation.”¹¹⁵ He also advocated “pretrial discovery and pretrial conferences, which tended to weed out frivolous suits, as well as to speed up trials once they began.”¹¹⁶ The speech, conservative in nature, led Brownell to remark to an Assistant Attorney General that “[w]e might find something for this guy.”¹¹⁷

Brownell had the opportunity to “find something” for Brennan upon the retirement of United States Supreme Court Justice Sherman Minton.¹¹⁸ On September 26, 1956, Brownell called Brennan and asked him to come to Washington, D.C. for a breakfast meeting with President Eisenhower.¹¹⁹ At this meeting, Eisenhower told Brennan that he would be nominated for Minton’s seat on the Supreme Court.¹²⁰ Eisenhower appointed Brennan because he was young, had prior judicial experience, and was an Irish-Catholic Democrat, which could help bolster Eisenhower’s lead in the Northeast during the 1956 Presidential election.¹²¹

Justice Brennan began his tenure on the United States Supreme Court in October of 1956.¹²² As a recess appointee, he began to hear cases immediately, prior to his confirmation by Congress.¹²³ In March 1957, the Senate, with only Senator Joseph McCarthy dissenting, finally confirmed him as an Associate Justice.¹²⁴

Brennan served thirty-four years on the Court.¹²⁵ Although he began his tenure in the middle of a liberal court, he retired as the most liberal member of a conservative court.¹²⁶ During the course of his tenure, Brennan protected the freedom of expression, the rights of

114. *See id.*

115. *Id.* at 84.

116. *Id.* at 85 (quoting Brennan’s speech at the United States Department of Justice).

117. *Id.* (quoting Brownell’s words to Assistant United States Attorney General William Rogers).

118. *See id.* at 88.

119. *See* Grunes, *supra* note 2, at 282.

120. *See id.*

121. *See id.* (citing ABRAHAM, *supra* note 8, at 265–66).

122. *See* ABRAHAM, *supra* note 8, at 266.

123. *See id.*

124. *See id.*

125. *See id.* at 267.

126. *See id.*

the poor, the rights of criminals, and the rights of various minorities.¹²⁷

On July 20, 1990, citing poor health and the strenuous demands of the Court, Justice Brennan notified President Bush of his resignation.¹²⁸ The President nominated David Souter, with whom Brennan remained friends until his death in 1996.¹²⁹

II. Brennan's Church-State Jurisprudence: An Overview

Although a constant advocate of strict separation, Brennan did not become the Court's chief spokesperson for this point of view until well after the Warren Court era ended and presidents appointed more conservative justices who favored greater accommodation between government and religion.¹³⁰ In the 1970s, Brennan often wrote concurring or dissenting opinions when the Burger Court supported and implemented the three-pronged *Lemon* test¹³¹ to decide Establishment Clause cases. Yet, it was during the 1980s that Brennan's influence apparently increased.¹³² Remarkably, he became both a stricter separationist and a more regular spokesperson for the Court as President Reagan packed the high tribunal with pro-accommodationists through the elevation of William Rehnquist to Chief Justice, and the appointments of Justices Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy.

Justice Brennan's success in promoting strict separationist opinions during his last years on the Supreme Court can be attributed, in part, to his well-documented "behind-the-scenes" skill as a master coalition builder.¹³³ According to one scholar, "[a]lmost from the beginning of his tenure on the Court, Justice Brennan was unusually successful in drafting opinions just broad enough to gain the approval of a majority without sacrificing libertarian values."¹³⁴

127. See *id.* at 268.

128. See *id.* at 267.

129. See, e.g., David Souter, *Justice Brennan's Place in Legal History*, in REASON AND PASSION, *supra* note 25, at 299, 309.

130. See generally Jon Veen, Note, *Where Do We Go from Here? The Need for Consistent Establishment Clause Jurisprudence*, 52 RUTGERS L. REV. 1195 (2000).

131. The "*Lemon* test" was developed in and named for the decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

132. See *infra* Part II.C.

133. See Edward V. Heck, *Justice Brennan and the Development of Obscenity Policy by the Supreme Court*, 18 CAL. W. L. REV. 410, 416 (1981).

134. *Id.*

Brennan's advocacy of a higher wall of separation between church and state, and the Court's corresponding unwillingness to adopt an accommodationist approach, can be attributed, in part, to the Court's reaction to the Reagan administration's heavy-handed attempt to change the High Court's policy through lobbying by Edwin Meese, Reagan's successor Solicitor General.¹³⁵ In short, the Court agreed with President Reagan's first Solicitor General who, shortly after his resignation, stated "[t]here has been this notion that my job is to press the Administration's policies at every turn and announce true conservative principles through the pages of my briefs. It is not. I'm the Solicitor General, not the Pamphleteer General."¹³⁶

A. The Brennan Approach and the Warren Court 1959–1969

Although Brennan voted with the majority in striking down a New York program under which students began each school day by reciting a nondenominational prayer composed by the State's Board of Regents in *Engel v. Vitale*,¹³⁷ it was not until the 1963 case of *Abington School District v. Schempp*¹³⁸ that Brennan undertook a systematic analysis of the First Amendment's prohibition that "Congress shall make no law respecting an establishment of religion."¹³⁹

Described as the hardest decision he had to make on the Court,¹⁴⁰ Justice Brennan's seventy-five page concurring opinion in *Schempp* explained his agreement with the majority that state laws mandating the reading of at least ten verses from the Bible, without comment, and the recitation of the Lord's Prayer each day in public schools violated the Establishment Clause of the First Amendment.¹⁴¹

In what may be his earliest discussion of the limitations of "original intent" jurisprudence,¹⁴² Brennan argued it was inappropriate to interpret the Establishment Clause solely on the basis of eighteenth

135. See generally Rodney A. Grunes, *Lobbying the Supreme Court: Reagan's Solicitor General and the Establishment Clause*, 11 MIDSOUTH POL. SCI. J. 31 (1990). Edwin Meese, Reagan's Solicitor General, viewed his role as restoring the original intent of the Framers. See Edwin Meese III, Address, *Construing the Constitution*, in 19 U.C. DAVIS L. REV. 22, 23–24 (1985).

136. LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND RULE OF LAW* 107 (1988).

137. 370 U.S. 421, 436 (1962).

138. 374 U.S. 203 (1963).

