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The Establishment Clause According to the Supreme Court: The Mysterious Eclipse of Free Exercise Values

Nancy H. Fink

THE ESTABLISHMENT CLAUSE ACCORDING TO THE SUPREME COURT: THE MYSTERIOUS ECLIPSE OF FREE EXERCISE VALUES

*Nancy H. Fink**

I. INTRODUCTION

The entire concept of constitutional government rests upon the belief that continuity and stability are both desirable and necessary if a political society is to survive the vicissitudes of social, political, and economic life. This belief, in turn, rests upon the assumption that some fundamental principles can be discovered and preserved in a written document. Our constitutional provisions are, however, but the vaguest outline of social principles which, if they are to enjoy any efficacy at all, must be interpreted and conscientiously preserved.

One of the first principles of American constitutionalism and one of the most fundamental ideas of modern western society is the concept of religious freedom. The yearning for religious tolerance was one of the primary motivations which drove our ancestors to the new world. Religious freedom, which is among the more significant ideas of enlightenment, ultimately found its way into the United States Constitution. Although incorporated in the first amendment,[1] the right to religious freedom has not, however, remained completely unfettered, for our founding fathers shared an equally strong belief in the "nonestablishment" ideal.[2] Recent developments under these related clauses indicate

* Associate Professor, Brooklyn Law School.

1. "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ." U.S. CONST. amend. I, cl. 1.

2. "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I, cl. 1. In most discussions of the religion clauses of the first amendment, the term "establishment clause" has been used to refer to this language in the first amendment. It is logically more accurate to use the term "nonestablishment principle" which Professor Giannella uses in his extensive discussion of the religion clauses. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968). This article will use both the conventional phrase, "establishment clause", and the more accurate term, "nonestablishment principle."

that the Supreme Court has fostered an unfortunate tension which threatens to significantly weaken the fundamental guarantee of religious freedom.

It is this tension between fostering religious freedom and preventing an establishment of religion which has increasingly occupied the Supreme Court in recent years,[3] primarily as a result of the proliferation of state legislative efforts to provide financial assistance to nonpublic schools caught in the pinch of escalating educational costs. State legislators have been motivated not only by their concern for protecting the public schools from the disastrous consequence of having to absorb millions of students if private schools are forced to close, but also by a genuine concern with the educational quality of nonpublic schools. Numerous programs have been developed to upgrade the total services provided nonpublic school students. Public monies have been expended for transportation, books, lunches, and medical services in an effort to provide some parity between public and nonpublic schools. Each new legislative effort has met with court challenges protesting the threat of establishment inhering in government programs which touch religious activities or institutions. One should not lose sight of the fact that state legislatures have themselves interpreted the religion clauses in formulating these various programs. The major disagreement between the legislatures and the Supreme Court stems from the divergent approaches of each to the balancing of free exercise and establishment ideals. While the legislatures have tended to favor the protection of the free exercise right, the Supreme Court has increasingly stressed the fundamentality of nonestablishment values.

In the past three decades, the Supreme Court has decided more than two dozen cases of major significance involving the interpretation of the religion clauses of the first amendment. From these cases, several major issues of continuing interest have emerged, together with a patchwork of results which, under close scrutiny, reveal inherent contradictions. This article will attempt to demonstrate the existence of these contradictions, to analyze them, and to suggest both a plausible explanation and a possible means of avoiding future contradictions in this sensitive area of religious liberty.

Exploration of seven cases decided over the past three decades,[4] each involving an alleged violation of the establishment clause and/or the free

3. The Court has been increasingly involved with establishment clause cases. Since 1970, the Court has decided eight cases of major significance interpreting this clause.

4. This article will discuss in detail only seven of these decisions in that they form the core of the dilemma. The cases are: Everson v. Board of Educ., 330 U.S. 1 (1947); Board

exercise clause, will demonstrate that from a logical and historical perspective, the cases are fundamentally irreconcilable and result in the denial of true religious liberty to many Americans. Moreover, this result is neither demanded by anything within the four corners of the Constitution nor by any other sufficiently compelling cause to justify the denial of so fundamental a right as freedom of religion.

II. A BRIEF OVERVIEW

The Court's decisions under the religion clauses have held that Sunday closing laws are constitutionally permissible because they neither tend to establish religion nor interfere with the free exercise thereof, even though they may work severe financial hardship on Saturday Sabbath observers.[5] No exemption from the ban on Sunday activities is constitutionally required for those who observe another day of rest.[6] Saturday Sabbath observers must, however, be given special consideration in the operation of unemployment laws, and cannot be denied unemployment benefits under the rubric of "unavailable for employment" if the "unavailability" stems from Saturday Sabbath observance.[7] Furthermore, exemptions from the payment of property taxes granted to religious institutions by most states are permissible.[8]

The Court's decisions respecting religion and public schools hold that children attending public schools cannot be made to salute the flag if their religious scruples direct otherwise.[9] The Court has also held that the accommodation of religious instruction by release-time programs is permissible[10] as long as the programs are not conducted on school property.[11] Both prayers[12] and Bible reading[13] are forbidden in public schools, even though they may be nondenominational and despite provisions excusing those children who do not wish to participate. In addition, the

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of Educ. v. Allen, 392 U.S. 236 (1968); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) [hereinafter cited as PEARL v. Nyquist]; Walz v. Tax Comm'n, 397 U.S. 664 (1970); Meek v. Pittenger, 421 U.S. 349 (1975); Lemon v. Kurtzman, 403 U.S. 602 (1971); Wolman v. Walter, 433 U.S. 229 (1977). Other cases are mentioned only as they may bear upon these decisions.

5. *See* Gallagher v. Crown Kosher Supermkt., 366 U.S. 617 (1961); Two Guys v. McGinley, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961).

6. *See* note 5, *supra*.

7. Sherbert v. Verner, 374 U.S. 398 (1963).

8. Walz v. Tax Comm'n, 397 U.S. 664 (1970).

9. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

10. McCollum v. Board of Educ., 333 U.S. 203 (1948).

11. Zorach v. Clauson, 343 U.S. 306 (1952).

12. Engel v. Vitale, 370 U.S. 421 (1962).

13. Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

state cannot, on the basis of a religious doctrine, forbid the teaching of certain theories or areas of subject matter such as evolution.[14] Finally, children whose families wish to protect them from the secularizing forces of the world, cannot be compelled to attend public schools past the eighth grade under existing compulsory education laws if the parents' desires are based upon longstanding and sincere religious beliefs.[15]

Court decisions in the area of financial assistance to children attending parochial schools reveal that the state may constitutionally provide funds to parents for bus transportation of their children to parochial schools[16] and may provide funds for textbooks to be used for the teaching of secular subjects in the parochial schools, at least when the books are merely "loaned" to the children.[17] The state may also "supply for use by pupils attending nonpublic schools . . . such standardized tests and scoring services as are used in the public schools of the state" to measure the progress of students in secular subjects;[18] "provide speech and hearing diagnostic services to pupils attending nonpublic schools" in the sectarian institutions when the services are performed by state[19] employees; and provide diagnostic psychological services under similar conditions.[20]

Therapeutic, guidance, and remedial services for students who have been identified as having a need for special attention are sanctioned when they are provided "in public schools, in public centers, or in mobile units located off the nonpublic premises."[21]

Issues of government financial aid to higher education have also reached the Court. It has approved federal financing of the construction of buildings on denominational college campuses as long as these buildings are not used for religious instruction or worship.[22] Similarly, a state may use its authority to aid private sectarian colleges in financing construction and improvement of facilities to be used for nonreligious purposes

14. Epperson v. Arkansas, 393 U.S. 97 (1968).

15. Wisconsin v. Yoder, 406 U.S. 205 (1972).

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

17. Board of Educ. v. Allen, 392 U.S. 236 (1968). *See also* Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975).

18. Wolman v. Walter, 433 U.S. at 238-39 (quoting OHIO REV. CODE ANN. § 3317.06(J) (Page Supp. 1976), *cf.* Meek v. Pittenger, 421 U.S. 349 (1975) (textbook loan program upheld but instructional materials loan programs and auxiliary services program invalidated).

19. Wolman v. Walter, 433 U.S. at 241 (quoting OHIO REV. CODE ANN. § 3317.06(D) (Page Supp. 1976)).

20. *Id.*

21. *Id.* at 244-45 (quoting OHIO REV. CODE ANN. §§ 3317.06(G)-(I), (H) (Page Supp. 1976)).

22. Tilton v. Richardson, 403 U.S. 672 (1971).

by the institution.[23] In one of its latest decisions, the Court has permitted a state to provide noncategorical grants to religiously affiliated colleges, provided the funds are not utilized by the institution for sectarian purposes.[24]

The ways in which states may not aid denominational schools are also interesting. A state may not supplement the salaries of nonpublic school teachers of secular subjects in parochial schools, even though the supplemented teacher's salary does not exceed the maximum paid to public school teachers.[25] A state may not "purchase" educational services from the parochial schools despite the fact that the contracts of "purchase" involve only actual expenditures by the parochial schools for teacher's salaries, textbooks, and instructional materials for secular courses which are the same as those taught in the public schools.[26] Furthermore, states may not provide for direct money grants to qualifying private schools for the maintenance and repair of school facilities and equipment to insure the health, welfare, and safety of enrolled pupils.[27]

Another legislative scheme which has been declared unconstitutional is one which provided tuition reimbursement to parents of children attending nonpublic schools, if the parents' taxable income did not exceed $5,000 per year, even though the amount of reimbursement was limited to $50 per year for grade school children and $100 for those in high school.[28] A complementary provision for those ineligible for the tuition reimbursement plan which provided a sliding scale of relief inversely proportional to the parents' income was also declared unconstitutional.[29]

It is also impermissible for a state to reimburse parochial schools for the costs of administering examinations, keeping attendance records, and complying with other reporting requirements mandated by state law.[30] A state may not provide auxiliary services such as counseling, testing and psychological services, speech and hearing therapy, and teaching for exceptional, remedial, and educationally disadvantaged chil-

23. Hunt v. McNair, 413 U.S. 734 (1973).

24. Roemer v. Board of Pub. Works, 426 U.S. 736 (1976).

25. Early v. DiCenso and Robinson v. DiCenso, *sub. nom.* Lemon v. Kurtzman, 403 U.S. 602, 615-20 (1971).

26. Lemon v. Kurtzman, 403 U.S. 602 (1971).

27. PEARL v. Nyquist, 413 U.S. 756 (1973).

28. *Id.* A similar program, in which no limitation was placed on parental income and reimbursements were limited to $75 and $150 respectively, met the same fate. Sloan v. Lemon, 413 U.S. 825 (1973).

29. PEARL v. Nyquist, 413 U.S. 756 (1973).

30. Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973).

dren.[31] Nor may the state provide loans of instructional materials and equipment such as periodicals, photographs, maps, charts, sound recordings, films, projection equipment, recording equipment, and laboratory equipment, either to the nonpublic schools[32] or to the students themselves.[33] In addition, the state may not supply transportation for field trips to nonpublic school students, even though such trips are limited to secular instructional objectives.[34]

This statement of the bare holdings suggests that the Supreme Court, in order to produce these results, has developed some rather complex relationships between constitutional factors, given the seemingly open-textured language of the first amendment. It appears that the Court has groped its way through historical, logical, and essentially pragmatic analyses in search of guideposts for the interpretation and application of the religion clauses. At times it has paused, satisfied that it had discovered the fundamental truth concerning the relationship between church and state under the Constitution, only to discover, all too soon, that a new circumstance has emasculated its previous formulation.[35]

III. The Argument: Nonestablishment at the Expense of Free Exercise

The major thesis of this article is that the Supreme Court's interpretation of the establishment clause conflicts at a fundamental level with a reasoned interpretation of the free exercise clause. In interpreting the two clauses, the Court has isolated them in order to avoid confronting this inconsistency, and in so doing seems implicitly to prefer the nonestablishment principle at the expense of the free exercise principle in its constitutional hierarchy. This preference for nonestablishment values over those of free exercise has its origins in the Enlightenment ideals of Thomas Jefferson and James Madison.

The extensive reliance of the Supreme Court on the views of Jefferson and Madison as the embodiment of first amendment wisdom is misplaced. Not only is it misplaced because the opinions of all other participants in the constitution-making process have been ignored, but also

31. Meek v. Pittenger, 421 U.S. 349 (1975).
32. *Id.*
33. Wolman v. Walter, 433 U.S. at 248-51.
34. *Id.* at 252-55.
35. As Professor Sutherland, Jr., in describing phrases the Court has substituted for due process of law, stated: "Each new phrase is more satisfactory only because for a time it is less familiar. As each in turn inevitably loses its potency, we find and substitute another." Sutherland, *Due Process and Disestablishment*, 62 Harv. L. Rev. 1306, 1307 (1949).

because Madison's and Jefferson's view of the appropriate relationship between church and state was undoubtably colored by historical circumstances. But historical circumstances change, and the possibility of establishment in America today is as remote as established churches were realities in 1791. The significant changes in American society since the ratification of the Bill of Rights require careful consideration in determining how the principle of nonestablishment should be interpreted in order to achieve the ideals embodied in the free exercise clause, as well as those in the nonestablishment clause. There has been a startling lack of sensitivity to this relationship in most of the Court's opinions.

