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Shared Time Instruction in Parochial Schools: Stretching the Establishment Clause to its Outer Limits

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I. Introduction and Scope

Public aid to parochial schools, commonly referred to as parochiaid,[1] is an area of the law characterized by weak regulation and strong political and religious pressures. Although parochiaid programs fall under the safeguard of the first amendment,[2] specific legislation ensuring their confinement within constitutional bounds is scarce.[3] The lack of legislation directly controlling parochiaid allows individual school districts great freedom in designing and implementing aid programs. Regulation of parochiaid is thus left to the judiciary, which has handed down conflicting and often contradictory opinions delineating the scope and permissibility of various parochiaid programs.[4] The absence of consistent legislative or judicial guidelines for state funded parochiaid permits many school districts to implement programs that may violate the establishment clause.[5] The school district of Grand Rapids, Michigan implemented a parochiaid shared time program[6] which tested the limits of constitutionality by placing publicly salaried teachers in parochial schools.[7] In *Americans United for Separation of Church and State v. The School District of the City of Grand Rapids*,[8] the Sixth Circuit

1. The term "parochiaid" will hereinafter be used to denote the general group of programs involving public aid to parochial schools.

2. The first amendment read in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

This comment primarily concerns the first religion clause, commonly referred to as the establishment clause. Both the establishment clause and the free exercise clause are applicable to the states through the due process clause of the fourteenth amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

3. *See generally* Rabinove, *Does Dual Enrollment Violate the First Amendment?*, 3 J.L. & EDUC. 129 (1974). *See also infra* notes 54-68 and accompanying text.

4. *See infra* notes 13-68 and accompanying text.

5. *See supra* note 2.

6. Shared time, or dual enrollment, is a procedure that allows pupils attending private or parochial schools to pursue studies that are funded by public revenue. Most shared time programs involve the transfer of parochial school students to public school buildings. *See* Rabinove, *supra* note 3, at 129.

7. *See infra* notes 73-77 and accompanying text.

8. 718 F.2d 1389 (6th Cir. 1983) [hereinafter referred to as Americans United v. Grand Rapids].

Court of Appeals struck down the Grand Rapids program, holding that this use of publicly salaried teachers in parochial school classrooms violated the establishment clause.[9]

This comment examines the possible effects of the *Americans United v. Grand Rapids* holding on other parochial programs. Further, this comment analyzes the Sixth Circuit holding in light of previous decisions of the United States Supreme Court, and discusses possible resolution of the shared time issue by a Court that has grown increasingly receptive to religious constituencies.[10] This comment also explores the feasibility of increased legislative control of parochiaid programs,[11] and examines the political and religious factors that have necessitated stricter judicial review of public aid to parochial schools.[12]

II. Supreme Court Treatment of Establishment Clause Education Cases

A. Busing

Many of the problems inherent in Supreme Court analysis of establishment clause education cases[13] can be traced to *Everson v. Board of Education of the Township of Ewing.*[14] In *Everson*, a divided Supreme Court approved a New Jersey program that provided parents with public reimbursement of cost of transporting their children to private[15] schools.[16] Justice Black, writing for the majority in

9. The Grand Rapids shared time program invalidated by the Sixth Circuit was not a traditional shared time program. *See infra* notes 86-98 and accompanying text.

10. *See infra* notes 110-148 and accompanying text.

11. *See infra* notes 140-164.

12. *See infra* notes 140-164 and accompanying text. *See also infra* notes 180-202 and accompanying text.

13. This comment applies the establishment clause to public aid to religious schools. The establishment clause has also been utilized by the Supreme Court to strike down religious activities *in* public schools. However, Supreme Court holdings concerning religion in public schools have been fairly consistent. *See, e.g.*, Abington School District v. Schempp, 374 U.S. 203 (1963) (invalidating Bible reading in public schools); Engel v. Vitale, 370 U.S. 421 (1962), (striking down school prayer); Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203 (1948) (prohibiting religious education programs in public schools). The Court in each of these cases strongly advocated governmental neutrality toward religion, requiring abolition of many long-standing programs that had allowed or promoted religion in public schools. Although Supreme Court holdings relating to religious activities in public schools have been fairly predictable to date, recent political developments may portend a shift in the Court's stance. *See infra* notes 110-128 and accompanying text.

14. 330 U.S. 1 (1947) [hereinafter referred to as *Everson*].

15. The New Jersey statute in *Everson* provided for reimbursement of parents of nonpublic school children. Most statutes granting aid or relief to students provide such relief to "non-public school" students or their families. However, roughly 90% of "non-public school" students attend parochial, rather than nonsectarian schools. Thus, statutes providing assistance to nonpublic school students generally have the effect of benefiting parochial, rather than private, school pupils.

16. Although the majority held that the establishment clause was intended to erect a wall of separation between church and state, it found the New Jersey pupil transportation statute nonviolative of this wall of separation. Rather, the Court held that the statute ap-

Everson, justified the program as public welfare legislation, similar in nature to services such as police and fire protection that the state provided for all citizens.[17] Justice Rutledge, in his dissent, argued that if reimbursement of busing costs for private school pupils was public welfare legislation, then "no possible objection to more extensive support of religious education could arise."[18]

Despite the potential justification for more extensive parochiaid pursuant to Justice Black's public welfare analogy, such extension was not immediately apparent.[19] Although the majority of post-*Everson* busing decisions have upheld state and school district transportation programs, most of these programs require transportation to be provided to public and parochial students in the same manner,[20] on established public school routes.[21] Some states have gone beyond the equality of treatment requirement by allowing school districts to transport private school pupils for a greater distance than public school pupils.[22] However, those states have not extended the *Everson*

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proached the verge of constitutional power without violating it.

17. 330 U.S. at 18. Justice Black compared providing transportation to private school students with state funded provision of other services for the general welfare, such as police and fire protection. The troublesome aspect of this analogy is that it is drawn broadly. If construed broadly, this language could justify providing free lunches or medical examinations to private school students, under the guise of general welfare services. *See* Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969).

18. *Id.* at 49.

19. The standard of review derived from *Everson* is known as the secular purpose doctrine. Under this test, the benefit to private schools must be secular in nature, and must benefit children rather than sectarian schools. *See* Wedlock and Jasper, *Parochiaid and the First Amendment: Past, Present and Future*, 2 J.L. & EDUC. 377 (1973).

20. *See, e.g.*, Rhoades v. School Dist. of Abington Tp., 424 Pa. 202, 226 A.2d 53 (1967), *cert. denied*, 389 U.S. 846 (1967). *See also* Jamestown School Committee v. Schmidt, 699 F.2d 1 (1st Cir. 1983) (upholding transportation of nonpublic school children provided that public and nonpublic school children were eligible for transportation on the same terms); Americans United, Inc. v. Independent School District, 288 Minn. 196, 179 N.W.2d 146 (1970) (holding that equality of treatment in transporting children who were required to attend school under compulsory attendance laws did not violate a Minnesota constitutional provision prohibiting public funding of sectarian schools); Alexander v. Bartlett, 14 Mich. App. 177, 165 N.W.2d 445 (1968) (upholding transportation of children to nonpublic schools on the basis of its secular purpose). *But see* Epeldi v. Engelking, 94 Idaho 390, 488 P.2d 860 (1971) (holding that transportation of public and private school children violated an Idaho constitutional proviso prohibiting application of public funds to parochial schools); Spears v. Honda, 51 Hawaii 103, 449 P.2d 130 (1968) (holding that subsidized transportation to children attending public and nonpublic schools was an invalid application of state funds to sectarian schools).

21. *See, e.g.*, Board of Education v. Bakalis, 54 Ill. 2d 448, 299 N.E.2d 737 (1973) (upholding transportation of parochial school students on public school bus routes); Bowker v. Baker, 73 Cal. App. 2d 653, 167 P.2d 256 (1946) (allowing parochial school students seats in public school buses under a pupil-benefit rationale). *But see, e.g.*, Matthews v. Quintin, 362 P.2d 932 (1961 Alaska) (invalidating publicly financed transportation of nonpublic school children over the same routes as public school children as inconsistent with a state constitutional prohibition against the use of public funds for sectarian schools).

22. Section 1361 of the Pennsylvania Public School Code requires that all nonpublic school students be provided with transportation within ten miles of their homes, even if this extends beyond their home school districts. 24 P.S. §13-1361 (Purdon 1965). For caselaw upholding the constitutionality of 24 P.S. §13-1361, *see* Springfield School District v. Department of Education, 483 Pa. 539, 397 A.2d 1154 (1979); McKeesport Area School District v.

classification of busing as a public welfare action — with a solely secular purpose — beyond trips to and from a school building.[23] Thus, despite tension between the majority's broad classification of busing as a public welfare benefit with a solely secular purpose, and the dissent's fear of overstepping the bounds of the establishment clause, *Everson* remained the standard of review of public aid to parochial schools for more than twenty years.[24]

B. Shared Materials

The Supreme Court expanded the establishment clause analysis of *Everson* in *Board of Education v. Allen*.[25] In *Allen*, the court upheld a New York statute authorizing the loan of state-purchased textbooks to both public and private school students.[26] The court based its two part analysis first on the secular purpose of the program — enhancement of educational opportunities[27] — and secondly found that this purpose neither advanced nor inhibited religion. This

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Commonwealth of Pennsylvania, Department of Education, 38 Pa. Commw. 290, 392 A.2d 912 (1978); Pequea Valley School District v. Commonwealth of Pennsylvania, Department of Education, 36 Pa. Commw. 483, 387 A.2d 1022 (1978); School District of Pittsburgh v. Commonwealth of Pennsylvania Department of Education, 33 Pa. Commw. 585, 382 A.2d 772 (1978). *See also* Cromwell Property Owners Association v. Toffolon, 495 F. Supp. 915 (D. Conn. 1979) (upholding transportation of parochial school students outside their home districts). *But see* Jamestown School Committee v. Schmidt, 427 F. Supp. 1338 (D.R.I. 1977) (striking down optional out-of-district transportation to private school students but not to public school student as violative of the establishment clause); Young v. Board of Education, Joint District #10 of Village of Mukwanago, 74 Wis. 2d 144, 240 N.W.2d 230 (1976) (holding that transporting parochial students to a school over five miles from their home district was not required); Rackmyer v. Gates-Chili Central School District, 48 A.D.2d 180, 368 N.Y.S.2d 636 (1975) (holding that the district was not obligated to transport students to a distant parochial school absent showing that students could not attend the parochial school closest to home); Wenner v. Board of Education, Middle Island Central School District 12, Town of Brookhaven, 71 Misc. 2d 978, 337 N.Y.S.2d 733 (1972) (holding transportation of parochial school students limited to bounds imposed by a mileage restriction statute).

23. In Wolman v. Walter, 433 U.S. 229 (1977), the Supreme Court held that publicly financed transportation for field trips taken by parochial school students violated the establishment clause. *Accord* Cook v. Griffin, 47 A.D.2d 23, 384 N.Y.S.2d 632 (1975).

24. Although the principles set forth in *Everson* were refined in other religion clause cases, *Everson* remained the leading establishment clause education case until 1968. For post-*Everson* religion clause cases, *see* McGowan v. Maryland, 366 U.S. 420 (1961) (upholding the constitutionality of Sunday retail closing laws); Zorach v. Clausen, 343 U.S. 306 (1952) (upholding the validity of released time programs).

25. 392 U.S. 236 (1968) [hereinafter referred to as *Allen*].

26. The Court upheld the New York statute on the basis of facts particular to the New York textbook loan program. It relied heavily on the status of the books themselves. The Court reasoned that since the books were loaned to nonpublic schools — rather than given outright — the title to the books remained in the state. Since the title remained in the state, the book loan program was not classified as direct aid to religion. The Court also relied on the child benefit theory of *Everson*, reasoning that the requests for the books were made on behalf of the students, rather than on behalf of a parochial school. For a general analysis of *Allen* and a discussion of what constitutes a "sectarian book," *see* Note, *Sectarian Books, the Supreme Court and the Establishment Clause*, 79 YALE L.J. 111 (1969).

