Loyola University Chicago Law Journal

Volume 25
Issue 3 *Spring 1994*

Article 3

1994

Can Science Guide Legal Argumentation? The Role Of Metaphor in Constitutional Cases

Stephen J. Safranek
Assist. Prof. of Law, University of Detroit Mercy School of Law

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Stephen J. Safranek[*]

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* Assistant Professor of Law, University of Detroit Mercy School of Law; B.A., University of San Francisco, 1981; M.A., University of Dallas, 1983; M.A., J.D., University of Notre Dame, 1988. The author wishes to give special thanks to the University of Detroit Mercy School of Law and the Dean of the Law School, Bernard Dobranski, for granting summer research grants, without which this Article would not exist. Also, the author would like to thank his research assistants Kristen Niemi and Diana Azzopardi for their help on this Article. Finally, thanks must be extended to Marguerite Hanes, whom I directed to do a research paper on the wall of separation. This paper makes her practically a co-author on part III.

I. INTRODUCTION

Thomas Kuhn provided the world with new insights into the nature of scientific theories in his classic text, *The Structure of Scientific Revolutions*.[1] In his postscript to the second edition, Kuhn described paradigms as accounts of the world shared by members of a pertinent scientific community.[2] He noted that paradigms "supply the group with preferred or permissible analogies and metaphors" which "help to determine what will be accepted as an explanation and as a puzzle-solution" for problems that the pertinent scientific community faces.[3]

Scientists view shared metaphors and analogies as the means for solving future problems or "test-cases." According to Kuhn, paradigms help students to see problems as being *like* those that they have seen before.[4] By working through test cases, the student gains a "group-licensed way of seeing."[5] This permits the student, for example, to identify the equation "f=ma" and apply it to countless particular instances.

In the law, professors, practitioners, and judges use metaphors and analogies not only to examine the particular cases before them, but also to determine how to interpret future cases. Yet, unlike scientists or poets, judges often use metaphors in legal decisions to create obscurity rather than clarity.[6]

Over the years, metaphors have increasingly become part of the scientific landscape as scientists have attempted to describe those things that we cannot see. Likewise, poets have long used metaphors to describe the unseeable or directly unknowable in terms of the knowable. Both scientists and poets use metaphor to provide understanding. By contrast, the use of metaphors in the law has not provided such understanding. One legal scholar has claimed that "[t]here is a residual mystery to the process of meaning of our legal metaphors," that both metaphors and law are essentially paradoxical, and that legal metaphors function as figures of speech rather than true metaphors.[7]

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1. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).
2. *Id.* at 182.
3. *Id.* at 184.
4. *Id.* at 189.
5. *Id.*
6. ARISTOTLE, *Topics*, Bk. III, 139b34, *in* W.K.C. GUTHRIE, THE LATER PLATO AND THE ACADEMY 112 (1978) ("What is expressed in metaphor is always obscure.").
7. Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053, 1076-77 (1989). Nevertheless, one must admit that "[t]he power of a metaphor is that it colors and controls the subsequent thinking about its subject." Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1383 (1988). The appeal of an effective metaphor is almost irresistible to one whose position is

Metaphors should provide understanding, not confusion. Unfortunately, the Supreme Court has not often used metaphors in this fashion. In fact, this Article argues that the Supreme Court's use of metaphor is unique in that the Court generally uses metaphor to deceive rather than to enlighten the reader. Because the Court's use of metaphors gives a "group licensed way of speaking" rather than a "group licensed way of seeing," its metaphors lack explanatory power. This Article takes the position that the Court should abandon its present approach to the use of metaphors and instead should follow the scientific and poetic approach in order to promote better understanding of the law.

This Article examines several popular metaphors that the Supreme Court uses and reveals their relative merit as guides for judges, legal scholars, and practitioners. Part II examines the Court's "rational basis test" metaphor; part III examines the Court's "wall of separation" metaphor; and part IV examines the Court's "bundle of sticks" metaphor. The Article proceeds with the view that one of the Supreme Court's primary roles is to interpret the Constitution by "creating a framework within which individuals more confidently and freely can formulate and carry out their personal and social projects."[8] In other words, it is the Court's role to provide guidelines for action.

Opponents of clear metaphors argue that instead of developing rules, courts should dispense justice through case-by-case analysis.[9] Advocates of rules and general principles, however, argue that judges, especially Supreme Court Justices, should set forth principles to dispense justice (i.e. equality) and provide predictability.[10] Without disputing either position, this Article argues that the Court's use of metaphors is an attempt to set forth principles or at least to create the impression that the Court is principled. The Article demonstrates, however, that while the Court's use of the "rational basis test" appears to embody an objective principle, it is frequently used to mask *ad hoc* decisions of the Court. Similarly, the Court's misuse of the "wall of separation" metaphor in the church and state context has resulted in considerable clouding of Establishment Clause jurisprudence and has done little to clarify important constitutional issues of church and state relations. On the other hand, the "bundle of sticks" metaphor, used in

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bolstered through its use.

8. Steven Smith, *Reductionism in Legal Thought*, 91 COLUM. L. REV. 68, 72-73 (1991). *See also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

9. Scalia, *supra* note 8, at 1176.

10. *Id.* at 1178-79.

the property rights context, has served as a useful metaphor in providing guidance and understanding to courts and practitioners. Ultimately, the Article attempts to answer the question: should the Court use metaphors and, if so, what purpose should metaphors serve?

This investigation will reveal that the Court's use of metaphors in First and Fourteenth Amendment cases is an attempt to mask what the Court seems unwilling to admit: that the Court lacks a paradigm. Although the Court seems to realize the worthlessness of its metaphors as guideposts, it nevertheless uses these metaphors to mask the random nature of its decisions as it projects an appearance of scientific objectivity upon the Supreme Court's decisions.

II. THE RATIONAL BASIS TEST

A. What is a "Test?"

One of the common metaphors in modern constitutional law is that of a "test." Ordinarily, one thinks of a test as a well articulated procedure designed to check compliance with certain standards, as in the testing of a product or a laboratory result. The word "test" evolved from the thirteenth century, when it was used to describe an item used by metalsmiths to determine the purity of alloys of gold and silver.[11] It has passed into our language as meaning "that by which the existence, quality or genuineness of anything is or may be determined."[12] The word "test" is commonly used in several contexts—for example, doctors test their patients' reactions and law professors test their students. When used in these ways, the word "test" retains two basic aspects. First, it involves the application of uniform standards. Thus, in testing a patient's eyesight, a doctor compares the patient's vision to that of a normal person at twenty feet. Second, because it involves uniform standards, a test is thought to have a degree of objectivity. This suggests that different persons performing the same process on an identical object will achieve similar, if not identical, results. If they do not, one does not question the validity of the test itself; rather, the explanation is thought to lie in the manner in which different people perform the same test. Therefore, in order to have a test, one must establish procedures and criteria by which one may determine whether an object or concept has met a given standard.[13]

11. XVIII OXFORD ENGLISH DICTIONARY 825 (2d ed. 1989).

12. *Id.*

13. This description of a test is not meant to be all encompassing, but merely to

B. The "Test" in the Fourteenth Amendment

The Supreme Court's use of the word "test" stretches the metaphor so far beyond its meaning that it becomes almost meaningless. This point is perhaps no more apparent than in the Court's use of the "rational basis test" metaphor in Fourteenth Amendment analysis. A survey of several cases reveals the uselessness of the "test" metaphor as a means of promoting better understanding of the Fourteenth Amendment.

The Supreme Court first used the term "rational basis test" in *Thomas v. Collins*,[14] which involved the appeal of a petition for habeas corpus.[15] Petitioner Thomas, president of the United Automobile, Aircraft and Agricultural Implements Workers Union, was cited for contempt of court and ordered to spend three days in jail for violating a temporary restraining order issued by the Texas District Court for Travis County.[16] The court had issued the order pursuant to a Texas law which prohibited persons from soliciting others for union membership without first obtaining an organizer's card.[17] Before the Supreme Court, Thomas argued that his prosecution under this law violated both his First Amendment rights as incorporated via the Fourteenth Amendment and his Fourteenth Amendment right of equal protection of the laws.[18]

The State of Texas, on the other hand, likened its attempt to regulate union solicitation practices to various state attempts to regulate commercial transportation, and it urged the Court to apply the "Commerce Clause" standard to determine whether the statute passed muster under the Federal Constitution.[19] The Court summarized the state's argument as one calling for the application of a "'rational basis'

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highlight the basic aspects of something generally called a test.

14. 323 U.S. 516 (1945).

15. *Id.* at 518.

16. *Id.* at 518-24.

17. *Id.* at 521. The Texas statute generally required all labor union organizers in the state to request and obtain a registration card before soliciting persons for union membership. The statute also required labor organizers to carry the card whenever they engaged in the practice of labor organizing. Failure to comply with the statute was a misdemeanor, punishable by a fine not exceeding $1,000, sixty days confinement in the county jail, or both. *Id.* at 519 n.1.

In anticipation of a well-publicized speech, during which Thomas was to encourage particular individuals to join a union, the trial court specifically enjoined Thomas from soliciting members before first obtaining an organizer's card. *Thomas*, 323 U.S. at 521 n.3. Thomas violated the order and was arrested. *Id.* at 522-23.

18. *Id.* at 518.

19. *Id.* at 527. Note that the "Commerce Clause" standard is also a metaphor.

test."[20]

It is difficult to ascertain why the Court chose to characterize the "Commerce Clause" standard as a test. Nonetheless, with the growth of science before and during the Second World War, the idea that a legal standard could be considered a "test" must have been an engaging metaphor for the Court. The Court refused to apply the "Commerce Clause" standard but instead determined that the nature of the liberties at stake called for a different criteria: "whatever occasion would restrain orderly discussion and persuasion, at an appropriate time and place, must have clear support in public danger, actual or impending."[21]

This description of the standard by which the Court judged the constitutionality of the statute at issue in *Thomas* is deficient for two reasons. First, the criteria are unclear. Although the Court held that the legality of the statute turned on whether the discussion restrained by the State occurred at an "appropriate time and place" and whether there was "clear support" for the State's action,[22] the Court failed to define either of these criteria. The mere articulation of the criteria by which the Court evaluated the constitutionality of the statute in *Thomas* does not alone indicate that the Court would reach a particular result. Thus, to understand how the Court would interpret these criteria, it would be necessary to look beyond the Court's articulated standard to the actual application of the criteria to the statute at issue in *Thomas*.

This raises a second problem. At the time it announced the standard in *Thomas*, the Court used a descriptive approach to Fourteenth Amendment protections that set forth several concepts so nuanced that one could only understand them by applying the stated principles to the particular facts at issue. Because these criteria were so susceptible to yielding different results based on minute and subtle variations in the particular facts at issue, no lawyer who had read *Thomas* at the time would have expected subsequent applications of this case to be objective, despite the Court's use of the word "test."

Although the term "rational basis test" did not appear until 1945, the Court had discussed tests at least ten years before *Thomas*. In *Metropolitan Casualty Insurance Co. v. Brownell*,[23] the Court faced the issue of whether an Indiana statute that discriminated between domestic and out-of-state insurers was constitutionally valid.[24] The

20. *Id.*
21. *Thomas*, 323 U.S. at 530.
22. *Id.*
23. 294 U.S. 580 (1935).
24. *Id.* at 582.

Court stated that the "ultimate test of validity is not whether foreign corporations differ from domestic, but whether the differences between them are pertinent to the subject with respect to which the classification is made."[25] The Court failed to define "pertinent," however. Moreover, its attempt to clarify what "differences" may serve as legitimate bases for differing treatment established such a broad standard that the term was useless. According to the Court, "[i]f those differences have any rational relationship to the legislative command, the discrimination is not forbidden."[26] Certainly, few lawyers will lack the ability to find any rational basis for a law that discriminates between residents and non-residents. Thus, in *Brownell*, the Court's analysis informs the lawyer only that legislation that treats corporations differently merely on the basis of whether the corporations are foreign or domestic violates the Equal Protection Clause.

The metaphorical use of the word "test" adds nothing to the Court's description of the legal standard to be applied. Its use is even more devoid of meaning in light of the Court's statement that discrimination will be upheld if it bears "any rational relationship to the legislative command"[27] and "if any state of facts reasonably may be conceived to justify it."[28] These broad pronouncements eviscerate the concept of a test.

In its elaboration of the test, the Court added new language to the analysis: the word "reasonabl[e],"[29] which is often used interchangeably with "rational." "Reasonable" is an ambiguous word which, when coupled with the word "test," produces a term that appears almost as oxymoronic as "substantive due process." The key to the outcomes of subsequent cases in this area, as will be discussed, is not whether a law is "rational," but whether the law is subject to a "rational basis" analysis.