The Court's extensive reliance upon the writings of Jefferson and Madison can be explained in large measure by the fact that the vision of religion and secular life which those writings espouse is essentially compatible with the dominant American religious experience—Protestantism. The ideal of total separation of religious experience into the private realm of individual and family experience is a product of both the Reformation and the Enlightenment. This ideal is clearly compatible with the beliefs of Protestant Americans, who until very recently have dominated the institutions of power and influence in American society. As a product of the Enlightenment, it reflects a movement away from a social structure in which religious and secular experience were integrated toward a predominantly secular society. This model of organization proceeds from the basic premise that socio-religious experience is a private affair between man and God. From this it derives the secondary premises that society is therefore separable from religious experience, and that in order to preserve the fundamental right to freedom of religion, society must erect and maintain a wall of separation between itself and religion.

While this view is compatible with Protestantism and comforting to the growing community of secularists, it is fundamentally antagonistic with other religious traditions in America. It is the essence of Catholicism, Orthodox Judaism, and some other minority religions in America that religious experience is pervasive. Separation of secular and religious experience is an anathema—a denial of religious teaching at its most essential level. The high and impregnable wall of separation which much of the Supreme Court's rhetoric envisions does not promote the cause of religious freedom for those who believe in the integration of secular and religious life. It places a high premium on the preservation of that religious tradition. The price one pays is the denial of full participation in the largess of the welfare state.

The modern welfare state redistributes vast sums of money. The efforts of the Supreme Court to maintain the antiseptic separation of secular and religious life has repeatedly frustrated state legislative efforts to create greater equality of benefit for religious minorities in the support which the state provides for various activities—principally educational. This denial of full participation in the redistributive efforts of the welfare states occurs precisely because those to whom the benefits are denied have insisted upon the free exercise of their chosen religions—religions which cannot accommodate the Supreme Court's need for total separation of the secular and religious activities concerned. There has been practically no effort on the part of the Supreme Court to explain why the denial of significant governmental benefits because of religious practice and belief does not result in the denial of either the right to free exercise or the equal protection of the laws.

Constitutional principles, although not infinitely flexible, nevertheless should be sufficiently open-textured to permit a reworking of the tangible effects of such principles in order to effectuate their underlying ideals. What may have been an appropriate response to establishment problems in 1791 is not necessarily appropriate, and indeed, may very well be totally inappropriate, in 1978. In its establishment clause analysis, the Court has ignored the fact that there are significant distinctions between that which the Constitution compels and that which it forbids. When setting forth minimum standards of constitutionally mandated behavior, the Court should follow a narrow model of constitutional interpretation, but when legislatively approved state activities are challenged on constitutional grounds, federalism demands that the court should adopt a more flexible approach so as to permit the widest possible latitude for state prerogatives. Educational policymaking is one of the more significant powers retained by the states under our constitutional system. In the twentieth century we have witnessed a massive shift of authority from the states to the federal realm—a shift which has been either facilitated or mandated by Supreme Court decisions. The considerable circumscription of legislative autonomy may, in some instances such as racial integration, be socially as well as constitutionally necessary, but that is clearly not the case in all other instances of judicially imposed restrictions.

The Court has simply failed to give due deference to state legislative processes. In particular, its concern with the politically divisive potential of state efforts to aid financially distressed parochial schools is blatantly disingenuous. The Court's inflexible requirement of separation has repeatedly frustrated legitimate efforts of state legislatures to reach politic-

ally acceptable programs of educational value for millions of children through the democratic process of debate and compromise. The potential for divisiveness lies not in the state legislative process, but in the overzealous use of the power of judicial review to preserve the nonestablishment ideal when what is required is the heightened sensitivity to free exercise values which is enhanced by many of the state programs which the Court has invalidated.

A new model for decision making is needed in this important and sensitive area of constitutional law. The Court should abandon its somewhat mechanical and arbitrarily-invoked separation formula in favor of a model which focuses upon the nature of the benefit sought to be provided and the status of the recipient with respect to the benefit, without regard to religious criteria. Such a model might ask the following question with respect to establishment clause problems: Is any person, as a result of the government action in issue, enjoying a benefit on account of his/her religious commitment which is not equally and similarly available to all other persons, similarly situated with respect to the benefit involved, without regard to religious criteria? It is very difficult to understand how religion would be advanced, much less established, by the evenhanded distribution of secular government benefits to all individuals similarly situated, with respect to need and without regard to religious affiliation or belief. It is equally difficult to understand how denial of such benefits to persons because of their religious beliefs or practices does not inhibit the free exercise of religion. Certainly the Supreme Court should not compel such results by invalidating state efforts which alleviate them when the state's purpose is clearly a legitimate secular one. Furthermore, a potential bonus is provided by this approach. Should the Supreme Court abandon its rigid separationist ideology in favor of a benefit oriented analysis, another major obstacle, the entanglement problem, would be removed, since it is a product of the Court's unwarranted focus on an antiseptic separation of secular and religious activity. Entanglement issues arise only through the concern that any aid to a religious institution, albeit for secular purposes, will necessitate supervision to prevent integration of that admittedly secular activity with a religious one. The proposed model would eliminate this concern, since it accepts the integrated nature of secular and religious activity as a protected free exercise right for those religions which do not accept the fundamentally Protestant ideology of separation.

If this proposed model or some other formulation which focuses upon the nature of the benefit to the individual vis-à-vis all others similarly situated were to be accepted, we would, as a society, have taken a major

step in the direction of substantive, rather than formal, freedom of religion for all Americans.

IV. AN HISTORICAL PERSPECTIVE

The history of the relationship between church and state in America has been a topic of considerable interest over the years. The most important view of that relationship has necessarily been that of the Supreme Court which derives its major premises primarily from the writings of Thomas Jefferson and James Madison, particularly the literature surrounding the historic struggle of Virginia to abolish public support of the ministry which culminated in the enactment of the *Virginia Bill for Establishing Religious Liberty*.[36] There has been a near blind faith that the opinions of these two giants of American constitutional history accurately reflect the purpose and intent of the framers and ratifiers in 1791. They have defined for us the broad framework of the constitutionally permissible relationship between church and state. In light of "the sacred tradition in American constitutional law . . . that the principal responsibility of judges is to carry out the 'intention' of those who framed the Constitution,"[37] those opinions remain the guiding principles of the 1970's. The unfortunate consequence of this has been that "by virtue of the political authority vested in the Supreme Court of the United States, its judges have sometimes exercised the enviable power of converting questionable history into unquestionable law."[38] According to this "official" view of the religion clauses, not only is the individual's conscience free from intrusion in religious matters, but the Constitution also imposes a duty upon the government to refrain from taking any

36. Of special significance in this regard, is the highly celebrated MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS written by James Madison to the General Assembly of the Commonwealth of Virginia in protest against the use of tax monies to pay the salaries of teachers of the Christian religion. It was out of this struggle, and largely through the efforts of James Madison and Thomas Jefferson, that Virginia's Bill for Establishing Religious Liberty was finally enacted in 1786. *See* B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 246 (1967). This bill became the prototype for the religion clauses of the first amendment, for, according to E. SMITH, RELIGIOUS LIBERTY IN THE UNITED STATES 247 (1972), "[t]he role of James Madison in the fashioning of the Bill of Rights thrust the Virginia experience to the center of the debate on the text of the First Amendment."

It is noteworthy that the MEMORIAL AND REMONSTRANCE was central to the dissenting opinion of Mr. Justice Rutledge in Everson v. Board of Educ., 330 U.S. 1, 63 (1947), appearing as an appendix to the opinion. It has been cited in both majority and minority opinions of numerous cases since.

37. M. DEWOLFE HOWE, THE CONSTITUTIONAL QUESTION: RELIGION AND THE FREE SOCIETY 49 (1958) (Fund for the Republic Pamphlet.)

38. *Id.*

action respecting the establishment of religion although there will be no resulting interference with individual conscience in religious matters.[39]

The extensive reliance of the Supreme Court on the views of Jefferson and Madison has not been an unmitigated good. As one recent observer put it, "there is no doubt that Americans have enjoyed important benefits as a result of Jefferson's successful campaign to disestablish religion at the national level . . . . What has had great benefits, however, has also had some costs."[40]

One of the major "costs" of this reliance is the product of an uncritical expansion of Jefferson's view that the state is precluded from any relationship with religion even though that relationship neither interferes with nor diminishes the religious freedom of other individuals or groups of individuals in the community. Jefferson's attitude can be traced to the wellspring of his intellectual universe,[41] the Enlightenment, with all of its emphasis upon rationalism and man's "emancipation" from the fetters of theological dogma and piety.[42] With this "emancipation" necessarily

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39. *But cf.* Welsch v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965) (conscientious objector cases decided on non-constitutional grounds). *See also* Gillette v. United States, 401 U.S. 437 (1971).

40. Little, *Thomas Jefferson's Religious Views and Their Influence on the Supreme Court's Interpretation of the First Amendment*, 26 CATH. U.L. REV. 57, 58 (1976).

41. Jefferson was the pre-eminent American exponent, along with Benjamin Franklin, of the eighteenth-century Enlightenment. Whether the Enlightenment is considered an intellectual movement, a temper of mind, or a climate of opinion, whether it is dismissed, denounced, or admired, Jefferson was one of its legitimate children, in the end one of its authentic geniuses . . . .

The controlling assumptions of enlightened thought were so thoroughly assimilated in Jefferson's mind that he cannot possibly be understood apart from them.

M. PETERSON, THOMAS JEFFERSON AND THE NEW NATION 46-47 (1970).

42. According to Merrill Peterson, the first principles of Enlightenment as assimilated by Jefferson were:

First, untrammeled free inquiry in the pursuit of knowledge. Nothing was to be taken for granted; everything was to be questioned, taken apart, traced back to its origins, and reconstructed in the light of intelligence . . . . Philosophy was a method of inquiry, not a static system of truths; and empirical science on the Newtonian model was good in all fields, the moral and social together with the physical . . . .

Second, the object of inquiry is the discovery of the natural order of things. Newton had demonstrated the order of the physical universe; Linnaeus had begun to put order into the chaos of life; and Locke, on the same empirical principles, had pointed the way to a science of mind. Were there not universal laws, roughly equivalent to the law of gravitation, in the moral and social realms? There were, the eighteenth-century philosophers insisted, but they lay buried under the rubble heaped up over the centuries by dogmatic authority and superstition . . . .

Third, reason is the principal agent of criticism and inquiry—reason, that is, not as "eternal verities" but as a method of verification. Aggressively secular,

came a decidedly anticlerical bias, a deep-seated suspicion of religious organization and hierarchy.[43] This scepticism has been translated by the Supreme Court into another dogma—a rule of constitutional law.[44]

The vision of the founding fathers with respect to the relationship between church and state was inseparable from their vision of each of those institutions. Neither time nor history has stood still, and accordingly neither church nor state bear even a remote resemblance to any reasonable vision thereof which may have been entertained by our founding fathers. How, then, is it reasonable to assume that the founding fathers separatist vision will accomplish any of the underlying purposes of the religious protection of the first amendment? As Professor Giannella has stated:

> [T]he founding fathers were assuming a government of highly limited powers. They expected religion to play a part in the established social order, but also expected the state to play a minimal role in forming that order. . . . But now that the state has undertaken the more positive role of allocating resources and actively structuring the social order, the question of how to treat religious groups and interests has become a fundamentally different one from that confronting our predecessors. To withhold studiously from religious groups all benefits flowing from governmental structuring of the social order will not only result

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enlightened thinkers exposed bigotry and superstition, denounced airy "metaphysical" speculation, and leveled the walls of mystery and authority separating man from nature.

Id. at 47.

43. [Jefferson] had no respect for the Established Church on any ground, and his reading of the modern rationalists, principally English and Scottish, conveyed him to that convenient via media of the Enlightenment, natural religion, between orthodoxy and atheism . . . [With respect to religion there were] two main propositions for enlightened men. First, that the Christianity of the churches was unreasonable, therefore unbelievable, but that stripped of priestly mystery, ritual, and dogma, reinterpreted in the light of historical evidence and human experience, and substituting the Newtonian cosmology for the discredited Biblical one, Christianity could be conformed to reason. Second, morality required no divine sanction or inspiration, no appeal beyond reason and nature, perhaps not even the hope of heaven or the fear of hell; and so the whole edifice of Christian revelation came tumbling to the ground . . . .