27. The Court interpreted the New York statute as authorizing the loan of only secular textbooks. Not only were the books themselves secular — the purpose the state advanced for the loan program — but also the furtherance of educational opportunities for all students, was similarly secular. 392 U.S. at 245.

second prong of the *Allen* analysis, commonly referred to as the primary effect test,[28] was subsequently utilized to uphold textbook loan statutes in Pennsylvania and Ohio. In *Meek v. Pittinger*[29] and *Wolman v. Walter*,[30] the Court validated *Allen* by upholding state textbook loans to sectarian school students.[31] However, the Court did not extend constitutional protection to materials other than textbooks.[32]

C. *Health, Safety, Guidance, and Auxiliary Services*

The provision of publicly funded health and welfare services to private schools — including lunches and health care programs — was also upheld in *Meek*[33] and *Wolman*.[34] However, in the area of

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28. The Court in *Allen* examined the purpose and primary effect of the New York statute. If the purpose of a statute granting aid to parochial schools is either the advancement or inhibition of religion, the enactment exceeds legislative power. To withstand establishment clause scrutiny, a statute must have a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Id.* at 243.

29. 421 U.S. 349 (1975). Although no majority opinion was reached, the Court held that loan of textbooks to nonpublic school pupils did not violate the establishment clause. Justice Stewart, joined by Justices Powell and Blackmun, reached this result by applying the pupil benefit and primary effect tests of *Allen*. Justice Rehnquist, joined by Justice White, concurred based on the similarity of the Pennsylvania statute challenged in *Meek* to the New York statute upheld in *Everson*.

30. 433 U.S. 229 (1977). In *Wolman*, the Court upheld an Ohio statute which authorized publicly financed purchase of textbooks for loan to parochial school students. The Court relied upon the *Allen* reasoning that a loaned book, with title retained by the state, did not constitute aid to parochial schools.

31. In cases challenging the loan of publicly financed textbooks to parochial school students, lower courts have found such programs to be violative of state constitutional provisions. *See, e.g.*, California Teachers Association v. Riles, 29 Cal. 3d 794, 176 Cal. Rptr. 300, 632 P.2d 953 (1981) (holding that a textbook loan program for nonpublic school students violated a California constitutional prohibition against public financial support of parochial schools); Bloom v. School Committee of Springfield, 376 Mass. 35, 379 N.E.2d 578 (1978) (striking down a statute that required public textbook loans to private school pupils as violative of a state constitutional prohibition against use of public funds or property to aid sectarian schools); Gaffney v. State Department of Education, 192 Neb. 358, 220 N.W.2d 550 (1974) (holding that the loan of textbooks to private schools violated a Nebraska constitutional provision against appropriation of public funds for sectarian schools). *See also* Griffin, *Public Aid to Private Schools: A Shift in Direction?*, 1 ED. LAW RPTR. 753 (1982), in which the author contends that *California Teachers Association v. Riles* heralds a shift away from theories allowing public aid to private schools.

32. In *Meek*, the Court held that a Pennsylvania statute authorizing public school authorities to lend maps, films, and tape recorders to nonpublic schools impermissibly violated the establishment clause. The Court in *Wolman* ruled that a similar statute in Ohio which authorized the loan of projectors, maps, tape recorders, and globes purchased with public funds to private schools, violated the establishment clause.

The Court's use of the *Allen* rationale to uphold subsequent textbook loan programs, coupled with its refusal to extend *Allen* to cover the loan of other instructional materials, validates post-*Allen* predictions of piecemeal resolution of establishment clause issues. *See* Valente, *Aid to Church Related Education: New Directions Without Dogma*, 55 VA. L. REV. 579 (1969).

33. In *Meek*, the Court held that a state may include parochial school students in publicly funded school lunch programs and health programs if these services are available to all school students. The Court based its decision on the fact that the services provided were secular and nonideological.

34. In *Wolman*, the Court upheld an Ohio statute providing state-funded diagnostic speech and hearing services to parochial school students. The Court upheld the *Wolman* program because the services provided were diagnostic in nature, and were performed by public employees.

guidance and auxiliary services, the *Meek* and *Wolman* holdings differ sharply. *Wolman* signified the Court's acceptance of publicly financed career guidance programs and remedial services as constitutional as long as such services were provided at a neutral, non-parochial location.[35] The *Meek* Court held, however, that Pennsylvania's publicly funded remedial and enrichment services to parochial school students at parochial school sites violated the establishment clause.[36]

D. Diagnostic Services

The Supreme Court has applied the distinction drawn in auxiliary service cases between administration by public school personnel and administration by parochial school personnel[37] in cases involving standardized testing. The Court invalidated a New York statute providing public compensation to nonpublic schools for expenses incurred in state-mandated testing.[38] However, *Wolman* upheld an Ohio statute providing public funds for standardized testing and scoring of parochial school pupils by public school employees.[39] Three years after *Wolman*, in *Committee for Public Education and Religious Liberty v. Regan*,[40] the Court allowed direct reimbursement to parochial schools for state-mandated testing services. The

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The Court's support of the health and welfare programs of *Meek* and *Wolman* is consistent with Justice Black's public welfare analogy in *Everson*. School health and lunch programs are more indicative of both public safety and secular purpose than bus transportation to a parochial school. *Meek* and *Wolman* also fulfill Professor Freund's prediction of expanded aid to parochial schools, justified by the *Everson* safety analogy. Freund, *supra* note 17.

35. The Court cautiously qualified its endorsement of the services provided in *Wolman*. It noted that the services provided in Ohio were available to public and private school students on an equal basis, were performed only in public schools, centers or mobile units rather than in sectarian schools, and were administered by state employees. The Court held that these circumstances reflected the non-sectarian nature of the services. However, the Court conditioned that publicly financed guidance counselling services should be monitored strictly to avoid impermissible state involvement in day-to-day curriculum planning within parochial schools.

36. The Pennsylvania statute challenged in *Meek* authorized public school officials to supply staff and auxiliary services, such as remedial and enrichment programs and guidance counselling, to non-public schools. The Court found that the Pennsylvania program violated the establishment clause. This holding centered on the fact that the auxiliary services were provided on the premises of parochial schools, at the request of parochial school officials. The Court held that providing publicly financed services in a sectarian environment prevented public officials from ensuring that church and state remained separate.

37. *See supra* notes 35-36 and accompanying text.

38. Levitt v. Committee for Public Education and Religious Liberty, 413 U.S. 472 (1973) (commonly referred to as *PEARL*). The Court based its invalidation of the reimbursement program in *PEARL* largely on the fact that parochial school teachers were paid with public funds for administering state tests. The Court noted that no effort had been made to insure that tests prepared and administered by parochial schools were free of religious influence. *Accord* New York v. Cathedral Academy, 434 U.S. 125 (1977) (striking down a subsequently enacted New York statute because the New York legislature had acted in direct contravention of the district court order invalidating the statute challenged in *PEARL*).

39. The Court focused on the fact that parochial school students were tested in secular subjects, that nonpublic school personnel were not involved in compiling or grading the tests, and that such personnel were not paid for administering the tests.

40. 444 U.S. 646 (1980).

New York statute upheld in *Regan* provided for state prepared examinations graded by parochial school personnel.[41] The swing in the court's view of permissible aid to private schools for testing purposes indicates both a shifting standard of analysis[42] and an erosion of church-state separation.[43]

E. Salary Subsidies

Equally difficult to understand in light of this contradictory line of analysis is public funding of sectarian teacher salaries. In *Lemon v. Kurtzman*,[44] the Supreme Court held that a Rhode Island statute providing public salary supplements to private school teachers, and a Pennsylvania statute providing state reimbursement of nonpublic school teacher's salaries violated the establishment clause. The Court articulated a three-part test in *Lemon* that has become a benchmark for establishment clause cases. The Court stated that a statute violates the establishment clause if it does not have a clearly secular legislative purpose,[45] if it has the primary effect of advancing or inhibiting religion,[46] or if it creates excessive entanglement between church and state.[47] The *Lemon* opinion united these separate tests derived from previous cases,[48] and formed the standard of review for *Meek*, *Wolman* and *Regan*. Different parts of the three-part *Lemon*

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41. The New York statute vested initial control of parochial student testing in parochial school teachers. The tests were prepared by state education authorities, but administered by parochial school personnel. The Court examined the elaborate auditing provision of the New York statute, and concluded that the provision ensured that public funds would be used solely for secular expenses. Thus, not only did the Court uphold parochial control of publicly mandated examinations, it validated reimbursement for such exams made directly to the nonpublic school.

42. The holding in *Regan* directly opposes that of *Wolman*. In *Wolman*, auxiliary services to private schools were upheld because they were administered on state property by public employees. *See supra* note 35.

43. This shift in permissible public funding of testing in private schools indicates the Court's willingness to allow the states greater freedom in designing and implementing testing programs. Although the purpose of such programs has traditionally been viewed as secular, the shift from *Wolman* to *Regan* in allowing parochial school personnel to administer such tests facilitates more extensive testing programs by requiring less public involvement at the parochial school level. This eroding distinction between public funding and parochial control severely tests the bounds of the establishment clause. *See generally*, Comment, *Cessation of the Excessive Entanglement Test and the Establishment of Religion*, 7 OHIO N.U.L. REV. 975 (1980).

44. 403 U.S. 602 (1971).

45. The first prong of the *Lemon* test stemmed from the *Everson* analysis. *See supra* notes 14-19 and accompanying text.

46. The second prong of *Lemon* arose from the *Allen* analysis. *See supra* notes 25-28 and accompanying text.

47. The third prong of *Lemon* was articulated initially in Walz v. Tax Commission, 397 U.S. 664 (1970). *Walz* involved an establishment clause challenge to a New York tax exemption statute granting tax relief to religious organizations for property used for religious or educational purposes.

48. 403 U.S. at 612 (1971). *See generally* Note, *Government Assistance to Church Sponsored-Schools: Tilton v. Richardson and Lemon v. Kurtzman*, 23 SYRACUSE L. REV. 113 (1972).

test have been emphasized by the Court in different analyses of establishment clause cases, but typically a program must pass all three tests to pass constitutional muster.[49] Following *Lemon*, commentators predicted that the Court would utilize the decision to curtail or limit public aid to private schools.[50] However, one commentator's less optimistic prediction of eroding separation between church and state[51] has been realized by subsequent developments,[52] including the growth of shared time programs.[53]

III. Shared Time Programs

A. State Constitutional and Statutory Foundations

Shared time or dual enrollment refers to the practice of parochial school students receiving instruction in specific subjects from public school teachers.[54] Unlike released time programs, which allow a student to leave public school classes to attend religious instruc-

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49. *See* Wedlock and Jasper, *Parochiaid and the First Amendment: Past, Present and Future*, 2 J.L. & EDUC. 377 (1973).

50. Commentators offered varied justification for the perceived shift toward contracting private school aid programs. *Lemon* has been hailed as signaling the unequivocal and immediate invalidation of aid to parochial schools other than textbook loans or transportation. *See* Pfeffer, *Aid to Parochial Schools: The Verge and Beyond*, 3 J.L. & EDUC. 115 (1974). *Lemon* also has been attacked as confusing; however, inconsistencies cited in *Lemon* were viewed as constraining state legislatures from enacting specific aid programs that had not been upheld by the Supreme Court. *See* Wilson, *The School Aid Decisions: A Chronicle of Dashed Expectations*, 3 J.L. & EDUC. 101 (1974). *Lemon's* invalidation of salary subsidies was viewed as possibly giving impetus to a renewed effort on the part of parochial school lobbies to obtain aid. However, in the face of *Lemon*, it appeared that the Court did not favor such efforts. *See* Robison, *Little Room Left to Maneuver*, 3 J.L. & EDUC. 123 (1974). It should be emphasized that these commentators based their predictions on cases decided as of 1974. Thus, their analysis pre-dates *Meek*, *Wolman* and *PEARL*.