139. U.S. CONST. amend. I. See *Schempp*, 374 U.S. at 241 (Brennan, J., concurring).

140. See EISLER, *supra* note 8, at 182.

141. See *Schempp*, 374 U.S. at 241 (Brennan, J., concurring).

142. See *id.* (Brennan, J., concurring).

century ideas.¹⁴³ “[A]wareness of history and an appreciation of the aims of the Founding Fathers,” Brennan explained, “do not always resolve concrete problems.”¹⁴⁴ Brennan further stated that, given the profound changes with respect to religious diversity and educational structure that have taken place since the adoption of the First Amendment, practices which might have been acceptable during the time of Madison and Jefferson might be highly offensive to both believers and nonbelievers in today’s more pluralistic society.¹⁴⁵

Brennan did maintain, however, that the basic Establishment Clause principles of the Framers were relevant in deciding contemporary church-state disputes.¹⁴⁶ Brennan explained:

What the Framers meant to foreclose . . . are those involvements of religious [organizations] with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice.¹⁴⁷

Using these principles, Brennan argued that the Establishment Clause prohibits more than the creation of an official state church.¹⁴⁸ The Framers designed the Establishment Clause to prevent all “interdependence” between religion and government.¹⁴⁹ This included eliminating daily prayers and Bible reading in the public schools that, although perhaps serving secular educational purposes, had always been regarded as being basically religious exercises.¹⁵⁰

For Brennan, keeping a strict separation between religion and government benefited both institutions. As he explained, “[i]t is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon government.”¹⁵¹

Yet, Justice Brennan was not always willing, at least in 1963, to keep church and state entirely separate. Forcefully arguing that the

143. *See id.* (Brennan, J., concurring) (“Whatever Jefferson or Madison would have thought of Bible reading or the recital of the Lord’s Prayer in what few public schools existed in their day, our use of the history of their time must limit itself to broad purposes, not specific practices.”).

144. *Id.* at 234 (Brennan, J., concurring).

145. *See id.* at 241 (Brennan, J., concurring).

146. *See id.* at 294 (Brennan, J., concurring).

147. *Id.* at 294–95 (Brennan, J., concurring).

148. *See id.* at 233 (Brennan, J., concurring).

149. *See id.* at 236 (Brennan, J., concurring).

150. *See id.* at 293–94 (Brennan, J., concurring).

151. *Id.* at 259 (Brennan, J., concurring).

Establishment Clause required government neutrality and not hostility toward religion, Brennan maintained that some forms of cooperation or accommodation between religion and government were constitutionally permissible.¹⁵² To prohibit churches and chaplains at military installations, for example, might run afoul of the free exercise of religion that is also protected by the First Amendment.¹⁵³ Moreover, invitational prayers in legislative chambers, the non-devotional use of the Bible in public schools, uniform tax exemptions that are incidentally available to religious institutions, and activities that, though religious in origin, have ceased to have religious meaning¹⁵⁴ (for example, Sunday Laws,¹⁵⁵ inscribing "In God We Trust" on currency, and the recitation of the Pledge of Allegiance) "might well represent no involvements of the kind prohibited by the Establishment Clause."¹⁵⁶

While Brennan joined the majority in several important Establishment Clause cases,¹⁵⁷ it was not until 1969 that Brennan authored a majority opinion concerning the Establishment Clause. In *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,¹⁵⁸ the Court was asked to resolve a property dispute involving two local Georgia churches that had withdrawn their affiliation from a hierarchical general church organization because of differences over church doctrine and practice.¹⁵⁹

Writing for a unanimous Court in *Presbyterian Church*, Justice Brennan found that a Georgia law allowing a civil court to award disputed property on the basis of its own interpretation of church doctrine violated the Establishment Clause as made applicable to the states through the Due Process Clause of the Fourteenth Amendment.¹⁶⁰ "If civil courts undertake to resolve such controversies," explained Brennan, "the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular

152. See *id.* at 294 (Brennan, J., concurring).

153. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibit the free exercise thereof . . .").

154. See *Schempp*, 374 U.S. at 299-304 (Brennan, J., concurring).

155. In the *Sunday Laws Cases*, the Court found that state laws compelling a uniform day of rest were not violations of the Establishment Clause. See *id.* at 263 (Brennan, J., concurring) (citing *McGowan v. Maryland*, 366 U.S. 240 (1961)).

156. *Id.* at 299 (Brennan, J., concurring) (citations omitted).

157. See, e.g., *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968); *Epperson v. Arkansas*, 393 U.S. 97 (1968).

158. 393 U.S. 440 (1969).

159. See *id.* at 449.

160. See *id.*

interests in matters of purely ecclesiastical concern.”¹⁶¹ Thus, Brennan remained consistent with the views he expressed in *Schempp*—that First Amendment values are jeopardized whenever the organs of government are used for essentially religious purposes.¹⁶²

Brennan clarified his views on church-property disputes the following year when he wrote a concurring opinion in *Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharsburg, Inc.*,¹⁶³ a case involving a property dispute between the general eldership and two secessionist congregations of the Churches of God.¹⁶⁴ Brennan emphasized that, with the exception of involving itself in matters of ritual and liturgy of worship or the tenets of faith, the states could pursue a variety of options to resolve these disputes without violating the First Amendment.¹⁶⁵ For example, states could follow the Court’s 1872 decision in *Watson v. Jones*,¹⁶⁶ which held that states could enforce decisions made by a majority within a local congregation.¹⁶⁷ Alternatively, when a church’s general hierarchical organization was involved, states could give preference to the decisions of the highest authority of the hierarchy.¹⁶⁸ Another option would be for the civil courts to utilize neutral principles of law, such as the formal title doctrine, under which civil courts can resolve property disputes by examining deeds, reverter clauses, and the state’s general corporation laws.¹⁶⁹ Finally, Brennan suggested that the states could pass carefully drawn special statutes governing church property arrangements.¹⁷⁰

Returning again to the Establishment Clause framework articulated in *Schempp*,¹⁷¹ Justice Brennan wrote a lengthy concurring opinion in *Walz v. Tax Commission*,¹⁷² regarding the Court’s decision to sustain the constitutionality of a New York statute that provided a tax exemption to religious as well as to other charitable organizations.¹⁷³

161. *Id.*

162. *See* *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 294–95 (1963) (Brennan, J., concurring).

163. 396 U.S. 367, 368 (1970) (Brennan, J., concurring).

164. *See id.* at 367.

165. *See id.* at 368 (Brennan, J., concurring).

166. 13 Wall. 679 (1871).

167. *See Maryland & Virginia Eldership*, 396 U.S. at 368 (Brennan, J., concurring) (citing *Watson*, 13 Wall. at 724).

168. *See id.* at 368–69 (Brennan, J., concurring).

169. *See id.* at 370 (Brennan, J., concurring).

170. *See id.* (Brennan, J., concurring).

171. *See Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 294–95 (1963) (Brennan, J., concurring).

172. 397 U.S. 664, 680–94 (1970) (Brennan, J., concurring).

173. *See id.* at 680.

In the process, Brennan sought to limit the sweep of Chief Justice Warren Burger's majority opinion that suggested there was "room for play" in the First Amendment's religious clauses and that the Court should adopt an attitude of "benevolent neutrality" when assessing governmental attempts to accommodate religion.¹⁷⁴

For Justice Brennan, property tax exemptions for religious institutions should be sustained, but on a much narrower basis.¹⁷⁵ First, Brennan found the long uninterrupted history of support for tax exemptions to be "compelling" and "overwhelming."¹⁷⁶ The earliest exemptions were adopted without controversy; no federal or state court had ever held that tax exemptions constituted an establishment of religion.¹⁷⁷

Second, Brennan noted that the purpose of granting a tax exemption to religious organizations was secular, not religious.¹⁷⁸ Exemptions are designed to promote the well-being of the community and diversity within society.¹⁷⁹ Most important, since the exemptions are available to all nonprofit organizations, including those that are religious, any benefit to religion could be seen as being merely incidental.¹⁸⁰

Finally, Brennan argued that tax exemptions are "qualitatively" different than general subsidies and that assessing property taxes against religious organizations would inevitably result in greater entanglement of government and religion.¹⁸¹ Thus, using the *Schempp* analysis, Brennan concluded that property tax exemptions do not "[1] serve the essentially religious activities of religious institutions[,] . . . [2] employ the organs of government for essentially religious purposes, . . . [or 3] use essentially religious means to serve governmental ends, where secular means would suffice."¹⁸²

174. *Id.* at 669. *See also id.* at 680–81 (Brennan, J., concurring); Stephen G. Gey, *Why Is Religion Special? Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 100 (1990).