The use of the "test" metaphor in this context thus has become meaningless. Instead of using it as a source of illumination and enrichment, the Court has used the word "test" and its sense of objectivity in the scientific world to hide arbitrary decision-making. The Court's treatment of cases in this area is thus disingenuous. It is analogous to scientists performing a test, even though they already know the results, or teachers conducting exams even though the outcomes have been predetermined. As certain examples of the Court's applica-

25. *Id.* at 583.
26. *Id.*
27. *Brownell*, 294 U.S. at 583.
28. *Id.* at 584.
29. *Id.*

tion or non-application of the "rational basis" test illustrate, such applications are not "tests" as scientifically or commonly understood.

In one of the most important cases of the 1960s, *Harper v. Virginia Board of Elections*,[30] the Court struck down a state poll tax without explanation.[31] Distinguishing a case in which it had upheld literacy testing as a permissible precondition to the right to vote in state elections,[32] the Court concluded that the poll tax violated the Fourteenth Amendment's Equal Protection Clause and reasoned that "[v]oter qualifications have no relation to wealth nor to paying or not paying this or any other tax."[33] The Court further described wealth as a "capricious or irrelevant factor" as a measure of voting qualifications,[34] even though, as Justice Black demonstrated in his dissent, the majority's trivialization of wealth classifications lacked foundation and the State's requirement of payment of a poll tax might indeed have had some rational basis.[35]

Justice Black's dissent reveals the problem with the Court's "equal protection test" metaphor. In his dissent, Justice Black noted that the Court's prior decisions interpreting the Equal Protection Clause, including the Court's opinion in *Breedlove v. Suttles*,[36] provided states with "the broadest kind of leeway in areas where they have a general constitutional competence to act."[37] Furthermore, he noted that the Virginia law, both as written and as applied, did not deny African-Americans the right to vote.[38] In examining the problem with the

30. 383 U.S. 663 (1966).

31. *Id.* at 666. At the time, § 173 of the Virginia Constitution directed the Virginia General Assembly to levy an annual poll tax not to exceed $1.50 on every Virginia resident 21 years or older. *Id.* at 664 n.1. Payment of the poll tax, the proceeds of which were used to fund public schools and for other general purposes, was a precondition of voting. *Id.* Virginia residents brought suit against the Virginia State Board of Elections, contending that the State's poll tax violated the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution. *Id.* at 664-65.

32. *Harper*, 383 U.S. at 665-66. The Court distinguished Lassiter v. Northampton County Board of Elections, 360 U.S. 45 (1959), on the ground that "unlike [the] poll tax, the 'ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot.'" *Harper*, 383 U.S. at 666 (quoting *Lassiter*, 360 U.S. at 51).

33. *Harper*, 383 U.S. at 666. The Court had previously stricken home site and occupation requirements on the same basis. *Id.* at 667. *See* Gray v. Sanders, 372 U.S. 368 (1963).

34. *Harper*, 383 U.S. at 668.

35. *Id.* at 674-75 (Black, J., dissenting).

36. 302 U.S. 277 (1937), *overruled by* Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

37. *Harper*, 383 U.S. at 674 (Black, J., dissenting).

38. *Id.* at 672 (Black, J., dissenting).

"equal protection test" metaphor, Justice Black noted that all laws treat certain groups differently from others and that many laws permissibly discriminate among persons with respect to voting. Justice Black observed, for example, that the Court had held that States could deny their citizens the right to vote in state elections on the basis of age or literacy.[39] He thus concluded that the Constitution permits a state to enact a poll tax either to collect revenue or to measure a person's interest in the welfare of the state,[40] because neither of these is an irrational reason for the tax.

Although the Court's holding in *Harper* may have advanced what many would consider to be better government policy than that embodied in the Virginia poll tax, the Court nevertheless failed to support its implicit rejection of *Breedlove*. The Court's decision provides one of the early glimpses into the fracturing of the Equal Protection Clause, reflecting the idea that certain "fundamental" rights, including the right to vote, are protected in ways that "economic" rights are not.[41] While the special protection accorded voting rights explains why the Court struck down the poll tax in *Harper*, it does not explain how *Harper* differs from *Breedlove*. The development of a range of Fourteenth Amendment protections reveals the ultimate uselessness of the "test" notion. As virtually all the later decisions make clear, the actual test occurs when the Court decides which level of scrutiny to apply to a given law. The Justices decide this preliminary but critical question only on the basis of their personal views regarding what constitutes a fundamental right or a special class. The revelation that the Justices' personal preferences, rather than some objective test, are at the heart of the Court's constitutional analysis demonstrates the general *ad hoc* nature of the Court's decisions.

The Court's opinion in *Craig v. Boren*[42] illustrates this point. In *Craig*, the Court struck down an Oklahoma statute that discriminated between men and women with respect to the minimum age for the sale of beer containing 3.2% alcohol.[43] The Court described the appropri-

39. *Id.* at 673 (Black, J., dissenting).

40. *Id.* at 674 (Black, J., dissenting).

41. *See id.* at 666-67 (characterizing the right to vote as fundamental and advocating careful scrutiny of infringements of that right).

42. 429 U.S. 190 (1976).

43. *Id.* at 191-92. Oklahoma had enacted legislation prohibiting the sale of "'non-intoxicating'" beer (beer containing 3.2% alcohol) to females under the age of 18 and to males under the age of 21. *Id.* The State's articulated purpose for distinguishing between females and males was the enhancement of traffic safety. *Id.* at 199. In support of the gender-based discrimination, the State pointed to evidence showing that more males than females aged 18-20 had been arrested for driving under the influence of alcohol;

ate standard as whether the law "serve[s] important governmental objectives" and is "substantially related to achievement of those objectives."[44] The Court concluded that the statute at issue failed to satisfy this intermediate standard of review.[45]

Justice Stevens' concurrence recognized the problem with the multi-tiered analysis the majority had adopted. The majority's approach, Justice Stevens commented, "does not describe a completely logical method of deciding cases, but is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion."[46] He found the law unconstitutional because it was neither aimed at increasing traffic safety nor did it have a significant deterrent effect.[47] Justice Stevens' analysis illuminates the purpose of the Court's "test" metaphor. Underlying Justice Stevens' concurrence is the observation that the Court's decisions on constitutional matters are, to a great degree, the product of balancing individual rights and governmental interests. When, as in *Craig*, no groups that have traditionally been subjected to discrimination are involved and no important rights are implicated, the Court's weighing seems petty. The Oklahoma legislature should be free to adopt legislation it deems appropriate to lower the incidence of drunken driving on its state highways. Justice Rehnquist's forceful dissent espoused this position, noting that the Court should have applied the "rational basis" test to determine whether the legislation at issue in *Craig* violated the Equal Protection Clause.[48]

Justice Steven's concurrence and Justice Rehnquist's dissent demonstrate that the Court is attached to the test metaphor because it does not want to appear to be acting like a legislature. Therefore, the Court applies what it asserts is an objective standard because it wants to appear to be making an objective determination, even if and when it *is* acting like a legislative body. The more the Court engages in weighing the particular facts of cases, the more it needs to appear objective to retain its legitimacy. Thus, the less objective its analysis becomes, the more it insists that some special objective standard guides its decisions.

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more males than females between the ages of 17-21 had been involved in traffic accidents; and that young males were more likely than females to drink beer and drive. *Id.* at 200-01.

44. *Craig*, 429 U.S. at 197.

45. *Id.* at 199-200.

46. *Id.* at 212 (Stevens, J., concurring).

47. *Id.* at 213-14 (Stevens, J., concurring).

48. *Id.* at 221-22 (Rehnquist, J., dissenting).

Minnesota v. Clover Leaf Creamery Co.[49] highlights the Court's attempt to appear objective in its constitutional interpretation. In *Clover Leaf Creamery*, it became apparent that the "rational basis" test had become a part of the language of constitutional cases. First, the Court noted that "[t]he parties agree that the standard of review applicable to this case under the Equal Protection Clause is the familiar 'rational basis' test."[50] The Court then explained that the test involves an inquiry into whether the legislation's classifications are rationally related to the statute's legitimate purposes.[51]

This "test," however, is not a test in any sense, as the Court's own analysis reveals. The Court noted that the party challenging the constitutionality of the classifications in the statute at issue bore the burden of showing "'that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.'"[52] Given the variety in viewpoints among members of state and federal legislatures, it would be nearly impossible for a court to conclusively determine that a legislature could not have reasonably conceived that the facts on which the legislation is based were true. Thus, the Court has established a standard in Equal Protection Clause cases that is virtually impossible for plaintiffs to meet. Two cases further highlight this problem.

In *Banker's Life & Casualty Co. v. Crenshaw*,[53] the Court expanded the "rational basis" test. In *Crenshaw*, a Mississippi statute required appellants who had unsuccessfully appealed money judgments entered against them to pay appellees an additional fifteen percent of the judgment rendered against them by the trial court.[54] The petitioner challenged this law under the Equal Protection Clause because it singled out appellants involved in money judgments.[55] The Supreme Court reviewed this challenge under the "rational basis" test.[56] Under this test, legislation is presumed valid and will be upheld if the challenged classification is "rationally related to a legitimate state interest."[57] The Court noted that the Mississippi law served several legitimate state interests, including preventing a squeeze on successful

49. 449 U.S. 456 (1981).
50. *Id.* at 461.
51. *Id.* at 462-63.
52. *Id.* at 464 (quoting Vance v. Bradley, 440 U.S. 93, 111 (1979)).
53. 486 U.S. 71 (1988).
54. *Id.* at 80.
55. *Id.* at 81.
56. *Id.*
57. *Id.*

parties, discouraging frivolous appeals, providing compensation to successful appellees, and conserving judicial resources.[58] Moreover, the Court reasoned that because appeals involving money judgments are easily assessed a fifteen percent penalty while other types of judgments cannot be assessed as easily, the classification was rational.[59] Accordingly, the Court upheld the statute.[60]

The decision reveals the vacuity of the notion that the Court was conducting a "test." As the petitioners argued, the state's classification treated with prejudice parties who appealed the entry of money judgments against them.[61] Mississippi could have written a fairer law—at least with respect to the stated purposes behind the challenged statute—that could have required all losing appellants to pay the appellee's attorney fees, or that could have imposed other sanctions. The state legislature, however, instead chose to adopt a law that singled out appellants of money judgments. The Court accepted the discriminatory treatment imposed by the Mississippi statute because the percentage of the penalty did not appear too high and because the Court had little interest in protecting the group of people affected. Although neither of these reasons for upholding a law is necessarily bad, they reveal that the Court's decision to uphold the law was based only upon the Justices' personal views. A decision to uphold a law merely because it does not disturb members of the Court can only be characterized as *ad hoc*.

Finally, in one of the most interesting recent equal protection cases, *Cleburne v. Cleburne Living Center, Inc.*,[62] the Court resolved a situation in which the State of Texas refused to provide a special use permit to a home for mentally handicapped persons.[63] The Supreme Court's majority opinion noted that the court of appeals had incorrectly applied an intermediate scrutiny standard rather than applying the

58. *Crenshaw*, 486 U.S. at 81-82.

59. *Id.* at 83-84.

60. *Id.* at 85.

61. *Id.* at 80-81.

62. 473 U.S. 432 (1985).

63. *Id.* at 435. The permit was required by a city zoning ordinance that required a special use permit for the construction of "'[h]ospitals for the insane or feeble-minded, or alcoholic [sic] or drug addicts, or penal or correctional institutions.'" *Id.* at 436 (footnote omitted). After determining that the proposed home fell under the classification of a "hospital for the feeble-minded" and holding a public hearing on the permit application, the city denied the application. *Id.* at 436-37. The principals behind the home then filed suit against the city, arguing that the zoning ordinance's classifications discriminated against the mentally retarded in violation of the Equal Protection Clause. *Id.* at 437.

"rational basis" test.[64] After summarizing the various levels of scrutiny that apply to different groups and rights,[65] the Court refused to grant the mentally handicapped special protection, in part, because both federal and state governments had created laws to protect them.[66] The Court failed to recognize that such an argument, if taken seriously, would eliminate special scrutiny for almost all classes and rights.

The determination of the appropriate level of scrutiny to apply to the statute ultimately turned on the Court's concern that if it upheld a special classification for the handicapped, it would open this area of the law to a variety of suits.[67] If the mentally handicapped deserved special classification, so too, the Court noted, might "the aging, the disabled, the mentally ill, and the infirm."[68] Nevertheless, even though it applied the "rational basis" test, the Court rejected Cleburne's zoning regulation because it could find no rational reason to treat the mentally handicapped differently from other groups that were not subject to the zoning restrictions.[69] Here, unlike in *Banker's Life*, the Court was unwilling to allow the local government to make distinctions on the basis of a difference far more substantial than that between money and non-money judgments. Moreover, the Court seemed to conclude that the City was using the ordinance to punish the mentally handicapped despite the City's stated objective that it enacted this legislation to protect them.[70]

Justice Marshall, who filed an opinion concurring in part and dissenting in part, highlighted the point that although the Court purported to evaluate the ordinance under a "rational basis" test, it actually used a far more searching inquiry. He opined that "Cleburne's ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation"[71] and that Cleburne's standards would stand under the "one step at a time" rule of *Williamson v. Lee Optical*[72] and its progeny.[73] Thus,

64. *Cleburne*, 473 U.S. at 442.

