10-1984

Aguilar v. Felton

Lewis F. Powell Jr

Excellent memo recommending

lgs 12/01/84 affirmance of CA 2

(Opinion by Friendly) in Aguilar,

and of CA 6 (Edwards).

Both decisions invalidated

services rendered by public

school teachers (taxpayers

expense) to children in non-

public schools. Courts

BENCH MEMORANDUM

applied Lemon test & relied

on the "excessive entanglement"

To: Mr. Justice Powell test. December 1, 1984

From: Lynda cases are almost indistinguishable

Nos. 84-237, -238, -239 Aguilar, et al. v. Felton, et al. from

No. 83-990 School District of Grand Rapids, et al. v. Ball, Meek

et al. v.

Pittenger

My concurring op in

Walman v. Question Presented

Walter, 433 U.S. 229 is relevant.

Whether the provision of supplemental instruction in nonpublic schools by public teachers, under the circumstances of these cases, violates the Establishment Clause of the First Amendment?

I. Background

A. Statutory Background

(1) In Aguilar, the services furnished to students in nonpublic schools are authorized by Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §2701, et seq., which declared it to be the policy of the United States to provide financial assistance to local educational institutions serving areas with concentrations of children from low-income families, in order to enable such institutions to meet the needs of educationally deprived children. Section 2740(a) provides that

> To the extent consistent with the number of educationally deprived children in the school district . . . who are enrolled in private elementary and secondary schools, [the local educational agency] shall make provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate. . . . Expenditures for educational services and arrangements pursuant to this section . . . shall be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the local educational agency.

Since 1966, New York City has been receiving federal funds under Title I to finance programs wherein it sends public school teachers and other professionals into religious and other nonpublic schools to provide remedial instruction and clinical and guidance services to students. The City's initial Title I program required the students to travel to

public schools after regular school hours for their remedial instruction; attendance lagged, however, and some programs were conducted in the nonpublic schools after hours. Attendance remained poor, and there was concern for the students' safety in travelling home after dark or in bad weather. A plan for students to participate in classes with public school students in public schools during the school day was rejected because of unspecified concerns about violating the New York Constitution. Consequently, the City devised the plan at issue here, of having public school teachers travel to the nonpublic schools during the school day to provide instruction.

(2) In Ball, Mich. Comp. Laws §380.1282 and its predecessor provisions have authorized local public school districts to develop educational programs to meet local educational needs, and have authorized the payment of state school aid funds to local boards of education for provision of part-time instruction in supplementary subjects to students in nonpublic schools by public school teachers. Pursuant to this general authorization, the Grand Rapids School District ("GRDS") set up the Shared Time and Community Education programs at issue in this case. Shared Time courses are offered in the nonpublic schools, during regular school hours, in classrooms leased to the GRDS. Although not required for graduation from the nonpublic schools, the courses were primarily remedial and enrichment

instruction in core courses such as reading, math, art, music, and physical education. Many of the teachers employed by the GRDS had previously taught in the nonpublic schools. The Community Education program consisted of voluntary, leisure time offerings, available to interested students on the leased premises after hours. Most of the instructors taught in the nonpublic school during the day, but were hired as part-time public school employees to teach the Community Education courses after hours.

B. Facts and Decisions Below

(1) Aguilar: In 1976, the National Coalition for Public Education and Religious Liberty sued the Secretary of HEW and the Chancellor of the New York City Board of Education to enjoin New York City's program under Title I providing instruction in nonpublic schools as violative of the Establishment Clause. An evidentiary hearing producing an extensive factual record was held before a three-judge court, which ruled that the program was constitutional. National Coalition for Public Education & Religious Liberty ("PEARL") v. Harris, 489 F. Supp. 1248 (SDNY 1980). This Court dismissed the appeal for want of jurisdiction because it was untimely filed. 449 U.S. 808 (1980). Meanwhile, this action was brought by 6 federal taxpayers in DC in the EDNY, but was stayed pending final determination of PEARL. Four parents of children in nonpublic schools receiving remedial assistance intervened as defendants. The parties

stipulated that the case was to be tried on the record developed in PEARL, with some supplementary affidavits. Judge Neaher agreed with the PEARL court's result, and dismissed the complaint.

CA2 (Feinberg, Friendly, & Oakes) reversed. In what is one of the best Court of Appeals opinions I have ever read, Judge Friendly thoroughly canvassed the circumstances of this case and the relevant Supreme Court case law, and concluded that the program violated the Establishment Clause on the excessive entanglement prong of the test established by Lemon v. Kurtzman, 403 U.S. 602 (1971), and its progeny. CA2 observed that although (1) New York City's program has been quite successful in achieving its goal of aiding educationally disadvantaged children, and (2) the record revealed little actual evidence that the teachers had been unable to remain religiously neutral, the program violated the Clause because the continuing surveillance required to be sure that Title I teachers did not advance or inhibit religion was "not significantly different" from that which this Court held in Meek v. Pittenger, 421 U.S. 349 (1975), would lead to excessive entanglement. The court found the lack of evidence of actual misconduct by Title I teachers in the past to be irrelevant to the serious potential for such problems posed by the structure of the program.

(2) Ball: In August 1980, six individual taxpayers sued GRDS, the State Board of Education, and others in DC, challenging the provision of Shared Time and Community Education services on premises leased from religiously-oriented nonpublic schools in the Grand Rapids community. A group of parents with children in the programs intervened, and an 8-day trial was conducted before Judge Gibson in May 1982. At the close of the case, but before rendering a decision, Judge Gibson recused himself; the case was reassigned to Judge Enslen, who decided the case based on the documentary evidence and transcripts of testimony. He ruled that most of the programs violated the Establishment Clause. (The Drownproofing, Outdoor Education, and Driver's Education programs were sustained.)

CA6 (Edwards and Lively) affirmed. Judge Krupansky dissented on the ground that the majority improperly ignored the "successful and fully documented operational history" of the programs, concluding that because the record demonstrates no attempted or actual religious indoctrination of students by teachers in the programs, the majority's rule amounts to a per se prohibition of secular instruction at sectarian institutions, a result she does not find compelled either by the First Amendment or by the case law.

C. Relevant Case Law

There are several cases decided by this Court involving the validity under the Establishment Clause of state aid to primarily religious nonpublic schools. A brief summary of the most relevant of these follows, as their reasoning will be central to decision of the cases at bar.

In Lemon v. Kurtzman, 403 U.S. 602 (1971), the Court crystallized the now well-known three-part test that has been commonly used to analyse cases arising under the Establishment Clause; all parties in these two cases apparently agree that the test should be applied here. That test is that (i) the statute at issue must have a secular legislative purpose; (ii) the statute's primary effect must be one that neither advances nor inhibits religion; and (iii) the statute must not foster "an excessive government entanglement" with religion. Id., at 612-613. To determine whether an excessive entanglement exists, the Court must look at (i) the character and purposes of the benefitted institution; (ii) the nature of the State aid provided; and (iii) the resulting relationship between the government and the religious authority.

Lemon also made some general observations about the Establishment Clause and its purposes. Observing that the language of the Clause forbids laws "respecting" an establishment of religion, the Court ruled that a law may be invalid that falls short of actually establishing religion, if it is a "step that could lead to such establishment."

Id., at 613. The classic warning in Establishment Clause cases has been against "'programs, whose very nature is apt to entangle the state in details of [religious] administration.'" Id., at 615 (quoting Justice Harlan's separate opinion in Walz v. Tax Commission, 397 U.S. 664, 695 (1970) (emphasis added)).

Lemon involved Rhode Island and Pennsylvania statutes authorizing state subsidization of religious schools in the form of supplements to the salaries of religious school teachers who taught secular subjects, and provision of textbooks and other instructional materials. The Court noted that the merits of the programs and their success in achieving the goals of improved education were not the issue; whether the programs were consistent with the First Amendment was the only important concern. Id., at 625.

The Court ruled that supplementing teacher salaries violated the Establishment Clause. The Court reached this result even though teachers had testified that they had not injected religion into the secular subjects they taught. The Court noted that it need not assume that the teachers had been guilty of bad faith or conscious design to evade the statutory limitations implemented to accommodate the Establishment Clause; the potential for allowing religion to creep in was just too great. States are required to be certain that the teachers receiving salary supplements are not inculcating religion, and

teachers are not susceptible, like books, of a one-time inspection to be sure of their ideological character. (The teachers at issue in this case were religious school teachers, many of them nuns, although the Act required that the teacher agree to teach only secular subjects and not to teach any religious subjects as long as she received the salary supplements.) The Court considered that a "comprehensive, discriminating, and continuing state surveillance [would] inevitably be required" to ensure that the statutory restrictions were obeyed. Id., at 619. Such surveillance would lead to an excessive government entanglement with the religious schools.

Finally, Lemon also considered that approving the programs would be likely to result in the sort of political divisiveness along religious lines that the Framers intended the First Amendment to prevent. Local elections would be permeated by the important issue of state aid to religious schools, and votes would be cast along religious lines. The situation would be aggravated by the need for continuing annual appropriations and larger demands as costs and populations grow. Id., at 622-623.

In Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), the Court concluded that public grants to nonpublic, primarily religious schools for maintenance and repair required to ensure student health and safety, and tuition reimbursement and tax deductions offered to parents of children in the nonpublic schools were

invalid because they had a primary effect of advancing religion. In analyising the case, your opinion for the Court reaffirmed the three-part test discussed in Lemon. Your opinion noted that it has never been thought either possible or desirable to enforce a regime of total separation between Church and State, id., at 760; some forms of aid may be channeled to the secular function of religious schools without providing prohibited direct aid to the sectarian, but "the channel is a narrow one," id., at 775. The Court concluded that the maintenance and repair provisions of the law were invalid as having an effect of advancing religion, because the law did not limit the provision of funds to portions of the facilities that were used for secular purposes. The Court noted that "a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education"; after Lemon, the State must be certain that the funds will not be so used. Id., at 778-779.

As to the tuition reimbursements and tax deductions, the Court noted that the fact that the aid was given to the parents and not directly to the school was not dispositive, but was only one factor to be considered. Id., at 781. It also observed that although the purposes of the program were admirable, this was only one factor to be weighed in determining whether the program violated cherished First Amendment values. Id., at 795. Finally, the Court considered the potential for political

divisiveness also to be an issue, as did the Lemon Court. The pressure for enlargement of the program was predictable and would lead to the type of political strife over religious issues that the First Amendment was intended to prevent. Id., at 795-797.

Wheeler v. Barrera, 417 U.S. 402 (1974), involved the scope of a State's duty under the federal Title I program (at issue in Aguilar, at bar) to provide services to nonpublic school children comparable to those provided public school children under the Act. The decision expressly left open the validity under the Establishment Clause of Title I aid provided on the premises of religious schools. Your concurrence stated, however, that you "would have serious misgivings about the constitutionality of a statute that required the utilization of public school teachers in sectarian schools. See [Nyquist.]" Id., at 428. Justice Douglas dissented on the ground that any aid to religious schools--direct or indirect--violated the First Amendment. He admonished that in failing to invalidate the program, the Court had been improperly "seduced" by the laudable purpose of Title I of helping educationally deprived children. Id., at 429-430.

Meek v. Pittenger, 421 U.S. 349 (1975), provides the closest factual analogy to the cases at bar. There, the Court considered Pennsylvania laws authorizing loans of textbooks and instructional materials to religious schools and providing "auxiliary services" including counseling,

therapy, and supplemental instruction for remedial and gifted students to students on the religious school premises, by public school employees. The loans of instructional materials were invalidated because unlike the loan of textbooks, which was upheld, the instructional materials were lent to the schools, not to the students. The schools' religious and secular educational functions were inextricably intertwined, and the loans therefore had the primary effect of advancing religion.

in Meek v. Pittenger

The Court ruled that the auxiliary services were invalid because they potentially would foster excessive entanglement and political divisiveness. The Court held that the DC had erred in relying on the "good faith and professionalism" of the auxiliary staff teachers and counselors to ensure that a nonideological posture was maintained. Id., at 369. The Court believed that the fact that the teachers and counselors were public employees did not "substantially eliminate the need for continuing surveillance" noted in Lemon, which had involved religious school teachers. Id., at 371. The schools they were visiting were dedicated to religious, as well as secular education, and the atmosphere of advancement of religion was constantly maintained. The "prophylactic contacts" necessary to ensure that the auxiliary staff played a nonideological role would lead to an intolerable degree of entanglement, because under Lemon, the State must be certain that impermissible conduct does not occur. Therefore, the

fact that the danger of such conduct is less in a remedial math class than in medieval history does not matter; "a diminished probability of impermissible conduct is not sufficient." Id.

In Wolman v. Walter, 433 U.S. 229 (1977), the Court upheld various provisions of Ohio law, drafted specifically to conform to Meek, which authorized loans of instructional materials and textbooks, provision of testing in which nonpublic school personnel were not involved, provision of diagnostic services by employees of the public school system on nonpublic school premises, and other services. The diagnostic services were distinguished from the teachers and counselors in Meek on the ground that such services have little or no educational content, the diagnostician has only limited contact with the children tested, and the nature of the relationship does not lend itself to the transmission of sectarian views. You wrote a separate opinion concurring in part and dissenting in part in which you agreed that the diagnostic services should be upheld. You noted that this area of the law does not lend itself to "analytical tidiness," and that many of the Court's decisions must seem arbitrary. Id., at 262. You found merit in the "persistent desire of a number of States to find proper means of helping sectarian education to survive," and noted the benefit that parochial schools have provided. Id. You considered it important to note that the risk of religious control over the democratic process was no

longer as significant as it was in the days of the Framers, and you viewed the risk of "deep political division along religious lines" to be "remote." Id., at 263. Any such risk seemed tolerable to you, given the benefit of sectarian schools and the continuing oversight of the Court. Id.

II. Discussion

The question of secular purpose is not at issue in either case--all parties in both cases agree that the programs at issue had a legitimate secular purpose. There is dispute in both cases about whether the programs have the effect of advancing religion; the primary issue in both cases, however, is whether the programs can be invalidated on "entanglement grounds." Both cases involve schools that are primarily religious in nature; therefore, the entanglement issue turns largely on the nature of the aid provided and the resulting relationship between the government and the religious authority. I believe that this Court's prior decisions, discussed above, demonstrate that the programs in both cases are invalid on entanglement grounds, and consequently, I devote most of my discussion to that issue.

A. Aguilar

I agree completely with Judge Friendly's opinion in this case invalidating the Title I program on

entanglement grounds. If Lemon, Nyquist, and Meek are still good law--and I have no reason to believe they are not--they compel the conclusion that the Title I program at issue here is unconstitutional. Appellants and the SG make much of the fact that Meek was decided on a meager factual record, while the program at issue here had been in operation for 16 years and the extensive trial court record showed no evidence of improper behavior by the Title I teachers. Under Meek and Lemon, however, these facts are unimportant. Although Meek may have been decided on a meager record, I find nothing in Justice Stewart's opinion that so limits the decision in that case. Rather, it held flatly that a court is not entitled to rely on the "good faith and professionalism" of the teachers involved to be sure that no impermissible conduct occurs. This was so even though the teachers were public school employees rather than religious school teachers, as in Lemon. Moreover, the Lemon decision noted that the DC had made "extensive findings" on the entanglement issue, 403 U.S., at 615, and some teachers there had testified that they did not inject religion into their courses. Nonetheless, the Court held that it need not, and did not, assume that the teachers had been unable to remain neutral; the potential that they would be unable to do so was present, and the State was required by the First Amendment to be "certain" that no impermissible conduct occurred. Thus, although the lack of evidence in the record here of actual misconduct presents an emotionally

appealing case for not invalidating the Title I program, under the decisions of this Court, that is not nearly enough. E.g., Nyquist, supra, at 778 ("a mere statistical judgment will not suffice"); Meek, supra, at 371 ("a diminished probability of impermissible conduct is not sufficient").

The SG's argument centers around what a highly effective and beneficial program Title I has been, and how ineffective alternatives to providing on-site instruction have proved to be. CA2 acknowledged the truth of this assertion and rightly stated that it was the overwhelming merit of the program that made this such a hard case. The merits of the particular program at issue, however, have never been deemed to be dispositive factors in determining its First Amendment validity. E.g., Lemon, supra, at 625 (the "merit and benefits of these schools . . . are not the issue before us," although the schools' "contribution has been . . . enormous"). See also Nyquist, supra, at 795 (admirable purposes of program only one factor to be considered). In your separate opinion in Wolman, you expressed the need to accommodate the government's laudable desire to aid nonpublic schools and what you viewed as the decreased risk of political divisiveness these days; nonetheless, the aid in Wolman was substantially different from the aid provided by New York's Title I program. The diagnosticians in Wolman were distinguished from teachers, which are involved in this case, on the ground of lessened

contact with children, contact in a context unlikely to permit transmission of religious values, and a relationship much different from that of the one shared by teacher and children. None of those distinctions are applicable here.

The SG argues that the safeguards undertaken in the program--of hiring public school teachers, of using rooms devoid of religious artifacts, the lack of reimbursement for use of the classroom space, supervision by field supervisors and the Board of Education--all serve to ensure that no religious instruction will be given by the Title I teachers. He also argues that the Title I program is governed by detailed regulations that have the effect of "routinizing" the relationship between the religious schools and the Title I program, thereby minimizing the need to worry about excessive entanglement. I do not find the SG's arguments persuasive.

Meek ruled that the fact that the teachers involved there were public employees did not "substantially eliminate the need for continuing surveillance" that existed because the instruction was provided on the premises of the religious schools. 421 U.S., at 371. The "atmosphere dedicated to the advancement of religion" that the Meek Court found made continuing surveillance necessary seems to me to be no less present here just because certain rooms have been stripped of religious artifacts. Respondents argue--and it seems patently true--that occasional unannounced visits by supervisors cannot accurately prohibit

improper religious inculcation or detect whether it has occurred. Moreover, the fact that the relationship between the Title I program administrators and the religious schools has become "routine" does not eliminate the need for surveillance; if anything, it may have the effect of making the need more apparent, as everyone will be less on guard to prevent improper conduct once the relationship becomes comfortable. The short answer is that Meek teaches that having public school teachers teach on the premises of religious schools presents a potential for impermissible conduct that is more heightened than if the instruction took place on a neutral site; it also held that the State must be certain that no such conduct occurred, something that could only be achieved by continuing surveillance. I can discern no substantial difference between this case and that one, and I would therefore recommend that you vote to affirm.

The only way to reverse, it seems to me, is to change your view from that of the Meek opinion, which you joined. Your separate opinion in Wolman could be read as leading toward that view, and certainly, in the abstract, it seems a shame to invalidate what has been a very important and worthwhile program in New York City. (Indeed, in New York City, sending one's child to public school is not really an alternative in many areas, because many of the public schools are just not safe.) On the other hand, as noted above, the programs upheld in Wolman are substantially

different from the program involved here. On balance, I believe the case should be affirmed.

B. Ball

For much the same reasons as those discussed above, I believe this case should be affirmed, as well. As in Aguilar, appellants stress the fact that the programs at issue have been in operation for a long time, and the extensive factual record developed in the DC showed no evidence that teachers providing the supplemental instruction were anything but neutral as to religion. As discussed above, however, Lemon and Meek lead to the conclusion that such evidence does not diminish the potential for impermissible conduct, and that it is therefore not dispositive.

Ball - greater potential for entanglement than Aguilar

If anything, the facts of this case present a greater potential for improper conduct than do those in Aguilar. Instead of public school teachers consistently being used, many of the teachers involved in the Shared Time program, and almost all of those involved in the Community Education program, are religious school teachers who have been hired by the public school to implement the programs. Moreover, the religious schools are paid by the private schools to lease the classroom space used. Under Meek, I believe that the Grand Rapids programs must also be invalidated because of the potential for excessive government entanglement.

C. Effect of Advancing Religion

Appellants in both cases emphasize the facts that the instruction offered is supplementary, that the courses are not required by the religious schools as a condition of graduation, and that the programs were offered to the students, not to the nonpublic schools. The argument that the courses were offered to the students is a transparent, but unsuccessful attempt to fit within Meek. The religious schools were required to authorize provision of the courses in any particular school, and those schools decided which students would receive the instruction (with the possible exception of the Community Education leisure time courses). Moreover, in Meek, the DC had held that the auxiliary services were provided to the children, not to the schools; yet the Court invalidated provision of the services.

That the courses were supplementary and were not required for graduation does not mean that the religious schools were not being advanced thereby; especially with respect to the remedial instruction, the public programs were fulfilling a function that was evidently needed in the religious schools. By providing it to those schools, the public aid relieved the schools of an obligation they otherwise would have had if they were going to educate their students properly. Therefore, it appears to me that the programs at issue here advanced religion by substantially aiding the religious schools.

Taxpayer paid for benefit of private schools

Conclusion

This Court has decided a long line of cases involving the validity under the Establishment Clause of public aid to nonpublic religious schools. Under the teachings of these cases, sending public school teachers to teach on the premises of religious schools has always been viewed as presenting the potential for improper inculcation of religion by the teachers, prevention of which would require continuing surveillance of a degree that would amount to excessive government entanglement with the administration of the religious schools. In my view, the fact that there has been no evidence of past improper conduct by such teachers involved in these programs does not lessen the potential for it occurring in the future. The cases have all held that the potential is as important as the fact of improper conduct, for purposes of protecting First Amendment values, and the potential exists because of the structure of these programs which requires the public instruction to be provided on the premises of religious schools. Consequently, surveillance leading to entanglement would still be required in these cases to be "certain" that no impermissible conduct occurs, and the programs are therefore invalid under this Court's longstanding view of the Establishment Clause. I therefore recommend that you vote to affirm in both cases.

lfp/ss 12/03/84

MEMORANDUM

TO: Lynda DATE: Dec. 3, 1984

FROM: Lewis F. Powell, Jr.

84-237,84-238,84-239 Establishment Clause Cases from New York and Michigan

Your bench memo is exellent and persuasive. I have not yet read Judge Friendly's long opinion, but have no doubt that it is a classic Friendly product that will be hard to disagree with.