175. *See Walz*, 397 U.S. at 691 (Brennan, J., concurring).

176. *See id.* at 681 (Brennan, J., concurring).

177. *See id.* at 684–85 (Brennan, J., concurring).

178. *See id.* at 687 (Brennan, J., concurring).

179. *See id.* at 687–89 (Brennan, J., concurring).

180. *See id.* at 693–94 (Brennan, J., concurring).

181. *See id.* at 691 (Brennan, J., concurring).

182. *Id.* at 692–93 (Brennan, J., concurring).

B. Application of the *Lemon* Test 1971–1982

In *Lemon v. Kurtzman*,¹⁸³ the Court began using a three-pronged test for resolving Establishment Clause jurisprudence.¹⁸⁴ As set forth by Chief Justice Burger for a nearly unanimous Court, a statute is valid if (1) it has “a valid secular legislative purpose,” (2) its “primary effect . . . neither advances nor inhibits religion,” and (3) there is no “excessive governmental entanglement with religion.”¹⁸⁵ Applying this test, the Court invalidated Pennsylvania and Rhode Island statutes authorizing the use of public tax monies to supplement or reimburse the salaries of teachers of secular subjects in private, including parochial, elementary schools.¹⁸⁶ These programs, explained Burger, violated the third part of the Court’s new Establishment Clause test.¹⁸⁷

The Court used this same analytical tool in *Tilton v. Richardson*,¹⁸⁸ decided the same day as *Lemon*.¹⁸⁹ In *Tilton*, the Supreme Court sustained the portion of the Higher Education Facilities Act of 1963¹⁹⁰ that authorized the awarding of federal grants to build secular academic facilities at church-related colleges and universities.¹⁹¹ Only the Act’s provision allowing federally-funded buildings to be used for sectarian purposes after twenty years was found to violate the Establishment Clause.¹⁹²

In his concurring opinion in *Lemon*, however, Justice Brennan stated that he would have invalidated all three programs, including the federal grant program.¹⁹³ Unlike the majority, he found no difference between allowing governmental assistance to church-related elementary schools and allowing such assistance to colleges.¹⁹⁴ In his view, all such programs had a similar constitutional infirmity: they provided a “direct subsidy from public funds for activities carried on by sectarian educational institutions.”¹⁹⁵

183. 403 U.S. 602 (1971).

184. *See id.* at 612–13.

185. *Id.*

186. *See id.* at 606–07.

187. *See id.* at 615.

188. 403 U.S. 672 (1971).

189. *See Tilton*, 403 U.S. at 672; *Lemon*, 403 U.S. at 602.

190. 20 U.S.C. §§ 701–721 (repealed 1972).

191. *See Tilton*, 403 U.S. at 689.

192. *See id.*

193. *See Lemon*, 403 U.S. at 661 (Brennan, J., concurring). The concurring opinion in *Lemon* was also applicable to *Tilton*. *See Lemon*, 403 U.S. at 642 (Brennan, J., concurring).

194. *See id.* at 659–60 (Brennan, J., concurring).

195. *Id.* at 643 (Brennan, J., concurring).

As a result, Brennan believed that the Court's prior decisions in *Everson v. Board of Education*¹⁹⁶ and *Board of Education v. Allen*,¹⁹⁷ where benefits in the challenged programs had been made directly to parents or schoolchildren, were inapplicable to *Lemon*.¹⁹⁸ Rather, in *Tilton*, public funds were given directly to sectarian institutions.¹⁹⁹ Thus, Brennan concluded that the aid to such institutions violated the Establishment Clause.²⁰⁰ As Brennan noted in his separate opinion in *Lemon*, "subsidies of tax monies directly to a sectarian institution necessarily aid the proselytizing function of the institution."²⁰¹

Brennan's main objections to these programs, however, were the dangers to education and religion caused by government monitoring and entanglement.²⁰² "The picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction surely raises more than an imagined specter of governmental 'secularization of a creed.'"²⁰³ In short, as he warned in *Schempp*, the Establishment Clause prohibits the state from using religious institutions to further its secular educational goals, "at least without the clearest demonstration that nonreligious means will not suffice."²⁰⁴

Until 1975, Brennan continued his opposition to all governmental programs designed to assist sectarian institutions and private school students.²⁰⁵ Unlike the Court, however, he relied on the approach he developed in *Schempp* rather than the newly formed *Lemon* test.²⁰⁶ In *Hunt v. McNair*,²⁰⁷ Brennan dissented from the Court's decision that South Carolina's program of issuing revenue bonds to help finance construction at a Baptist-controlled college passed muster under the Establishment Clause.²⁰⁸ Although the program involved no direct state assistance to the sectarian institution, Brennan argued that the provisions for "'continuing financial relationships or dependencies,' 'annual audits,' 'governmental analysis,' and 'regulation and

196. 330 U.S. 1 (1947) (allowing public monies to be spent on transportation to private and parochial schools).

197. 392 U.S. 236 (1968).

198. See *Lemon*, 403 U.S. at 644 (Brennan, J., concurring).

199. See *id.* at 643 (Brennan, J., concurring).

200. See *id.* at 659 (Brennan, J., concurring).

201. *Id.* (Brennan, J., concurring).

202. See *id.* at 650-51 (Brennan, J., concurring).

203. *Id.* at 650 (Brennan, J., concurring).

204. *Id.* at 659 (Brennan, J., concurring) (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 265 (1963) (Brennan, J., concurring)).

205. See, e.g., *Hunt v. McNair*, 413 U.S. 734, 749-50 (1973) (Brennan, J., dissenting).

206. See *id.* (Brennan, J., dissenting).

207. 413 U.S. 734 (1973).

208. See *id.* at 749-50 (Brennan, J., dissenting).

surveillance'” created the very kind of “‘intimate continuing relationship or dependency between government and religiously affiliated institutions’ that in the plurality’s view was lacking in *Tilton*.”²⁰⁹

Justice Brennan began interpreting and applying the *Lemon* test in *Meek v. Pittenger*.²¹⁰ Here, Brennan agreed with the Court that a Pennsylvania statute authorizing the direct loan of instructional materials and equipment and providing auxiliary services²¹¹ to nonpublic schools violated the “primary effect” prong of *Lemon* since most qualifying schools were religious in nature.²¹² However, he dissented from the judgment sustaining the constitutionality of a textbook loan program that made books which were permissible in public schools available to schoolchildren attending nonpublic, primarily religious-oriented schools.²¹³

According to Brennan, the three-factor Establishment Clause test had evolved over fifty years of the Court’s consideration of the issue of state aid to church-related educational institutions.²¹⁴ The significance of *Lemon*, however, was the adding, without the Court’s express acknowledgment, of a “significant” fourth prong, the “divisive political potential,” that was to be used in determining the permissibility of state subsidies to sectarian educational institutions.²¹⁵ For Brennan, the political divisiveness addition to the *Lemon* test was crucial to determining the constitutionality of Pennsylvania’s textbook loan program being considered in *Meek*.²¹⁶ In his view, the program was designed to relieve “the desperate financial plight of nonpublic, primarily parochial, schools,” not to benefit the state’s students. Therefore, the program proved to have a politically divisive purpose.²¹⁷

In addition to the Court’s failure in *Meek* to even consider political divisiveness, Brennan chided the plurality for relying on *Allen*.²¹⁸ Unlike *Allen*, noted Brennan, Pennsylvania required a substantial and impermissible amount of state administrative involvement with non-

209. *Id.* at 754 (Brennan, J., dissenting) (quoting *Tilton v. Richardson*, 403 U.S. 672, 688 (1971) (Brennan, J., dissenting)).