65. *Id.* at 439-42.

66. *Id.* at 443-46.

67. *Id.* at 445-46.

68. *Id.*

69. Among its reasons for rejecting the home for the handicapped, the City expressed concern about the "size of the home and the number of people that would occupy it." *Cleburne*, 473 U.S. at 449.

70. *Id.* at 448-50.

71. *Id.* at 456 (Marshall, J., concurring in part and dissenting in part).

72. 348 U.S. 483 (1955).

73. *Cleburne*, 473 U.S. at 458 (Marshall, J., concurring in part and dissenting in part) (citing *Lee Optical*, 348 U.S. at 489). Justice Marshall's reference was to the rule that "under the traditional and most minimal version of the rational-basis test, 'reform

Justice Marshall recognized that the majority opinion opened the door to a more searching inquiry in cases where the Court had traditionally applied a more deferential "rational basis" standard.[74] In Justice Marshall's view, the majority failed to provide any justification for this more exacting "rational basis" scrutiny.[75]

C. *Conclusions on the "Test" Metaphor*

As a consequence of the Court's decisions, the notion of a "test" permeates the discourse of practitioners, professors, and students of constitutional law. Although the term has become entrenched in constitutional analysis, it masks the *ad hoc* nature of Supreme Court decisions. Interestingly, the "test" metaphor has been extensively used in Fourteenth Amendment equal protection and due process analysis and in First Amendment Establishment Clause analysis, even though these areas of constitutional law are among the most politically charged and least understandable of the Court's decisions. Few people can predict the Court's decisions in these areas and even fewer can explain the Court's reasoning in reaching its decisions. Instead of applying an objective standard, commentators merely count noses based upon prior decisions and perceived ideological leanings of Court members.

The so-called tests do not test anything. As every professor of constitutional law knows, if the Court chooses to apply the "rational basis" test, the legislation nearly always passes scrutiny. The crucial analysis, which involves the decision whether to subject the particular legislation to the "rational basis" test, occurs before the test is even applied. Far from resting on objective criteria, this process of selecting the level of scrutiny for each classification involves policy and moral judgments.

Therefore, while the Court tries to make its decisions appear straightforward, its most important decisions are rooted in policy or ideological leanings. Few of the Court's "tests" actually function as tests or provide clear and predictable answers to modern legal problems. Thus, the metaphor of a "test" lacks meaning.

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may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'" *Id.* (quoting *Lee Optical*, 348 U.S. at 489).

74. *Cleburne*, 473 U.S. at 460 (Marshall, J., concurring in part and dissenting in part).

75. *Id.* (Marshall, J., concurring in part and dissenting in part).

III. THE WALL OF SEPARATION

A. What is a "Wall?"

The Supreme Court's First Amendment decisions have provided the public and attorneys with the most well-known metaphor of constitutional law: the "wall of separation between church and state." This metaphorical "wall" invokes a mental image of the Great Wall of China, the Iron Curtain, or a backyard wall. Each of these walls has two general but core characteristics. First, a wall is a distinct divider that provides clear boundaries. Second, a wall actually divides or separates things. As the following analysis shows, however, the Court's use of the "wall of separation" metaphor has served neither of these purposes. The Court has used it neither to clarify nor to divide. Indeed, it is a metaphor without meaning in the Court's usage.

Thomas Jefferson created the "wall of separation" metaphor on January 1, 1802, in a letter that he wrote while President to the Danbury Baptist Association to explain his refusal to declare a national day of prayer and fasting.[76] In that letter, President Jefferson compared essentially different things by using a metaphor that was to have a profound impact on the Supreme Court of the United States: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State."[77] Jefferson substituted an impressive figurative phrase for the literal words of the religion clauses; his metaphor clarified lofty constitutional language, added emotional intensity to a stark quotation, and succinctly conveyed the writer's feelings and attitude.

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76. Letter from Thomas Jefferson to Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptist Association (Jan. 1, 1802), *reprinted in* SAUL K. PADOVER, THE COMPLETE JEFFERSON 518-19 (2d ed. 1969). Some have attributed the "wall" metaphor to an earlier source than Jefferson. *See* Ross, *supra* note 7, at 1064. Ross notes that Roger Williams, a seventeenth century colonial advocate of religious tolerance and separatism, wrote of a wall separating "'the garden of the church and the wilderness of the world[.]'" *Id.* (quoting R. Williams, "Mr. Cotton's Letter Lately Printed, Examined and Answered," *in* P. MILLER, ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION 98 (1953)). In Williams' view, the wall was needed to protect religious institutions from the evils of the secular world. *See id.*

77. Letter from Thomas Jefferson to Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptist Association (Jan. 1, 1802), *reprinted in* PADOVER, *supra* note 76, at 519. The quotation is from the First Amendment of the U.S. Constitution, which provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

Like all poetic devices, Jefferson's metaphor condensed a wealth of concepts into a few words. Once in the Court's vocabulary,[78] the "wall of separation" took on a life of its own as the foremost paradigm of church-state relationships under the Constitution. Although the frequency with which the Court has cited Jefferson's metaphor has been erratic[79] and the "wall" is currently unpopular with the Court,[80] the influence of the concept has been and continues to be pervasive. The Court has identified the wall almost exclusively with the Establishment Clause alone,[81] despite Jefferson's language to the contrary. Perhaps not coincidentally, the Court's difficulties in this area of constitutional law are almost as infamous as the "wall of separation" itself.[82]

Whether the Court's use of the "wall of separation" ever coincided with Jefferson's original meaning is an issue that other commentators of constitutional law have examined.[83] This Article focuses on what

78. Jefferson's metaphor appeared for the first time in Reynolds v. United States, 98 U.S. 145, 164 (1878), discussed *infra* part III.B.

79. The ebb and flow of the Court's use of the "wall" metaphor is outlined in Joel F. Hansen, Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 B.Y.U. L. REV. 645, 646-48 (1978).

80. The Court's recent opinions either directly or indirectly disclaim any reliance on the "wall." *See* Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989); Wallace v. Jaffree, 472 U.S. 38 (1985); Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646 (1980), discussed *infra* text accompanying notes 218-51; *but see* Lee v. Weisman, 112 S. Ct. 2649, 2662 (1992) (Blackmun, J., concurring) (noting that "[i]n the words of [Thomas] Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State'" (quoting Everson v. Board of Educ., 330 U.S. 1, 16 (1947) (citation omitted))). In *Wallace*, the majority omitted any reference to the "wall," and Justice Rehnquist's dissent attacked the metaphor's validity. *See Wallace*, 472 U.S. at 91-114; *see also infra* note 82.

81. The Court has also used the metaphor interchangeably to describe the religion clauses together and the Establishment Clause alone, even in the same case. *See Everson*, 330 U.S. at 16, 18. The Supreme Court's opinion in *Everson* is discussed *infra* part III.C.1.

82. The Court has often acknowledged that it has encountered problems interpreting the Establishment Clause. *See, e.g., Wallace*, 472 U.S. at 112 (Rehnquist, J., dissenting) ("We have done much straining since 1947 [the year in which the Court decided *Everson*], but still we admit that we can only 'dimly perceive' the *Everson* wall."); *Regan*, 444 U.S. at 662 (Blackmun, J., dissenting) ("Establishment Clause cases are not easy . . . and we are divided among ourselves . . . ."); Wolman v. Walter, 433 U.S. 229, 263 (1977) (Powell, J., concurring in part and dissenting in part) (acknowledging that the Court's approach to Establishment Clause cases lacks "analytical tidiness"). *Wolman* is discussed *infra* part III.E.

83. *See* Hansen, *supra* note 79, at 651-74; Rodney K. Smith, *Getting Off on the Wrong Foot and Back On Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the* Reynolds *and* Everson *Decisions*, 20 WAKE FOREST L. REV. 569 (1984); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1449-55 (1990).

the Court has said and done to Jefferson's metaphor and what Jefferson's metaphor has done to the Court.

B. The "Wall" Appears

Jefferson's metaphor probably gained its status in the Supreme Court's First Amendment jurisprudence in part because of its relatively early appearance in *Reynolds v. United States*,[84] the first major case presented to the Court for interpretation of the First Amendment's religion clauses. Reynolds, a Mormon from the Utah Territory, challenged his conviction under a federal criminal bigamy statute as a violation of his free exercise rights.[85] To determine the scope of the constitutional guarantee of religious freedom that the Framers intended, the Court conducted a brief historical review of the period of time surrounding the adoption of the First Amendment, from which Thomas Jefferson emerged as the dominant figure.[86]

In one short paragraph, the Court noted that official religion, taxation for its support, and laws dictating doctrine, practices, and punishment for violations had been common in the colonies.[87] These circumstances, the Court observed, had led to a controversy that culminated in the proposal of a tax bill to the Virginia House of Delegates in 1784 for the support of Christian teachers.[88] In a second paragraph, the *Reynolds* Court reported that in opposition to the proposed tax bill, James Madison had written and circulated his "Memorial and Remonstrance Against Religious Assessments,"[89] a paper arguing against an assessment in Virginia for the benefit of religious education.[90] Following this brief discussion of Madison's

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Contrary to some popular views, Jefferson was not an advocate of strict separation of church and state. Jefferson sponsored a bill in the Virginia legislature to punish Sabbath breakers, and, as President, he allowed federal support of religious missionaries to Native Americans. *See* DONALD L. DRAKEMAN, CHURCH-STATE CONSTITUTIONAL ISSUES 52 (1991). Ironically, Jefferson closed his letter to the Danbury Baptists with a prayer. *See* Letter from Thomas Jefferson to Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptist Association (Jan. 1, 1802), *reprinted in* PADOVER, *supra* note 76, at 518-19.

84. 98 U.S. 145 (1878).

85. *Id.* at 146, 161-62.

86. *Id.* at 162-63.

87. *Id.*

88. *Id.* at 163. The tax bill is reprinted as an appendix to Justice Rutledge's dissenting opinion in *Everson*, 330 U.S. at 72 (Rutledge, J., dissenting).

89. James Madison, *Memorial and Remonstrance Against Religious Assessments, in* 2 GALLARD HUNT, THE WRITINGS OF JAMES MADISON 183 (1901). "Memorial and Remonstrance" is also reprinted as an appendix to Justice Rutledge's dissent in *Everson*, 330 U.S. at 63.

90. *Reynolds*, 98 U.S. at 163.

attitude toward the relationship between the state and religion, the Court focused on Jefferson.

After the proposed Virginia tax bill was defeated, the Court noted, Thomas Jefferson drafted and introduced a bill for the establishment of religious freedom, which the House of Delegates passed in its next session.[91] The *Reynolds* Court concentrated on the preamble to Jefferson's second bill, which set forth two concepts central to the relationship between church and state: first, the state does not have power over religious opinions and beliefs, lest religious liberty be destroyed; and second, the State may exercise power when beliefs become actions that threaten peace and good order.[92] After quoting from the preamble, the Court concluded that "[i]n these two sentences is found the true distinction between what properly belongs to the church and what to the State."[93]

The Court then cited several additional historical facts to support the conclusion it had already reached. A little more than a year after Jefferson's bill was passed, the Court noted, the Constitutional Convention met, and even though Jefferson was in France at the time, he commented on the proposed Constitution.[94] The Court observed that although Jefferson was disappointed that the draft of the Constitution contained no "express declaration insuring the freedom of religion," he was "willing to accept it as it was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations."[95] The Court then reported that four states had proposed constitutional amendments for declarations of religious freedom.[96] Accordingly, Madison and other "advocates of religious freedom" proposed the First Amendment at the first session of the First Congress, and it was adopted.[97]

Finally, the Court considered Jefferson's commentary on the First Amendment, quoting the entire passage from Jefferson's letter to the

91. *Id.* Jefferson was in France when the Virginia statute was eventually passed in 1786. *See infra* note 104.

92. *Reynolds*, 98 U.S. at 163.

93. *Id.* In his autobiography, Jefferson noted that the bill had finally been enacted "with some mutilations in the preamble." 1 THE WRITINGS OF THOMAS JEFFERSON (Andrew A. Lipscomb & Albert E. Bergh, eds., 1903) [hereinafter 1 WRITINGS OF JEFFERSON].

94. *Reynolds*, 98 U.S. at 163.

95. *Id.* For Jefferson's account of what transpired, see *infra* note 104.

96. *Reynolds*, 98 U.S. at 164. The states cited by the Court were New Hampshire, New York, North Carolina, and Virginia. *Id.*

97. *Id.*

Danbury Baptists containing the "wall of separation" metaphor.[98] Without comment, the Court concluded:

> Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.[99]

After a survey of the historically vilified practice of polygamy, the Court did not hesitate to uphold the conviction.[100]

This Article appropriately describes the way in which the wall metaphor found its way into the Court's First Amendment as an "appearance"[101] because the *Reynolds* Court placed no particular emphasis on the metaphor. It simply appeared in the Court's opinion as part of the Court's larger quotation from Jefferson's Danbury letter.[102] Presumably, the Court's silence indicates that it did not view the metaphor as having any meaning independent of that of the letter itself, and the letter, in turn, only distinguished between the government's ability to legislate against an individual's actions and its absolute inability to exert any power over an individual's religious beliefs or opinions.

