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The Road to Vouchers: The Supreme Court's Compliance and the Crumbling of the Wall of Separation Between Church and State in American Education

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TABLE OF CONTENTS

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> In a society as religiously diverse as ours, the Court has recognized that we must rely on the Religion Clauses of the First Amendment to protect against religious strife, particularly when what is at issue is an area as central to religious belief as the shaping, through primary education, of the next generation's minds and spirits.[1]

I. INTRODUCTION

The issue of government aid to religious schools and institutions in the United States is once again at the forefront of political debate throughout the country. Recent calls by conservative leaders for school vouchers, tax benefits, and direct funding of church activities have been stirring excitement and earning headlines in major newspapers. Since the passage of the No Child Left Behind Act[2] and the launching of President Bush's "Faith-Based Initiative" program,[3] the battle between secular and

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[1] Zelman v. Simmons-Harris, 536 U.S. 639, 725 (2002) (Breyer, J., dissenting).

[2] No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified in scattered sections of 20 U.S.C.). The No Child Left Behind Act was actually passed in 2002. Under the Act, states are required to test all students in grades three through eight in reading and mathematics every year as a condition of receiving federal Title I aid. In disadvantaged schools that fail to make adequate yearly progress for three consecutive years, students can use Title I funds to transfer to a higher-performing public school, or to pay for supplemental educational services.

[3] In December 2002, President Bush issued an Executive Order to eliminate discrimination against faith-based and community organizations. He also called on Congress to pass important legislation that increases charitable giving and

sectarian forces in the United States has intensified, raising the prospect that the future of public education in America could be in jeopardy.[4] In the spring of 2003, United States Secretary of Education, Rod Paige, sparked "a storm of criticism with remarks praising the values of Christian schools" and stating his "personal preference" for educating children in Christian schools over public schools.[5]

The recent trend in favor of school vouchers and greater accountability by way of sanctioning failing public schools is indicative of the mounting pressure on policy makers and the courts to tear down the figurative wall of separation between church and state in American education. Opponents of the "wall" argue that there is nothing wrong with giving individuals the choice of where or how to educate their children and that the principle of religious freedom embodied in the First Amendment protects a child's right to be educated in a religious environment. Supporters of the "wall" contend that increased government aid to religious schools through voucher or tax benefit programs undermines the "no aid to religion" principle espoused by Thomas Jefferson and James Madison and embodied in the First Amendment's Establishment Clause of the United States Constitution. In response to the growing controversy, the U.S. Supreme Court, led by a compliant conservative majority, has handed down some important decisions over the last decade which have redefined the legal relationship between church and state in American education and paved the way for vouchers and other religion-based initiatives.

The purpose of this Article is to examine the impact of the Supreme Court's recent decisions on American education and to highlight the substantial erosion of the "wall of separation" between church and state over the past three decades. Specifically, this Article seeks to show that the road to vouchers and "school choice" in American education has been paved gradually by an ideologically-driven majority of Justices on the Supreme Court. Part II of this Article will address the history and rationale behind the First Amendment's Establishment Clause and, in particular, focus on the efforts of Jefferson and Madison to guard against religious strife by erecting a wall of separation between church and state in the new

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strengthens faith-based and other neighborhood groups involved in community service. Exec. Order No. 13,279, 3 C.F.R. 258 (2002), *reprinted in* 5 U.S.C. § 601 (2003). The President's religious-based initiative has been the subject of controversy from the moment he announced it early in his Presidency.

[4] *See* Eric Lichtblau, *Bush Plans to Let Religious Groups Get Building Aid*, N.Y. TIMES, Jan. 22, 2003, at A1.

[5] *See* Diane Jean Schemo, *Church-State Furor Engulfs Education Chief*, N.Y. TIMES, Apr. 10, 2003, at A18.

Republic.[6] Part III will examine the Supreme Court's gradual shift away from the principle of "strict separation" during the post-Civil Rights era, highlighting those decisions which caused the initial blurring of the wall separating church and state in American education.[7] Part IV will analyze some of the important Court decisions affecting education during the Reagan-Bush era, focusing specifically on the change in composition of the Court and the ideological shift in favor of greater government involvement in religious education.[8] Part V discusses the emergence of two new legal standards the Court created to measure the constitutionality of government aid programs benefiting parochial schools.[9] Part VI describes the landmark ruling in *Zelman v. Simmons-Harris* in 2002, which upheld an Ohio voucher program that enabled parents to send their children to private and parochial schools at taxpayer expense, and the impact this decision has had on the "school choice" movement in the United States.[10] This Article will conclude by arguing that the *Zelman* decision marked the triumph of sectarianism over secularism in American education. With this decision, the Supreme Court effectively extinguished Jefferson's and Madison's vision of a prosperous democratic Republic buttressed by an effective system of secular public education. By demolishing the wall of separation between church and state in the *Zelman* case, the Supreme Court has set the stage for an era of religious apartheid in America and possibly even conflict between religious groups over who is entitled to the public's money.

II. THE HISTORY OF THE ESTABLISHMENT CLAUSE AND ITS EARLY INTERPRETATION

A. The Founding Fathers and the Construction of the Wall of Separation Between Church and State

To better understand the history behind the principle of separation between church and state, it is important to examine the intent of the Founding Fathers in drafting the First Amendment to the Constitution. During the Colonial period, Thomas Jefferson and James Madison were the chief proponents of the separation principle.[11] In 1779, Jefferson drafted the

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[6] *See infra* notes 11–38 and accompanying text.

[7] *See infra* notes 39–100 and accompanying text.

[8] *See infra* notes 101–22 and accompanying text.

[9] *See infra* notes 123–90 and accompanying text.

[10] *See infra* notes 191–228 and accompanying text.

[11] *See* U.S. DEP'T OF STATE, *Backgrounder* [sic] *on the Virginia Statute for Religious Freedom*, *in* BASIC READINGS IN U.S. DEMOCRACY, *at* http://usinfo.state.gov/usa/infousa/facts/democrac/42.htm (last visited Dec. 1, 2003).

Virginia Bill for Religious Liberty which argued against taxation proposals aimed at supporting religion:

> [T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern, and whose power he feels most persuasive to righteousness . . . .[12]

To Jefferson, past rulers, civil and ecclesiastical, had assumed control over most of the world through the skillful manipulation of religion and mankind's fear of God. He agreed with the English political philosopher John Locke, who wrote in his *Letter Concerning Toleration*, that the "care of souls cannot belong to the civil magistrate because his power consists only in outward force."[13] True and saving religion, Locke argued, "consist[s] in the inward and full persuasion of the mind."[14] Both Locke and Jefferson believed that complete religious freedom should be recognized by the law and that no government should prescribe the faith of its citizens.

Jefferson's views concerning religious freedom are clear in his *Bill for Religious Liberty* in Virginia. According to the bill,

> [N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.[15]

Religious liberty, Jefferson believed, was not limited to certain sects or even Christianity as a whole; it was extended to all faiths. "The care of

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[12] 12 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 85 (William Walter Hening ed., Richmond, Va., George Cochran 1823) [hereinafter VIRGINIA STATUTES AT LARGE].

[13] JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 127 (J.W. Gough ed., 1955).

[14] *Id.*

[15] VIRGINIA STATUTES AT LARGE, *supra* note 12, at 86.

every man's soul," he wrote, "belongs to himself; . . . God himself cannot save a man against his will; and any form of spiritual compulsion is doomed to inevitable failure."[16]

At the same time that Jefferson proposed his *Bill for Establishing Religious Freedom*, a second bill was introduced in the Virginia General Assembly by the prolific statesman Patrick Henry, which declared that "the Christian Religion shall in all times coming be deemed and held to be the established Religion of the Commonwealth."[17] In remonstrating against Henry's proposed bill, James Madison argued against the Commonwealth's endorsement of Christianity:

> Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?[18]

In Madison's view, a true religion did not need the support of law or taxpayer money, and cruel persecutions were the inevitable result of government-established religion.[19] In *Memorial and Remonstrance*, he wrote that establishment of religion weakened the beliefs of adherents so favored, strengthened their opponents, and generated "pride and indolence in the Clergy; ignorance and servility in the laity; [and] in both, supersti-

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[16] *See* 1 DUMAS MALONE, JEFFERSON AND HIS TIME 275 (1948).

[17] The bill required every person to enroll his name with the county clerk and designate a religious society that he intended to support for taxation purposes. Taxes would be obtained and distributed to the designated Christian organization accordingly. For those who did not register with a particular Christian organization, taxes would be spread across the various religious sects. *See* LEO PFEFFER, CHURCH, STATE AND FREEDOM 109 (1967).

[18] James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* 2 WRITINGS OF JAMES MADISON 186 (Gaillard Hunt ed., 1901). Madison wrote against a backdrop in which nearly every Colony had at one time exacted a tax for church support. *See* PFEFFER, *supra* note 17, at 109, 123, 125–26; R. FREEMAN BUTTS & LAWRENCE A. CREMIN, A HISTORY OF EDUCATION IN AMERICAN CULTURE 15–22 (1953); R. FREEMAN BUTTS, THE AMERICAN TRADITION IN RELIGION AND EDUCATION 14–16, 66–67 (1950).

[19] *See* Madison, *supra* note 18, at 187.

tion, bigotry and persecution."[20] To Madison, an official religion was no more pleasing a prospect than an official church, and, therefore, it was best to keep religion and government separate. Madison's *Memorial and Remonstrance* played a central role in defeating the Virginia tax assessment bill in 1786.[21]

Jefferson and Madison captured the colonists' conviction that individual religious liberty could be achieved best under a government which was prohibited from taxing or supporting religious activity of any kind, or interfering with the religious beliefs of any individual or group. Compelling an individual to support religion violated the fundamental principles of freedom of conscience and liberty of personal conviction necessary for the American democratic experiment to succeed. Jefferson's *Bill for Establishing Religious Freedom* and Madison's *Memorial and Remonstrance* provided the logic and rationale for the "wall of separation" between church and state upon which the Religion Clauses of the First Amendment are based.[22]

The First Amendment to the Constitution was ratified in 1791. The First Amendment's Establishment Clause states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[23] The purpose of the Clause was to put an end to the religious discrimination and persecution that had plagued the "Old World" for centuries.[24] The Clause embodies an understanding that liberty and social

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[20] *Id.*

[21] *See* William Sierichs, Jr., *Ye Olde Walls of Separation*, FREETHOUGHT TODAY, Mar. 2001, http://www.ffrf.org/fttoday/march01/sierichs.html.

