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The Supreme Court's 1984–85 Church-State Decisions: Judicial Paths of Least Resistance

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THE SUPREME COURT'S 1984–85 CHURCH-STATE DECISIONS: JUDICIAL PATHS OF LEAST RESISTANCE

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Introduction

The scope of first amendment protection of religious freedom was a central issue during the 1984–85 Supreme Court Term.[1] Of the 185 cases granted review, seven alleged violations of the religion clauses.[2] Five of these claimed violations of the establishment clause, challenging prayer in public schools,[3] government aid to parochial schools,[4] display of a Nativity scene on public land,[5] and legislation requiring employers to allow Sabbath observers a day of rest.[6] Two cases asserted free exercise claims, challenging government regulation of commercial activities of religious institutions[7] and a state requirement of photographs on drivers' licenses.[8] These cases were litigated at a time when the Burger Court's approach to religion cases was in a state of flux, departing from the Warren Court's legacy of strict separation of church and state and from strict application

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[1] The first amendment's establishment and free exercise clauses provide, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I.

[2] Religion cases, especially those dealing with free exercise issues, also account for a significant number of cases on the Court's 1985–86 docket. *See infra* text accompanying notes 188–200.

[3] Wallace v. Jaffree, 105 S. Ct. 2479 (1985).

[4] Aguilar v. Felton, 105 S. Ct. 3232 (1985); Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216 (1985).

[5] Bd. of Trustees v. McCreary, 105 S. Ct. 1859 (1985), *aff'g by an equally divided Court* McCreary v. Stone, 739 F.2d 716 (2d Cir. 1984).

[6] Thornton v. Caldor, Inc., 105 S. Ct. 2914 (1985).

[7] Alamo Found. v. Secretary of Labor, 105 S. Ct. 1953 (1985).

[8] Jensen v. Quaring, 105 S. Ct. 3492 (1985), *aff'g by an equally divided Court* Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984).

of the establishment test formulated by the Burger Court itself in *Lemon v. Kurtzman*.[9]

In this climate of change, the Court's grant of certiorari to seven religion cases augured a revolution in church-state doctrine.[10] This revolution, however, did not occur. The outcomes of the key establishment cases may have appeared to reaffirm principles of separation. However, the opinions in these cases continued the recent trend away from strict separation. The holdings in the establishment cases were narrow and can be explained by their close factual similarities to controlling precedents rather than by a doctrinal shift.[11] Several of the 1984–85 decisions also reflect a special standard of review that is particularly protective of children.[12] Outside of these two considerations, the Court has continued to apply a considerably weakened version of the *Lemon* test.[13]

This Article presents a critical analysis of the Supreme Court's 1984–85 religion cases, tracing the developments which have transformed the *Lemon* test into a device which elevates the form and context of challenged government aid to constitutional dimensions. It argues that the deferential nature of the Court's review, and the absence of a workable theory to secure individual religious liberty, seriously undermine the protection of that liberty against legislative encroachment. Part I examines the Burger Court's approach to religious issues in previous terms and sketches an overview of the 1984–85 cases. Part II explains how the holdings of the 1984–85 cases were determined by precedents involving substantially similar facts. Part III presents three themes or standards that emerge from these cases. Part IV analyzes the weakened version of the *Lemon* test that is used by the current Court. Part V discusses some broad conceptual problems in the Court's approach. Finally, Part VI of the Article takes a brief look at the Court's 1985–86 Term.

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[9] 403 U.S. 602, 612–13 (1971).

[10] *See* Greenhouse, *Supreme Court May Shift From Separation To Accommodation, The Highest Legal Authority Enters Church-State Debate*, N.Y. Times, Oct. 21, 1984, § 4, at 2, col. 3; Lauter, *Major Shift Looming in Church-State Law*, Nat'l L.J., Sept. 10, 1984, at 1.

[11] *See infra* text accompanying notes 46–100.

[12] *See infra* text accompanying notes 112–19, 159–64.

[13] *See infra* text accompanying notes 123–79.

I. Context and Parameters

A. The Shift from Separation to "Accommodation"

The Burger Court's approach to religion issues began in 1971 with *Lemon v. Kurtzman*, which adopted a tripartite test for establishment questions.[14] The *Lemon* test would invalidate the state practice or legislation if its purpose was religious, if its primary effect was to advance religion, or if it entailed excessive government entanglement in religious affairs. This strict approach to establishment cases apparently derived from a belief that government support of religion is inherently coercive, even if extended to all religions.[15] The Court in *Lemon* construed the establishment clause's protection of individual religious liberty as guaranteeing independence from government promotion or encouragement of religion.

At the same time, the Court also recognized that the free exercise clause requires protection from government burdens on religious liberty.[16] In the landmark case of *Wisconsin v. Yoder*,[17] the Court interpreted the free exercise clause as mandating a religious exemption from compulsory school attendance for Amish children. The free exercise clause necessitated this exemption because the government interests in compulsory education, while strong, could not override tenets central to the Amish religion.

This twofold understanding of the first amendment's protection of religious liberty—an establishment mandate against

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[14] 403 U.S. at 612–13. *Lemon* followed more than 30 years of case-by-case review of state legislation affecting religious freedoms. The Court first applied the free exercise clause to the states in Cantwell v. Connecticut, 310 U.S. 296 (1940) (upholding free exercise right to proselytize in streets), and the establishment clause in Everson v. Bd. of Educ., 330 U.S. 1, 13 (1947) (upholding state reimbursement for bus fare paid by parochial school students). While cases during this period sometimes articulated a strict standard concerning government financing of religion, no functional tests were proposed. *See, e.g.*, *Everson*, 330 U.S. 1; McCollum v. Bd. of Educ., 333 U.S. 203 (1948).

[15] *See Everson*, 330 U.S. at 15 ("Neither a state nor the Federal Government can . . . pass laws which aid one religion, *aid all religions*, or prefer one religion over another.") (emphasis added). Thus the Court barred religious instruction in public schools even where it was multidenominational. McCollum v. Bd. of Educ., 333 U.S. 203 (1948). Where the challenged support was financial, taxpayer coercion raised an additional establishment concern. *See, e.g.*, *Everson*, 330 U.S. at 13.

[16] *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (burden on free exercise must be justified by compelling state interest); *Everson*, 330 U.S. at 15–16.

[17] 406 U.S. 205 (1972).

government promotion of religion, and a concomitant free exercise protection of individual religious interests—appeared to erode in recent terms. A more permissive approach, which allowed government financial aid for a variety of religious purposes, developed in its stead. The Court upheld government aid to religion in several cases: *Lynch v. Donnelly*[18] upheld a municipally-funded Nativity display; *Marsh v. Chambers*[19] upheld a sectarian legislative chaplaincy; *Widmar v. Vincent*[20] upheld a public university prayer club, and *Mueller v. Allen*[21] upheld the allowance of tuition tax deductions to parents of parochial school children. The *Lemon* test for establishment cases had apparently given way to a more ad hoc standard of governmental "accommodation"[22] of religion, under which the Court deferred to legislation promoting the interests of majoritarian religions. This new version of the accommodation doctrine, drawn from historical analysis and from free exercise doctrine,[23] confused the relevant inquiries of the free exercise and establishment clauses, diluting the protections afforded by both.

Applying this ad hoc standard to establishment cases, the Court relied on longstanding "unbroken history,"[24] competing first amendment requirements,[25] and other policy concerns[26] to

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[18] 465 U.S. 668 (1984).

[19] 463 U.S. 783 (1983).

[20] 454 U.S. 263 (1981).

[21] 463 U.S. 388 (1983).

[22] *See, e.g., Lynch*, 465 U.S. at 673 (Constitution mandates "accommodation" of all religions). The new accommodation doctrine claims to address a conflict between the free exercise and establishment mandates. *See Lynch*, 465 U.S. at 673; *see also infra* text accompanying notes 180–87.

[23] The historical support derives from Story's commentaries, which are cited at great length in *Jaffree*, 105 S. Ct. at 2488–89, and from the traditional nature of the activity, *see infra* text accompanying notes 102–11. The Court has drawn the free exercise component from early Supreme Court cases such as Zorach v. Clauson, 343 U.S. 306 (1952) (upholding released-time program in which religious classes were held in church buildings) and *McCollum*. *See Lynch*, 465 U.S. at 673.

[24] *See, e.g., Lynch*, 465 U.S. at 674; *Marsh*, 463 U.S. at 792.

[25] *See Lynch*, 465 U.S. at 673 (concern with free exercise); Widmar v. Vincent, 454 U.S. 263, 271–72 (1981) ("[A]n open-forum policy, including nondiscrimination against religious speech, would have a secular purpose and would avoid entanglement with religion."). *But see id.* at 287 n.5 (White, J., dissenting) ("I know of no precedent holding that simply because a public forum is open to all kinds of speech—including speech about religion—it must be open to regular religious worship services as well.").

[26] *See, e.g.*, Witters v. Wash. Dep't of Servs. for the Blind, 106 S. Ct. 748 (1986) (vocational rehabilitation funding upheld even where used for religious purpose); *Mueller*, 463 U.S. 388 (stressing interest in education).

uphold the challenged practices. Thus accommodation, "illuminated by history," appeared to replace the *Lemon* test; the Court focused on the form, context,[27] and perception[28] of government aid rather than on religious intent or effect.

In free exercise cases, the new accommodation doctrine threatened to allow governmental, majoritarian interests to override the interests of religious minorities. The interest in maintaining traffic flow on state fair grounds, for example, defeated a religious claim of a right to circulate and proselytize freely among visitors to the fair.[29] The Court also upheld the government's interest in mandatory payments to Social Security as "indispensible to the fiscal vitality of the . . . system,"[30] even though it accepted the contention that both payment and receipt of Social Security benefits are forbidden by the Amish faith.[31] Government interests in administrative convenience and uniformity apparently outweighed the free exercise rights of groups or individuals who challenged specific government regulation as burdensome to religious practice.