Given this unremarkable beginning, the metaphor may not have become as prominent as it did but for the Court's general emphasis on Thomas Jefferson's interpretation of the First Amendment's religion clauses.[103] Even though Jefferson was out of the country for five years prior to and during the drafting, debating, and finalizing of the First Amendment,[104] the Court relied on Jefferson as the definitive

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98. *See id.* See *supra* notes 76-77 and accompanying text for a more thorough discussion of Jefferson's letter to the Danbury Baptists.

99. *Reynolds*, 98 U.S. at 164.

100. *Id.* at 164-66.

101. *See supra* text accompanying note 84.

102. *Reynolds*, 98 U.S. at 164.

103. *See id.* at 163-64.

104. Jefferson was appointed "Minister Plenipotentiary" in May 1784, and sailed for France that July to join Dr. Benjamin Franklin in Paris. 1 WRITINGS OF JEFFERSON, *supra* note 93, at 89-90. He did not return to the States until November 1789, two months after Congress had finalized the Bill of Rights. *Id.* at 160. Jefferson was proud of his efforts to secure religious liberty in Virginia, but was quick to dispel any notion that he had played a role in securing religious liberty for the new nation:

> I was in Europe when the Constitution was planned, and never saw it until after it was established. On receiving it I wrote strongly to Mr. Madison, urging the want of provision for the freedom of religion, freedom of the press, trial by jury, habeas corpus, the substitution of militia for a standing army, and an express reservation to the States of all rights not specifically granted to the

source for determining the "scope and effect of the [First] amendment."[105] Although no member of the Court squarely addressed this historical anomaly for more than one hundred years,[106] the Court's focus on Jefferson in this seminal case secured his role in the Court's First Amendment jurisprudence.

Despite its mistake in linking Jefferson to the First Amendment, the *Reynolds* Court was not responsible for the metaphor's later identification with the Establishment Clause.[107] The Court unmistakably viewed *Reynolds* as a free exercise case. In its first major attempt to give substance to the religion clauses, the Court said little about the passage of the First Amendment. Instead, it was satisfied with a two paragraph survey of religious history and two writings of Thomas Jefferson. By framing the issue as it did, the Court found no need to delve into the words and actions of the First Congress. If it had, Thomas Jefferson would not have been the focus, and James Madison would have merited more than a passing mention.[108] Because the particular language extracted from Jefferson's proposed tax bill and the theme of his letter to the Danbury Baptists provided the Court with all that it believed necessary to interpret the Free Exercise Clause, the Court found no need to interpret Jefferson's "wall" metaphor. Nevertheless, because the Court chose to cite the entire Danbury letter, the "wall of separation" quietly found its way into constitutional law.

Within the narrow boundaries of a free exercise exemption case, the *Reynolds* methodology and the "wall of separation" were relatively harmless. Once adopted into the broad arena of Establishment Clause cases, however, the inconsequential deficiencies of *Reynolds* assumed constitutionally significant proportions. With Thomas Jefferson cast

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> Union. He accordingly moved in the first session of Congress for these amendments, which were agreed to and ratified by the States as they now stand. That is all the hand I had in what related to the Constitution.

Letter from Thomas Jefferson to Dr. Joseph Priestley (June 19, 1802), *quoted in* Smith, *supra* note 83, at 599.

105. *Reynolds*, 98 U.S. at 164.

106. *See Wallace*, 472 U.S. at 91-92 (Rehnquist, J., dissenting).

107. Justice Black first equated Jefferson's metaphor with the Establishment Clause in *Everson*, 330 U.S. at 16. As a result of *Everson*, Jefferson's "wall of separation" became so identified with the Establishment Clause alone that later justices would refer to Jefferson's metaphor as the *Everson* "wall." *See, e.g., Wallace*, 472 U.S. at 107, 112 (Rehnquist, J., dissenting); *cf. Wolman*, 433 U.S. at 266 (Stevens, J., dissenting) (citing the *Everson* "test").

108. James Madison drafted the proposed First Amendment, introduced it, and guided its passage through Congress. Madison's major role in First Amendment history is discussed in Smith, *supra* note 83; McConnell, *supra* note 83, at 1476-85; and Hansen, *supra* note 79, at 651-53. Justice Rehnquist also reviewed Madison's efforts in *Wallace*, 472 U.S. at 92-99 (Rehnquist, J., dissenting).

as the most prominent historical figure in the interpretation of the First Amendment's religion clauses, the "wall" took on a life of its own when transferred to Establishment Clause cases.

C. *Public Aid to Religious Schools*

1. *Everson v. Board of Education:* Building the "Wall"

Although the "wall of separation" first found its way into the Supreme Court's First Amendment jurisprudence innocuously in *Reynolds*, its use as a constitutional mandate began in a case involving aid to religious schools.[109] Heralded as "high and impregnable,"[110] the "wall of separation" meant that the Constitution forbade state financial support of religious schools as an impermissible advancement of religion.[111] While all members of the Court agreed on the premise,[112] the consensus broke down over the meaning of "support." As a result, even the first time that the Court used the "wall" metaphor in a school funding case, it did not interpret the "wall of separation" to be a rigid barrier preventing all aid to religious schools. At issue in school funding cases such as *Everson* was not whether the states could aid religious schools, but rather how they could do so without "advancing" religion. The "wall of separation" did not assist the Court, and over the course of several Supreme Court decisions in this area, the complexity of the problem caused the "high and impregnable" wall to become "blurred and indistinct," until finally it was relegated to a reference in a dissent.[113] In the process, the Court struggled to find a principled basis for deciding these cases and to understand the real constitutional implications of public aid for religious schools.

In 1947, the Court spelled out the meaning of the Establishment Clause for the first time in *Everson v. Board of Education*.[114] In doing so, the Court assigned Jefferson's metaphor a meaning without considering the meaning that Jefferson intended the metaphor to have. The Court simply took the phrase out of context from *Reynolds* and interpreted its use as appropriate only to discern the meaning and scope

109. Everson v. Board of Educ., 330 U.S. 1 (1947).

110. *Id.* at 18.

111. *Id.* at 16.

112. *See, e.g., id.* at 31-32 (Rutledge, J., dissenting).

113. *See* Board of Educ. v. Allen, 392 U.S. 236, 254 (1968) (Black, J., dissenting). For a discussion of Justice Black's dissenting opinion, see *infra* text accompanying footnotes 144-49.

114. 330 U.S. 1 (1947). Although a few earlier cases may have implicated the Establishment Clause, the issue was never directly addressed. *Id.* at 43 n.35 (Rutledge, J., dissenting).

of the Establishment Clause.[115] This subtle deviation from Jefferson's actual language allowed the Court to pit the two religion clauses against each other and set the stage for undermining the very definition the Court had announced.

In *Everson*, a New Jersey law permitted the State to reimburse parents for the cost of their children's bus fare to both public and parochial schools.[116] Following the *Reynolds* formula, the Court first conducted an in-depth historical review of religion in the colonies.[117] It summarized Madison's "Memorial and Remonstrance" and quoted from both the preamble and the text of Jefferson's "Virginia Bill for Religious Liberty."[118] Then, in an often-quoted passage, the Court set forth six distinct Establishment Clause prohibitions.[119] Although four of the commands did not provoke disagreement among the justices, two laid the seedbed for acrimonious debate and barely survived the five-to-four *Everson* decision:

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or

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115. *Id.* at 16.

116. *Id.* at 3 n.1. The statute authorized local school boards to "make rules and contracts" for transporting all students in a district except students of private schools operated for profit. *Id.* No equal protection challenge was raised. *Everson*, 330 U.S. at 4 n.2.

117. *Id.* at 8-11. Compared to the *Reynolds* Court, the *Everson* Court conducted an expansive historical survey. Although its survey centered on the question of tax support for religion, the Court also made numerous references to religious persecution. *See id.*

118. *Id.* at 12-13. Citing *Reynolds*, the Court stated that it had "previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute." *Id.* at 13 (citations omitted). In light of the Court's difficulties with the Establishment Clause, it is interesting to compare an academic viewpoint summarizing the Virginia statute:

> One should note, however, precisely what comprised the separation of Church and State in the act of 1785. No one could be legally required to attend any church or support any ministry. No one could legally suffer any injury in his body or his goods because of his religious beliefs. All should be free to maintain their religious opinions, without benefit or loss from such professions of belief. In short, there were three factors in the equation: the Church, the State, and the Individual. The act of 1785 protected the individual from any loss at the hands of the State because of his relations to the Church. It did not attempt to define the relations between Church and State except in terms of the individual. It contained an implicit ban, of course, upon a church establishment, but beyond that it did not go. Efforts to read more into it inevitably take on the subjective cast of thought of the person who does the reading.

WILLIAM H. MARNELL, THE FIRST AMENDMENT: THE HISTORY OF RELIGIOUS FREEDOM IN AMERICA 96-97 (1964).

119. *Everson*, 330 U.S. at 15-16.

> prefer one religion over another . . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion . . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'[120]

Having just declared both the "wall" and the Establishment Clause to be absolutes, the Court effectively denied their absolute status by holding that the New Jersey statute did not violate the Establishment Clause.[121] The Court acknowledged that the law helped children get to church schools and possibly even resulted in greater church school enrollment.[122] Nevertheless, the Court held that these beneficial effects were only incidental to the State's efforts to insure safety for all without regard to religion, and thus did not amount to "support" for the schools.[123] In upholding the law, the Court found that a general welfare law that insured the safety of all school children, such as the New Jersey statute, was comparable to State funding for police and fire protection for children.[124]

The Court insisted that the "wall of separation" guided its decision. Stating that the First Amendment's wall between church and state "must be kept high and impregnable" and that not even the "slightest breach" was permissible, the Court held that New Jersey had not breached the Establishment Clause wall.[125] The Court's dual use of the "wall of separation"—first, as a substitute for the Establishment Clause and then simply as a justification for its decision—effectively deprived the metaphor of any real meaning. The dissenters noted this inconsistency, analogizing the majority's decision to "Julia who, according to Byron's reports, 'whispering "I will ne'er consent,"—consented.'"[126] The most scathing disapproval came from Justice Rutledge:

> I cannot believe that the great author of those words, or the men who made them law, could have joined in this decision. Neither

120. *Id.* (citation omitted).

121. *Id.* at 17-18. Although the Court noted that contributing tax-raised funds to support religious schools would violate the Establishment Clause, *id.* at 16, it further concluded that denying the benefits of a general welfare program to parochial school children because of their religion would violate the First Amendment's Free Exercise Clause. *Id.*

122. *Everson*, 330 U.S. at 17.

123. *See id.* at 17-18.

124. *Id.*

125. *Id.* at 18.

126. *Id.* at 19 (Jackson, J., dissenting).

> so high nor so impregnable today as yesterday is the wall raised between church and state by Virginia's great statute of religious freedom and the First Amendment . . . .[127]

Justice Rutledge's use of the "wall" was clear: "no aid" meant no aid. The Court's use of the "wall," by contrast, made little sense and was particularly groundless as a basis for argument.[128] The *Everson* Court never even defined aid, but merely clarified what was not aid. Thus, *Everson* provided a negative formula for successful lawmaking. The "wall," which had sounded so formidable, would not bar general welfare laws aimed at parents and children where church schools were secondary beneficiaries.

The Court's use of the "wall" also had more subtle consequences. Although its historical review seemed to indicate that the Court considered religious discrimination to be a primary issue in Establishment Clause cases,[129] the Court's insistence on using the "wall of separation" as a basis for upholding the law relegated religious discrimination to a secondary consideration. Furthermore, the Court's reference to the clash between the Establishment Clause and Free Exercise Clause seems contrived because the Court indicated that states could provide transportation only to public school children if they so chose.[130] Because the free exercise concern was unnecessary to the Court's conclusion and thus appeared superficial, *Everson* became known for its "high and impregnable wall," rather than for the fact that it took so little to knock the wall down. This may also explain why free exercise concerns became so marginalized in later Establishment Clause cases.

One final criticism of the *Everson* majority is that it perceived only the law's secular purpose of safety for all school children and the inci-

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127. *Everson*, 330 U.S. at 29 (Rutledge, J., dissenting).

128. One commentator characterized Justice Black's opinion for the Court as "enigmatic" because Justice Black's historical analysis noted the strict historical separation of Church and State, yet his legal analysis nevertheless led him to conclude that indirect aid to religious schools was permissible. *See* Smith, *supra* note 83, at 638-39. Professor Smith also noted that Justice Black's opinion was subject to further criticism because it failed to take advantage of the wealth of historical materials that could have been used to arrive at the same result in the case. *See id.* at 639.