[22] The earliest use of the metaphor "wall of separation" can be found in Richard Hooker's *Of the Lawes of Ecclesiastical Politic* in the sixteenth century whereby Hooker wrote that dissenters of the Anglican Church demanded that the "walls of separation" between church and Commonwealth must forever be upheld. *See* Richard Hooker, *Of the Lawes of Ecclesiastical Politic*, *in* DIVINE RIGHT AND DEMOCRACY: AN ANTHOLOGY OF POLITICAL WRITING IN STUART ENGLAND 214 (David Wootten ed., 1986). The phrase is later found in the Englishman James Burgh's book *CRITO, or Essays on Various Subjects*, wherein Burgh, in condemning regression of Roman Catholics, demanded, "Build an impenetrable wall of separation between things sacred and civil." JAMES BURGH, 11 CRITO, OR ESSAYS ON VARIOUS SUBJECTS 119 (1767). This book was widely read throughout the colonies and influenced the philosophical views of Jefferson and Madison.

[23] U.S. CONST. amend. I.

[24] *See, e.g.*, Paul A. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969). The development of medieval Europe was almost solely that of continual struggle between church and state, with kings rebelling against the

stability demand a religious tolerance that respects the religious views of all citizens; it permits those citizens "to worship God in their own way and to teach their children and to form their characters" as they wish.[25] The government, in other words, was bound by the Constitution to "neither support nor oppose any particular form of the church but to leave all of them strictly alone."[26] In 1802, Jefferson described the Establishment Clause metaphorically as "a wall of separation between Church and State."[27]

This wall of separation was not challenged much during the early years of the Republic. America's common schools, including the first public schools, were largely Protestant in character and there was little concern or debate over issues such as diversity.[28] It was common to teach students the King James version of the Bible and to recite Protestant prayers in class.[29] Though discriminatory, these practices were not perceived to be divisive because the population at the time was substantially homogeneous.[30]

By the turn of the century, however, immigration and growth had changed American society dramatically. In 1900, there were roughly twelve million Catholics in America, and the Jewish population had grown significantly.[31] With this increase in population, non-Protestants began to resist the Protestant domination of the nation's public schools.[32] Religious conflict between Protestants and Catholics grew intense, and sometimes violent, as "Catholic students suffered beatings or expulsions for refusing

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church, and the power of the state being readily put to use to stamp out heretics and nonconformists.

[25] LORD RADCLIFFE, THE LAW & ITS COMPASS 71 (1960).

[26] MALONE, *supra* note 16, at 275–76.

[27] *See* Thomas Jefferson, Address Before a Committee of the Danbury Baptist Association (Jan. 1, 1802), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 307, 307 (Adrienne Koch & William Peden eds., 1998).

[28] *See, e.g.*, David Tyack, *Onward Christian Soldiers: Religion in the American Common School*, *in* HISTORY AND EDUCATION: THE EDUCATIONAL USES OF THE PAST 217–26 (Paul Nash ed., 1970).

[29] *Id.*

[30] At the time of the founding of the Republic, Catholics consisted of less than two percent of the American church-affiliated population. *See* BARRY A. KOSMIN & SEYMOUR P. LACHMAN, ONE NATION UNDER GOD: RELIGION IN CONTEMPORARY AMERICAN SOCIETY 45 (1993).

[31] John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 299–300 (2001).

[32] *See id.* at 300–05.

to read from the Protestant Bible."[33] Nevertheless, this rise in religious strife at the time did not prompt much litigation over the issue of separation of church and state. During this period, there were few lawsuits invoking the Establishment Clause and most resulted in the Supreme Court not even addressing the question of the constitutionality of government aid to religious schools.[34]

B. *The* Everson *Decision: Challenging the "Wall of Separation" in Education*

After World War II, the arena of public education became the primary battleground for supporters and opponents of the "wall of separation" to wage their campaigns defining the proper relationship between church and state in American society. America's system of secular public schools had long been regarded as the cornerstone of American democracy, and it served as a model for public school systems in Europe and East Asia after the war. Given the rise in the number of private and religious schools during the twentieth century and the resulting rise in demand for funds to maintain these schools, however, it was only a matter of time until the "no aid to religion" principle would be tested in American education.

The inaugurating case of the modern era of Establishment Clause doctrine was *Everson v. Board of Education of Ewing* in 1947.[35] In *Everson*, a New Jersey taxpayer challenged a state program providing public money to pay the bus fares of parochial school pupils on city buses as part of a general scheme to reimburse the public-transportation costs of children attending both public and private schools.[36] In a split decision, the Supreme Court held that the program did not violate the Establishment Clause of the First Amendment, but the Court did draw a clear line preserving the principle of separation from which there was no dissent:

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[33] *Id.* at 300.

[34] In *Cochran v. Louisiana Board of Education*, the Supreme Court did not address the Establishment Clause question when it upheld a state program providing textbooks to children attending nonpublic schools on the basis that the program had an adequate public purpose. *See* Cochran v. La. Bd. of Educ., 281 U.S. 370, 375 (1930). In the 1908 case of *Quick Bear v. Leupp*, the Court also upheld payments by Indian tribes to Roman Catholic schools, suggesting in dicta that there was no Establishment Clause problem even though the Court did not squarely face the issue. *See* Quick Bear v. Leupp, 210 U.S. 50, 81–82 (1908).

[35] Everson v. Bd. of Educ. of Ewing, 330 U.S. 1 (1947).

[36] *Id.* at 3.

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.[37]

The Court reiterated Jefferson's phrase that the Establishment Clause was "intended to erect 'a wall of separation between church and state.' "[38]

The applicability of the Establishment Clause to public aid programs benefiting religious schools was settled in *Everson*. For the next few decades, the Supreme Court never repudiated its strict interpretation of the "wall of separation" and the basic principle of "no aid to religion" through public benefits was unquestioned.

III. THE BLURRING OF THE WALL OF SEPARATION BETWEEN CHURCH AND STATE IN AMERICAN EDUCATION: 1968-1980

The passage of the Civil Rights Act of 1965 was a turning point for America's system of education. The aftermath of the Act's passage was characterized by new opportunities for African-Americans and the racial integration of workplaces and public schools. At the same time, the post-Civil Rights era ushered in a new period of migration and "white flight" to the suburbs, altering dramatically the demographic make-up of urban areas around the country.[39] The effect of this demographic shift was that whites virtually abandoned public schools in the inner cities,[40] where minority attendance was relatively high, and a concomitant increase in the number of private and parochial schools. This period of white flight and private school growth coincided with a series of new legal challenges to existing Establishment Clause doctrine and with new interpretations by the Supreme Court of the "no-aid to religion" principle.

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[37] *Id.* at 15–16 (citing Reynolds v. United States, 98 U.S. 145, 164 (1878)).

[38] *See id.* at 16 (quoting *Reynolds*, 98 U.S. at 164).

[39] *See* Greg Winter, *Schools Resegregate, Study Finds*, N.Y. TIMES, Jan. 21, 2003, at A14.

[40] *Id.*

A. *The* Lemon *Test and the Early Exceptions to the Strict Separation Principle*

The erosion of the wall of separation between church and state in American education began nearly two decades after *Everson* in the case of *Board of Education of Central School District No. 1 v. Allen*.[41] In *Allen*, the Supreme Court upheld a New York law authorizing local school boards to lend textbooks in secular subjects to children attending religious schools.[42] In its decision, the Court relied on the theory that the in-kind aid could only be used for secular educational purposes.[43] The Court found it relevant that "no funds or books are furnished [directly] to parochial schools, and the financial benefit is to parents and children, not to schools."[44]

The *Allen* Court recognized that religious instruction and secular education can become entangled at religious schools.[45] Nevertheless, the Court reasoned that if indirect state aid could be restricted to serve the latter, it is permissible under the Establishment Clause.[46] To avoid the entanglement, the Court's focus in the post-*Allen* line of cases would have to be on the question of divertibility. Under this concept, the greater the risk of diverting public money to religious purposes in public schools, the less legitimate the aid scheme was under the separation principle.

Perhaps the most important case dealing with the question of divertibility in the post-Civil Rights period was *Lemon v. Kurtzman*.[47] In *Lemon*, the Supreme Court held that state statutes providing public aid to church-related elementary and secondary schools violated the Establishment Clause of the First Amendment.[48] In reaching its decision, the Court focused on the difficult task of line drawing in Establishment Clause

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[41] Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236 (1968).

[42] *See id.* at 238.

[43] *See id.* at 243.

[44] *See id.* at 243–44.

[45] *See id.* at 248.

[46] *Id.* at 243–45.

[47] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[48] *See id.* at 625. As described by the Court,

> Pennsylvania has adopted a statutory program that provides financial support to nonpublic elementary and secondary schools by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. Rhode Island adopted a statute under which the State pays directly to teachers in nonpublic elementary schools a supplement of 15% of their annual salary.

Id. at 606–07.

matters and established a three-part test to resolve conflicts arising from government programs that sponsor, support or become involved in religious education. First, the Court argued that for a law to be valid, it must have a "secular legislative purpose."[49] Second, the law's "principal or primary effect must be one that neither advances nor inhibits religion."[50] Third, the law "must not foster an excessive government entanglement with religion."[51] A violation of any one of these prongs was all that was required to invalidate a law under the Establishment Clause.

In applying the test to the challenged statutes, the Court held that both statutes violated the "excessive entanglement" portion of the test.[52] According to the Court, both statutes violated the Religion Clauses of the First Amendment, as "the cumulative impact of the entire relationship arising under the statutes in each State involve[d] excessive entanglement between government and religion."[53] One of the Court's major concerns in the case was that children could subtly fall prey to religious influences at school with the support of the government even though this was not the intent behind the law nor the intent of school policy.[54] "We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment," argued Chief Justice Burger.[55] "We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral."[56] "With the best intentions," Justice Burger added, "such a teacher would find it hard to make a total separation between secular teaching and religious doctrine."[57]

The *Lemon* decision was important for two reasons. First, the Court synthesized its jurisprudence since *Everson* by enunciating a test—the *Lemon* test—to aid courts and legislatures in their interpretation of the Establishment Clause in education. Second, the Court observed that the line or "wall" separating church and state was not as clear-cut as the *Everson*

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[49] *Id.* at 612.
[50] *Id.*
[51] *Id.* at 613.
[52] *Id.* at 614.
[53] *Id.* at 613–14.
[54] *See id.* at 618–19.
[55] *Id.* at 618.
[56] *Id.*
[57] *Id.* at 618–19.

Court described. According to Chief Justice Burger in *Lemon*, "[j]udicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[58] The blurring of the line separating church and state signaled a shift in philosophy within the Court away from the Madisonian idea of "no aid to religion" to no aid that could be diverted to support the religious, as distinct from the secular, activity of an institutional beneficiary.

With the establishment of the *Lemon* test, a strict application of the "no aid to religion" principle was no longer practical. Every case had to be examined under the *Lemon* test, and the Court was saddled with the task of applying the three prongs to a number of different factual scenarios. The result of this change in the Supreme Court's approach to Establishment Clause challenges was the Court's inability to avoid creating new standards or parameters to judge aid programs benefiting religious education.