Dismissing revelation, divine grace, and the future state of Christianity, dismissing, in short, the religion of the churches, Jefferson believed that natural reason and the evidence of the senses provided a sufficient basis of religion and ethics.

Id. at 50-52.

44. M. DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS 7 (1965).

> in deprivations not demanded by the purposes of nonestablishment but in some cases will actually frustrate them.[45]

Professor Bernard Bailyn has written that "the most advanced pre-Revolutionary arguments for disestablishment—arguments that would eventually bear fruit in all governments of the new nation—were unstable compounds of narrow denominationalism and broad libertarianism."[46] While the "denominational" arguments, as Bailyn calls them, incontrovertibly rested upon concern for the free exercise of religion by dissenters, the libertarian views appear to have had a more tenuous connection with the exercise of religion and a more cogent relationship to the enlightenment ideal of a secular society guided by man's illimitable capacity to create a morally just and socially viable community without reliance upon religious ideology or faith. The views of Jefferson and Madison represent more clearly the second variety of arguments, although perhaps partially influenced by claims of persecuted dissenters,[47] and were "encrusted with certain implicit assumptions which were products of prevailing social, political, and economic conditions."[48]

Constitutionalism springs from man's impulse to preserve certain fundamental values. Presumably, the preservation of those values implicit in the religion clauses of the first amendment was the primary objective of the authors as well as the ratifiers of the Bill of Rights. "Specific intent" is a term of considerably narrower and more temporally specific connotation than that of underlying or fundamental value. Since the specific intent of the framers was necessarily determined by historical contingencies, it ought not to weigh heavily on future generations, at least when the fundamental objectives inherent in the Constitution are discoverable. While modern philosophy has convinced us that even fundamental values change over time, we may nevertheless entertain the presumption that the rate of change diminishes in direct proportion to the extent to which particular values are held to be fundamental by a particular society. Constitutional interpretation must operate on this premise if it is to be anything more than a mere reflection of transitory trends in the political sphere.[49]

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45. Giannella, *supra* note 2, at 514-15.

46. B. BAILYN, *supra* note 36, at 257.

47. *Id.* at 260.

48. Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development, Part I: The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1383 (1967).

49. Mr. Justice Frankfurter, dissenting in West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 665 (1943), said:

> The Court has no reason for existence if it merely reflects the pressures of the day. Our system is built on the faith that men set apart for this special function, freed from the influences of immediacy and from the deflections of worldly

Changing historical conditions must bear upon the means by which underlying constitutional objectives are to be achieved. It is idle foolishness to suppose that unchanging responses to vastly different problems arising in monumentally altered social and economic circumstances can be expected to produce results which are consistent with the underlying purposes of the Constitution.[50] In the context of the religion clauses of the first amendment, the transformation of American society has been so extensive as to call into serious question the continuing validity of any earlier doctrinal formulations of the constitutionally mandated relationship between religion and the state. The failure of the Court to recognize the need for this extensive reevaluation of its dogmatic interpretation of the establishment clause has resulted in the substantial impairment of the right of free exercise by millions of Americans. While this may yet prove to be the inevitable consequence of the preservation of our religious liberty, there is a need for a more systematic attempt to analyze the underlying purposes of the religion clauses and how best to achieve these objectives under present social, political, and economic circumstances.[51] The Court's timeworn rhetoric about Virginia's historic struggle to preserve the freedom of choice of each individual in religious matters has done little to comfort those who see that freedom as substantially illusory for many Americans. It is one thing to say "not one penny" shall be taken from a taxpayer to support ministers of religion in 1785[52] and to repeat, nearly 200 years later, that "not one penny" shall be taken from a taxpayer to provide remedial reading, guidance counseling, and other special educational services to educationally deprived children who attend parochial schools, although identical services are provided by the state to children in the public school system.[53] The real concern ought not to be how the framers of the Constitution would have resolved the particular issue before the Court, but what they believed to be the

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ambition, will become able to take a view of longer range than the period of responsibility entrusted to Congress and legislatures.

50. *See, e.g.*, Weems v. United States, 217 U.S. 349, 373 (1910), in which Justice McKenna stated:

> In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.

51. An analysis along the lines of Professor Giannella's comprehensive critique in his two part article entitled *Religious Liberty, Nonestablishment and Doctrinal Development*, which can be found in 80 HARV. L. REV. 1381 (1967) and 81 HARV. L. REV. 513 (1968), would be welcome.

52. *See* JAMES MADISON, MEMORIAL AND REMONSTRANCE, *supra* note 36.

53. Meek v. Pittenger, 421 U.S. 349 (1975).

fundamental purposes underlying the religion clauses and how best to achieve those purposes under contemporary circumstances.[54]

Late eighteenth century American society was a Protestant culture. Nineteenth century America witnessed perhaps the greatest influx of culturally diverse people any nation has ever experienced. When the revolutionary thrust of industrialization and modern secularization is added to this cultural milieu, it becomes obvious that American society has become significantly less homogeneous with respect to religious and other cultural values than it was in 1791. The likelihood, in this cultural climate, of anything remotely resembling a traditional "establishment" is infinitesimal. While recognizing that the nonestablishment principle was intended to reach relationships between government and religion which were substantially less than full-fledged establishments, one might nevertheless consider this diminished risk as an important factor in evaluating the permissible scope of government associations designed to enhance free exercise rights of Americans, as opposed to those associations which impinge in some measurable way upon them.[55]

There is another facet of the development of constitutional doctrine from the ideological polemics of Jefferson and Madison which warrants attention. The Enlightenment is frequently cited as the fountainhead of modern secularism, and there is undoubtedly a significant relationship between the two. One should not forget, however, that the Enlightenment would have been unthinkable without the Reformation. The rejection of a monolithic church, the assertion of the right of skeptical inquiry into religious dogma and the shift of focus from religious observance in the community to the individual's personal faith and relationship with God, all served to pave the way for the skepticism and rationalism of the Enlightenment. Modern secularism, born with the Enlightenment and nourished by modernity, might logically be called the illegitimate heir of

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54. We try to make the most of the consequences of what our forefathers did, but there is no reason why we should feel we have to carry out their plans for us. Were they so wise they didn't need to know the facts? The intention of the framers of the Constitution, even assuming we could discover what it was, when it is not adequately expressed in the Constitution, that is to say, what they meant when they did not say it, surely has no binding force upon us . . . . What they left unsaid they left open for us to decide . . . .

The Constitution has become something in its own right. It is an integral part of what men do with it. It has long ceased to be no more than what other men do with it. It has long ceased to be no more than what other men hoped they would do or intended them to do . . . It is not stuffed but pregnant with meaning.

C. CURTIS, LIONS UNDER THE THRONE 2-3, 7-8 (1947).

55. *See* Meek v. Pittenger, 421 U.S. 349, 387 (1975) (Burger, C. J., concurring in part and dissenting in part).

Protestant theology. It is certainly significantly more consistent with the Protestant world view of separation of secular and religious life than it is with the older and still important tradition of religious observance as an integral part of the life of the community. That traditional focus remains a basic premise of religious experience for many Americans today and cannot be ignored if the free exercise guarantee is to be honored in substance as well as in form.

One form of "secularism" which peaked in the early twentieth century with various attempts at coercive acculturation,[56] had antecedents which, in retrospect, appear to have been thinly-veiled attempts to perpetuate a Protestant world in spite of the heavy burden they placed upon non-Protestant minorities.[57] Contemporary secularism still retains significant aspects of the earlier antireligious ideology of its predecessors. Its self-image is that of the standardbearer of American democratic ideals against the encroaching influences of religious institutions.[58] There is implicit in such an ideology the earlier anticlericism of the Reformation and its ideological progeny, the Enlightenment.

One of the most perplexing issues in the earlier confrontations of the nineteenth century over state aid to parochial schools is still with us today. If tax money cannot be spent to aid institutions which teach religious precepts, then ipso facto public schools must be purged of religious influence. But if all religion is removed from the public school curriculum, how will good morals be taught to children?[59] In the nineteenth century some believed that moral education could imbue children "with the 'fundamental tenets of duty which are the basis of all religion, [without the influence of] sectarian or dogmatic teaching . . . .' "[60] But others were not persuaded, remaining convinced that the "morality" taught in the public schools was Protestantism in a universalist disguise.

The drift towards an increasingly secularized society in the twentieth century has been reflected in our public schools, to the extent that one might legitimately question whether any conscious effort is given to the

56. Two excellent examples of such abortive attempts can be found in Pierce v. Society of Sisters, 268 U.S. 510 (1925) and Myer v. Nebraska, 262 U.S. 390 (1923).

57. The ideological polemics leading to the Blaine Amendment controversy in 1875-76 are illustrative of the earlier "secularism." For a discussion of this period, see E. SMITH, *supra* note 36, ch. 6.

58. *See, e.g.*, opinions of Mr. Justice Douglas and Mr. Justice Fortas in Board of Educ. v. Allen, 392 U.S. 253, 254-72 (1968).

59. *See, e.g.*, Giannella, *supra* note 2.

60. Theodore Sedguick, Counsel to the Public School Society of New York, *quoted in* E. Smith, *supra* note 36, at 112.

"moral" education of children in American public schools. It would be an oversimplification to suggest that the numerous signs of moral disintegration in society are attributable to this failure of the public schools. It is, nevertheless, equally insensitive to suggest that religious parents, concerned about the moral as well as the religious education of their children have no claim to public support. The rising crime rates among juveniles and young adults, the increasing number of suicides among teenagers, the high incidence of drug and alcohol use and addiction, and the epidemic proportions of venereal disease among young adults are, to some Americans, distressing signs of the total disintegration of a moral order in American society. Many of these parents seek refuge in traditional religious education for their children. Although that may not be the only reasonable response of concerned parents, it is clearly a rational one. It is a response which deserves the support of the community unless such support is a clear and direct violation of the rights of others in the community. By the Court's own admission, the clear and unequivocal language of the Constitution does not prohibit this support. Rather the wording of the Constitution renders it imperative for the Court to consider the injustice and inequality which may result from some of its establishment clause decisions respecting financial assistance for the secular education of children in religious institutions.

V. The Parameters of the Establishment Clause

A. Absolutist Rhetoric and Accommodation: The Fundamental Inconsistency

In the first major discussion by the Supreme Court of the establishment clause, Justice Black, in *Everson v. Board of Education*,[61] announced the parameters for judicial interpretation:

> 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 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

61. 330 U.S. 1 (1947).

> 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 was intended to erect "a wall of separation between church and State."[62]

The sweeping breadth of this statement is astonishing, especially when one considers both the paucity of language in the first amendment[63] and the narrow issue before the Court of the constitutionality of a New Jersey enabling law and a local ordinance which together provided reimbursement to parents for actual expenses incurred for their children's public transportation to public and parochial schools within the district. A taxpayer challenged the payments made to parents of children attending parochial schools as violative of the establishment clause. The Supreme Court, per Justice Black, upheld the statute. In dissent, Justice Jackson criticized the seemingly paradoxical nature of the majority's analysis and its conclusion in observing that:

> the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters. The case which irresistably comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, "whispering 'I will ne'er consent'—consented."[64]

The stage was thus set for a drama which played time and time again as new cases involving the establishment clause came before the Court. On one hand was the Court's absolutist rhetoric, and on the other was a sense of a need for some form of practical accommodation of the diverse interests within a pluralistic society. The tension between absolute prin-

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62. *Id.* at 15-16.

63. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I, cl. 1. The brevity of the language has been the source of much of the Court's difficulty in interpreting it. Although Justices have found more certainty in these clauses than others, a close reading of the following passage from the opinion of Mr. Justice Douglas in Zorach v. Clauson, 343 U.S. 306, 312 (1952) may shed doubt on just how clear those certainties are:

> There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the "free exercise" of religion and an "establishment" of religion are concerned, the *separation must be complete and unequivocal*. The First Amendment within the scope of its coverage *permits no exception; the prohibition is absolute*. The First Amendment, however, *does not say that in every and all respects there shall be a separation of* Church and State. Rather, *it studiously defines the manner, the specific ways*, in which there shall be no concert or union or dependency one on the other [emphasis added].