129. *See Everson*, 330 U.S. at 8-13. The Court traced the development of religious freedom in America, recalling that the first settlers came to escape the "bondage of laws" that forced them to practice a certain religion. *Id.* at 8. The Court then praised the efforts of early American leaders who fought for religious freedom as a fundamental American principle. *Id.* at 11-12.

130. *Id.* at 16. This would seem to mean that the state could constitutionally enact educational assistance laws that initially excluded parochial school children, but once the state extended benefits to all, a free exercise claim would magically arise. This point was not lost on the dissenters. *See id.* at 26-27 (Jackson, J., dissenting); *Everson*, 330 U.S. at 52-60 (Rutledge, J., dissenting).

dental benefits that the law provided to church schools, and that it failed to take into account the religious purposes that the statute served.[131] The dissenters, by contrast, delved into the history of sectarian schools and concluded that their primary purpose was to inculcate religious beliefs.[132] The only factor sustaining the law, the dissenters argued, was the majority's invalid[133] conclusion that the aid did not amount to "support" for religion.[134] Noting the religious mission of the schools and the admitted benefits of the bus service, the dissenters believed that the bus-fare law aided religion, and thus violated the Establishment Clause.[135] Thus, the majority's "high and impregnable wall" proved to be no buttress against semantics, and its location between permissible tax dollars for general welfare and forbidden tax dollars for religion depended solely on the depth of the Court's inquiry into the statute's purpose and effect.[136]

2. The "Wall" Becomes a Line: *Board of Education v. Allen*

The viewpoint of the *Everson* majority easily prevailed twenty-one years later in *Board of Education v. Allen*,[137] much to the dismay of Justice Black, the author of the *Everson* opinion. In *Allen*, the Court transformed the supposedly absolute "wall" into a "line between state neutrality to religion and state support of religion," thus making the separation of church and state required by the Constitution dependent

131. This criticism can best be understood by referring to a method of Establishment Clause inquiry that the Court later followed. Subsequent to *Everson*, the "wall of separation" became the source of the "purpose" and "effect" prongs of the test that the Court formulated in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). In *Lemon*, the Court fashioned a three-part inquiry to try to "add some mortar to *Everson's* wall." *Wallace*, 472 U.S. at 108 (Rehnquist, J., dissenting). Under this test, "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 612-13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1968)) (citations omitted). The purpose and effect prongs of the *Lemon* test help determine the side of the "wall" on which a law will fall. The results of a purpose and effect inquiry, however, actually depend upon the depth of analysis. For a more thorough discussion of the *Lemon* test, see *infra* text accompanying notes 150-65.

132. *Everson*, 330 U.S. at 21-24 (Jackson, J., dissenting), 46-47 (Rutledge, J., dissenting).

133. *Id.* at 49, 57 (Rutledge, J., dissenting). According to Justice Rutledge, "in this realm such a line can be no valid constitutional measure." *Id.* at 48-49.

134. *Id.* at 45, 56 (Rutledge, J., dissenting).

135. *Everson*, 330 U.S. at 24-27 (Jackson, J., dissenting), 48 (Rutledge, J., dissenting).

136. *See supra* note 131.

137. 392 U.S. 236 (1968). The decision, written by Justice White, was split, with one justice concurring and three justices dissenting.

on the degree of that separation.[138] This gentler formulation of the "wall" was irrelevant, however, because despite its substitution of a "line" for the *Everson* "wall," the Court nevertheless based its decision on the *Everson* rationale.

At issue in *Allen* was a New York law that allowed public school boards to approve secular textbooks and lend them free of charge to both public and parochial school children in grades seven through twelve.[139] Using the purpose and effect test that had been formally approved five years earlier in *Abington School District v. Schempp*,[140] the *Allen* Court reasoned that *Abington's* citation to *Everson* meant that *Everson* would have passed the two-prong test.[141] The Court recognized that lending books was comparable to providing bus services in that it furthered the secular goal of providing educational opportunities for all school children.[142] Similarly, the Court deemed the fact that free books provided by the state might also help church schools to keep and attract pupils to be constitutionally insignificant.[143]

In a forceful dissent, Justice Black, the author of the *Everson* opinion, cited Jefferson's metaphor in full. Describing the New York law as a "flat, flagrant, open violation" of the Establishment Clause,[144] Justice Black quoted the entire *Everson* list of establishment prohibitions, including the "wall of separation" language.[145] Yet Justice Black's distinction between bus fare and books was informed less by his rigid "wall" concept than by his critical analysis of the law's purpose and effect. In Justice Black's view, the law providing free books to parochial schools could only have been the product of "powerful sectarian religious propagandists" who secured the law to

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138. *Id.* at 242. The Court's characterization of separation in terms of degree recalls Justice Rutledge's "warning" in *Everson*: "This is not therefore just a little case over bus fares. [While it may be] distant . . . from a complete establishment of religion, it differs from it only in degree; and it is the first step in that direction." *Everson*, 330 U.S. at 57 (Rutledge, J., dissenting).

139. *Allen*, 392 U.S. at 238-39.

140. 374 U.S. 203 (1963). The Court stated the test as follows:

> [W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

Id. at 222 (citations omitted).

141. *Allen*, 392 U.S. at 243.

142. *Id.* at 243-44.

143. *Id.*

144. *Id.* at 250 (Black, J., dissenting).

145. *Id.* at 250-51 (Black, J., dissenting).

help church schools carry on their religious mission.[146] Far from merely garnering a few more students, Justice Black argued, the primary effect of this law was to teach and propagate religious viewpoints by providing the essential tools of sectarian education.[147] But Justice Black's strongest objections were grounded in fears of political strife and the slippery slope concept. He saw no principled way to distinguish the textbooks in *Allen* from future tax-funded school buildings, teacher salaries, and the like.[148] As in his majority opinion in *Everson*, Justice Black concluded his dissent in *Allen* by invoking the "high and impregnable" wall of separation and by chastising Justice White's majority opinion.[149]

Although it reduced the "wall" to a "line," the Court's reliance on *Everson* seemed to prove that the "wall" was even less relevant to the interpretation of the First Amendment's religion clauses than it had first appeared. In addition, it bolstered the impression that the Court's position on public aid programs was flexible. But as Justice Black persuasively argued, the Court misread the precedent that he had authored. Upholding the "wall" as a constitutional measuring stick and using it to castigate the Court therefore proved doubly effective. It highlighted the fact that a "line" between "general welfare laws" and "support for religion laws" provided virtually no barrier at all and that the Court's "line" failed to answer Justice Black's slippery slope argument. As a result, the Court was spurred to deeper analysis and

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146. *Allen*, 392 U.S. at 251 (Black, J., dissenting).

147. *Id.* at 252-53 (Black, J., dissenting).

148. *Id.* at 253-54 (Black, J., dissenting). This argument must have caused Justice Black particular chagrin because Justice Rutledge had made the same argument against Justice Black's majority opinion in *Everson*:

> Payment of transportation is no more, nor is it any the less essential to education, whether religious or secular, than payment for tuitions, for teachers' salaries, for buildings, equipment and necessary materials. Nor is it any the less directly related, in a school giving religious instruction, to the primary religious objective all those essential items of cost are intended to achieve. No rational line can be drawn between payment for such larger, but not more necessary, items and payment for transportation.

Everson, 330 U.S. at 48 (Rutledge, J., dissenting).

149. *Allen*, 392 U.S. at 254 (Black, J., dissenting). Justice Black wrote that the Establishment Clause was written:

> On the assumption that state aid to religion and religious schools generates discord, disharmony, hatred, and strife among our people, and that any government that supplies such aids is to that extent a tyranny . . . . [T]he only way to protect minority religious groups from majority groups in this country is to keep the wall of separation between church and state high and impregnable . . . . The Court's affirmance here bodes nothing but evil to religious peace in this country.

Id. (Black, J., dissenting).

the "wall" enjoyed a brief resurrection of sorts.

D. Lemon *and the Creation of Another Test Metaphor*

The states seemed to regard the new "line" and Justice Black's predictions as direct cues for action. In *Lemon v. Kurtzman*,[150] the Court considered challenges to a Pennsylvania law that directly reimbursed religious schools for secular expenditures on teachers' salaries, textbooks, and instructional materials,[151] and to a Rhode Island law that supplemented the salaries of teachers who taught secular subjects in religious schools.[152] Although the prophecies made by Justice Black in *Allen* seemed to have materialized, the Court did not respond by imposing the absolute wall of *Everson*. Instead, it continued down the path of *Allen*. The Court noted that the language of the religion clauses was "at best opaque," admitted that it could only "dimly perceive the lines of demarcation,"[153] and concluded that total separation of church and state was "not possible in an absolute sense."[154]

The Court reasoned that establishment issues were best resolved by focusing on the historic evils the clause was intended to prevent.[155] As a guide, the Court formulated the so-called *Lemon* test by combining into a single, multi-part test the criteria it had used to evaluate the constitutionality of state statutes in two earlier cases. From *Walz*, the Court adopted the criterion that the statute must not foster "'excessive government entanglement with religion.'"[156] The balance of the *Lemon* test consisted of the "purpose and effect" inquiries that the

150. 403 U.S. 602 (1971).

151. *Id.* at 609. Pennsylvania specifically enacted its law to relieve the financial crisis for nonpublic schools. The state viewed the program as supporting "purely secular educational objectives." *Id.*

152. *Id.* at 607. Rhode Island enacted its law in response to a legislative finding that the quality of education in nonpublic schools was threatened by rapidly rising salaries needed to attract good teachers. *Id.*

153. *Lemon*, 403 U.S. at 612. These statements came immediately after the Court had discussed Justice Black's majority opinion in *Everson*. The Court was probably trying to limit the rhetoric of the "wall" to arrive at a middle ground somewhere between *Everson* and *Allen*. It is highly unlikely that the Court would have failed to recognize that Justice Black's opinions relied upon the "high and impregnable wall" metaphor, since Justice Black cited so forcefully to the metaphor.

154. *Id.* at 614. The Court further noted that its prior decisions interpreting the Establishment Clause did not demand total separation between Church and State. *Id.*

155. *Id.* at 612. The Court quoted from Walz v. Tax Comm'n, 397 U.S. 664 (1970), in which it upheld the constitutionality of tax exemptions for church property. The "evils" that the *Lemon* Court identified were "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Lemon*, 403 U.S. at 612 (quoting *Walz*, 397 U.S. at 668).

156. *Lemon*, 403 U.S. at 613 (quoting *Walz*, 397 U.S. at 674).

Court had developed in *Allen*.[157] Before beginning its analysis of the statutes at issue, the Court rejected the "wall" concept by warning that "far from being a 'wall,'" the line separating church and state from entanglement was a "blurred, indistinct, and variable barrier."[158] Nevertheless, the Court struck down both laws on excessive entanglement grounds.[159]

The *Lemon* Court cited a number of reasons in support of this conclusion. First, it pointed to the "substantial religious character" of church-related elementary and secondary schools and the impossibility of ensuring that a teacher, unlike a textbook, would remain secular.[160] Second, as proof of excessive governmental interference and involvement with religion, the Court cited the very provisions the states had instituted to insure that funds would go only to support secular education.[161] Finally, the Court focused on the probability of political divisiveness along religious lines because these programs marked a first step down the slippery slope of increasing demands for financial aid to religious schools.[162]

In essence, the Court used almost every objection that Justice Black raised in *Allen* as a basis for its decision in *Lemon*. Yet, instead of returning to the *Everson* "wall" as Justice Black had urged, the Court specifically rejected this metaphor.[163] The Court's brief acknowledgment of the growing crisis in education may explain its refusal to invoke such an apparently concrete barrier as the *Everson* "wall."[164]

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157. *Id.* at 612. For the language of the full *Lemon* test, see *supra* note 131.

158. *Lemon*, 403 U.S. at 614.

159. *Id.* at 624-25.

160. *Id.* at 616-17, 619.

161. *Id.* at 621-22. The Court described the nature of the entanglement as follows:

> The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance . . . . In particular the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state.

Id. at 621-22.

162. *Lemon*, 403 U.S. at 622-25.

163. *See supra* text accompanying note 158.

164. *Lemon*, 403 U.S. at 625. On the role of public tax-based support for religious schools, the Court commented:

> Finally, nothing we have said can be construed to disparage the role of church-related elementary and secondary schools in our national life. Their contribution has been and is enormous. Nor do we ignore their economic plight in a period of rising costs and expanding need. Taxpayers generally have been spared vast sums by the maintenance of these educational institutions by religious organizations, largely by the gifts of faithful adherents.

The concept of an absolute "wall" seems more directly at odds with innovative methods of resolving the problems in educating children than does a vague line only "dimly perceive[d]."[165] *Lemon* appeared to mean that the states would be free to operate somewhere between the boundaries of *Allen* and the murky line that it had set in *Lemon*. It soon became clear, however, that instead of abandoning the wall in *Lemon*, the Court had simply relocated it.