51. By denying federal subsidies for parochial school teacher's salaries, the Court did not alleviate the economic pressure on parochial schools. Despite *Lemon*, one commentator theorized that continuing economic decline of parochial schools would necessitate a parochial school demand for some form of federal subsidy. *See* Boles, *Persistent Problems of Church, State and Education*, 1 J.L. & EDUC. 601 (1972).

52. Subsequent court decisions have validated Boles' predictions. *See* Buchanan, *Governmental Aid to Sectarian Schools: A Study in Concisive Precedents*, 15 HOUS. L. REV. 783 (1978) (a post-*Wolman* examination of Supreme Court aid to private school decisions). *See also supra* notes 33-43 and accompanying text.

53. *See infra* note 54.

54. One commentator describes shared time as "enabling religious school pupils to pursue secular studies such as mathematics, physical sciences, industrial arts and physical education *in public schools* while simultaneously studying those subjects which include a denominational content in their own denominational schools." Rabinove, *supra* note 3, at 129 (emphasis added). Another commentator defines shared time as "an arrangement for pupils enrolled in nonpublic elementary or secondary schools to *attend public schools* for instruction in certain subjects." Flynn, *Shared Time, Hope or Chaos for the Schools*?, NATIONAL SCHOOL BOARDS ASSOCIATION INFORMATION BULLETIN (Vol. 3, Jan. 1956) (emphasis added).

In Pennsylvania, shared time has been characterized as "an arrangement whereby a student regularly and concurrently *attends a public school* part-time and a nonpublic school part-time, pursuing part of his elementary or secondary program of studies under the direction and control of the public school and the remaining part under the direction and control of the nonpublic school." S. FRANCIS AND T. RUTTER, PENNSYLVANIA SCHOOL LAW, VOL. I, §15.6 (1983) (emphasis added).

tion,[55] the content of shared time instruction is secular. Constitutional challenges arising from shared time programs do not question the nature of instruction; rather, they question implementation and control of such instruction.

Although the concept of shared time often is coupled with the term "program", shared time usually evolves from state statutory or constitutional rights.[56] By the 1960's, many states had implemented shared time offerings under the authority of their constitutional provisions.[57] Creating shared time programs from state constitutional or statutory foundations engendered few state constitutional challenges.[58] This lack of litigation in turn gave local officials great latitude in designing shared time offerings.

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55. Released time programs involve teaching religion to public school pupils. The Supreme Court has held that religious instruction in public schools, even on an optional basis, is constitutionally impermissible. *See* Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203 (1948). However, the Court upheld the constitutionality of programs releasing students from public school classes to receive religious instruction away from public school premises. *See* Zorach v. Clausen, 343 U.S. 306 (1952). *Accord* Lanner v. Wimmer, 662 F.2d 1349 (10th Cir. 1981) (holding that released time program allowing students to attend seminary classes was not per se unconstitutional, but that monitoring attendance at religious classes by utilizing student aids did violate the establishment clause). In Abington School District v. Schempp, 372 U.S. 203 (1963), Justice Brennan distinguished *McCollum* from *Zorach* by pointing out that the *McCollum* program accorded sectarian teachers identical authority to public school teachers. The Court stated that the *McCollum* program brought government and religion into proximity forbidden by the establishment clause.

Although this comment focuses on shared time rather than released time, the Court's distinction between on- and off-premises instruction is central to the Sixth Circuit's reasoning in *Americans United.*

56. *See, e.g.*, Pennsylvania Public School Code of 1949, Act of 1949, P.L. 30, No. 14 §502, providing in pertinent part that: "no pupil shall be refused admission to the courses in additional schools or departments, by reason of the fact that his elementary or academic education is being or has been received in a school other than a public school."

57. Shared time developed in the early 1960's as a less drastic and direct form of aid to private schools. By 1963-64, at least 280 school systems offered shared time courses to nonpublic school students. The states with the most districts offering shared time in the early 1960's were: Michigan, 42 districts; Ohio, 36 districts; Pennsylvania, 31 districts; Illinois, 27 districts; and Wisconsin, 25 districts. For the purpose of the above table, shared time was defined as part-time attendance *at public schools* by parochial school students. (emphasis added). Most of the districts responding to the survey offered private school students the opportunity to enroll in vocational education courses. *See* F. SORAUF, THE WALL OF SEPARATION (1976), utilizing data gathered in a 1964 study commissioned by the National Education Association. Although the American Civil Liberties Union opposed shared time as early as 1965 on the grounds of possible conflict with church and state separation, many shared time offerings continued to flourish in the mid-1970's and beyond. *See* Rabinove, *supra* note 3.

58. One of the earliest cases addressing shared time was Commonwealth *ex rel.* Wehrle v. School District of Altoona, 241 Pa. 224, 88 A. 481 (1913), upholding admission of private and sectarian school students to public school vocational training program. This case was decided under §401 of the School Code of 1911, the predecessor of §502 of the Pennsylvania Public School Code.

The holding in Commonwealth *ex rel.* Wehrle v. School Dist. of Altoona not only upheld the school code, but also found that the code provision did not violate Pennsylvania's constitutionally mandated prohibition against use of public monies to support sectarian schools. *See* PA. CONST. art. 3, §15 (formerly art. 10, §2).

B. *Local Design and Implementation*

State officials generally implement shared time offerings that are mandated by state law. Accordingly, state attorneys general[59] and department of education officials[60] have been reluctant to restrict shared time offerings. Their leniency stems in part from the broad language of state constitutional provisions[61] and in part from the scarcity of suits challenging such programs.[62] State court attacks on shared time offerings in public schools generally have failed.[63] Thus, traditional shared time programs can be assumed to be constitutionally permissible as compared to the released time program upheld in *Zorach v. Clausen*,[64] where students were released from pub-

59. Many states rely on attorney general opinions that have interpreted state laws to permit shared time. Attorneys general of Utah, California, Oregon, Oklahoma, and Ohio have construed their state laws as permitting shared time.

An example of one such ruling by the Ohio Attorney General states:

It is believed that a board of education can properly permit a child of school age to attend only particular classes in a school. . . . The fact that he is also enrolled in another school . . . and is attending classes therein during a part of the school day, does not, in itself, appear to disqualify the child from enrolling in a public school for a particular course of instruction, and it is not believed that such dual enrollment would be unlawful even if one school is maintained by a church.

Letter form the Attorney General of Ohio to the Department of Public Instruction, May 14, 1962.

60. Department of Education officials usually interpret state constitutional provisions for individual school districts. During an interview with officials at the Pennsylvania Department of Education, this author examined the department's "shared time" file. The file consisted of requests from school districts and parochial schools for guidance on the scope of instruction permissible under Pennsylvania law.

61. The only restraints upon shared time offerings in Pennsylvania, for example, derive from the language of §502 of the Public School Code. The Code provides in pertinent part that additional schools and departments may be provided for "the education and recreation of persons residing *in such district*." (emphasis added). Thus, the only limit on shared time offerings in Pennsylvania is the requirement that a student must be a resident in the district where he desires to enroll in public school classes. As long as the student meets this residency requirement, the public school code obligates school districts to allow participation in public school courses on a space-permitting basis. School districts need not make special concessions for private school students utilizing shared time offerings, but must offer them equal treatment with public school peers.

Pennsylvania's "open-ended" shared time system reflects state education policies strongly favoring the right of parents to choose a private school education for their children. Although Pennsylvania's education policy recognized that direct state aid to private schools is constitutionally forbidden, it acknowledges that state support of educational alternatives, either within or outside the school system when private funds are available, is encouraged. Shared time, offering the public school system to private schools, is one such educational alternative. *See* REPORT OF THE CITIZENS COMMISSION ON BASIC EDUCATION, Commonwealth of Pennsylvania (Nov. 1973).

62. An official of the Pennsylvania Education Department explained that lack of state policy concerning shared time is balanced by judicial control. He explained that the department of education ensures that each pupil receives his §502 right to a public education, while the judiciary controls the scope of those rights through case law which the department uses as guidelines for advice requested by school districts. Interview with officials of the Pennsylvania Department of Education, January 19, 1984.

63. Traditional shared time programs involving parochial school students' enrollment in public school classes, generally are held to be permissible under state constitutional provisions.

64. In Zorach v. Clausen, 343 U.S. 306 (1952), the Supreme Court upheld the constitutionality of released time from public school for the purposes of attending religious services or studies outside the public school building. Shared time is a form of released time; however,

lic school for the purpose of attending religious service.

Conversely, state constitutional challenges to shared time programs involving the use of public school teachers in parochial schools — rather than the transfer of private school students to public schools — have been more successful.[65] Although federal courts have invalidated programs involving public school teachers in parochial schools,[66] the Supreme Court has refused to rule on the constitutionality of such arrangements.[67] Thus, the constitutionality of shared time programs involving the transfer of teachers rather than students is ripe for judicial resolution. *Grand Rapids v. Americans United*[68] presented the Sixth Circuit with just such an opportunity.

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students are released for the purpose of pursuing secular studies.

The *Zorach* program was upheld because the religious studies took place outside of public school premises. Shared time programs that provide for public school instruction *at* public schools should be similarly valid. The use of public schools for secular instruction of parochial school students alleviates any fear of religion permeating such instruction, the same fear that prompted the Court to invalidate an on-premises released time program in *McCollum*, while upholding an off-premises program in *Zorach*.

65. *See, e.g.*, Fisher v. Clackamas County School District, 13 Or. App. 56, 507 P.2d 839 (1973) (invalidating a shared time program in which parochial school students were taught secular subjects by publicly financed teachers in parochial school classrooms, as violative of the Oregon Constitution); State *ex rel.* Chambers v. School District, 155 Mont. 422, 472 P.2d 1013 (1970) (overturning use of state funds to pay public school teachers working in parochial schools, as violative of the Montana Constitution); Special District for the Education and Training of Handicapped Children v. Wheeler, 408 S.W.2d 60 (Mo. 1966) (invalidating state subsidy of public school teacher salaries when such teachers worked part-time in parochial schools). *But see, e.g.*, Morton v. Board of Education of City of Chicago, 69 Ill. App. 2d 38, 216 N.E.2d 305 (1966) (upholding shared time program between parochial and public schools based on local school board power to create and maintain any form of experimental programs to educate children).

66. *See* Americans United for Separation of Church and State v. Porter, 485 F. Supp. 432 (W.D. Mich. 1980) (striking down arrangement providing public school instruction to parochial school students in leased parochial school classrooms, as violative of the establishment clause); Americans United for Separation of Church and State v. Board of Education of Beechwood Independent School District, 369 F. Supp. 1059 (E.D. Ky. 1974) (invalidating public school district's classroom lease arrangement with parochial schools on establishment clause grounds); American United for Separation of Church and State v. Paire, 359 F. Supp. 505 (D.N.H. 1973) (holding that a lease arrangement providing public school teachers and materials in Catholic schools violated the establishment clause); Americans United for Separation of Church and State v. Oakey, 339 F. Supp. 545 (D. Vt. 1973) (enjoining a Vermont program providing publicly funded teachers to parochial schools, as violative of the establishment clause).

67. In Wheeler v. Barrera, 417 U.S. 402 (1974), the administration of federally funded Title I aid programs was challenged. Title I aid refers to aid programs established under Title I of the Elementary and Secondary Education Act, 20 U.S.C. §241(a) *et seq.* (1984) *See infra* note 102 and accompanying text. *See also infra* notes 105 and 106 and accompanying text. In *Wheeler*, the Court refused to determine whether Title I required the assignment of public school teachers to parochial schools to provide on-premises instruction. The Court similarly avoided examining the establishment clause effect of the placement of publicly funded teachers in parochial schools.