210. 421 U.S. 349 (1975).

211. These services included such things as counseling, testing, and psychological services. *See id.* at 352–53.

212. *See id.* at 383–84 (Brennan, J., concurring and dissenting).

213. *See id.* at 378–79 (Brennan, J., concurring and dissenting).

214. *See id.* at 373 (Brennan, J., concurring and dissenting).

215. *See id.* at 374 (Brennan, J., concurring and dissenting).

216. *See id.* at 378 (Brennan, J., concurring and dissenting).

217. *Id.* at 382 (Brennan, J., concurring and dissenting).

218. *See id.* at 384 (Brennan, J., concurring and dissenting).

public schools.²¹⁹ This was not a program that benefited students, Brennan explained.²²⁰ Rather, it was one that primarily benefited church-related schools.²²¹ Therefore, the statute also violated the “primary effects” prong of *Lemon*.²²²

One year later, Brennan again applied the *Lemon* test more strictly than the Court’s plurality when, dissenting in *Roemer v. Board of Public Works*,²²³ he found that a Maryland program that provided annual, non-categorical grants to private, mostly Catholic, colleges for nonsectarian purposes violated the Establishment Clause.²²⁴ Relying on his opinions in *Schempp* and *Lemon*, Brennan reiterated his view that the First Amendment prohibits government from providing direct subsidies for activities, including secular activities, at church-related educational institutions.²²⁵ Such payments from public funds impermissibly advance religion, create “too close a proximity” between government and religion, and create a real danger of the “secularization of a creed.”²²⁶

The following year, in his dissenting opinion in *Walman v. Walter*,²²⁷ Brennan applied the *Lemon* test to find unconstitutional every provision of a far-reaching Ohio law authorizing the state to provide students of nonpublic schools with books, instructional materials and equipment, standardized testing and scoring, diagnostic services, therapeutic services, and field trip transportation.²²⁸ Justice Brennan dissented from the Court’s decision to uphold all but the instructional materials and equipment and field trip transportation provisions.²²⁹ The scope of the statute and the amount of state funding of sectarian schools convinced him that “a divisive political potential of unusual magnitude inheres in the Ohio program.”²³⁰

219. *See id.* at 379 (Brennan, J., concurring and dissenting).

220. *See id.* at 379–80 (Brennan, J., concurring and dissenting).

221. *See id.* (Brennan, J., concurring and dissenting).

222. *See id.* at 383 (Brennan, J., concurring and dissenting).

223. 426 U.S. 736 (1976).

224. *See id.* at 772 (Brennan, J., dissenting).

225. *See id.* at 770–71 (Brennan, J., dissenting) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 642, 659–60 (1971) (Brennan, J., concurring); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 236, 294–95 (1963) (Brennan, J., concurring)).

226. *Id.* at 772 (Brennan, J., dissenting) (quoting *Lemon*, 403 U.S. at 649 (Brennan, J., concurring)).

227. 433 U.S. 229 (1977).

228. *See id.* at 255–56 (Brennan, J., dissenting).

229. *See id.* (Brennan, J., dissenting).

230. *Id.* at 256 (Brennan, J., dissenting).

While Brennan had written important concurring and dissenting opinions previously, it was not until the 1982 case of *Larson v. Valente*,²³¹ that Brennan had the opportunity to write a majority opinion applying the *Lemon* test in an Establishment Clause case.²³² Surprisingly, he failed to do so.²³³

Brennan agreed with the Unification Church that Minnesota's charitable contributions law, which exempted from certain registration and reporting requirements only those religious organizations that receive more than fifty percent of their funds from nonmembers, violated the Establishment Clause of the First Amendment.²³⁴ In his view, this law violated the essence of the Establishment Clause because the government had given preference to one religious denomination over another.²³⁵ When this occurs, Brennan explained, the statute must be invalidated unless the state can demonstrate "a compelling governmental interest"²³⁶ which was "closely fitted to further that interest."²³⁷ This was not done here.²³⁸ Although protecting citizens from unscrupulous charitable solicitations was found to be compelling,²³⁹ Brennan maintained that the fifty percent rule was neither logically nor closely fitted to serve that interest.²⁴⁰

Justice Brennan returned to the problem of state involvement in church disputes in *Serbian Eastern Orthodox Diocese v. Milivojevich*.²⁴¹ Writing for the Court,²⁴² Brennan again called for a strict separation between government and the decisions of a hierarchical church.²⁴³ He found that decisions concerning the appointment and removal of a bishop, the validity of church reorganization, the fraud, collusion, or arbitrariness of ecclesiastical decisions, and the control over church property exercised by a defrocked diocesan bishop, were matters which must be left to the church judicatory rather than to the state's civil courts.²⁴⁴

231. 456 U.S. 228 (1982).

232. *See id.* at 230.

233. *See id.* at 252.

234. *See id.* at 246–47.

235. *See id.* at 250–51 (citing *Murdock v. Pennsylvania*, 319 U.S. 105, 116–17 (1943)).

236. *Id.* at 247 (quoting *Widmar v. Vincent*, 454 U.S. 263, 269–70 (1943)).

237. *Id.*

238. *See id.* at 251.

239. *See id.* at 248.

240. *See id.* at 255.

241. 426 U.S. 696 (1976).

242. *See id.* at 697.

243. *See id.* at 724–25.

244. *See id.* at 713.

Two jurisdictional decisions complete this period. In *National Labor Relations Board v. Catholic Bishop of Chicago*,²⁴⁵ Justice Brennan dissented from the Court's decision that the National Labor Relations Board ("NLRB") lacked jurisdiction to resolve disputes brought by lay teachers in two Catholic high schools.²⁴⁶ While Justice Brennan maintained that the National Labor Relations Act permitted the NLRB to exercise jurisdiction, he failed to resolve whether this would be constitutionally permissible under the religion clauses of the First Amendment.²⁴⁷

Finally, in *Valley Forge Christian College v. Americans United for the Separation of Church & State, Inc.*,²⁴⁸ Justice Brennan dissented from the Court's finding that a strict separationist organization lacked standing to challenge the constitutionality of transferring federally-owned "surplus property" to a church-related college.²⁴⁹ Arguing that important Establishment Clause rights were at stake,²⁵⁰ Brennan noted in his dissent that the Court erred in refusing to rely on *Flast v. Cohen*,²⁵¹ which would have permitted the Court to reach the merits of the case.²⁵²

C. Strict Separation on an Accommodationist Court 1983–1990

During his last six years on the Court, Justice Brennan made a concerted effort to thwart the Reagan administration's attempt to have the Court abandon the *Lemon* test and adopt an approach that permitted the government to accommodate, if not promote, religion in American life.²⁵³ In *Marsh v. Chambers*,²⁵⁴ a six-justice majority²⁵⁵ found that the Establishment Clause was not violated by Nebraska's practice of opening state legislative sessions with a prayer offered by a Presbyterian clergyman who had been paid for sixteen years with pub-

245. 440 U.S. 490 (1979).