Only two years later in *Committee for Public Education v. Nyquist*,[166] the Court made several references to the "wall." *Nyquist* involved an Establishment Clause challenge to a New York law that provided direct money grants to religious schools for building maintenance and repair, tuition reimbursements for low income parents, and tuition tax credits for middle income parents.[167] The direct nature of the monetary aid provided under the law must have alarmed the Court because it made four references to Jefferson's "wall."[168] Perhaps the most interesting of these references came in a summary of the Court's Establishment Clause jurisprudence:

> As a result of these decisions and opinions, it may no longer be said that the Religion Clauses are free of 'entangling' precedents. Neither, however, may it be said that Jefferson's metaphoric "wall of separation" between Church and State has become "as winding as the famous serpentine wall" he designed for the University of Virginia. Indeed, the controlling constitutional standards have become firmly rooted and the broad contours of our inquiry are now well defined.[169]

In a footnote following this statement, the Court admitted that its "guiding principles" did not make its task in *Nyquist* "an easy one."[170] Moreover, the Court acknowledged that it had previously "recognized its inability to perceive with invariable clarity the 'lines of demarcation in this extraordinarily sensitive area of constitutional law.'"[171] Finally, the Court acknowledged that the wall, of necessity, was not "without bends" and that it even "may constitute a 'blurred, indistinct, and variable barrier'" on the question of entanglement.[172] After admitting its misgivings about the relevance of the "wall," the Court proceeded to

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Id.

165. *See supra* text accompanying note 153.
166. 413 U.S. 756 (1973).
167. *Id.* at 762-66.
168. *See id.* at 761 & n.5, 772, 781.
169. *Id.* at 761 (citations omitted).
170. *Id.* at 761 n.5.
171. *Nyquist*, 413 U.S. at 761 n.5 (quoting *Lemon*, 403 U.S. at 612).
172. *Id.* (quoting *Lemon*, 403 U.S. at 614).

examine the broad contours of the effect prong of the *Lemon* test.

As in *Lemon*, the *Nyquist* Court did not question the secular legislative purposes of preserving a safe educational environment, promoting diversity and pluralism among public and non-public schools, and preventing the public schools from becoming overburdened.[173] The effect prong proved just as paradoxical for New York in *Nyquist*, however, as the entanglement prong had been for Pennsylvania and Rhode Island in *Lemon*. In *Lemon*, the Court's decision to invalidate the law was based upon the same entangling features that the state legislature had included in order to ensure compliance with the Constitution.[174] In *Nyquist*, the state tried to escape this entanglement trap by minimizing its oversight into the way that religious schools used the funds.[175] Nevertheless, the Court seized on the inadequacy of the statute's controls over the use to which the religious schools put the money to strike down the law for its unconstitutional effect.[176]

The major disagreement among the members of the Court centered on the tax provisions. The majority opinion, authored by Justice Powell, invalidated the tax provisions because they benefited only parents of children in sectarian schools.[177] The state could not cast this as a general law, the majority concluded, when its precise function was to aid private schools, "the great majority of which are sectarian."[178] Therefore, in the majority's view, the law's primary effect was to advance religion by encouraging parents to keep their children in church schools with tax rewards and incentives.[179] But as Chief

173. *Id.* at 773; *see Lemon*, 403 U.S. at 613.

174. *Lemon*, 403 U.S. at 619, 621-22.

175. New York generally restricted the maintenance and repair funds to fifty percent of the costs for comparable services in public schools. *See Nyquist*, 413 U.S. at 774. The Court found statistical criteria insufficient to guarantee that state funds would not be used to finance religious education. *Id.* at 774-78. The tuition grants and tax credits were not subject to any restrictions other than initial qualifying standards. *Id.* at 783-87, 790-91.

176. The Court commented on the statute's deficiencies at several points in its opinion, concluding that "[the] maintenance and repair provisions violate the Establishment Clause because their effect, inevitably, is to subsidize and advance the religious mission of sectarian schools." *Nyquist*, 413 U.S. at 779-80. Additionally, the Court stated "we think it clear that New York's tuition grant program fares no better under the effect test than its maintenance and repair program . . . ." *Id.* at 785. The Court reasoned that New York's tax credit plan is not "sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools." *Id.* at 794.

177. *Id.* at 783.

178. *Id.*

179. *Nyquist*, 413 U.S. at 790-91. In discussing the tax credit provision in his opin-

Justice Burger pointed out in his dissent, the striking of a "special" law that had the same permissible effects as a "general" law was inconsistent with the Court's holding that the purpose of the law was secular.[180] Justice White's dissent noted that despite its quotation from *Everson* that "'[n]o tax . . . can be levied to support any religious institutions,'"[181] the majority admitted that the state had not levied a tax "for the *purpose* of supporting religious activities."[182]

The reasoning underlying the *Nyquist* majority's opinion appears to be the same as the unarticulated basis of *Lemon*: the Court's growing concern with line drawing after it had lowered the *Everson* "wall" in *Allen*. In fact, the Court commented that although Justice Black's prediction that the failure to maintain a "high and impregnable wall" would lead sectarian religious groups to "'cease to rely on voluntary contributions of members of their sects while waiting for the Government to pick up all the bills for religious schools'"[183] had not proved true, "the ingenious plans for channeling state aid to sectarian schools that periodically reach this Court abundantly support the wisdom of Mr. Justice Black's prophecy."[184] This concern can also be the only explanation for the Court's renewed fondness for citing the "wall of separation," which was otherwise irrelevant to its decision.

Thus, despite all the historical evidence to the contrary, the Court has associated Jefferson's "wall" with a strong, principled stand against state encroachments on the First Amendment. But even as a defense against state encroachments, the "wall" was always meaningless. On the one hand, the Court defined Jefferson's metaphor as "the

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ion for the Court, Justice Powell included a caveat that foreshadowed a future opinion: "Since the program here does not have the elements of a genuine tax deduction, such as for charitable contributions, we do not have before us, and do not decide, whether that form of tax benefit is constitutionally acceptable under the 'neutrality' test in *Walz*." *Id.* at 790 n.49. Ten years later, in an opinion written by Justice Rehnquist in which Justice Powell joined, Minnesota's tax deduction statute for tuition, books, and instructional materials was upheld on that basis. *See* Mueller v. Allen, 463 U.S. 388, 397-98 (1983).

180. *Nyquist*, 413 U.S. at 804-05 (Burger, C.J., dissenting). Chief Justice Burger's point is well taken, but the Court's opinion is confusing on this issue. Although it specifically held that the statute had a secular purpose, *id.* at 773, the Court stated that "insofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions." *Id.* at 793. Although the Court may have been distinguishing the narrow practical purpose from the broad legislative purpose, Chief Justice Burger's point is quite valid.

181. *Id.* at 780 (quoting *Everson*, 330 U.S. at 16).

182. *Id.* at 823 (White, J., dissenting).

183. *Nyquist*, 413 U.S. at 785 (quoting *Allen*, 392 U.S. at 253 (Black, J., dissenting)).

184. *Id.* at 785.

principle of total separation;"[185] on the other, it simultaneously denied its validity.[186] Defined as an absolute, modified by several caveats, and used as a pointless defense against state action, the "wall" appeared in *Nyquist* as little more than a banner for the majority. Although the majority cited the "wall," none of the three dissenters[187] who wanted the tax provisions upheld referred to the wall.

Ironically, the "wall" suffered its worst abuse in the only case where citations to it finally coincided with the downfall of a public aid statute. The majority and each of the dissenters in *Nyquist* discussed the mounting educational crisis and the states' substantial reasons for enacting public aid statutes.[188] The *Lemon* standard was virtually impossible for the states to meet, even though the Court has consistently found that the states had valid reasons for trying to aid parochial schools.[189] Yet, each of the Court's cryptic opinions gave the states the impetus to try. After *Nyquist*, the Court's opinions in these types of cases became more fractured; dissenters in cases that allowed state aid to religious schools provided stronger defenses of the "wall," and state aid programs became more palatable to the majority of the Court. Thus, *Nyquist* and its banner waving turned out to be a watershed.

E. Wolman, Regan, *and the Practicality of "Support"*

The transitional case of *Wolman v. Walter*,[190] decided just four years after *Nyquist*, contained enough dissent and confusion to satisfy even the most cynical critics of the Court's previous unprincipled decisions. *Wolman* was thus a microcosm of the difficulties created by the "wall." The Court's search for a principled foundation became apparent from the nearly incomprehensible cross-voting in the case.[191]

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185. *Id.* at 771 n.28.

186. *Id.* at 760. The Court acknowledged that "[i]t has never been thought either possible or desirable to enforce a regime of total separation." *Id.*

187. Chief Justice Burger and Justices White and Rehnquist each wrote a dissenting opinion. *See Nyquist*, 413 U.S. at 798 (Burger, C.J., dissenting), 805 (Rehnquist, J., dissenting), 813 (White, J., dissenting).

188. *Id.* at 795, 805 (Burger, C.J., dissenting), 813 (Rehnquist, J., dissenting), 815-20, 823 (White, J., dissenting).

189. *See* Mueller v. Allen, 463 U.S. 388, 400 (1983); Committee for Public Educ. and Religious Liberty v. Regan, 444 U.S. 646, 661 (1980), discussed *infra* text accompanying notes 218-51; *Lemon*, 403 U.S. at 625, discussed *supra* text accompanying notes 150-65.

190. 433 U.S. 229 (1977).

191. *Id.* at 231-32. Justice Blackmun announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, V, VI, VII, and VIII, in which Justices Stewart and Stevens joined; Chief Justice Burger and Justices Brennan, Marshall, and Powell joined with respect to Part I; Chief Justice Burger and Justices Marshall and Powell joined with respect to Part V; Chief Justice Burger and Justice

Even loyal advocates of the "wall" could not agree on a result. When the dust settled, the only clear message was that the "wall" had fallen from grace and the state had won a partial victory.

At issue in *Wolman* was a comprehensive Ohio statute providing myriad forms of public aid to parochial schools.[192] The Court methodically applied the *Lemon* analysis and once again accepted as legitimate the legislature's stated secular purpose.[193] Citing the "wall" only once,[194] the majority upheld most of the statute.[195] Justices Marshall and Stevens, by contrast, used the "wall" to take the rest of the Court to task and urged that *Allen* be overruled.[196]

Justice Marshall urged a return to the *Everson* "wall" and blamed *Allen* for its demise: "I am now convinced that *Allen* is largely

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Powell joined with respect to Part VI; Justices Brennan and Marshall joined with respect to Parts VII and VIII; and Chief Justice Burger and Justices Stewart and Powell joined with respect to Parts II, III, and IV. Chief Justice Burger dissented in part. Justices Brennan, Marshall, and Stevens filed opinions concurring in part and dissenting in part. Justice Powell filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part. Justices White and Rehnquist filed a statement concurring in the judgment in part and dissenting in part.

192. *Id.* at 233. In essence, the statute authorized the state "to provide nonpublic school pupils with books, instructional materials and equipment, standardized testing and scoring, diagnostic services, therapeutic services, and field trip transportation." *Id.*

193. The Court based this conclusion on "Ohio's legitimate interest in protecting the health of its youth and in providing a fertile educational environment for all the school children of the State." *Id.* at 236 (footnote omitted). Although only three other Justices (Chief Justice Burger and Justices Stewart and Powell) joined in the part of the opinion finding the purpose legitimate and the remainder of the Court's opinion did not address the statute's purpose, some of the programs in the Ohio statute were upheld. *See infra* note 195 and accompanying text. Presumably, the various justices who joined or concurred in the Court's judgment as to the portions of the statute that were upheld agreed at least on this point.

194. *Wolman*, 433 U.S. at 236. Only Chief Justice Burger and Justices Stewart and Powell joined Justice Blackmun in this section of the opinion.

195. A plurality upheld two sections of the statute: a provision permitting the use of public money to purchase and lend textbooks to students at religious schools; and a provision permitting the use of public funds to provide standardized academic testing to students at nonpublic schools. *See id.* at 238, 241. Two different majorities of justices sustained two other sections that provided speech, hearing, and psychological diagnostic services and certain therapeutic services to students at religious schools. *See id.* at 244, 248. A third majority struck down two final sections of the statute. One section, which permitted the use of public funds for purchasing and lending instructional equipment to nonpublic schools, was held to violate the Establishment Clause because it "had the primary effect of providing a direct and substantial advancement of the sectarian enterprise." *Id.* at 250. The Court struck down the other section, which permitted the use of public money to provide transportation to nonpublic schools for field trips, because of its effect and because it created "excessive entanglement" between church and state. *Id.* at 254.