I would appreciate, however, your giving me a brief memo making the best arguments you can in favor of reversal. It is one thing to invalidate state legislation, particularly where in Catholic states one can be reasonably sure that the legislators are influenced by their constituents. It is something else to invalidate a major act of Congress that for a fifth of the century seems to be recognized widely as constructive. It has been before Congress more than once over this period, without substantial criticism. There is no evidence - at least in this record - that the Act has tended to promote religion. We have said, of course, that such evidence is not required. The Act could lead to entanglement, but

again no findings were made in either of these cases of "entangelement" in the sense contemplated by the First Amendment. It is conceded apparently that the purpose of the Act was secular.

As you know, I am not fond of per se rules - except, perhaps, the need for bright lines in some types of criminal case. Change is inevitable, and constitutionalizing a per se rules prevents accommodation to change.

Is there any authority for making a distinction between facial invalidity of the Act and invalidity as applied? In this case, apparently the attack is "facial" at least as the Act is read to permit public school teachers to go into non-public schools for instructional purposes. As the Act has been applied, at least on the basis of the records in these cases, there has been no showing of furthering religion or entanglement.

Apart from this, identify our decisions that you think could support a holding that the Act is not invalid - facially or applied.

I do not suggst, Lynda, that I am thinking of voting to Reverse. I am troubled by invalidating a federal statute that serves an admirable purpose.

L.F.P., Jr.

ss

84-237 AGUILAR v. FELTON
84-238 SECRETARY v. FELTON
84-239 CHANCELLOR v. FELTON

Argued 12/5/84

Public school teachers provide instruction on private school premises.

Lee (SG)

Issue is validity of Title I.

– uniformly recognized as beneficial.

It is agreed that "off-premises" presentation of this program doesn't work. Expensive.

- N.Y. Bd of Ed. ~~explored~~ explored the various ways to conduct the program.

The after regular hours option doesn't work.

N.Y. Bd of Ed was "bound by Fed Act" to provide remedial ed. in both pub. & private schools.

Unlike all other cases before us, there is a record of 19 yrs that demonstrates no religious entanglements. Two DCs have so found: in PEARL & this case. (Lee emphasizes these findings).

Not like Lemon. Teachers & public school teachers & subjects are supplementary.

As to Grand Rapids case (responding to BRW), Lee says this case is different.

Fed statute limits use of funds to ~~spec~~ specific by its ~~terms~~ provisions.

Lee (cont.)

This ~~case~~ case involves a fed statute enacted after carefully considered by Congress.

CA 2 invalidated program because it was conducted ~~not~~ on premises.

CA 2 misread Meek. It did not to frame a per se. There was no factual record.

If we invalid the program when adm. "on premises", Table I would remain & the $ claims would have to be appeal off-premises at needless expense.

Responding to HAB, Lee said Missouri case may be different but ~~he is~~ she is not familiar with that case.

Relies on Wheeler that Lee says required decision on a case to case basis

Zeller (appellee)

Meek controls.

Trial was conducted solely on basis of written submissions — affidavits & documents. No evidence CA did it disagree with findings of DC.

Program is beneficial, but it will not be terminated — it can be conducted legally in a way to continue the education

(I did not follow her argument - check Zeller's brief)

Impossible to detect the extent to which religion may be furthered by teacher.

Pupils are ~~young~~ young & impressionable. Presence of remedial teachers in religious school enhances the respect for the school.

Geller (cont)

Direct aid with fed funds to religious schools. When public school teachers provide instruction in a private school, the responsibility of the private schools for remedial education is removed.

There is aid - this was a purpose of the Act. Tax dollars are used to help religious schools

Lee (Reply)

V

Unlike Act 195, which provides only for the loan of teaching material and equipment, Act 194 authorizes the Secretary of Education, through the intermediate units, to supply professional staff, as well as supportive materials, equipment, and personnel, to the nonpublic schools of the Commonwealth. The "auxiliary services" authorized by Act 194—remedial and accelerated instruction, guidance counseling and testing, speech and hearing services—are provided directly to nonpublic school children with the appropriate special need. But the services are provided only on the nonpublic school premises, and only when "requested by nonpublic school representatives." Department of Education, Commonwealth of Pennsylvania, Guidelines for the Administration of Acts 194 and 195, § 1.3.

The legislative findings accompanying Act 194 are virtually identical to those in Act 195: Act 194 is intended to assure full development of the intellectual capacities of the children of Pennsylvania by extending the bene-

961. The *Marburger* District Court invalidated as violating the constitutional prohibition against establishment of religion New Jersey's provision of instructional material and equipment to nonpublic elementary and secondary schools. New Jersey's program did not differ in any material respect from the loan provisions of Act 195. See 358 F. Supp., at 36–37. After finding that the nonpublic schools aided, for the most part, were church-related or religiously affiliated educational institutions, *id.*, at 34, the court held that the program had a primary effect of advancing religion. *Id.*, at 37. The court also held, as did the District Court in the case before us, that excessive entanglement of church and state would result from attempts to police use of material and equipment that were readily divertible to religious uses. *Id.*, at 38–39. This Court's affirmance of the result in *Marburger* was a decision on the merits, entitled to precedential weight. See *Edelman* v. *Jordan*, 415 U. S. 651, 670–671; cf. *Cincinnati, N. O. & T. P. R. Co.* v. *United States*, 400 U. S. 932, 935 (WHITE, J., dissenting from summary affirmance).

fits of free auxiliary services to all students in the Commonwealth. Act 194, § 1 (a), Pa. Stat. Ann., Tit. 24, § 9–972 (a). The appellants concede the validity of this secular legislative purpose. Nonetheless, they argue that Act 194 constitutes an impermissible establishment of religion because the auxiliary services are provided on the premises of predominantly church-related schools.[17]

In rejecting the appellants' argument, the District Court emphasized that "auxiliary services" are provided directly to the children involved and are expressly limited to those services which are secular, neutral, and nonideological. The court also noted that the instruction and counseling in question served only to supplement the basic, normal educational offerings of the qualifying nonpublic schools. Any benefits to church-related schools that may result from the provision of such services, the District Court concluded, are merely incidental and indirect, and thus not impermissible. See 374 F. Supp., at 656–657. The court also held that no continuing supervision of the personnel providing auxiliary services would be necessary to establish that Act 194's secular limitations were observed or to guarantee that a member of the auxiliary services staff had not "succumb[ed] to sectarianization of his or her professional work." 374 F. Supp., at 657.

[17] The appellants do not challenge, and we do not question, the authority of the Pennsylvania General Assembly to make free auxiliary services available to all students in the Commonwealth, including those who attend church-related schools. Contrary to the argument advanced in a separate opinion filed today, therefore, this case presents no question whether "the Constitution permits the States to give special assistance to some of its children whose handicaps prevent their deriving the benefit normally anticipated from the education required to become a productive member of society and, at the same time, to deny those benefits to other children *only because* they attend a Lutheran, Catholic, or other church-sponsored school . . . ." *Post*, at 386–387.

We need not decide whether substantial state expenditures to enrich the curricula of church-related elementary and secondary schools,[18] like the expenditure of state funds to support the basic educational program of those schools, necessarily result in the direct and substantial advancement of religious activity.[19] For decisions of this Court make clear that the District Court erred in relying entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained.

In *Earley* v. *DiCenso*, a companion case to *Lemon* v. *Kurtzman, supra*, the Court invalidated a Rhode Island statute authorizing salary supplements for teachers of secular subjects in nonpublic schools. The Court expressly rejected the proposition, relied upon by the District Court in the case before us, that it was sufficient for the State to assume that teachers in church-related schools would succeed in segregating their religious beliefs from their secular educational duties.

> "We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. . . .
>
> ". . . But the potential for impermissible fostering of religion is present. . . . The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion . . . .

[18] Because Acts 194 and 195 impose identical qualification requirements, compare Act 194, § 1 (c), Pa. Stat. Ann., Tit. 24, § 9–972 (c), with Act 195, §§ 1 (c), (e), Pa. Stat. Ann., Tit. 24, §§ 9–972 (c), (e), the same schools are eligible for aid under each Act.

[19] More than $14 million was appropriated in the 1972–1973 school year to provide auxiliary services for nonpublic school students pursuant to Act 194. The amount was increased to $17,880,000 for the 1973–1974 school year.

"A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. . . ." 403 U. S., at 618–619.

The prophylactic contacts required to ensure that teachers play a strictly nonideological role, the Court held, necessarily give rise to a constitutionally intolerable degree of entanglement between church and state. *Id.*, at 619. The same excessive entanglement would be required for Pennsylvania to be "certain," as it must be, that Act 194 personnel do not advance the religious mission of the church-related schools in which they serve. *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29, 40–41, aff'd, 417 U. S. 961.[20]

That Act 194 authorizes state funding of teachers only for remedial and exceptional students, and not for normal students participating in the core curriculum, does not distinguish this case from *Earley* v. *DiCenso* and *Lemon* v. *Kurtzman, supra.* Whether the subject is "remedial reading," "advanced reading," or simply "reading," a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists. The likelihood of inadvertent fostering of re-

[20] In addition to invalidating New Jersey's provision of instructional material and equipment to nonpublic schools, see n. 16, *supra*, the District Court in *Marburger* struck down the State's program to supply nonpublic schools with "auxiliary services." New Jersey defined "auxiliary services" in substantially the same manner as Pennsylvania, and the administration of the New Jersey program did not differ significantly from the administration of Act 194. See 358 F. Supp., at 39. The District Court held that the auxiliary services program "is unconstitutional by reason of the church-state administrative entanglement it would produce." *Id.*, at 40. This Court's affirmance of *Marburger* is a decision on the merits as to the constitutionality of New Jersey's auxiliary-services program, and is entitled to precedential weight.

ligion may be less in a remedial arithmetic class than in a medieval history seminar, but a diminished probability of impermissible conduct is not sufficient: "The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion." 403 U. S., at 619. And a state-subsidized guidance counselor is surely as likely as a state-subsidized chemistry teacher to fail on occasion to separate religious instruction and the advancement of religious beliefs from his secular educational responsibilities.[21]

The fact that the teachers and counselors providing auxiliary services are employees of the public intermediate unit, rather than of the church-related schools in which they work, does not substantially eliminate the need for continuing surveillance. To be sure, auxiliary-services personnel, because not employed by the nonpublic schools, are not directly subject to the discipline of a religious authority. Cf. *Lemon* v. *Kurtzman*, 403 U. S., at 618. But they are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained. See *id.*, at 618–619.

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[21] The "speech and hearing services" authorized by Act 194, at least to the extent such services are diagnostic, seem to fall within that class of general welfare services for children that may be provided by the State regardless of the incidental benefit that accrues to church-related schools. See, *e. g.*, *Everson* v. *Board of Education*, 330 U. S. 1. Although the Act contains a severability clause, Act 194, § 2, in view of the fact that speech and hearing services constitute a minor portion of the "auxiliary services" authorized by the Act, we cannot assume that the Pennsylvania General Assembly would have passed the law solely to provide such aid. See *Sloan* v. *Lemon*, 413 U. S., at 833–834. Indeed, none of the appellees has suggested that the severability clause be utilized to save any portion of Act 194 in the event this Court finds the major substance of the Act constitutionally invalid.

The potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present. To be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that those restrictions were being followed.[22]

In addition, Act 194, like the statutes considered in *Lemon* v. *Kurtzman, supra,* and *Committee for Public Education & Religious Liberty* v. *Nyquist, supra,* creates a serious potential for divisive conflict over the issue of aid to religion—"entanglement in the broader sense of continuing political strife." *Committee for Public Education & Religious Liberty* v. *Nyquist,* 413 U. S., at 794. The recurrent nature of the appropriation process guarantees annual reconsideration of Act 194 and the prospect of repeated confrontation between proponents and opponents of the auxiliary-services program. The Act thus provides successive opportunities for political fragmentation and division along religious lines, one of the principal evils against which the Establishment Clause was intended to protect. See *Lemon* v. *Kurtzman,* 403 U. S., at 622–623. This potential for political entanglement, together with the administrative entanglement which would be necessary to ensure that auxiliary-services personnel remain strictly neutral and nonideological when functioning in church-related schools, compels the conclusion that Act 194 violates the constitutional prohibition against laws "respecting an establishment of religion."

[22] The presence of auxiliary teachers in church-related schools, moreover, has the potential for provoking controversy between the Commonwealth and religious authorities over the extent of the teachers' responsibilities and the meaning of the legislative and administrative restrictions on the content of their instruction. See *Lemon* v. *Kurtzman,* 403 U. S., at 619.

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The Honorable Lewis F. Powell, Associate Justice
Supreme Court of The United States
The Supreme Court Building
Washington, D.C.

December 5, 1984

Dear Justice Powell:

I'm certain even a brief law review reprint can scarcely be welcome at this time, but I did wish to share the enclosed Comment, nonetheless. It expresses my misgivings re Lynch v. Donnelly, from last term.

All my best wishes.

Sincerely,

Wm. Van Alstyne

William Van Alstyne

File on Aguilar 84-237 Powell

COMMENT

TRENDS IN THE SUPREME COURT: MR. JEFFERSON'S CRUMBLING WALL — A COMMENT ON *LYNCH v. DONNELLY*

WILLIAM VAN ALSTYNE*

This comment is based upon an address by Professor Van Alstyne to the Annual Conference of the United States Court of Appeals for the District of Columbia Circuit, delivered on May 17, 1984, at Williamsburg, Virginia.

Although the first amendment belongs to all the states, it especially belongs to Virginia.[1] The most notable antecedent debates occurred here. The seminal contributions by James Madison and Thomas Jefferson originated here. The strongest resolves to protect religious liberty from political interference were memorialized here. My immediate purpose is to comment on one particular case decided last term in the Supreme Court, *Lynch v. Donnelly*,[2] which sustained a municipality's nativity display against a constitutional challenge. I mean

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1. The Supreme Court wrote in Everson v. Board of Educ., 330 U.S. 1, 11 (1947):

> No one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in the Bill of Rights' provisions embracing religious liberty. But Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.

See also JEFFERSON, *An Act for Establishing Religious Freedom*, in 2 THE WRITINGS OF THOMAS JEFFERSON 300-03 (A. Bergh ed. 1905); J. MADISON, *Memorial and Remonstrance Against Religious Assessments*, in 8 THE PAPERS OF JAMES MADISON 298-306 (1973). *See generally* T. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA 1776-1787 (1977); H. ECKENRODE, THE SEPARATION OF CHURCH AND STATE IN VIRGINIA (1910); A. STOKES & L. PFEFFER, CHURCH AND STATE IN THE UNITED STATES 366-97 (1964) (one-vol. rev. of A. STOKES, CHURCH AND STATE IN THE UNITED STATES (1950)).

2. 104 S. Ct. 1355 (1984). The case furthers the trend represented in the preceding term by Marsh v. Chambers, 103 S. Ct. 3330 (1983), a decision upholding the conduct in a state legislature of regular sectarian prayer, led by ministers paid from tax revenues.

briefly to examine the case by the light of an understanding of the first amendment that Jefferson and Madison may have shared. My broader purpose is to suggest the extent to which *Lynch v. Donnelly* may serve as a synecdoche of a larger drift that now appears to be winning acceptance in the Supreme Court.

This trend can be summed up as a movement from one national epigram to another; it is the movement from "E Pluribus Unum" to "In God We Trust," from the ideal expressed by our original Latin motto—one nation out of highly diverse but equally welcome states and people—to an increasingly pressing enthusiasm in which government re-establishes itself under distinctly religious auspices. *Lynch v. Donnelly* is the clearest expression to date that acts affiliating government and religion may be deemed consistent with the first amendment, at least if accomplished gradually, that is, incrementally. A constitutional neologism has nearly displaced the much different figure of speech, that of a "wall of separation" between church and state, which Thomas Jefferson once used in commemorating the ratification of the first amendment.[3] The neologism is that insofar as most persons are religious, it is altogether natural that government should itself reflect that fact in its own practices. Thus, according to this neologism, it is not helpful to regard the first amendment as having emplaced a wall separating the practices of religion from the practices of government, for it is not walls, but bridges, that the first amendment contemplates. Even the absorption of a dominant religion within government itself may be deemed altogether unexceptionable—as though it were but a part of natural history. It is thus symbiosis, not separation, that the first amendment may be interpreted to accommodate. At least I cannot understand *Lynch v. Donnelly* otherwise, although I think it very far re-

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3. Jefferson wrote of a "wall of separation" in replying to an address from a committee of the Danbury Baptist Association of Connecticut:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State.

T. JEFFERSON, Letter of Jan. 1, 1802, in 16 THE WRITINGS OF THOMAS JEFFERSON 281-82 (A. Bergh ed. 1905). In *Lynch*, 104 S. Ct. at 1359, Chief Justice Burger writes of Jefferson's "wall":

> The concept of a 'wall' of separation is a useful figure of speech probably deriving from views of Thomas Jefferson. The metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.

He goes on to say that far from requiring "complete separation of church and state," the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Id.*

moved from the interpretation of the first amendment originally agreed upon by all nine Justices of the Supreme Court when the issue was first comprehensively addressed, in *Everson v. Board of Education*,[4] nearly forty years ago.

I.

Although there is of course very substantial controversy over the "right" meaning of the religion clauses of the first amendment,[5] there is nonetheless considerable agreement that they originally met with broad support from at least three distinct sources. The disagreement has been not so much whether there were not at least these three sepa-

4. 330 U.S. 1 (1947).

5. As a sampler of academic books and articles on the religion clauses of the first amendment, the following may be helpful: R. CORD, SEPARATION OF CHURCH AND STATE 5, 15 (1982) (first amendment was not intended to preclude federal aid to religion "on a nondiscrimination basis"); M. HOWE, THE GARDEN AND THE WILDERNESS 1-31 (1965) (discussing federalism and the first amendment); W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 12-13 (1964) (supporting a theory of "full neutrality, . . . requiring the government to be neutral not only between sects but also between believers and nonbelievers"); P. KAUPER, RELIGION AND THE CONSTITUTION 45-51 (1964) (arguing that historical sources are inconclusive and that "it is more useful [in construing the religion clauses] to look at what actual results have been reached in [their] application"); P. KURLAND, RELIGION AND THE LAW 112 (1962) (also supporting the neutrality theory; "democratic society cannot survive if these elements of the rule of law are rejected"); M. MALBIN, RELIGION AND POLITICS 1-17 (American Enterprise Institute Studies in Legal Policy, 1978) (arguing that Madison compromised with those in the first Congress who believed that Congress should be free to prefer religion over irreligion); L. PFEFFER, CHURCH, STATE AND FREEDOM (rev. ed. 1967) (a compendious history); THE WALL BETWEEN CHURCH AND STATE (D. Oaks, ed. 1963) (collecting articles); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 675 (1980) (arguing that "the establishment clause should forbid only government action whose purpose is solely religious and that is likely to impair religious freedom"); Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 349 (1984) (arguing that the establishment clause "does not disassociate religion from government" but acts as "a limitation on any mutual dependence"); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1384-85 (1967) (proposing "a rather simple scheme of the elementary factors weighed by the court in evaluating religious liberty claims"); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968) (continuing Part I); Moore, *The Supreme Court and the Relationship Between the 'Establishment' and 'Free Exercise' Clauses*, 42 TEX. L. REV. 142 (1963) (supporting a neutrality theory); Pfeffer, *Freedom and/or Separation: The Constitutional Dilemma of the First Amendment*, 64 MINN. L. REV. 561 (1980) (examining conflict between the two religion clauses); Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692, 693 (1968) (arguing that the establishment clause "prohibit[s] only aid which has as its motive or substantial effect the imposition of religious belief or practice"); Van Alstyne, *Constitutional Separation of Church and State: The Quest for a Coherent Position*, 57 AM. POL. SCI. REV. 865 (1963); Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463, 1463 (1981) (proposing "a standard that erects an impregnable wall between church and state"); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1056 (1978) (proposing a "narrower" definition of religion under the establishment clause than under the free exercise clause).

rate sets of political interest, each of which could be well served by the proposed clauses; it was rather whether one or another was so dominant that acts of government consistent with that set of interests, albeit not necessarily equally consistent with one of the other sets of interests, should be deemed consistent with the clauses as ratified. Up to a point, however, the Supreme Court treated them as converging on a single legal principle and thus felt no compulsion to treat those interests as rivals among which it need choose. Rather, the matter was seen as yielding a single legal principle, quite robust by itself, and substantially consistent with all three sets.

These diverse inputs were the concerns of voluntarism, separatism, and federalism. The first, voluntarism, was derived largely from the moderate spirit of religious toleration associated with the Quaker tradition of Pennsylvania.[6] The second, separatism, was derived principally from the successful efforts of Madison and Jefferson in Virginia to disentangle the affairs of government from religious establishments, especially in respect to taxes and levies for religious assistance.[7] The third, federalism, was derived from the preferences of other states that—in contrast with Virginia—maintained particular religious establishments, which they were concerned to keep free from the interference of the national government.[8] It was quite consistent with all three concerns that they would converge on a single proposition: Congress should be disabled from legislating on religion.[9] The final form of agreement in-

6. Maryland, Rhode Island, and Pennsylvania have been grouped together as "the most successful colonial experiments in religious freedom which the transformers of colonies into states and the framers of our American Constitution had before them." 1 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 364 (1950). Of these, Penn's colony was "the most consistent." *Id.* Penn's influential *Frame of Government* (1682) provided that all persons otherwise qualified who "possess faith in Jesus Christ" were eligible to serve in legislative and executive capacities. 2 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1526 (B. Poore ed. 1877). This toleration of all Protestant sects and of Catholicism was remarkable in its day, though, as Stokes writes, Penn was "no modern secularist." 1 A. STOKES, *supra*, at 207; *cf.* P. KAUPER, *supra* note 5, at 48 (crediting Roger Williams and other religious leaders who contributed to "the American experiment in religious liberty").

7. *See supra* note 1.

8. *See* M. HOWE, *supra* note 5, at 1-31. At the time that the first amendment was adopted, five states had established churches—Massachusetts, Connecticut, New Hampshire, Maryland, and South Carolina. 1 A. STOKES, *supra* note 6, at 559; *see also* Pfeffer, *Freedom and/or Separation: The Constitutional Dilemma of the First Amendment*, 64 MINN. L. REV. 561, 562-63 (1980).

Madison attempted to write a guarantee of religious liberty for all citizens into the Bill of Rights, which would have overridden those states that had not yet guaranteed their citizens such rights. He failed. *See* I. BRANT, JAMES MADISON, FATHER OF THE CONSTITUTION 1787-1800, at 273 (1950). Not until 1833 did all states abandon established religion. *See* L. PFEFFER, *supra* note 5, at 126.