Rather than shielding minority religions whose beliefs and practices are at odds with government regulation, the Court now protects majoritarian religions whose practices and beliefs have been assimilated by affirmative governmental regulation. Under this new approach, the only limit on governmental aid to religion is a putative historically-based protection against coerced orthodoxy.[32] When the Court relied on tradition to uphold the *Lynch* Nativity scene and the legislative chaplaincy in *Marsh*, it essentially decreed that minority religions must accommodate majoritarian religious practices which have become part of, and legitimated by, American culture. The mere passage of time thus acts as a statute of limitations; a practice that

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[27] *See infra* text accompanying notes 134–57.

[28] *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). *See infra* text accompanying notes 158–74.

[29] Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

[30] United States v. Lee, 455 U.S. 252, 258 (1982).

[31] *Id.* at 257.

[32] Thus in *Lynch* the test was whether the challenged legislation "in reality . . . establishes a religious faith, or tends to do so." 465 U.S. at 678. This standard was adopted *verbatim* by the *Lynch* Court from the Solicitor General's arguments in the case. *See* Brief amicus curiae of the United States at 36. The United States has been promoting the new accommodation doctrine. *See* Brief amicus curiae of the United States, *Jaffree*.

continues long enough becomes a tradition, insulated from later establishment challenge.[33]

B. Form Over Substance—A Minimalist Approach to Protection of Individual Religious Liberty

This recent judicial shift, in which the Court adopted accommodation in the context of government promotion of religion and upheld the government's asserted interests in efficiency and convenience when minority religions sought accommodation, indicated a new judicial deference to majoritarian legislation. When the Court granted review to seven church-state cases in the 1984–85 Term, this trend was expected to climax with the consolidation of a new doctrine.

This consolidation did not take place. The Court struck down various forms of government aid to religion as violating the establishment clause: *Wallace v. Jaffree*[34] invalidated an Alabama silent prayer statute; *Thornton v. Caldor*[35] overturned a Connecticut statute providing absolute accommodation for Sabbath observers, notwithstanding the resulting burden or inconvenience on the employer or fellow workers; *Grand Rapids v. Ball*[36] and *Aguilar v. Felton*[37] invalidated state and federal programs which financed remedial and enrichment courses taught by public and private school teachers on parochial school premises. In *Alamo Foundation v. Secretary of Labor*,[38] the Court denied a free exercise claim for an exemption from federal minimum wage laws for the commercial activities of an evangelical organization. Finally, the Court divided equally in both *Board of Trustees v. McCreary*,[39] which upheld use of public land for a privately financed Nativity display, and *Jensen v.*

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[33] *See Lemon*, 403 U.S. at 626 (establishment claim made in *Walz* "could not stand up against more than 200 years of virtually universal practice imbedded in our colonial experience and continuing into the present").

[34] 105 S. Ct. at 2479.

[35] 105 S. Ct. 2914, 2917.

[36] 105 S. Ct. 3216.

[37] 105 S. Ct. 3232.

[38] 105 S. Ct. 1953.

[39] 105 S. Ct. 1859.

Quaring,[40] which upheld a free exercise exemption from driver's license photograph requirements.

In light of previous decisions such as *Mueller*, *Marsh* and *Lynch*, which allowed various forms of government aid to religion, some commentators interpreted the results in *Jaffree*, *Grand Rapids*, *Aguilar* and *Thornton* as a return to principles of separation of church and state, as crucial to the protection of religious liberty and as a revitalization of the *Lemon* test in analyzing establishment challenges.[41]

This Article takes a different view. Much of the 1984–85 Term can be seen as narrow application of precedent rather than as a retreat from the Court's recent accommodation initiative.[42] More significantly, the standards of review employed in these opinions would allow some government aid intended for a religious purpose. While the Court has not yet clearly articulated a new doctrine, it appears to be groping for standards of judicial review. Several Justices have interpreted the first amendment religion clauses to prohibit government financial assistance only if the reasons for such assistance are exclusively religious.[43] Under this approach, any secular purpose will justify government aid to religion.

The Court now places more importance on the appearance or perception of government aid than on its objective. This emphasis is reflected in the application of a new, weakened form of the *Lemon* test and in the "endorsement test" proposed by Justice O'Connor in her *Lynch* concurrence.[44] It is also reflected in a heightened concern with the form and context of the government aid.[45] This perspective provides great protection to children, who are considered to be more likely to perceive government aid as government endorsement, but little protection to minority religious interests in general. It also demonstrates continued judicial permissiveness toward government

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[40] 105 S. Ct. 3492.

[41] *See, e.g.*, McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 2 (forthcoming).

[42] *See infra* text accompanying notes 46–100.

[43] *See infra* text accompanying notes 124–30.

[44] *See infra* text accompanying notes 165–74.

[45] *See infra* text accompanying notes 135–57.

support of religion. Such permissiveness is particularly threatening to minority religions, because majoritarian community acceptance is inherent in any "longstanding tradition." Without independent judicial review, majoritarian religious practices will be virtually impossible to challenge.

Thus while there is a consensus on the Court which would sustain government aid to majoritarian religions, depending upon the form and context of the aid, the same consensus would deny free exercise exemptions sought by minority religions, deferring instead to the legislature's concern with mere administrative or economic interests. The Court's new accommodation approach has simultaneously reduced both establishment and free exercise protections, abdicating issues of individual religious liberty to the legislature, where they will rise or fall as a matter of majority fiat.

II. Old Wine in New Bottles

One reason why the 1984–85 decisions should not be viewed as a return to separation is that they presented facts very similar to those of previous cases that were decided under a stricter approach. Several of the 1984–85 cases involved clear attempts to circumvent those earlier rulings. It is not surprising, therefore, that the results in these new cases upheld the separation of church and state. The holdings were narrow, however, with limited precedential value. Furthermore, the results, determined by previous cases, should not disguise the continuing deterioration of separation principles.

A. The Return of School Prayer

Wallace v. Jaffree[46] posed the first reconsideration of teacher-led religious activities in the public schools since the decisions in *Engel v. Vitale*[47] and *Abington School District v.*

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[46] 105 S. Ct. 2479 (1985).

[47] 370 U.S. 421 (1962) (invalidating teacher-led prayer in public schools).

Schempp[48] in the 1960's barred teacher-led school prayer and Bible reading.[49] The *Jaffree* decision, striking down Alabama legislation which authorized a one-minute period of silence "for meditation or voluntary prayer,"[50] rests on the determination that the statute's purpose was exclusively religious.[51] This conclusion is based on the legislative history of the statute as well as its text. Since the statute at issue amended prior legislation providing only for "meditation," the Court found the addition of the words "or voluntary prayer" to indicate that "the State intended to characterize prayer as a favored practice."[52] The Court held that this endorsement of religion violated the establishment clause.

The impact of *Jaffree* is limited to the reaffirmation of a silent version of *Engel*; a majority of the Justices believes that the Alabama statute shared the *Engel* statute's objective of authorizing teacher-led prayer. The Court does not indicate a willingness to go further and find that all teacher-led moments of silence violate the establishment clause. To the contrary, the Court appears to approve of the prior Alabama "meditation" statute as "merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day."[53] The concurring opinions of Justices Powell and O'Connor also support some form of moment of silence legislation.[54] The *Jaffree* decision thus decides only the permissibility of government-endorsed silent prayer and not, contrary to popular view, the constitutionality of government-sponsored moments of silence.

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[48] 374 U.S. 203 (1963) (invalidating recitation of Lord's Prayer and Bible reading).

[49] When the Court considered *Jaffree*, 24 other moment of silence statutes were in force nationwide, all of which had been enacted subsequent to *Engel* and *Schempp*. *See Jaffree*, 105 S. Ct. at 2498 n.1.

[50] Ala. Code § 16-1-20.1 (Supp. 1984).

[51] 105 S. Ct. at 2492 ("The Legislature enacted § 16-1-20.1 . . . for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each school day.").

[52] *Id.*

[53] *Id.* at 2491.

[54] *Id.* at 2495 (Powell, J., concurring) ("the 'effect' of a straightforward moment-of-silence statute is unlikely to 'advanc[e] or inhibit religion'"); *id.* at 2501 (O'Connor, J., concurring) ("moment of silence laws in many States should pass establishment clause scrutiny").

B. "On Premises" Aid to Parochial Schools

The 1984–85 parochiaid cases arose against the background of the 1983 *Mueller*[55] decision. *Mueller* sustained a tuition tax deduction benefitting parents of parochial school children but theoretically available to parents of public school children as well.[56] The Court in *Mueller* relied on the ostensible availability of tax relief to all parents in order to distinguish adverse precedent,[57] even though parents of public school children rarely incurred the expenses necessary to qualify for the deduction.[58] This fiction of equal aid sufficed to change the result even though the statute retained the effect of uniquely benefitting parents of parochial school children.

In this context of apparent judicial receptivity to government support for parochial schools, *Grand Rapids v. Ball*[59] and *Aguilar v. Felton*[60] brought the schoolroom back to the Court in the 1984–85 Term. Both cases involved legislative schemes which skirted *Meek v. Pittenger*,[61] where the Court had prohibited state employees, including teachers, from providing services to parochial school students on the school premises.

In *Grand Rapids*, the Court considered two state-financed programs, Shared Time and Community Education, which provided courses for parochial school students in classrooms located in, and leased from, parochial schools. The Shared Time instructors were primarily public school teachers. The Community Education instructors were full-time parochial school teachers, functioning as part-time "public school" teachers at

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[55] 463 U.S. 388 (1983).

[56] The statute at issue in *Mueller* provides a deduction for actual expenses incurred for the "tuition, textbooks and transportation" of dependents attending elementary or secondary schools. It does not distinguish between public and parochial school expenses. *See* 463 U.S. at 391.