246. *See id.* at 508 (Brennan, J., dissenting).

247. *See id.* at 518 (Brennan, J., dissenting).

248. 454 U.S. 464 (1982).

249. *See id.* at 482, 490 (Brennan, J., dissenting).

250. *See id.* at 513 (Brennan, J., dissenting).

251. 392 U.S. 83, 102 (1968) (establishing a two-pronged formula to determine taxpayer standing).

252. *See Valley Forge*, 454 U.S. at 510–11 (Brennan, J., dissenting).

253. *See, e.g., Marsh v. Chambers*, 463 U.S. 783 (1983). The Reagan administration's efforts to promote accommodation were effected through judicial appointments and in briefs and arguments presented by the Solicitor General.

254. 463 U.S. 783 (1983).

255. *See id.* at 784.

lic funds.²⁵⁶ Writing for the Court,²⁵⁷ Chief Justice Burger adopted the Solicitor General's argument²⁵⁸ that the legislative prayer should be upheld on the basis of history and original intent instead of the three-pronged *Lemon* framework used by the lower courts.²⁵⁹

Justice Brennan's dissent represents his most comprehensive examination of the Establishment Clause since *Schempp*. Moreover, his admission that he had been "wrong" in that case²⁶⁰ has become a textbook example of judicial statesmanship and courage.²⁶¹ As Brennan explained:

I have come to the conclusion that I was wrong then and that the Court is wrong today. I now believe that the practice of official invitational prayer . . . is unconstitutional. It is contrary to the doctrine as well [as] the underlying purposes of the Establishment Clause, and it is not saved either by its history or by any of the other considerations suggested in the Court's opinion.²⁶²

Unlike the Court, Brennan maintained that the constitutionality of legislative prayers should have been determined through an application of the *Lemon* test.²⁶³ In his view, this was not a close issue.²⁶⁴ Almost any group of law students, Brennan noted sarcastically, would "nearly unanimously" find that the invocation of divine guidance on a government body would involve a religious and not a secular purpose, would have a primary effect that was "clearly religious," and would involve excessive entanglement between government and religion in that selection of a "suitable" chaplain would likely produce the kind of "political divisiveness" that the Establishment Clause was designed to prevent.²⁶⁵

Justice Brennan also examined the "underlying function" of the Establishment Clause and the forces that shaped its doctrine.²⁶⁶ Citing his *Lemon* opinion, Brennan noted that the Establishment Clause represented a "statement about the proper role of *government*" in a society where history has demonstrated that religion "'must be a private mat-

256. *See id.* at 784–86.

257. *See id.* at 784.

258. *See id.* at 792; *see also* Brief for the United States as Amicus Curiae at 32, *Marsh v. Chambers*, 463 U.S. 783 (1983) (No. 82-23).

259. *See Marsh*, 463 U.S. at 786.

260. *See id.* at 796 (Brennan, J., dissenting).

261. *See* Richard S. Arnold, *Mr. Justice Brennan—An Appreciation*, 26 HARVARD C.R.-C.L. L. REV. 7, 10–11 (1991).

262. *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting).

263. *See id.* at 796–97 (Brennan, J., dissenting).

264. *See id.* at 796 (Brennan, J., dissenting).

265. *See id.* at 799–801 (Brennan, J., dissenting).

266. *See id.* at 801–02 (Brennan, J., dissenting).

ter for the individual, the family, and the institutions of private choice.’”²⁶⁷ He identified separation and neutrality as the basic principles underlying the Establishment Clause, which serves four important purposes: (1) guaranteeing the individual’s right to conscience; (2) keeping government from interfering in the autonomy of religious life; (3) preventing the trivialization and degradation of religion by an overly close attachment to state institutions; and (4) minimizing the chances of religious issues becoming divisive in the political arena.²⁶⁸

Finally, Brennan suggested in *Marsh* that the Court had a misguided view of the intent of the Framers, the First Amendment, and the Constitution.²⁶⁹ According to Brennan:

The Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers Our primary task must be to translate “the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century into concrete restraints on officials dealing with the problems of the twentieth century.”²⁷⁰

Justice Brennan dissented again in *Lynch v. Donnelly*,²⁷¹ known as the Rhode Island nativity scene case.²⁷² In *Lynch*, a five-justice majority, relying on a long unbroken history of governmental acknowledgment of religion and public subsidizing of holidays with religious significance, voted to uphold state support of a nativity scene in Pawtucket, Rhode Island’s annual Christmas display.²⁷³ For Brennan, the problem was largely one of trying to limit the damage caused by yet another attack on the strict separation principle.²⁷⁴ Although the Court had rejected the Solicitor General’s advice to avoid the “analytic overkill” of *Lemon*,²⁷⁵ the Chief Justice agreed with the Reagan administration that the Establishment Clause did not require the complete separation of church and state, but rather mandated benevolent neu-

267. *Id.* at 802 (Brennan, J., dissenting) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971)).

268. *See id.* at 803–06 (Brennan, J., dissenting); *see also* DONALD L. DRAKEMAN, CHURCH-STATE CONSTITUTIONAL ISSUES 26–27 (1991).

269. *See Marsh*, 463 U.S. at 814–16 (Brennan, J., dissenting).

270. *Id.* at 816–17 (Brennan, J., dissenting) (quoting *W. Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943)).

271. 465 U.S. 668 (1984).

272. *See id.* at 670–71.

273. *See id.* at 670, 687.

274. *See id.* at 694–96 (Brennan, J., dissenting).