196. *See Wolman*, 433 U.S. at 257-59 (Marshall, J., concurring in part and dissenting in part), 265 & n.2, 266 (Stevens, J., concurring in part and dissenting in part).

responsible for reducing the 'high and impregnable' wall between church and state erected by the First Amendment to 'a blurred, indistinct, and variable barrier,' incapable of performing its vital functions of protecting both church and state."[197] Although he did not define the "wall," Justice Marshall made clear that the line "should be placed between general welfare programs . . . and programs of educational assistance."[198] Justice Marshall saw the proper line as the one drawn by Justice Black in his dissent in *Allen* and his majority opinion in *Everson*.[199] He further explained that this line distinguished "between programs that help the school educate a student," which would generally be permitted, and "welfare programs that may have the effect of making a student more receptive to being educated," which would generally be forbidden.[200] Accordingly, under Justice Marshall's formulation, the entire statute would be struck down except for the diagnostic services provision.[201]

Justice Stevens also advocated a return to Justice Black's *Everson* wall, but in a slightly different form than that proposed by Justice Marshall. He characterized the wall as strictly forbidding *any* tax "'in any amount . . . to support any religious activities or institutions . . . whatever form they may adopt to teach or practice religion.'"[202] Other than listing examples of invalid aid,[203] however, Justice Stevens gave little substance to his formulation. In contrast to Justice Marshall, Justice Stevens felt that the "wall" would allow the diagnostic and therapeutic provisions as possible public health services.[204] He took this position despite his conclusion that as a result of the Court's decision, "only a much smaller amount [of money for nonpublic schools]

197. *Id.* at 257 (Marshall, J., concurring in part and dissenting in part) (citations omitted).

198. *Id.* at 259 (Marshall, J., concurring in part and dissenting in part) (footnote omitted).

199. *Id.* at 259 n.4 (Marshall, J., concurring in part and dissenting in part).

200. *Id.* at 259 n.5 (Marshall, J., concurring in part and dissenting in part). This explanation is confusing, however, because bus fare reimbursements could never fall on the side of simply "making a student more receptive to being educated," and thus, under Justice Marshall's analysis, *Everson* itself should have come out differently. Justice Marshall's own analysis of the Ohio statute further indicates that his "line" would be just as likely to lead to anomalous results. Inevitably, Justice Marshall found himself reaching the same conclusions as the majority regarding the law's purpose and effect and making the same distinctions between direct and indirect aid that the Court had made. *See Wolman*, 433 U.S. at 260-62 (Marshall, J., concurring in part and dissenting in part).

201. *Id.* at 256, 260-62 (Marshall, J., concurring in part and dissenting in part).

202. *Id.* at 265 (Stevens, J., concurring in part and dissenting in part) (quoting *Everson*, 330 U.S. at 16).

203. *Id.* (Stevens, J., concurring in part and dissenting in part).

204. *Id.* at 266 (Stevens, J., concurring in part and dissenting in part).

may still be involved."[205] With this remark, Justice Stevens eviscerated his own idea that the wall prohibited a public tax "in any amount" to be used to support religious activities[206] and blurred his criteria for determining when the wall had been breached.[207]

Justices Marshall and Stevens were no more able to agree on the elusive parameters of the "wall" than were the Justices on the *Everson* Court who had constructed it. The contradictory results and internal inconsistencies in each opinion are, in fact, reminiscent of *Everson*. According to Justices Marshall and Stevens, "no aid" did not mean no aid; rather, it meant no aid of a particular kind. This type of "wall," one which lacks a definitive meaning, cannot help lower courts determine what aid, if any, is constitutionally permissible. These confused dissents thus underscore one of the major reasons for the considerable internal discord and disorder on the Court.

A comparison of these dissents to Justice Powell's separate opinion illustrates a second difficulty created by the "wall." In his concurrence and partial dissent, Justice Powell suggested a resolution to the Court's problems.[208] First, he rejected the position that public aid to sectarian schools is invalid because it necessarily aids religion.[209] Instead, Justice Powell noted that such aid could be used to advance general public and governmental interests. In particular, he noted that parochial schools provide a type of tax relief to the general public,[210] and he recognized the states' interest in promoting high-quality education for all school children.[211] If the states were prohibited from

205. *Wolman*, 433 U.S. at 266 n.4 (Stevens, J., concurring in part and dissenting in part).

206. *See supra* text accompanying note 202.

207. Apparently, Justice Stevens saw no inconsistency in his position, for he concluded his brief dissent by raising the *Everson* "wall" once again:

> This Court's efforts to improve on the *Everson* test have not proved successful. "Corrosive precedents" have left us without firm principles on which to decide these cases. As this case demonstrates, the States have been encouraged to search for new ways of achieving forbidden ends. What should be a "high and impregnable" wall between church and state, has been reduced to a "blurred, indistinct, and variable barrier." The result has been, as Clarence Darrow predicted, harm to "both the public and the religion that [this aid] would pretend to serve."

Wolman, 433 U.S. at 266 (Stevens, J., concurring in part and dissenting in part) (alteration in original) (footnotes and citations omitted).

208. *Id.* at 262-64 (Powell, J., concurring in part and dissenting in part). Justice Powell recognized that the Court's decisions in previous Establishment Clause cases, a "troubling area" of constitutional interpretation, seemed "arbitrary." *Id.*

209. *Id.* at 262 (Powell, J., concurring in part and dissenting in part).

210. *Id.* (Powell, J., concurring in part and dissenting in part).

211. *Wolman*, 433 U.S. at 262 (Powell, J., concurring in part and dissenting in part).

permitting some public funds to be used by nonpublic schools, Justice Powell observed, "[t]he persistent desire of a number of States to find proper means of helping sectarian education to survive would be doomed,"[212] which would be a "harsh result" and contrary to the public interest.[213] Based on these concerns, Justice Powell suggested a common sense approach:

> At this point in the 20th century . . . [t]he risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court. Our decisions have sought to establish principles that preserve the cherished safeguard of the Establishment Clause without resort to blind absolutism. If this endeavor means a loss of some analytical tidiness, then that too is entirely tolerable.[214]

Justice Powell's frank assessment of the realities of the issue left no room for any "wall of separation." He found the entire statute acceptable with one minor reservation.[215] In particular, he found the statute's provision of bus transportation for field trips unobjectionable because that provision was "indistinguishable in principle" from the provision that the *Everson* Court had upheld.[216]

Without any reference to the wall, Justice Powell arrived at the same conclusion as had the Court in *Everson*, thus showing that the wall is generally irrelevant to Establishment Clause analysis. More importantly, Justice Powell achieved a result consistent with *Everson* without referring to its "wall," whereas neither of the *Everson* "wall" advocates did. This confusion of outcomes shows that the "wall of separation," in addition to being extraneous, can also hinder the careful balancing that constitutional adjudication usually requires.

Justice Powell's separate opinion in *Wolman* may have signaled that

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212. *Id.* (Powell, J., concurring in part and dissenting in part).

213. *Id.* (Powell, J., concurring in part and dissenting in part).

214. *Id.* at 263 (Powell, J., concurring in part and dissenting in part) (citations omitted).

215. *See id.* at 263-64 (Powell, J., concurring in part and dissenting in part). Justice Powell would not have objected to laws that provided educational materials to sectarian students if those materials also were customarily provided to secular students. *See Wolman*, 433 U.S. at 264 (Powell, J., concurring in part and dissenting in part). He only concurred in the Court's judgment striking the loan for the purchase of instructional materials because he viewed the loan as a "transparent fiction" that actually provided the materials to the nonpublic schools rather than to their students. *Id.* (Powell, J., concurring in part and dissenting in part).

216. *Id.* at 264 (Powell, J., concurring in part and dissenting in part).

the Court was ready to find a more sound analytical basis for similar state legislation.[217] In *Committee for Public Education and Religious Liberty v. Regan,*[218] the Court demonstrated the extent of its willingness to revise its earlier positions and dismantle the "wall." In a five-to-four decision the Court upheld a New York law that provided direct cash reimbursements to parochial schools for costs incurred in performing state-mandated testing, record keeping, and reporting.[219] The *Regan* Court majority did not make a single reference to the "wall."

Applying a less-than-rigorous *Lemon* analysis,[220] the Court had little trouble determining that the law did not have any religious purpose or effect,[221] despite the direct cash payments to religious schools. Opponents of the statute argued that all direct cash payments aided religious education.[222] The Court, however, saw no constitutional distinction between paying sectarian teachers and paying an outside service to perform the same functions.[223] As the Court explained its reasoning:

> In either event, the nonpublic school is being relieved of the cost of grading state-required, state-furnished examinations . . . .

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217. *Id.* at 262 (Powell, J., concurring in part and dissenting in part).

218. 444 U.S. 646 (1980).

219. *Id.* at 648, 657, 662. The Court had struck down a previous version of the statute because (1) it provided payments for grading and administering teacher-prepared tests that could be used for religious instruction; and (2) it failed to provide a means of insuring that public funds would be spent exclusively on secular services. *See* Levitt v. Committee for Public Educ., 413 U.S. 472 (1973). The New York legislature revised the statute that the Court struck down by eliminating the provisions granting payment for teacher-prepared tests and by adding an audit procedure. *Regan*, 444 U.S. at 650-52. After the district court struck down this revised version of the statute, *see* Committee for Public Educ. v. Levitt, 414 F. Supp. 1174 (S.D.N.Y. 1976), the Court vacated and remanded in light of its decision in *Wolman*. *See* 433 U.S. 902 (1977); *see also Regan*, 444 U.S. at 656. On remand, the district court noted that *Wolman* provided a "'more flexible concept'" of state aid for religious schools than had Meek v. Pittenger, 421 U.S. 349 (1975). *Regan*, 444 U.S. at 653 (quoting *Levitt*, 461 F. Supp. at 1127). Accordingly, the district court finally sustained the statute.

220. Justice Blackmun leveled this charge in his dissenting opinion, arguing that "[i]n order properly to analyze the amended school aid plan . . . it is imperative . . . to examine the statute's operational details with great precision and with fewer generalities than the Court does today." *Regan*, 444 U.S. at 664 (Blackmun, J., dissenting).

221. *Id.* at 656-57. The Court reasoned that using state-prepared tests to evaluate the quality and effectiveness of education prevented the possibility of religious teaching. *Id.* at 655-56. Similarly, the Court noted that record keeping (taking and recording daily attendance) and reporting (annual attendance reports and annual reports on students, faculty, curriculum, and facilities) could not be diverted for religious purposes. *Id.* at 656-57.

222. *Id.* at 661.

223. *Regan*, 444 U.S. at 658.

> None of our cases requires us to invalidate these reimbursements simply because they involve payments in cash. The Court "has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." . . . [We] reach the same results with respect to the reimbursements for [record keeping and reports].[224]

After addressing and dismissing the challengers' entanglement argument,[225] the Court once again reiterated its position that not all public aid, whether in cash or kind, necessarily furthers the religious mission of sectarian schools.[226] Finally, the Court stated the essence of its decision: New York had shown "with sufficient clarity" that its statute promoted legitimate secular purposes with little risk of advancing religion.[227] With a warning that *Regan* was not to be used as a "litmus-paper test" for the future,[228] Justice White summarized the Court's more moderate approach to Establishment Clause jurisprudence:

> What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the States—the former charged with interpreting and upholding the Constitution and the latter seeking to provide education for their youth—produces a single, more encompassing construction of the Establishment Clause.[229]

In his dissent, Justice Blackmun opined that the statute had an impermissible religious effect and created excessive entanglement between church and state.[230] He also observed that the statute provided "a direct subsidy of the operating costs of the sectarian school that aids the school as a whole."[231] Justice Marshall silently

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224. *Id.* at 658-59 (citation and footnote omitted).

225. *Id.* at 660-61. The Court adopted the district court's finding that the audit provision was an effective means of insuring that funds would only cover secular services and of guarding against inflated claims. *Id.* at 659-60. The Court also noted that the reimbursement scheme was unlikely to create excessive state entanglements because the process was "straightforward and susceptible to the routinization that characterizes most reimbursement schemes." *Id.* at 660.

226. *Regan*, 444 U.S. at 661-62.

227. *Id.* at 662.

228. *Id.*

229. *Id.* Justice White's summary was remarkably similar to the approach advocated by Justice Powell in *Wolman*. *See supra* note 214 and accompanying text.

230. *Regan*, 444 U.S. at 669-70 (Blackmun, J., dissenting).

231. *Id.* at 669 (Blackmun, J., dissenting).

joined Justice Blackmun's partial dissent,[232] demonstrating that he had retreated from his *Everson* position.[233] But Justice Stevens refused to give up on the "wall."[234]

Alone in his dissent and his citation to the "wall," Justice Stevens criticized the Court's approval of a direct subsidy as one more *ad hoc* decision made possible by the majority's *Lemon* analysis.[235] Furthermore, he saw that *Regan's* "groping rationale" could be used to uphold State subsidies to religious schools where virtually any state requirement was involved.[236] Addressing the entire line of the Supreme Court's Establishment Clause cases, Justice Stevens commented:

> The Court's adoption of such a position confirms my view . . . that the entire enterprise of trying to justify various types of subsidies to nonpublic schools should be abandoned. Rather than continuing with the sisyphean task of trying to patch together the "blurred, indistinct, and variable barrier" described in *Lemon v. Kurtzman*, I would resurrect the "high and impregnable" wall between church and state constructed by the Framers of the First Amendment.[237]

Justice Stevens' terse dissent exhibits his frustration and resignation to the obvious. Without a single reference to even a "line," much less to a "wall," the Court had finally approved the flow of state tax money directly into sectarian schools. That the "wall" had been completely razed was beyond debate, and Justice Stevens did not even bother with an analysis explaining his use of the metaphor. Instead, he simply held out the "high and impregnable wall" as a principled bulwark standing in stark contrast to the Court's precarious and futile case-by-case search for a more satisfactory doctrine. But Justice Stevens' solemn convictions may have been driven more by his reverence for the "wall" than they were enlightened by principle. Stripping *Everson* of its celebrated "wall" language and focusing on its underlying analy-

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232. *Id.* at 662. Justice Marshall's approach to the wall is itself a study in contradiction. His insistence on a "high and impregnable wall" in his dissent in *Wolman*, 433 U.S. at 257, should be contrasted with his characterization of the "wall" in his majority opinion in Gillette v. United States, 401 U.S. 437 (1971), in which the Court considered the Free Exercise and Establishment Clause implications of compulsory military service and concluded that "[t]he metaphor of a 'wall' or impassable barrier between Church and State, taken too literally, may mislead constitutional analysis . . . ." *Gillette*, 401 U.S. at 450.