68. 718 F.2d 1389 (6th Cir. 1983), *cert. granted*, 104 S.Ct. 1412 (1984).

IV. Grand Rapids v. Americans United

A. Factual Background

1. Growth and History of Shared Time in Michigan. — Shared time in Michigan originally was derived from legislation and has been refined by the judiciary.[69] Michigan courts have upheld not only the authority of local school boards to offer shared time classes to parochial and private school students,[70] but also have held that such instruction may be provided on the premises of nonpublic schools.[71] Based on broad legislative language and liberal judicial interpretation governing shared time, local school boards in Michigan have been assured of receiving state funding for shared time programs.[72]

2. *Grand Rapids Shared Time Programs.* — In 1975, the Grand Rapids School District instituted a program providing education services to sectarian schools in the district. By 1978, these services had been extended to forty sectarian schools, involving 9,497 nonpublic school students and $1,397,577 of public aid.[73] The services offered by Grand Rapids were shared time and community education programs.[74] In both programs the district utilized leased

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69. The Michigan statute provides in pertinent part:

> The board of a school district shall establish and carry on the grades, schools, and departments it deems necessary or desirable for the maintenance and improvement of the schools, determine the course of study to be pursued, and cause the pupils attending school in the district to be taught in the schools or departments the board deems expedient.

1976 P.A. 451, §1282; MICH. STAT. ANN. §15.41282 (1979). This provision appears more general than Pennsylvania's §502, which explicitly details auxiliary services. *See supra* note 56. Michigan courts have expanded this statutory language to authorize various shared time programs. *See infra* notes 70-71.

70. The Michigan Supreme Court has held that local school boards have authority to provide shared time instruction to part-time public school students. *See* Traverse City School District v. Attorney General, 384 Mich. 390, 185 N.W.2d 209 (1971). *Traverse City* involved an action for a declaratory judgment testing the viability of an attorney general's opinion concerning permissible state aid to parochial schools. The court held that a Michigan constitutional prohibition against aid to non-public schools did not prohibit shared time programs, including programs involving the use of public school teachers in parochial schools.

71. *See, e.g.*, Citizens to Advance Public Education v. Porter, 65 Mich. App. 168, 237 N.W.2d 232 (1975) (upholding shared time programs involving public school teachers working in leased parochial school classrooms). *Accord Traverse City, supra* note 70. *But see,. e.g., Americans United v. Porter, supra* note 66.

72. The state of Michigan pays shared time funds directly to participating school districts. The Michigan legislature has authorized the payment of state school aid funds without regard to whether shared time instruction occurs on premises leased from a parochial school. *See* Americans United v. Grand Rapids, 546 F. Supp. 1071, 1077 (W.D. Mich. 1982).

73. *Id.* By 1979-80, the program involved 10,667 nonpublic school students, with the majority already enrolled in parochial schools.

74. The Grand Rapids shared time program was a "standard" shared time program, providing courses predominantly supplemental to the core curriculum of parochial schools. Exceptions were physical education, industrial arts, art, and music programs. All shared time programs were offered during school hours, in contrast to the community education courses which were taught before or after regular school hours.

nonpublic school classrooms. Although the leases did not specify the particular rooms to be used, the public school teachers were instructed to "desanctify the classrooms."[75] Thus, the shared time instructors removed religious symbols from classrooms, but the majority of their students were students already enrolled in the parochial school.[76] The shared time instructors were employed by the school district, but many had previously been employed by the sectarian institution.[77]

3. Litigation. — The potential breach of separation of church and state by the Grand Rapids School District prompted a federal court challenge by Americans United for Separation of Church and State[78] and six individual plaintiffs.[79] Although the district judge dismissed the organizational plaintiff for lack of standing,[80] he found the individual plaintiffs to have standing to challenge the shared

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Both Grand Rapids programs have been characterized as an effort on the part of the public school system to provide parochial schools with services in a manner concomitant with the Constitution. The policy behind the Grand Rapids' programs was establishing good community relations with the large segment of voters with children enrolled in nonpublic schools. Telephone interview with Legislative Analyst, Office of Legislation and School Law, Michigan Department of Education (January 24, 1984).

75. The teachers were instructed to remove religious symbols from classrooms and to post signs within the rooms identifying them as public school classrooms. However, adjoining corridors and other facilities were not devoid of religious symbols. 546 F. Supp. at 1078.

76. *Id.*

77. *Id.*

78. Americans United for Separation of Church and State is a District of Columbia corporation, comprised of taxpayers throughout the United States, including Michigan citizens. The membership of Americans United is estimated at more than 50,000 members. The organization seeks to maintain strict separation of church and state. It has "listening posts" in its local chapters, which inform the organization of possible problems in church/state relations.

When the organization learns of potential constitutional litigation, the legal committee examines the issue and assesses the gravity of the possible constitutional claim. If the committee deems the precedent important, the case is turned over to the board of trustees for approval. If approval is granted, the general counsel initiates the lawsuit. Telephone interview with Albert J. Menendez, Director of Research and Legal Liaison, Americans United (January 27, 1984).

Mr. Menendez's sentiments about his organization are not shared by all commentators. Americans United has been described as an uncompromisingly militant organization that lobbies only intermittently and therefore ineffectively. This lack of lobbying clout forces Americans United to rely heavily on litigation, although such litigation has been viewed as an attempt to create dramatic effect and stimulate separationist sentiment, rather than to make precedents and determine legal rules. *See* R. MORGAN, THE POLITICS OF RELIGIOUS CONFLICT: CHURCH AND STATE IN AMERICA (2d ed. 1980). *See also* Sorauf, *supra* note 57, for a general listing and description of separationist groups and their constituencies.

79. The six individual plaintiffs were Phyllis Ball, Katherine Pieper, Gilbert Davis, Patricia Davis, Frederick Schwass and Walter Bergman, all residents of the Grand Rapids School District, Michigan taxpayers, and opponents of public funding of nonpublic schools. Although the organizational plaintiff was dismissed for lack of standing, the case was still referred to as Americans United v. Grand Rapids.

80. The district judge held that Americans United failed to assert taxpayer standing, which was required to challenge the shared time program. Flast v. Cohen, 392 U.S. 83 (1968). The Court rejected Americans United's attempt to gain standing based on its "special status" as a representative of opponents of the shared time program, relying upon Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982).

time plan.[81] Utilizing the three-prong test of *Lemon v. Kurtzman*,[82] Judge Enslen scrutinized the Grand Rapids shared time program and found that it violated the establishment clause.[83] The defendant school district — permanently enjoined by the district court from continuing its programs[84] — promptly appealed to the Sixth Circuit[85] for resolution of the establishment clause issue.

B. Sixth Circuit Analysis of the Grand Rapids Shared Time Program

1. Standard of Review and Secular Purpose. — The Sixth Circuit Court of Appeals prefaced its holding in *Americans United*[86] by acknowledging that the Michigan legislature and courts had approved spending public funds on shared time programs.[87] Judge Edwards then stated that, notwithstanding this Michigan precedent, the federal judiciary must determine whether the Grand Rapids program violated the establishment clause.[88] The court affirmed Judge Enslen's finding that the individual plaintiffs had standing to bring suit, and adopted his findings of fact.[89] The court then turned to Judge Enslen's analysis. Applying the first prong of the *Lemon* test to the Grand Rapids program, Judge Edwards agreed with the district court finding that the program clearly had a secular purpose.[90]

2. Advancing or Inhibiting Religion. — The court then applied the second and third prongs of *Lemon* to the case. In his opinion for the district court, Judge Enslen had held that the Grand Rapids shared time program advanced religion, a constitutionally impermissible effect. The Sixth Circuit agreed that the program benefited a narrow class of persons, directly aided parochial schools, and excluded the general public.[91] The Sixth Circuit also concurred with Judge Enslen's finding that the shared time program provided direct

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81. The individual plaintiffs were found to satisfy both tests set forth in *Flast*. They established a logical link between their status as taxpayers and the legislation challenged, and they established a nexus between their taxpayer status and the alleged constitutional violation.

82. *See supra* notes 44-48 and accompanying text.

83. The Sixth Circuit incorporated a large portion of District Court Judge Enslen's findings of fact and conclusions of law in its opinion. Judge Enslen's findings will be included in subsequent discussion of the Sixth Circuit's analysis.

84. Americans United v. Grand Rapids, 546 F. Supp. at 1099.

85. Americans United v. Grand Rapids, 718 F.2d 1389 (6th Cir. 1983).

86. *Id.* at 1390.

87. *Id.*

88. *Id.* at 1391.

89. *Id.*

90. The court found that there was "no basis to form a conclusion that there was any purpose or intent to advance religion uncontitutionally." *Id.* at 1398.

91. *Id.* at 1399. Central to this finding was the fact that the benefited students did not have to leave their parochial schools in order to receive shared time instruction. The Court held that the location of classes in the sectarian atmosphere of a parochial school contributed to constitutionally impermissible promotion of religion.

financial benefits to parochial schools, without any commingling of public and private school pupils.[92]

3. Entanglement. — In his memorandum opinion for the district court,[93] Judge Enslen discussed the church and state entanglement issue in two contexts, administrative and political. The Sixth Circuit concurred with Judge Enslen's finding that government supervision inherent in the Grand Rapids program indicated excessive administrative entanglement.[94] The court also affirmed the district judge's finding that this shared time program engendered political entanglement, noting that great community dissension could stem from the program.[95] After agreeing that two prongs of the *Lemon* test were violated by the Grand Rapids program, the Sixth Circuit affirmed the district court's grant of a permanent injunction.[96] The Sixth Circuit noted that the Grand Rapids program could be distinguished from other programs deemed constitutional by courts because of the strong religious character of the schools involved in this case.[97] The court concluded that finding the Grand Rapids program constitutional would extinguish the separation of church and state in public education.[98]

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92. *Id.*

93. 546 F. Supp. 1071 (W.D. Mich. 1982).

94. Judge Enslen applied the three-part test outlined in Roemer v. Maryland Public Works Board, 426 U.S. 736 (1976), to evaluate administrative entanglement. In *Roemer*, the Court examined the character and purpose of the benefited institutions, the nature of the aid provided, and the resulting relationship between the state and religious entities. *Id.* at 738.

In applying this test, Judge Enslen found that the Grand Rapids program violated all three prongs. Illustrative of excessive entanglement in the Grand Rapids program was the status of Mr. Zandee, a physical education teacher. The court noted that Mr. Zandee was employed by the public school system to teach shared time physical education courses in a parochial school, although he had previously held the same position as a parochial school employee. While receiving public funds for his salary, Zandee also received parochial school funding for his job as a basketball coach.

The Sixth Circuit agreed with Judge Enslen's finding that Mr. Zandee's status demonstrated excessive administrative entanglement between church and state. The court found that such aspects of the Grand Rapids program illustrated the need for strict state monitoring to prevent religious views from entering shared time classes. In turn, such monitoring requirements would constitute excessive administrative entanglement. 718 F.2d at 1403 (1983).

95. *Id.* at 1400-01. The court noted that the Grand Rapids Board of Education used shared time benefits to influence voters to approve a school tax increase. The court found the board's effort fostered political division along religious lines, in disregard of *Lemon*.

96. *Id.* at 1404.

97. The court noted that the Grand Rapids program "primarily assisted elementary schools; gave substantial financial aid to education in parochial school buildings; aided parochial schools that had religious indoctrination as a paramount goal; [and] impacted both parochial schools and taxpayers directly." *Id.* at 1405.

98. The court noted that although recent Supreme Court holdings favor more liberal interpretation of the establishment clause, this accommodation should not extend to the Grand Rapids program. The court feared that constitutional approval of the Grand Rapids program would result in public funding of most private and parochial school costs. *Id.* at 1406.