In *Committee for Public Education and Religious Liberty v. Nyquist*,[59] the Supreme Court applied the *Lemon* test and struck down a New York program of tuition grants for poor parents and tax deductions for more affluent ones who sent their children to religious schools.[60] Although the program was enacted for ostensibly "secular purposes," the Court found that its "effect" was "unmistakably to provide desired financial support for nonpublic, sectarian institutions."[61] The Court focused on what the aid bought when it reached the endpoint of its disbursement and reasoned that such aid to parents indirectly through tax deductions was no different from forbidden direct aid to religious schools for religious uses.[62]

The *Nyquist* decision was significant because the case gave the Court an opportunity to evaluate the separation principle and to apply the *Lemon* test in the context of state tax policy impacting religious education. Moreover, the Court acknowledged that there was no distinction between "direct" and "indirect" aid to parochial schools under the separation principle. Such aid in either form was deemed to violate the "no aid to

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[58] *Id.* at 614.

[59] Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

[60] The New York program provided financial aid to nonpublic primary and secondary schools by way of (1) grants to nonpublic schools for "maintenance and repair" of facilities and equipment; (2) tuition reimbursement to parents whose children were enrolled in elementary and secondary schools; and (3) tax relief for parents who did not qualify for the tuition reimbursement plan. *Id.* at 762–65.

[61] *Id.* at 783.

[62] *See id.* at 793.

religion" principle. The creation of this line between "direct and "indirect" aid to religious schools would take on increased significance in the Court's examination of *Meek v. Pittenger* two years later.[63]

In *Meek*, the Supreme Court rejected part of a Pennsylvania law authorizing the state to provide auxiliary services, textbooks, and instructional materials to children attending church-related schools.[64] The Court approved only the part of the program that authorized the loaning of textbooks because the textbooks were secular and were the same as those used in the public schools.[65] The Court reasoned that the benefit of the loaned textbooks accrued to the parents or students, not directly to the school, because the students would be using the same books in public schools.[66] The Court refused to bring auxiliary services and instructional materials under the constitutional umbrella because these services and materials could be used directly by the school to advance religion in church-related schools.[67]

By the end of the 1970s, the wall of separation between church and state had begun to erode, even though it was still largely intact. The Supreme Court had established a new framework through which to examine state funding programs targeting aid to religious primary and secondary schools. The *Lemon* test, the doctrine of "divertibility," and the direct/

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[63] *See* Meek v. Pittenger, 421 U.S. 349 (1975), *overruled in part by* Mitchell v. Helms, 530 U.S. 793 (2000).

[64] *Id.* at 373. One part of the law, Act 194, provided auxiliary services to children enrolled in nonpublic schools, including counseling, testing psychological services, speech and hearing therapy, and services for disadvantaged and exceptional children. The other part, Act 195, extended a direct loan of textbooks and instructional materials and equipment to parochial schools. The law defined instructional materials and equipment as photographs, maps, charts, globes, films, projection equipment, recording equipment, etc. *Id.* at 351–55.

[65] *Id.* at 361.

[66] *Id.*

[67] *Id.* at 363. The Supreme Court in *Wolman v. Walter* similarly upheld the constitutionality of an Ohio statute that permitted the expenditure of state funds to purchase secular textbooks for loan to the students, for use of standardized test and scoring services that were the same as those used in public schools, and for the provision of diagnostic and therapeutic services to the students. Wolman v. Walter, 433 U.S. 229, 238 (1977), *overruled in part by* Mitchell v. Helms, 530 U.S. 793 (2000). On the other hand, the Court struck down that part of the law that authorized state money for purchases of instructional materials and equipment for the students and for transportation for field trips. *Id.* at 250. The Court relied less on the distinction between "direct" and "indirect" aid to religious schools and focused more on the three *Lemon* factors to reach its decision. *Id.* at 253–54.

indirect distinction had replaced the "no aid to religion" rule as the guidepost for the Supreme Court's interpretation of the Establishment Clause. *Allen*, *Lemon*, *Nyquist*, and *Meek* were indicative of the growing political pressure on state legislatures to provide aid to private and parochial schools at the elementary and secondary levels. Similarly, the realm of higher education was experiencing its own shift in Establishment Clause jurisprudence, and state legislatures encountered strong pressure to expand public aid to religious institutions of higher learning.

B. "Divertibility" and the "Pervasively Sectarian" Standard in Higher Education

Although *Everson* remained the governing decision as applied to public benefits inuring to religious schools, the Supreme Court during the 1970s and early-1980s proved to be more willing to tolerate government aid schemes earmarking money for religious institutions of higher learning if the aid was indirect or not divertible to religious functions. Generally, in judging whether aid programs to institutions of higher learning crossed the line separating church and state, the Court tried to be practical, upholding aid earmarked for secular use when the aid recipients were not so "pervasively sectarian" that their secular and religious functions could not be kept apart.

On the same day that the *Lemon* test was established, the Supreme Court addressed the question of diverting federal aid to religious institutions of higher learning in *Tilton v. Richardson*.[68] The issue in *Tilton* was whether four church-related colleges and universities[69] could receive federal aid under Title I of the Higher Education Facilities Act of 1963, which provides construction grants for buildings and facilities used exclusively for secular educational purposes.[70] The Court applied the

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[68] Tilton v. Richardson, 403 U.S. 672 (1971).

[69] The four institutions were Sacred Heart University, Annhurst College, Fairfield University, and Albertus Magnus College. At the time, all four schools were governed by Catholic religious organizations, and the faculties and student bodies at each were predominantly Catholic. *Id.* at 686.

[70] *Id.* at 675. Title I authorized "direct" grants and loans for facility construction on public and private campuses. The facilities must have been used for defined secular purposes not for religious instruction, training, or worship. Higher Education Facilities Act of 1963, Pub. L. No. 88-2040, 77 Stat. 363 (1963). As noted by the Supreme Court, the "Act itself was carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions." *Tilton*, 403 U.S. at 679.

Lemon test and held that direct Title I aid to these church-related schools did not violate the Establishment Clause because religious indoctrination was not a substantial purpose or activity of these schools.[71] According to Chief Justice Burger, who wrote the majority opinion, there was "no evidence that religion seeps into the use of any of these facilities."[72] The Court focused on the second prong of the *Lemon* test by arguing that "[t]he crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion."[73] In its analysis of the "government entanglement" prong of the *Lemon* test, the Court held that "[s]ince religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education."[74] This, the Court believed, "reduces the risk that government aid will in fact serve to support religious activities," thereby decreasing the risk of entanglement between government and religion.[75]

The Court's willingness to permit government aid to go forward in this case, and not in *Lemon*, was based on the premise that church-related institutions of higher learning and religious elementary and secondary schools were fundamentally different. "The 'affirmative if not dominant policy' of the instruction in pre-college church schools," the court asserted, "is 'to assure future adherents to a particular faith by having control of their total education at an early age.' "[76] The Court also argued that primary and secondary school students were more vulnerable to being indoctrinated into a particular faith because they were younger and more easily influenced than the average college-aged student.[77] According to the Court, "[t]here is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination."[78] Moreover, the Court pointed out that even though the church-related institutions were governed by Roman Catholic organizations and had predominantly Catholic students and faculty members, the record showed that no one was required to attend religious services, each institution's curriculum was characterized by a high degree of "academic freedom," and "courses [were] taught according to

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[71] *Tilton*, 403 U.S. at 681–82.

[72] *Id.* at 681.

[73] *See id.* at 679.

[74] *Id.* at 687.

[75] *Id.*

[76] *Id.* at 685–86 (quoting Walz v. Comm'r, 397 U.S. 664, 671 (1970)).

[77] *Id.* at 686.

[78] *Id.*

the academic requirements of the subject matter and the teacher's concept of professional standards."[79]

The effect of *Tilton* on higher education finance was significant. Within a few years of the decision, several states amended their constitutions to permit direct student grant and loan aid to go to private religious institutions.[80] *Tilton* extended the applicability of the *Lemon* test beyond the realm of public aid to primary and secondary schools, and it further blurred the wall separating permissible from impermissible aid to religious institutions under the Establishment Clause. According to the Court, "candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area."[81] The *Tilton* Court, however, left unresolved the question of whether public money could be diverted to a religious school if religion permeated a substantial portion of that school's activities. This question was addressed directly in *Hunt v. McNair*.[82]

In *Hunt*, the South Carolina Educational Facilities Authority Act[83] was challenged as a violation of the Establishment Clause insofar as it authorized financing through the issuance of revenue bonds to benefit a Baptist-controlled college.[84] Consistent with the Supreme Court's approach in *Tilton*, the Court applied the *Lemon* test and concluded that the statute's purpose was secular and that it did not have the primary effect of advancing or inhibiting religion, nor did it foster excessive government entanglement with religion.[85] The Court reasoned that there was little in the record that suggested that the college's operations were oriented significantly towards sectarian rather than secular education.[86] It did say, however, that aid may have the primary effect of advancing religion when "it flows to an institution in which religion is so pervasive that a substantial portion of its

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[79] *Id.*

[80] Virginia, Georgia, and Massachusetts were some of the states that amended their constitutions to permit public money to go towards grants and loans to support private institutions. *See generally* A.E. DICK HOWARD, STATE AID TO PRIVATE HIGHER EDUCATION (1977).

[81] *Tilton*, 403 U.S. at 678.

[82] Hunt v. McNair, 413 U.S. 734 (1973).

[83] S.C. CODE ANN. §§ 59-109-10 to 59-109-180 (Law. Co-op. 2003). The Act established an Educational Facilities Authority to assist, through the issuance of revenue bonds, higher educational institutions in constructing and financing building projects. The Act, however, did not include facilities used for sectarian instruction or religious worship. *Hunt*, 413 U.S. at 736–37.

[84] *Hunt*, 413 U.S. at 736.

[85] *Id.* at 741–49.

[86] *Id.* at 746.

functions are subsumed in the religious mission."[87] This language allowed for the possibility of finding an Establishment Clause violation where public money is distributed to support institutions that are "pervasively sectarian."[88]

In 1976, the issue of "pervasive sectarianism" was tested when the Supreme Court reviewed a First Amendment challenge to a state financing scheme for higher education in *Roemer v. Board of Public Works*.[89] In *Roemer*, a First Amendment challenge was brought against a Maryland statute that authorized public aid in the form of non-categorical annual grants provided to eligible colleges and universities within the state of Maryland.[90] Again, applying the *Lemon* test, the Court held that the statute did not violate the Establishment Clause because the aid did not have the primary effect of advancing religion nor did it foster an excessive government entanglement with religion.[91] The Court reasoned that the primary effect portion of the *Lemon* analysis was not satisfied because the eligible private institutions were not "so permeated by religion that the secular side cannot be separated from the sectarian" side.[92] The Court then concluded, using language from *Hunt*, "that no state aid at all may go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones, and . . . if secular activities *can* be separated out, they alone must be funded."[93]

Once again, the Supreme Court applied a balancing test comparing the level of religious activity to secular activity on college campuses. The Court, in defending the funding scheme, focused on three aspects of the institution in making its decision. First, the Court stressed that although the Roman Catholic Church was represented on the governing boards of each college, there was "no instance of entry of Church considerations into

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[87] *Id.* at 743.