[57] *Mueller* had come close to overruling a prior case, Comm. for Public Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973), in which the Court invalidated a New York statute providing a tax credit only to parents of private school students. The *Mueller* fiction of equal aid to both religious and nonreligious parents of school children apparently swayed Justice Powell from his opposition to the tuition tax credit in *Nyquist*. Powell's vote was also crucial in *Grand Rapids* and *Aguilar*.

[58] *See infra* note 148.

[59] 105 S. Ct. 3216 (1985).

[60] 105 S. Ct. 3232 (1985).

[61] 421 U.S. 349 (1975).

the close of the parochial school day, when they taught the program's secular courses. The statute attempted to evade *Meek* by providing for the "leasing" of parochial school premises, theoretically converting them into a "public school" while the programs took place.[62]

Aguilar v. Felton involved a Title I program of the Elementary and Secondary Education Act of 1965,[63] which provided federal funds to pay the salaries of public school employees teaching remedial courses on parochial school premises. The drafters of the Title I program[64] sought to circumvent *Meek* by providing for supervision of the public school teachers to prevent any religious indoctrination.[65]

The Court relied on *Meek* as controlling precedent when it invalidated the programs in *Grand Rapids* and *Aguilar*.[66] The narrowness of the holdings, however, reflects a lack of consensus for extending this precedent. Government aid for religious schools is not deemed to be unconstitutional in itself; providing assistance to all school children, including those attending religious schools, satisfies the Court's requirement of a secular purpose.[67] As in *Meek*, the operative fact is not the government aid in itself, but rather the delivery of that aid on religious school premises.[68] The Court explained the importance of the latter by emphasizing the danger that school children will perceive government programs on parochial grounds as an official endorsement of religion.[69] From this perspective, the ongoing govern-

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[62] 105 S. Ct. at 3220.

[63] *See* 20 U.S.C. § 3805(a) (1982).

[64] Title I authorizes federal funding for programs proposed by local educational agencies and approved by state educational agencies. 20 U.S.C. § 3805(a) (1982).

[65] This supervision responded to the Court's suggestions in *Meek*: "To be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that those restrictions were being followed." 421 U.S. at 372. The *Aguilar* Court, however, found this supervision to present entanglement problems. 105 S. Ct. at 3237.

[66] *See Grand Rapids*, 105 S. Ct. at 3225; *Aguilar*, 105 S. Ct. at 3238.

[67] *See, e.g., Grand Rapids*, 105 S. Ct. at 3223 (Although the Court found that here the "principal effect of the challenged programs [was] to advance . . . religion," the Court upheld the lower court's finding that "the purpose of the Community Education and Shared Time programs was 'manifestly secular.'").

[68] *See Aguilar*, 105 S. Ct. at 3236 ("aid is provided in a pervasively sectarian environment"); *Grand Rapids*, 105 S. Ct. at 3223 ("inquiry must begin with a consideration of the nature of the institutions in which the programs operate").

[69] *See Grand Rapids*, 105 S. Ct. at 3223. This focus on the "imprimatur"—here, the

ment inspections in *Aguilar* were not an acceptable remedy for the risks presented.

C. Public Display of a Privately Financed Nativity Scene

Board of Trustees v. McCreary[70] forced the Court to confront the implications of its earlier decisions in *Widmar v. Vincent*[71] and *Lynch v. Donnelly*.[72] Appellees in *McCreary* claimed a free speech right to erect their Nativity display for a two-week period on a small public traffic circle park in the center of town. The Village of Scarsdale objected on establishment clause grounds. Relying on *Widmar* and *Lynch*, the Second Circuit upheld appellees' right to erect a Nativity display on public property.[73]

McCreary raised several issues which earlier decisions had left unresolved: To what extent does the religious free speech right recognized in *Widmar* extend to an unattended display? Where public forum principles do not compel access to village land, is access a discretionary matter for the village government? After *Lynch*, are there any limits to a village's discretion over Nativity displays, or would public sponsorship be impermissible where the display is solitary, rather than surrounded by secular symbols, and where it is located on public, rather than private, land? Towns and villages across the nation were asking these types of questions;[74] unfortunately, the Court failed to answer them during the 1984–85 Term. Justice Powell's absence from the *McCreary* oral argument left an equally divided Court affirming the Second Circuit's holding. Justice Powell had provided the crucial vote in two other establishment cases of the Term, *Grand Rapids* and *Aguilar*, and his concern during

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children's perception of the government aid—appears to limit *Grand Rapids* and *Aguilar*, as well as *Meek*, to the special "religion in the schools" caselaw. *See infra* text accompanying notes 112–19, 158–64.

[70] 105 S. Ct. at 3216.

[71] 454 U.S. 263 (1981) (student prayer group had free speech right to meet on public university grounds).

[72] 465 U.S. 668 (1984) (allowing government financial sponsorship of Nativity display).

[73] McCreary v. Stone, 739 F.2d at 726–27 (2d Cir. 1984).

[74] *See After Pawtucket: Religious Symbols on Public Land*, Report of American Jewish Congress (July, 1985) (on file with the Harvard Civil Rights-Civil Liberties Law Review).

the Term with links between public and religious institutions[75] might have suggested opposition to the Scarsdale creche display. However, this concern had not prevented Justice Powell from joining the majority opinion in *Lynch* or from authoring the opinion for the Court in *Widmar*. Consequently, theories of how the case would have been decided had Justice Powell taken part in the decision can only be speculative.

D. Establishment and Other Limits to Free Exercise

In the remaining 1984–85 religion cases, the Court continued to minimize free exercise concerns, elevating in their place administrative or convenience interests and a purported fear of establishment problems. *Thornton v. Caldor*[76] concerned a statutory mandate that an employee who observed a particular day of the week as his Sabbath could not be required by his employer to work on that day.[77] The statute was designed to give protection for Sabbath observance after a state court eliminated Connecticut's Blue Laws.[78] However, unlike federal law, which provides merely for "reasonable accommodation,"[79] the Connecticut statute failed to qualify the Sabbath observer's right.[80]

The Court invalidated the provision as impermissibly coercive, focusing on the absence of any reasonableness or balancing test in the statute that would permit employers to consider other interests. These ostensibly weighty concerns include the "convenience" of other employees.[81] The Court also made cursory reference to the fact that the statute granted religious employees a guaranteed day off every week—a right also valued by nonreligious employees. The Court held that the Connecticut statute

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[75] *See Aguilar*, 105 S. Ct. at 3240.

[76] 105 S. Ct. 2914 (1985).

[77] "No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal." Conn. Gen. Stat. Ann. § 53-303e(b) (West Supp. 1985).

[78] The Connecticut Blue Laws have a complex history, both in the legislature and in the state courts. *See Thornton*, 105 S. Ct. at 2915 n.2.

[79] 42 U.S.C. § 2000e(j) (1981).

[80] *See Thornton*, 105 S. Ct. at 2917–18 ("the statute allows for no consideration as to whether the employee has made reasonable accommodation proposals"); *see also id.* at 2919 (O'Connor, J., concurring).

[81] *See* 105 S. Ct. at 2918.

violated the establishment clause because it protected the rights of Sabbath observers at the expense of others.[82]

The nearly unanimous but cursory opinion in *Thornton* can only be explained against the backdrop of prior Blue Laws cases. In *McGowan v. Maryland*,[83] the Court had relied on secular justifications to uphold Sunday closing laws against establishment challenges.[84] In *Braunfeld v. Brown*,[85] decided the same year, the Court had denied Orthodox Jews a free exercise exemption to the Sunday laws, explaining that the laws imposed a mere economic burden, rather than a direct burden on the exercise of religion.[86] While the state prohibited sales of retail goods on Sundays, it did not bar a Saturday holiday; such a direct penalty presumably would have posed a free exercise conflict that the Court would have had to recognize.[87]

As in these earlier cases, the Court in *Thornton* failed to recognize the need for true free exercise accommodation. At least two Justices considered such accommodation unnecessary, partially because any burden suffered by Thornton was imposed by his employer rather than by the government.[88] Even where there is a true government-imposed conflict, however, *Thornton* has wider implications for the future of free exercise accommodations. Echoing *Braunfeld*, the Court expressed a concern

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[82] *Id.*; *see also id.* at 2919 (O'Connor, J., concurring).

[83] 366 U.S. 420 (1961).

[84] "[S]ecular justifications have been advanced for making Sunday a day of rest . . . when people may recover from the labors of the week . . . ." 366 U.S. at 434.

[85] 366 U.S. 599 (1961).

[86] *Id.* at 606 ("To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature.").

Notwithstanding the burden/penalty distinction drawn in *Braunfeld*, the Court has chosen in other free exercise cases to grant exemptions where there was merely an economic burden. *See* Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

[87] *See Braunfeld*, 366 U.S. at 606 ("[T]his is not the case before us because the statute at bar does not make unlawful any religious practices of appellants.").

[88] Justice O'Connor's concurring opinion addresses this point directly, noting that the statute "attempts to lift a burden on religious practice that is imposed by *private* employers, and hence it is not the sort of accommodation statute specifically contemplated by the Free Exercise Clause." 105 S. Ct. at 2919. *See also Jaffree*, 105 S. Ct. at 2496 (O'Connor, J., concurring).

The *Thornton* majority does not expressly recognize the absence of a government burden on private employees, although it does emphasize that through the statute the state places a burden on private employers. *See* 105 S. Ct. at 2918.

for equal treatment, noting that the statute would provide a benefit only to Sabbath observers. The Court followed the analysis employed earlier in *TWA v. Hardison*,[89] where an employee sought Saturdays off under the "reasonable accommodation" standard imposed by Title VII of the Civil Rights Act.[90] In that case, the Court held that the desired accommodation would have resulted in "unequal treatment" in favor of the religious observer, underscoring the constraints of equal protection within which religious accommodation must function.[91] The *Thornton* Court suggests that this accommodation, with its implicit endorsement of religion, is coercive of nonbelievers; government "must take pains not to compel people to act in the name of any religion."[92] In both cases, the Court's concern with unequal treatment overshadows the fundamental free exercise mandate.