C. *Educational Implications of Americans United v. Grand Rapids*

1. Effect On Local School Boards and Other Shared Time Programs. — The permanent injunction granted by Judge Enslen and affirmed by the Sixth Circuit ended the Grand Rapids program of offering shared time classes in parochial school facilities.[99] The effect of this injunction may influence administration of shared time programs in other districts as well. Although there are few educational regulations governing local implementation of shared time, school boards consistently look to judicial holdings for guidance in areas of assistance to nonpublic schools.[100] State and local authorities traditionally have exercised great creativity in providing educational services to nonpublic school students. The holding in *Americans United v. Grand Rapids* should remind local and state officials that administrative convenience and economic expediency cannot supersede constitutional prohibitions against state establishment of religion.[101]

2. Implications of Americans United on Federally Funded Title I Programs. — Although the Sixth Circuit holding in *Americans United* invalidated the Grand Rapids program of state-funded shared time classes at parochial schools, it did not distinguish between state and federally funded programs operating within parochial schools. Title I of the Elementary and Secondary Education Act,[102] providing for educational assistance to public and non-public schools, has been upheld as constitutionally permissible.[103] Under Title I programs, federally funded teachers travel to parochial and private schools to offer remedial services.[104] The Sixth Circuit's holding, which focused on the location of Grand Rapids' shared time classes, may reopen debate concerning the constitutionality of Title I offer-

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99. The Grand Rapids School District continues to operate programs that were challenged at the trial level. It provides bus service for public and private school students attending public school classes at public school buildings. *See* Euchner, *Grand Rapids May Appeal Court's Rejection of "Shared Time" Plan*, Education Week, Oct. 5, 1983, at 5, col. 1.

100. *See supra* note 62.

101. At least one education department official has hypothesized that the primary reason for moving teachers rather than pupils in shared time programs is the administrative convenience and the low cost of such a procedure. Interview at Pa. Department of Education (Jan. 19, 1984).

102. 20 U.S.C. §§241a et seq. (1984).

103. *See* Commonwealth v. School Committee of Springfield, 81 Mass. 502, 417 N.E.2d 408 (1981) (upholding public payment for services offered to special education students at their parochial schools); National Coalition for Public Education and Religious Liberty v. Harris, 489 F. Supp. 1248 (S.D.N.Y. 1980) (holding that a public school may permit federally funded Title I remedial teachers to tutor pupils eligible under Title I in the premises of their parochial schools). *But see* Felton v. Secretary, United States Department of Education, 739 F.2d 48 (2d Cir. 1984), *infra* note 105.

104. *See* Harris, *supra* note 104.

ings on the premises of parochial schools.[105]

To avoid the spectre of invalidating such programs, courts must distinguish between the purposes of shared time programs and Title I programs. Title I programs can be characterized as providing necessary remedial services to needy children,[106] whereas shared time programs traditionally provide enrichment above and beyond the normal curriculum.[107] The apparent factual distinctions between shared time offerings and Title I programs should protect Title I programs from invalidation under the *Americans United* holding. However, cases upholding provision of Title I services on the premises of parochial schools could be utilized to justify providing shared time services in parochial school classrooms.[108] The potential for con-

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105. The questionable constitutionality of Title I programs under the establishment clause is not a novel issue. A recent Second Circuit holding invalidated New York City's Title I instruction in public schools, relying in part on *Americans United.*

In Felton v. Secretary, United States Department of Education, 739 F.2d 48 (2d Cir. 1984), the Second Circuit held that a Title I program utilizing federally funded public school teachers to provide remedial and guidance services in parochial schools violated the establishment clause.

The court utilized *Meek's* prohibition of public instruction in sectarian schools and relied upon the *Lemon* analysis. Specifically, the court found that the New York City program was impossible to supervise, and thus violative of the *Lemon* excessive administrative entanglement test.

The Second Circuit also feared that validation of the New York City program would pave the way for more excessive public teaching in sectarian schools. In a footnote, the court listed programs held invalid by the Sixth Circuit in *Americans United* as an example of its anxiety.

A certiorari petition has been filed in the *Felton* case, and the Solicitor General has requested that the Supreme Court hear arguments from *Felton* in the fall 1984 term. The Solicitor General has also requested that *Felton* be consolidated with *Americans United.* Secretary, United States Department of Education v. Felton, 739 F.2d 48 (2d Cir. 1984), *petition for cert. filed,* 53 U.S.L.W. 3134 (U.S. Aug. 13, 1984) (No. 84-238). *See also* Chancellor of the Board of Education, City of New York v. Felton, *petition for cert. filed,* 53 U.S.L.W. 3134 (U.S. Aug. 13, 1984) (No. 84-239).

106. *See* 20 U.S.C.S. §2701 et seq. (West Supp. 1983). Section 2701 (popularly referred to as Title I) provides in pertinent part:

> Congress hereby declares it to be the policy of the United States to provide financial assistance . . . to local educational agencies serving areas with concentrations of children from low-income families to expend and improve their educational programs by various means . . . which contribute particularly to meeting the special education needs of educationally deprived children.

The language of the act specifically addresses special education needs of educationally deprived children. Initially, Title I sought to provide educational services to students who were not receiving adequate education. Thus, the legislative intent behind Title I is distinguishable from shared time programs, which provide primarily enrichment courses. *See supra* note 74.

107. The course offerings in the Grand Rapids shared time program are a good example of such supplementary courses. *See supra* note 74.

108. Some shared time programs provide classes such as physical education, which are part of state-mandated curriculum. *See supra* note 74. If Title I programs do not violate the establishment clause, as held in *Harris, supra* note 103, then core curriculum offerings under shared time programs may be constitutionally permissible under the same reasoning, even if offered at a parochial school. The tension between permissible Title I programs in private schools and nonallowable shared time programs in private schools has led at least one commentator to predict that the Supreme Court will fashion a justification for on-site Title I programs. *See* Anastaplo, *The Religion Clauses of the First Amendment,* 11 MEM. ST. U.L. REV. 151 (1981).

However, the Sixth Circuit's invalidation of the Grand Rapids shared time program may result in a re-examination of Title I instruction at parochial schools, as demonstrated by *Fel-*

fusion between these programs coupled with recent legislation providing for education of handicapped children in public or private schools[109] necessitates resolution of the shared time issue by the Supreme Court.

D. Certiorari and Possible Supreme Court Analysis

1. The Court's Shift in Education Cases. (a) The new makeup of the Court. — In the thirty-seven years following *Everson*,[110] the Supreme Court has eroded the strict separationist principle, albeit in a piecemeal manner. The inconsistent string of Supreme Court decisions delineating separation of church and state[111] provides an indication of the stances of individual justices concerning aid to parochial schools.[112] The present composition of the Court suggest future swings away from strict interpretation of the establishment clause. Although the Court does not depend upon political constituencies as do state legislators, the Court is sensitive to growing power and influence of religious groups in America. This trend is illustrated by President Reagan's efforts on behalf of both religious schools[113] and reli-

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ton, supra note 105.

109. In 1975, Congress enacted the Education for All Handicapped Children Act, 20 U.S.C. §§1401 *et seq.* (1979). This act reaches all handicapped children, including those enrolled in private and parochial schools. Although the act only mandates that nonpublic school handicapped children be allowed to enroll in programs funded under the act, regulations suggest possible service arrangements for implementing the act's provisions. The act thus sets the stage for conflict analogous to problems engendered by Title I. If services under the act can be provided at parochial schools without violating the establishment clause, then the door may be open for other programs as well, such as shared time. PRIVATE SCHOOLS AND THE PUBLIC GOOD (E. Gaffney ed. 1980).

110. 330 U.S. 1 (1947).

111. *See supra* notes 14-53 and accompanying text.

112. Six Justices have rather firm positions on establishment clause issues. Justice Brennan follows separationist lines, and Justices Stevens and Marshall generally adopt his reasoning. Justices White, Rehnquist and Burger are accommodationists. Justice White follows the secular purpose test of *Lemon* in formulating his philosophy, while Justices Rehnquist and Burger utilize both the secular purpose and excessive entanglement tests of *Lemon*. Justice Powell tends to vote with the accommodationists, while Justice Blackmun appears to be moving towards Justice Brennan's separationist view. Justice O'Connor appears to favor the accommodationist view espoused by Justice Rehnquist.

Commentators have varying views of the Courts division on religious issues. John Whitehead, an attorney for the conservative Rutheford Foundation, views the Court as divided 4-4, with Justice O'Connor providing the swing vote. New York University law professor John Sexton, a representative of Separationist groups, views Justices Burger, White, Powell, Rehnquist and O'Connor as forming a conservative, majority bloc. *See* Lauter, *Major Shift Looming in Church-State Law*, NATIONAL LAW JOURNAL, Sept. 10, 1984.

In examining holdings of the Burger Court in establishment clause cases, a clear pattern emerges. In cases that have deemed auxiliary services unconstitutional, Justices Burger, Rehnquist and White have consistently dissented. *See, e.g.*, Meek v. Pittinger, 421 U.S. 349 (1975); Wolman v. Walter, 433 U.S. 229 (1977); New York v. Cathedral Academy, 434 U.S. 125 (1977). However, in cases where auxiliary services were held to be constitutionally permissible, Justices Brennan, Marshall and Stevens have been the dissenters. *See, e.g.*, *Wolman* (the portion pertaining to health services and textbook loans), and Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

113. In December 1984, President Reagan reiterated his support for tax credits and vouchers to benefit parochial and private schools before an audience of more than 2000 educa-

gion in public schools,[114] as well as by the flexible leanings of Justice O'Connor,[115] the only Reagan appointee to the Court at the present time.

(b) The shift from strict separation: Muller v. Allen. — In *Muller v. Allen*,[116] a divided Supreme Court[117] upheld the constitutionality of Minnesota state tax provisions allowing parents of private school students to deduct expenses incurred in such schooling. In his majority opinion, Justice Rehnquist stated that the three-part test of *Lemon* provides nothing more than a "sign post" in dealing with establishment clause cases.[118] Justice Rehnquist upheld the Minnesota statute, finding that it had a secular purpose,[119] that it did not advance religion,[120] and that it did not excessively entangle church and state.[121]

Justice Rehnquist's finding that the Minnesota tax deduction plan did not promote or advance religion understandably troubled the proponents of the holding in *Americans United v. Grand Rapids*. Justice Rehnquist's conclusion that the statute in *Muller* did not advance religion was based almost wholly on the fact that the deduction was available to all students, sectarian and secular alike.[122] If this rationale was applied to the Grand Rapids shared time program, it too could be found to serve all students, since the shared time courses were theoretically available to both public and private school students. *Muller* was viewed with concern by Judge Edwards, who carefully distinguished it in his *Americans United* opinion. Judge

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tors at a national conference in Indianapolis. 37 CHURCH AND STATE 1 (Jan. 1984).

114. At the same conference, the President also reaffirmed his commitment to a constitutional amendment allowing government sanctioned school prayer. *Id.*

Attorney General William French Smith explained the position of the Reagan Administration in a recent article.

The Attorney General stated that the administration is seeking to encourage an interpretation of the establishment clause that would engender a more balanced treatment of religion and greater accommodation of religious values. The Attorney General hypothesized that, in light of recent Supreme Court decisions, the Court may be inclined to apply the *Lemon* tests less stringently to cases involving state aid to religious schools. *See* Smith, *Some Observations on the Establishment Clause*, 11 PEPPERDINE L. REV. 457 (1984) (adapted from a speech given by Attorney General William French Smith on Feb. 5, 1984).

115. Justice O'Connor has voted consistently with Justices White, Burger, and Rehnquist. *See, e.g., Muller, infra* notes 116-17.

116. 103 S. Ct. 3062 (1983).

117. Justice Rehnquist wrote the majority opinion, which was joined by Justices Burger, White, Powell and O'Connor.

118. *Muller*, 103 S. Ct. at 3068 (1983).

119. Justice Rehnquist stated that the state's decision to defray educational expenses incurred by parents evidences a purpose "both secular and understandable." *Id.* at 3069.