64. Everson v. Board of Educ., 330 U.S. 1, 19 (1947) (Jackson, J., dissenting).

ciples and political realities, implicit within any society, exists perhaps to an unnecessary degree in the Court's establishment clause opinions.[65] One of the most perplexing aspects of *Everson* and subsequent cases is total lack of confrontation between the basic assumptions underlying both majority and minority opinions. Contrast, for example, the principle that neither federal nor state government may pass any law aiding religion generally, with the clearer case of prohibiting aid to any particular religion. In light of a long tradition of tax exemptions for religious property, deductions from personal income for donations to religious organizations, and Sunday closing laws, some brief explanation of the rationale behind this principle seems warranted. Such an explanation has never been offered, although the Court has continually reasserted in subsequent opinions its belief in the validity of its opposition to aiding religion generally. This principle has been a major element in the Court's nonestablishment rhetoric, figuring prominently in its analysis of various establishment clause cases, although since *Everson* the Court has been forced to acknowledge the existence of tax exemptions and Sunday closing laws. In its analysis in these cases, the Court has, by and large, been content to rely upon the longstanding nature of the practices and secular goals each could be said to accomplish.[66] It has never seriously confronted the obvious fact that in spite of the secular purposes which may be served by such laws, religious benefits are also derived from them. The Court has therefore found no need to examine tax exemption and Sunday closing laws vis-à-vis its continuing assertion that no aid, in whatever form or amount, may be given to support religious institutions and activities. Having recognized the legitimacy of such legislative accommodation to religion, the Court could have attempted a reformulation of its "no aid" rhetoric pursuant to the meaningful preservation of the first amendment protection of free exercise. However, it has chosen not to do so.

B. Aid to Religion v. Aid to Parents and Children: An Uneasy Dichotomy

In *Everson*, Justice Black relied upon an analogy frequently recited by the Court. He reasoned that in providing transportation for parochial school children as well as public school children, the state is simply

65. *See* R. McCLOSKY, THE AMERICAN SUPREME COURT 11-23 (1960).

66. *See* Walz v. Tax Comm'n, 397 U.S. 664 (1970) (property tax exemptions held constitutional). *See also* Gallagher v. Crown Kosher Supermkt., 366 U.S. 617 (1961); Braunfield v. Brown, 366 U.S. 599 (1961); Two Guys v. McGinley, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday closing laws, without exemptions for Saturday Sabbath observers, held constitutional).

furnishing the benefits of a public service to the whole community, not unlike fire, police, and sanitation services. While all these services may make it more likely that some parents might choose to send their children to parochial school, such an eventuality is not within the ambit of the "advancement" of religion forbidden by the establishment clause. "That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them."[67]

Additional support for the constitutionality of certain forms of aid to families whose children attend parochial schools is found in Justice Black's opinion in *Everson*. In it he asserts that "[t]he State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[68] This distinction between aid to religion on the one hand and to parents and/or children on the other, as a constitutionally significant fact reappeared in *Board of Education v. Allen*,[69] a case involving a state statute providing textbooks to all school children.

In *Allen*, Justice White, writing for the Court, stated that:

> The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.[70]

While it is clear that Justice White relied upon the opinion of Justice Black in *Everson*, it is informative to note that Justice Black dissented in *Allen*. His language is particularly interesting in view of the fact that the majority saw a close analogy between the bus fares in *Everson* and the textbooks in *Allen*. Justice Black, however, saw no such connection and stated in dissent, "I know of *no prior opinion* of this Court upon which the majority here can rightfully rely to support its holding . . . ."[71]

Clearly there are distinctions which can be drawn between buses and textbooks, but none of these possible distinctions, without more, can

67. Everson v. Board of Educ., 330 U.S. 1, 18 (1947).
68. *Id.*
69. 392 U.S. 236 (1968) (citation omitted).
70. *Id.* at 243 (citation omitted).
71. *Id.* at 252 (emphasis added).

serve to explain the intensity of Justice Black's dissent. This distinction between aid to religion and aid to parents or children attending denominational schools cannot withstand careful scrutiny. Religion is neither an abstraction, nor some disembodied force in society with an existence separate and apart from its adherents.[72] Religion is a human enterprise. Religious institutions are nothing more than associations of individuals who share certain beliefs and who are engaged in a common pursuit. What distinguishes religious groups from other voluntary associations in the constitutional scheme is the additional recognition afforded religious activity by the free exercise clause of the first amendment above and beyond the general right of association encompassed within the extended parameters of the first amendment. "Religion" is a term with broad and shifting connotations. In its most pristine sense it refers to a body of dogma generally elaborating the relationship between man and God. Another common usage of the term connotes the whole panoply of beliefs and practices generally associated with the active involvement of individuals with a "religious" creed or dogma. In a perhaps more subjective sense, "religion" can mean simply the deeply held convictions of an individual relative to either a particular brand of religious dogma or to his personal relationship with the Almighty. There is yet another sense in which the word "religion" is used which is closest to the prevailing Supreme Court connotation, namely, referring to an organized religious group such as the Catholic Church, the Mormon Church, or any other religious organization.

The ambiguity in the meaning of "religion" adds another dimension of uncertainty to the already vague concept of "no aid" to religion to which the Court continually professes to adhere, in spite of its decisions validating not only buses and books for parochial school students but also Sunday closing laws and property tax exemptions for religious organizations. Religion, in whatever sense it may be used, has no meaningful existence apart from the people who profess, practice, and believe in its tenets. Any "aid to religion" is therefore ipso facto an aid to individuals and any aid to individuals in the pursuit of religious goals must necessarily also be aid to religion in one or more of its commonly accepted meanings.

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72. This conception of religion is strangely analogous to a conception of law which represents a dominant strand in Western legal thought. Both are seen as autonomous entities without any inextricable relationship to their practitioners—as phenomena capable of independent existence and therefore cognizable without reference to their essentially human dimension. But law and religion are human enterprises, unintelligible except in relation to living, breathing, interacting human beings.

C. *Aid to Parents and Children: Inconsistency in Applying the Standard*

Assuming arguendo that the distinction between aid to religion and aid to individuals can be sustained and could therefore support the Court's decisions in *Everson* and *Allen*, it is difficult to reconcile the Court's decision in *PEARL v. Nyquist*[73] with these earlier decisions. In *PEARL*, the Court invalidated a New York State scheme which provided either a tuition reimbursement or a tax credit, depending upon income level, to parents who paid private school tuition during the taxable year.[74] In so doing, Justice Powell, writing for the majority, said:

> By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. And while *the other purposes* for that aid—to perpetuate a pluralistic educational environment and to protect the fiscal integrity of over-burdened public schools—are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions.[75]

To see any significant constitutional distinction between the busfares in *Everson*, the textbooks in *Allen*, and the tuition grants/tax credits in *PEARL* is to infuse the first amendment with quantitative rather than qualitative distinctions. In each case, the parent is given financial relief from the burdensome costs of parochial school education and the parent's financial ability to choose a parochial school education for his child is enhanced by the public contribution. In no instance is the parochial school the direct recipient of the state aid. Nevertheless, the Court concluded that in the tax credits/tuition reimbursement situation, "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions."[76] In distinguishing *Everson* and *Allen*, the Court emphasized that busing is an inherently nonreligious service and that the books in *Allen* were specifically nonreligious in nature. With respect to the tuition reimbursement and tax credit scheme, the Court found no inherent or statutory criteria for assuring the nonreligious

73. 413 U.S. 756 (1973).

74. The maximum amount of benefit was to be $50 per child for elementary school students and $100 per student for high school students in any taxable year. In no event could the amount of reimbursement exceed 50% of the actual tuition paid and tax credits were available only to parents who paid at least $50 tuition during the taxable year. *Id.* at 764.

75. *Id.* at 783 (emphasis added) (citation omitted).

76. *Id.*

character of the benefit derived. "There has been," said the Court, "no endeavor 'to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former.' "[77] The Court, in *PEARL*, considered irrelevant the fact that the maximum possible state contribution to the education of any parochial school student would not be more than 15% of total cost of that student's education although all available evidence indicated that parochial schools spend substantially more than fifty per cent of the school day, and presumably an equivalent per cent of the school dollar on secular education. The Court reasoned that "[o]ur cases have long since foreclosed the notion that mere statistical assurances will suffice to sail between the Scylla and Charybdis of 'effect' and 'entanglement.' "[78]

Concern with the degree of the aid to religion ignores the distinction upon which *Everson* and *Allen* relied—that the financial benefit inures to the parents of school children and not to the religious institution and that there is, therefore, no resulting aid to religion. The state-supported buses which transport children to parochial schools carry them to their theology lessons as well as to their biology labs, and the books loaned by the state are utilized in what the Court has described on numerous occasions as a "pervasively sectarian atmosphere."[79] It is difficult to perceive how a more significant or more substantial aid to religion arises from the tax credits or tuition reimbursements than from the busrides or books. For constitutional purposes they seem analogous.

Another argument advanced by the Court in support of its willingness to view the tuition reimbursements and tax credits as aid to religion instead of as aid to parents deserves attention. The Court, responding to the argument that the New York plan did not make parents mere conduits for funds ultimately destined for the support of parochial schools, stated that "[I]f the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into sectarian

77. *Id.* (quoting Lemon v. Kurtzman, 403 U.S. 602, 613 (1971)). But note that when state statutes have attempted to segregate funds for strictly secular purposes, the Court has rejected such laws because the supervision necessary to assure compliance runs afoul of the Court's entanglement criteria. Such supervision would compromise the integrity of religious institutions which the first amendment was designed to protect. *See, e.g.*, Meek v. Pittenger, 421 U.S. 349 (1975); Lemon v. Kurtzman, 403 U.S. 602 (1971).

78. 413 U.S. at 787-88. It is noteworthy that the Court cited no previous cases when it rejected the "long since foreclosed" notion that it might be possible to conceive of public support for secular education in parochial schools without the ineluctable result that religion in thereby "advanced."

79. *See, e.g.*, Meek v. Pittenger, 421 U.S. at 371.

institutions."[80] This contention, however, fails to raise a constitutionally significant distinction between these payments and the benefits provided in *Everson* or provided in *Allen*. The Court in *PEARL* apparently recognized that in each of these cases the state aid makes it more likely that some children will be able to attend parochial schools and that the refusal of the state to provide the financial assistance in question would presumably make it harder for some parents to elect religious schools in lieu of public ones. But what the Court in *PEARL* apparently does not accept is Justice Black's reminder in *Everson* that it is not the purpose of the establishment clause to make such a choice more onerous than necessary.[81]

The criticism by the *PEARL* majority that the New York tax credit/tuition reimbursement scheme provided an incentive to parents to send their children to parochial schools is a double-edged sword. If partial relief from tuition expenses constitutes an incentive to choose private education, there exists a much greater incentive to reject private education in favor of public education which will, of course, result in total relief from educational expenses. It is revealing of the Court's conception of "neutrality" that the lesser incentive is seen as a violation of the establishment clause whereas the far greater incentive to forsake religious for secular institutions is treated as "neutral" and without free exercise implications.

D. Walz: Another Weak Link in PEARL

A second aspect of *PEARL v. Nyquist* presents an even more startling example of the Court's failure to come to terms with earlier precedent or continuing practices of both the states and the federal government. Appellees, in support of the New York tax credit plan, argued that the Court's earlier decision in *Walz v. Tax Commission*[82] was strong precedent in favor of the constitutionality of this form of tax relief. In *Walz*, the issue presented was the validity of a state constitutional provision which exempted "real or personal property used exclusively for religious, educational, or charitable purposes"[83] from taxation. The appellant in *Walz* had argued that such exemptions violated the establishment clause because the result was to require him to contribute indirectly to religious institutions in violation of his right to be free from taxation for religious purposes.[84] The Court, per Justice Burger, disagreed.

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80. 413 U.S. at 786.
81. See text accompanying note 67 *supra*.
82. 397 U.S. 664 (1970).
83. N.Y. STATE CONST. art. 16, § 1, *quoted at* 397 U.S. at 666-67.
84. 397 U.S. at 667.

Chief Justice Burger upheld the New York property tax exemption, citing the universality of such tax exemptions throughout the United States[85] as well as the "ancient" character thereof.[86] Distinguishing *Walz*, the *PEARL* Court noted that the New York tax credit scheme had no historical antecedents,[87] although it conceded that "historical acceptance without more would not alone have sufficed"[88] to validate an otherwise objectionable law. This rationale for the Court's rejection of *Walz* as controlling precedent in *PEARL* is not convincing. The Court again emphasized the importance of a neutral posture toward religion in order to give due respect to both free exercise rights and establishment considerations.[89] "Special tax benefits, however, cannot be squared with the principle of neutrality established by the decisions of this Court."[90]

These same "special tax benefits," however, were found to be constitutionally permissible in *Walz*, and similar exemptions from federal income taxation have been provided for by Congress since the enactment of the first income tax law in 1913 following the adoption of the sixteenth amendment.[91] The Court "distinguished" the *Walz* exemption by saying that although it clearly conferred a benefit on religion, that benefit was "an indirect and incidental one"[92] unlike the benefit provided by the New York scheme, the very "purpose and inevitable effect [of which was] to aid and advance . . . religious institutions."[93] This purported distinction is particularly curious. The "indirect and incidental" benefit in *Walz* resulted from total exemption from property taxation granted directly to churches, synagogues and other religious institutions, while the direct and constitutionally offensive benefit in *PEARL* results from a partial credit against state income tax granted to parents who pay private school tuition for their children. This distinction seems to distort reality and appears to have been designed only to evade earlier precedent.