[88] *See id.* The majority opinion in *Hunt* quoted Chief Justice Burger, who held open the possibility in *Tilton* that some institutions may not pass the pervasively sectarian test and could be challenged accordingly. He said, "Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics." *Id.* (quoting Tilton v. Richardson, 403 U.S. 672, 682 (1971)).

[89] Roemer v. Bd. of Pub. Works, 426 U.S. 736 (1976).

[90] *Id.* at 740.

[91] *Id.* at 737–38.

[92] *Id.* at 759 (quoting Roemer v. Bd. of Pub. Works, 387 F. Supp. 1282, 1293 (D. Md. 1974)).

[93] *Id.* at 755.

college decisions . . . ."[94] The Court drew an important distinction between symbolic oversight and actual control in its analysis of the boards' functions.[95] Second, the Court pointed out that only the theology departments made hiring decisions on a religious basis.[96] Hiring criteria, according to the Court, were primarily based on "academic quality."[97] The Court agreed with the lower court that any effort by an institution to " 'stack its faculty with members of a particular religious group' would have been noticed by other faculty members, who had never been heard to complain."[98] Furthermore, the Court closely scrutinized some of the day-to-day practices occurring on some of the campuses, such as prayer in class, the hanging of religious symbols in classrooms and even the "wearing of clerical garb" by some of the instructors.[99] It argued that none of these factors were significant because there was "no 'actual college policy' of encouraging" these practices.[100] The totality of these factors helped influence the Court's decision to uphold the Maryland statute in this case. In the majority's mind, there was obvious evidence of sectarian activity on these campuses, but not enough to tip the balance and overturn the statute on First Amendment grounds.

In *Hunt* and *Roemer*, direct state aid to religious institutions of higher learning was upheld because the Supreme Court saw no violation in providing aid to institutions that were not pervasively sectarian. It was left unclear what exactly constituted "pervasive" sectarianism. No one knew how far the Court would go before it would invalidate a federal or state aid program on Establishment Clause grounds under this standard. The ambiguity surrounding this phrase and its applicability to institutions of higher learning would remain unclear for years as more legal challenges were brought to test the Court's interpretation of the Establishment Clause as it is applied to higher education finance programs.

IV. THE REAGAN-BUSH ERA AND THE FORMATION OF AN IDEOLOGICALLY COMPLIANT SUPREME COURT MAJORITY

The election of Ronald Reagan as President of the United States in 1980 was an important turning point in the history of Establishment Clause

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[94] *Id.* (quoting *Roemer*, 387 F. Supp. at 1295).
[95] *See id.*
[96] *Id.* at 757.
[97] *Id.*
[98] *Id.* (quoting *Roemer*, 387 F. Supp. at 1294).
[99] *See id.* at 756.
[100] *Id.* (quoting *Roemer*, 387 F. Supp. at 1293).

jurisprudence. Politically, the American people were ready for a change in leadership in the aftermath of the Watergate scandal, the oil shocks, and the Iran hostage crisis. On the education front, the path to integration in America's public schools was being undercut by the rapid growth of suburban neighborhoods and private schools around the country. Religious conservatives, school choice advocates, and opponents of the wall of separation between church and state were determined to elect a President who would further their vision of American education. This vision, however, could only be realized by appointing Supreme Court justices who would validate the constitutionality of various government aid programs benefiting private and religious schools.

A. The Doctrine of "Neutrality" and Indirect Aid to Religious Schools

The Supreme Court's support for the idea of complete separation between church and state waned considerably after Ronald Reagan was elected to the White House. As state legislatures around the country passed new forms of aid programs targeting nonpublic schools, the Court, instead of adhering to a strict interpretation of the wall of separation, chose to dissect each program in an effort to filter out permissible from impermissible forms of public aid. Along the way, new tests and terms of art were created, further blurring the line separating church and state.

Some of the common types of government aid programs passed during the 1980s took the form of tax credits or tax deductions.[101] The leading case on the subject of tax credits resulted from a Minnesota statute that allowed parents to deduct from their income taxes a legislatively specified amount.[102] In *Mueller v. Allen*, the Supreme Court approved the plan, charting a new direction of greater flexibility in permitting public aid to

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[101] As the *Nyquist* decision revealed, the issue of public aid to private and parochial schools in the form of tax credits or tax deductions was not a new idea. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (holding that tax deductions for parents who sent their children to religious schools violated the Establishment Clause). As in *Nyquist*, the Supreme Court in *Grit v. Wolman* also affirmed a lower court's decision to invalidate an Ohio statute which provided a tax credit to parents who sent their kids to nonpublic schools. Grit v. Wolman, 413 U.S. 901 (1973), *aff'g* Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Ohio 1972). Moreover, in *Byrne v. Public Funds for Public Schools*, 442 U.S. 907, *aff'g* 590 F.2d 514 (3d Cir. 1979), the Supreme Court invalidated a tax benefit program allowing nonpublic school parents in New Jersey a $100 tax deduction for each dependent child in attendance at a tuition-charging nonpublic school.

[102] Mueller v. Allen, 463 U.S. 388, 390 (1983).

private and parochial schools.[103] Justice Rehnquist, applying the *Lemon* test, concluded that the statute had a secular purpose, that it did not advance religion, and that government entanglement with religion was minimal.[104] Moreover, the Court distinguished between its rejection of earlier tax deduction or credit schemes by noting that benefits under the former plans were available only to parents of nonpublic school children, while the Minnesota deduction was neutral in its application because it was available to parents of "all" children in both public and nonpublic schools.[105] The idea of permitting "neutral" aid in the form of tax deductions for religious and secular educational expenses was a breakthrough for wall opponents and school choice advocates. The *Allen* decision marked an important juncture in the way the Supreme Court assessed the constitutionality of government aid programs benefiting religious schools by placing the emphasis on the manner in which the aid is distributed rather than who specifically benefits from it.

In 1985, the Supreme Court reversed course temporarily, striking down two programs offering public aid to parochial schools. In *School District of Grand Rapids v. Ball*, the Court held that a Michigan plan offering benefits to nonpublic schools through shared time and community education programs financed by the public school system was in violation of the Establishment Clause.[106] Justice Brennan, writing for the majority, found that the plan had the primary effect of advancing religion under the *Lemon* test.[107] Moreover, in *Aguilar v. Felton*, the Court, again led by Justice Brennan, struck down a New York City plan that provided Federal Title I money to pay for the use of public school teachers in parochial schools to teach remedial courses to their students.[108] The Court found that the

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[103] *Id.*

[104] *Id.* at 395–403.

[105] *Id.* at 397–98.

[106] Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985), *overruled in part by* Agostini v. Felton, 521 U.S. 203 (1997). Of the forty-one nonpublic schools eligible for the program, forty were deemed "pervasively sectarian" in character—that is the purpose of those schools was to advance their particular religions. *Id.* at 379.

[107] A majority found a substantial risk that teachers—even those who were not employed by the private schools—might "subtly (or overtly) conform their instruction to the [pervasively sectarian] environment in which they [taught]." *Id.* at 388.

[108] Aguilar v. Felton, 473 U.S. 402 (1985), *overruled in part by* 521 U.S. 203 (1997). In 1965, Congress enacted Title I of the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified as amended in scattered sections of 20 U.S.C.), "to ensure that all children have a fair, equal,

program violated the excessive entanglement prong of the *Lemon* test because public employees who teach on religious school premises must be closely monitored to ensure that they do not "inculcate" religion.[109]

Though the *Ball* case and the *Aguilar* decision were contrary to the trend in favor of permitting more public aid to parochial schools, the erosion of the wall continued during the 1980s as new appointments were made to the Supreme Court. The appointments of Justices O'Connor, Scalia, Kennedy and Rehnquist as Chief Justice sent a sharp signal that President Reagan was committed to a Supreme Court that was philosophically supportive of the idea of public aid to private and parochial schools. This philosophy was enunciated by Chief Justice Rehnquist in his dissent in *Wallace v. Jaffree* in 1985, where he argued that the "wall of separation" was a "metaphor based on bad history, a metaphor which has proved useless as a guide to judging" and that it "should be frankly and explicitly abandoned."[110] The true intent of the Establishment Clause, he maintained, was to prohibit a national religion or the "official designation of any church as a 'national' one."[111] It did not intend to create "government neutrality between religion and irreligion, nor did it prohibit the federal government from providing nondiscriminating aid to religion."[112] Rehnquist's dissent lowered the bar for judicially-sanctioned aid to religious schools and it

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and significant opportunity to obtain a high-quality education." 20 U.S.C. § 6301 (2003). Toward that end, Title I channels federal funds, through the States, to local educational agencies which then disburse these funds to provide remedial education, guidance and job counseling to eligible students. *Id.* § 6315(c). Title I funds must be made available to all eligible children, regardless of whether they attend public schools, *id.* § 6312(c), and the services must be "secular, neutral, and nonideological." *Id.* § 6320. Moreover, Title I services provided to children attending private schools must be "substantially comparable." *Id.* § 6321(c)(1)(B).

[109] *Aguilar*, 473 U.S. at 420. The *Aguilar* Court's finding of "excessive" entanglement rested on three grounds: (i) the program would require "pervasive monitoring by public authorities" to ensure that Title I employees did not inculcate religion; (ii) the program required "administrative cooperation" between the government and parochial schools; and (iii) the program might increase the dangers of "political divisiveness." *Id.* at 413–14.

[110] Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting). This case involved a state statute authorizing a moment of silence "for meditation or voluntary prayer" in public school classrooms. *Id.* at 40. The Court held that the statute was unconstitutional, rejecting the argument that the Establishment Clause prohibits only government discrimination between religious sects. *Id.* at 53.

[111] *Id.* at 113 (Rehnquist, J., dissenting).

[112] *Id.* at 106 (Rehnquist, J., dissenting).

helped set the stage for the eventual crumbling of the wall of separation between church and state in American education.