120. In concluding that the Minnesota statute did not advance religion, the Court relied on the fact that the tax credit arrangement was one of many deductions available under Minnesota law. The Court also relied on the fact that the dedication was available to all parents, including those whose children attend public schools or non-sectarian private schools. *Id.*

121. The Court found little potential for entanglement in the tax deduction plan.

122. *See supra* note 120.

Edwards examined both *Muller's* dissenting opinion,[123] which found that the tuition plan primarily promoted religion,[124] and majority holding, which emphasized that the tax plan benefits accrued to parents rather than to parochial schools.[125] Judge Edwards noted that tuition deduction was not generally available to public school parents and therefore may have promoted religion. However, Judge Edwards distinguished *Americans United* from *Muller* in concluding that shared time aid in *Americans United* granted direct aid to parochial schools rather than indirect aid to parents of parochial school children.[126] Judge Edwards' attention to *Muller*, and his careful distinction of *Muller* and *Americans United* points out a basis for concern about possible analysis of the case by a Supreme Court that, in the aftermath of *Muller*,[127] is considered increasingly accommodationist.[128]

(c) The shift continues: Lynch v. Donnelly. — The Supreme Court's most recent establishment clause pronouncement has heightened fears that the Court is espousing an accommodationist viewpoint. In *Lynch v. Donnelly*,[129] a divided Supreme Court[130] held that a municipally funded and sanctioned nativity scene display did not

123. Justice Marshall wrote the dissenting opinion, which was joined by Justices Brennan, Blackmun and Stevens.

124. 103 S. Ct. at 3070.

125. 718 F.2d at 1406.

126. *Id.*

127. After the Eighth Circuit affirmed the challenged Minnesota tax deduction, in Muller v. Allen, 676 F.2d 1195 (1983), those contemplating possible Supreme Court analysis felt that the statute would be invalidated, based on the primary effect test. In the wake of *Muller*, commentators are wary that approval of the tax plan will open the door to more extensive aid to parochial schools programs.

128. The holding in Marsh v. Chambers, 103 S. Ct. 3330 (1983), also fueled concern with the accommodationist leanings of the current Supreme Court. In *Marsh*, the Court upheld the Nebraska state legislature's payment of a chaplain with public funds.

Justice Burger wrote the majority opinion, stating that the public funding for the chaplain's services did not violate the establishment clause. Justice Brennan dissented, and was joined by Justice Marshall. Justice Stevens also dissented.

Justice Brennan was primarily concerned that the majority did not apply the *Lemon* three prong test. Justice Brennan felt that, if the *Lemon* test was applied to *Marsh*, the practice of hiring a legislative chaplain would clearly be found to violate the establishment clause.

The impact of *Marsh* may initiate a shift away from strict church/state separation. The validation of the state-funded chaplain in *Marsh* turned on a small, specific, and narrow exception to establishment clause law. However, the Courts refusal to invoke the *Lemon* analysis may portend an ominous shift away from strict interpretation of the establishment clause. *But see* Jamestown School Committee v. Schmidt, 699 F.2d 1 (1st Cir. 1983), *cert. denied*, 52 U.S.L.W. 3229 (U.S. Oct. 4, 1983) (No. 83-1500) (refusing the First Circuit's finding that Rhode Island's practice of providing greater transportation benefits to private school students than to public school students was unconstitutional).

129. 104 S. Ct. 1355 (1984). It is interesting to note that the Reagan Administration filed an amicus brief in support of *Lynch*, and had also filed amicus briefs in support of accommodation of religion in the *Muller* and *Marsh* cases. Such briefs manifest the administration's support of the court's recent establishment clause analysis. *See* Smith, *supra* note 114.

130. Chief Justice Burger wrote the majority opinion, which was joined by Justices White, Powell, Rehnquist and O'Connor. Justices Brennan, Marshall, Blackmun and Stevens dissented.

violate the establishment clause. Although *Lynch* did not address an educational issue, the case represents the current establishment clause analysis of Chief Justice Burger and his followers on the court.

The Chief Justice applied the familiar *Lemon* test to the creche and found that although it was religiously significant, the city had a secular purpose for including it in the holiday display.[131] Chief Justice Burger concluded that the display did not impermissibly advance religion, and that the creche did not create excessive entanglement between church and state.[132] The majority opinion focused on the secular purpose of the display and the historical precedent and tradition behind such symbols.

Lynch's result, the validation of a municipally funded creche, is not as anxiety-provoking as the analysis utilized by the court to reach that result. Although the Court has utilized the *Lemon* test in deciding establishment clause cases since 1971, Chief Justice Burger's use of it in *Lynch* did not stem from obligation to precedent. Rather, he referred to the use of the three component test as something "we have often found . . . useful."[133]

Justice Brennan, writing for the dissenters, found the *Lemon* standard the proper guide for *Lynch*.[134] However, he applied each prong of the test to the creche and found that it failed all three. Justice Brennan and the other dissenters strongly disagreed with Chief Justice Burger's mandate for religious accommodation, characterizing the holding as placing government sanction on particular religious beliefs.[135]

The *Lynch* analysis may portend further erosion of the establishment clause in future parochiaid cases. Chief Justice Burger's philosophy of "affirmative accommodation"[136] of all religions could easily extend to aid to nonpublic schools. The majority opinion in *Lynch* relied heavily on the secular purpose prong of *Lemon*, a test that most school aid programs easily pass, since school aid is usually utilized for secular subjects, serves a valid public function, and does not in itself promote religion. However, *Lynch* did not consider administrative entanglement. Since the creche was included in a public display of seasonal items, supervision was considered unnecessary. Conversely, public aid to private schools clearly must be supervised and observed. The primary effect test also hinders a *Lynch*-like re-

131. *Lynch*, 104 S. Ct. at 1363.
132. *Id.* at 1363-64.
133. *Id.* at 1362. The Chief Justice also states that "we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area." *Id.*
134. *Id.* at 1370.
135. *Id.*
136. *Id.* at 1359.

sult in parochiaid cases. Although the Court concluded that the Pawtucket creche did not have the primary effect of advancing religion, it did so by comparing the effects of the creche with the effects of various forms of public school aid.[137] In light of the long history of school aid law promulgated by the Court, further refinement of *Lynch's* use of the *Lemon* tests as discretionary rather than mandatory is clearly in order. The court must either reaffirm *Lemon* or a *Lynch*-like erosion of the *Lemon* tests will occur.

2. Possible Concerns of the Parties to Americans United v. Grand Rapids Upon Granting of Certiorari. — On December 14, 1983, the Grand Rapids school district, along with the other defendants[138] in *Americans United*, filed a joint petition for certiorari to the United States Supreme Court, which was granted by the Court on February 27, 1984.[139] The petitioners contend that the case must be resolved in order to guide local school districts in their interpretation and implementation of shared time rights. They also contend that Supreme Court review is necessary to resolve problems the Sixth Circuit's analysis may have created for federally funded Title I programs.[140] The petitioners rely heavily on Judge Krupansky's dissent in *Americans United*, in which he stressed the smooth operation of the Grand Rapids program, and the inability of Americans United to demonstrate that the shared time program promoted religious studies.[141] Petitioners rely upon this failure to show sectarian overtones to assert the inequity of invalidating any shared time program offered in a nonpublic school as violative of the establishment

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137. *Id.* at 1363.

138. The original defendants in *Americans United* were the Grand Rapids School District, Philip Runkel, the Superintendent of Public Instruction for the State of Michigan, the Michigan State Board of Education, the Michigan State Treasurer, and several individuals representing children who received shared time instruction. The defendants consolidated their appeal in both the district court and the court of appeals, and subsequently filed a joint petition for certiorari.

139. Amercians United v. Grand Rapids, 718 F.2d 1389 (6th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3489 (U.S. Dec. 15, 1983) (No. 83-990), *cert. granted*, 104 S. Ct. 1412 (1984).

The Solicitor General of Michigan has been granted leave to participate in the oral argument as amicus curiae, and the oral argument has been divided. *See* 52 U.S.L.W. 3890 (June 12, 1984).

Amici curiae for the plaintiffs include Americans United for Separation of Church and State, the Baptist Committee for Public Affairs, the American Jewish Committee and the National Education Association.

The case is titled School Dist. of Grand Rapids v. Ball on appeal, reflecting the district and court of appeal's determination that plaintiff Americans United lacked standing. *See supra* notes 79-80. However, this case will continue to be referred to in the remaining text as *Americans United v. Grand Rapids*, or *Americans United*.

140. Cert. Petition at 8-9, School Dist. of Grand Rapids v. Ball, 718 F.2d 1389 (6th Cir. 1983). *See supra* notes 102-09 and accompanying text.

141. 718 F.2d at 1408 (1983).

clause.[142] Petitioners also depend upon Judge Krupansky's finding that the Grand Rapids program did not advance religion[143] or result in excessive entanglement with religion.[144]

The eagerness of petitioners to obtain review of *Americans United*[145] stands in stark contrast to respondents' position. Respondents contend that the implications of certiorari are financial, rather than constitutional. They point out that under the Grand Rapids shared time program, the school district included parochial school students within general public school enrollment figures.[146] This inclusion enabled the school district to collect substantial funding from the State of Michigan through its aid to parochial schools plan.[147] The financial and constitutional implications inherent in the possible reversal of Judge Edwards' holding have not escaped attention. The Supreme Court's grant of certiorari thus makes Americans United "uneasy" because it introduces the possibility of constitutionally permissible shared time instruction at parochial school locations.[148]

V. Proposals for Avoiding the Establishment Clause Morass

A. Statutory Clarification

Shared time traditionally has been defined as a parochial school student's attendance "at a public school part of the time."[149] How-

142. Cert. Petition at 9, et seq., School Dist. of Grand Rapids v. Ball, 718 F.2d 1389 (6th Cir. 1983).

143. Judge Krupansky held that religion was not advanced by the Grand Rapids program because the program did not relieve the parochial schools of financial responsibilities. He based this conclusion on the fact that the parochial schools had no duty to offer the shared time courses. Since these courses were not included in mandatory curriculum requirements, the shared time offerings could be justified by analogy to the pupil benefit theory of *Everson*. 718 F.2d at 1411 (1983).

144. Judge Krupansky predicated his finding of no entanglement on the fact that the record disclosed no religious indoctrination during shared time classes, even in the absence of state supervision or monitoring. *Id.* at 1413.

145. Counsel for petitioners believes that the issues raised by the school district on appeal including the effect of *Americans United* on Title I programs justify granting of certiorari. Telephone interview with counsel of Baxter and Hammond (Jan. 27, 1984).

146. *See* Conn, *Kenneth Zandee's Salary: Why Michigan Taxpayers Don't Have to Pay it Anymore*, 36 CHURCH AND STATE 225 (1983).

147. *Id.* Respondents' assertion that petitioner's appeal was largely motivated by financial considerations is supported by the statements of Grand Rapids school district officials. William Foster, assistant to the Grand Rapids superintendent of schools, stated that a prime motive for running the shared time program was the fact that it enabled the school district to receive additional public funding. He stated that "getting extra money for education is something everyone is striving for." *See Grand Rapids May Appeal Court's Rejection of "Shared Time" Plan*, Education Week, Oct. 5, 1983, at 5, col. 1 [hereinafter cited as Education Week].

148. Americans United is wary of Supreme Court analysis of the Grand Rapids shared time program, its fear being founded upon the recent holding in *Muller*. Telephone interview with Albert J. Menendez, Director of Research and Legal Liaison, Americans United (Jan. 24, 1983).