275. *See id.* at 678–85; Brief of the United States as Amicus Curiae at 3, *Lynch v. Donnelly*, 465 U.S. 668 (1984) (No. 82-1256).

trality and accommodation.²⁷⁶ Emphasizing that the crèche should be viewed in the context of the Christmas holiday season,²⁷⁷ the Court concluded that the celebration of a national holiday was a valid secular purpose,²⁷⁸ that the primary effect advanced religion no more than hundreds of religious paintings hanging in publicly supported museums,²⁷⁹ and that any benefit to a particular religion was “indirect,” “remote,” and “incidental.”²⁸⁰

Justice Brennan disagreed with both the Court’s use of history and its application of the *Lemon* test.²⁸¹ Pointing out there was no “widespread celebration” of Christmas when the Establishment Clause was adopted,²⁸² Brennan argued it was impossible for the Court to know what the Framers’ views would be on the constitutionality of the nativity scenes.²⁸³ Most importantly, under Brennan’s view, even a generally accepted historical practice is subject to contemporary Establishment Clause analysis.²⁸⁴ After applying the *Lemon* test in a much stricter manner than the majority of the Court,²⁸⁵ Brennan determined that Pawtucket’s seasonal display of a crèche lacked a valid secular purpose,²⁸⁶ had a primary effect which advanced the majoritarian Christian religion,²⁸⁷ and, to the extent that this controversy might result in political divisiveness among non-Christian minorities, it fostered excessive governmental entanglement with religion.²⁸⁸

Although Brennan voted to strike down Minnesota’s tax deduction plan²⁸⁹ and Alabama’s silent moment for meditation and prayer statute,²⁹⁰ he wrote no opinions in those cases.²⁹¹ However, Brennan spoke for the Court in two controversial 1985 parochial aid decisions

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276. See *Lynch*, 465 U.S. at 672–73.
277. See *id.* at 679.
278. See *id.* at 681.
279. See *id.* at 683.
280. *Id.* (quoting *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973)).
281. See *id.* at 696–97 (Brennan, J., dissenting).
282. See *id.* at 720 (Brennan, J., dissenting).
283. See *id.* (Brennan, J., dissenting).
284. See *id.* at 721–22 (Brennan, J., dissenting).
285. See *id.* at 697–704 (Brennan, J., dissenting).
286. See *id.* at 698 (Brennan, J., dissenting).
287. See *id.* at 701 (Brennan, J., dissenting).
288. See *id.* at 702 (Brennan, J., dissenting).
289. See *Mueller v. Allen*, 463 U.S. 388, 404 (1983) (Marshall, J., dissenting).
290. See *Wallace v. Jaffree*, 472 U.S. 38, 39, 61 (1985).
291. See *id.* at 39; *Mueller*, 463 U.S. at 389.

that again supported a strict separation of church and state.²⁹² In *Grand Rapids School District v. Ball*,²⁹³ the Court affirmed a lower court ruling which invalidated two programs, known as "Shared Time" and "Community Education," which used public school teachers to provide remedial and enrichment classes to nonpublic school children, at public expense, in classrooms located in and leased from the nonpublic schools.²⁹⁴ While Shared Time teachers were full-time employees of the public schools,²⁹⁵ Community Education teachers were part-time public school employees who were regularly employed full time by parochial and other nonpublic schools.²⁹⁶

Writing for the Court,²⁹⁷ Justice Brennan stated that the challenged programs should be measured against the *Lemon* test criteria.²⁹⁸ In his view, the programs violated the "primary effect" prong of *Lemon* in three ways.²⁹⁹ First, there was a "a substantial risk of state-sponsored indoctrination" since no effort was made to monitor the programs for religious content.³⁰⁰ Second, the programs advanced religion through the establishment of a symbolic link between government and religion.³⁰¹ "Government promotes religion," explained Brennan, "as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines."³⁰² Moreover, the symbolism is likely to adversely affect the impressionable minds of schoolchildren.³⁰³ Third, the programs violated the Es-

292. See *Aguilar v. Felton*, 473 U.S. 402 (1985); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985).

293. 473 U.S. 373 (1985).

294. See *id.* at 397-98.

295. See *id.* at 376.

296. See *id.* at 377.

297. See *id.* at 374. The Community Education program was struck down by a seven-to-two vote, with Justices Rehnquist and White dissenting. See *id.* at 398-400 (separate opinions by Burger, C.J. and O'Connor, J.); *id.* at 400-01 (White, J., dissenting; Rehnquist, J., dissenting). The Shared Time program, on the other hand, was invalidated by a five-to-four vote with Chief Justice Burger and Associate Justices White, Rehnquist, and O'Connor dissenting. See *id.* at 398-401 (separate opinions by Burger, C.J., O'Connor, J., White, J., and Rehnquist, J.).

298. See *id.* at 382.

299. See *id.* at 397.

300. *Id.* at 387.

301. See *id.* at 390.

302. *Id.* at 389.

303. See *id.* at 391-92 (citing Donald A. Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 574 (1968)).

tablishment Clause because they promoted religion by providing, in effect, a direct cash subsidy to the church-related schools.³⁰⁴

The Court reached a similar decision in *Aguilar v. Felton*,³⁰⁵ invalidating a remedial program under which New York City used federal funds, received under the Elementary and Secondary Education Act, to pay public employees who taught disadvantaged students in both religious and public schools.³⁰⁶ Specifically, the Court rejected the Solicitor General's argument that the Constitution permitted the government to offer "remedial assistance to educationally deprived children in their own schools."³⁰⁷

Writing for the five-justice majority in *Aguilar*,³⁰⁸ Justice Brennan concentrated on the problem raised by governmental monitoring of publicly funded instruction in nonpublic schools.³⁰⁹ In his view, this monitoring violated the "excessive entanglement" prong of the *Lemon* test.³¹⁰ Moreover, this entanglement was unavoidable because "[i]n short, the religious school, which has as a primary purpose the advancement and preservation of a particular religion must endure the ongoing presence of state personnel whose primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought."³¹¹

Justice Brennan spoke again for the Court in *Edwards v. Aguillard*,³¹² when, in a seven-to-two decision, it struck down Louisiana's Balanced Treatment for Creation-Science and Evolution-Science Act.³¹³ Claiming as its sole purpose the protection of academic freedom,³¹⁴ this law mandated that creation science, "the scientific evidences [for creation or evolution] and inferences from those scientific evidences," be given balanced treatment whenever evolution was taught in public schools.³¹⁵

In his sweeping majority opinion, Brennan maintained in *Aguillard* that the Louisiana creationism statute failed to pass constitutional

304. *See id.* at 395-96.

305. 473 U.S. 402 (1985).

306. *See id.* at 404-06, 408.

307. Brief of the United States as Appellant at 18, *Aguilar v. Felton*, 473 U.S. 402, 408 (1985) (No. 84-237).

308. *See Aguilar*, 473 U.S. at 403.

309. *See id.* at 409.

310. *See id.* at 413.

311. *Id.*

312. 482 U.S. 578 (1987).

313. *See id.* at 582.

314. *See id.* at 581.

315. *Id.*

muster under the three-pronged *Lemon* test.³¹⁶ Specifically, Brennan agreed with the lower federal courts that the legislature failed to assert a valid secular purpose.³¹⁷ “The preeminent purpose of [the law],” explained Brennan, was not to promote academic freedom, but “to advance the religious viewpoint that a supernatural being created humankind.”³¹⁸ If Louisiana wanted to promote academic freedom, posited Brennan, “it would have encouraged the teaching of all scientific theories on human origins.”³¹⁹ And why was the teaching of creation science required only when evolution was taught?³²⁰

To support his view on the real purpose of the Balanced Treatment Act, Brennan noted the “historic and contemporaneous link” between the teaching of evolution and fundamentalist religious denominations.³²¹ He also noted that the legislative history of the statute demonstrated an endorsement of a religious view hostile to evolution.³²² Any endorsement of religion, Brennan noted, was prohibited by the Establishment Clause.³²³

Use of the endorsement language was not accidental. In *Lynch v. Donnelly*,³²⁴ Justice Sandra Day O’Connor proposed modifying the first two prongs of the *Lemon* test with a test prohibiting “government[al] endorsement or disapproval of religion.”³²⁵ In *Aguillard*, Brennan successfully gained O’Connor’s support for the majority opinion relating to endorsement.³²⁶

A very different kind of church-state dispute arose in *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.³²⁷ In *Amos*, the Supreme Court unanimously held that exempting the secular nonprofit activities of religious organizations from the religious anti-discrimination requirements of Title VII of the 1964 Civil Rights Act did not violate the Establishment Clause.³²⁸ Thus, it was not a violation for the Mormon Church to fire several employees

316. *See id.* at 585–94.