According to the *PEARL* majority, property tax exemptions are motivated "not [by] any purpose to support or to subsidize, but [by the desire to create] a fiscal relationship designed to minimize involvement

85. *Id.* at 676.
86. *Id.*
87. 413 U.S. at 792.
88. *Id.*
89. *Id.*
90. *Id.* at 793.
91. Act of Oct. 3, 1913, § II G(a), 39 Stat. 172. The present exemption is found in I.R.C. §§ 501-09.
92. 413 U.S. at 793.
93. *Id.*

and entanglement between Church and State.''[94] Again, the Court conveniently ignored history and logic to suit its purpose. While the *Walz* majority did discuss the importance of nonentanglement and the positive contribution of tax exemptions in achieving this important goal, in no way did this discussion alter the historical facts. From colonial times churches have been exempt from taxation to relieve them of the financial burden of taxation and to facilitate their vital participation in the intellectual and spiritual life of the community. The nonentanglement standard itself has no meaningful existence apart from its objective of preserving the integrity of both institutions—the church and the state. The motivation for and inevitable effect of such tax exemptions must be seen as an effort to ''advance'' both church and state, just as the motivation and effect of the New York plan must be viewed as an effort to advance the state's secular interest in quality education for all children as well as an attempt to preserve free exercise rights of its citizens.

Other than in Mr. Justice Rehnquist's dissent,[95] no mention is made in *PEARL* of a starkly analogous provision of the Internal Revenue Code which provides a deduction to taxpayers for contribution to religious and other charitable organizations, including all contributions made directly to churches and synagogues for religious purposes.[96] It is unclear how deductions for contributions directly to churches for religious purposes can survive establishment clause scrutiny, while partial deductions for tuition paid to parochial schools cannot.[97]

E. The Neutral Posture: An Emphasis on ''Nonestablishment Values''

Another important theme in the Supreme Court's establishment clause decisions is its concern with the maintenance of a neutral posture towards religion by the state. The Court has insisted that the state take no active role in the religious life of the people. Since the religion clauses have been construed to protect nonbelievers as well as believers, any state support for or encouragement of religious activity, although nondenominational in nature, has been held to violate the establishment clause.[98] The purpose of that clause ''was to assure that the national

94. *Id.*

95. *Id.* at 810 (Rehnquist, J., dissenting).

96. I.R.C. §§ 170, 2055, 2522.

97. The federal income tax deduction for contributions to churches and other charitable institutions has not been challenged under the establishment clause.

98. Both prayer, Engel v. Vitale, 370 U.S. 421 (1962), and Bible reading, Abington School Dist. v. Schempp, 374 U.S. 203 (1963), in public schools have been held violative of the establishment clause. There is, of course, a serious question about the nondenominational character of any prayer or Bible reading but the Court recited the prayer as nondenominational and nevertheless struck it down.

legislature would not exert its power in the service of any purely religious end . . . ."[99] By virtue of incorporation, of course, the state legislatures are similarly restricted.[100] In upholding this aim of the establishment clause, the Court has invalidated state laws requiring prayer in *Engel v. Vitale*[101] and Bible reading in *Abington School District v. Schempp*.[102] In both cases, the Court emphasized the importance of a "wholesome neutrality" toward religion which the establishment clause was meant to promote.

Governmental affirmation of the importance of religious belief or activity, which implicitly exists when the state sanctions classroom prayers or Bible reading, is thought to violate the establishment clause regardless of the presence or absence of any compulsion which would interfere with the free exercise rights of coerced individuals. In *Engel*, the Court cautioned against confusing the establishment and free exercise issues when it observed:

> Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.[103]

However, it is clear from the trial record, as well as the briefs of counsel, that the litigants in both *Engel* and *Abington* alleged a violation of both the free exercise and establishment clauses. While the Supreme Court may be correct in its suggestion that a violation of the establishment clause may be found when there is no specific showing of a concomitant denial of the right of free exercise in a particular case, the Court's assertion that the two clauses "forbid two quite different kinds of governmental encroachment upon religious freedom"[104] is questionable. In elaborating upon its position, the Court said that a primary

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99. Abington v. Schempp, 374 U.S. at 234 (Brennan, J., concurring) (quoting McGowan v. Maryland, 366 U.S. 420, 465-66 (1961)). Mr. Justice Brennan continued to quote from Justice Frankfurter, as follows: "The Establishment Clause 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." 374 U.S. at 234.

100. Cantwell v. Connecticut, 310 U.S. 296 (1940).

101. 370 U.S. 421 (1962).

102. 374 U.S. 203 (1963).

103. 370 U.S. at 430.

104. *Id.*

rationale for the existence of the establishment clause was the belief that a union of government and religion would tend to destroy government and degrade religion.[105] In support of this proposition the Court stated:

> The history of governmentally established religion, both in England and in this country, showed that *whenever government had allied itself with one particular form of religion*, the inevitable result had been that *it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs*. The same history showed that *many people had lost their respect for any religion* that had relied upon the support of government to spread its faith. . . . Another purpose of the Establishment Clause rested upon an awareness of the historical fact that *governmentally established religions and religious persecutions go hand in hand*.[106]

The Court's evidence tends to support the suggestion that the religion clauses of the first amendment do have a unifying theme—that the free exercise of religion, including the right to disbelieve, is essential to the continued viability of religion and that the prevention of established religion is the singularly most important means of assuring that freedom. Nonestablishment has little, if any, meaning apart from its importance as a safeguard against coercion of the nonbeliever or the dissident believer in religious matters. To argue that nonestablishment is an independent goal worthy of constitutional sanctity is analogous to arguing that the right of habeas corpus has independent significance apart from the individual's freedom from unlawful restraint which it is meant to preserve. Both may serve deep psychological needs as symbols of individual freedom and governmental restraint, but that is hardly the independent justification which the Court is suggesting in either of these cases or in some of its later decisions regarding aid to children attending religious schools.[107]

Stripped of its free-exercise implications, the concept of a religiously neutral secular democratic state presents a threat to the continued existence of religious institutions in the modern state. The ideology of the liberal state rests upon a conception of an independent secular state, not because of some inherent quality of transcendent significance in such a

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105. *Id.* at 431.

106. *Id.* at 431-32 (emphasis added). Note that the Court cited only James Madison's MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (which may be found in the appendix to Everson v. Board of Educ., 330 U.S. at 63-72) in support of its historical interpretation.

107. *See e.g.*, Meek v. Pittenger, 421 U.S. 349 (1975); PEARL v. Nyquist, 413 U.S. 756 (1973).

state, but because the liberal state leaves the individual greater latitude for the expression of his personality in the "private realm" from which the state is excluded. The very purpose of constricting the scope of state power is to expand the concomitant area of individual autonomy. To the framers of the Constitution, religious freedom was one of the most important aspects of that realm of private autonomy in which the individual was to be protected from state interference. Accordingly, the right of free exercise of religion is intimately bound up with the prohibition of establishment.

As the Court has frequently noted, the right to free exercise, without the parallel prohibition against establishment, would be tenuous and perpetually uncertain. The converse, however, is clearly not the case. Nonestablishment might well flourish without the restraint of the free exercise clause, but religion would not. It is precisely the autonomous character which the Supreme Court has recently given to the establishment clause which presents the greatest threat to free exercise today. The Court has distorted the first amendment by not only emphasizing the independence of the establishment clause, but by elevating it to a position of prominence in the scheme of first amendment values. While the Court has refrained from expressing any direct preference for establishment clause values over those of the free exercise clause, recently decided cases support the conclusion that such a choice has indeed been made.[108]

F. "Indoctrination": A Variation on the Theme of Neutrality

A variation on the theme of governmental neutrality, which requires that the government prefer no religious practice over any other or religion over nonreligion, is reflected in the Court's concern over government support of religious "indoctrination." This concern became the focal point for all three dissenting opinions in *Board of Education v. Allen*[109] and is best summarized by Justice Douglas' terse language: "[w]hatever may be said of *Everson*, there is nothing ideological about a bus . . . . The textbook goes to the very heart of education . . . . It is

108. In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one "advancing" religion. However great our sympathy for the burdens experienced by those who must pay public school taxes at the same time that they support other schools because of the constraints of "conscience and discipline," and notwithstanding the "high social importance" of the State's purposes, neither may justify an eroding of the limitations of the Establishment Clause now firmly emplanted.

PEARL v. Nyquist, 413 U.S. at 788-89 (citations omitted).

109. 392 U.S. 236 (1968).

the chief, although not solitary, instrumentality for propagating a particular religious creed or faith."[110]

The concept of "indoctrination" as it appears in the establishment clause opinions of the Supreme Court is inextricably related to the Court's failure to reconcile its conception of nonestablishment with individual rights of free exercise. It is, after all, precisely because of the free exercise rights of parents and children that parents must be permitted to satisfy compulsory education requirements for their children by sending them to parochial schools.[111] The argument that the constitutional basis for denying these children the benefits of public welfare legislation for educational purposes is that these children will be religiously "indoctrinated" in the parochial schools in violation of the nonestablishment principle requires serious scrutiny.

This so-called "indoctrination" is the very purpose for which religiously motivated parents choose parochial over secular schools. It is, in essence, that which the free exercise clause protects. How then can it be constitutionally impermissible for a state to include parochial school children within the operation of a statute designed to provide secular educational benefits to all children, on the ground that the books will be utilized within an environment which "indoctrinates" students with the tenets of a particular faith, when that very "indoctrination" is protected by the free exercise clause?

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110. *Id.* at 257. *See also* note 197 *infra*.

111. There is no precise holding on this issue. A strong argument can be made, however, that the cases of Wisconsin v. Yoder, 406 U.S. 205 (1972), Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Myer v. Nebraska, 262 U.S. 390 (1923), lead inevitably to such a conclusion. In the latter two cases, the Court, faced with state compulsory education laws, found that such statutes could not be used to eliminate nonpublic schools—compulsory school attendance requirements could be satisfied by attendance at either public or nonpublic schools. Although neither case can be said to have been decided on first amendment grounds, it is interesting to note that, in his dissenting opinion in *Everson*, Justice Rutledge, joined by three other justices, asserted that Pierce had been decided on such grounds. 330 U.S. at 33.

Yoder represents, in a sense, a third dimension of the problem—in which the question before the Court was not the right to send children to nonpublic schools in lieu of public education, but the right to reject public education based upon a religious belief in no "formal" education past a certain age (which was below that required by compulsory education laws). The Court held that Jonas Yoder, a member of the Old Order of Amish and other respondents similarly situated, entertained a sincere religious belief which precluded compliance with the compulsory education laws of Wisconsin as applied to children beyond the eighth grade. The state's legitimate interest in promoting good citizenship and assuring economically independent individuals, could not outweigh a reasonable free exercise claim in these circumstances.

In light of the holdings in these three cases, it would seem frivolous to argue that parents who send their children to parochial schools are not protected in doing so by the free exercise clause.

The presence of religious "indoctrination" in parochial schools has been a major obstacle to equalization of state support of secular education in public and parochial schools. The Court's position has been, in essence, that as long as sectarian education continues in parochial schools, any state assistance to those schools, no matter how secular and independent of the religious function, nevertheless "advances" religion in violation of the establishment prohibition. The Court has failed entirely to consider the possible relevance of noncoercion in these cases. It has denied that there may be any constitutionally significant difference between the religious "indoctrination" of public school students through prayer or Bible reading in the public schools, and the religious "indoctrination" of parochial students, at their parents behest, in parochial schools which receive state support for the secular aspects of the school's educational program. In the first case, an establishment clause violation seems clear. The state, acting through its teacher-agents, is performing a religious function. It thereby provides both financial support (however minimal) and, more importantly, official approval to that religious activity. Regardless of its nondenominational character, such official religious activity is certain to offend the nonbeliever or the nonconforming believer. In the second case, however, nonbelievers and nonconforming believers are not threatened by the religious activity. It is performed in an atmosphere of willing participation. The state does not engage in the religious activity; it is performed by agents of the church, not those of the state. No financial support is provided since the state support can be directed only at secular activities of the institution.

It is important to emphasize that private denominational schools provide secular education which is at least equal to the minimum standards established by state boards of education. The work of the parochial school is substantially secular—preparing young people for the responsibilities of family, career, and community. To the extent that means can be devised which will assure the continued vitality of the American commitment to the separation of church and state, parochial schools deserve community support.