B. Indirect Aid and "School Choice" in Higher Education

Prior to 1986, First Amendment challenges brought before the Supreme Court in the higher education arena had dealt primarily with the issue of direct federal and state aid to religious colleges and universities in the United States. It had not yet addressed the question of indirect student aid to private religious institutions or school choice. The issue of indirect aid in the higher education realm was addressed by *Witters v. Washington Department of Services for the Blind* in 1986.[113] The question presented in *Witters* was whether the First Amendment's Establishment Clause precluded the state of Washington from extending assistance under the state's vocational rehabilitation assistance program to a blind person who chose to study at a Christian college to become a pastor, missionary, or youth director.[114] The Court held that the First Amendment did not preclude such aid in this case, characterizing it as aid to individuals from which religious schools could derive no significant benefit.[115]

The Court opined that state aid could flow indirectly to religious institutions "only as a result of the genuinely independent and private choices of aid recipients" and as long as it was not likely that "any significant portion of the aid expended under the . . . program as a whole [would] end up flowing to religious education."[116] The Court explained:

> Washington's program is 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited,' and . . . . creates no financial incentive for students to undertake sectarian education. . . . [T]he fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State.[117]

The majority also noted that only a small portion of the overall aid under the state's program would go to religious education, even though several of the justices thought that this point was irrelevant.[118]

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[113] Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986).

[114] *See id.* at 483. Assistance under the Washington program is paid directly to the student, who then transmits it to the educational institution of his or her choice. *Id.* at 487.

[115] *Id.* at 488.

[116] *Id.*

[117] *Id.* at 488 (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782–83 (1973)).

[118] *See id.* at 487.

The Supreme Court's decision in *Witters* established an important precedent in the field of higher education. It allowed for public money to be distributed indirectly to private religious colleges and universities by way of individual choice. It also reinforced the Court's earlier application of "neutral availability" discussed in *Mueller* recognizing that "the full benefits of the program [are not] limited, in large part or in whole, to students at sectarian institutions."[119] In effect, the Supreme Court appeared to set forth a new standard for permissible aid to institutions of higher learning; that as long as an institution was not pervasively sectarian and as long as the aid did not constitute a significant portion of the overall aid provided to the institution, public money could be distributed indirectly to the institution through individual recipients.

By the early 1990s, the Supreme Court was comfortably in the control of conservative wall opponents. Reagan's successor, George H.W. Bush, solidified the conservative majority with the appointment of Clarence Thomas. Accordingly, numerous challenges to the wall of separation were brought by legislatures representing states with large percentages of parochial school students.[120] The repeated efforts by legislatures to circumvent the Establishment Clause gave the new majority an opportunity to entertain further exceptions to the Establishment Clause in education matters. The propensity of the Court to create new exceptions in Establishment Clause jurisprudence, though diametrically opposed to the intent enunciated in Madison's *Memorial and Remonstrance*,[121] emboldened opponents of the wall of separation to push forward in their efforts to tear down the wall. Indeed, by the time Bill Clinton was elected to the White House, then Justice Rehnquist's declaration that the wall "should be frankly and explicitly abandoned"[122] was fast becoming a reality.

V. THE CONSERVATIVE MAJORITY AND THE CRUMBLING OF THE WALL OF SEPARATION BETWEEN CHURCH AND STATE DURING THE 1990S

For nearly five decades, Establishment Clause jurisprudence in American education rested on the theory that religion and government can best work to achieve their aims if each is left free from the other. The practical application of this theory, however, became less clear as the

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[119] *Id.* at 488–89.

[120] *See infra* Part V.

[121] *See* Madison, *supra* note 18.

[122] Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting).

Supreme Court yielded repeatedly to pressure for specific exceptions to the rule. Following the shift in ideological composition of the nation's highest Bench, calls for increased government interaction with religion intensified during the 1990s. The rise of the Christian Coalition and the evangelical movement throughout the heartland presented new challenges for the American system of education helping to fuel controversy over issues such as school prayer, the posting of the Ten Commandments, and school vouchers. Under the watchful eye of a more conservative Supreme Court, the rise of sectarianism and the promise of school choice would soon clash with the traditional idea of secular public school system as the new majority moved to demolish the wall of separation once and for all in American education.

A. The Convergence of "Neutrality" and "Choice" in Validating Public Aid to Religion

Prior to the 1990s, the issues of neutrality, individual choice, and direct and indirect aid to religious schools had been addressed by the Supreme Court in separate cases, resulting in the establishment of specifically tailored exceptions to the "no aid to religion" principle. These issues converged in 1993 when the parents of a deaf boy named James Zobrest asked the Supreme Court to allow the school district to furnish the boy with a sign language interpreter, pursuant to the Individuals with Disabilities Education Act ("IDEA")[123] and its Arizona counterpart,[124] in a Roman Catholic high school to facilitate his education.[125] In *Zobrest v. Catalina Foothills School District*, the Supreme Court held that the Establishment Clause does not lay down a bar to the assignment of a public employee to a sectarian school and, therefore, the school district should furnish an interpreter to accompany Zobrest to classes at a Roman Catholic high school if he so chooses.[126]

In the majority opinion, Chief Justice Rehnquist addressed the neutrality question, the "choice" issue and the distinction between direct and indirect aid in one decision.[127] "[G]overnment programs," he argued, "that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause

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[123] 20 U.S.C. §§ 1400–1487 (2003).

[124] ARIZ. REV. STAT. §§ 15-761 to 15-774 (2003).

[125] Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

[126] *Id.* at 2.

[127] *Id.*

challenge just because sectarian institutions may also receive an attenuated financial benefit."[128] He noted that the same reasoning in *Mueller* and *Witters* applied in this case, whereby the service provided was a "general government program that distributes benefits neutrally to any child" without regard to the "sectarian-nonsectarian" nature of the school the child attends.[129]

Rehnquist also emphasized the importance of individual choice, arguing that "[b]y according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decisions of individual parents."[130] He elaborated further on the choice issue by pointing out that because the IDEA creates no financial incentive for parents to choose a sectarian school, "an interpreter's presence . . . cannot be attributed to state decisionmaking."[131] He then distinguished the government aid programs in *Meek* and *Ball* from the IDEA program in this case by describing the aid provided in those cases—instructional equipment and material, teachers, and guidance counselors—as direct aid which "relieved sectarian schools of costs they otherwise would have borne in educating their students."[132] He stated that "[d]isabled children, not sectarian schools, are the primary beneficiaries of the IDEA;" schools "are only incidental beneficiaries."[133] Moreover, he added that "the task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor. . . . Nothing in this record suggests that a sign-language interpreter would do more than accurately interpret whatever material is presented to the class as a whole."[134]

The *Zobrest* decision was an important precedent because it combined several of the new standards for circumventing the wall of separation into one disposition. The issues of neutrality, choice, and the direct/indirect distinction were addressed by the Court and reinforced as solid exceptions to the no aid to religion principle. The only issue not addressed by the Court in *Zobrest* was the pervasively sectarian standard. Thus, as a result of the *Zobrest* decision, religious organizations and wall opponents could look to the convergence of neutrality and individual choice as a proper test

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[128] *Id.* at 8.
[129] *Id.* at 10.
[130] *Id.*
[131] *Id.*
[132] *Id.* at 12.
[133] *Id.*
[134] *Id.* at 13.

for measuring the validity of various schemes to distribute public aid to parochial schools.[135]

One such religious organization at the University of Virginia sought to expand upon the new test by asking the Supreme Court to review the constitutionality of a direct aid program to religious activities on campus. In *Rosenberger v. Rector and Visitors of University of Virginia*, the Supreme Court examined a constitutional challenge to a decision by the University of Virginia denying funding to a student-run religious publication.[136] The funding was made available to numerous other student-run publications through the university's Student Activity Fund.[137] The Court held that there was no violation of the Establishment Clause in part because "no public funds flow directly to [the publication's] coffers."[138]

The Court again focused on the principle of neutrality in making aid available, arguing that "the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[139] The Court for the first time, however, expanded its usual analysis of neutrality by attempting to narrow the kind of aid prohibited under the Establishment Clause to taxes levied for the direct support of the church. Justice Kennedy, writing for the majority, argued:

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[135] A year later, in *Board of Education v. Grumet*, Justice Souter wrote that "the principle is well grounded in our case law, as we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges." Bd. of Educ. v. Grumet, 512 U.S. 687, 704 (1994).

[136] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 822–23 (1995).

[137] *Id.* "The [Student Activity Fund] receives its money from a mandatory fee" and is designed "to support a broad range of extracurricular student activities that 'are related to the educational purpose of the University.'" *Id.* at 824 (quoting Appendix to Petition for Writ of Certiorari at 61a, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (No. 94-329)).

[138] *Id.* at 842. The irony of the Supreme Court's decision in this case is underscored by the fact that the University of Virginia, an instrumentality of the Commonwealth for which it was named, was founded by Thomas Jefferson in 1819, and ranked by him, together with the authorship of the Declaration of Independence and of the Virginia Act of Religious Freedom, as one of his three most important achievements. These achievements are listed on Jefferson's tombstone at Monticello just a few miles off campus.

[139] *Id.* at 839.

> The neutrality of the program distinguishes the student fees from a tax levied for the direct support of a church or group of churches. A tax of that sort, of course, would run contrary to Establishment Clause concerns dating from the earliest days of the Republic. The apprehensions of our predecessors involved the levying of taxes upon the public for the sole and exclusive purpose of establishing and supporting specific sects. The exaction here, by contrast, is a student activity fee designed to reflect the reality that student life in its many dimensions includes the necessity of wide-ranging speech and inquiry and that student expression is an integral part of the University's educational mission.[140]

The idea of permitting nontax funds to be spent on religion as long as these funds were neutrally available was a major step towards dismantling the wall of separation between church and state. In effect, the Court ordered an instrumentality of the State to support religion with direct funding.