9. "To leave the thorny matter of religion to each state, and at the same time to clearly guarantee no jurisdiction in the matter by the national government, was the expedient compromise." Esbeck, *supra* note 5, at 364; *see also infra* text accompanying note 18.

troduces the first amendment itself: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

Accepted at face value, the concerns of voluntarism, separatism, and federalism were not at odds with one another. They framed no tension; rather, they mutually reinforced a single proposition: Questions of religious choice were not to be the business of the national government.[10] Article VI of the Constitution had already provided that "no religious test shall ever be required as a qualification to any office or public trust under the United States,"[11] a provision meant to make it quite clear that "unbelievers or Mohammedans" were not excludable.[12] The motto of the new nation, proposed in a Continental Congress committee report by Franklin, Adams, and Jefferson, and adopted for use in the Great Seal of the United States in 1782, was "E Pluribus Unum."[13] The original legend on new coins, first on continental dollars, then on the fugio cent minted in Philadelphia, in 1787, was "Mind Your Business."[14] The inscription on the obverse side of the Great Seal was "Novus Ordo Seclorum," a New Order of the Ages.[15] The secular separation assured each individual that none need feel alien to this government, whatever his own religion or personal philosophy, for it was to be a temporal government not commingled with a clergy, a theism, or a church. At the same time, this wall of separation—in Jefferson's terminology[16]—assured the several states that they would be immune from attempts by the national government to influence or limit their own religious establishments in any respect.

The resolve to forbid this national government from adopting a religion or reserving its offices for only the religious carried over to the field of international affairs. Whatever the disposition of other nations, each might expect a relationship of amity with the United States, which

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10. *See* M. HOWE, *supra* note 5, at 17-23. *But cf.* R. CORD, *supra* note 5 (concluding that the first amendment does not absolutely bar government from religious involvement). *See generally* P. KURLAND, *supra* note 5; L. PFEFFER, *supra* note 5.

11. U.S. CONST. art. VI, cl. 3.

12. *See* 1 A. STOKES, *supra* note 6, at 603; *see also* J. STORY, COMMENTARIES ON THE CONSTITUTION § 1871 (Boston 1833) (referring to the article VI guarantee that "the Catholic and the Protestant, the Calvinist and the Armenian, the infidel and the Jew, may sit down at the common table of the national councils, without any inquisition into their faith or mode of worship").

13. *See* G. HUNT, THE HISTORY OF THE SEAL OF THE UNITED STATES 7, 41 (1909); A. STOKES, *supra* note 6, at 467-68.

14. THE COMPREHENSIVE CATALOGUE AND ENCYCLOPEDIA OF UNITED STATES COINS 53, 201 (J. Rose & H. Hazelcorn eds. 1976).

15. G. HUNT, *supra* note 13, at 41.

16. T. JEFFERSON, *supra* note 3.

itself incorporated no religious predisposition against any nation. This observation is illustrated in article XI of our 1797 treaty with Tripoli:

> As the government of the United States of America is not in any sense founded on the Christian religion—as it has in itself no character of emnity [sic] against the laws, religion, or tranquillity of Musselmen—and as the said states never have entered into any war or act of hostility against any Mahometan nation, it is declared by the parties, that no pretext arising from religious opinions shall ever produce an interruption of the harmony existing between the two countries.[17]

So strongly was the principle respected by some that they were to risk quite substantial political opprobrium in its behalf, even where the risk may have seemed unnecessary to undertake. Thus, when Congress resolved to request merely precatory presidential statements of annual thanksgiving, themselves seemingly harmless and altogether uncontroversial gestures unlikely to offend anyone, Washington and Adams easily acquiesced—but Jefferson could not. The practice was doubtless well intentioned, he admitted, but the principle was careless and unsound. "I do not think myself authorized to comply," Jefferson wrote,

> I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment or free exercise of religion, but from that also which reserves to the States the powers not delegated to the United States. Certainly, no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government. . . . I do not believe it is for the interest of religion to invite the civil magistrate to direct its exercises, its discipline, or its doctrines; nor of the religious societies, that the General Government should be invested with the power of effecting any uniformity of time or matter among them. . . .
>
> I am aware that the practice of my predecessors may be quoted. But I have ever believed, that the example of State executives led to the assumption of that authority by the General Government, without due examination, which would have discovered that what might be a right in a State government, was a violation of that right when assumed by another. Be this as it may, every one must act according to the dictates of his own reason, and mine tells me that civil powers alone have been given to the President of the United States, and no authority to direct the religious exercises of his constituents.[18]

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17. Treaty of Peace and Friendship, Nov. 4, 1796-Jan. 3, 1797, United States-Tripoli, art. XI, 8 Stat. 154, 155, T.S. No. 358. *But see* 1 STOKES, *supra* note 6, at 497-98 (claiming that the language "the government of the United States is not, in any sense, founded on the Christian religion . . ." was "virtual[ly] repudiat[ed]" by its omission less than a decade later from the extended Tripoli Treaty).

18. Letter from Thomas Jefferson to Rev. Samuel Miller (Jan. 23, 1808), in 11 THE WRITINGS OF THOMAS JEFFERSON 428-30 (A. Bergh ed. 1905). For further discussion on Jefferson's

Madison, as president, did not adhere to Jefferson's example but, even after he had discounted such ceremonial utterances for fasts and festivals as "merely recommendatory" and "absolutely indiscriminate," he acknowledged that in fact they constituted a "deviation from the strict principle" he shared with Jefferson.[19] Similarly, Madison acknowledged that he had been quite mistaken in approving—as a member of the House, in 1789—bills for the payment of, congressional chaplains.[20] "Is the appointment of Chaplains to the two Houses of Congress," he asked,

> consistent with the Constitution, and with the pure principles of religious freedom? . . . In strictness the answer on both points must be in the negative. The Constitution of the U.S. forbids everything like an establishment of a national religion. The law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. . . . If Religion consists in voluntary acts of individuals, singly, or voluntarily associated, and [if] it be proper that public functionaries, as well as their Constituents should discharge their religious duties, let them like their Constituents, do so at their own expense.[21]

The feature of tax subsidy was especially offensive to Madison—unsurprisingly, since it was that very practice that he and Jefferson had successfully opposed in Virginia. There, Madison had written that not even "three pence" should be coerced of any person, through taxes, for the propagation of religious views with which he disagreed.[22] The

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view of the proper relationship between government and religion see L. LEVY, JEFFERSON AND CIVIL LIBERTIES (1963).

19. 1 A. STOKES, *supra* note 6, at 491.

20. *Id.* at 456. Robert Cord has suggested that these reflections by Madison should be dismissed for the same reason, he says, that it would be "absurd" for any serious analyst or historian to give the slightest credence to equivalent statements by Mr. Nixon respecting the wrongness or unconstitutionality of surreptitious tape recordings in which he participated when he was president. R. CORD, *supra* note 5, at 36. But even supposing one accepted his comparison of James Madison with Richard Nixon, his idea of what the serious analyst or historian should do seems odd. If, indeed, Mr. Nixon were even now to suggest that he may have been quite wrong, and that he now does regard what he did as president as having been inconsistent with the fourth amendment, is it the case that every serious analyst or historian should: (a) dismiss such a statement as wholly unworthy of credence, and (b) record Mr. Nixon as necessarily having held the view that what he did as president was wholly consistent with the fourth amendment? Why would the serious analyst or historian do so?

21. Madison, *Aspects of Monopoly One Hundred Years Ago*, HARPER'S MAG. 489, 493 (1914), *quoted in* 1 A. STOKES, *supra* note 6, at 346-47; *cf.* Marsh v. Chambers, 103 S. Ct. 3330, 3336-37 (1983) ("Remuneration [of a state legislature's chaplaincy] is grounded in historic practice initiated . . . by the same Congress that adopted the Establishment Clause . . . .").

22. J. MADISON, *supra* note 1, at 300. The particular application of the establishment clause as a use restriction on congressional appropriations drawn from taxes is a source of taxpayer standing that has thus far been unique to the first amendment. *See* Flast v. Cohen, 392 U.S. 83, 101-06 (1968) (two-part test: taxpayer has standing only where he alleges (a) exercise of congres-

point, reflecting Madison's broader, Virginian, perspective went beyond the abuse of the tax power as such. Thus, although no taxes were involved, and although the matter was obviously not one he needed to interfere with, Madison, as president, vetoed a grant of land made by Congress for what Congress thought a benign use by a Baptist church

> *[b]ecause* the bill in reserving a certain parcel of land of the United States for the use of said Baptist Church, comprises a principle and precedent, for the appropriation of funds of the United States, for the use and support of religious societies; contrary to the article of the Constitution which declares that Congress shall make no law respecting a religious establishment.[23]

The separation principle, moreover, operated in both directions; it was meant to keep religion from entangling the state as well as to keep the churches free from the state influence that would have been the inevitable concomitant of state financial support. *The Memorial and Remonstrance Against Religious Assessments*, of 1785, inveighed against the risk that "the Civil Magistrate . . . may employ Religion as an engine of Civil policy," and equally against the infusion of any particular religion within government "because it will have a like tendency to banish our Citizens," i.e., to make them aliens to their own government.[24] Competition among religions for position within government must be avoided so that none need fear any other, as each might otherwise seek its own establishment through government or within

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sional taxing and spending power and (b) violation of a "specific constitutional limitation" upon that power). *Cf.* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 476-82 (1982) (first prong of *Flast* test not satisfied where complaint was based on agency, not congressional, action and congressional authorization of agency action was not derived from taxing and spending power); Frothingham v. Mellon, 262 U.S. 447, 488 (1923) (taxpayer, failing to show "direct injury," denied standing to challenge constitutionality of federal statute).

For examples of how the free exercise clause may appropriately permit exemption from government regulation, as distinct from either requiring or permitting a tax subsidy for a religious practice, see discussion and cases *infra* notes 30, 31; *see also* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 690-93 (1980) (disapproving Sherbert v. Verner, 374 U.S. 398 (1963), insofar as "compulsorily raised tax funds" paid to plaintiff to enable her to practice her religion were improper as a forbidden levy on others). In a passage reminiscent of Madison, *see supra* text accompanying note 21, Choper writes:

> [T]he Establishment Clause should be held to forbid the government's paying chaplains to minister to the religious needs of prisoners and miltary personnel. It may be that, under a Free Exercise Clause balancing test, the state could not exclude chaplains who volunteer for these purposes. But the Establishment Clause makes it the financial responsibility of the church and not the state to attend to its members' religious needs.

Choper, *supra*, at 693-94.

23. President's Message of Feb. 28, 1811, to the House of Representatives, Returning a Bill, 22 ANNALS OF CONG. 1098 (1811).

24. J. MADISON, *supra* note 1, at 301-02.

government.[25]

Voluntarism, then, was the principle of personal choice. Separatism was the principle of non-entanglement. Federalism was the principle of pure state autonomy, immune from national power, respecting policies that affect religion. Laws favoring religious establishments, like laws prohibiting the free exercise of religion, were thus altogether disallowed. The contributing streams of the first amendment were not, in this view, jostling and competitive. Rather, they converged on a single proposition thought eminently suitable for the national government. Citizens from all states, regardless of each state's own internal practices, would be assured of being able to meet on common secular ground to conduct the civil business of a purely civil government. The authority of that government was of enumerated civil powers that incorporated none of a religious provenance or cast, and was constrained from directing or otherwise influencing the voluntarism of private choice. No religious tests of any kind were to be associated with that government, for no sort of favored religion or "national" religion would be appropriate for Congress even to consider. Laws tending to finance religion, like laws tending to prohibit particular religions or to favor preferred religions, were prohibited to the national government in order to leave room for such diverse and separate policies as each state might individually elect. The motto of the country, "E Pluribus Unum," was significant: One nation, a civil and neutral polity, from many states of highly diverse people and practices.

Then, with the abandonment, circa 1834, of the last state-established religions and the subsequent enactment, in 1868, of the fourteenth amendment, a principle originally felt suitable to apply to Congress partly on behalf of the states ultimately became applicable to the states as well.[26] The detachment of government from religion that

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25. *See* Curry, *James Madison and the Burger Court: Converging Views of Church-State Separation*, 56 IND. L.J. 615 (1981) (discussing Madison's concern with the political divisiveness of factions, reflected in his conception of the separation of church and state).

26. The Court, in *Everson*, regarded the fourteenth amendment as incorporating the establishment clause, 330 U.S. at 14-15, and its analysis in *Lynch*, 104 S. Ct. 1355, 1358 (1984), maintains the consistency of that interpretation. In Abington School Dist. v. Schempp, 374 U.S. 203, 215-17 (1963), the Court chastised those for whom this issue seems less clear cut than it has seemed to the Court for engaging in practices "of value only as academic exercises." *Id.* at 217. For recent scholarly debate on the issue of the incorporation of the Bill of Rights, see R. BERGER, GOVERNMENT BY JUDICIARY 134-56 (1977) (stating that the fourteenth amendment was simply designed to prevent discrimination against blacks in those rights guaranteed by the Civil Rights Bill of 1866 and was not intended to make the Bill of Rights binding on the states); Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980) (arguing that legislative history shows that the privileges and immunities clause of the fourteenth amendment was designed to apply the Bill of Rights to the states); Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435

Jefferson and Madison had originally fought to achieve in Virginia had become a general obligation.

II.

In their first full address to the subject, in *Everson v. Board of Education*,[27] all nine Justices of the Supreme Court agreed in this view. Indeed, the following summary by Justice Black was faulted by no one on the Court:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[28]

Rather, four of the nine Justices, agreeing entirely with Black's view, dissented solely on the separate basis that they, unlike the majority, believed it had not been honored, that is, that the particular law in question[29] was defective. Indeed, it was on the basis of Justice Black's description of the first amendment, rather than on the basis of some different description, that the dissent itself also relied.[30]

Fourteen years later, Justice Frankfurter, who had concurred in *Everson* with Justice Black's sentiments even while dissenting in the particular case, returned to the same theme. "The Establishment Clause," he declared,

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(1981); Curtis, *Further Adventures of the Nine-Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L.J. 89 (1982); Berger, *Incorporation of the Bill of Rights: A Reply to Michael Curtis' Response*, 44 OHIO ST. L.J. 1 (1983); Curtis, *Still Further Adventures of the Nine-Lived Cat: A Rebuttal to Raoul Berger's Reply on Application of the Bill of Rights*, 62 N.C.L. REV. 517 (1984). For more dated examples, see L. PFEFFER, *supra* note 5, at 142-49; Van Alstyne, *supra* note 5, at 866-67.

27. 330 U.S. 1 (1947).

28. *Id.* at 15-16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

29. *See id.* at 46 (Rutledge, J., dissenting). The particular law at issue in *Everson* was a local law providing for bus fare reimbursement for sums spent by parochial as well as by public school children to ride municipal buses.

30. *See id.* at 31-43 (Rutledge, J., dissenting).

> withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief. Congress may not make these matters, as such, the subject of legislation, nor, now, may any legislature in this country. Neither the National Government nor, under the Due Process Clause of the Fourteenth Amendment, a State may, by any device, support belief or the expression of belief for its own sake, whether from conviction of the truth of that belief, or from conviction that by the propagation of that belief the civil welfare of the State is served, or because a majority of its citizens, holding that belief, are offended when all do not hold it.[31]

Difficult cases still arise, of course, even under the Black-Frankfurter view of the establishment clause. Generally, however, the difficulty of such cases has been limited to circumstances in which the good-faith conduct of civic business has imposed a hard choice on individuals whose personal religion has instructed them in opposition to the law. In such cases, there is a fair question whether the relevant public policy is so pressing that, whatever the strength of the religiously-grounded opposition to it, exceptions will not be tolerable, or whether, to the contrary, respect for religious pluralism counsels a measure of state self-restraint.

At one extreme, criminal prohibitions of homicide, mutilation, or child abuse cannot yield regardless of the intensity of the religious passion that demands such exceptional forms of "free" exercise. At the other extreme, however, the civil polity is not seriously distressed if it excuses those for whom ritual forms of respect for the state are acts of blasphemy. In the latter circumstance, the doubtfulness of the state's policy, the meanness of disallowing conscientious abstention, and the gratuitousness of the damage to the sincerely pious weigh in favor of accommodating sincerely held religious beliefs.[32] The establishment clause as described by Jefferson or Madison and summarized in the quoted excerpts from opinions by Justices Black and Frankfurter is not necessarily hostile to such an accommodation. Therefore the occasional wisdom of accommodation does not constitute an objection to traditional establishment clause doctrine. To the contrary, respect for so modest an accommodation as would be required in these circum-

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31. McGowan v. Maryland, 366 U.S. 420, 465-66 (1961).

32. *See* West Virginia Board of Educ. v. Barnette, 319 U.S. 624, 639-42 (1943). For a more recent example, see Wisconsin v. Yoder, 406 U.S. 205, 236 (1972) (compulsory school attendance law not applied to Amish) and compare Prince v. Massachusetts, 321 U.S. 158, 165 (1944) (selling of religious literature not exempted from state prohibition of sale of literature by minors on the streets). *See also* Choper, *supra* note 5, at 673.

stances would be strongly counselled by the free exercise clause.[33] In between these extreme and thus rather obvious cases, the closer and more difficult issues must continue to be addressed without inconsistency with the principles of neutrality and separation.

In sharp contrast to those closer issues and presenting a paradigmatic disregard of the establishment clause in virtually every dimension of its concerns would be a case involving all of the following deliberate acts of government:

> 1. The overt alignment of government with the particular theology of one, politically dominant, religious sect;
> 2. The collaboration of government with commercial interests to stimulate consumer purchases by the government's own promotional use of a particular religion's artifacts and mysteries;
> 3. The propagation under government sponsorship of distinctly religious symbols uniquely associated with one sect's most holy event—the miracle of divine birth of its particular prophet and messiah;
> 4. The purchase and maintenance through tax levies, and promotional display in outdoor public location each year, of sectarian objects, during the season designated for the Mass or eucharist of one religion's principal sacrament.

The facts of *Lynch v. Donnelly*[34] fit this paradigm exactly. Accordingly, when appropriately petitioned by a natural coalition of plaintiffs, a federal district court enjoined the governmental practice.[35] The state had not merely aided "all" religions but rather had promoted emphatically and exclusively *one* religion. It had not only broken with a general neutrality regarding purely religious doctrine, it had also preferred one religion over others. It had used tax money in support of a religious activity and encouraged belief in, and endorsed, the particular holy day—Christ's Mass—of one sect. It openly participated in the affairs of one church by duplicating in wood and plastic the imagery of a sacred event in order to encourage a general secular, commercial enthusiasm to intensify its holy day. The wall of separation between church and state had clearly been breached by a clear governmental, politicized, symbiotic embrace of one faith's preferred holy day.[36]

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33. *See* West Virginia Board of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (freedom of worship "may not be infringed on . . . slender grounds.").

34. 104 S. Ct. 1355, 1358 (1984).

35. Donnelly v. Lynch, 525 F. Supp. 1150, 1181 (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982) (2-1 decision), *rev'd*, 104 S. Ct. 1355 (1984). The plaintiffs in *Lynch* included an objecting taxpayer, offended members of minority religions, and aggrieved residents alienated by the absorption by government of a partisan religious observance that the government had adopted and sponsored. 525 F. Supp. at 1153-57.

36. *See id.* at 1173 (concluding that the municipality had "tried to endorse and promulgate religious beliefs by including a nativity scene in its display").

In its examination of this obtuse collaboration, the district court had little problem. The entanglement with religious controversy, the identification of the state with one favored theology, the alienation of many of its own residents embittered by the hubris of local government enlisting the tax power and regulatory authority to identify itself with the creed of one religion's martyred prophet, the objectively communicated support and endorsement of that religion's singular claims, all ought to have made the case easy.

In *Lynch v. Donnelly*,[37] a divided panel in the United States Court of Appeals for the First Circuit affirmed. The Supreme Court, in an opinion by the Chief Justice, with four justices dissenting, reversed both lower court holdings that the municipal purchase, maintenance, and periodic illuminated Christmas display of a purely Christian nativity scene was unconstitutional. The opinion perfunctorily acknowledged the "three-prong" test of the Court's earlier cases, which demands that a challenged statute have a "secular legislative purpose," that its "primary effect" neither "advance nor inhibit" religion; and that it not promote "an excessive entanglement" with religion.[38] Purporting to apply the "primary effect" prong of this test the Chief Justice observed:

> Of course the creche is identified with one religious faith *but no more so* than the examples we have set out from prior cases . . . .[39]
>
> We can assume, *arguendo*, that the display advances religion . . .; [but] whatever [the] benefit to one faith . . .[,] display of the creche is *no more* an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the holiday itself as "Christ's Mass" . . . .[40]
>
> [T]o conclude that the primary effect of including the creche is to advance religion in violation of the Establishment Clause would require that we view it as *more* beneficial to and *more* an endorsement of religion . . . than . . . [specific forms of assistance previously allowed such as textbook loans to parochial schools and bus fare reimbursements, or] *more* of an endorsement of religion than the Sunday Closing Laws upheld in *McGowan v. Maryland* . . . [or the payment of chaplain salaries sustained in *Marsh v. Chambers*].[41]

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37. 691 F.2d 1029 (1st Cir. 1982).

38. *Lynch*, 104 S. Ct. at 1362, (paraphrasing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)).

39. *Id.* at 1365 (emphasis added).

40. *Id.* at 1364 (emphasis added).

41. *Id.* at 1363 (emphasis added) (citing, for example, Marsh v. Chambers, 103 S. Ct. 3330 (1983); Board of Educ. v. Allen, 392 U.S. 236 (1968) (permitting expenditure of public funds for textbooks for students attending church-sponsored schools); McGowan v. Maryland, 366 U.S. 420 (1961); Everson v. Board of Educ., 330 U.S. 1 (1947)).