149. *See* Stearns, *Shared Time: A Proposal for the Education of Children*, 57 RELIGIOUS ED. 5 (1962). Stearns defines shared time as "a sharing of the school time of children between state supported and church supported schools, the former supplying general education

ever, statutes mandating the right to receive shared time instruction do not prescribe proper location for shared time classes.[150] A straightforward solution to problems engendered by the Grand Rapids shared time program would consist of redrafting state legislative or constitutional provisions. The addition of four words — "in the public schools" — to state funded public education legislation[151] would curtail the power of local school boards and limit potentially unconstitutional programs.[152] Although such statutory modification would be simple,[153] economical,[154] and most likely effective,[155] there is little movement toward such reform. The current trend in parochial school aid utilizes broadly drawn statutes to design programs meeting the needs of individual school districts.[156] These statutes are often overbroad without safeguards against constitutional encroachment,[157] yet school administrators favor them because they allow great autonomy in fashioning school aid programs.[158]

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in a religiously neutral context and the latter in a denominational religious context." Stearns' definition of shared time appeared in an article advocating the use of shared time programs. The article formed the background for a symposium on shared time, featuring commentary from eighteen sectarian and secular educators, responding to Stearns' definition of shared time. *See Symposium: Shared Time*, 57 RELIGIOUS ED. 5, 5-36 (1962). *See also supra* note 54 for additional definitions of shared time.

150. *See, e.g.*, MICH. STAT. ANN. §15.41282 (1979), which provides in pertinent part:

> The board of a school district shall establish and carry on the grades, schools, and departments it deems necessary or desirable for the maintenance and improvement of the schools, determine the course of study to be pursued, and cause the pupils attending school in the district *to be taught in the schools or departments the board deems expedient.* (emphasis added).

See also Pennsylvania Public School Code §502 which does not specify a mandatory location for a school district's offering additional instruction to nonpublic school students.

151. For example, in MICH. STAT. ANN. §15.41282 (1979), the phrase "in the schools or departments the board deems expedient" would simply be replaced with the phrase "in the public schools."

152. This addition to the statutory language would have unquestionably prohibited the Grand Rapids policy of offering shared time classes in parochial school buildings.

153. *See supra* note 151.

154. The potential for decreasing costs to a district by avoiding litigation would be substantial.

155. *See supra* note 152.

156. *See supra* note 150.

157. An official of the Pennsylvania Department of Education, discussed the feasibility Pennsylvania's adoption of a Grand Rapids style shared time program with this author. He stated that §502 of the Pennsylvania public school code would probably permit such a program in the absence of contrary judicial precedent, provided that the children receiving shared time services were taught within their home school districts. Interview at Pa. Dept. of Ed., Jan. 19, 1984.

158. Authority for the fact that shared time is an established right under Pennsylvania law can be found in the Commonwealth School Administrator's Handbook. In 1978, the handbook was updated to conform to a standard set of forms and regulations. In the process of the update, all references to administrative aspects of shared time including guidelines signed by State Superintendent David H. Kurtzman, were deleted from the handbook.

The deleted sections of the School Administrators Handbook are enlightening. They provided that "*it is the responsibility of the public school district to provide classroom space*, facilities, equipment and instructional staff for shared time classes (emphasis added). The handbook also emphasized that enrollment in shared time programs was open to nonpublic school students, who were to be admitted "*to the public secondary schools*." Pennsylvania

Legislators' lack of initiative in maintaining church-state separation starkly contrasts their readiness to promote legislation actively supporting sectarian aid programs.[159] The Minnesota statute providing tax relief to parents of parochial school pupils, recently upheld in *Muller v. Allen*,[160] exemplifies legislation designed to assist religious schools.[161] In the wake of *Muller*, legislators in at least five states have introduced proposals for state laws granting tax relief to parents of private and parochial school pupils.[162] Strong pressure for a national tuition tax credit bill has also mounted,[163] coupled with lobbying efforts urging adoption of a constitutional amendment allowing school prayer.[164]

B. Political Reality v. Statutory Ideals

Ideally, parochiaid legislation drafted with strict adherence to constitutional principles would maintain Thomas Jefferson's wall of separation between church and state.[165] However, difficulty in drafting clearly separationist aid proposals[166] and increasing pressure on legislatures to grant farreaching benefits to parochial schools[167] can be traced to active sectarian lobbying groups. These groups wield political pressure and influence, and are responsible for the inception of extensive parochiaid programs as well as the lack of legislation governing most forms of parochiaid.

Government aid to parochial schools has been a political issue in the United States for over twenty-five years, with roots extending

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School Administrators Handbook, p. 115 et seq. (1968). The fact that shared time provisions were not reproduced into the new edition of the handbook may indicate the settled state of shared time in Pennsylvania.

159. The political push for legislative support of parochial programs, particularly tuition tax credits, can be seen as a natural outgrowth of shared time programs. Although shared time enriched parochial school curriculum, it alone did not alleviate the severe financial burdens borne by Catholic schools in the 1970's. Tuition tax credit plans could relieve parochial schools of the problem of scarce funding. They could also enable parochial schools to offer most courses within the parochial building, taught by sectarian-oriented and financed instructors. Thus, tuition tax credit plans serve the dual purpose of keeping parochial schools financially stable, while enabling them to maintain their pervasively sectarian character.

160. 103 S.Ct. 3062 (1983). *See supra* notes 116-121 and accompanying text.

161. *See supra* note 123-124 and accompanying text.

162. Legislators in New York, Wisconsin, Nebraska, Alabama and New Jersey have proposed *Muller*-type deduction plans. *See Après Muller, Le Deluge?, Parochial Forces Move in Five States But Federal Bill is Priority*, 36 CHURCH AND STATE 171 (1983).

163. *Id.* Although parochial lobbying groups lobbied diligently for passage of a tuition tax credit bill, the bill was defeated by a vote of 59-38 on November 16, 1983.

164. *See* Van Alstyne, *Reagan's Prayer Amendment: Government Control of Religion?*, 36 CHURCH AND STATE 45 (1983).

165. In an 1802 letter to three friends, President Thomas Jefferson contemplated that "[the] 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." *See The Life and Selected Writings of Thomas Jefferson*, 332-33 (A Koch and W. Peden, eds. 1944).

166. *See supra* notes 150-152 and accompanying text.

167. *See supra* notes 116-124 and accompanying text.

back to New York State in the 1830's.[168] Although numerous surveys[169] and state aid referendums[170] demonstrate that a majority of Americans oppose parochiaid, the number of parochiaid programs offered in a given state strongly correlates with the size of the Catholic population of that state.[171] In light of religious lobbies' increasing power in Washington,[172] and lawmakers' renewed interest in religion,[173] statutory control of parochiaid programs remains an ideal goal, albeit one with questionable chance for implementation.[174]

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168. *See* A. MENENDEZ, RELIGION AT THE POLLS 155 (1977).

169. A 1952 Gallup poll showed opposition to parochiaid narrowly prevailing, 49% opposed to 40% in favor of such aid, with 11% of those polled undecided. By 1963 when parochiaid programs had become more prevalent, a Harris survey indicated that 54% of persons polled opposed parochiaid, compared to 33% who approved of such programs. In 1969, a Gallup poll showed that 64% of the participants did not support parochiaid, while only 24% were in favor of it. *Id.* at 155-56.

170. Within a span of 30 years, ten states have held referenda on private school aid issues. From Wisconsin in 1946 to Missouri in 1976, all ten states firmly rejected parochiaid proposals. Although parochiaid was voted down in each state, an analysis of the religious orientation of voters in each state examined reveals that Roman Catholic voters generally approve of parochiaid programs, while Protestant and Jewish voters commonly oppose them.

A 1970 parochiaid referendum in Michigan illustrates the correlation between religious affiliation and support of parochiaid. The Michigan referendum emerged as a reaction against Michigan's increased aid to parochial schools. Separationist groups sought, through a referendum, to amend the Michigan Constitution to prohibit public aid to parochial schools. Fifty-seven percent of those voting rejected parochiaid and endorsed constitutional amendment. Only 13 of Michigan's 83 counties rejected amendment. The religious affiliation of the voters in the counties that rejected amendment was predominantly Catholic and Dutch Reformed. Included among the counties rejecting anti-parochiaid amendment was the county containing the Grand Rapids School District. *See* Menendez, *Religion at the Polls* (1977).

171. *See* PAPA, AUXILIARY SERVICES TO RELIGIOUS ELEMENTARY AND SECONDARY SCHOOLS: THE STATE OF SCHOOL AID (1982), a pamphlet survey of the various auxiliary services offered by states to private schools. Two of Papa's more interesting surveys include comparison of the Roman Catholic population of a state to the number of accommodation programs it sponsors, and a survey contrasting the percentage of private school enrollment in a state with the number of parochial assistance programs it offers.

In the survey relating Catholic population of a state to the number of parochial school assistance programs it offers, Pennsylvania, ranking eleventh in Catholic population, offers eight accommodation programs, as does Michigan, which ranks sixteenth in Catholic population. Eight programs of parochial school assistance is a substantial offering when compared with other states. This relatively high number of parochial assistance programs also comports with ranking of Pennsylvania and Michigan as states with a high number of private school students. Pennsylvania ranks fourth in this category, while Michigan ranks twentieth.

The statistical data for Pennsylvania is equally enlightening when viewed in relation to the important religion clause and education lawsuits that have originated in Pennsylvania courts, and ended at the Supreme Court. *See, e.g.*, Meek v. Pittenger, 421 U.S. 349 (1975); Lemon v. Kurtzman, 403 U.S. 602 (1971).

172. For an unflattering portrait of church lobbyists in Washington, D.C., see J. ADAMS, THE GROWING CHURCH LOBBY IN WASHINGTON (1970). Adams regards religious lobbyists critically, observing: "One gets the impression that Church activists regard the wall of separation between church and state as a kind of political aberration on the part of Thomas Jefferson." *Id.* at 12.

173. For a discussion of the connection between the faith of a legislator and his voting patterns, see P. BENSON & D. WILLIAMS, RELIGION ON CAPITAL HILL (1982).

174. Although efforts to sponsor national tuition tax credit legislation have failed on the federal level, it seems unrealistic to expect strict constitutional monitoring of educational issues from a legislature consisting of an increasing number of legislators from the "new right", a label that Benson and Williams use to denote legislators strongly supporting school prayer amendment. *Id.* at 168-84.

The Sixth Circuit holding in *Americans United v. Grand Rapids*[175] recognized the intensely political nature of parochiaid programs. The court utilized the concept of political entanglement, as defined in *Lemon*,[176] to examine the effect shared time would have on the Grand Rapids religious community.[177] The court recognized that an avowed purpose of the Grand Rapids program was solicitations of political support for local school aid financing packages.[178] This purpose has been found to both promote political division along religious lines and create even greater political tension among members of the Grand Rapids community.[179] It is evident that the problems of shared time programs are unlikely to be resolved by legislative responses. Rather, the judiciary must reconcile the increasing demand for public aid to private schools with the constraints imposed by the establishment clause.[180]

C. Judicial Clarification.

If the judiciary's only task were determining the constitutionality of individual parochiaid programs, the Sixth Circuit's holding in *Americans United* would need no further elaboration. However, in establishment clause cases, the method and analysis utilized by the Court are as important as the disposition of an individual case. In light of the Supreme Court's inconsistency in educational aid decisions[181] the analysis the Court may adopt in its scrutiny of the Grand Rapids shared time program is of paramount importance. Ideally, the Court will examine *Americans United* from the perspective adopted by the

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175. 718 F.2d 1389 (6th Cir. 1983).

176. 403 U.S. 602 (1971).

177. 718 F.2d at 1400 (6th Cir. 1983).

178. The court focused its analysis on the March 1980 Grand Rapids school millage campaign. In preparation for the campaign, the Grand Rapids School Board prepared a factual source handbook for distribution to campaign workers. In the sourcebook, the school board made a noticeable effort to influence taxpayers with children in private schools to vote for the tax increase by promoting the availability of publicly financed shared time classes. *Id.* at 1400.