233. *See supra* text accompanying notes 197-201.

234. *See Regan*, 444 U.S. at 671 (Stevens, J., dissenting) (citations omitted).

235. *Id.* (Stevens, J., dissenting).

236. *Id.* (Stevens, J., dissenting).

237. *Id.* (Stevens, J., dissenting).

sis, *Regan* does not seem so far removed from *Everson* after all.

In *Everson*, the Court stated several constitutional principles: the state may not support religion,[238] may not discriminate against religion,[239] and may not interfere with religion.[240] *Everson* is correctly understood as primarily concerning state support because its free exercise concerns were attenuated at best.[241] The New Jersey law did not "hamper" its citizens' free exercise or "handicap" religion.[242] Nonetheless, the Court looked at the problem of state discrimination in providing public benefits to its citizens on the basis of religious faith to conclude that bus-fare reimbursement was not state support.[243] The Court noted that general safety, health, and welfare laws do not support religion; rather, they support society, of which religion and its institutions are an integral part.[244] Viewed in this way, *Regan* is an extension of *Everson*.[245]

In *Regan*, the New York testing and reporting requirements had created a recognized financial burden on all schools, which the state legislature recognized.[246] The local public schools already received state funds to help defray expenses.[247] If the public schools, which had funds from their local tax bases to support them, could not afford to meet the requirements, then the private schools could less afford them.[248] The financial burden could have eventually forced many of these schools to close. Because New York did not intend to undermine education by monitoring its equality, it extended the state subsidy to all schools.[249] Therefore, lifting the burden on public schools while leaving religious schools to sink or swim could arguably have created two constitutional problems: religious discrimination and religious

238. *Everson*, 330 U.S. at 16.

239. *Id.* at 16, 18.

240. *Id.* at 16.

241. *See supra* text accompanying notes 129-30.

242. *See Everson*, 330 U.S. at 17-18.

243. *Id.* at 16-18.

244. *See id.* at 17-18.

245. One critical distinction that may well justify *Regan's* extension of *Everson* is that the facts in *Regan* implicated all three constitutional prohibitions identified in *Everson*.

246. *See Regan*, 444 U.S. at 650 n.3.

247. *Id.* at 650.

248. The annual cost to private schools of complying with the state law could constitute as much as 5.4 percent of an individual school's personnel budget, with statewide expenditures under the statute totaling $8 to $10 million. *Id.* at 665 (Blackmun, J., dissenting).

249. *See id.* at 650 n.3.

interference.[250]

The remaining constitutional prohibition at issue in *Regan* was state support of religion, and specifically whether the state's subsidy of a state-imposed administrative burden for all schools "supports" or "advances" religion. Unlike in *Everson*, the state "aid" did not "help children get to church schools" or "enable church schools to attract more pupils."[251] Rather, the state aid was more likely aimed at maintaining the status quo, and despite Justice Stevens' dissent, the Court permitted this result.

F. Conclusions on the Court's Use of the "Wall" Metaphor

The Court's greatest difficulty in Establishment Clause cases has been in trying to define the constitutional boundaries of the church-state relationship with respect to state aid to religious schools. Immediately upon its first use in Establishment Clause cases, the "wall of separation" proved to be a useless concept. It never provided a method of analysis and eventually became only a frustrated plea by dissenters.

Trying to maintain a "wall" between religious schools and the state is problematic because, as the Court has recognized, the state has a strong interest in maintaining parochial schools. These schools relieve the burden on an already strained public school system while providing competition and diversity in education. In turn, parochial schools need some state assistance to keep operating. Although schools may flounder without state aid, unlimited state aid may effectively create a secondary public school system. The "wall of separation" could never solve this complex problem.

Nevertheless, belief in the concept originally expressed in *Everson*—that the wall of separation forbids state aid to religious schools as an aid to religion itself—has never perished. It has a bright-line, high-principled ring that tempts the Court when the issues are difficult, as they almost always are in these cases. But it is the "wall" itself, rather than the cold commands of the Constitution, that has created most of the agonizing.

250. As Justice O'Connor has noted, a state makes a Free Exercise rather than an Establishment Clause accommodation when it "lifts a government-imposed burden" on religion. *Wallace*, 472 U.S. at 82-83 (O'Connor, J., concurring).

251. *See supra* part III.C.1.

IV. THE BUNDLE OF STICKS

A. What is a "Bundle of Sticks?"

One of the most familiar metaphors in the law is that of the "bundle of sticks," which is used to indicate rights that make up an ownership interest in property. Justice Cardozo first analogized property ownership to a bundle of sticks: "[T]he bundle of power and privileges to which we give the name of ownership is not constant through the ages. The faggots must be put together and rebound from time to time."[252] This metaphor has become part of the Supreme Court's Fifth Amendment takings analysis, but, unlike the metaphors previously discussed, the bundle of sticks has served as a useful guide to takings analysis.

One of the sticks in the bundle involves the right to enjoy one's property free of physical invasion. Because the Court has determined that physical invasion or occupation destroys one of the sticks in the bundle, the invasion always gives a landowner a right to compensation under the Fifth Amendment.

B. The "Bundle" as Guide

In *Kaiser Aetna v. United States*,[253] the Court determined that a physical invasion compromises a right essential to the bundle of sticks.[254] In *Kaiser Aetna*, the owner of a private pond had made improvements to the pond by constructing a marina in the pond and by connecting the pond to a bay in the Pacific Ocean.[255] The federal government argued that in so doing, Kaiser Aetna made the marina a "navigable water of the United States," subject to the "navigational servitude" of the federal government.[256] At issue was whether the government could open the water to the public without paying compensation.[257] Justice Rehnquist delivered the opinion of the Court:

> [T]he Government must condemn and pay for [a number of expectancies embodied in the concept of "property"] before it takes over the management of the landowner's property. In this

252. BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 129 (1928).
253. 444 U.S. 164 (1979).
254. *Id.* at 180.
255. *Id.* at 166-67.
256. *Id.* at 168-69.
257. *Id.*

> case, we hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.[258]

The Court characterized the right to exclude others, or the right to be free from a physical invasion, as "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[259] This right, the Court reasoned, would be violated if the government could force Kaiser Aetna to allow the public a right of access across their pond, for such government action went "far beyond ordinary regulation or improvement for navigation."[260] Thus the substantial degree of government-mandated invasion partially explains the Court's decision.

Three years later, however, the Court found the degree of invasion unimportant. In *Loretto v. Teleprompter Manhattan CATV Corp.*,[261] Jean Loretto, the owner of an apartment building, filed a class action lawsuit in New York state court against a cable television company.[262] Loretto sought damages and injunctive relief, alleging that Teleprompter's installation of cables in her building pursuant to a New York statute constituted a taking in violation of her Fifth Amendment rights.[263] Although the New York state courts held that the statute did not constitute a taking,[264] the Supreme Court reversed, concluding that any permanent physical occupation of property amounts to a taking.[265]

The State of New York had enacted the statute at issue to promote tenant access to cable television service.[266] Describing the extent to which the cable occupied Loretto's building, the Court noted that the cable lines ran across the roof and from the roof of the building down the front to the first floor.[267] Furthermore, Teleprompter had installed two large silver boxes along the roof cables.[268] The Court determined that the installation of the cables and boxes constituted a physical occupation[269] and concluded that "a permanent physical occupation

258. *Kaiser Aetna*, 444 U.S. at 179-180 (footnotes omitted).
259. *Id.* at 176.
260. *Id.* at 178.
261. 458 U.S. 419 (1982).
262. *Id.* at 421, 424.
263. *Id.* at 424.
264. *Id.* at 424-25.
265. *Id.* at 441.
266. *Loretto*, 458 U.S. at 423.
267. *Id.* at 422.
268. *Id.*
269. *Id.* at 438.

authorized by government is a taking without regard to the public interests that it may serve."[270] The Court did not base its decision on any sort of "fairness" or "justice" approach, and it showed no concern for balancing equities, for the economic impact of the regulation, or for evidence that the property value of the building may have increased as a result of the regulation. Since it had determined in *Kaiser Aetna* that "the landowner's right to exclude [is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property,'"[271] the Court disallowed the installation of cables because it compromised one of the sticks in the bundle of rights.

The *Loretto* decision appears strange in light of governmental actions affecting property in general. Various governmental agencies commonly regulate the use of private property without violating the Fifth Amendment.[272] Even in instances where regulations diminish the value of a private landowner's property by more than ninety-five percent, the Court has indicated that there might not be a taking.[273] Contrasted with its use of metaphor in the previously discussed contexts,[274] the Court's interpretation of the Takings Clause is consistently literal. Thus, although one may disagree with the Court's use of the bundle of sticks metaphor, it does provide consistency and guidance to lower courts. Because it informs government agencies that *any* permanent physical invasion will be considered a taking and enables them to tailor their actions accordingly, the metaphor is useful. Indeed, one might argue that the Court has taken the metaphor too seriously and has allowed the "bundle of sticks" metaphor, rather than the Constitution, to guide its decisions.

C. Conclusions on the "Bundle of Sticks" Metaphor

The bundle of sticks metaphor has guided the Supreme Court in its decisions regarding government-compelled physical invasions of and government-regulated use of private property. The Court's adherence to the notion that property rights are a "bundle of sticks" reveals how a metaphor may actually serve as a guide to the Supreme Court, lower courts, and the public. Every court and practitioner of the law there-

270. *Id.* at 426.

271. *Loretto*, 458 U.S. at 433 (quoting *Kaiser Aetna*, 444 U.S. at 176).

272. For example, zoning regulations are the norm in virtually every state and city. In addition, federal environmental regulations govern the use of land.

273. *See, e.g.*, Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2919 (1992) (Stevens, J., dissenting).

274. See the discussion of the Court's use of the rational basis test and wall of separation metaphors *supra* parts II and III.

fore knows that even the smallest permanent physical invasion of property violates the property owner's constitutional rights. No "walls" need be breached nor "tests" met. Thus, the "bundle of sticks" metaphor is used to enlighten and guide. As a result, the Court has shown that metaphors are not inherently ambiguous when used in a legal context but are ambiguous only because the Court has usually failed to take its metaphors seriously.

V. CONCLUSION

Paradigms and metaphors should help us understand new situations.[275] Yet, as the foregoing discussion of tests, walls, and bundles demonstrates, the Supreme Court's paradigms usually do not serve as guides. The "test" metaphor is not useful because it is difficult to predict which "test" the Court will apply to a new group or right. The most troublesome aspect of the use of tests is the process by which the Court decides which test will be applied to a particular group or right. Similarly, the "wall" serves no purpose other than as a rhetorical device that suggests an absolutist approach to church and state issues.

The uselessness of these particular metaphors does not eviscerate the value of metaphors in legal discourse. The "wall of separation" metaphor could be useful if the Court seriously considered the implications of its words. If the Court had meaningfully applied the "wall," our entire Establishment Clause jurisprudence would be different. Thus, the uselessness of the metaphor stems not from the Court's failure to choose a clear metaphor, but from the Court's unwillingness to treat the metaphor seriously.

The Court's abuse of metaphor will ultimately prove disastrous. The American legal system is dependent upon the use of language. The words of the Supreme Court provide guidance to lower courts and practitioners. When the Court, as the supreme interpreter of constitutional language, purposefully and intentionally hides its decisions behind deceptive metaphors, it allows other members of the profession

275. The progressivity of the paradigm—that is, its usefulness in new contexts—is critical. *See* Lawrence Tribe, *The Curative of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 35 (1989). As Professor Tribe explains, "[a] progressive paradigm adapts in a constructive fashion to new 'data'—new situations and problems; a 'degenerative' paradigm must be revised in an ad hoc fashion to handle these new facts or contexts." *Id.* (footnotes omitted).

to hide behind this confusion and encourages them to focus on outcomes, rather than reasoning. Thus, although metaphors may be powerful tools, the Supreme Court's use of metaphors frequently undermines the communication and reasoning that forms the basis of our legal system.