> We are unable to discern a *greater* aid to religion deriving from inclusion of the creche than from these benefits and endorsements previously held not violative . . . .[42]

Such was the tenor of the analysis under the purported "three-prong" approach; but, given the Chief Justice's warning that the Court would not be "confined to any single test or criterion in this sensitive area"[43] we should assuredly be alert to the possibility that an altogether new test was aborning. What is that test? Apparently it is an "*any more than*" test. Here, in one possible summary, are its parts.[44]

> First, the court must determine whether the government acts that have been questioned plainly sponsor, assist, promote, or advance a particular religion, its specific practices, its distinctive theology, or its establishment.
>
> Second, assuming that the acts complained of plainly do sponsor, assist, promote, and advance a particular religion, its specific practices, its distinctive theology, and its establishment, the court must then nonetheless also determine whether in doing so, the government has merely acted in a manner consistent with what it has regularly done—or with what Congress has regularly done—in the past.
>
> Third, unless the court finds that the additional acts are more egregious than other acts of government of a like kind—that is, unless the new acts advance this religion "any more than" government has generally advanced a preferred religion—the court shall sustain the acts in question.[45]

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42. *Id.* at 1364 (emphasis added).

43. *Id.* at 1362.

44. Actually, if one pays very close attention to the cases, it appears that in fact a majority of the Court has been applying a "*scarcely* any more than" test; the question is whether what government has done in the instant case is scarcely any more than what a majority of the Court has acquiesced in in the recent past. Thus, from the five-to-four decision in *Everson*, one may trace forward through Board of Education v. Allen, 392 U.S. 236, 241-49 (1968); Walz v. Tax Comm'n, 397 U.S. 664, 674-80 (1970) (upholding property tax exemptions for religious property); Hunt v. McNair, 413 U.S. 734, 741-49 (1973) (upholding state revenue bonds to finance a Baptist college; approximating the phraseology of the "any more than" test); Roemer v. Board of Pub. Works, 426 U.S. 736, 745-70 (1976) (upholding public grants to private colleges and religious institutions); Wolman v. Walter, 433 U.S. 229, 241-55 (1977) (providing textbooks, standardized testing and scoring, diagnostic services and career guidance for parochial students constitutional, but providing instructional materials and equipment and field trip services unconstitutional); Committee for Pub. Educ. v. Regan, 444 U.S. 646, 653-62 (1980) (upholding use of public funds to reimburse nonpublic schools for performing state-required testing and reporting); Mueller v. Allen, 103 S. Ct. 3062, 3065-71 (1983) (upholding tax deductions for expenses of sending child to nonpublic school); and Marsh v. Chambers, 103 S. Ct. 3330, 3332-37 (1983). To be sure, even now not every gross practice will be sustained. For example, mandatory posting of the Ten Commandments in public schools was held invalid in Stone v. Graham, 449 U.S. 39, 39-43 (1980) and legislative delegation to churches of an absolute veto over neighborhood liquor licenses was held invalid in Larkin v. Grendel's Den, 459 U.S. 116, 120-27 (1982).

45. This summary is of course my own and certainly would not be useful if recited to the Court in any actual case. Even so, this mere parody of a test was at once applied by a lower

In an artless sense—but in no sense that will withstand even the mildest scrutiny—the *Lynch* case can also be fitted within the literal wording of the "three-prong" test a majority of the Court has declared that it will usually apply to establishment clause claims.[46] The first prong, we recall, is that the law or governmental practice must possess a "secular" purpose. If "secular" is taken merely descriptively, simply as a synonym for whatever things temporal or civil government thinks appropriate to undertake as a temporal and civil government, then the facts of the *Lynch* case do indeed fit a "secular" purpose. That purpose is the government's own decision to identify its own conduct, and the uses of its tax revenues, with the events, values, mysteries, customs, and monotheism of a particular religion—the religion, hardly coincidentally, that is most widely subscribed to nationally as well as locally. The municipal purchase and annual, public, illuminated, tax-supported Christmas display of a nativity scene fit within *that* purpose exceedingly well. By the same gesture, the "primary effect" of the city's practice is without doubt to bring about that secular, that is, governmental, objective. Moreover, because the local government pursues its policy strictly through the uses of its own monies and its own property and does not engage any church to provide the place for its illuminated display, there are obviously no "entanglements" with any church or religious body as such.[47]

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federal court, in Fausto v. Diamond, No. 80-0520S (D.R.I. June 19, 1984) (available Sept. 12, 1984, on LEXIS, Genfed library, Dist file). The case rejects a taxpayer's suit to enjoin city tax funding and maintenance of an anti-abortion memorial, dedicated to the "unknown child," which was located on city-owned property and was the object of an overtly religious dedication ceremony. *Id.* Although the court acknowledged the affiliating linkages with the locally dominant religion—remarking that "two. . . commissioners declaimed, in effect, that their church required them to vote in support of the [religiously inscribed, anti-abortion] plaques," *id.*, and that "it is impossible to ignore the imposing backdrop of the cathedral," *id.*—it turned aside the complaint on the basis that "this court is unable to discern that the memorial is a *greater* aid to the Roman Catholic faith than was the creche in *Lynch*," *id.* (emphasis added).

See also Katcoff v. Marsh, 582 F. Supp. 463, 474 (E.D.N.Y. 1984), which sustained congressional appropriations of $84 million per year for military chaplain salaries and related religious programs. The court held that in light of the Supreme Court's acceptance of a state legislature's use of tax funds to pay its own in-house chaplains—in Marsh v. Chambers, 103 S. Ct. 3330, 3335-37 (1983)—it could see no sufficient distinction from the case before it even though the sums were vastly greater, the chaplains many times more numerous, and the programs much more pervasive. *Katcoff*, 582 F. Supp. at 474; *see also supra* note 44 and cases cited therein.

46. *Lynch*, 104 S. Ct. at 1362; Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

47. Concurring in the Court's decision in Abington School Dist. v. Schempp, 374 U.S. 203 (1963), Justice Brennan wrote:

> What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of gov-

Viewed this way, the decision need not have been compromised by the majority opinion's ineffectual attempt to compare the city's illuminated, commercially-manufactured, outdoor nativity scene to the mere inclusion of historic religious paintings in a public museum.[48] Neither need the opinion have been hedged by suggesting that had the nativity scene been unaccompanied by additional Christmas tokens such as Santa and reindeer—additions, incidentally, that embarrass the suggestion that the entire display was otherwise similar to the collection of a public art museum—it might have been unconstitutional.[49] Rather, a square logical fit can be made to the conventional three-prong test, albeit a fit that is at once self-validating and ironic. Essentially, it is the following, as, regretfully, I believe was the real case.

Insofar as the theology, artifacts, and liturgy of a particular religion have already formally been adopted into government itself and made a regular feature of government's own practice, the religion has itself been partly secularized. That is, it has been assimilated into and

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ernment for essentially religious purposes; or (c) *use essentially religious means to serve governmental ends*. . . .

Id. at 294-95 (emphasis added). The last point, that government may not "use essentially religious means to serve governmental ends," meant, in the context of *Schempp*, that even supposing the sole reason for Bible readings at the opening of each class day were utterly secular—that is, not at all to induce belief in the Bible but solely as a clever device to get students to quiet down—they were nonetheless unconstitutional because the religion clauses meant to forbid government from exploiting religious forms as a deliberate tool of secular policy. The license of the state, to appropriate the forms of religion as instruments of state policy, may subject each such religion to degraded uses over which it can exercise no control. Avoidance of that hazard was a principal theme of Madison's *Memorial and Remonstrance*. *See* J. MADISON, *supra* note 7. In *Lynch*, however, the Chief Justice virtually stood the Brennan criteria upside down. First, he declared that it is enough that there be any discernible secular purpose, no matter how minor; he explicitly declares that it need not be exclusive or even dominant. *Lynch*, 104 S. Ct. at 1363 n.6. Then, insofar as any secular purpose *is* present, he declares that even assuming essentially religious means have been appropriated by government as the means of effectuating that secular objective, it is "irrelevant." *Id.* at 1363 n.7.

But *why* it is "irrelevant" is not explained, nor is it clear why anyone would not think it relevant. If the object were purely to build military morale, and the principal effect were indeed to build such morale rather than, for example, to assist a particular church, would it be similarly "irrelevant" that the means chosen to build such morale involved the government in producing and distributing crosses, copies of militant hymns such as "Onward Christian Soldiers" and the like, in preparing troops for the capture of oil fields in Iran? The majority's failure to see "relevance" in such a matter is dismaying.

48. *See Lynch*, 104 S. Ct. at 1369.

49. *Id.* at 1358, 1362-63. Justice Brennan's dissent sought to narrow the decision accordingly, *id.* at 1370, and a later district court decision limiting the damage wrought by *Lynch* has enjoined a city's funding of a nativity scene where "no Santa Clauses or trees" outfitted the display, ACLU v. City of Birmingham, No. 83-CV3348DT (E.D. Mich. July 23, 1984) (available Sept. 12, 1984, on LEXIS, Genfed library, Dist file). *But see* McCreary v. Stone, 739 F.2d 716, 729 (2d Cir. 1984) (holding that *Lynch* was not "based upon the physical context . . . of the creche" but rather upon the context of the "holiday season"), *cert. granted sub nom.* Board of Trustees v. McCreary, 53 U.S.L.W. 3289 (U.S. Oct. 15, 1984) (No. 84-277).

made a part of the state temporal, and not simply left to the church spiritual. To whatever additional extent other incidents of that religion are similarly annexed and identically made a part of official state practice, the acts that are necessary to do so obviously do serve a "secular" purpose, namely, the appropriation of a particular religion or faith as a practice of government. The events that do this may be individually modest, discrete, and extremely gradual, as has happened in the United States.[50]

This movement, a movement of gradual, secularized Christian ethnocentrism, has tended to elude the establishment clause itself. Originally, in merely marginal, seemingly trivial, and obviously nonjusticiable[51] ways, statesmen and politicians easily commingled religiously colored habits of personal conduct with their deportment in public office. Some no doubt did so naturally, without thinking about it. Others, perhaps somewhat crassly, doubtless saw strong political advantage in making great public display of their piety. The commonplace personal tendency, to identify preferred "religious truths" with national policy, is institutionally irresistible in times of greatest sacrifice, such as war time. Thus, it is scarcely surprising, given the religious antecedents of the abolitionist movement, that the Union cause in the Civil War would be mingled with the assimilation of Christian symbolism, and that Christian theology thus would itself become part of the cause. Recall, for instance, the Battle Hymm of the Republic. That "In God We Trust" was first authorized for use on American coins in 1864, therefore, is scarcely remarkable.[52] That the fuller transition was made during the 1950's, with the alteration of the national motto,[53] the insertion of a common monotheism in the Pledge of Allegiance,[54] and the mandatory insertion of "In God We Trust" on all United States currency and money,[55] is equally unsurprising. Jingoistic desires to paint a vivid contrast in the Cold War, separating ourselves, claiming "God" within "our" government, for sanctimonious contrast with "Godless atheistic" Communism, made the deliberate appropriation of a pervasive religiosity an irresistibly useful instrument of state policy.[56]

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50. See, e.g., the Chief Justice's own presentation in *Lynch*, 104 S. Ct. at 1360-62 (reciting government's official acknowledgements since 1789 of religion's role in American life).

51. *See* Rescue Army v. Municipal Court, 331 U.S. 549, 568 (1947) (discussing the Court's "policy of strict necessity in disposing of constitutional issues").

52. A. STOKES & L. PFEFFER, *supra* note 1, at 568.

53. H.R. REP. NO. 1959, 84th Cong., 2d Sess. 2, *reprinted in* 1956 U.S. CODE CONG. & AD. NEWS 3720, 3720-21.

54. A. STOKES & L. PFEFFER, *supra* note 1, at 570.

55. *Id.*

56. *Id.* at 570-71. *See also* W. MILLER, PIETY ALONG THE POTOMAC 41-46 (1964) (discussing religion and anti-Communism during the 1950's).

In these marginal, gradual, ordinary ways, then, virtually from the beginning the nation has drifted, reidentified itself, and become, like so many others, accustomed to the political appropriation of religion for its own official uses. In exchange, it now purchases religious support. Late arrivals to America may suppose they can take the government's religiosity or leave it, but they are stuck with the reality that clashes so clearly with the first amendment: Ours is basically a Christian-pretending government where they will be made to feel ungrateful should they complain. The gradual but increasingly pervasive installment of compromised religious ritual within government itself thus draws that which was formerly outside to the inside; the prevailing monotheism has been made a commonplace exhibition in state practice, and put to service and supported by the state when felt useful. Additional appropriations from sectarianism may then become logically fitted as part of this "secular" but sectarian state. Distinctly religious practices, insofar as they serve the state, thus by definition have virtually succeeded in satisfying a secular purpose and promoting a secular interest. In this gradual absorptive fashion, then, satisfying the Court's current "test" can scarcely ever be a problem.

III.

Not so long ago, Justice Powell said that he believed we were now far removed from the dangers that so troubled Jefferson and Madison.[57] It is difficult to agree that that is so and, in any event, the supposition seems scarcely sufficient ground for the Court to modify the first amendment simply to accord with its own confidence. "E Pluribus Unum" should mean something to us all, aspirationally, that we ought not abandon although Congress itself has seen fit to do so. The idea of a civil nation of free people, diverse in their thoughts, equal in their citizenship, and with none to feel alien, outcast, or stranger in relation to civil authority, remains powerful and compelling. The installation of a state theism has not been worthy of the United States. *Lynch v. Donnelly* was itself not a credit to an able and distinguished Court. Both the case and the tendency it represents are disappointing reminders that religious ethnocentrism, as well as religious insensitivity, are still with us. I do not know whether Mr. Jefferson would have been surprised, but I believe he would have been disappointed.

57. Wolman v. Walter, 433 U.S. 229, 263 (1977) (Powell, J., concurring in part, dissenting in part).

No. 84-237, Aguilar v. Felton Conf. 12/7/84

The Chief Justice Para
J. Friendly thought he was bound by our opinions in Meek & Wolman.
Purpose of Title I is secular & safeguards are extensive. Reluctant to invalidate it.
No ev. of an efforts to promote religion
We have approved aid w/n to test books & buses.

Justice Brennan Aff'm
Principles of Meek, Wolman & other cases control

Justice White Rev.

Justice Marshall Aff'm

Justice Blackmun Aff'm

Can't reverse w/o overruling Meek.

Justice Powell Aff'm

See my notes & file on the Mich case.

Justice Rehnquist Rev.

Justice Stevens Aff in

J: Friendly accurately summarized our cases & they control.

Justice O'Connor Rev

Rev Meek's per se rule

File

84-237

December 10, 1984

Dear Professor Van Alstyne:

Thank you for your article on Lynch v. Donnelly.

I note your concern that Mr. Jefferson's "Wall" may be crumbling. You are quite right that the First Amendment - all of it - we think belongs especially to my state. Not only Jefferson and Madison, but also George Mason had more than a little to do with it.

As I joined Donnelly you will not be surprised that it does not strike me as a precedent likely to do any real damage to the Wall. I will read your article more carefully with special interest

Sincerely,

Professor William Van Alstyne
The University of Chicago
The Law School
1111 East 60th Street
Chicago, Illinois 60637

LFP/vde

A major Establishment Clause case.
CA2 in effect invalidated an important part (Title I) of the Elementary & Secondary Ed. Act.

Hold for Hunt, & consider hearing back to back with 83-990 School Dist. of Grand Rapids v. Ball

PRELIMINARY MEMO

October 5, 1984 Conference
List 3, Sheet 1

No. 84-237		
AGUILAR, ET AL. (parents of parochial school students)	Appeal from ~~Cert. to~~ CA2 (Feinberg, Friendly, & Oakes) } strong Panel	
v.		
FELTON, ET AL. (taxpayers)	Federal/Civil	Timely
No. 84-238		
SEC., U.S. DEPT. OF EDUCATION	Appeal ~~Cert. to~~ same	
v.		
FELTON, ET AL.	Federal/Civil	Timely
No. 84-239		
CHANCELLOR, BD. OF. ED. OF CITY OF N.Y.	Appeal from ~~Cert. to~~ same	
v.		
FELTON, ET AL.	Federal/Civil	Timely

NPJ_
lynda

1. SUMMARY: Petrs challenge the CA2's holding that New York City's provision of remedial teaching services to church-affiliated schools, pursuant to Title I of the Elementary and Secondary Education Act, violates the Establishment Clause.

2. FACTS AND DECISIONS BELOW: Title I of the ESEA provides federal funds to local education agencies to improve the education of economically and educationally deprived children.[1] The Act specifically requires that "remedial education services" be provided to children in private and public schools on an equal basis. The New York City Board of Education administers the largest Title I program in the country. After trying various alternative methods of providing Title I services to private schools, the Board decided in 1966 to send teachers employed by the public schools onto the premises of private schools, including religious schools, to teach Title I classes during regular school hours. Under this program, peripatetic public school employees go from one school to another during the school day to teach remedial reading, remedial arithmetic, speech therapy, and to provide guidance counseling.

In 1976, the National Coalition for Public Education and

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[1] Effective July 1, 1982, Title I was superseded by Chapter 1 of the Education Consolidation and Improvement Act of 1981. The parties and the courts below agree that its provisions concerning the participation of private school students in programs funded under the Act are virtually identical to those of Title I. The CA2 does not seem to have considered the possibility that the passage of the new Act has mooted this case, and that does not seem to be something that should trouble this Court. The parties and the CA2 continue to refer to the Act as "Title I," and I shall do likewise.

Religious Liberty brought an action against federal and local officials to enjoin this program as violative of the Establishment Clause. See National Coalition for Public Education & Religious Liberty v. Harris, 489 F. Supp. 1248 (S.D.N.Y.), appeal dismissed for want of jurisdiction, 449 U.S. 808 (1980) [PEARL]. After an evidentiary hearing, a three-judge district court concluded that the program did not violate the Establishment Clause and dismissed the complaint. This Court dismissed the appeal, apparently because of untimeliness. See Joint App. at 9a.

Meanwhile, in 1978, the ~~appellees~~ appellees in the present suit, six federal taxpayers, filed suit in the E.D.N.Y. raising the same claim. Four individuals whose children attend private elementary schools in NYC and receive Title I educational assistance intervened as defendants. The suit was stayed pending the outcome of PEARL, and the parties stipulated that it would be decided on the basis of the record in that case, along with some supplementary affidavits. In 1983, the DC (Neaher, DJ) entered summary judgment in favor of the defendants, relying on the reasoning in PEARL.

The PEARL court (Van Graafeiland, Tenney, Broderick) had examined NYC's Title I program in detail, noting that: (1) parochial school officials have no voice in the initial assignment of a Title I teacher; (2) religious affiliation has no bearing on assignment of teachers; and (3) each Title I teacher assigned to a private school is instructed not to engage in team teaching, not to introduce religious subjects, and not to allow Title I

supplies to be used by the private school. In addition, Title I teachers occupy classrooms that are specifically designated solely for that purpose and that are free from any religious symbols or artifacts.

The court analyzed this program under the three-part test of Lemon v. Kurtzmann, 403 U.S. 602 (1971), finding initially that Title I had a secular legislative purpose. Turning to the "primary effect" prong of the test, the court observed that Title I services were comparable to the off-premises therapeutic and remedial services that this Court approved in Wolman v. Walter, 433 U.S. 229 (1977). In that case, however, the Court relied on the ground that the use of a religiously neutral site negated the danger of religious advancement inherent in the nature of student-teacher interaction. But despite this seemingly crucial distinction, the on-premises instruction at issue here did not have a primary effect of advancing religion because: (1) the parochial schools in this case were not "pervasively sectarian;" (2) the regulations governing the program ensured a separation between Title I instruction and that provided by the parochial schools, and the evidence demonstrated that the regulations had been strictly observed; and (3) the extensive record, covering 14 years of the program's operation, distinguished this case from Supreme Court cases involving challenges to statutes or programs shortly after their enactment.

As for the third prong of the Lemon test, the court rejected the argument that a finding of "excessive entanglement" was mandated by the decision in Meek v. Pittenger, 421 U.S. 349

(1975). Meek addressed the constitutionality of a state program similar to Title I, under which public school employees provided auxiliary services to nonpublic school children on the premises of nonpublic schools. The Court held that "[t]he prophylactic contacts required to ensure that teachers play a strictly nonideological role . . . necessarily give rise to a constitutionally intolerable degree of entanglement between church and state." 421 U.S. at 370. The Court based this holding on two grounds: first, that the state would have to engage in continuing surveillance to ensure the neutrality of the auxiliary teachers; and second, that the issue of state aid to religious schools presented a serious potential for divisive political conflict.

The PEARL court found that neither of these considerations applied to NYC's Title I program. Because the NYC parochial schools were not "pervasively sectarian," the need for continuing surveillance of publicly employed teachers was minimized, and the record indicated that such surveillance was not necessary to ensure compliance with the Board's regulations. The court identified two types of contact between the government and religious authorities under the program -- supervision of Title I teachers by public administrators, and routine administrative contact between Title I personnel and nonpublic school administrators. The first of these had been found to create excessive entanglement in Meek, but in this case the Title I classes were sufficiently separate from the rest of the parochial school that the case was more analogous to the "off-premises"

instruction sanctioned in Wolman. The minor administrative contacts with parochial school administrators in this case "neither [gave] the parochial school officials any control over the program nor involve[d] Title I personnel in the affairs of the parochial schools." Joint App. at 100a.

As for the danger of political divisiveness, Title I, unlike other statutes invalidated by the Supreme Court, did not target its benefits at a narrow class of church-related schools. Rather, Title I benefitted a nationwide class of students, only 4% of whom attended private schools. The history of appropriations under Title I since 1965 revealed no signs of religious strife.

Point

In conclusion, the PEARL court stated that "[w]hile Title I could conceivably engender a program that did not satisfy Establishment Clause standards, this Court will not rule on the basis of abstract propositions. No constitutional infirmity has been revealed on the facts of this case."Joint App. at 103a.

On appeal of the instant case, the CA2 disagreed with the analysis of the PEARL court and reversed the DC's order granting summary judgment to the defendants on the basis of PEARL. After canvassing the Supreme Court's opinions in this area, particularly Meek and Wolman, the CA2 concluded "that public funds can be used to afford remedial instruction . . . to students in religious elementary and secondary schools only if such instruction or services are afforded at a "neutral site" off the premises of the religious school." Joint App. at 36a. Teachers might be subtly influenced by a sectarian milieu, and

CA2 dis-agreed

site must be "neutral"

the constant state surveillance necessary to guard against this was itself a constitutionally excessive entanglement of church and state. The evidence contained in the extensive record went principally to the defendants' contention that the NYC plan did not have a primary effect of advancing religion, whereas Meek was premised on the "excessive entanglement" prong of the Lemon test. The CA also focused on the inevitable potential for entanglement under the program and the "symbolic significance of the regular appearance of public school teachers in religious schools." Joint App. at 43a. The CA found "means and averages" irrelevant; even if the risk of entanglement existed in only a small proportion of the schools involved, the program ran afoul of the Establishment Clause.