This concern for "preferential treatment," whether framed as an equal protection or an establishment constraint, demonstrates a troublesome insensitivity to free exercise interests. The need for free exercise accommodation arises when a neutral government policy or practice burdens a particular religious tenet. Government relief of that conflict should not raise a preference claim where the relief is the least restrictive alternative necessary to lift the burden.[93] While the Connecticut statute may not have presented such an alternative, the distinction between burden and benefit fails to appear in the *Thornton* opinion. Instead, the Court focuses on the statute's failure to weigh convenience and other commercial interests against the Sabbath observer's free exercise claims—a failure which should not raise a genuine establishment problem or impinge on any other countervailing compelling interest. The *Thornton* Court does make an important but cursory reference to the putative benefit denied to other nonreligious employees.[94] Aside from

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[89] 432 U.S. 63 (1977).

[90] 42 U.S.C. §§ 2000e(j), 2000e-2(a)(1) (1982).

[91] 432 U.S. at 84.

[92] 105 S. Ct. at 2917; *see also*, 105 S. Ct. at 2919 (O'Connor, J., concurring) ("The message conveyed is one of endorsement of a particular religious belief, to the detriment of those who do not share it.").

[93] *See Jaffree*, 105 S. Ct. at 2504 (O'Connor, J., concurring).

[94] See *Thornton*, 105 S. Ct. at 2918 n.9.

An additional administrative question, which plagues all free exercise claims that raise economic issues, is implicated by the facts in *Thornton*. In cases where the relief

this, however, the Court's elevation of mere administrative or "convenience" interests over those of free exercise indicates a significant departure from the traditional standard requiring a compelling government interest to defeat free exercise claims.[95] *Thornton* and its predecessors thus suggest that less rigorous scrutiny now applies to conflicts between marketplace and religious interests.[96]

Alamo Foundation v. Secretary of Labor[97] also demonstrates this approach. A nonprofit religious organization, staffed by its members and deriving its income largely from operating commercial businesses, sought an exemption from minimum wage and other provisions of the Fair Labor Standards Act. The Court rejected the free exercise claim, finding no conflict between the Fair Labor Standards Act's requirement of minimum benefits and the Alamo Foundation associates' religious principles, which prohibit receiving wages.[98]

In *Jensen v. Quaring*,[99] an equally divided Court affirmed an Eighth Circuit decision striking down a Nebraska driver's license statute which failed to provide a religious exemption from the law's photograph requirement. Even though *Jensen* concerned a direct government burden on religious practice,

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sought would be valued outside of the religious community, such as a day off in *Thornton* or an exemption from Social Security taxes, *see United States v. Lee*, 455 U.S. 252 (1982), the Court often denies the exemption because of the administrative inquiry that it asserts would be necessary to sort out sincere claims from fraudulent ones. *See, e.g.*, *Braunfeld*, 366 U.S. at 609:

> [T]here could well be the temptation for some, in order to keep their businesses open on Sunday, to assert that they have religious convictions which compel them to close their businesses on what had formerly been their least profitable day. This might make necessary a state-conducted inquiry into the sincerity of the individual's religious beliefs . . . .

But see id. at 615 (Brennan, J., dissenting) (finding no problem with such an inquiry).

[95] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963) (state may not deny unemployment compensation to Seventh-Day Adventist because of her refusal to accept employment requiring work on Saturdays); Prince v. Mass., 321 U.S. 158 (1944) (compelling government interest in protecting children overrides asserted free exercise claims concerning the use of child labor).

[96] *See Thornton*, 105 S. Ct. at 2918 ("Moreover, there is no exception when honoring the dictates of Sabbath observers would impose upon the employer substantial economic burdens or when the employer's compliance would require the imposition of significant burdens on other employees . . . .").

[97] 105 S. Ct. 1953 (1985).

[98] *Id.* at 1963.

[99] 105 S. Ct. 3492.

and even though the requested exemption would likely not be a benefit desired by nonbelievers, as was arguably the case in *Thornton* and *Alamo*, four Justices opposed the exemption. Thus, the Court's increasing deference to the legislature in free exercise cases may no longer be limited to concerns about disparate economic benefits. If the administrative interest in avoiding review of exemption applications satisfies four Supreme Court Justices, little appears to be left of the longstanding "compelling interest" requirement protective of free exercise rights.[100]

III. The Search for Standards—Themes of the 1984–85 Term[101]

A. The Tradition Standard

One theme underlying the 1984–85 religion cases is a continuing deference to "longstanding tradition," such as was used in *Marsh* and *Lynch* to uphold a legislative chaplaincy and a government-sponsored Nativity display. This reliance on a "tradition" exception to stricter establishment review had been used earlier to sustain the state Blue Laws in *McGowan v. Maryland*[102] and the tax exemptions for churches in *Walz v. Tax Commission*.[103] The tradition standard may have also supported more stringent free exercise review in *Wisconsin v. Yoder*.[104] However, the Court's application of the tradition exception to the establishment concerns in *Marsh* and *Lynch* extended the scope of the exception. In *Marsh*, history was so controlling that the Court failed to engage in even the pro forma establishment review employed in *Walz* and *McGowan*. In *Lynch*, which extended the tradition of government accommodation of Christmas to include government sponsorship of the Nativity display,

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[100] *See* Quaring v. Peterson, 728 F.2d 1121, 1128 (8th Cir. 1984) (Fagg, J., dissenting).

[101] Because *McCreary* and *Jensen* both affirmed without opinion lower court rulings, and because of the marginal church-state nature of *Alamo Foundation v. Dept. of Labor*, the remainder of this discussion will deal almost exclusively with the decisions in *Jaffree*, *Grand Rapids*, *Aguilar* and *Thornton*.

[102] 366 U.S. 420, 431–44 (1961).

[103] 397 U.S. 664, 676–80 (1970).

[104] 406 U.S. 205, 225–27 (1972) (comparing 200 years of Amish tradition with relatively recent compulsory education).

the Court broadened the putative government "tradition" far beyond its historical roots.[105]

The Court apparently derives its tradition standard from a theory that examines the Founders' view of a challenged practice as the principal component of constitutional analysis.[106] This approach itself rests on a shaky foundation.[107] More importantly, it affords no establishment clause protection in those cases where it may be most necessary—where the practice at issue has promoted majoritarian interests for years without challenge.

Although the key 1984–85 religion cases upheld the establishment challenges, the opinions did not retreat from this tradition standard. The 200 years of tradition that supported the legislative chaplains in *Marsh* simply did not exist for the public school prayer in *Jaffree*.[108] As Justice O'Connor notes, public schools were not even in existence at the time of the Founders, so reconstruction of their opinions on the permissibility of school prayer should be immaterial.[109]

The *Jaffree* dissenting opinions also rely on an historical basis for school prayer. Both Chief Justice Burger and Justice Rehnquist ground their arguments in support of school prayer on the history of publicly sponsored congressional prayer and on presidential Thanksgiving Day proclamations,[110] failing to distinguish between the long history of legislative prayer and the shorter history of public school prayer.

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[105] *See* Teitel, Book Review, 2 Const. Commentary 529 (1985).

[106] *See Lynch*, 465 U.S. at 1359–60.

[107] *See* Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 939–41 (1985); *see also* Stevens, J., Address to the Federal Bar Ass'n (Oct. 23, 1985) (on file with the Harvard Civil Rights-Civil Liberties Law Review); Brennan, J., Address to Georgetown University (Oct. 12, 1985) (on file with the Harvard Civil Rights-Civil Liberties Law Review).

[108] *See* 105 S. Ct. at 2494 n.4 (Powell, J., concurring); *id.* at 2502 (O'Connor, J., concurring). This distinction was also noted by the majority opinion in *Grand Rapids*, 105 S. Ct. at 3226 n.9. The Court in *Jaffree* did not address the point directly. It did, however, review history to examine and reject the claim that the establishment clause serves only to protect against orthodoxy or preference among Christian sects. *See* 105 S. Ct. at 2488.

[109] 105 S. Ct. at 2503 (O'Connor, J., concurring).

[110] *See id.* at 2505 (Burger, C.J., dissenting); *id.* at 2508–16, 2520 (Rehnquist, J., dissenting).

The historical argument extends to its broadest parameters in Justice Rehnquist's opinion. His dissent in *Jaffree* is based on the legislative history of the religion clauses. Rehnquist contends that the history of the establishment clause reveals a prohibition only against designation of a national church and assertion of official preference of one church over another.

The *Grand Rapids*, *Aguilar* and *Thornton* opinions do not explicitly rely on historical arguments.[111] However, the lack of a tradition for the specific statute at stake in *Thornton* may explain why the Court invalidated that statute as a preferential establishment of religion when it is unwilling to overturn the traditional Blue Laws that favor only Christian Sabbath observers.

B. The Protection of Children Standard

For years, schools have been battlegrounds for competing church and state interests in controlling the education of children.[112] *Jaffree*, *Grand Rapids* and *Aguilar* reflect the Court's continued application of heightened scrutiny in establishment challenges when the recipients of the aid are public and private school children. While *Jaffree*, *Grand Rapids* and *Aguilar* each invalidated government sponsorship under different prongs of the tripartite *Lemon* standard,[113] a theme in all three opinions is the special protection accorded to school children. This emphasis derives from the Court's concern with children's perception of government aid. On the assumption that children are less able to distinguish between government sponsorship and neutrality,[114] the Court has prohibited certain practices in public schools that have survived constitutional scrutiny when performed in other public institutions.[115]

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[111] Justice Rehnquist, in his *Grand Rapids* dissent, does rely cursorily on the "first 150 years of the Establishment Clause" as putative historical support for government assistance to religious schools. 105 S. Ct. at 3232.