The dissent in *Rosenberger* voiced its disapproval of Justice Kennedy's reasoning. Justice Souter wrote, "[t]he opinion of the Court makes the novel assumption that only direct aid financed with tax revenue is barred, and draws the erroneous conclusion that the involuntary Student Activities Fee is not a tax."[141] He also argued that "[u]sing public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money."[142] "[A]ny such use of [nontax funds]," he added, "would ignore one [of] the dual objectives of the Establishment Clause, which was meant not only to protect individuals and their republics from the destructive consequences of mixing government and religion, but to protect religion from a corrupting dependence on support from the Government."[143]

One of the more interesting aspects of the *Rosenberger* case was the debate between Justice Thomas in his concurrence and Justice Souter in his dissent over the original intent of the framers, particularly James Madison, with respect to the Establishment Clause and public aid to religion. Thomas argued that Madison's objection to the Virginia tax assessment bill of 1786 "did not rest on the premise that religious entities may never participate on equal terms in neutral government programs."[144] Instead, Justice Thomas

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[140] *Id.* at 840.
[141] *Id.* at 864–65 (Souter, J., dissenting).
[142] *Id.* at 868 (Souter, J., dissenting).
[143] *Id.* at 891 (Souter, J., dissenting).
[144] *Id.* at 854 (Thomas, J., concurring).

contended it was grounded in the notion that "the Virginia assessment was flawed because it 'violate[d] that equality which ought to be the basis of every law.' "[145] Madison wrote against a background in which nearly every colony had exacted a tax for church support.[146] According to Thomas, Madison's views "'[indicate] that he saw the [First] Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects,' but not 'as requiring neutrality on the part of government between religion and irreligion.' "[147] "In any event," he concluded, "the views of one man do not establish the original understanding of the First Amendment."[148]

The dissent attacked Thomas' concurrence as a misinterpretation of Madison's intent. "Nowhere in the Remonstrance . . . did Madison advance the view that Virginia should be able to provide financial support for religion as part of a generally available subsidy program," argued Justice Souter.[149] "In attempting to recast Madison's opposition as having principally been targeted against 'governmental preferences for *particular* religious faiths,' " Souter wrote, "Justice Thomas wishes to wage a battle that was lost long ago . . . ."[150] Citing *Everson* and a number of other Supreme Court precedents, Souter reasserted the Court's position with respect to direct funding of religious activity:

> The principle against direct funding with public money is patently violated by the contested use of today's student activity fee. Like today's taxes generally, the fee is Madison's threepence. The University exercises the power of the State to compel a student to pay it and the use of any part of it for the direct support of religious activity thus strikes at what we have repeatedly held to be the heart of the prohibition on establishment.[151]

According to Souter, Madison inveighed against government aid to religion for a number of reasons, but critical here is the fact that those reasons

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[145] *Id.* (quoting Madison, *supra* note 18).

[146] *See, e.g.*, PFEFFER, *supra* note 17, at 109, 123, 125–26; BUTTS & CREMIN, *supra* note 18, at 15–22; BUTTS, *supra* note 18, at 72.

[147] *Rosenberger*, 515 U.S. at 856 (Thomas J., concurring) (quoting Wallace v. Jaffree, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting)).

[148] *Id.* (Thomas, J., concurring).

[149] *Id.* at 872 n.1 (Souter, J., dissenting).

[150] *Id.* (citations omitted). Justice Souter points out that "[a]lthough it was a taxation scheme that moved Madison to write in the first instance, the Court has never held that government resources obtained without taxation could be used for direct religious support." *Id.* at 890 (Souter, J., dissenting).

[151] *Id.* at 873–74 (citations omitted).

would have applied whether or not the aid was being distributed directly or neutrally.

Until the *Rosenberger* decision, the prohibition against direct funding of religious activities was a central tenet of Establishment Clause jurisprudence. The majority, however, dismissed that notion denying that the case had anything to do with direct aid to a religious activity on a public university campus. In Justice Kennedy's words, "We do not confront a case where even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity."[152] The dissent, however, disagreed, noting that the Supreme Court never held that neutrality might be sufficient to render direct aid to religion constitutional.[153]

B. Agostini *and* Mitchell*: Removing the Foundation of the Wall of Separation*

With the principles of neutrality and individual choice more firmly established as standards for judging the validity of public aid programs benefiting religious education, the Supreme Court next focused on harmonizing its earlier jurisprudence with its more recent rulings. The opportunity to overrule an earlier important decision came in 1997 when the Supreme Court, in *Agostini v. Felton*, revisited the question put forth in *Aguilar* of whether a New York program sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to Title I of the Elementary and Secondary Education Act of 1965[154] was a violation of the First Amendment's Establishment Clause.[155] The *Agostini* Court held that the program did not violate the Establishment Clause.[156] According to the Court, relief was proper this time under Federal Rule of Civil Procedure 60(b)(5) and under the Supreme Court's decision in *Rufo v. Inmates of Suffolk County Jail*[157] "because the 'decisional law [had] changed to make legal what the [injunction] was designed to prevent.' "[158] Specifically, petitioners pointed to the statements

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[152] *Id.* at 842.

[153] *Id.* at 880.

[154] For a brief discussion on this Act, see *supra* note 108.

[155] Agostini v. Felton, 521 U.S. 203 (1997).

[156] *Id.* at 234–35.

[157] Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992).

[158] *Agostini*, 521 U.S. at 214 (quoting *Rufo*, 502 U.S. at 388). Rule 60(b)(5) states in part: "On motion and upon such terms as are just, the court may relieve a

of five justices in *Board of Education v. Grumet*, calling for the overruling of *Aguilar*.[159]

In the *Agostini* majority opinion, Justice Sandra Day O'Connor reasoned that the Court's earlier decision in *Aguilar* and, in part, *Ball* had been "undermined by subsequent Establishment Clause decisions," including *Witters*, *Zobrest*, and *Rosenberger*.[160] She wrote, "In light of our conclusion that *Aguilar* would be decided differently under our current Establishment Clause law, we think adherence to that decision would undoubtedly work a 'manifest injustice,' such that the law of the case doctrine does not apply."[161] O'Connor focused on the effect and entanglement prongs of the *Lemon* test as well as the doctrines of neutrality and individual choice. With regard to the former, she cited *Zobrest* arguing that the Court had abandoned the presumption erected in *Aguilar* and *Ball* that the "presence of a public employee on private school property creates an impermissible 'symbolic link' between government and religion."[162]

In referencing neutrality and individual choice, O'Connor reiterated the standard adopted by the Court to determine the constitutionality of programs providing public aid to parochial schools. She wrote, "where . . . the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular

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party . . . from a final judgment [or] order . . . [when] it is no longer equitable that the judgment should have prospective application . . . ." FED. R. CIV. P. 60(b)(5). In *Rufo*, the Supreme Court held that it is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show "a significant change either in factual conditions or in law." *Rufo*, 502 U.S. at 384.

[159] In *Board of Education v. Grumet*, the Supreme Court held that a New York law that carved out a public school district to coincide with the boundaries of the village of Kiryas Joel, an enclave of the Satmar Hasidic sect, violated the Establishment Clause. In the course of the majority's opinion, the Court observed that New York had created the special school district in response to the *Aguilar* decision, which had required New York to cease providing IDEA services to Satmar children on the premises of their religious private schools. Bd. of Educ. v. Grumet, 512 U.S. 687, 692 (1994). Five Justices, including Rehnquist, Scalia, Thomas, O'Connor, and Kennedy, joined opinions calling for reconsideration of *Aguilar*. *See id.* at 717–18 (O'Connor, J., concurring in part and concurring in judgment); *id.* at 731 (Kennedy, J., concurring in judgment); *id.* at 750 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

[160] *Agostini*, 521 U.S. at 216.

[161] *Id.* at 236.

[162] *Id.* at 224.

beneficiaries on a nondiscriminatory basis"[163] it "is less likely to have the effect of advancing religion."[164] "[I]t is clear," she argued, "that Title I services are allocated on the basis of criteria that neither favor nor disfavor religion. The services are available to all children who meet the Act's eligibility requirements, no matter what their religious beliefs or where they go to school."[165] With regard to individual choice, O'Connor cited *Zobrest*, asserting that "the provision of instructional services under Title I is indistinguishable from the provision of sign-language interpreters under the IDEA. Both programs make aid available only to eligible recipients. That aid is provided to students at whatever school they choose to attend."[166]

Agostini was a landmark ruling. Not only did the Court announce a rule of unprecedented breadth, but it also modified the *Lemon* test—which asks whether a statute (1) has a secular purpose, (2) has a primary effect of advancing or inhibiting religion, or (3) creates an excessive entanglement between government and religion[167]—for the first time since its inception. The Court in *Agostini* examined only the first and second factors, recasting the entanglement inquiry as simply one element in determining a statute's effect.[168] The specific criteria used to determine an impermissible effect includes: (1) whether the aid results in governmental indoctrination, (2) whether the program defines its recipients by reference to religion, and (3) whether the aid creates an excessive entanglement between government and religion.[169] Moreover, the result in *Agostini* was to overrule *Aguilar* and *Ball* and to expand, once again, the scope of permissible public aid authorized to religious institutions under the Establishment Clause.

While the *Agostini* case was being decided, another important First Amendment challenge was pending from Louisiana. In the case of *Mitchell v. Helms*, the Supreme Court considered the question of whether Chapter Two of the Education Consolidation and Improvement Act of 1981, as applied in Jefferson Parish, Louisiana, is a law respecting an establishment of religion because many of the private schools receiving Chapter Two aid

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[163] *Id.* at 205.

[164] *Id.*

[165] *Id.* at 232 (citations omitted).

[166] *Id.* at 228. O'Connor points out that "Title I funds [never] reach the coffers of religious schools." The "funds are instead distributed to a *public* agency . . . that dispenses services directly to the eligible students within its boundaries, no matter where they choose to attend school." *Id.* at 228–29.

[167] *See supra* notes 49–51 and accompanying text.

[168] *Agostini*, 521 U.S. at 232–33.

[169] *Id.*

in that parish are religiously affiliated.[170] The Court, in a plurality decision, held that Chapter Two was not such a law.[171]

In drafting the Court's opinion, Justice Thomas reconfirmed the principles of neutrality and private choice and overruled the Court's earlier decisions in *Meek* and *Wolman*.[172] First, Thomas addressed the principles of neutrality and private choice, asserting that the heart of the Court's reasoning in *Agostini*, *Zobrest*, *Witters*, and *Mueller* was upholding aid that is offered to "a broad range of groups or persons without regard to their religion" so long as the aid goes to a religious institution " 'only as a result of the genuinely independent and private choices of individuals.' "[173] The Court determined that the Chapter Two program "does not result in government indoctrination, because it determines eligibility for aid neutrally, allocates that aid based on the private choices of the parents of schoolchildren . . . . Nor does Chapter 2 define its recipients by reference to religion."[174]

Though Thomas could have concluded his analysis at this point, he instead chose to repudiate what he considered unworkable doctrines (the direct/indirect distinction, divertibility, and the pervasively sectarian standard) that preceded the doctrines of neutrality and private choice in earlier cases. In addressing the direct/indirect distinction, Thomas argued

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[170] Mitchell v. Helms, 530 U.S. 793 (2000). Chapter Two of the Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, 95 Stat. 469, as amended, 20 U.S.C. §§ 7301–73, is a close cousin of the provision of the Elementary and Secondary Education Act of 1965 that the Supreme Court considered in *Agostini*. Like the Title I program, Chapter Two channels federal funds to local educational agencies, which are usually public schools districts, via state educational agencies, to implement programs to assist children in elementary and secondary schools. Among other things, Chapter Two provides:

> "for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials."

20 U.S.C. § 7215(a)(3). Chapter Two is now technically Subchapter VI of Chapter 70 of 20 U.S.C., where it was codified by the Improving America's School Act of 1994, Pub. L. 103-382, 108 Stat. 3707 (codified as amended in scattered sections of 20, 25, 29, & 42 U.S.C.).