In a footnote, the CA disposed of the defendants' attempt to distinguish Meek on the ground that the risk of political divisiveness was much lower under Title I than under the state statute at issue in Meek: "as we read Meek, the political strife argument was simply an additional consideration to bolster a conclusion already reached on other grounds." Joint App. at 51a n.24. In another footnote, the CA recognized that "there are deep divisions within the [Supreme] Court with respect to issues such as those here presented and, as appellees have strongly suggested to us, that the composition of the Court has changed since Meek." Id. at 53a n.25. But the CA declined to disregard established precedent on the basis of speculation as to what the Court would do today: "Our task is to analyze the precedents and

aimed at us.

apply them as best we can: The responsibility for modifying or overruling them, if that is to be done, rests elsewhere." Id.

3. CONTENTIONS: ~~Appellants:~~ Appellants:

Aguilar, et al: This case falls within the Court's appellate jurisdiction under 28 U.S.C §1252 because the CA2 held unconstitutional a common application of an Act of Congress. Appellees did not challenge the facial validity of Title I, but they sought to enjoin any expenditure of federal funds to provide education services in religious schools during school hours. The CA2's decision, therefore, casts doubt on the constitutionality of Title I programs across the country. In an analogous context, this Court has held that similar allegations concerning Title I were sufficient to justify the convening of a three-judge court under 28 U.S.C. §2282. Flast v. Cohen, 392 U.S. 83 (1968).

On the merits, the CA erred in interpreting this Court's decisions as creating a per se rule prohibiting public school teachers from offering any form of instruction at church-affiliated schools. This approach is out of harmony with more recent Establishment Clause decisions of this Court that reject an "absolutist" interpretation of prior cases. See, e.g., Lynch v. Donnelly, 104 S. Ct. 1355 (1984). Meek is distinguishable because the program challenged there, while quite similar to Title I, had only recently been enacted. The Court therefore focused on potential problems, none of which have arisen under NYC's well-established program.

The CA2's disregard of the record conflicts with Wheeler v. Barrera, 417 U.S. 402 (1974), in which this Court declined to

rule on the constitutionality of an on-premises Title I program for the very reason that no evidentiary record of such a program was before it. Clearly, the Court was inviting parties litigating the constitutionality of such a program to develop such a record -- with the implication that a court should rely on this record in deciding the case.

The CA2's ruling has a nationwide impact. Other suits challenging Title I have revealed that programs such as NYC's are common. See Wamble v. Bell, C.A. No. 77-0254-CV-W-8 (W.D. Mo., argued and submitted March 30, 1983); Barnes v. Bell, C.A. No. C-80-0501-L(B) (W.D.Ky., filed Oct. 2, 1980).

The Court has granted cert in School District of the City of Grand Rapids v. Ball, No. 83-990 (cert. granted 2/27/84). While the program at issue in that case differs from Title I in some respects, it also involves instruction by public school teachers in church-affiliated schools. Appellants suggest that the two cases be set for argument together.

The SG: The SG agrees that this case falls within the Court's appellate jurisdiction as a holding that a federal statute is unconstitutional as applied to a particular circumstance. Although the CA2 did not explicitly state that it was holding Title I unconstitutional as applied, such a determination was a "necessary predicate to the relief" that it granted. See United States v. Clark, 445 U.S. 23, 26 n.2 (1980). In addition, Flast v. Cohen held that an Establishment Clause challenge to Title I was properly brought before a three-judge court under 28 U.S.C. §2282. This holding sheds light on the

meaning of 28 U.S.C. §1252, because both provisions were enacted as part of the same statute.

On the merits, the NYC program does not constitute excessive entanglement between church and state. The requirements imposed on participating private schools are unambiguous, resembling fire and building safety codes: The school must maintain a classroom in a certain condition [i.e., free of religious symbols] and must allow supervisors on the premises for unannounced inspections. The City must supervise Title I teachers to guard against the injection of religious material into their classes, but public school authorities routinely supervise all of their teachers partly for this purpose. The mere fact that classes are conducted on the premises of religious schools does not inevitably mean "entanglement" will result.

Meek does not control this case, because its holding rested in significant part on the potential for political divisiveness presented by the statutory scheme there at issue. Appropriations for private and public schools were addressed by separate statutes. Title I, by contrast, is a single statutory scheme that provides aid to students in both public and nonpublic schools according to a fixed rule of per-student parity. More important, the Court did not have an evidentiary record before it in Meek, as it does here.

This case should be heard together with Grand Rapids. Because there are important differences between the two cases, a decision that the Grand Rapids program is unconstitutional will not necessarily resolve the constitutionality of Title I.

Important considerations militate in favor of plenary review of this case. The CA2 has struck down an integral aspect of a large and very important federal education program, and the issue presented by this case recurs frequently. This case is a particularly appropriate one for the Court to review because the NYC Title I program is the largest in the nation, and the record provides a detailed portrait of the operation of the program for over 15 years. Moreover, Establishment Clause cases such as this one tend to be fact-specific. By considering this case and Grand Rapids together, the Court "will be able to make its decision on the basis of wider information and will be able to provide more complete guidance to lower courts." The SG and the other appellants are prepared to file briefs by October 15.

NYC Board of Education: The NYC Title I program passes all three prongs of the Lemon test. Entanglement is "a question of kind and degree," Lynch v. Donnelly, 104 S. Ct. at 1364, and the state has a substantial interest in assuring that students receive an adequate secular education. Meek is distinguishable for the reasons cited by the other appellants. Apart from Establishment Clause concerns, the CA2's decision will frustrate the statutory rights of children from "the lower classes" to receive Title I instruction at parochial as well as public schools.

Grand Rapids involves two local programs under which the school district leases classrooms from parochial schools and provides various classes at the leased facilities during school hours. Many of the teachers employed in the publicly funded

programs are either former or present teachers at the parochial school to which they are assigned. This case presents "a less extreme factual situation for determination under the Establishment Clause," and probable jurisdiction should be noted.

Appellees: Meek controls this case, and other Supreme Court decisions bolster its holding. As the CA2 concluded, Meek did not rest on the potential for political divisiveness posed by the statutory scheme at issue there. Nor did the decision rest on the "sectarian" nature of the parochial schools in that case. Meek merely described the schools as "schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." 421 U.S. at 371. The parochial schools in this case fit that description.

The SG's argument that the only surveillance is that of public employees by public employees must fail because it could easily have been made in Meek. Moreover, the argument is untrue: the Board must also conduct "surveillance" of church school classrooms and church school students. Even more significant is that the Board has not and cannot engage in surveillance of the constant daily communication between public school teachers and their church school counterparts.

The extensive record that appellants contend distinguishes this case from Meek and others does not disprove excessive entanglement. The precedents envisage a surveillance that is all but impossible to acheive, and the appellants' surveillance is in any case grossly inadequate. The only evidence of any

surveillance is one visit per month to each church school in the program by a supervisor employed by the Board. Moreover, Wheeler v. Barrera does not constitute an invitation by this Court to litigate this issue on the basis of a record. Meek, which was decided after Wheeler, struck down the state statute at issue on the basis of its facial unconstitutionality.

4. DISCUSSION: This is a case that the Court should almost certainly review, especially in the light of its grant of cert in Grand Rapids. The facts of Grand Rapids are quite similar, but I think the SG is right that a decision in that case will not necessarily dispose of this one. On the one hand, the Grand Rapids program "leases" the classrooms from the parochial schools, arguably making the program less objectionable under the Establishment Clause. On the other hand, the teachers in the Grand Rapids program are in some cases simultaneously employed by the parochial school at which they teach -- or were so employed before joining the public payroll -- and that feature seems to present a much greater threat of entanglement.

A somewhat more difficult question is whether this case arises under the Court's appellate jurisdiction, although appellees don't challenge appellants' assertions that it does. The CA2 did not explicitly state that it was holding Title I unconstitutional as applied, and the case cited by the SG as authority for the proposition that such a holding was implicit is arguably distinguishable.[2] However, this Court has previously

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Footnote(s) 2 will appear on following pages.

held that Title I authorizes programs such as the one at issue here, see Wheeler v. Barrera, and their adoption under the statute is apparently widespread. Moreover, Flast v. Cohen is fairly strong authority that an appeal will lie. The claims raised in Flast were almost identical. This Court held that a three-judge court was properly convened under 28 U.S.C. §2282, which provided that an injunction restraining enforcement of any Act of Congress on grounds of unconstitutionality should not be granted unless the application had been heard and determined by a three-judge district court. The Court observed that the purpose of §2282 was "to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme . . . by issuance of a broad injunctive order." 392 U.S. at 89 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 154 (1963)). If §1252 is similarly concerned with preventing widespread disruption as the result of one court's holding -- albeit a CA rather than a DC -- it should apply in this case.

5. RECOMMENDATION: I recommend NPJ and consolidation for argument with School District of the City of Grand Rapids v. Ball, No. 83-990.

A response has been filed for all three cases.

September 24, 1984 Wexler Opins in petn.

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[2] United States v. Clark, 445 U.S. 23, 26 n.2 (1980). In Clark, the Ct. Cl. had granted relief on the basis of its holding in a previous case that an Act of Congress was unconstitutional. This Court rejected the argument that an appeal would lie only if the Ct. Cl. actually repeated its earlier holding of unconstitutionality.

Argued ....., 19... *Assigned* ....., 19... No. 84-237

Submitted ....., 19... *Announced* ....., 19...

AGUILAR

VS.

FELTON

Postponed Note 3

Postponed Note 6 & set in tandem with 83-990 School Dist of Grand Rapids v. Ball

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.				✓									
Brennan, J.	✓	Aff			Ball								
White, J.				✓									
Marshall, J.				✓									
Blackmun, J.				✓									
Powell, J.				✓									
Rehnquist, J.				✓									
Stevens, J.							✓						
O'Connor, J.				✓									
.....													

Court ..... Voted on ....., 19... October 5, 1984

Argued ....., 19... Assigned ....., 19... No. 84-237

Submitted ....., 19... Announced ....., 19...

AGUILAR

VS.

FELTON

Postponed Note 3

Postponed Hotte & set in tandem with 83-990 School Dist of Grand Rapids v. Ball

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.				✓									
Brennan, J.	✓	Jur			Ball								
White, J.				✓									
Marshall, J.				✓									
Blackmun, J.				✓									
Powell, J.				✓									
Rehnquist, J.				✓									
Stevens, J.							✓						
O'Connor, J.				✓									

Court ..... Voted on ....., 19... October 5, 1984

Argued ....., 19... Assigned ....., 19... No. 84-238

Submitted ....., 19... Announced ....., 19...

SEC., U.S. DEPT. OF ED.

vs.

FELTON

Postpone
~~Note~~

consolidate
with 84-237

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

Note

PRELIMINARY MEMO

October 5, 1984 Conference
List 3, Sheet 1

No. 84-238

SECRETARY, U.S. DEPT. OF EDUCATION	Cert. to CA2 (Feinberg, Friendly, Oakes)	
v.		
FELTON, ET AL.	Federal/Civil	Timely

This case is curve-lined with No. 84-237. Please see the memo in that case.

September 24, 1984	Wexler	Opin in petn.

Note

PRELIMINARY MEMO

October 5, 1984 Conference
List 3, Sheet 1

No. 84-239

CHANCELLOR, BOARD OF EDUCATION OF THE CITY OF NEW YORK — Cert. to CA2 (Feinberg, Friendly, Sr. CJ, Oakes)

v.

FELTON, ET AL. — Federal/Civil — Timely

This case is curve-lined with No. 84-237. Please see the memo in that case.

September 24, 1984 — Wexler — Opin in petn.

Note

PRELIMINARY MEMO

October 5, 1984 Conference
List 3, Sheet 1

No. 84-239

CHANCELLOR, BOARD OF EDUCATION OF THE CITY OF NEW YORK	Cert. to CA2 (Feinberg, Friendly, Sr. CJ, Oakes)	
v.		
FELTON, ET AL.	Federal/Civil	Timely

This case is curve-lined with No. 84-237. Please see the memo in that case.

September 24, 1984	Wexler	Opin in petn.

October 5, 1984

Court ..... *Voted on* ....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 84-239

Submitted ....., *19*... *Announced* ....., *19*...

CHANCELLOR, BD. OF ED. OF NY

vs.

FELTON

Postpone ~~Note~~

Consolidate with 84-237

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

CA 2 - 5
Good Summary of the two cases - 6
Entanglement - 7
Colleges are different - 9

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

L.F.P.

From: **Justice Brennan**

Circulated: APR 2 1985

Recirculated: _____

1st DRAFT

Reversed.
WJB relies on "entanglement" alone - not

SUPREME COURT OF THE UNITED STATES

Nos. 84-237, 84-238 AND 84-239

YOLANDA AGUILAR, ET AL., APPELLANTS
84-237 *v.*
BETTY-LOUISE FELTON ET AL.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, APPELLANT
84-238 *v.*
BETTY-LOUISE FELTON ET AL.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, APPELLANT
84-239 *v.*
BETTY-LOUISE FELTON ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[April —, 1985]

Cases relied on:
Lemon - 7 (entanglement)
Meek - 8, 9

JUSTICE BRENNAN delivered the opinion of the Court.

The City of New York uses federal funds to pay the salaries of public employees who teach in parochial schools. In this companion case to *School District of Grand Rapids* v. *Ball*, —— U. S. —— (1985), we determine whether this practice violates the Establishment Clause of the First Amendment.

I

A

The program at issue in this case, originally enacted as Title I of the Elementary and Secondary Education Act of

1965,[1] authorizes the Secretary of Education to distribute financial assistance to local educational institutions to meet the needs of educationally deprived children from low income families. The funds are to be appropriated in accordance with programs proposed by local educational agencies and approved by state educational agencies. § 3805(a).[2] "To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provisions for including special educational services and arrangements . . . in which such

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[1] Title I was codified at 20 U. S. C. § 2701 *et seq.* Section 2701 provided:

"In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children."

Effective July 1, 1982, Title I was superseded by Chapter I of the Education Consolidation and Improvement Act of 1981, 20 U. S. C. § 3801 *et seq.* See 20 U. S. C. § 3801 (current Chapter I analogue of § 2701). The provisions concerning the participation of children in private schools under Chapter I are virtually identical to those in Title I. Compare 20 U. S. C. § 2740 (former Title I provision) with 20 U. S. C. § 3806 (current Chapter I provision). For the sake of convenience, we will refer adopt the usage of the parties and continue to refer to the program as "Title I."

[2] The statute provides:

"A local educational agency may receive a grant under this subchapter for any fiscal year if it has on file with the State educational agency an application which describes the programs and projects to be conducted with such assistance for a period of not more than three years, and such application has been approved by the State educational agency."

See also 20 U. S. C. § 2731 (former Title I analogue).

children can participate." § 3806(a).[3] The proposed programs must also meet the following statutory requirements: the children involved in the program must be educationally deprived, § 3804(a),[4] the children must reside in areas comprising a high concentration of low-income families, § 3805(b),[5] and the programs must supplement, not supplant, programs that would exist absent funding under Title I. § 3807(b).[6]

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[3] In *Wheeler* v. *Barrera*, 417 U. S. 402 (1974), we addressed the question whether this provision requires the assignment of publicly employed teachers to provide instruction during regular school hours in parochial schools. We held that Title I mandated that private school students receive services comparable to, but not identical to, the Title I services received by public school students. *Id.*, at 420–421. Therefore, the statute would permit, but not require, that on-site services be provided in the parochial schools. In reaching this conclusion as a matter of statutory interpretation, we explicitly noted that "we intimate no view as to the Establishment Clause effect of any particular program." *Id.*, at 426. *Wheeler* thus provides no authority for the constitutionality of the program before us today.

[4] The statute provides:

"Each State and local educational agency shall use the payments under this subchapter for programs and projects (including the acquisition of equipment and, where necessary, the construction of school facilities) which are designed to meet the special educational needs of educationally deprived children."

[5] The statute provides:

"The application described in subsection (a) of this section shall be approved if . . . the programs and projects described—
(1)(A) are conducted in attendance areas of such agency having the highest concentration of low-income children. . . ."

[6] The statute provides:

"A local educational agency may use funds receive under this subchapter only so as to supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs and projects assisted under this subchapter, and in no case may such funds be so used as to supplant such funds from such non-Federal sources. In order to demonstrate compliance with this subsection a local education

Since 1966, the City of New York has provided instructional services funded by Title I to parochial school students on the premises of parochial schools. Of those students eligible to receive funds in 1981–1982, 13.2% were enrolled in private schools. Of that group, 84% were enrolled in schools affiliated with the Roman Catholic Archdiocese of New York and the Diocese of Brooklyn and 8% were enrolled in Hebrew day schools. With respect to the religious atmosphere of these schools, the Court of Appeals concluded that "the picture that emerges is of a system in which religious considerations play a key role in the selection of students and teachers and which has as its substantial purpose the inculcation of religious values." 739 F. 2d 48, 68 (1984).

The programs conducted at these schools include remedial reading, reading skills, remedial mathematics, English as a second language, and guidance services. These programs are carried out by regular employees of the public schools (teachers, guidance counselors, psychologists, psychiatrists and social workers) who have volunteered to teach in the parochial schools. The amount of time that each professional spends in the parochial school is determined by the number of students in the particular program and the needs of these students.

The City's Bureau of Nonpublic School Reimbursement makes teacher assignments, and the instructors are supervised by field personnel, who attempt to pay at least one unannounced visit per month. The field supervisors, in turn, report to program coordinators, who also pay occasional unannounced supervisory visits to monitor Title I classes in the parochial schools. The professionals involved in the program are directed to avoid involvement with religious activities that are conducted within the private schools and to bar religious materials in their classrooms. All material and equipment used in the programs funded under Title I are

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agency shall not be required to provide services under this subchapter outside the regular classroom or school program."

supplied by the Government and are used only in those programs. The professional personnel are solely responsible for the selection of the students. Additionally, the professionals are informed that contact with private school personnel should be kept to a minimum. Finally, the administrators of the parochial schools are required to clear the classrooms used by the public school personnel of all religious symbols.

B

In 1978, six taxpayers commenced this action in the District Court for the Eastern District of New York, alleging that the Title I program administered by the City of New York violates the Establishment Clause. These taxpayers, appellees in today's case, sought to enjoin the further distribution of funds to programs involving teaching on the premises of parochial schools. Initially the case was held for the outcome of *National Coalition for Public Education and Religious Liberty* v. *Harris ("PEARL")*, 489 F. Supp. 1248 (SDNY 1980), which involved an identical challenge to the Title I program. When the District Court in *PEARL* affirmed the constitutionality of the Title I program, *ibid.*, and this Court dismissed the appeal for want of jurisdiction, 449 U. S. 808 (1980), the challenge of the present appellees was renewed. The District Court granted the appellants' motion for summary judgment based upon the evidentiary record developed in *PEARL*.

A unanimous panel of the Court of Appeals for the Second Circuit reversed, holding that

> "[t]he Establishment Clause, as it has been interpreted by the Supreme Court in *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29 (D. N. J. 1973), *aff'd mem.*, 417 U. S. 961 (1974); *Meek* v. *Pittenger*, 421 U. S. 349 (1975) (particularly Part V, pp. 367–372); and *Wolman* v. *Walter*, 433 U. S. 229 (1977), constitutes an insurmountable barrier to the use of federal funds to send public school teachers and other professionals into

religious schools to carry on instruction, remedial or otherwise, or to provide clinical and guidance services of the sort at issue here." 739 F. 2d, at 50.

We noted probable jurisdiction to decide whether the program administered by the City of New York and funded under Title I violates the Establishment Clause. —— U. S. —— (1984). We affirm.

II

In *City of Grand Rapids* v. *Ball*, *ante*, the Court has today held unconstitutional under the Establishment Clause two remedial and enhancement programs operated by the Grand Rapids Public School District, in which classes were provided to private school children at public expense in classrooms located in and leased from the local private schools. The New York programs challenged in this case are very similar to the programs we examined in *Ball*. In both cases, publicly funded instructors teach classes composed exclusively of private school students in private school buildings. In both cases, an overwhelming number of the participating private schools are religiously affiliated. In both cases, the publicly funded programs provide not only professional personnel, but also all materials and supplies necessary for the operation of the programs. Finally, the instructors in both cases are told that they are public school employees under the sole control of the public school system.

The appellants attempt to distinguish this case on the ground that the City of New York, unlike the Grand Rapids Public School District, has adopted a system for monitoring the religious content of publicly funded Title I classes in the religious schools. At best, the supervision in this case would assist in preventing the Title I program from being used, intentionally or unwittingly, to inculcate the religious beliefs of the surrounding parochial school. But appellants' argument fails in any event, because the supervisory system established by the City of New York inevitably results in the

excessive entanglement of church and state, an Establishment Clause concern distinct from that addressed by the effects doctrine. Even where state aid to parochial institutions does not have the primary effect of advancing religion, the provision of such aid may nonetheless violate the Establishment Clause owing to the nature of the interaction of church and state in the administration of that aid.

The principle that the state should not become too closely entangled with the church in the administration of assistance is rooted in two concerns. When the state becomes too closely enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers, even when the governmental purpose underlying the involvement is largely secular. In addition, the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters. "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum* v. *Board of Education*, 333 U. S. 203, 212 (1948).

In *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), the Court held that the supervision necessary to ensure that teachers in parochial schools were not conveying religious messages to their students would constitute the excessive entanglement of church and state:

> "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendemt. These prophylactic contacts will involve excessive and enduring entanglement between state and church." 403 U. S., at 619.

Similarly, in *Meek* v. *Pittenger*, 421 U. S. 349 (1975), we invalidated a state program that offered, *inter alia*, guidance, testing, remedial and therepeutic services performed by public employees on the premises of the parochial schools. *Id.*, at 352–353. As in *Lemon*, we observed that though a comprehensive system of supervision might conceivably prevent teachers from having the primary effect of advancing religion, such a system would inevitably lead to an unconstitutional administrative entanglement between church and state.