[112] *See, e.g.*, Mueller v. Allen, 463 U.S. 388 (1983); Stone v. Graham, 449 U.S. 39 (1980); Meek v. Pittenger, 421 U.S. 349 (1975); Committee for Public Educ. v. Nyquist, 413 U.S. 756 (1973); Wisconsin v. Yoder, 406 U.S. 205 (1972); Lemon v. Kurtzman, 403 U.S. 602 (1971); Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962); McCollum v. Bd. of Educ., 333 U.S. 203 (1948).

[113] The Court relied on the religious purpose of the Alabama silent prayer statute, *Jaffree*, 105 S. Ct. at 2492–93; the effect of the State parochial program in *Grand Rapids*, 105 S. Ct. at 3222–23; and the excessive entanglement of the statutory supervision provisions in *Aguilar*, 105 S. Ct. at 3237.

[114] *See infra* text accompanying notes 159–64.

[115] The Court has, for instance, permitted government practices such as organized prayer and funding for religious displays and institutions involving adults, while barring similar government activity involving children. *Compare Lynch*, 465 U.S. 668 (sustaining government-sponsored Christmas display); *Marsh*, 463 U.S. at 792 (sustaining legislative prayer by distinguishing between adults not susceptible to "religious indoctrination" and children subject to "peer presssure"); *Widmar*, 454 U.S. at 274 n.14 (university students

This theme is particularly apparent in the *Grand Rapids* opinion, which centers on the parochial school child's perception of public school instructors teaching on parochial school premises.[116] The Court concluded that this form of government aid advances religion in three ways. First, teachers offering instruction on the premises of the pervasively religious schools might inculcate religion.[117] Second, there is a symbolic link between government and religion when students see public school employees teaching in parochial schools.[118] Finally, the Court found that such programs might, in effect, subsidize religion since the schools were the beneficiaries of the aid.[119]

C. "Imprimatur" or Perception of Aid Standards

In deciding the 1984–85 establishment cases, the Court continued to apply an analysis based on perception of government aid. This concern with perception influences the tradition standard and the protection of children standard described above. Thus, the Court sustained government aid in *Lynch* and *Marsh* because years of community approval indicated a perception that the challenged practices were part of a larger cultural tradition. Conversely, it prohibited government aid in *Jaffree*, *Grand Rapids* and *Aguilar* largely because it doubted the ability of children to distinguish neutral support from religious endorsement. This theme has also influenced the weakening of the *Lemon* test.[120]

"are less impressionable than younger students," and should be able to appreciate that the university's policy is one of neutrality toward religion); Tilton v. Richardson, 403 U.S. 672, 685–86 (1971) (distinguishing university students as less impressionable and less susceptible to religious indoctrination) *with Nyquist*, 413 U.S. at 775–77 (barring financing for repair and maintenance of parochial school); Stone v. Graham, 449 U.S. 80 (1980) (striking down law requiring display of Ten Commandments on public school walls); *Engel*, 370 U.S. 421 (barring teacher-led school prayer).

[116] 105 S. Ct. at 3223–24.

[117] *Id.* at 3224–26. Interestingly, the Court discounted the absence of evidence of such inculcation in the record, reasoning that young children, who were the beneficiaries of the instruction, were likely to be incapable of detecting this impermissible effect. This point emphasizes the significance of the Court's choice of "perceiver" in its analysis. *See infra* text accompanying notes 158–74.

[118] *Id.* at 3227 ("In this environment, the students would be unlikely to discern the crucial difference between the religious school and 'public-school' classes, even if the latter were successfully kept free of religious indoctrination.").

[119] *Id.* at 3223–24.

[120] *See infra* text accompanying notes 131–74.

The Court's concern with the "imprimatur" or appearance of government approval of aid to religion is part of an analytical framework with dangerous implications. Incorporating community perception into the religion clause standard of review threatens the independent role of judicial review. This "imprimatur" test, combined with formalistic tests concerning the direction and context of the aid,[121] allows government aid to religion to escape constitutional scrutiny so long as the community as a whole accepts the practice. This judicial acceptance of the fact of government aid conflicts with the Court's assertions that religious liberty extends to protect nonbelievers from coercion.[122] Most troubling is the supposed objectivity of the endorsement test. The determinative question is whose perceptions will govern. Focusing on perceptions, especially "objective" perceptions, ultimately endangers the religious minorities whose rights were intended to be the central focus of the religion clauses.

IV. The Weakened *Lemon* Test

The 1984–85 Term witnessed an unsurprising reappearance of the *Lemon* establishment test. While eschewed in the previous Term's "tradition" cases, the test had been consistently applied in cases involving religion in the schools.[123] Cases involving school children formed a substantial part of the 1984–85 religion docket, and the remaining cases failed to present a "tradition" alternative. The current version of the test, however, is a weak shadow of the original. At best, it will ferret out government aid intended exclusively for a religious purpose, as the Court found expressly in *Jaffree* and implicitly in *Thornton*. Where the government aid has a mixed purpose, the new *Lemon* test has virtually no impact, since only some secular purpose is required. The Court will probably sustain the aid if it considers it sufficiently "indirect" or if it is sandwiched in an array of other nonreligious aid—unless the perceivers of that aid are children, who have an arguably diminished capacity to distin-

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[121] *See infra* text accompanying notes 135–57.
[122] *See, e.g., Grand Rapids*, 105 S. Ct. at 3222–23.
[123] *See, e.g.*, Mueller v. Allen, 463 U.S. 388 (1983).

guish between government aid for secular purposes and aid for religious purposes.

A. Evolution of the Purpose Prong

The first prong of the *Lemon* test asks whether government aid has a religious purpose. In the 1973 case of *Committee for Public Education v. Nyquist*, the Court applied this test strictly, evaluating a parochiaid statute by looking for a "clearly secular" legislative purpose.[124] *Lynch* weakened this "secular purpose" inquiry when it held that any secular purpose could save government legislation that is primarily intended to advance religion.[125] As applied in *Jaffree*, the majority and concurring opinions stress that it is the absence of any secular purpose for Alabama's silent prayer statute which invalidates the legislation.[126]

Thus, under the new interpretation of the *Lemon* test, legislation need only have one secular purpose to withstand establishment review. Under this minimal purpose inquiry, almost all government aid to religion would be permissible, even if such aid goes beyond the type of historically sanctioned aid to religion upheld in *Lynch* and *Marsh*. Moreover, O'Connor's *Jaffree* concurrence argues that the Court's inquiry must be "deferential" and "limited" to the legislature's "stated intent."[127]

This minimal purpose inquiry appears to be mere pro forma judicial review.[128] The Court should not uphold a statute on the basis of a legislative declaration of a single secular purpose. Rather, it should probe deeply into the legislative motivation. A mere "avowed" secular purpose ought not be sufficient to save a statute passed with the intent to aid religion.[129] The

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[124] 413 U.S. 756, 775 (1973).

[125] 465 U.S. at 681.

[126] 105 S. Ct. at 2492; *id.* at 2500 (O'Connor J., concurring); *id.* at 2495 (Powell, J., concurring). O'Connor's "endorsement" test also examines the purpose of legislation, to determine whether it is intended to convey a message of endorsement. *See id.* at 2497 (O'Connor, J., concurring).

[127] *Id.* at 2500.

[128] *See id.* at 2517 (Rehnquist, J., dissenting) ("The purpose prong means little if it only requires the legislature to express any secular purpose and omit all sectarian references . . . .").

[129] *See* Stone v. Graham, 449 U.S. 39, 41 (1980).

Court's refusal to scrutinize legislative purpose is especially ominous in the evolution of the school prayer statutes. So long as any singular secular purpose is apparent, a moment of silence statute would likely pass the Court's minimal purpose inquiry.[130]

B. The "Imprimatur" Effect Test

The effect prong of the *Lemon* test has traditionally distinguished aid having a "primary effect" of advancing religion from aid having an "indirect" or "incidental" effect.[131] In *Grand Rapids* and *Thornton*, the Court did strike down government aid which had the primary effect of advancing religion.[132] These cases weakened the *Lemon* effect test, however, by their emphasis on imprimatur or perception of endorsement.[133] The Court focused on whether, given the objective context of the government aid and the subjective perception by the recipients, the aid was likely to be interpreted as a government message of endorsement of religion.[134] In applying the objective portion of this test, the Court upheld the aid where it was not provided directly to the religious institution or where it was submerged in an array of other, nonreligious beneficiaries.

1. Objective Imprimatur: Form and Context

a. Directness of Aid

The parochiaid schemes in *Grand Rapids* and *Aguilar* provided public financing of teaching in private religious schools.

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[130] This question has plagued the courts in other moment of silence cases. *See, e.g.*, May v. Cooperman, 780 F.2d 240 (3d Cir. 1985) (striking down moment of silence statute); *see also* Walter v. West Virginia Bd. of Educ., 610 F. Supp. 1169 (S.D. W. Va. 1985) (striking down moment of silence statute which explicitly referred to prayer).

[131] *See* Roemer v. Md. Public Works, 426 U.S. 736, 758 (1976); *Nyquist*, 413 U.S. at 771; Hunt v. McNair, 413 U.S. 734, 742–43 (1973).

[132] *See Grand Rapids*, 105 S. Ct. at 3226–27; *Thornton*, 105 S. Ct. at 2918.

[133] *Compare* Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (establishment clause was intended to erect a wall of separation between church and state) *with Jaffree*, 105 S. Ct. at 2497 (O'Connor, J., concurring) (establishment clause precludes statutes whose purpose and effect go against the grain of protected religious liberties).

[134] *See Grand Rapids*, 105 S. Ct. at 3226; *Jaffree*, 105 S. Ct. at 2490; *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring); *Widmar*, 454 U.S. at 274.