317. *See id.* at 585–86.

318. *Id.* at 591.

319. *Id.* at 588.

320. *See id.* at 589.

321. *See id.* at 590.

322. *See id.* at 591–92.

323. *See id.* at 593.

324. 465 U.S. 668 (1984).

325. *Id.* at 691 (O’Connor, J., concurring).

326. *See Aguillard*, 482 U.S. at 579. The endorsement language is set forth in *Aguillard* at Section III of the opinion. *See id.* at 585–94.

327. 483 U.S. 327 (1987).

328. *See id.* at 329–30.

of church-owned corporations because they failed to satisfy the requirements of church membership.³²⁹

Justice Brennan concurred,³³⁰ viewing *Lemon* as inapplicable in cases involving confrontation between the rights of religious organizations and those of individuals.³³¹ "Sensitivity to individual religious freedom dictates that religious discrimination be permitted only with respect to employment in religious activities."³³²

The loss of support for Justice Brennan's strict separationist approach became evident in two cases decided in his last year on the Court. In *Texas Monthly, Inc. v. Bullock*,³³³ only Justices Marshall and Stevens joined Brennan's plurality opinion striking down a Texas statute that provided a sales tax exemption limited to religious periodicals.³³⁴ The statute violated the Establishment Clause, according to Brennan, because religious publications were preferred by the government over nonreligious ones.³³⁵ Arguing that the state must demonstrate a secular aim, Brennan indicated that a tax exemption scheme could pass constitutional muster if, for example, "all groups that contributed to the community's cultural, intellectual, and moral betterment" were eligible for the benefit.³³⁶

Justice Brennan's last Establishment Clause opinion was written in *Allegheny v. American Civil Liberties Union*,³³⁷ another Christmas display case.³³⁸ In *Allegheny*, the Court held, by a five-to-four margin, that a crèche displayed in the most public part of the county courthouse and bearing a banner proclaiming "Gloria in Excelsis Deo!," meaning "Glory to God in the Highest!," constituted an endorsement of religion in violation of the Establishment Clause.³³⁹ While Brennan concurred in this judgment,³⁴⁰ he dissented from the Court's decision that the display of a Chanukah menorah next to a Christmas tree just outside the city-county building, which included a mayoral statement saluting the festive lights of freedom, passed constitutional muster

329. See *id.* at 330, 335.

330. See *id.* at 340 (Brennan, J., concurring).

331. See *id.* at 340 & n.1 (Brennan, J., concurring).

332. *Id.* at 345 (Brennan, J., concurring).

333. 489 U.S. 1 (1989).

334. See *id.* at 5.

335. See *id.* at 15.

336. *Id.*

337. 492 U.S. 573 (1989).

338. See *id.* at 578.

339. See *id.* at 578, 621.

340. See *id.* at 637 (Brennan, J., concurring and dissenting).

under *Lemon*.³⁴¹ Writing for the Court, Justice Blackmun noted that, while the menorah is a religious symbol, displaying it with the Christmas tree, "the preeminent secular symbol of the Christmas holiday season," along with the mayor's statement, it becomes more of a symbol of cultural diversity and part of the celebration of the winter holidays than an endorsement of religious faith.³⁴²

Ever the coalition builder, Brennan joined Justice O'Connor's concurring opinion concerning the applicability of her endorsement test.³⁴³ However, in his separate opinion, Brennan criticized O'Connor and Blackmun for their application of this test to the facts of *Allegheny*.³⁴⁴ Disagreeing with the premises that the Christmas tree was a purely secular symbol,³⁴⁵ that Chanukah was a secular holiday symbolized by the menorah,³⁴⁶ and that the government may promote pluralism by sponsoring public displays having strong religious associations,³⁴⁷ Brennan concluded:

To lump the ritual objects and holidays of religions together without regard to their attitudes toward such inclusiveness, or to decide which religions should be excluded because of the possibility of offense, is not a benign or beneficent celebration of pluralism: it is instead an interference in religious matters precluded by the Establishment Clause.³⁴⁸

III. Brennan's Jurisprudence and Catholicism

Although a devout Catholic,³⁴⁹ Justice Brennan was a strict separationist who became stricter still in maintaining a high wall of separation between church and state during his later years on the Court. In addition to striking down prayer and Bible reading in public schools, Brennan publicly opposed virtually every governmental program that benefited church-related institutions and students.³⁵⁰

At first glance, it would appear that Catholicism did not affect Justice Brennan's Establishment Clause jurisprudence. Yet, one key aspect of the Catholic faith is the recognition of the dignity of the human individual. According to the United States Catholic Confer-

341. See *id.* (Brennan, J., concurring and dissenting).

342. See *id.* at 617-19.

343. See *id.* at 623, 627-32 (O'Connor, J., concurring).

344. See *id.* at 644 (Brennan, J., concurring and dissenting).

345. See *id.* at 640-41 (Brennan, J., concurring and dissenting).

346. See *id.* at 643-44 (Brennan, J., concurring and dissenting).

347. See *id.* at 644 (Brennan, J., concurring and dissenting).

348. *Id.* at 645 (Brennan, J., concurring and dissenting).

349. See EISLER, *supra* note 8, at 182.

350. See, e.g., *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 397-98 (1985).

ence (“USCC”), the staff arm of the National Conference of Catholic Bishops, which presents the “official” Catholic view on political issues in the United States:

Catholic social teaching is based on and inseparable from our understanding of human life and human dignity. Every human being is created in the image of God and redeemed by Jesus Christ, and therefore is invaluable and worthy of respect as a member of the human family. Every person, from the moment of conception to natural death, has inherent dignity and a right to life consistent with that dignity. Human dignity comes from God, not from any human quality or accomplishment.³⁵¹

Justice Brennan’s underlying principles, to a significant extent, parallel this view, though without the sectarian overtones. While these principles might be more directly evident in death penalty³⁵² and social welfare³⁵³ cases, they also apply to those religious minorities, agnostics, and nonbelievers protected under the Establishment Clause of the First Amendment.

However, Justice Brennan’s specific views on the relationship between religion and the law were contrary to those espoused by the Catholic Church.³⁵⁴ The differences in opinion were most apparent in the context of school prayer and public aid to private and religious schools. His views led one major Catholic journal of opinion to comment that Brennan was “not Catholic enough. Did he not vote against aid to parochial schools? Did he not write a concurring opinion that barred prayer from public school?”³⁵⁵

During his tenure on the Supreme Court, Justice Brennan and the Catholic Church differed in their opinions on the role of religion in the public school classroom. The Catholic Church traditionally is not opposed to religion in school, either in the form of prayer or in education.³⁵⁶ On the contrary, the Catholic Church sought, and continues to seek, an extensive relationship between public schools and

351. Monsignor Dennis M. Schurr, General Secretary, NCCBB/USCC, *Sharing Catholic Social Teaching: Challenges and Directions*, <http://www.nccbuscc.org/sdwp/projects/socialteaching/socialteaching.htm> (last modified Oct. 20, 1999).

352. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring). Brennan stated that “[t]he basic concept underlying the [Cruel and Unusual Punishment Clause] is nothing less than the dignity of man.” *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 99 (1958)).

353. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970).

354. See Joseph R. Preville, *Leo Pfeffer and the American Church-State Debate: A Confrontation with Catholicism*, 33 J. CHURCH & ST. 37 (1991).

355. Editorial, *Justice Brennan and Successor*, AMERICA, Aug. 4, 1999, at 51.

356. See Interview with William F. Davis, *supra* note 16.

religion.³⁵⁷ One key aspect of this is the belief that “[t]rue quality education must address the moral and spiritual needs of the students.”³⁵⁸ According to the USCC, this means “the development and implementation of a form of moral education integrated into the total public school curriculum that responds to student needs and is respectful of the variety of beliefs found in our nation.”³⁵⁹ According to the Catholic Church, public schools could accomplish these goals by implementing school prayer, neutral religious education, and “released time” programs.³⁶⁰

Justice Brennan, however, disagreed with any notion of prayer, religious education, or spiritual training as part of the public school curriculum.³⁶¹ In *Schempp*, Brennan, in his concurring opinion, noted:

It is implicit in the history and character of American public education that the public schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions.³⁶²

Incorporation of religion into secular public schools, Brennan further noted, would undermine the value of either alternative.³⁶³

Finally, Brennan’s opinions differed with those of the Catholic Church in that he rejected the notion that religion in school would automatically enhance the educational experience.³⁶⁴ Instead, Brennan argued that parents, and not government, should determine whether the inclusion of religion would diminish or enhance their child’s education.³⁶⁵

Brennan and the Catholic Church particularly differed on the issue of public financing of parochial schools. The Catholic Church officially maintains that the government should provide “equitable tax

357. See *Principles for Education Reform in the United States*, <http://www.nccbuscc.org/education/parentassn/reform.htm> (last modified Nov. 9, 1999).

358. *Id.*

359. *The Role of the Catholic Church in Public Policy*, <http://www.nccbuscc.org/education/fedasst/background.htm> (last modified Nov. 9, 1999).

360. See Interview with William F. Davis, *supra* note 16.

361. See, e.g., *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

362. *Id.* at 241–42 (Brennan, J., concurring).

363. See *id.* (Brennan, J., concurring) (“The choice which is thus preserved is between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own.”).

364. See *id.* (Brennan, J., concurring).

365. See *id.* at 242 (Brennan, J., concurring) (“It is no proper function of the state or local government to influence or restrict [the] election [of religion in education].”).

support for the education of pupils in public, private, and religious schools to implement the natural right of parental freedom of choice in the education of their children.”³⁶⁶ Moreover, the Catholic Church argues in support of “the principle that private and religious school students and professional staff have the right and opportunity for equitable participation in all government programs to improve education, especially those which address the needs of the educationally, economically, and socially disadvantaged.”³⁶⁷ Thus, the Catholic Church advocates an entanglement of public money with religious schools to provide for basic educational services and any other programs necessary to support such institutions.³⁶⁸

Brennan disagreed with this position profoundly. Indeed, his disagreement did not simply extend to remedial programs for disadvantaged students or federal funding for the teaching of disadvantaged students in religious schools.³⁶⁹ Rather, he opposed virtually every governmental program that benefited church-related institutions and their students, including salary supplements to parochial school teachers, textbooks, instructional materials and equipment, testing and scoring, diagnostic services, therapeutic services, and field trip transportation programs.³⁷⁰

Justice Brennan and the Catholic Church shared certain underlying core values relating to human dignity. In this respect, Catholicism did influence Brennan’s decisions on the Supreme Court. However, in Establishment Clause disputes, both parties have consistently held opposite positions. While Brennan favored the *Lemon* test and a strict separationist approach, the Catholic Church favored, and still favors, an approach where government accommodates and helps finance religious education.³⁷¹

If Catholicism did not directly affect Brennan’s Establishment Clause jurisprudence, then what did? Other explanations certainly exist. Arguably, Brennan’s strict separationist view stems from his strong notion of libertarian dignity, which focuses on the rights of the individual. For example, in *Marsh v. Chambers*,³⁷² Brennan argued that the Establishment Clause reflected a “turbulent history” and that religion should remain a personal and private matter “for the individual, the

366. *The Role of the Catholic Church in Public Policy*, *supra* note 359.

367. *Id.*

368. *See generally id.*

369. *See, e.g.,* *Wolman v. Walter*, 433 U.S. 229, 255–56 (1977).

370. *See* discussion *supra* Part II.

371. *See The Role of the Catholic Church in Public Policy*, *supra* note 359.

372. 463 U.S. 783 (1983).

family, and the institutions of private choice.”³⁷³ This view is also consistent with his argument against school prayer in *Schempp*.³⁷⁴

Another possible explanation is that Brennan, in adopting a strict separationist approach, sought to promote a sense of responsive democracy. According to Frank Michelman, responsive democracy “ties the possibility of individual self government in politics to a society’s strict adherence to the precept of absolutely unrestricted access to public discourse for every person and every view.”³⁷⁵ This view, a “foundational substantive social norm,” holds that an “uncompromising obedience to the principle of unrestricted public discourse is a prerequisite for legitimate government.”³⁷⁶ Michelman contends that this may be closer to Brennan’s constitutional view because it fits with the notion of individual dignity.³⁷⁷

One final explanation may be found in the speeches of the Justice himself. In 1985, at Georgetown University, Brennan spoke of a living constitution.³⁷⁸ According to Brennan, “the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.”³⁷⁹ Brennan’s strict separation approach to Establishment Clause cases, therefore, recognizes the religious plurality existing in society.

Conclusion

Did William J. Brennan, Jr. keep his promise to the Senate Judiciary Committee to base his decisions on the Constitution, laws, and precedent rather than on his personal religious beliefs in church-state disputes? The answer seems to be a categorical “yes.” Indeed, Brennan’s views on the proper relationship between religion and the law were often directly contrary to the positions taken by his church.

Nonetheless, Brennan’s Establishment Clause legacy protects not only Catholicism, but religion as a whole. Whether the underlying rationale was ultimately Catholic virtue, libertarian dignity, responsive democracy, or a tribute to the times, Justice Brennan’s contributions

373. *Id.* at 802 (Brennan, J., dissenting) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971)).

374. *See supra* text accompanying notes 362–65.

375. FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* 42 (1999).

376. *Id.* at 43.

377. *See id.*

378. *See generally* William J. Brennan, Jr., Address, *Construing the Constitution*, in 19 U.C. DAVIS L. REV. 2, 7 (1985).

379. *Id.*

to Establishment Clause jurisprudence represents a concern for keeping government out of religion. Indeed, Brennan's Establishment Clause legacy, while currently challenged by members of the Court, is part of what makes Justice Brennan one of the most important justices in the history of the United States Supreme Court.