> "The prophylactic contacts required to ensure that teachers play a strictly nonideological role, the Court held [in *Lemon*], necessarily give rise to a constitutionally intolerable degree of entanglement between church and state. *Ibid.*, at 619. The same excessive entanglement would be required for Pennsylvania to be 'certain,' as it must be, that . . . personnel do not advance the religious mission of the church-related schools in which they serve. *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29, 40–41, aff'd, 417 U. S. 961." 421 U. S., at 370.

In *Roemer* v. *Maryland Public Works Board*, 426 U. S. 736 (1976), the Court sustained state programs of aid to religiously affiliated institutions of higher learning. The state allowed the grants to be used for any nonsectarian purpose. The Court upheld the grants on the ground that the institutions were not "pervasively sectarian," *id.*, at 758–759, and therefore a system of supervision was unnecessary to ensure that the grants were not being used to effect a religious end. In so holding, the Court identified "what is crucial to nonentangling aid programs: the ability of the State to identify and subsidize seperate secular functions carried out at the school, without on-the-site inspections being necessary to prevent diversion of the funds to sectarian purposes." 426 U. S., at 765. Similarly, in *Tilton* v. *Richardson*, 403 U. S. 672 (1971), the Court upheld one-time grants to sectarian

institutions because ongoing supervision was not required. See also *Hunt* v. *McNair*, 413 U. S. 734 (1973).

As the Court of Appeals recognized, the elementary and secondary schools here are far different from the colleges at issue in *Roemer*, *Hunt*, and *Tilton*. 739 F. 2d, at 68–70. Unlike the colleges, which were found not to be "pervasively sectarian," many of the schools involved in this case are the same sectarian schools which had "as a substantial purpose the inculcation of religious values" in *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 768 (1973). Moreover, our holding in *Meek* invalidating instructional services much like those at issue in this case rested on the ground that the publicly funded teachers "were performing educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." *Meek*, *supra*, at 371. The court below found that the schools involved in this case were "well within this characterization." 739 F. 2d, at 70.[7] Unlike the schools in *Roemer*, many of the schools here receive funds and report back to their affiliated church, require attendance at church religious exercises, begin the school day or class period with prayer, and grant preference in admission to members of the sponsoring denominations. *Id.*, at 70. In addition, the

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[7] Appellants suggest that the degree of sectarianism differs from school to school. This has little bearing on our analysis. As Judge Friendly, writing for the court below, noted: "It may well be that the degree of sectarianism in Catholic schools in, for example, black neighborhoods, with considerable proportions of non-Catholic pupils and teachers, is relatively low; by the same token, in other schools it may be relatively high. Yet . . . enforcement of the Establishment Clause does not rest on means or medians. If any significant number of the Title I schools create the risks described in *Meek*, *Meek* applies. It would be simply incredible, and the affidavits do not aver, that all, or almost all, New York City's parochial schools receiving Title I aid have . . . abandoned 'the religious mission that is the only reason for the schools' existence.'" 739 F. 2d, at 70 (quoting *Lemon* v. *Kurtzman*, 403 U. S., at 650 (opinion of BRENNAN, J.).

Catholic schools at issue here, which constitute the vast majority of the aided schools, are under the general supervision and control of the local parish. *Ibid.*

The critical elements of the entanglement proscribed in *Lemon* and *Meek* are thus present in this case. First, as noted above, the aid is provided in a pervasively sectarian environment. Second, because assistance is provided in the form of teachers, ongoing inspection is required to ensure the absence of a religious message. Compare *Lemon*, *supra*, at 619, with *Tilton*, *supra*, at 668, and *Roemer*, *supra*, at 765. In short, the scope and duration of New York's Title I program would require a permanent and pervasive State presence in the sectarian schools receiving aid.

This pervasive monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement. Agents of the State must visit and inspect the religious school regularly, alert for the subtle or overt presence of religious matter in Title I classes. Cf. *Lemon* v. *Kurtzman*, 403 U. S., at 619 ("What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion"). In addition, the religious school must obey these same agents when they make determinations as to what is and what is not a "religious symbol," and thus off limits in a Title I classroom. In short, the religious school, which has as a primary purpose the advancement and preservation of a particular religion must endure the ongoing presence of State personnel whose primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought.

The administrative cooperation that is required to maintain the educational program at issue here entangles Church and State in another way that infringes interests at the heart of the Establishment Clause. Administrative personnel of the public and parochial school systems must work together in resolving matters related to schedules, classroom assign-

ments, problems that arise in the implementation of the program, requests for additional services, and the dissemination of information regarding the program. Furthermore, the program necessitates "frequent contacts between the regular and the remedial teachers (or other professionals), in which each side reports on individual student needs, problems encountered, and results achieved." 739 F. 2d, at 65.

We have long recognized that underlying the Establishment Clause is "the objective . . . to prevent, as far as possible, the intrusion of either [Church or State] into the precincts of the other." *Lemon* v. *Kurtzman*, *supra*, at 614. See also *McCollum* v. *Board of Education*, 333 U. S. 203, 212 (1948). Although "[s]eparation in this context cannot mean absence of all contact," *Walz* v. *Tax Commission*, 397 U. S. 664, 676 (1970), the detailed monitoring and close administrative contact required to maintain New York's Title I program can only produce "a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." *Id.*, at 674. The numerous judgments that must be made by agents of the state concern matters that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations. As government agents must make these judgments, the dangers of political divisiveness along religious lines increase. At the same time, "[t]he picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction surely raises more than an imagined specter of governmental 'secularization of a creed.'" *Lemon* v. *Kurtzman*, 403 U. S. 602, 650 (1971) (opinion of BRENNAN, J.).

III

Despite the well-intentioned efforts taken by the City of New York, the program remains constitutionally flawed owing to the nature of the aid, to the institution receiving the aid, and to the constitutional principles that they implicate—that neither the state nor federal government shall promote

or hinder a particular faith or faith generally through the advancement of benefits or through the excessive entanglement of church and state in the administration of those benefits.

Affirmed.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 2, 1985

Re: No. 84-237 - Aguilar v. Felton
No. 84-238 - Sec. of Education v. Felton
No. 84-239 - Chancellor of Bd. of Education of N.Y. v. Felton

Dear Bill:

Please join me.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 2, 1985

Re: 84-237, 84-238, 84-239 - Aguilar v. Felton

Dear Bill:

Please join me.

Respectfully,

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 2, 1985

Re: 84-237, Aguilar, et al. v. Felton, et al.
84-238, Secty. U.S. Dept of Education v. Felton
84-239, Chancellor, Board of Education of the City of New York v. Felton, et al.

Dear Bill,

I have a different view in these cases and will await the dissent or write separately.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 8, 1985

84-237 - Aguilar v. Felton

84-238 - Secretary, U.S. Department of Education v. Felton

84-239 - Chancellor of the Board of Education of the City of New York v. Felton

Dear Bill,

I shall await other writing in these cases.

Sincerely yours,

Justice Brennan

Copies to the Conference

April 9, 1985

LLYNDA GINA-POW

MEMO TO Lynda

FROM: LFP, JR.

RE: 84-237 - 239; and 83-990 School District of Grand Rapids v. Ball

I have in mind generally a concurring opinion of perhaps half a dozen pages. In view of your more intimate familiarity with our prior cases (I have not reread any of them), and your facility in drafting, I would appreciate your undertaking this when you have given me a draft in the Securities Act cases.

Random thoughts include the following:

1. As we have discussed, I think Aguilar involves essentially the same "subsidy" rationale very well stated in Ball, pp. 18-23.

2. I also agree that "entanglement" is involved in both cases, and would quote Harlan's opinion in Waltz.

3. In several of our cases (Lemon, Nyquist, and Meek, we emphasized the risk of "political devisiveness". I do not believe that WJB has emphasized this. I consider it quite important, as one can be certain that politics will enter into decisions as to aid to parochial schools

in states that have large sectarian population - e.g. New York.

4. Perhaps we could include a quote or two from relevant things that I said in Nyquist.

5. Your bench memo quoted in part from my separate opinion in Wolman. I would like in a footnote to repeat some of that, quoting Wolman. There is no danger in my opinion of a state religion, and so we are talking about aid to religion as such - whatever the faith may be. A high percentage of the population do not belong to any religion. I know from my own experience in education that private schools often are helpful to public schools (perhaps not so in major cities such as New York). Certainly in Virginia the Espiscopal schools - with which you are familiar - provide quality education that is fully competitive, and often better, than that provided in the public schools. They provide an option for parents who can afford to use them.

6. What worries me most about these cases, as you and I have discussed, is that both Title I and the Michigan Program probably are beneficial as presently operated. There is no evidence to the contrary, though the absence of such evidence has been viewed as irrelevant

in prior cases. I do not think WJB has closed the door to possible types of state aid. I do not read his opinion as holding that Title I is facially invalid. Rather, the entanglement results are potential because of the way New York City has structured the program. I believe Judge Friendly refer to the structure of the New York program.

To the extent we can do so properly, I would like to emphasize that even-handed asssitance to all schools - absent the entanglement structure in Aquilar - would present a different situation. In Nyquist I emphasized that some types of assistance are appropriate. What if Congress simply appropriated funds to supplement education for children in deprived areas and made the funds - and only the funds - available to the appropriate school authorities? The only supervision would be federal, and would see that both public and private schools used the funds properly. This would require the parochial schools to provide these programs with their own teachers and on their own premises with no participation by public school teachers or oversight by personnel of the public schools? See the Minnesota case we decided - last Term, I believe.

7. I agree that Judge Friendly's opinion is excellent. WJB has mentioned it. Perhaps we could use a quote or two.

LFP, JR.

lfp/ss 05/03/85

MEMORANDUM

TO: Lynda DATE: May 2, 1985

FROM: Lewis F. Powell, Jr.

84-237 Aguilar, et al

On a first reading, your draft of May 1 is quite close to what I suggested in my memo and we have discussed. Although I may have some further thoughts, my initial reaction and suggestions are as follows:

1. Footnote 1 should be expanded, and possibly relocated. The reader will not understand it in its present position and form. The point is that the Court's opinion is based solely on entanglement, and we suggest that in addition to entanglement - as important as that is - the effect prong of Lemon is violated where there is a government subsidy of parochial schools through the combined use of federal funding and direct public school assistance in parochial schools.

2. I do not understand the sentence in the middle of page 9. See my question in the margin.

3. On page 10, either in the text or in the note, I would like to try to be somewhat more specific than the present draft. I have suggested a minor change in the language of the first sentence following citation of the cases. In lieu of the next sentence, try something along the following lines:

"In the cases cited there were assistance programs that made funds available equally to public and nonpublic schools without entanglement. The constitutional defect in Title I, as indicated above, is that it provides a financial subsidy to be administered in major part by public school teachers within parochial schools - resulting almost inevitably in forbidden entanglement. If, for example, Congress could fashion an even-handed financial assistance program to both public and nonpublic schools for the laudable purposes of Title I, leaving it to each category of schools to administer the federal funds without the entangelement identified in this case, we would be presented with a different question."

4. I like the quote as to value of parochial schools beginning on page 10, but this seems misplaced at the end of the opinion. Try finding a better location for it - perhaps where you first speak of the laudable purpose of Title I.

L.F.P., Jr.

ss

lfp/ss 05/03/85

MEMORANDUM

TO: Lynda DATE: May 2, 1985

FROM: Lewis F. Powell, Jr.

84-237 Aguilar, et al

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L.F.P., Jr.

ss

May 9, 1985

83-990 Grand Rapids v. Ball
84-237 Aguilar v. Felton

Dear Bill:

Please join me in these two cases.

I am circulating a concurring opinion in Aguliar that expresses additional views.

Sincerely,

Justice Brennan

lfp/ss

cc: The Conference

File

lgs May 4, 1985

MEMORANDUM TO JUSTICE POWELL

From: Lynda

Re: No. 84-237 Aguilar v. Felton

Attached is a redraft of your concurrence in this case. As you will see, I have incorporated your changes and made some other minor alterations. The one suggestion with which I had some difficulty was the proposal that we be more specific in suggesting what type of program might pass Establishment Clause scrutiny. The import of your suggested language was that if Congress could fashion a program that was evenhanded and that could be administered by the parochial schools on their own, it would be valid. This is true only if the program would not constitute direct aid to the parochial schools. The Court's cases that have approved aid to parochial schools have all involved evenhanded indirect aid; it is not only because the aid is evenhanded that it is valid; it is also because the aid is indirect and needs no surveillance. If it is direct, it constitutes an impermissible subsidy that advances religion unless there is some way to be "certain," Meek v. Pittenger, 421 U.S., at 371, that the aid is not being used to foster religious goals. The only way to be certain that it is not so used, of

I yes

course, requires surveillance in most cases; surveillance, of course, leads to excessive entanglement.

In sum, I think it would be incorrect to suggest that aid would be permissible as long as it was evenhanded and structured so that entanglement would not ensue. We must be sure not to leave out the fact that the aid may not have the effect of advancing religion. Our cases have suggested, therefore, that the aid must also be indirect, such as the tax deductions in Mueller, the provision of textbooks to children in Allen, and the reimbursements for bus fare in Everson.

This all gets quite complicated to explain in capsule form, and explains why I was deliberately vague in my first draft. I have given it another shot in the new draft, but am inclined to think it is better to be vague than to give governments and schools false hopes that a certain type of program may be found constitutional in the future.

I have attached a copy of my first draft and your memo to me for reference.

lgs May 7, 1985

Lynda - your new sentence is better (less graceless!)

Re Aguilar concurrence

It strikes me that the next to last sentence in the opinion, on p. 5, needs work. Although I think it does the job substantively, it is much too long and graceless. Following is a proposed substitute that is at least a little shorter.

If, for example, Congress could fashion a program of evenhanded financial assistance to both public and private schools that could be administered, without governmental supervision in the private schools, so as to prevent the diversion of the aid from secular purposes, we would be presented with a different question.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 13, 1985

Re: No. 84-237) Aguilar v. Felton
No. 84-238) Secretary, U.S. Dept. of Ed. v. Felton
No. 84-239) Chancellor of Board of Education
of City of New York v. Felton

Dear Bill:

Please join me.

Sincerely,

Harry

Justice Brennan

cc: The Conference

pp. 6, 7

See pp 7 & 9

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: JUN 13 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 84–237, 84–238 AND 84–239

YOLANDA AGUILAR, ET AL., APPELLANTS
84–237 *v.*
BETTY-LOUISE FELTON ET AL.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, APPELLANT
84–238 *v.*
BETTY-LOUISE FELTON ET AL.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, APPELLANT
84–239 *v.*
BETTY-LOUISE FELTON ET AL.

ON APPEALS FROM UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June ——, 1985]

JUSTICE O'CONNOR, dissenting.

Today the Court affirms the holding of the Court of Appeals that public schoolteachers can offer remedial instruction to disadvantaged students who attend religious schools "only if such instruction . . . [is] afforded at a neutral site off the premises of the religious school." 739 F. 2d 48, 64 (CA2 1984). This holding rests on the theory, enunciated in Part V of the Court's opinion in *Meek* v. *Pittenger*, 421 U. S. 349, 367–373 (1975), that public schoolteachers who set foot on parochial school premises are likely to bring religion into their classes, and that the supervision necessary to prevent religious teaching would unduly entangle church and state. Even if this theory were valid in the abstract, it cannot validly be applied to New York City's 19 year old Title I pro-

Noted

I see no need to reply.

6/14

Noted - Justice O'Connor would overrule Meek. I see no real need for us to respond, do you? If so, I would be happy to draft something. Lynda

gram. The Court greatly exaggerates the degree of supervision necessary to prevent public school teachers from inculcating religion, and thereby demonstrates the flaws of a test that condemns benign cooperation between church and state. I would uphold Congress's efforts to afford remedial instruction to disadvantaged schoolchildren in both public and parochial schools.

I

As in *Wallace* v. *Jaffree*, —— U. S. —— (1985) and *Thornton* v. *Caldor, Inc.*, —— U. S. —— (1985), the Court in this litigation adheres to the three part Establishment Clause test enunciated in *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971). To survive the *Lemon* test, a statute must have both a secular legislative purpose and a principal or primary effect that neither advances nor inhibits religion. Under *Lemon* and its progeny, direct state aid to parochial schools that has the purpose or effect of furthering the religious mission of the schools is unconstitutional. I agree with that principle. According to the Court, however, the New York Title I program is defective not because of any improper purpose or effect, but rather because it fails the third part of the *Lemon* test: the Title I program allegedly fosters excessive government entanglement with religion. I disagree with the Court's analysis of entanglement and I question the utility of entanglement as a separate Establishment Clause standard in most cases. Before discussing entanglement, however, it is worthwhile to explore the purpose and effect of the New York Title I program in greater depth than does the majority opinion.

The purpose of Title I is to provide special educational assistance to disadvantaged children who would not otherwise receive it. Congress recognized that poor academic performance by disadvantaged children is part of the cycle of poverty. S. Rep. 89–146, 89th Cong., 1st Sess. 4 (1965). Congress sought to break the cycle by providing classes in remedial reading, mathematics, and English to disadvantaged

children in parochial as well as public schools, for public schools enjoy no monopoly on education in low income areas. *Wheeler* v. *Barrera*, 417 U. S. 402, 405–406 (1974). See 20 U. S. C. §§2740(a), 3806(a). Congress permitted remedial instruction by public school teachers on parochial school premises only if such instruction is "not normally provided by the nonpublic school" and "would contribute particularly to meeting the special educational needs of educationally deprived children." S. Rep. 89–146, *supra*, at 12. See 34 CFR 200.73 (1984) (Department of Education Regulations implementing Title I and precluding instruction on parochial school premises except where necessary and where such instruction is not normally provided by the school).

After reviewing the text of the statute and its legislative history, the District Court concluded that Title I serves a secular purpose of aiding needy children regardless of where they attend school. Juris Statement App. in No. 84–238, p. 56a, incorporating findings of the district court in *National Coalition for Public Education & Religious Liberty* v. *Harris*, 489 F. Supp. 1248, 1258 (SDNY 1980) (*"PEARL"*). The Court of Appeals did not dispute this finding, and no party in this Court contends that the purpose of the statute or of the New York City Title I program is to advance or endorse religion. Indeed, the record demonstrates that New York City public schoolteachers offer Title I classes on the premises of parochial schools solely because alternative means to reach the disadvantaged parochial school students—such as instruction for parochial school students at the nearest public school, either after or during regular school hours—were unsuccessful. *PEARL*, 489 F. Supp., at 1255. As the Court of Appeals acknowledged, New York City "could reasonably have regarded [Title I instruction on parochial school premises] as the most effective way to carry out the purposes of the Act." 739 F. 2d, at 49. Whether one looks to the face of the statute or to its implementation, the Title I program is undeniably animated by a legitimate secular purpose.

The Court's discussion of the effect of the New York City Title I program is even more perfunctory than its analysis of the program's purpose. The Court's opinion today in *Grand Rapids* v. *Ball*, —— U. S. —— (1985), which strikes down a Grand Rapids scheme that the Court asserts is very similar to the New York program, identifies three ways in which public instruction on parochial school premises may have the impermissible effect of advancing religion. First, "state-paid instructors, influenced by the pervasively sectarian nature of the religious schools in which they work, may subtly or overtly indoctrinate the students in particular religious tenets at public expense." Second, "state-provided instruction in the religious school buildings threatens to convey a message of state support for religion to students and to the general public." Third, "the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." *Id.*, at ——–——. While addressing the effect of the Grand Rapids program at such length, the Court overlooks the effect of Title I in New York City.

One need not delve too deeply in the record to understand why the Court does not belabor the effect of the Title I program. The abstract theories explaining why on-premises instruction might possibly advance religion dissolve in the face of experience in New York. As the District Court found in 1980,

> "New York City has been providing Title I services in nonpublic schools for fourteen years. The evidence presented in this action includes: extensive background information on Title I; an in-depth description of New York City's program; a detailed review of Title I rules and regulations and the ways in which they are enforced; and the testimony and affidavits of federal officials, state officers, school administrators, Title I teachers and supervisors, and parents of children receiving Title I services. The evidence establishes that the result

> feared in other cases has not materialized in the City's Title I program. The presumption—that the 'religious mission' will be advanced by providing educational services on parochial school premises—is not supported by the facts of this case." *PEARL*, 489 F. Supp, at 1265.

Indeed, in nineteen years there has never been a single incident in which a Title I instructor "subtly or overtly" attempted to "indoctrinate the students in particular religious tenets at public expense." *Grand Rapids*, —— U. S., at ——.

Common sense suggests a plausible explanation for this unblemished record. New York City's public Title I instructors are professional educators who can and do follow instructions not to inculcate religion in their classes. They are unlikely to be influenced by the sectarian nature of the parochial schools where they teach, not only because they are carefully supervised by public officials, but also because the vast majority of them visit several different schools each week and are not of the same religion as their parochial students.* In light of the ample record, an objective observer of the implementation of the Title I program in New York would hardly view it as endorsing the tenets of the participating parochial schools. To the contrary, the actual and perceived effect of the program is precisely the effect intended by Congress: impoverished school children are being helped to overcome learning deficits, improving their test scores, and receiving a significant boost in their struggle to obtain both a thorough education and the opportunities that flow from it.

The only type of impermissible effect that arguably could carry over from the *Grand Rapids* decision to this litigation, then, is the effect of subsidizing "the religious functions of the

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* It is undisputed that 78% of Title I instructors who teach in parochial schools visit more than one school each week. Almost three quarters of the instructors do not share the religious affiliation of any school they teach in. App. 49.

parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." —— U. S., at ——. That effect is tenuous, however, in light of the statutory directive that Title I funds may be used only to provide services that otherwise would not be available to the participating students. 20 U. S. C. §3807(b). The Secretary of Education has vigorously enforced the requirement that Title I funds supplement rather than supplant the services of local education agencies. See *Bennett* v. *Kentucky*, —— U. S. —— (1985); *Bennett* v. *New Jersey*, —— U. S. —— (1985).

Even if we were to assume that Title I remedial classes in New York may have duplicated to some extent instruction parochial schools would have offered in the absence of Title I, the Court's delineation of this third type of effect proscribed by the Establishment Clause would be seriously flawed. Our Establishment Clause decisions have not barred remedial assistance to parochial school children, but rather remedial assistance *on the premises of the parochial school.* Under *Wolman* v. *Walter*, 433 U. S. 229, 244–248 (1977), the New York City classes prohibited by the Court today would have survived Establishment Clause scrutiny if they had been offered in a neutral setting off the property of the private school. Yet it is difficult to understand why a remedial reading class offered on parochial school premises is any more likely to supplant the secular course offerings of the parochial school than the same class offered in a portable classroom next door to the school. Unless *Wolman* was wrongly decided, the defect in Title I program cannot lie in the risk that it will supplant secular course offerings.