179. It is interesting to note that, in accordance with Papa's statistical data linking the percentage of parochiaid programs with the percentage of Catholics in a given area [*see supra* note 171], Grand Rapids not only sports a high percentage of Catholics, but it provides shared time benefits to 28 Catholic schools. The majority of the 40 schools receiving shared time aid were therefore Catholic. This large block of parents with children enrolled in private schools constitutes a powerful voting force in Grand Rapids. The Sixth Circuit's finding of political entanglement and the use of shared time programs to influence voters in the tax rate referendum was borne out in the aftermath of the suit. William Foster, Administrative Assistant to the Grand Rapids Superintendent of Schools, has admitted that since the Grand Rapids program was held to be unconstitutional, the support of parents with private school children for school tax campaigns has noticeably declined. *See Education Week*, *supra* note 147.

180. This difficulty of legislating church and state issues, and the renewed political interest in religious matters, has contributed greatly to the proliferation of religion clause cases in the courts. One commentator states "on an issue as highly charged as [religion] the winners prevail in the legislature, the losers go to court." Greenhouse, *Embracing Volatile Church-State Issues*, New York Times, March 9, 1984, at 16A, col. 5.

181. *See supra* notes 14-53 and accompanying text.

district and appeals courts, the *Lemon* tests.[182] If the Court chooses to utilize the *Lemon* criteria, it may provide an analytical model for parochiaid cases based on the emphasis it accords to the different *Lemon* factors.

In their review of *Americans United*, the district and appellate courts placed great emphasis on political entanglement. Although this component of the *Lemon* test allows courts to shift their analysis of parochiaid impact from a school district to the community at large,[183] emphasis of it will not lead to a consistent analytical model for establishment clause cases. The difficulty arising from reliance on the political entanglement test stems from the fact that a political entanglement judgment is often based on predictions of political divisiveness rather than on actual political effects.[184] The political effects of parochiaid programs are factors that should be considered by courts in deriving a standard for reviewing establishment clause cases.[185] Thus, the potential for political entanglement does not provide a clear test for application to education aid cases. To formulate a more consistent analytical model, courts should concentrate on the actual political effect of such parochiaid programs.

The administrative entanglement prong of *Lemon* enables courts to focus on the actual effects and practical consequences of parochiaid programs.[186] This test centers on the degree of supervision necessary to ensure maintenance of church-state separation.[187] Unlike the political entanglement test — which focuses on future effects of a program on the community — the administrative entanglement test recognizes that a parochiaid program will engender in-

182. The three establishment clause tests derived from *Lemon* are the secular purpose test, the primary effect test, and the excessive entanglement test. The excessive entanglement test is sometimes subdivided into two parts, political entanglement and religious entanglement. *See supra* notes 44-49 and accompanying text.

183. Political entanglement refers to the effect of parochiaid cases on communities. This sub-part of *Lemon* is often referred to as the political divisiveness standard. If a parochiaid program could potentially divide communities along religious lines it will usually fail this test. *See supra* note 95 and accompanying text. *See also* notes 175-179 and accompanying text.

184. The Sixth Circuit emphasized the Grand Rapids School Board's use of shared time benefits as a device to gain the support of voters favoring parochial education. However, the only evidence of actual political entanglement produced at trial was a school board handbook detailing shared time offerings and requesting support in a school tax referendum. The court found this small piece of evidence of actual political entanglement could generate future political divisiveness within Grand Rapids.

185. It would be impossible to decide education cases with an analysis that was totally devoid of political considerations. Educational aid and politics are too intertwined in some areas to completely ignore their relationship. *See supra* notes 166-174 and accompanying text.

186. *See supra* note 47.

187. Administrative entanglement can be broken down into two sub-classifications; control of funding administration paperwork and records relating to parochial programs; and control over public school teachers conducting classes for parochial school pupils. The latter problem receives great attention from the courts. Although it would be impossible to police every shared time course held in a public or private school, the possibility of sectarian overtones in publicly funded lessons increases when such lessons are held in parochial schools.

herent administrative problems. For example, commingling public employees and materials with parochial schools and pupils creates an immediate need for supervision and control.[188] Courts have traditionally sought to ensure that publicly funded shared time classes remain secular in nature.[189] The administrative problems inherent in achieving this goal are especially evident when monitoring must be done at a parochial school location. Such supervisory problems are concrete, rather than speculative. These problems evidence the utility of the administrative entanglement test as an analytical tool for establishment clause cases. Increased emphasis on this prong of *Lemon* would provide solid guidance to local school districts, since the actual administrative effects of a parochiaid program, unlike potential political ramifications, are more easily discernible.

The excessive entanglement prong of *Lemon* is not the only test courts should utilize to clarify establishment clause analysis. The primary effect component of *Lemon* is equally essential for providing guidance to local school districts. Under the primary effect test, a program is constitutionally infirm if the program's primary effect is to either inhibit or advance religion.[190] Although a program itself may be purely secular, its effect may nonetheless advance religion in some manner.

The Grand Rapids shared time program demonstrates the utility of establishment clause analysis focusing on primary effect. It was not disputed that the Grand Rapids shared time classes were purely secular.[191] However, the Court found that because students receiving shared time instruction never left their parochial schools, the program's primary effect was promotion of religion.[192] Essential to this finding was the fact that parochial school students received public school instruction without commingling with public schools students. Both the pervasively sectarian character of the schools receiving shared time teachers, and the homogeneous composition of the classes distinguished the Grand Rapids program from other permissible shared time programs offered in public schools.[193]

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188. *See supra* note 187.

189. This concern with maintaining the secular nature of shared time programs is similar to the court's concern with maintaining the voluntary nature of released time. The difficulty in controlling a program of religious education within a public school, and ensuring that participation was voluntary, was a major factor in the court's invalidation of the *McCollum* released time program. *See supra* note 55.

190. Advancement of religion is the appropriate prong of the primary effect test for analysis of establishment clause cases. The inhibiting religion test is primarily utilized in free exercise clause cases.

191. *See supra* note 90. The secular purpose prong of *Lemon* is usually the easiest to apply. The secular purpose of the Grand Rapids shared time curriculum was conceded by plaintiffs at an early stage of litigation.

192. *See supra* notes 91-92 and accompanying text.

193. *See supra* notes 65-67 and accompanying text.

The Supreme Court has hinted at the correlation between the primary effect test and classes consisting entirely of parochial school students. In declining to review a challenge to a Nebraska program utilizing leased parochial school classrooms for public education,[194] Justice Brennan relied heavily on the fact that, although the shared time classrooms were located in parochial schools, the students attending the classes came from both parochial and public institutions.[195] Justice Brennan's use of the primary effect analysis in *Nebraska v. Hartington*[196] clarifies the types of programs which violate the establishment clause. It remains for the Supreme Court to integrate the primary effect test and the excessive administrative entanglement test, and thus provide guidance to local school districts implementing shared time programs. Although the Supreme Court declined to apply these tests to a parochial school on-premises aid program in *Wheeler v. Barrera*[197], review of *Americans United v. Grand Rapids* provides another opportunity to address questions previously unanswered by the Court as well as an opportunity to clarify its establishment clause analysis.

Supreme Court review of *Americans United* also may provide the Court with an opportunity to weaken or abandon the three-prong *Lemon* test. The Courts granting of certiorari to one other establishment clause case[198] — concerning state protection of worker's sabbath observances[199] — has given those who favor accommodation a renewed optimism.[200] However, the *Lemon* analysis may still present the most equitable method for resolving such cases, in light of similar measures that could be utilized to invalidate shared time programs.

Although an analysis of *Americans United* refining the primary

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194. Nebraska State Board of Education v. School District of Hartington, 188 Neb. 1, 195 N.W.2d 161 (1972), *cert. denied*, 409 U.S. 921 (No. 71-1531) (1972).

195. 409 U.S. at 925-26.

196. *Id.*

197. 417 U.S. 402 (1974). *See supra* note 67.

198. The Court's docket for the fall 1984 term is laden with cases involving religion. The Court, by granting certiorari to cases involving the establishment clause, seems eager to enter the growing church-state debate.

Muller, *Marsh* and *Lynch* all evidence the courts increased interest in religion cases. *Marsh* and *Lynch* were granted review even though only one circuit had passed on the issues involved. Traditionally, the Court withholds certiorari until a conflict among circuits emerges.

199. Caldor, Inc. v. Thornton, 191 Conn. 336, 464 A.2d 785 (1983), *cert. granted*, 104 S.Ct. 1438 (1984).

200. Many groups that support accommodation eagerly await a post-*Lynch* establishment clause holding. The renewed interest in church-state issues has been viewed as a movement toward the most fundamental change in the law governing religious issues since the early 60s. Religious groups are hoping that the cases currently on the Courts Fall 1984 calendar will be vehicles for the Court to both shift towards the accommodation of religion and to reconsider its previous church-state decisions. Some commentators view the Court as shifting towards the incorporation of accommodation, as utilized in free exercise clause cases, into an establishment clause analysis. *See* Lawler, *Major Shift Looming in Church-State Law*, NAT'L. L.J. Sept. 10, 1984.

effect and excessive entanglement components of *Lemon* would guide school districts in implementing shared time programs, an argument can be advanced for an even stricter standard of review. Ideally, strict interpretation of the establishment clause mandates that the Supreme Court return to Justice Rutledge's dissent in *Everson*.[201] Under Justice Rutledge's economic benefit theory, government aid which in any way defrays parochial school costs is constitutionally impermissible.[202] The use of this standard of review would clearly invalidate the Grand Rapids shared time program[203] and would question all shared time programs, regardless of situs.[204]

Application of Justice Rutledge's analysis most likely would invalidate many forms of aid to parochial schools, including shared time.[205] However, use of the economic benefits analysis is impracticable in the face of political realities. The current political climate portends increasing pressure favoring aid to private schools.[206] In light of this political climate, application of a strict economic benefits theory is unlikely.

The most feasible solution to the shared time stalemate is stringent application of the *Lemon* tests. These tests will allow the Court flexibility in dealing with the unique facts of individual religious aid programs, while providing standards to which programs must adhere in order to pass constitutional muster. Under the *Lemon* framework, not all shared time programs would be invalidated. Rather, only those programs conducted at parochial schools would be constitutionally infirm. Under this analysis, shared time programs at public schools could continue to provide every student with the opportunity to receive a public education. At the same time, invalidation of shared time classes in parochial schools would protect against programs sacrificing constitutionality for administrative convenience.

VI. Conclusion

Shared time programs are enjoying renewed popularity in the

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201. 330 U.S. 1 (1947).

202. Justice Rutledge believed that busing was a form of economic aid to parochial schools, and thus should not be publicly funded. He based this conclusion on the premise that all services are essential to education, and public provision of any essential service to a parochial school constituted impermissible state aid to church institutions.

203. The Grand Rapids shared time program provided a large variety of courses to parochial school students. The schools were not only relieved of financing such courses, but may have attracted more students to sectarian institutions due to enhancement through shared time programs.

204. The basic economic benefit theory espoused by Justice Rutledge would most likely classify shared time offerings as essential to education, especially those courses that are a part of state mandated curriculum. The situs of the program would not be a major factor under this analysis, because the focus is on the benefit conferred, rather than on the location of that benefit.

205. *See supra* notes 204-205.

206. *See supra* notes 113-115.

wake of increased support for public aid to private schools. Although the right of all children to a public education is beyond dispute, their right to receive that education in a parochial school building raises serious establishment clause questions. The Sixth Circuit's analysis of this type of shared time program found that the program did not pass constitutional muster. However, the Sixth Circuit's holding in *Americans United* does not close the door to public aid to parochial education.

In light of increasing political and religious pressures, new forms of aid to parochial schools will be devised, some of which may run afoul of the Constitution. This area of the law is undergoing rapid change, and the Supreme Court's inconsistent analysis in previous education cases provides little guidance to states and local school districts. The Supreme Court must clarify private school aid policies. Strict application of the *Lemon* primary effect and administrative entanglement tests will not only invalidate the Grand Rapids program challenged by Americans United, but will provide sorely needed guidance to school districts as well as warning that parochial school convenience will not be ratified at the expense of the establishment clause.

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