[171] *Mitchell*, 530 U.S. at 801. Justice Thomas announced the judgment of the Court and delivered the opinion, in which Chief Justice Rehnquist and Justices Scalia and Kennedy joined, and Justice O'Connor filed a concurring opinion.

[172] *Id.* at 835.

[173] *Id.* at 809–10 (quoting *Agostini*, 521 U.S. at 226).

[174] *Id.* at 829.

that the purpose of the distinction was merely to prevent "'subsidization' of religion."[175] "Whether one chooses to label this program 'direct' or 'indirect' is a rather arbitrary choice, one that does not further the constitutional analysis," he wrote.[176] He added that if aid to schools is "neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion.'"[177] In Thomas' view, government aid did not have to pass through individuals' hands in order for it to comply with the Establishment Clause and, therefore, the issue of whether the aid was "direct" or "indirect" was irrelevant.

Thomas next took up the issue of "divertibility" in examining whether instructional and educational materials, including computers and overhead projectors, can be used to inculcate a religious message in school. According to Thomas, "*any* aid, with or without content, is 'divertible' in the sense that it allows schools to 'divert' resources."[178] He compared Chapter Two aid in Jefferson Parish with the textbook question in *Allen*, arguing that even though the "lack of divertibility motivated [the] holding in *Allen*, it is hard to imagine any book that could not, in even moderately skilled hands, serve to illustrate a religious message."[179] "A concern for divertibility . . . is misplaced," he wrote, "because it is boundless—enveloping all aid, no matter how trivial—and thus has only the most attenuated (if any) link to any realistic concern for preventing an 'establishment of religion.'"[180] It was Thomas' position that any aid which was suitable for use in a public school was also suitable for use in any private school.

Finally, Thomas addressed the pervasively sectarian standard, a factor which had not been considered by the Court since *Aguilar* and *Ball* in 1985. Citing *Zobrest* and *Agostini* (which overruled *Aguila*r and *Ball* in part),

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[175] *Id.* at 816 (quoting Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 394 (1985)).

[176] *Id.* at 818.

[177] *Id.* at 816 (quoting Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 489 (1986)). Thomas noted that *Agostini* relied primarily on *Witters* for this conclusion and made clear that private choice and neutrality would resolve the concerns formerly addressed by the rule in *Ball*. *Id.*

[178] *Id.* at 824.

[179] *Id.* at 823.

[180] *Id.* at 824. Thomas notes that the doctrine of divertibility was not considered in *Zobrest*, *Witters*, or *Mueller* and therefore it should be rejected in this case. *Id.* at 820–21.

Thomas argued that the Court upheld aid programs to children who attended primary and secondary schools that were pervasively sectarian.[181] "[T]here was a period," he noted, "when this factor mattered, particularly if the pervasively sectarian school was a primary or secondary school. But that period is one that the Court should regret, and it is thankfully long past."[182]

Thomas discussed several reasons for dispensing with the pervasively sectarian standard in the constitutional analysis. First, he believed that it was fast becoming irrelevant given the failure of the Court to consider the issue in more recent precedents.[183] Second, it was Thomas' view that the "religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose."[184] "If a program offers permissible aid to the religious (including the pervasively sectarian), the areligious, and the irreligious," he claimed, "it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be."[185] Third, he argued that an "inquiry into the recipient's religious views" was "offensive" and that such an inquiry "collides with [Supreme Court] decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity."[186] Finally, in what may be an attempt to defend his own Catholic identity, Thomas asserted that "hostility" to pervasively sectarian schools, particularly Catholic schools, "has a shameful pedigree that we do not hesitate to disavow."[187] "This doctrine, born of bigotry should be buried now," he concluded.[188]

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[181] *Id.* at 827.

[182] *Id.* at 826 (citations omitted).

[183] *Id.* at 826–27.

[184] *Id.* at 827.

[185] *Id.*

[186] *Id.* at 828.

[187] *Id.* Thomas points out that opposition to aid to sectarian schools emerged in "the 1870s with Congress's consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions." At that time, he notes, there was "pervasive hostility to the Catholic Church and to Catholics in general," and the term "sectarian" was widely viewed as a code word for "Catholic." *Id.* Today, however, state constitutions in forty-seven states still restrict state legislatures from approving voucher money for "sectarian" private schools under similar to provisions to the Blaine Amendment. After the Blaine Amendment failed in Congress in 1875, many states simply amended their own constitutions to adopt the language. *See* HOWARD, *supra* note 80.

[188] *Mitchell,* 530 U.S. at 829.

The Supreme Court's rulings in *Agostini* and *Mitchell* were tremendous blows to the wall of separation. By renouncing the basic doctrines or tests upon which the constitutionality of government aid programs were measured, the Court removed the foundation of the wall that had been erected over the last several decades. Ostensibly, the only form of prohibited aid to religious education left as a result of the crumbling of the wall was the direct monetary subsidization of religious education itself by government. But even this form of aid was at best questionable in the wake of the Court's decision in *Rosenberger*, which disavowed the direct/indirect aid distinction altogether in allowing public money to flow to religious activities on campus.[189] Justice Souter, in his dissenting opinion in *Agostini*, best summed up the state of the law when he wrote that "[t]here is simply no line that can be drawn between the instruction paid for at taxpayers' expense and the instruction in any subject that is not identified as formally religious."[190]

With the wall of separation between church and state in American education substantially eroded, the five Justices—Rehnquist, O'Connor, Scalia, Kennedy, and Thomas—who had helped to tear down the wall were in position to take the next step and authorize vouchers through the doctrinal vehicles of neutrality and school choice. The remainder of this article analyzes the Supreme Court's most recent decision in *Zelman v. Simmons-Harris,* the Cleveland voucher case, and the broader question of whether there still exists a wall separating church and state in American education.

VI. *ZELMAN V. SIMMONS-HARRIS*: THE TRIUMPH OF PRIVATE "SCHOOL CHOICE" IN AMERICAN EDUCATION

The road to vouchers in American education was paved during the Reagan-Bush era with the appointment of five conservative Supreme Court Justices who were influenced by conservative leaders, the religious right and the alleged crisis in America's inner-city public schools. In 1998, the city of Milwaukee made national headlines when the Wisconsin Supreme Court declared the Milwaukee Parental Choice Program—authorizing school vouchers to inner city parents—constitutional in *Jackson v. Benson.*[191] The Milwaukee voucher decision eventually was appealed to the

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[189] *See supra* notes 137–40 and accompanying text.

[190] Agostini v. Felton, 521 U.S. 203, 245 (1997) (Souter, J., dissenting).

[191] Jackson v. Benson, 578 N.W.2d 602 (Wis.), *cert. denied*, 525 U.S. 997 (1998).

U.S. Supreme Court, but the Court denied certiorari, thus indicating its stance on the voucher issue. The Milwaukee example prompted other cities around the nation to establish similar programs which were the subjects of numerous court challenges. A specific pilot project in Ohio, however, would ultimately reach the Supreme Court and force the Court to enunciate its true position on the voucher issue.

A. The Cleveland Voucher Decision: The End of the Road for Wall Supporters

In 1995, the Federal District Court for the Northern District of Ohio placed the entire school district of Cleveland, Ohio under state control, declaring "a crisis of magnitude" among some of the worst public schools in the nation.[192] Student performance in the district was dismal, the drop-out rate far exceeded the graduation rate, and the district itself failed to meet many of the basic standards required by the state to operate.[193] According to the Ohio State Auditor, the Cleveland public school system was in the midst of a "crisis . . . unprecedented in the history of American education."[194]

Against this background, the State of Ohio established a pilot program designed to provide educational choices to families with school children who reside in the Cleveland City School District.[195] The program provided financial assistance to families in any Ohio school district that was or had been "under federal court order requiring supervision and operational management of the district by the state superintendent."[196] Under the tuition aid portion of the program, any private school, religious or nonreligious, could participate and accept program students as long as the school was

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[192] Reed v. Rhodes, 1 F. Supp. 2d 705, 705 (N.D. Ohio 1995), *aff'd*, 215 F.3d 1327 (6th Cir. 2000).

[193] *See* Cleveland City School District Performance Audit 2–1 (Mar. 1996). A copy of the Audit is available from the Auditor of the State of Ohio by calling 1-800-282-0370.

[194] *Id.*

[195] *See* Pilot Project Scholarship Program, OHIO REV. CODE ANN. §§ 3313.974–3313.979 (Anderson 2003).

[196] *Id.* § 3313.975(A). The program provides two kinds of aid to parents of children in covered district. First, the program provides tuition aid for students in kindergarten through third grade, to attend a participating public or private school of their parent's choosing. *Id.* § 3313.975(B), (C)(1). Second, the program provides tutorial aid for students who choose to remain enrolled in public school. *Id.* § 3313.975(A).

located within the boundaries of the Cleveland school district and met statewide educational standards.[197] Any public school located in a school district adjacent to the covered district could also have participated in the program.[198] All participating schools, whether public or private, were required to accept students in accordance with rules and procedures established by the state superintendent.[199] Tuition aid was distributed to parents according to financial need.[200]

In July 1999, a group of Ohio taxpayers challenged the Ohio program in United States District Court, seeking to enjoin it on the basis that it violated the Establishment Clause. The District Court granted summary judgment for the challengers[201] and that decision was affirmed the next year by a divided panel of the United States Court of Appeals for the Sixth Circuit, which found that the program had the primary effect of advancing religion in violation of the Establishment Clause.[202] On appeal to the Supreme Court, the Court, unlike in the Milwaukee voucher case, granted certiorari.[203]

The question presented before the Supreme Court was whether the Ohio program had the forbidden effect of advancing or inhibiting religion.[204] The Court, in a 5-4 decision, held that it did not.[205] Citing *Mueller*, *Witters*, and *Zobrest*, Chief Justice Rehnquist wrote that these cases

> make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens

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[197] *Id.* § 3313.976(A). Participating private schools may not discriminate on the basis of race, religion, or ethnic background, or to "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." *Id.* § 3313.976(A)(6).

[198] *Id.* § 3313.976(C).

[199] *Id.* § 3313.976(A)(1)–(8).

[200] If parents choose a private school, checks are made payable to the parents who then endorse the checks over to a chosen school. *Id.* § 3313.979.

[201] Simmons-Harris v. Zelman, 72 F. Supp. 2d 834 (N.D. Ohio 1999).

[202] Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000).

[203] Simmons-Harris v. Zelman, 533 U.S. 976 (2001).

[204] Zelman v. Simmons-Harris, 536 U.S. 639, 649 (2002). As in most of the recent decisions involving the constitutionality of government aid programs to religious schools, the Supreme Court found in applying the first prong of the *Lemon* test that the program was enacted for a valid secular purpose, in this case "providing educational assistance to poor children in a demonstrably failing public school system." *Id.*

[205] *Id.* at 643–44. Chief Justice Rehnquist filed the opinion in which Justices O'Connor, Thomas, Scalia, and Kennedy concurred.