II

Recognizing the weakness of any claim of an improper purpose or effect, the Court today relies entirely on the entanglement prong of *Lemon* to invalidate the New York City Title I program. The Court holds that the occasional presence of peripatetic public schoolteachers on parochial school

grounds threatens undue entanglement of church and state because (1) the remedial instruction is afforded in a pervasively sectarian environment; (2) ongoing supervision is required to assure that the public schoolteachers do not attempt to inculcate religion; (3) the administrative personnel of the parochial and public school systems must work together in resolving administrative and scheduling problems; and (4) the instruction is likely to result in political divisiveness over the propriety of direct aid. *Ante*, at ——— – ———; *Id.*, at ——— – ——— (concurring opinion of POWELL, J.).

This analysis of entanglement, I acknowledge, finds support in some of this Court's precedents. In *Meek* v. *Pittenger*, 421 U. S. 349, 369 (1975), the Court asserted that it could not rely "on the good faith and professionalism of the secular teachers and counselors functioning in church related schools to ensure that a strictly nonideological posture is maintained." Because "a teacher remains a teacher," the Court stated, there remains a risk that teachers will intertwine religious doctrine with secular instruction. The continuing state surveillance necessary to prevent this from occurring would produce undue entanglement of church and state. *Id.*, at 370–372. The Court's opinion in *Meek* further asserted that public instruction on parochial school premises creates a serious risk of divisive political conflict over the issue of aid to religion. *Ibid.* *Meek*'s analysis of entanglement was reaffirmed in *Wolman* two terms later.

I would accord these decisions the appropriate deference commanded by the doctrine of *stare decisis* if I could discern logical support for their analysis. But experience has demonstrated that the analysis in Part V of the *Meek* opinion is flawed. At the time *Meek* was decided, thoughtful dissents pointed out the absence of any record support for the notion that public school teachers would attempt to inculcate religion simply because they temporarily occupied a parochial school classroom, or that such instruction would produce political divisiveness. 421 U. S., at 385 (opinion of BURGER,

C. J.); *Id.*, at 387 (opinion of REHNQUIST, J.). Experience has given greater force to the arguments of the dissenting opinions in *Meek*. It is not intuitively obvious that a dedicated public school teacher will tend to disobey instructions and commence proselytizing students at public expense merely because the classroom is within a parochial school. *Meek* is correct in asserting that a teacher of remedial reading "remains a teacher," but surely it is significant that the teacher involved is a professional, full-time public school employee who is unaccustomed to bringing religion into the classroom. Given that not a single incident of religious indoctrination has been identified as occurring in the thousands of classes offered in Grand Rapids and New York over the past two decades, it is time to acknowledge that the risk identified in *Meek* was greatly exaggerated.

Just as the risk that public schoolteachers in parochial classrooms will inculcate religion has been exaggerated, so has the degree of supervision required to manage that risk. In this respect the New York Title I progam is instructive. What supervision has been necessary in New York to enable public school teachers to help disadvantaged children for 19 years without once proselytizing? Public officials have prepared careful instructions warning public schoolteachers of their exclusively secular mission, and have required Title I teachers to study and observe them. App. 50–51. Under the rules, Title I teachers are not accountable to parochial or private school officials; they have sole responsibility for selecting the students who participate in their class, must administer their own tests for determining eligibility, cannot engage in team teaching or cooperative activities with parochial school teachers, must make sure that all materials and equipment they use are not otherwise used by the parochial school, and must not participate in religious activities in the schools or introduce any religious matter into their teaching. To ensure compliance with the rules, a field supervisor and a program coordinator, who are full-time public school employ-

ees, make unannounced visits to each teacher's classroom at least once a month. *Id.*, at 53.

The Court concludes that this degree of supervision of public school employees by other public school employees constitutes excessive entanglement of church and state. I cannot agree. The supervision that occurs in New York's Title I program does not differ significantly from the supervision any public schoolteacher receives, regardless of the location of the classroom. JUSTICE POWELL suggests that the required supervision is extensive because the State must be *certain* that public schoolteachers do not inculcate religion. *Ante*, at ——. That reasoning would require us to close our public schools, for there is always some chance that a public schoolteacher will bring religion into the classroom, regardless of its location. See *Wallace* v. *Jaffree*, —— U. S. ——, —— n. 23 (1985). Even if I remained confident of the usefulness of entanglement as an Establishment Clause test, I would conclude that New York's efforts to prevent religious indoctrination in Title I classes have been adequate and have not caused excessive institutional entanglement of church and state.

The Court's reliance on the potential for political divisiveness as evidence of undue entanglement is also unpersuasive. There is little record support for the proposition that New York's admirable Title I program has ignited any controversy other than this litigation. In *Mueller* v. *Allen*, 463 U. S. 388, 403–404, n. 11 (1983), the Court cautioned that the "elusive inquiry" into political diviseness should be confined to a narrow category of parochial aid cases. The concurring opinion in *Lynch* v. *Donnelly*, —— U. S. ——, —— (1984), went further, suggesting that establishment clause analysis should focus solely on character of the government activity that might cause political divisiveness, and that "the entanglement prong of the *Lemon* test is properly limited to institutional entanglement."

I adhere to the doubts about the entanglement test that were expressed in *Lynch*. It is curious indeed to base our interpretation of the Constitution on speculation as to the likelihood of a phenomenon which the parties may create merely by prosecuting a lawsuit. My reservations about the entanglement test, however, have come to encompass its institutional aspects as well. As JUSTICE REHNQUIST has pointed out, many of the inconsistencies in our Establishment Clause decisions can be ascribed to our insistence that parochial aid programs with a valid purpose and effect may still be invalid by virtue of undue entanglement. *Wallace* v. *Jaffree*, —— U. S., at ——–——. For example, we permit a State to pay for bus transportation to a parochial school, *Everson* v. *Board of Education*, 330 U. S. 1 (1947), but preclude States from providing buses for parochial school field trips, on the theory such trips involve excessive state supervision of the parochial officials who lead them. *Wolman*, 433 U. S., at 254. To a great extent, the anomalous results in our Establishment Clause cases are "attributable to [the] 'entanglement' prong." Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict, 41 U. Pitt. L. Rev. 673, 681 (1980).

Pervasive institutional involvement of church and state may remain relevant in deciding the *effect* of a statute which is alleged to violate the Establishment Clause, *Walz* v. *Tax Commission*, 397 U. S. 664 (1970), but state efforts to ensure that public resources are used only for nonsectarian ends should not in themselves serve to invalidate an otherwise valid statute. The State requires sectarian organizations to cooperate on a whole range of matters without thereby advancing religion or giving the impression that the government endorses religion. *Wallace* v. *Jaffree*, —— U. S., at —— (dissenting opinion of REHNQUIST, J.) (noting that State educational agencies impose myriad curriculum, attendance, certificance, fire, and safety regulations on sectarian schools). If a statute lacks a purpose or effect of advancing

or endorsing religion, I would not invalidate it merely because it requires some ongoing cooperation between Church and State or some state supervision to ensure that state funds do not advance religion.

III

Today's ruling does not spell the end of the Title I program of remedial education for disadvantaged children. Children attending public schools may still obtain the benefits of the program. Impoverished children who attend parochial schools may also continue to benefit from Title I programs offered off the premises of their schools—possibly in portable classrooms just over the edge of school property. The only disadvantaged children who lose under the Court's holding are those in cities where it is not economically and logistically feasible to provide public facilities for remedial education adjacent to the parochial school. But this subset is significant, for it includes more than 20,000 New York City schoolchildren and uncounted others elsewhere in the country.

For these children, the Court's decision is tragic. The Court deprives them of a program that offers a meaningful chance at success in life, and it does so on the untenable theory that public schoolteachers (most of whom are of different faiths than their students) are likely to start teaching religion merely because they have walked across the threshold of a parochial school. I reject this theory and the analysis in *Meek* v. *Pittenger* on which it is based. I cannot close my eyes to the fact that, over almost two decades, New York's public schoolteachers have helped thousands of impoverished parochial schoolchildren to overcome educational disadvantages without once attempting to inculcate religion. Their praiseworthy efforts have not eroded and do not threaten the religious liberty assured by the Establishment Clause. The contrary judgment of the Court of Appeals should be reversed.

I respectfully dissent.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 14, 1985

Re: No. 84-237) Aguilar v. Felton
84-238) Secretary, United States Department
) Of Education v. Felton
84-239) Chancellor of the Board of Education
Of the City of New York v. Felton

Dear Sandra,

Please join me in Parts II and III of your dissent in this case.

Sincerely,

WHR

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 24, 1985

Re: No. 84-237 - Aguilar v. Felton
No. 84-238 - Secretary, United States Department of Education v. Felton
No. 84-239 - Chancellor of the Board of Education v. Felton

Dear Bill:

Enclosed is a typed copy of my separate opinion in this case.

Regards,

WEB

Justice Brennan

Copies to the Conference

No. 84-237) Aguilar v. Felton
84-238) Secretary, United States Department of Education v.
) Felton
84-239) Chancellor of the Board of Education v. Felton

CHIEF JUSTICE BURGER, dissenting.

Under the guise of protecting Americans from the evils of an Established Church such as those of the Eighteenth Century and earlier times, today's decision will deny countless schoolchildren desperately needed remedial teaching services funded under Title I. The program at issue covers remedial reading, reading skills, remedial mathematics, English as a second language, and assistance for children needing special help in the learning process. The "remedial reading" portion of this program, for example, reaches children who suffer from dyslexia, a disease known to be difficult to diagnose and treat. Many of these children now will not receive the special training they need, simply because their parents desire that they attend religiously affiliated schools.

What is disconcerting about the result reached today is that, in the face of the human cost entailed by this decision, the Court does not even attempt to identify any threat to religious liberty posed by the operation of Title I. I share JUSTICE WHITE's concern that the Court's obsession with the criteria identified in Lemon v. Kurtzman, 403 U.S. 602 (1971), has led to results that are "contrary to the long-range interests of the country," post, at 2. As I wrote in Wallace v. Jaffree, ___ U.S. ___, ___ (1985) (dissenting opinion), "our responsibility is not to apply tidy formulas by rote; our duty is to determine whether

the statute or practice at issue is a step toward establishing a state religion." Federal programs designed to prevent a generation of children from growing up without being able to read effectively are not remotely steps in that direction. It borders on paranoia to perceive the Archbishop of Canterbury or the Bishop of Rome lurking behind programs that are just as vital to the nation's schoolchildren as textbooks, see generally Board of Education v. Allen, 392 U.S. 236 (1968), transportation to and from school, see generally Everson v. Board of Education, 330 U.S. 1 (1947), and school nursing services.

On the merits of this case, I dissent for the reasons stated in my separate opinion in Meek v. Pittenger, 421 U.S. 349 (1975). We have frequently recognized that some interaction between church and state is unavoidable, and that an attempt to eliminate all contact between the two would be both futile and undesirable. Justice Douglas, writing for the Court in Zorach v. Clauson, 343 U.S. 306, 312 (1952), stated:

> "The First Amendment ... does not say that in every and all respects there shall be a separation of Church and State. ... Otherwise the state and religion would be aliens to each other -- hostile, suspicious, and even unfriendly."

The Court today fails to demonstrate how the interaction occasioned by the program at issue presents any threat to the values underlying the Establishment Clause.

I cannot join in striking down a program that, in the words of the Court of Appeals, "has done so much good and little, if any, detectable harm." 739 F.2d 48, 72 (CA2 1984). The notion that denying these services to students in religious schools is a neutral act to protect us from an Established Church has no sup-

port in logic, experience, or history. Rather than showing the neutrality the Court boasts of, it exhibits nothing less than hostility toward religion and the children who attend church-sponsored schools.

84-237 Aguilar v. Felton

WJB for the Court 12/10/84
1st draft 4/2/85
2nd draft 4/15/84
Joined by TM 4/2/85
JPS 4/2/85
LFP 5/9/85
HAB 5/13/85

LFP concurring
1st draft 5/9/85

SOC dissenting
1st draft 6/13/85
2nd draft 6/18/85
WHR joins Parts II and III

CJ dissenting
Typed draft 6/24/85
1st draft 6/25/85

SOC will await dissent or write separatyely 4/2/85
BRW will await other writing 4/8/85

File in Aguilar

IN THE NATION | Tom Wicker N.Y. Times, Friday, July 12, 1985

Church and State Again

Attorney General Edwin Meese and the Secretary of Education, William Bennett, have blasted the Supreme Court for four recent decisions upholding the rigid separation of church and state. Maybe they didn't read Mr. Justice Lewis Powell's concurring opinion in one of those cases.

Mr. Bennett said he found it hard to understand the court's "fastidious disdain for religion."

Mr. Meese complained that the First Amendment, which the court was interpreting, was intended only "to prohibit religious tyranny, not to undermine religion generally."

But the court didn't "undermine" religion or show "fastidious disdain" for it. In two of the cases, it ruled unconstitutional certain forms of tax subsidies for parochial schools; in the other two it found that the First Amendment's ban on an "establishment of religion" had been violated by a Connecticut law giving workers a right to a weekly Sabbath day off, and by an Alabama law providing for a moment of "voluntary prayer" in the public schools.

Justice Powell, concurring in one of the parochial school cases, pointed to what he believed was a "considerable risk of continuing political strife" over state aid to religious schools. "The risk of political divisiveness" that might "strain the political system," he wrote, was an "additional" reason for strict adherence to the constitutional separation of church and state.

Mr. Meese and Mr. Bennett risked stirring up just that kind of strife and divisiveness by arguing that the court had ruled *against* religion rather than *for* the separation of church and state. In all four cases, the court went against the Reagan Administration's advice and the two officials were understandably upset by the results; but that doesn't justify ignoring the real danger cited by Justice Powell.

Unseemly responses to 4 Court rulings

This Administration, in fact, seems continually entangled in volatile church-state issues. Conservative fundamentalists, many talking of a "Christian nation," participated heavily in the re-election of the President. Mr. Reagan himself appeared to be making a religious appeal in a political campaign when he suggested at a prayer breakfast that those without religion might also be without a "sense of moral obligation."

The Administration has relentlessly pushed for a constitutional amendment permitting organized prayer in the schools; and had supported with open enthusiasm all the state statutes and programs the Supreme Court ruled unconstitutional in the four disputed cases.

Mr. Meese told the American Bar Association that the Supreme Court, in those four decisions, had made "policy choices" rather than basing its rulings on constitutional principles. That's a peculiar charge against a court six of whose nine justices were appointed as strict constructionists by Presidents Nixon, Ford and Reagan; it's also unseemly. Differing with a ruling is one thing; for an Attorney General to characterize the Supreme Court as acting politically rather than judicially is quite another.

Justice Rehnquist, predictably dissenting down the line, took another tack. The court, he wrote in the Alabama case, was ignoring the intent of the framers of the Bill of Rights, which was only to prevent one religion from being preferred over another — not to require neutrality between religion and what the Justice called "irreligion."

But it's not easy to determine two centuries later what the framers' precise purpose was, or its limits. Justice Rehnquist himself complained that the records of debate on the religion clause of the First Amendment in the House of Representatives "does not seem particularly illuminating." And anyway, to hold a present-day court to the narrow historical standard of 18th-century intent — even if indisputably established — would be to put the Constitution in a straitjacket.

As Justice Sandra Day O'Connor pointed out, for instance, there were no public schools when the First Amendment was written. How could the framers have had specific intent toward something that didn't exist? And even if those who wrote the First Amendment did have equality among religious sects primarily in mind, that doesn't and shouldn't mean that their obvious larger intent — to guarantee religious liberty — can't be interpreted today to protect "irreligion" too. □

3900 Wisconsin Avenue, NW
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202 537 6770

David O. Maxwell
Chairman of the Board and
Chief Executive Officer

File on Regulation
↓
Copy sent Ltr VE

FannieMae

July 17, 1985

Justice Lewis Powell
550 N Street, SW
Washington, DC 20024

Dear Justice Powell:

I have never known whether it was proper to comment on the decisions of the Supreme Court from a personal standpoint, but if not, I hope you will forgive me for writing to express my gratitude for your position in the recent cases involving the separation of church and state in this country.

I have always felt that religion should be a private affair, lest we risk the consequences of that divisiveness and strife of which you wrote so eloquently in your opinion.

Joan joins me in sending warmest regards to you and Mrs. Powell.

Sincerely,

David

DOM/mk

2d Draft - May 4, 1985

L.F.P.

Reviewed 5/4

This fully meets my concerns & suggestions. OK for printed Chambers draft. Opinions often look a little different in type.

LFP

Nos. 84-237, 84-238, and 84-239

YOLANDA AGUILAR, et al., APPELLANTS v. BETTY-LOUISE FELTON, et al.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, APPELLANT v. BETTY-LOUISE FELTON, et al.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, APPELLANT v. BETTY-LOUISE FELTON, et al.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[May ___, 1985]

JUSTICE POWELL, concurring.

I concur in the Court's opinions and judgments today in this case and in Grand Rapids School District v. Ball, ante, p. ___, holding that the aid to parochial schools involved there violates the Establishment Clause of the First Amendment. I write to emphasize additional reasons why precedents of this Court require us to invalidate these two educational programs that concededly have "done so much good and little, if any, detectable harm." Felton v. Secretary, United States Department of Education, 739 F.2d 48, 72 (CA2 1984). The Court has previously recognized the inimitable value that parochial schools can provide:

> "Parochial schools, quite apart from their sectarian purpose, have provided an educational

> alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools. The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them."

Mueller v. Allen, supra, at ___, (quoting Wolman v. Walter, (433 U.S. 229, (1977) ~~supra, at~~ 262 (POWELL, J., concurring in part, concurring in the judgment in part, and dissenting in part)). Regrettably, however, the Title I and Grand Rapids programs do not survive ~~our necessarily stringent~~ the required by our cases Establishment Clause scrutiny.

I agree with the Court that in this case the Establishment Clause is violated because there is too great a risk of government entanglement in the administration of the religious schools; the same is true in Ball, ante. As beneficial as the Title I program appears to be in accomplishing its secular goal of

supplementing the education of deprived children, its elaborate structure, the participation of public school teachers, and the government surveillance required to ensure that public funds are used only for secular purposes inevitably present a serious risk of excessive entanglement. Our cases have noted that "'[t]he State must be certain, given the Religious Clauses, that subsidized teachers do not inculcate religion.'" Meek v. Pittenger, 421 U.S. 349, 371 (1975) (emphasis added) (quoting Lemon v. Kurtzman, 403 U.S. 602, 619 (1971)). This is true whether the subsidized teachers are religious school teachers, as in Lemon, or public school teachers teaching secular subjects to parochial school children at the parochial schools. Judge Friendly, writing for the unanimous Court of Appeals, agreed with this assessment of

our cases. He correctly observed that the structure of the Title I program required the active and extensive surveillance ~~which~~ that the City has provided, and, "under Meek, this very surveillance constitutes excessive entanglement even if it has succeeded in preventing the fostering of religion." 739 F.2d, at 66.

This risk of entanglement is compounded by the additional risk of political entanglement stemming from the aid to religion at issue here. I do not suggest that at this point in our history the Title I program or similar parochial aid plans could result in the establishment of a state religion. There likewise is small chance that these programs ~~will~~ could result in significant religious or denominational control over our democratic processes. See Wolman v. Walter, ~~433 U.S. 229,~~ supra, at 263 ~~(1977)~~.

(POWELL, J., concurring in part, concurring in the judgment in part, and dissenting in part). Nonetheless, there remains a significant risk of continuing political strife over the propriety of direct aid to religious schools and the proper allocation of limited ~~amounts of~~ governmental resources. As this Court has repeatedly recognized, there is a likelihood whenever direct governmental aid is extended to some groups that there will be competition and strife among them and others to gain, maintain, or increase the financial support of government. E.g., Committee for Public Education v. Nyquist, 413 U.S. 756, 796-797 (1973); Lemon v. Kurtzman, supra, 403 U.S., at 623. In states such as New York that have large and varied sectarian populations, ~~it is a virtual certainty~~ one can be assured that politics will enter into any state

decision to aid parochial schools. ~~Moreover, in these days of fiscal uncertainty,~~ public schools, as well as private schools, are under increasing financial pressure to meet real and perceived needs. Thus, any proposal to extend direct governmental aid to parochial schools ~~alone~~ is likely to spark political disagreement from taxpayers who support the public schools, as well as from non-recipient sectarian groups, who may fear that needed funds are being diverted from them. In short, aid to parochial schools of the sort at issue here potentially leads to "that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." Walz v. Tax Commission, 397 U.S. 664, 694 (1970) (opinion of Harlan, J.). Although the Court's

Cynda, I'm not sure I can find this proposition here.

opinion does not discuss it at length, see ante, at 12, the potential for such divisiveness is a strong additional reason for holding that the Title I and Grand Rapids programs are invalid on entanglement grounds.

The Title I program at issue in this case also would be invalid under the "effects" prong of the test ~~set forth~~ adopted in Lemon v. Kurtzman, supra.[1] As has been ~~thoroughly~~ discussed thoroughly in Ball, ante, at 18-23, with respect to the Grand Rapids programs, the type of aid provided in New York by the Title I program amounts to a state subsidy of the parochial schools by relieving those schools of the

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[1]Nothing that I say here should be construed as suggesting that a court inevitably must determine whether all three prongs of the Lemon test have been violated. See, e.g., Committee for Public Education v. Nyquist, 413 U.S. 756, 794 (1973). I discuss an additional infirmity of the programs at issue in these cases only to emphasize why even a beneficial program may be invalid because of the way it is structured.

duty to provide the remedial and supplemental education their children require. This is not the type of "indirect and incidental effect beneficial to [the] religious institutions" that we suggested in Nyquist would survive Establishment Clause scrutiny. 413 U.S., at 775. Rather, by directly assuming part of the parochial schools' education function, the effect of the Title I aid is "inevitably . . . to subsidize and advance the religious mission of [the] sectarian schools," id., at 779-780, even though the program provides that only secular subjects will be taught. As in Meek v. Pittenger, supra, the secular education these schools provide goes "'hand in hand" with the religious mission that is the reason for the schools' existence. 421 U.S., at 366, quoting Lemon v. Kurtzman, supra, at 657 (opinion of BRENNAN, J.)).