G. The Vitality of the "Indoctrination" Principle: Aid to Higher Education

The major factor distinguishing the cases dealing with state aid to denominational colleges from those concerning aid to elementary and secondary parochial schools appears to be the Court's perception of the attenuated risk of indoctrination of students at the college level. This perception rests upon essentially two ideas. First, the mission of the

lower level parochial school is the religious education of young children, while the primary function of the denominational college is to prepare young men and women for professional careers in the secular world. Secondly, the age and discretion of college students is such that they are significantly less susceptible to indoctrination and therefore better able to resist whatever attempts may, admittedly, be made to influence their religious beliefs and practices. These ideas were articulated by Chief Justice Burger in *Tilton v. Richardson*,[112] when he observed:

> Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities.[113]

Hunt v. McNair[114] was the next of these cases to come before the Court. The Court outlined criteria for determining what private educational activities may be supported by state funds. *Hunt* established that "no state aid at all [may] go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones and that if secular activities can be separated out, they alone may be funded."[115] Having articulated these established criteria, the Court proceeded in *Roemer v. Maryland*[116] to approve noncategorical grants to sectarian colleges.[117] In so doing it made an observation of critical importance: "[a] system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church."[118] It went on to say that "religious institutions need not be

112. 403 U.S. 672 (1971).
113. *Id.* at 687.
114. 413 U.S. 734 (1973).
115. Roemer v. Board of Pub. Works, 426 U.S. 736, 755 (1976).
116. 426 U.S. 736 (1976).
117. The Maryland statutory scheme challenged in *Roemer* provides funding for "any private institution of higher learning within the State of Maryland," provided the institution is accredited by the State Department of Education . . . maintains one or more "associate of arts or baccalaureate degree" programs, and refrains from awarding "only seminarian or theological degrees." . . . [The amount of aid received by each institution is] an amount equal to 15% of the State's per-full-time-pupil appropriation for a student in the state college system. . . . [A] recipient institution may put [the grants received] to whatever use it prefers . . . . [provided that] "[n]one of the moneys [sic] . . . shall be utilized by the institutions for sectarian purposes."

Id. at 740-41. For a description of the administrative controls on this program, see *id.* at 741-43.
118. *Id.* at 745.

quarantined from public benefits that are neutrally available to all."[119] Nevertheless, many problems remain. For example, in its most recent establishment clause decision, *Wolman v. Walter*,[120] the Court, again confronted with state aid to elementary and secondary parochial schools, struck down several provisions because of the pervasively sectarian nature of the educational environment and the impossibility of guaranteeing that state monies would not be used to promote sectarian ends. This result was reached even though the provisions of the invalidated statute called for the loan of "instructional materals and instructional equipment of the kind in use in the public schools . . . and which is 'incapable of diversion to a religious use' "[121] as well as transportation for field trips " 'as are provided to public school students' . . . 'to enrich the secular studies of students.' "[122]

In *Roemer*, however, the Court upheld the noncategorical grants to sectarian colleges for secular purposes, despite the fact that evidence was presented to the Court indicating that "[m]andatory religion or theology courses are taught at each of the colleges. . . . [s]ome classes are begun with prayer. . . . some instructors wear clerical garb and some classrooms have religious symbols."[123] The Court affirmed the trial court's conclusion that "[n]one of these facts impairs the clear and convincing evidence that courses at each [institution] are taught 'according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards.' "[124]

The anomalous result is that the establishment clause forbids a state from sending public school personnel to a sectarian school to provide auxiliary services such as remedial reading because of the "potential for impermissible fostering of religion"[125] or from transporting parochial school children to a museum of natural history to study primitive culture for the same reason,[126] although the same constitutional provision permits noncategorical grants to sectarian colleges which require their students to take courses in religion, even though some classes are begun by prayer and some teachers wear clerical garb, because these colleges are not "pervasively sectarian."[127] Not only does the Court's indoctrination

119. *Id.* at 746.
120. 433 U.S. 229 (1977). *See* text accompanying notes 156-175 *infra*.
121. *Id.* at 248.
122. *Id.* at 252.
123. 426 U.S. at 756.
124. *Id.* at 756-57.
125. Meek v. Pittenger, 421 U.S. at 369.
126. *See* 426 U.S. at 762.
127. *Id.* at 756-59.

principle mistakenly perceive the free exercise aspect of the issue, but the Court has demonstrated a startling inability to apply its own principle with either clarity or consistency.

H. The Potential for Inadvertant Fostering of Religion: Meek v. Pittenger

While textbooks and busing programs have survived establishment clause challenges, other state programs of a public-welfare nature have not. In *Meek v. Pittenger*,[128] the Court upheld the textbook provisions of the statutes presented for review, but invalidated other provisions which in principle appear indistinguishable from textbook programs.

The provisions of the Pennsylvania statute declared unconstitutional in *Meek* fell into two categories. The first provided "auxiliary services," including "counseling, testing, and psychological services, speech and hearing therapy, teaching and related services for exceptional children, for remedial students, and for the educationally disadvantaged."[129] All such services were to be rendered on the private school premises by public school personnel paid by and subject to the control of the state board of education. The second major category of aid provided for loans, upon request, of certain "instructional materials and equipment" including books, periodicals, photographs, maps, charts, globes, sound recordings, slides, films, video tapes, recording and projection equipment, and laboratory equipment. Any such materials were required to be secular, neutral, and nonideological.[130]

The Court, per Justice Stewart, began its discussion of the problems presented by the case by articulating a three-part test culled from prior opinions: "First, the statute must have a secular legislative purpose. Second, it must have a 'primary effect' that neither advances nor inhibits religion. Third, the statute and its administration must avoid excessive government entanglement with religion."[131] Justice Stewart observed by way of a caveat that "[i]t is well to emphasize, however, that the tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired."[132]

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128. 421 U.S. 349 (1975).
129. *Id.* at 352-53.
130. *Id.* at 354-55.
131. *Id.* at 358 (citations omitted).
132. *Id.* at 358-59.

The decision continues with the following juxtaposition of concepts, revealing the Supreme Court's dilemma in its adjudication of establishment clause controversies. A quotation from Justice Black's seminal opinion in *Everson*, "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions . . ."[133] is followed by the observation that "not all legislative programs that provide indirect or incidental benefit to a religious institution are prohibited by the Constitution."[134] And finally, there is the recognition of the need for prudential judgment: "The problem, like many problems in constitutional law, is one of degree."[135] That last simple phrase, "the problem is one of degree," generates a host of fundamental questions, not the least of which is the scope of judicial power vis-à-vis legislative prerogatives, an issue heightened in these cases by the implications one may wish to draw from the "federalism issue" lurking in any fourteenth amendment incorporationist decision.

The Court's decision in *Meek*, invalidating the state plan to lend instructional materials, rested upon the conclusion that in spite of its valid secular purpose,[136] "the direct loan of instructional material and equipment ha[d] the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefiting from the Act."[137] The Court acknowledged "that as part of general legislation made available to all students, a State may include church-related schools in programs providing bus transportation, school lunches, and public health facilities—secular and nonideological services unrelated to the primary, religion-oriented educational function of the sectarian school."[138] The distinction between these constitutionally permissible programs and the Pennsylvania plan at issue in *Meek* was said to be that the other programs provided merely "indirect and incidental benefits to church-related schools," whereas the *Meek* plan provided

133. *Id.* at 359 (quoting 330 U.S. at 16).

134. 421 U.S. at 359.

135. *Id.* (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).

136. The Act was "accompanied by legislative findings that the welfare of the Commonwealth requires that present and future generations of schoolchildren be assured ample opportunity to develop their intellectual capacities." The statute was "intended to further that objective by extending the benefits of free educational aids to every schoolchild in the Commonwealth, including nonpublic school students who constitute approximately one quarter of the schoolchildren in Pennsylvania." 421 U.S. at 363.

137. "[O]f the 1,320 nonpublic schools in Pennsylvania that . . . qualify for aid under [the] Act . . . , more than 75% are church-related or religiously affiliated educational institutions." 421 U.S. 349, 364 (1975).

138. *Id.* at 364.

"massive aid" which was thought to be "neither indirect nor incidental."[139]

The Court's reasoning, however, is not convincing for there is no constitutional basis for drawing a distinction between the text books approved in *Allen* and the equipment rejected in *Meek*. Rather the Court appears to be exercising its prudential judgment in opposition to that of the state legislature.

I. Scylla and Charybdis: Effect and Entanglement

To appreciate the full significance of *Meek v. Pittenger*, one must understand several other recent Supreme Court decisions. In *Lemon v. Kurtzman*,[140] decided with two other cases,[141] the Supreme Court rejected an attempt by the Commonwealth of Pennsylvania to enact legislation providing economic assistance to parochial schools in aid of the secular function performed therein.[142] The statutory scheme in *Lemon* authorized contracts between the state board of education and nonpublic schools for the "purchase" of certain enumerated secular services.[143] The state's objective was to provide at least a partially free secular education to children whose parents elected to send them to nonpublic schools.

The Supreme Court rejected this plan and a similar one enacted by Rhode Island on the ground that, although both states had sought to segregate their contributions to the nonpublic schools to avoid the constitutionally impermissible "advancement of religion,"[144] the states

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139. *Id.* at 364-65.

140. 403 U.S. 602 (1971).

141. Earley v. DiCenso and Robinson v. DiCenso, *sub. nom.* Lemon v. Kurtzman, 403 U.S. 602 (1971).

142. The Pennsylvania Nonpublic Elementary and Secondary Education Act was passed in 1968 in response to a crisis that the Pennsylvania Legislature found existed in the State's nonpublic schools due to rapidly rising costs. The statute affirmatively reflects the legislative conclusion that the State's educational goals could appropriately be fulfilled by government support of "those purely secular educational objectives achieved through nonpublic education . . . ."
403 U.S. at 609 (citation omitted).

143. "The statute authorizes [the] state Superintendent of Public Instruction to 'purchase' specified 'secular educational services' from nonpublic schools. Under the 'contracts' authorized by the statute, the State directly reimburses nonpublic schools solely for their actual expenditures for teachers' salaries, textbooks, and instructional materials." *Id.*

144. "The two legislatures . . . [recognizing] that church-related . . . schools have a significant religious mission . . . have therefore sought to create statutory restrictions designed to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former." *Id.* at 613.

had thereby fallen into the equally abhorrent trap of "entanglement."[145] This vice has a double aspect, the Court explained; "[a]s well as constituting an independent evil against which the Religion Clauses were intended to protect, involvement or entanglement between government and religion serves as a warning signal."[146]

In analyzing these programs, the Court emphasized the need for continuous supervision to ensure that state funds would be used solely for secular purposes.[147] A major problem cited by the Court in *Lemon* was reliance on the good faith efforts of parochial school teachers to maintain the required separation between the secular and religious aspects of the educational process: "We do not assume . . . that parochial school teachers will be unsuccessful in their attempts to segregate their religious beliefs from their secular education responsibilities. But the potential for impermissible fostering of religion is present."[148]

It is obvious that the Pennsylvania legislature drafted the statutes invalidated in *Meek* in direct response to the Court's opinion in *Lemon*. In so doing, the legislature sought to develop a program of aid which would avoid the direct grant problems of *Lemon*. The *Meek* scheme involved two forms of aid: the educational equipment and materials were provided to nonpublic schools on a loan basis from the state, following the example of previously approved textbook loan programs, and the auxiliary services program was to be admininstered by the state itself and was to employ only state personnel.[149] These arrangements were obviously intended to avoid both the problem of direct grants to the nonpublic schools and the reliance upon parochial school employees to administer the secular services funded by the state, a major concern expressed by the Court in *Lemon*.[150] Presumably the legislature thought that this would avoid the necessity of "comprehensive, discriminating, and continuing state surveillance"[151] to ensure the integrity of the secular purposes of the program.

Although the new scheme was designed to avoid "the Scylla and Charybdis of 'effect' and 'entanglement' "[152] the Court nevertheless held

145. "[T]he cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion." *Id.* at 614.

146. *Id.* at 624-25.

147. "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected." *Id.* at 619.

148. *Id.*

149. *See* 421 U.S. at 351-55.

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

151. *Id.*

152. PEARL v. Nyquist, 413 U.S. at 788.

in *Meek* that such a program did create "a serious potential for divisive conflict over the issue of aid to religion—'entanglement in the broader sense of continuing political strife.' "[153] In support of this proposition, the Court pointed to the "recurrent nature of the appropriation process [which would] guarantee annual reconsideration of [the Act]. . . ."[154] It is appropriate to question why the alleged potential for political conflict makes this program unconstitutional, whereas programs such as those approved in *Everson* and *Allen* have apparently caused little, if any, political divisiveness over the years although requiring annual appropriations. Ironically, the Court sees no danger of political divisiveness in its continuing invalidation of the acts of state legislatures, which represent thoughtful choices born of the give and take of legislative compromise aimed at accommodating diverse groups in a pluralistic society.[155]

Lemon v. Kurtzman, PEARL v. Nyquist, and *Meek v. Pittenger* delivered a clear message. Carefully restricted grants of aid for secular nonideological equipment and services performed in nonpublic schools, whether by public or nonpublic school personnel, violate the establishment clause because they create an excessive entanglement between church and state and carry a potential for fostering religion and promoting political divisiveness. Nonrestricted indirect grants to parents of children attending parochial schools violate the establishment clause because in failing to restrict the use of such grants to secular education, they necessarily have the effect of advancing religion. It has become increasingly obvious that the standards imposed upon state legislation by the Court constitute a serious obstacle in the search for a remedy for the fiscal problems which beset parochial education today.