Rejecting arguments that this aid benefitted only the children,[135] the Court held the "on premises" programs to be unconstitutional "direct" aid to religious institutions.[136] The directness of the aid distinguished these programs from the tax deductions in *Mueller* which went to parents of parochial school children. The private decisionmaking stressed in *Mueller* was central again in *Witters v. Washington Department of Services for the Blind*,[137] the first church-state decision of the 1985–86 Term. In *Witters*, the Court upheld vocational assistance for a blind man to train for the ministry at a religious college because the final decision to attend the religious institution rested with the individual.[138]

This emphasis on the directness of the aid entails a formalistic inquiry which reflects the Court's concern with appearances. Whether a check is made out to a religious school or to a parent of a child attending that religious school, the source of the aid is the government[139] and the ultimate beneficiaries are religious institutions which will be using the aid for religious purposes. The existence of a "middleman" should be irrelevant to the constitutional inquiry.

b. Presence of an Array of Beneficiaries

The presence or absence of an array of beneficiaries—religious and nonreligious alike—has emerged as another crucial factor in the new *Lemon* effect analysis. The Court appears to be convinced that aid to religion constitutes "neutrality" when it is extended to nonreligious beneficiaries as well, notwithstanding that the establishment clause necessitates different constitutional standards for aid to religious as opposed to nonreligious recipients. Prior parochiaid cases, for example, had sustained

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[135] Brief amicus curiae of the United States at 15, *Grand Rapids*; Brief amicus curiae of the United States at 16, *Aguilar*.

[136] *See Grand Rapids*, 105 S. Ct. at 3228; *Aguilar*, 105 S. Ct. at 3241 (Powell, J., concurring).

[137] 106 S. Ct. at 752.

[138] *Id.* at 752.

[139] Indeed, this was acknowledged in *Grand Rapids*. *See* 105 S. Ct. at 3228 (noting that in Sloan v. Lemon, 413 U.S. 825 (1973) and *Nyquist* the Court struck down programs where the aid was formally given to parents because "these differences in form were insufficient to save programs whose effect was indistinguishable from that of a direct subsidy to religious schools").

government provision of buses and textbooks when the aid was offered to both religious and nonreligious school children.[140] In recent terms, this factor developed into a central inquiry. In *Widmar*, the Court held that the presence of an array of beneficiaries, including many secular clubs, diminished the likelihood that the challenged student religion club would have the effect of advancing religion.[141] In *Lynch*, the Court relied on a variation of this array analysis, upholding the Nativity display which was literally within an array of secular Christmas symbols.[142] In *Mueller*, the Court upheld tax deductions to defray educational expenses because the benefits were theoretically available to an array of religious and secular beneficiaries—parents of both parochial and public school children.[143]

Conversely, the absence in *Grand Rapids*, *Aguilar* and *Thornton* of an array of beneficiaries appears to be central to the Court's invalidation of the government aid. *Grand Rapids* and *Aguilar* involved assistance that primarily benefitted parochial school children.[144] Likewise, the Court in *Thornton* emphasized that the Sabbath observer was the sole beneficiary of the Connecticut statute.[145]

The presence of an array of beneficiaries, religious and nonreligious, undeniably lessens the perception of government aid. Yet the centrality of the array factor in the Court's effect analysis threatens the vitality of establishment review. A statutory scheme may boast a secular array which is false or entirely hypothetical, designed to mask the fact that the aid is going exclusively to religion. For example, while the program in *Aguilar* would aid low income children of all schools, public and private, the great majority of private schools benefitting

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[140] *See, e.g.*, Bd. of Educ. v. Allen, 392 U.S. 236 (1968); Everson v. Bd. of Educ., 330 U.S. 1 (1947). *See also Mueller*, 463 U.S. at 398 n.8, citing *Tilton* and *Walz* as examples of aid accorded to all educational and charitable non-profit institutions.

[141] 454 U.S. at 274. *Cf. Grand Rapids*, 105 S. Ct. at 3226. *See* Teitel, *The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Religious Activities in the Public High Schools: A Proposal for a Unitary First Amendment Forum Analysis*, 12 Hastings Const. L.Q. 529 (1985).

[142] *See* 465 U.S. at 671.

[143] 463 U.S. at 398.

[144] *See Aguilar*, 105 S. Ct. at 3235; *Grand Rapids*, 105 S. Ct. at 3223. *But see* Brief amicus curiae of the United States at 14, *Grand Rapids*; Brief amicus curiae of the United States at 16, *Aguilar*.

[145] 105 S. Ct. at 2917–18.

from the federal funding were parochial.[146] *McCreary* posed a similar false array problem. While the public traffic circle park was theoretically available for religious and nonreligious expression, over the years most of the beneficiaries were proponents of religious displays.[147]

This false array problem demonstrates the necessity that any array be preexisting, like the one in *Widmar*, in order to diminish the imprimatur of government aid. Finding itself in a dilemma of its own making, the Court appears to be struggling with this issue. In *Mueller*, the Court found the patently hypothetical array sufficient to diminish imprimatur[148] whereas in *Grand Rapids* and *Aguilar*, it did not.[149] *Jaffree* also highlights these difficulties; although Justice O'Connor's concurrence suggests that moment of silence legislation which provides for silent prayer as one of an array of alternatives would be constitutional,[150] such an array is exactly what was provided by the Alabama statute as amended to allow for "meditation or prayer." In striking down the statute, the Court in essence held that Alabama had provided a false array.

A more fundamental problem with the array approach is the extent to which religious and nonreligious beneficiaries may be treated equally. The Court's current approach obfuscates what, if anything, the first amendment religion clauses say about this matter. Clearly, some forms of government aid may be provided on an equal basis; most would agree that police and fire protection ought to be offered to churches on the same basis as to secular institutions. It does not follow, however, that tax monies may be divided equally among public and parochial schools.[151] A distinction should be drawn between provision of secular government services and provision of other government services which may advance religious goals. Services such as

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[146] 105 S. Ct. at 3235–36.

[147] *See* McCreary v. Stone, 575 F. Supp. 1112, 1115–16, 1123–25 (S.D.N.Y. 1983).

[148] 463 U.S. at 397. *Cf. id.* at 400 n.9 (Minn. Dept. of Revenue reported that only taxpayers with dependents in nonpublic schools benefitted); *id.* at 405 (Marshall, J., dissenting).

[149] The difference may have been determined by other effect factors, such as the directness of the aid—deductions to parents were upheld in *Mueller*; on-premises aid was struck down in *Grand Rapids* and *Aguilar*.

[150] 105 S. Ct. at 2501.

[151] *See Schempp*, 374 U.S. at 260 (Brennan, J., concurring).

police and fire protection retain their secular nature even when provided to a religious beneficiary.[152] Once government funds are provided to a religious institution, though, they may be diverted to advance religion,[153] violating basic establishment principles. Furthermore, such funding conflicts with the Court's asserted concern for protecting the liberty of disbelievers; when tax funds are doled out to religious institutions, there is automatic coercion of nonadherents.[154] Because the Court did not even mention this taxpayer coercion in *Grand Rapids* and *Aguilar*, such coercion apparently no longer concerns it.

Thus the Court's emphasis on arrays undercuts the establishment clause mandate that religion be treated differently from secular concerns. The array standard similarly jeopardizes free exercise accommodation principles which would assist only religious beneficiaries.[155] This is apparent in *Thornton*, where the Court sought to equate religious and secular interests.[156] The array standard brings to the fore the conflict between principles of equality and the religion clauses' mandate of different, special treatment for religion.[157]

2. *Subjective Imprimatur—The Observer of Government Aid*

The subjective aspect of the Court's new endorsement approach centers on the perception of the government aid. This concern with perceptions reflects a view of government assistance to religion as a two-way street. A message of government endorsement is the result of a dialogue between government and observers of government assistance.[158] This raises the question of whose perception is determinative. Where children are in-

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[152] At least one Justice has employed this distinction. See *Lemon*, 403 U.S. at 643 (Brennan, J., concurring) (distinguishing impermissible public funding in *Lemon* from reimbursement for bus fare in *Everson* and loan of textbooks in *Allen*).

[153] *See, e.g.*, Witters v. Wash. Dept. of Servs. for the Blind, 106 S. Ct. 752 (1986).

[154] *See Engel*, 370 U.S. at 444 (Douglas, J., concurring); *Everson*, 330 U.S. at 15–16.

[155] *See Jaffree*, 105 S. Ct. at 2504 (O'Connor, J., concurring).

[156] *See* 105 S. Ct. at 2918.

[157] *See Jaffree*, 105 S. Ct. at 2504 (O'Connor, J., concurring).

[158] *See Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) ("The meaning of a statement to its audience depends both on the intention of the speaker and on the 'objective' meaning of the statement in the community.").

volved, their perceptions trigger a heightened scrutiny. In other cases, the issue revolves around the perceptions of the nonadherent versus the perceptions of the public at large.

a. Lemon *and the Children*

Historically, many forms of government assistance to religion, sustained as to adults, have been barred on school premises where children are the perceivers of the government involvement with religion.[159] In *Marsh*, for example, the Court emphasized that "the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination' . . . or peer pressure."[160] Children, on the other hand, may be unable to distinguish between government sponsorship and neutrality. Due to their inexperience and impressionability, it is difficult for them to differentiate government aid for a secular purpose from aid for a religious purpose.[161]

Jaffree, *Grand Rapids* and *Aguilar* reflect this concern for children's perceptions of a symbolic link between government and religion. In *Grand Rapids* and *Aguilar*, the Court held that, while the respective state and federal legislatures did not intend to endorse religion, the teachers involved in the aid programs would nonetheless convey this message to children. This would be true regardless of the nature of the teacher's involvement, given the children's youth and impressionability.[162]

Jaffree also evidences concern for the school child's perceptions. While the Court focuses on the exclusively religious purpose intended by the legislature, rendering inquiry into the statute's effect unnecessary, the opinion reiterates the special difficulties the school child encounters in distinguishing between neutrality and sponsorship.[163] Accordingly, the impressionability of school children continues to elevate the level of judicial protection against government coercion of individual religious freedom.[164]

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[159] *See supra* note 115.

[160] 463 U.S. at 792.

[161] *See Grand Rapids*, 105 S. Ct. at 3224–27; *Schempp*, 374 U.S. at 222.