Because of the predominantly religious nature of the schools, the substantial aid provided by the Title I program "inescapably results in the direct and substantial advancement of religious activity." Meek v. Pittenger, supra, at 366.

I recognize the difficult dilemma in which governments are placed by the interaction of the "effects" and entanglement prongs of the Lemon test. Our decisions require governments extending aid to parochial schools to tread an extremely narrow line between being certain ~~only~~ that the principal or primary effect of the aid is not to advance religion, ~~secular and not religious goals are being fostered, and~~ (Lemon v. Kurtzman, supra, at 612, and) avoiding excessive entanglement. Nonetheless, the Court has never foreclosed the possibility that some types of aid to parochial schools could be valid under the Establishment Clause. Mueller v. Allen, (supra, at) ~~U.S.~~ ___.

Lynch - Ark Lee to take a look at this sentence. In Wallace, I say - w/respect to the "purpose" prong - that it is satisfied if there is a secular as well as a religious purpose. I think J P S agrees. Of course, this case does not involve a religious "purpose" - at least that seems to be agreed.

~~(1983)~~ ~~[103 S.Ct., at 3065]~~. Our cases have upheld evenhanded secular assistance to both parochial and public school children in some areas. E.g., id. (tax deductions for educational expenses); Board of Education v. Allen, 392 U.S. 236 (1968) (provision of secular textbooks); Everson v. Board of Education, 330 U.S. 1 (1947) (reimbursements for bus fare to school). I do not read the Court's opinion as precluding these types of indirect aid to parochial schools. In the cases cited, the assistance programs made funds available equally to public and nonpublic schools without entanglement. The constitutional defect in the Title I program, as indicated above, is that it provides a direct financial subsidy to be administered in significant part by public school teachers within parochial schools--resulting in both the

without diverting its benefits from secular purposes,

advancement of religion and ~~forbidden~~ entanglement. If, for example, Congress could fashion an evenhanded financial assistance program to both public and private schools for the laudable purposes of Title I, which could be administered by the schools themselves because its benefits ~~could not be~~ diverted from secular purposes, we would be presented with a different question.

I join the opinions and judgments of the Court.

Lynda - This looks good to me. Do you co-clerks agree? And do you think this holds out "false hopes"?

On second reading of the sentence, I suggest the above revision. What do you think?

Lynda Simpson
X-3092
1st Chambers Draft
7 copies

4#0237G

Nos. 84-237, 84-238, and 84-239

YOLANDA AGUILAR, et al., APPELLANTS v. BETTY-LOUISE FELTON, et al.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, APPELLANT v. BETTY-LOUISE FELTON, et al.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, APPELLANT v. BETTY-LOUISE FELTON, et al.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[May ___, 1985]

JUSTICE POWELL, concurring.

I concur in the Court's opinions and judgments today in this case and in Grand Rapids School District v. Ball, ante, p. ___, holding that the aid to parochial schools involved there violates the Establishment Clause of the First Amendment. I write to emphasize additional reasons why precedents of this Court require us to invalidate these two educational programs that concededly have "done so much good and little, if any, detectable harm." Felton v. Secretary, United States Department of Education, 739 F.2d 48, 72 (CA2 1984). The Court has previously recognized the inimitable value that parochial schools can provide:

> "Parochial schools, quite apart from their sectarian purpose, have provided an educational

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I agree with the Court that in this case the Establishment Clause is violated because there is too great a risk of government entanglement in the administration of the religious schools; the same is true in Ball, ante. As beneficial as the Title I program appears to be in accomplishing its secular goal of

supplementing the education of deprived children, its elaborate structure, the participation of public school teachers, and the government surveillance required to ensure that public funds are used only for secular purposes inevitably present a serious risk of excessive entanglement. Our cases have noted that "'[t]he State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion.'" Meek v. Pittenger, 421 U.S. 349, 371 (1975) (emphasis added) (quoting Lemon v. Kurtzman, 403 U.S. 602, 619 (1971)). This is true whether the subsidized teachers are religious school teachers, as in Lemon, or public school teachers teaching secular subjects to parochial school children at the parochial schools. Judge Friendly, writing for the unanimous Court of Appeals, agreed with this assessment of

our cases. He correctly observed that the structure of the Title I program required the active and extensive surveillance that the City has provided, and, "under Meek, this very surveillance constitutes excessive entanglement even if it has succeeded in preventing the fostering of religion." 739 F.2d, at 66.

This risk of entanglement is compounded by the additional risk of political entanglement stemming from the aid to religion at issue here. I do not suggest that at this point in our history the Title I program or similar parochial aid plans could result in the establishment of a state religion. There likewise is small chance that these programs would result in significant religious or denominational control over our democratic processes. See Wolman v. Walter, supra, at 263

(POWELL, J., concurring in part, concurring in the judgment in part, and dissenting in part). Nonetheless, there remains a significant risk of continuing political strife over the propriety of direct aid to religious schools and the proper allocation of limited governmental resources. As this Court has repeatedly recognized, there is a likelihood whenever direct governmental aid is extended to some groups that there will be competition and strife among them and others to gain, maintain, or increase the financial support of government. E.g., Committee for Public Education v. Nyquist, 413 U.S. 756, 796-797 (1973); Lemon v. Kurtzman, supra, 403 U.S., at 623. In states such as New York that have large and varied sectarian populations, one can be assured that politics will enter into any state decision to aid

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potential for such divisiveness is a strong additional reason for holding that the Title I and Grand Rapids programs are invalid on entanglement grounds.

The Title I program at issue in this case also would be invalid under the "effects" prong of the test adopted in Lemon v. Kurtzman, supra.[1] As has been discussed thoroughly in Ball, ante, at 18-23, with respect to the Grand Rapids programs, the type of aid provided in New York by the Title I program amounts to a state subsidy of the parochial schools by relieving those schools of the duty to provide the remedial and supplemental education their children require. This is not the type of "indirect and incidental effect beneficial to [the] religious institutions" that we suggested in Nyquist would survive Establishment Clause scrutiny. 413 U.S., at 775. Rather,

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I recognize the difficult dilemma in which governments are placed by the interaction of the "effects" and entanglement prongs of the Lemon test. Our decisions require governments extending aid to parochial schools to tread an extremely narrow line between being certain that the "principal or primary effect" of the aid is not to advance religion, Lemon v. Kurtzman, supra, at 612, and avoiding excessive entanglement. Nonetheless, the Court has never foreclosed the possibility that some types of aid to parochial schools could be valid under the Establishment Clause. Mueller v. Allen, supra, at ___. Our cases have upheld evenhanded secular assistance to both parochial and public school children in some areas. E.g., id. (tax deductions for educational expenses); Board of Education v. Allen, 392 U.S. 236 (1968) (provision of

secular textbooks); Everson v. Board of Education, 330 U.S. 1 (1947) (reimbursements for bus fare to school). I do not read the Court's opinion as precluding these types of indirect aid to parochial schools. In the cases cited, the assistance programs made funds available equally to public and nonpublic schools without entanglement. The constitutional defect in the Title I program, as indicated above, is that it provides a direct financial subsidy to be administered in significant part by public school teachers within parochial schools--resulting in both the advancement of religion and forbidden entanglement. If, for example, Congress could fashion an evenhanded financial assistance program to both public and private schools for the laudable purposes of Title I that could be administered in the private schools without governmental

supervision, but in such a way as to prevent those schools from diverting the aid from secular purposes, we would be presented with a different question.

I join the opinions and judgments of the Court.

Lynda Simpson
X-3092
1ST Chambers Draft
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L.F.O.
5/1-2-3

Nos. 84-237, 84-238, and 84-239

YOLANDA AGUILAR, et al., APPELLANTS v. BETTY-LOUISE FELTON, et al.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, APPELLANT v. BETTY-LOUISE FELTON, et al.

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ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[May ___, 1985]

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I agree with the Court that in this case the Establishment Clause is violated because there is too great a risk of government entanglement in the administration of the religious schools; the same is true in Ball, ante. As beneficial as the Title I program appears to be is in accomplishing its secular goal of supplementing the education of deprived children, the elaborate structure and surveillance required to ensure that public funds are used only for secular purposes inevitably presents a serious risk of excessive entanglement. Our cases have noted, that "'[t]he State must be certain, given the Religious Clauses, that subsidized teachers do not inculcate religion.'" Meek v. Pittenger, 421 U.S. 349, 371 (1975) (emphasis added) (quoting Lemon v. Kurtzman, 403 U.S. 602, 619 (1971)). This is true whether the subsidized teachers

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Lynda - There is an awkward sentence. Not sure I've improved it

This risk of entanglement is compounded by the additional risk of political entanglement stemming from the aid to religion at issue here. I do not suggest that ~~At~~ this point in our history ~~there is little risk that~~ the Title I program, or similar parochial aid plans, ~~will~~ could result in the establishment of a state religion. There is likewise is small

chance that these programs will result in signficant religious or denominational control over our democratic processes. See Wolman v. Walter, 433 U.S. 229, 263 (1977) (POWELL, J., concurring in part, concurring in the judgment in part, and dissenting in part). Nonetheless, there remains a significant risk of continuing political strife over the propriety of direct aid to religious schools and the proper allocation of limited amounts of governmental resources. As this Court has repeatedly recognized, there is a likelihood whenever direct governmental aid is extended to some groups that there will be competition and strife among them and others to gain, ~~or~~ maintain, ~~the~~ support of government. E.g., Committee for Public Education v. Nyquist, 413 U.S. 756, 796-797 (1973); Lemon v. Kurtzman, supra, 403 U.S., at

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program "inescapably results in the direct and substantial advancement of religious activity." Meek v. Pittenger, supra, at 366.

I recognize the difficult dilemma in which governments are placed by the interaction of the "effects" and entanglement prongs of the Lemon test. Our decisions require government aid to parochial schools to tread an extremely narrow line between being certain religion is not fostered and avoiding excessive entanglement. Nonetheless, the Court has never foreclosed the possibility that aid to parochial schools could be valid under the Establishment Clause. Mueller v. Allen, ___ U.S. ___, ___ (1983) [103 S.Ct., at 3065]. Our cases have upheld evenhanded secular assistance to both parochial and public school children in some areas. E.g., id. (tax

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Reframe - See my comments.

The Court has previously recognized the inimitable value that parochial schools can provide:

Reiterate

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Mueller v. Allen, supra, at ___ (quoting Wolman v. Walter, supra, at 262 (POWELL, J., concurring in part, concurring in the judgment in part, and dissenting in part)). Regrettably, the Title I and Grand Rapids programs do not survive our necessarily stringent Establishment Clause scrutiny.

I join the opinions and judgments of the Court.

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Did anyone in Ball say anything about "effects"?

I agree that in this case, ~~as well as in Ball, ante,~~ the Establishment Clause is violated because there is too great a risk of government entanglement in the administration of the religious schools. As beneficial as the Title I program undoubtedly is in accomplishing its secular goal of supplementing the education of deprived children, the elaborate structure and surveillance required to ensure that public funds are used only for secular purposes inevitably presents too great a risk of excessive entanglement. As we have repeatedly noted, "'[t]he State must be certain, given the Religious Clauses, that subsidized teachers do not inculcate religion.'" Meek v. Pittenger, 421 U.S. 349, 371 (1975) (emphasis added) (quoting Lemon v. Kurtzman, 403 U.S. 602, 619 (1971)). This is true whether the subsidized teachers

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what does this mean?

The Court has previously recognized the inimitable value that parochial schools can provide:

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I join the opinions and judgments of the Court.

05/07

OK with me to go for 1st draft today if Dan & Lee have approved this

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

L.F.P. 5/7

From: **Justice Powell**

Circulated: _____

Recirculated: _____

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1st CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 84–237, 84–238 AND 84–239

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84–237 *v.*
BETTY-LOUISE FELTON ET AL.

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I join the opinions and judgments of the Court.

05/07

I reviewed the Chambers draft on 5/12 though I know changes were made. (I brought this draft home by mistake)

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: _____

Reviewed again on 5/12.

Lynda — Take a look

1st CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 84–237, 84–238 AND 84–239

YOLANDA AGUILAR, ET AL., APPELLANTS
84–237 *v.*
BETTY-LOUISE FELTON ET AL.

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84–239 *v.*
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ON APPEALS FROM UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[May ——, 1985]

JUSTICE POWELL, concurring.

I concur in the Court's opinions and judgments today in this case and in *Grand Rapids School District* v. *Ball*, *ante*, p. ——, holding that the aid to parochial schools involved ~~there~~ violates the Establishment Clause of the First Amendment. I write to emphasize additional reasons why precedents of this Court require us to invalidate these two educational programs that concededly have "done so much good and little, if any, detectable harm." *Felton* v. *Secretary, United States Department of Education*, 739 F. 2d 48, 72 (CA2 1984). The Court has previously recognized the inimitable value that parochial schools can provide:

in those cases

I changed this

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I agree with the Court that in this case the Establishment Clause is violated because there is too great a risk of government entanglement in the administration of the religious schools; the same is true in *Ball*, *ante*. As beneficial as the Title I program appears to be in accomplishing its secular goal of supplementing the education of deprived children, its elaborate structure, the participation of public school teachers, and the government surveillance required to ensure that public funds are used ~~only~~ for secular purposes inevitably present a serious risk of excessive entanglement. Our cases have noted that "'[t]he State must be *certain*, given the Religion Clauses, that subsidized teachers do not inculcate religion.'" *Meek* v. *Pittenger*, 421 U. S. 349, 371 (1975) (emphasis added) (quoting *Lemon* v. *Kurtzman*, 403 U. S. 602, 619 (1971)). This is true whether the subsidized teachers are religious school teachers, as in *Lemon*, or public school teachers teaching secular subjects to parochial school children at the parochial schools. Judge Friendly, writing for the unanimous Court of Appeals, agreed with this assessment of our cases. He correctly observed that the structure of the Title I program required the active and extensive surveillance that

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This risk of entanglement is compounded by the additional risk of political entanglement stemming from the aid to religion at issue here. I do not suggest that at this point in our history the Title I program or similar parochial aid plans could result in the establishment of a state religion. There likewise is small chance that these programs would result in significant religious or denominational control over our democratic processes. See *Wolman* v. *Walter*, *supra*, at 263 (POWELL, J., concurring in part, concurring in the judgment in part, and dissenting in part). Nonetheless, there remains a ~~significant~~ real risk of continuing political strife over the propriety of direct aid to religious schools and the proper allocation of limited governmental resources. As this Court has repeatedly recognized, there is a likelihood whenever direct governmental aid is extended to some groups that there will be competition and strife among them and others to gain, maintain, or increase the financial support of government. *E. g.*, *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 796–797 (1973); *Lemon* v. *Kurtzman*, *supra*, 403 U. S., at 623. In states such as New York that have large and varied sectarian populations, one can be assured that politics ~~will~~ likely enter into ~~any~~ state decision to aid parochial schools. Public schools, as well as private schools, are under increasing financial pressure to meet real and perceived needs. Thus, any proposal to extend direct governmental aid to parochial schools alone is likely to spark political disagreement from taxpayers who support the public schools, as well as from non-recipient sectarian groups, who may fear that needed funds are being diverted from them. In short, aid to parochial schools of the sort at issue here potentially leads to "that kind and degree of government involvement in religious life

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I join the opinions and judgments of the Court.

Lynda Simpson
X-3092
1st Draft
4 copies

05/07

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: _____

changes on pp. 1, 3, 5

1ST Draft
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[May ——, 1985]

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Lynda Simpson
X-3092
7 copies
Still 1st Draft

05/07

changes on
pp. 2
3

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: MAY 9 1985

Recirculated: _____

STET 1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 84–237, 84–238 AND 84–239

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ON APPEALS FROM UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[~~May~~ June —, 1985]

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JUSTICE POWELL, concurring.

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
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From: **Justice Powell**

Circulated: MAY 9 1985

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I agree with the Court that in this case the Establishment Clause is violated because there is too great a risk of government entanglement in the administration of the religious schools; the same is true in *Ball*, *ante*. As beneficial as the Title I program appears to be in accomplishing its secular goal of supplementing the education of deprived children, its elaborate structure, the participation of public school teachers, and the government surveillance required to ensure that public funds are used only for secular purposes inevitably present a serious risk of excessive entanglement. Our cases have noted that "'[t]he State must be *certain*, given the Religion Clauses, that subsidized teachers do not inculcate religion.'" *Meek* v. *Pittenger*, 421 U. S. 349, 371 (1975) (emphasis added) (quoting *Lemon* v. *Kurtzman*, 403 U. S. 602, 619 (1971)). This is true whether the subsidized teachers are religious school teachers, as in *Lemon*, or public school teachers teaching secular subjects to parochial school children at the parochial schools. Judge Friendly, writing for the unanimous Court of Appeals, agreed with this assessment of our cases. He correctly observed that the structure of the Title I program required the active and extensive surveillance that

the City has provided, and, "under *Meek*, this very surveillance constitutes excessive entanglement even if it has succeeded in preventing the fostering of religion." 739 F. 2d, at 66.

This risk of entanglement is compounded by the additional risk of political divisiveness stemming from the aid to religion at issue here. I do not suggest that at this point in our history the Title I program or similar parochial aid plans could result in the establishment of a state religion. There likewise is small chance that these programs would result in significant religious or denominational control over our democratic processes. See *Wolman* v. *Walter*, *supra*, at 263 (POWELL, J., concurring in part, concurring in the judgment in part, and dissenting in part). Nonetheless, there remains a significant risk of continuing political strife over the propriety of direct aid to religious schools and the proper allocation of limited governmental resources. As this Court has repeatedly recognized, there is a likelihood whenever direct governmental aid is extended to some groups that there will be competition and strife among them and others to gain, maintain, or increase the financial support of government. *E. g.*, *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 796–797 (1973); *Lemon* v. *Kurtzman*, *supra*, 403 U. S., at 623. In states such as New York that have large and varied sectarian populations, one can be assured that politics will enter into any state decision to aid parochial schools. Public schools, as well as private schools, are under increasing financial pressure to meet real and perceived needs. Thus, any proposal to extend direct governmental aid to parochial schools alone is likely to spark political disagreement from taxpayers who support the public schools, as well as from non-recipient sectarian groups, who may fear that needed funds are being diverted from them. In short, aid to parochial schools of the sort at issue here potentially leads to "that kind and degree of government involvement in religious life

that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." *Walz* v. *Tax Commission*, 397 U. S. 664, 694 (1970) (opinion of Harlan, J.). Although the Court's opinion does not discuss it at length, see *ante*, at 11, the potential for such divisiveness is a strong additional reason for holding that the Title I and Grand Rapids programs are invalid on entanglement grounds.

The Title I program at issue in this case also would be invalid under the "effects" prong of the test adopted in *Lemon* v. *Kurtzman*, *supra*.* As has been discussed thoroughly in *Ball*, *ante*, at 18–23, with respect to the Grand Rapids programs, the type of aid provided in New York by the Title I program amounts to a state subsidy of the parochial schools by relieving those schools of the duty to provide the remedial and supplemental education their children require. This is not the type of "indirect and incidental effect beneficial to [the] religious institutions" that we suggested in *Nyquist* would survive Establishment Clause scrutiny. 413 U. S., at 775. Rather, by directly assuming part of the parochial schools' education function, the effect of the Title I aid is "inevitably . . . to subsidize and advance the religious mission of [the] sectarian schools," *id.*, at 779–780, even though the program provides that only secular subjects will be taught. As in *Meek* v. *Pittenger*, *supra*, the secular education these schools provide goes "'hand in hand'" with the religious mission that is the reason for the schools' existence. 421 U. S., at 366 (quoting *Lemon* v. *Kurtzman*, *supra*, at 657 (opinion of BRENNAN, J.)). Because of the predominantly religious nature of the schools, the substantial aid provided

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I recognize the difficult dilemma in which governments are placed by the interaction of the "effects" and entanglement prongs of the *Lemon* test. Our decisions require governments extending aid to parochial schools to tread an extremely narrow line between being certain that the "principal or primary effect" of the aid is not to advance religion, *Lemon* v. *Kurtzman*, *supra*, at 612, and avoiding excessive entanglement. Nonetheless, the Court has never foreclosed the possibility that some types of aid to parochial schools could be valid under the Establishment Clause. *Mueller* v. *Allen*, *supra*, at ——. Our cases have upheld evenhanded secular assistance to both parochial and public school children in some areas. *E. g.*, *id.* (tax deductions for educational expenses); *Board of Education* v. *Allen*, 392 U. S. 236 (1968) (provision of secular textbooks); *Everson* v. *Board of Education*, 330 U. S. 1 (1947) (reimbursements for bus fare to school). I do not read the Court's opinion as precluding these types of indirect aid to parochial schools. In the cases cited, the assistance programs made funds available equally to public and nonpublic schools without entanglement. The constitutional defect in the Title I program, as indicated above, is that it provides a direct financial subsidy to be administered in significant part by public school teachers within parochial schools—resulting in both the advancement of religion and forbidden entanglement. If, for example, Congress could fashion a program of evenhanded financial assistance to both public and private schools that could be administered, without governmental supervision in the private schools, so as to prevent the diversion of the aid from secular purposes, we would be presented with a different question.

I join the opinions and judgments of the Court.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 84–237, 84–238 AND 84–239

YOLANDA AGUILAR, ET AL., APPELLANTS
84–237 *v.*
BETTY-LOUISE FELTON ET AL.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, APPELLANT
84–238 *v.*
BETTY-LOUISE FELTON ET AL.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, APPELLANT
84–239 *v.*
BETTY-LOUISE FELTON ET AL.

ON APPEALS FROM UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June ——, 1985]

JUSTICE POWELL, concurring.

I concur in the Court's opinions and judgments today in this case and in *Grand Rapids School District* v. *Ball*, *ante*, p. ——, holding that the aid to parochial schools involved in those cases violates the Establishment Clause of the First Amendment. I write to emphasize additional reasons why precedents of this Court require us to invalidate these two educational programs that concededly have "done so much good and little, if any, detectable harm." *Felton* v. *Secretary, United States Department of Education*, 739 F. 2d 48, 72 (CA2 1984). The Court has previously recognized the important role of parochial schools:

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> lions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools. The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them."

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