J. Devising a Remedy: Wolman v. Walter

State legislatures have demonstrated considerable tenacity in their continuing battle with the Supreme Court over programs of aid to parochial schools. The latest round in this contest, *Wolman v. Walter*,[156] represents both a victory for persistence and a retrenchment for resistance. The Ohio legislature, aware of the result in *Meek*, enacted a statute providing various types of aid to private elementary and secondary

153. Meek v. Pittenger, 421 U.S. at 372.

154. *Id.*

155. At least one member of the Court does see such a threat. "I see at least as much potential for divisive political debate in opposition to the crabbed attitude the Court shows in this case." *Id.* at 386 (Burger, C. J., dissenting).

156. 433 U.S. 229 (1977).

schools. Four of the six forms of aid reviewed by the Court in this case were upheld; the other two were struck down, although a considerable effort of judicial calculus is required to sort out these results.[157]

In the end, six justices agreed that textbook loans to students in parochial schools are still constitutionally permissible, although for the first time several dissenters argued that *Allen*[158] should be overruled.[159] The section of the Ohio statute authorizing the expenditures "[t]o supply for use by pupils attending nonpublic schools . . . such standardized tests and scoring services as are used in the public schools of the State"[160] was also supported by six justices. An earlier case, *Levitt v. Committee for Public Education & Religious Liberty*[161] was distinguished on the ground that the specific constitutional infirmity in *Levitt*, that there was no available means "to assure that internally prepared tests are free of religious instruction,"[162] had been cured under the Ohio scheme because "[t]he nonpublic school does not control the content of the test or its result. This serves to prevent the use of the test as a part of religious teaching, and thus avoids that kind of direct aid to religion found present in *Levitt* . . . [and] eliminates the need for the supervision that gives rise to excessive entanglement."[163]

The real success of the Ohio effort to aid parochial school students, however, came with the approval of two provisions of the statute authorizing diagnostic[164] and therapeutic[165] services. Since the Court had

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157. For some idea of the nightmare which the members of Court created, reproduced below is the final paragraph from a syllabus to the Court's opinion in *Wolman*.

> BLACKMUN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, V, VI, VII, and VIII, in which STEWART and STEVENS, J.J., joined; in which as to Part I, BURGER, C.J., and BRENNAN, MARSHALL, and POWELL, J.J., also joined; in which as to Part V, BURGER, C.J., and MARSHALL and POWELL, J.J., also joined; in which as to Part VI BURGER, C.J., and POWELL, J., also joined; in which as to Parts VII and VIII, BRENNAN and MARSHALL, J.J., also joined; and an opinion in which as to Parts II, III, and IV, BURGER, C.J., and STEWART and POWELL, J.J., joined. BURGER, C.J., dissented from Parts VII and VIII. BRENNAN, J., . . . MARSHALL, J., . . . and STEVENS, J., . . . filed opinions concurring in part and dissenting in part. POWELL, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part. . . . WHITE and REHNQUIST, J.J., filed a statement concurring in the judgment in part and dissenting in part. . . .

Id. at 231-32.

158. 392 U.S. 236 (1968).

159. *See* opinions of Mr. Justice Marshall, 433 U.S. at 256-62; and Mr. Justice Stevens, *id.* at 264-66.

160. OHIO REV. CODE ANN. § 3317.06(J) (Supp. 1976).

161. 413 U.S. 472 (1973).

162. *Id.* at 480, *quoted in* Wolman v. Walter, 433 U.S. at 239.

163. Wolman v. Walter, 433 U.S. at 240-41.

164. OHIO REV. CODE ANN. § 3317.06(D), (F) (Supp. 1976).

165. OHIO REV. CODE ANN. § 3317.06(G), (I), (K) (Supp. 1976).

invalidated similar programs two terms earlier in *Meek v. Pittenger*,[166] this success was indeed surprising. With respect to diagnostic services, the Court noted that it invalidated the portion of the Pennsylvania statute in *Meek* which authorized such services "only because it was found unseverable from the unconstitutional portions of the statute."[167] The Court also recalled that it had emphasized that such services seemed "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."[168] It was not, therefore, terribly surprising that the Court upheld this portion of the Ohio Code.

The fate of the therapeutic services, however, was a surprise. In *Meek* the Court had found that personnel engaged in therapeutic services, which, unlike diagnostic ones, tend to be based upon a continuing relationship between the therapist and the student, were actually in a position to transmit ideological views. Therefore, a danger arose that pressure from the pervasively sectarian atmosphere of the church-related school might cause even public school personnel to inadvertently foster religious beliefs. The Ohio legislature, conversant with the decision in *Meek*, provided for therapeutic services to be rendered by public school personnel either on public school premises, in public centers, or in mobile units located off the nonpublic school premises. The Supreme Court found that the therapeutic services "are to be offered under circumstances that reflect their religious neutrality," and therefore, "the danger perceived in *Meek* does not arise."[169]

The Ohio legislature's attempt to provide instructional materials, however, was unsuccessful.[170] Following the precedent of *Allen* in which textbooks loaned directly to nonpublic school students were approved, the Ohio legislature sought to provide other instructional materials and equipment via a loan system to students or their parents. This, it was believed, would overcome the hurdle of aid to the sectarian school enterprise as a whole found fatal to the similar statutory scheme of *Meek*. The Supreme Court was not persuaded, stating that "it would exalt form over substance if this distinction were found to justify a result different from that in *Meek*."[171] The Court went on to point out that the

166. 421 U.S. 349 (1975).

167. Wolman v. Walter, 433 U.S. at 244.

168. *Id.* at 243 (quoting from Meek v. Pittenger, 421 U.S. at 371 n.21).

169. *Id.* at 247.

170. The Court also struck down the section of the Ohio Code which authorized field trip transportation. *Id.* at 255.

171. *Id.* at 250.

real infirmity arose because of the "impossibility of separating the secular education function from the sectarian" which means that any state aid in support of the educational function of the parochial schools "inevitably flows in part in support of the religious role of the schools."[172] The opinion for the Court, written by Mr. Justice Blackmun, does not explain why a test tube is different in this respect from a textbook. Some of the dissenting and concurring Justices argued that there was no constitutional difference between the two, but, unfortunately, some of them would hold both bus rides and textbooks unconstitutional.[173]

The Court never explained why state aid to provide loans of textbooks and bus transportation for children attending parochial schools does not have the same "primary effect of aiding religion."[174] The same bus carrying the child to his science laboratory also carries him to his religion class and the secular textbooks, no more and no less than the secular maps and secular test tubes, are used in an educational environment "in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission."[175] What principle distinguishes one case from the other? The best indication from the language quoted above is that no principle is involved. The Court has merely made a prudential judgment that some aid is permissible but too much is unconstitutional.

Logical inconsistency, however, is merely the product of a more fundamental problem—the Court's insistence upon a rigid conception of separation at the expense of free exercise values. The necessary consequence of these decisions is that free secular education is available to some only if they are willing to forego their right to choose an integrated secular and religious education in accordance with their religious beliefs.

K. "Purpose and Effect": Down the Garden Path to Unconstitutionality

What began with the *Everson* decision as a commitment to neutrality in the relations of church and state under the establishment clause [176] has

172. *Id.*

173. Justice Marshall went so far as to opine that "*Allen* is largely responsible for reducing the 'high and impregnable' wall between church and state erected by the First Amendment." *Id.* at 257.

174. *Id.* at 242.

175. Meek v. Pittenger, 421 U.S. 349, 366 (1975) (quoting from Hunt v. McNair, 413 U.S. 734, 743 (1973)).

176. "[The first a]mendment requires the State to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

evolved into an apologetic hostility to religious groups seeking substantive realization of the right to free exercise.[177] The explanation for much of this must remain in the recesses of the judicial minds that shaped the parameters of the establishment clause in the intervening years. Time and again the conceptual apparatus which appeared to promise an even-handed analysis of church-state relationships has been perverted into a weapon against non-Protestant believers. The very concept of "neutrality" has led to decidedly nonneutral results, an outstanding example of which is to be found in the Sunday closing law cases.[178]

In *McGowan v. Maryland*,[179] Justice Frankfurter suggested a mode of analysis which seemed to promise a balanced approach. There he stated:

> These regulations may fall afoul of the Constitutional guarantee against infringement of the free exercise or observance of religion. Where they do, they must be set aside at the instance of those whose faith they prejudice. But once it is determined that a challenged statute is supportable as implementing other substantial interests than the promotion of belief, the guarantee prohibiting religious "establishment" is satisfied.[180]

Justice Frankfurter agreed with the majority that contemporary Sunday closing laws, whatever their historical origins, promote substantially secular interests and that, regardless of the incidental benefit to religion, such laws are constitutional under the establishment clause.[181]

In a companion case, *Braunfeld v. Brown*,[182] in which an Orthodox Jewish merchant demonstrated that the Sunday closing laws caused him severe financial hardship because they did not exempt Saturday Sabbath observers, Justice Frankfurter was not persuaded by his own caveat respecting potential threats to free exercise.[183] The majority were similarly unmoved,[184] although the Justices dissenting in each of the cases discussed the discriminatory treatment afforded Sabbatarians by the Court's analysis.[185]

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177. However great our sympathy for the burdens experienced by those who must pay public school taxes at the same time that they support other schools because of the constraints of 'conscience and discipline' and notwithstanding the 'high social importance' of the State's purposes, neither may justify an eroding of the limitations of the Establishment Clause now firmly emplanted [sic].

PEARL v. Nyquist, 413 U.S. 756, 788-89 (1973) (citations omitted).

178. *See* McGowan v. Maryland, 366 U.S. 420 (1961) and its companion cases.

179. 366 U.S. 420 (1961).

180. *Id.* at 466 (Frankfurter, J., concurring).

181. *Id.* at 504-05.

182. 366 U.S. 599 (1961).

183. *Id.* at 610.

184. *Id.* at 605-06.

185. If the "free exercise" of religion were subject to reasonable regulations . . . or if all laws "respecting the establishment of religion" were not proscribed, I

Two years after *McGowan*, the language of Justice Frankfurther, quoted above, was transformed into one of the major criteria to be used by the Court in subsequent establishment clause cases. In *Abington v. Schempp*,[186] Justice Clark, writing for the majority, stated the "test" as follows:

> [W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[187]

One might reasonably have expected the Court to apply this test in subsequent cases in a manner consistent with the Court's approach to the Sunday closing law cases. In these cases, the Court, recognizing the legitimate secular goals sought by Sunday closing laws, refused to invalidate them under the establishment clause although a religious benefit was also derived from them. This benefit was thought to be incidental to the otherwise valid legislative objectives in spite of clear historical evidence of religious motivation for such legislation throughout much of its existence.[188] The majority, in upholding the Sunday closing laws,

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> could understand how rational men, representing a predominantly Christian civilization, might think these Sunday laws did not unreasonably interfere with anyone's free exercise of religion and took no step toward a burdensome establishment of any religion.
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> . . . I do not see how a State can make protesting citizens refrain from doing innocent acts on Sunday because the doing of those acts offends sentiments of their Christian neighbors.

366 U.S. 420, 561-62 (Douglas, J., dissenting). "[T]he issue in this case . . . is whether a State may put an individual to a choice between his business and his religion. The Court today holds that it may. But I dissent, believing that such a law prohibits the free exercise of religion." 366 U.S. 599, 611 (Brennan, J., concurring and dissenting). "Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand." 366 U.S. 599, 616 (Stewart, J., dissenting).

186. 374 U.S. 203 (1963).

187. *Id.* at 222.