[162] *See Grand Rapids*, 105 S. Ct. at 3227; *Aguilar*, 105 S. Ct. at 3237–38.

[163] 105 S. Ct. at 242 n.51.

[164] Compulsory school attendance also heightens the concern with coercion. *See Jaffree*, 105 S. Ct. at 2503 (O'Connor, J., concurring).

b. The O'Connor Endorsement Test: "Nonadherent" vs. the "Populace at Large"

The Court has gone beyond this concern for children, using the perception standard in other contexts as well. Although Justice O'Connor first proposed the "endorsement" inquiry in her *Lynch* concurrence,[165] a majority of the Court now appears to recognize it.[166] The key question in this conceptual framework is the source of the relevant perception, and the 1984–85 cases reflect the Court's struggle to respond.

The choice is between the minority "nonadherent" and the "reasonable person" or the "public at large"; the decision among them affects the nature of judicial review. O'Connor's initial choice in determining the relevant observer of endorsement was the minority nonadherent. This standard, first expressed in *Lynch*[167] and referred to in *Jaffree*,[168] appears to be properly grounded in the basic constitutional concern with protection of minority religious rights.[169] While the standard of inquiry is correct, however, the *Lynch* result itself indicates the danger arising from judicial use of perception tests. Despite Justice O'Connor's rhetoric adopting the vantage point of a minority nonadherent, she concluded that government sponsorship of a Nativity display merely endorses a cultural symbol and fails to convey an impermissible message to nonadherents.[170] This conclusion reflects majoritarian rather than minority "nonadherent" thinking, and the *Lynch* decision ultimately stands for the essence of establishment: the conversion to "culture" of the majority religion.

In the 1984–85 Term, Justice O'Connor made passing reference to her *Lynch* nonadherent standard,[171] but moved on to

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[165] 465 U.S. at 690–94.

[166] *See Grand Rapids*, 105 S. Ct. at 3226 ("[A]n important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval, of their individual religious choices."); *Jaffree*, 105 S. Ct. at 2490 (quoting tests from O'Connor's *Lynch* concurrence).

[167] 465 U.S. at 688 (O'Connor, J., concurring).

[168] 105 S. Ct. at 2497 (O'Connor, J., concurring).

[169] *See id.* at 2497.

[170] 465 U.S. at 692–93.

[171] *See Jaffree*, 105 S. Ct. at 2497 (O'Connor, J., concurring).

adopt the vantage point of the reasonable person, the "objective observer" or the "public at large."[172] Under this standard, she determined that moment of silence legislation fails to engender messages of endorsement.[173] On the other hand, she found that minority Sabbath observers' time off in *Thornton* sent a message of endorsement to majority nonobservant workers.[174]

These holdings raise serious questions about the independent role of judicial establishment review. Since the "public at large" has already expressed its views through the legislative process, judicial adoption of a "public at large" standard for examining legislation provides no review at all. More important, the endorsement standard will not protect religious minorities. Where government aid to religion is at stake, the objective observer is deemed not to perceive a message of endorsement; yet where a burden on free exercise is claimed, as in *Thornton*, accommodation may be denied because others will see it as an endorsement. The truly objective observer would seem to reach opposite results. Thus the conclusions drawn by O'Connor demonstrate the danger that any such endorsement or perception standard may be twisted to serve as a tool which supports majoritarian ends.

C. The Lemon *Entanglement Concern*

As originally devised, the *Lemon* test provided that state entanglement with religion in the administration of government aid constituted an independent establishment clause violation. The comprehensive inquiry examined the extent of financial and administrative entanglement as well as political divisiveness resulting from the aid.[175] In recent years, the Court has substantially limited the entanglement inquiry. In *Lynch* and *Mueller*, the Court indicated that the entanglement test would generally focus solely on administrative entanglement—the extent of on-

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[172] *See Thornton*, 105 S. Ct. at 2919 (O'Connor, J., concurring); *Jaffree*, 105 S. Ct. at 2501 (O'Connor, J., concurring).

[173] *Jaffree*, 105 S. Ct. at 2501. *But see* May v. Cooperman, 572 F. Supp. 1561 (D.N.J. 1983) (emphasizing effect of moments of silence on nonbelievers), *aff'd*, 780 F.2d 240 (3d Cir. 1985).

[174] 105 S. Ct. at 2919.

[175] *Lemon*, 403 U.S. at 619–20, 622–24.

going government monitoring of religious affairs.[176] *Mueller* indicated that the concern over political divisiveness would be limited to those cases involving direct financing to religious institutions.[177]

Despite these recent limitations, the entanglement test showed renewed vitality in the 1984–85 Term. The importance of the entanglement concern as an independent test was crucial to the Court's evaluation of religion in the school cases.[178] However, consideration of administrative entanglement as an independent establishment evil is a double-edged sword. Separation of government and religion necessarily requires some ongoing government surveillance.[179] The point is to distinguish between government involvement in the service of constitutional protections and entanglement arising from unconstitutional government promotion of religion.

V. Conceptual Problems: Establishment vs. Free Exercise

The Court's approach in the 1984–85 opinions indicates serious conceptual difficulties that portend future problems. The central issue is the extent to which the first amendment allows government intentionally to aid religion. The analysis employed in these cases reflects the vitality of the new accommodation doctrine, which blurs establishment and free exercise concerns and eviscerates the first amendment religion clause analysis.

This accommodation doctrine, especially as applied in *Thornton* and *Jaffree*, responds to the recently fashionable, but largely semantic, construction of the religion clauses which has

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[176] *See Lynch*, 465 U.S. at 684; *Mueller*, 463 U.S. at 403 n.11.

[177] 463 U.S. at 403 n.11.

[178] *Aguilar*, for example, indicates that where there is a paucity of evidence of religious effect the Court may look to evidence of extensive government involvement aimed at averting promotion of religion. 105 S. Ct. at 3239. In addition to *Aguilar*'s concern over unconstitutional entanglement, the case posed the precise scenario of political divisiveness contemplated in *Mueller*, 463 U.S. at 403 n.11. Justice Powell devoted the substance of his *Aguilar* concurrence to the political divisiveness problems presented by direct financial aid to religious institutions. *See* 105 S. Ct. at 3240–41.

[179] *See* Bender v. Williamsport Area School Dist., 741 F.2d 538, 556 (3d Cir. 1984), *rev'd on other grounds*, 54 U.S.L.W. 4307 (1986); *see also Mueller*, 463 U.S. at 403. *But see Widmar*, 454 U.S. at 272 n.11 (unconstitutional entanglement results from university having to determine "which words and activities fall within 'religious worship'").

produced an artificial tension between their two mandates. According to this somewhat pedantic reading of the clauses, if a governmental religious purpose is automatically invalid under the *Lemon* test, all free exercise accommodations are constitutionally flawed, since they are intended to facilitate religious belief or practice.[180] Indeed, this reasoning appears to underlie the *Thornton* analysis, although the Court could not explicitly overturn the statute on religious purpose grounds without jeopardizing all future free exercise accommodations. Instead, the Court referred to other putative establishment concerns which are nonetheless characteristic of all legitimate free exercise accommodations—the effects of these accommodations on the perceptions of others.

Jaffree posed the inverse problem—a statute which did not present a free exercise accommodation responsive to a burden, but which, as in *Thornton*, did have an exclusively religious purpose. Because there was no burden necessitating accommodation, the Court held that the statute's religious purpose raised establishment problems. The difference in the *Jaffree* and *Thornton* analyses indicates that the religious purpose test may not end the constitutional inquiry, lest all genuine free exercise accommodations be similarly tainted. This dilemma is not ameliorated by the minimalist purpose inquiry employed in *Jaffree*. Ironically, the "exclusively religious purpose" standard invalidates government-legislated free exercise accommodations, while permitting, so long as there is any secular purpose, unnecessary government promotion of religion. As currently applied, therefore, the *Lemon* purpose inquiry fails to serve either religion clause mandate.

Another unnecessary tension between establishment and free exercise concerns is posed by the subjective imprimatur, or endorsement, test. At this point, a religious purpose would not, in itself, pose constitutional problems; some perception of government aid, together with the intention to convey that endorsement, seems necessary. Such an appearance of govern-

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[180] *See, e.g., Jaffree*, 105 S. Ct. at 2504 (O'Connor, J., concurring). *See also* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673 (1980); G. Goldberg, Reconsecrating America (1984); Brief amicus curiae of the United States, *Jaffree*.

ment endorsement is diluted by the Court's receptivity to arrays of aid which benefit both religion and nonreligion. This signals the end of special treatment for religion[181] and allows government to promote religion as it does secular concerns.[182]

Several alternatives have been offered to respond to the artificial tension between the two religion clause mandates caused by the present application of the *Lemon* test. One approach would reduce the tension by limiting the reach of one or both clauses. The establishment mandate, for example, may be limited by reading "religion" more narrowly for establishment purposes than for free exercise purposes.[183] Alternatively, the scope of free exercise concerns may be limited by allowing only those accommodations necessary to lift burdens imposed by government, not those imposed by private parties.[184]

Another approach, that of finding a unifying theme for both mandates, is epitomized by the new accommodation doctrine, which seeks to draw support from the tension rather than to limit it. The religion clauses are read against each other, with the conclusion that the Founders could not have intended government accommodations to be antithetical to the establishment clause. From this, a unifying theme is drawn which would allow a variety of government accommodations, whether or not they respond to actual burdens.[185] As shown above, however, this approach results in a substitution of legislative judgments for judicial review. Another unifying theme which has been offered is that of "neutrality," under which the religion clauses are read together to prohibit both burdens on, and benefits to, religion.[186] This proposal would be unworkable in practice; a "benefit"

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[181] This hearkens back to the Court's "neutrality" principle. *See Everson*, 330 U.S. at 15–16; Brief for Petitioner at 10, Bender v. Williamsport Area School Dist., 54 U.S.L.W. 4307 (1986) (seeking "equal treatment" for religious and non-religious groups).