> who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.[206]

As was true in those cases, the Ohio *program* was determined to be "neutral in all respects toward religion" and one of "true private choice."[207] "[N]o reasonable observer," argued Rehnquist, "would think a neutral program of private choice . . . carries with it the *imprimatur* of government endorsement."[208]

Unable to rely on the traditional arguments of divertibility or pervasive sectarianism, the dissent, led by Justice Stevens, raised two new arguments in opposition to the Court's ruling. The first argument focused on the Ohio program itself and the fact that the vast majority of the voucher recipients received religious indoctrination at state expense.[209] Stevens wrote:

> The State may choose to divide up its public schools into a dozen different options and label them magnet schools, community schools, or whatever else it decides to call them, but the State is still required to provide a public education and it is the State's decision to fund private school education over and above its traditional obligation that is at issue in these cases.[210]

According to Stevens, the fact that public money was used to fund the religious education of Ohio citizens supported the conclusion that "the law is one 'respecting an establishment of religion.' "[211] In addition, Stevens revived the old concern over "political divisiveness" that was at the heart of Jefferson's and Madison's thinking in drafting the Establishment Clause and related it to the present era of global conflict. He argued:

> I have been influenced by my understanding of the impact of religious strife on the decisions of our forbears to migrate to this continent, and on the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another. Whenever we remove a brick from the wall that was designed to separate religion and government, we

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[206] *Id.* at 652.
[207] *Id.* at 653.
[208] *Id.* at 655.
[209] *Id.* at 684.
[210] *Id.* at 685.
[211] *Id.*

> increase the risk of religious strife and weaken the foundation of our democracy.[212]

Justice Stevens criticized the majority for approving the voucher scheme while maintaining that the figurative wall of separation enunciated in *Everson* is still intact. "It is only by ignoring *Everson*," Stevens added, "that the majority can claim to rest on traditional law in its invocation of neutral aid provisions and private choice to sanction the Ohio law."[213]

The Court's ruling in *Zelman* was a landmark decision paving the way for federal and statewide voucher programs across the country. Since the decision, several states have proposed similar voucher legislation.[214] Not since *Everson* has a single case had such a profound impact on public education. With the wall of separation between church and state practically demolished, the question remains whether the Establishment Clause is even relevant in determining the constitutionality of government aid to religious schools.

B. *The Aftermath of the Cleveland Voucher Ruling and the Drive for "Religion-Based" Programs*

Since the Cleveland voucher decision in 2002, efforts to promote public aid to parochial schools and other religious-based initiatives have accelerated.[215] Anticipating *Zelman*, Governor Jeb Bush of Florida signed into law the first comprehensive state voucher program in the country.[216] Under Florida's A-plus Program, a public school student's parent or guardian may request and receive from the state an opportunity scholarship for the child to enroll in and attend a private or parochial school when that child's public school is determined to be failing by the state.[217] This program was

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[212] *Id.* at 686.

[213] *Id.* at 688.

[214] *See* Krista Kafer, Progress on School Choice in the States, 3–6, The Heritage Foundation (July 10, 2003), *at* http://www.heritage.org/Research/Education/g1639.cfm.

[215] "Each year, about $65 million is spent by foundations and individuals to promote vouchers." National Education Association, *Vouchers*, NEA on the Issues (Oct. 2001), *at* http://www.nea.org/vouchers.

[216] Since the Florida voucher program was passed, at least eleven states have entertained bills pertaining to vouchers and/or school choice in the last two years. *See* Kafer, *supra* note 214.

[217] FLA. STAT. ch. 1008.33 (2003). Each public school is assigned a grade of "A" through "F" based on the proportion of its students earning a passing grade on the Florida Comprehensive Assessment Test. *Id.* § 1008.34.

established notwithstanding Article I, Section 3 of the Florida Constitution which states that:

> No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.[218]

Today, opportunities for school choice in Florida exceed the federal requirements set out in President Bush's "No Child Left Behind" Act as Florida parents have both public and private school choice options whenever a school fails to meet state requirements in two of four years.[219] "By offering vouchers to students" as a legal sanction against underperforming public schools, "the Florida plan is intended to motivate those schools to improve their academic performance."[220]

At the national level, the call for more public aid to religious institutions as a whole has intensified in the wake of *Zelman*. In April 2003, Education Secretary Rod Paige raised a storm of protest when he remarked:

> All things equal, I would prefer to have a child in a school that has a strong appreciation for the values of the Christian community, where the child is taught to have a strong faith . . . . That's not the case in a public school where there are so many different kids with different kinds of values.[221]

Secretary Paige's department oversees federal programs serving the nation's 86,000 public schools. "His department recently advised the nation's public school districts that public schools that blocked the religious expression of students on school grounds risked losing federal money."[222]

President Bush also has taken steps to further undercut the wall of separation between church and state by establishing his "Faith-Based

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[218] FLA. CONST. art. I, § 3.

[219] Federal law requires only public school choice and only when a school has failed to meet adequate yearly progress for two consecutive years. 20 U.S.C. § 6136(b)(1)(A), (E) (2003).

[220] LISA SNELL, SCHOOL VOUCHERS AS A LEGAL SANCTION 3 (Reason Public Policy Institute, Policy Study No. 284, July 2001), *available at* www.rppi.org/ps284.pdf (on file with author).

[221] *See* Schemo, *supra* note 5.

[222] *Id.*

Initiative" program. In December 2002, he "issued executive orders telling federal agencies not to discriminate against religious groups in awarding social services contracts."[223] In January 2003, the President authorized the Department of Housing and Urban Development to oversee the use of tax dollars to build religious centers where worship occurs, "as long as part of the building is used for social services."[224] A few months later, he authorized the use of "federal grants to renovate churches and religious sites that are designated historic landmarks."[225] Most recently, he has been seeking from Congress legislation that would make it easier for "religious groups to compete for government grants" and "favor members of their own faith in hiring," thereby ignoring anti-discrimination laws.[226] "I continue to urge Congress to take additional steps to end discrimination against faith-based organizations," he stated during an interview.[227] The United States Senate responded in April to the President's request by passing a "pared" down version of his "faith-based initiative" program entitled the Charity, Aid, Recovery and Empowerment Act.[228] Thus, in the rush to capitalize on the *Zelman* decision, the President, Congress, and wall opponents have been trampling upon the last vestiges of the Establishment Clause.

VII. CONCLUSION

Since the Second World War, the arena of public and private education has become the primary battleground upon which the struggle to tear down the "wall of separation" between church and state has been waged. Thomas Jefferson and James Madison sought to protect the new Republic from

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[223] *See* Laurie Goodstein & Richard Stevenson, *In Shift, U.S. to Offer Grants to Historic Churches*, N.Y. TIMES, May 28, 2003, at A15.

[224] *See* Adam Cohen, *What Mr. Jefferson Would Think of Ms. Myles's Addiction Program*, N.Y. TIMES, Mar. 9, 2003, at 12.

[225] Goodstein & Stevenson, *supra* note 223.

[226] *See* Sheryl G. Stolberg, *Senators Set Deal on Religion-Based Initiative*, N.Y. TIMES, Mar. 29, 2003, at A8.

[227] *See* Sheryl G. Stolberg, *Senate Passes Version of Religion Initiative*, N.Y. TIMES, Apr. 10, 2003, at A24.

[228] Charity, Aid, Recovery and Empowerment (CARE) Act of 2003, S. 476, 108th Cong., 1st Sess. (2003). The Charity, Aid, Recovery and Empowerment Act offers tax advantages intended to encourage charitable giving and benefit soup kitchens, maternity homes and other community groups. It would increase social services grants to states by $1.3 billion and "would provide technical assistance to small groups, including black and Hispanic churches, that need help competing for federal financing." Stolberg, *supra* note 227.

religious strife by erecting a wall of separation between church and state at the outset of the American experiment. They believed that religious liberty could be achieved best under a government which was prohibited from taxing or supporting religious activity of any kind, or from interfering with the religious beliefs of any individual or group. Jefferson's *Bill for Establishing Religious Freedom*[229] and Madison's *Memorial and Remonstrance*[230] provided the intellectual and philosophical foundations for the Establishment Clause of the First Amendment, which today continue to enshrine the basic prohibition against government aid to religion.

Over the last four decades, however, the wall of separation between church and state as it applies to education gradually has been torn down due to increased pressure from religious groups for more school choice and the changing ideological composition of the Supreme Court. From the Court's decision in *Everson* recognizing a strict adherence to the wall of separation to its most recent ruling in *Zelman* authorizing school vouchers, numerous exceptions to the "no aid to religion" principle were carved out to permit government aid to flow to religious schools. The *Lemon* test, the doctrine of divertibility, and the "pervasively sectarian" standard were examples of these exceptions or tests established by the Court to assess the validity of government aid programs. The application of these tests often yielded outcomes that reflected the ideological preferences of individual Justices for a particular aid program.

The wall of separation between church and state began to crumble in the 1990s, following the appointment of Justice Clarence Thomas to the Supreme Court. With five conservative Justices on the Bench (Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy and Thomas), the Supreme Court handed down several important decisions, including *Mueller*, *Zobrest*, *Agostini*, and *Mitchell*, which overruled earlier precedents and undercut the stricter "no aid to religion" standard used to assess the constitutionality of government aid programs benefiting religious schools. In renouncing the "no aid to religious" principle, the Court removed the foundation upon which the wall had been erected. The crumbling of the wall opened the door to vouchers in *Zelman* which in turn set the stage for increased government involvement in religious education for years to come.

In the wake of the *Zelman* decision, conservative leaders in Washington and various states have been pressing forward with plans to establish voucher schemes and other government aid programs benefiting religious

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[229] VIRGINIA STATUTES AT LARGE, *supra* note 12.

[230] Madison, *supra* note 18.

schools.[231] The Bush Administration's support for these plans coupled with the movement for greater accountability in public schools are indicative of the continuing push to ensure that public aid is redirected away from public education toward private and religious education.[232] Moreover, the President's successful push on Capitol Hill to direct more public aid to religious groups through his "Faith-Based Initiative" campaign reveals that all three branches of the Government are committed to the use of taxpayer money to further sectarian ends.[233] With the "wall of separation" between church and state practically demolished and a compliant Supreme Court majority supporting the President's agenda, opponents of the wall of separation appear to be winning their struggle to strengthen the government's role in religious affairs.

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[231] *See supra* notes 2–5, 215–28, and accompanying text.
[232] *See supra* notes 2–3, 223, and accompanying text.
[233] *See supra* notes 3–5, 223–28, and accompanying text.