[182] This attitude fails to recognize the historical commitment to treating religion differently, which arises because "religion is too personal, too sacred, too holy . . . ." *Engel*, 370 U.S. at 432.

[183] L. Tribe, American Constitutional Law 832–33 (1978).

[184] *See Thornton*, 105 S. Ct. at 2919 (O'Connor, J., concurring).

[185] *See* McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 6 (forthcoming) (arguing for a "framework that acknowledges the legitimacy of encouraging and facilitating religious liberty," and criticizing the Court for applying conflicting approaches to free exercise cases and establishment cases).

[186] *See* Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill. L. Rev. 3, 24 (1978).

banned by the establishment clause might still be required under free exercise.

The difficulty in reconciling the putative clash between the two religion clauses does not, however, render incomprehensible the dual religion clause mandate or the *Lemon* inquiry. The ostensibly invalid religious purpose of free exercise accommodation statutes and the perception of such a purpose by nonadherents should survive establishment scrutiny because there is a compelling interest posed by free exercise rights. The establishment scrutiny should not be diluted by free exercise concerns, but should rather follow a two-step analysis. First, the Court should subject the statute to the *Lemon* inquiry, looking for an intent and effect of aiding religion. Second, the Court should inquire whether the accommodation is responsive to a government burden on religion or is required by another constitutionally compelling interest. *Jaffree* did hold that there was no such government burden to be alleviated;[187] this passing acknowledgment in the Court's opinion and in O'Connor's concurrence signals a potential check on the accommodation doctrine and false collisions between free exercise and establishment protections.

In conclusion, this Article contends that, rather than a doctrinal retreat from accommodation doctrine, the Court's holdings in the seven religion cases of the 1984–85 Term demonstrate a continuing abdication of judicial review resulting in deference to majoritarian legislation. Holdings that seem to signal a return to former standards are actually very narrow, tracking controlling precedent. Moreover, the standards implemented by the Court are formalistic, and traditional forms of government aid to religion are given only perfunctory review. This formalistic approach results in judicial support for government promotion of majoritarian religion under the guise of cultural traditions. Similarly, free exercise accommodations of minority religion interests are defeated by almost any countervailing majoritarian interests of administration or convenience. Such judicial deference to legislative decisions about religion threatens the independent role of judicial review and jeopardizes the fundamental

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[187] 105 S. Ct. at 2491 n.45; *see also id.* at 2505 (O'Connor, J., concurring).

liberties of religious minorities—those who are most in need of first amendment protection.

VI. Epilogue

The Court is not likely to retreat in the near future from the standards apparent in the 1984–85 cases. Indeed, the 1985–86 Term has perpetuated these trends, and other cases soon to be decided may be expected to follow suit. These cases continue to call upon the Court to choose between conflicting standards of perception, demonstrating the problems with the endorsement approach to religion clause review.

In *Witters v. Washington Department of Services for the Blind*,[188] the Court balanced an array of assertedly indirect government aid to nonreligious beneficiaries with the longstanding principle opposing government aid to a religious institution for a religious purpose. The Court ruled that an individual's use of state vocational rehabilitation funding to study for the ministry did not have the effect of advancing religion. Because the Court saw the aid as indirect, viewing the program as a whole rather than focusing solely on Witters' use of the funding, it is not surprising that the Court found no constitutional violation.

Bender v. Williamsport Area School District[189] involved free speech and establishment concerns posed by a high school prayer club. The perception concern raised by children who observed the prayer clubs on school premises was pitted against an alleged array of nonreligious student clubs. Thus the subjective "religion in the schools" standard competed with the newer emphasis on objective "arrays" or "equal access" for religion and nonreligion. While the majority sidestepped the substantive issues because of standing problems, the issues are likely to resurface in the future. The conflict between the recently enacted Equal Access Act[190] and the unanimity among the courts

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[188] 106 S. Ct. 748 (1986).

[189] 54 U.S.L.W. 4307 (1986) (vacating judgment due to lack of standing of school board member).

[190] 20 U.S.C.A. §§ 4071–74 (Supp. 1986). The Equal Access Act was enacted to allow student religious groups to operate on public secondary school premises to the same extent as other noncurricular student groups.

of appeals, barring such clubs on constitutional grounds,[191] will require Supreme Court resolution. In determining which perception standard will govern, the Court must decide whether the government sponsorship involved in a high school prayer club is more like teacher-led school prayer in the elementary schools or like the *Widmar* university prayer club situations. Indeed, the *Bender* dissents, which reached the merits, held *Widmar* to be controlling.[192] In light of *Grand Rapids* and *Aguilar*, future resolution of the issues raised in *Bender* may turn on the nature of teacher supervision of the student-initiated prayer clubs. Extensive teacher involvement, coupled with the absence of a true array,[193] could result in a decision against such a prayer club.

Four other cases highlight the problems with the analysis employed by the Court in *Thornton*. They raise the issue of the extent to which government must accommodate free exercise claims in the face of other government policy interests, alleged establishment problems and other constitutional concerns. These cases involve the availability of exemptions which might be desirable to others, as is true of almost all free exercise claims. Because of this, the *Thornton* perception standard is inadequate, and the Court must look toward the nature of the countervailing governmental interest. Unless the Court finds a less restrictive alternative responsive to the government's concerns, it is likely to allow almost any governmental interest to override religious liberty rights, as it did in *Alamo* and *Lee*.

Goldman v. Weinberger[194] involved a free exercise claim by an Orthodox Jew who sought to wear a skullcap (yarmulke)

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[191] In addition to the Third Circuit, whose judgment in *Bender*, 741 F.2d 538 (1984), was vacated, four other courts of appeals have ruled prayer clubs unconstitutional. *See* Bell v. Little Axe Indep. School Dist., 766 F.2d 1391 (10th Cir. 1985); Nartowicz v. Clayton County School Dist., 736 F.2d 646 (11th Cir. 1984); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983); Brandon v. Bd. of Educ., 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

[192] 54 U.S.L.W. at 4312 (Powell, J., dissenting); *id.* at 4312 (Burger, C.J., dissenting).

[193] The high school in Williamsport, for example, had few clubs, none of which were advocacy clubs similar to the proposed prayer club. The results in *Grand Rapids* and *Aguilar* demonstrate the Court's unwillingness to accept false arrays in cases involving the heightened protection accorded religion in the schools.

[194] 54 U.S.L.W. 4298 (1986).

while on military duty. The option of an unobtrusive exception standard—permitting nonuniform gear as long as it is unobtrusive—would have addressed the military interest in uniformity while allowing Goldman to wear a yarmulke. Yet the Court found the government's interest in military uniformity to override the religious practice, employing a mere "reasonableness" test.[195] The Court thus deferred to a majoritarian standard, using minimal judicial review. Justice Brennan's dissent makes clear the noncompelling nature of the governmental interest in this case:

> The Court's response to Goldman's request is to abdicate its role as principal expositor of the Constitution and protector of individual liberties in favor of credulous deference to unsupported assertions of military necessity . . . . [U]nder the guise of neutrality and evenhandedness, majority religions are favored over distinctive minority faiths.[196]

Heckler v. Roy[197] concerns an American Indian's free exercise claim to an exemption from the Social Security number requirement of AFDC and Food Stamp programs. Given the Court's recent elevation of administrative interests, there appears to be no exemption to the Social Security number requirement which would be acceptable to the Court in *Roy*.

If the Court is satisfied with administrative interests and uniformity as justifications for burdens on religious liberty, other arguably more compelling interests, such as protecting against establishment or discrimination, are also likely to take precedence. *Ansonia Board of Education v. Philbrook*[198] and *Ohio Civil Rights Commission v. Dayton Christian Schools*[199] pit religious liberty interests against preference and discrimination concerns. *Dayton Christian Schools* involves a conflict between a school's free exercise claim and a female teacher's right not

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[195] *Id.* at 4300.

[196] *Id.* at 4301, 4303 (Brennan, J., dissenting).

[197] No. 84-780, *probable jurisdiction noted*, 105 S. Ct. 3474 (1985).

[198] No. 85-495, *cert. granted*, 106 S. Ct. 848 (1986).

[199] No. 85-488, *jurisdictional issues postponed until hearing on merits*, 106 S. Ct. 379 (1985).

to be discriminated against on the basis of sex. At this stage in the case, the issue is merely whether the state's civil rights commission may assert jurisdiction over the school's decision to discharge the teacher. The private school's religious liberty claim for hiring appropriate role models is likely to succumb to the state's interest in jurisdiction to investigate claims of sex discrimination in employment. The religious school's claim of exemption from state jurisdiction fails to provide a lesser restrictive alternative responsive to the state's concern.

Philbrook raises issues involving free exercise as it is protected by Title VII's reasonable accommodation provisions. The teacher seeks days off for religious observance during approximately six holy days each year, while the school provides only three such days for religious observance and three days for "personal business." The Court may uphold the teacher's proposed accommodation—usage for religious observance of the personal business days afforded to other employees, because this poses no "undue hardship" to the employer.[200] Moreover, in merely treating religious days as equal to other personal business days, the accommodation would likely not run afoul of the *Thornton* fairness concerns. However, the teacher's alternative offer of accommodation, whereby he would pay for substitute teachers in return for which his own salary would remain undiminished, is unlikely to be required by free exercise. In light of the *Thornton* fairness concerns, such accommodation might not even be allowed—the arrangements could be seen as an endorsement of religion by other school employees, who might desire similar arrangements for days off for nonreligious reasons. Given the existence of less burdensome alternatives, however, such as granting leave without pay, use of the two-step analysis described above,[201] rather than the *Thornton* approach, would indicate which accommodations survive establishment review and are required for free exercise.

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[200] *See* Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476, 485 (2d Cir. 1985), *cert. granted*, 54 U.S.L.W. 3484 (1986).

[201] *See supra* text accompanying notes 186–87.