188. Clear evidence of religious purpose (at least of the historical variety) can be gainsaid from the language of the very laws at issue in McGowan v. Maryland. *See, e.g.*, MD. ANN. CODE, art. 27 "Sabbath Breaking":

> §492. Working on Sunday; permitting children or servants to game, fish, hunt, etc.—No person whatsoever shall work or do any bodily labor on the Lord's day, commonly called Sunday; and no person having children or servants shall command, or wittingly or willingly suffer any of them to do any manner of work or labor on the Lord's day (works of necessity and charity always excepted), nor shall suffer or permit any children or servants to profane the Lord's day by gaming, fishing, fowling, hunting or unlawful pastime or recreation . . . .

showed little or no concern with the incidental but obvious benefit to the Christian religion derived from the promotion of an atmosphere conducive to religious observance. Even the dissenters, excepting Justice Douglas,[189] showed little concern for the establishment aspects of these laws, contenting themselves with an analysis of the resulting interference with the free exercise rights of Sabbatarians.[190]

It was, therefore, somewhat paradoxical to hear the Supreme Court, per Justice Powell, characterize New York's tax credit, tuition reimbursement plan in *PEARL v. Nyquist*[191] in the following language:

> [W]hile the other purposes for that aid—to perpetrate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools—are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions. In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one "advancing" religion.[192]

Justice Powell's footnote thirty-nine is even more astonishing. In answer to criticism from fellow justices that he had ignored the immensely significant modifier "*primary*" in the purpose and effect test, he said:

> Our cases simply do not support the notion that a law found to have a "primary" effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion. In *McGowan v. Maryland*, Sunday Closing Laws were upheld, not because their effect was, first, to promote the legitimate interest in a universal day of rest and recreation and only secondarily to assist religious interests; instead, approval flowed from the finding, based upon a close examina-

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Compare this with the original Biblical injunction:

> Remember the sabbath day, to keep it holy. Six days shalt thou labour, and do all thy work; but the seventh day is a sabbath unto the LORD thy God, in it thou shalt not do any manner of work, thou, nor thy son, nor thy daughter, nor thy man-servant, nor thy maid-servant, nor thy cattle, nor thy stranger that is within thy gates; for in six days the LORD made heaven and earth, the sea, and all that is in them, and rested on the seventh day; wherefore the LORD blessed the sabbath day, and hallowed it.

EXODUS 20:8-11 (THE HOLY SCRIPTURES according to the Masoretic Text).

189. Justice Douglas' opinion in *McGowan* expresses concern with both establishment and free exercise clause violations. 366 U.S. at 524 (Douglas, J., dissenting).

190. Both Justice Stewart and Justice Brennan expressed the opinion that the Sunday closing laws without exemptions for Sabbatarians violated their rights to the free exercise of religion. Braunfeld v. Brown, 366 U.S. 599, 610 (1961).

191. 413 U.S. 756 (1973).

192. *Id.* at 783, 788.

> tion of the history of such laws, that they had only a remote and incidental effect advantageous to religious institutions.[193]

Rhetoric is a weapon against which analytic skills pale, but it does seem obvious that the Court's application of the "purpose and effect" analysis in *PEARL* is discordant with its application to the Sunday closing law cases. In the latter cases, the test was applied benignly in the face of religiously ladened statutory language and a history of religious, as well as secular, purpose and effect. In *PEARL*,[194] *Meek*,[195] and *Wolman*,[196] the test was used with the exactitude of a Geiger counter attuned to the presence of even the slightest possibility of a religious benefit.

The decisions of the Supreme Court in this sensitive area of church and state, as outlined above, suggest the possibility of nonconstitutional factors at work. The blatant inconsistencies in the application of the Court's own standards of decision are veiled only by the Court's continuing reliance upon rhetoric and the convenient, but selective, use of history to suit its purposes. The result, not surprisingly, has been the perpetuation of a Protestant conception of religion and the scope of its protection due under the first amendment.

V. Some Reflections on Religion, Democracy, Federalism, Judicial Review, and the Establishment Clause

Perhaps the most fundamental tension implicit in the religion clauses of the first amendment is derived from the Court's interpretation that the establishment clause mandates not only a separation of church and state in the political and administrative sense, but also in the sense of creating an inviolable separation between civil society and the religious realm.[197]

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193. *Id.* at 783-84 n.39 (citations omitted).

194. 413 U.S. 756 (1973).

195. 421 U.S. 349 (1975).

196. 433 U.S. 229 (1977).

197. Justice Rutledge, joined by Justices Frankfurter, Jackson, and Burton, dissenting in Everson v. Board of Educ. put it as follows:

> The [first a]mendment's purpose was not to strike merely at the official establishment of a single sect, creed, or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.

330 U.S. at 31-32.

Another expression of this concept of total separation, which originated with Roger Williams, was used by Justice Black for the majority in *Everson*: "[T]he clause against establishment of religion by law was intended to erect a 'wall of separation between church and State.' " *Id.* at 16.

Under this interpretation, the two spheres of activity are to be clearly delineated and any interference of one with the other forbidden. But, of course, the first amendment also contains a free exercise clause, to protect the individual believer in the observance of the tenets of his or her faith. The Court's interpretation of the establishment clause so as to provide maximal separation must implicitly presuppose that the guarantee of free exercise can nevertheless be fully accommodated within such a universe, unless we are to understand the Court as saying that absolute separation is of the essence, although full realization of the free exercise mandate may thereby be compromised.

The idea that the guarantee of free exercise can be fully realized, in spite of a conception of total separation under the establishment clause, rests upon an essentially Protestant conception of religion and its proper role in the affairs of men. That is to say, religion can and should be separate from political and economic life.[198] This view excludes

> religion as "divisive" or as separated by constitutional fiat from the common and public arena, thereby subordinating religious affirmation to a superior civic faith. One encounters rather often the attitude that the "creeds" or "sects" are peripheral and private and of only individual or family significance; they should not "meddle" in the public arena. The real faith of society is "democracy" to which some may add a subordinate private religious creed if they want to.[199]

This characteristic posture of American Protestantism is, however, not universally shared by other faiths. To some believers, "[s]uch a point of view is naturally offensive . . . for it misunderstands the necessarily transcendent and all encompassing relevance of religion."[200] To such an individual the total separation of faith from the experience of everyday

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198. Justice Jackson, dissenting in *Everson*, frankly acknowledged this ideology and its relationship to the rise of public education in the United States when he said:

> Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values. It is a relatively recent development dating from about 1840. It is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion. Whether such a disjunction is possible, and if possible whether it is wise, are questions I need not try to answer.

330 U.S. at 23-24 (footnote omitted).

199. W. MILLER, RELIGION AND THE FREE SOCIETY 13 (1958) (Fund for the Republic Pamphlet).

200. *Id.* at 13.

life is impossible. His religious universe is not separable, indeed its essence is its nonseparability from the totality of human experience.[201]

How then can the free exercise rights of the dissident believer, the non-Protestant, which by their very nature require integration of civil and religious spheres be reconciled with an establishment clause interpretation which demands their absolute separation? The plain answer is that they are irreconcilable. The fanciest rhetorical footwork cannot overcome this difficulty. The recurrent emergence of this fundamental tension in numerous cases before the Court and the Court's failure to address the issue directly leads inevitably to an alternative explanation that: in spite of the interference with the free exercise rights of certain religious minorities, absolute separation of church and state—or the closest approximation the Court can reach—must be the overriding concern.[202]

Perhaps the most revealing and at the same time the most frustrating aspect of this problem is the Court's failure to deal explicitly with the apparent conflict. To do so would require the Court to make a difficult decision. It might have to decide that its interpretation of the establishment clause was erroneous or that it had outlived its usefulness and was

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201. Justice Jackson also saw this problem clearly when he observed that:

> The Roman Catholic Church, counseled by experience in many ages and many lands and with all sorts and conditions of men, takes what, from the viewpoint of its own progress and the success of its mission, is a wise estimate of the importance of education in religion. It does not leave the individual to pick up religion by chance. It relies on early and indelible indoctrination in the faith and order of the Church by the word and example of persons consecrated to the task.
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> . . .
>
> I should be surprised if any Catholic would deny that the parochial school is a vital, if not the most vital, part of the Roman Catholic Church. . . . Catholic education is the rock on which the whole structure rests . . . .

Everson v. Board of Educ., 330 U.S. at 23-24. A similar position could be articulated for the Orthodox Jewish community as well.

202. Professor Howe suggested an interpretation of the two clauses which is more fundamentally consistent with the historical intent of the first amendment. It seemed to him that:

> [T]oday's liberals have not sufficiently recognized the complexities of motive which fashioned the policy of separation, [and that] the justices have been compelled by the very structure of the First Amendment's prohibitions to acknowledge [until recently] that it sought to do something more secure the people from ecclesiastical depradations. For the prohibition is not only against the enactment of laws respecting an establishment of religion; it is against the making of laws prohibiting its free exercise. The specificity of this second assurance makes it clear beyond controversy that the framers could not have intended the policy of separation, enunciated in the prohibition of establishment, to frustrate or inhibit the religious experience.

M. DEWOLFE HOWE, *supra* note 44, at 10.

responsible for the apparent irreconcilability between the establishment clause and the free exercise clause. Alternatively, it might be required to choose between the two conflicting first amendment values, nonestablishment and free exercise, in situations in which both cannot be achieved simultaneously. Neither is a determination which the Court would enjoy making. In one case, it must concede and explain its error. This might require tacit recognition of the role of religious preconceptions in its earlier decisions. In the other, it must decide which of two fundamental principles of the Constitution must be sacrificed if both cannot be fully realized. Neither is an enviable task but the Supreme Court cannot continue to do implicitly what it refrains from doing explicitly without bringing disapprobation upon itself.

At the most fundamental level, the conflict between a Protestant world view and that of some other religions as it relates to the question of public support for religiously oriented schools is that while it is the essence of Protestantism to maintain separate spheres of religious and civil activity, it is equally fundamental to Catholicism, Orthodox Judaism, and some other religious faiths that such a separation is inconceivable. The public school, which is the reflection of this prevailing Protestant ideology, conflicts at the most fundamental level with the beliefs and practices of observers of the other tradition.[203] There is therefore no satisfactory choice available to the observant parent who holds this alternative world view. His children must, according to the fundamental tenets of his faith, pursue an integrated education, one in which secular knowledge and religious training are necessarily intertwined. It is not that secular education is irrelevant or even less important, it is simply that it must not, indeed cannot, be separated from an ancient and profound religious ideology.[204]

The implicit assumption in the Supreme Court's approach to the issue of aid to parochial schools, that "neutrality" under the establishment clause is achieved by the availability of public education for all children, completely ignores this basic fact. The choice is not between public and parochial education; it is between public education and religion. In order

203. *See* notes 197, 199 & 201 *supra*, & 204-05 *infra*.

204. As a matter of fact, the State maintains a system of schools which is not completely satisfactory to Catholics, inasmuch as no place is given to morality and religion. Since the Church realizes that the teaching of religion and instruction in the secular branches cannot rightfully or successfully be separated one from the other, she is compelled to maintain her own system of schools for general education as well as for religious instruction. . . .

2 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 654 (1950) (quoting Monsignor John A. Ryan).

to receive the benefits of public education under the Court's interpretation of the establishment clause, these believers must sacrifice the very essence of their respective faiths—the belief that the religious and secular orders cannot be separated. This is not a "neutral" result. It provides Protestants and nonbelievers with the benefits of public education while denying others the benefits of public education unless they are willing to succumb to the prevailing ideology of separation. This result is offensive to the principle of free exercise as protected by the first amendment.

The explanation for the Court's failure to recognize this aspect of the establishment-free exercise problem and its failure to acknowledge the inequality of the freedom of religion which results is attributable to the longstanding and deeply ingrained liberal tradition in American law which does not concern itself with substantive inequality. Within this tradition, the commitment of the law to equality is restricted to a formal conception of equal access to legal and political institutions. Substantive inequality is attributed to the nature of things. Differential access to power and material wealth is explained by the unequal distribution of natural talent and capacity—not by differential treatment under existing law.[205] The law treats all persons equally. In the words of Anatole France, "The law, in its majestic equality, forbids the rich as well as the poor man to sleep under bridges."[206] Likewise, the Constitution, as interpreted by the Supreme Court, permits the states to provide free secular education to all children—Catholics, Orthodox Jews, Protestants, and nonbelievers—in the public schools.

The problem is, however, infinitely more complex than the comparatively simple question of equality of educational opportunity. It is not merely the gap between a conception of formal legal equality of access and the resulting substantive inequality of benefit. The fact that the resulting inequality is inextricably the product of the exercise of the right to freedom of religion poses a whole new dimension to the problem. Children are being denied participation in a substantial public benefit precisely because of their (or their parents) decision to undertake the obligations imposed upon them by their faith. It is clear not only that the denial of access to free educational services results from the free exercise of religion, but that the availability of public education, under these circumstances, works as a disincentive to free exercise. The economic pressure to forego religiously oriented education is strong, particularly among low income Americans.

205. The prevailing liberal ideologies of meritorious reward and the rule of law present formidable obstacles to even a discussion of substantive equality.

206. A. FRANCE, LELYS ROUGE ch. 7 (1894).

When a state imposed a tax on the sale of religious literature, the Court struck it down as a burden upon the free exercise of religion.[207] The economic consequences of such a tax are considerably less severe than those which result from the inability to participate in so substantial a benefit as free education, yet the Court has given little more recognition than a deferential nod toward the financial burdens of parochial school parents. Nor has it demonstrated any inclination toward a type of equal protection analysis in such situations.[208] An analysis based upon equal protection criteria might prove fruitful. However, it might be impeded by the same ideological biases which underlie the Court's direct analysis of establishment and free exercise cases. Although there is basis for an equal protection analysis,[209] it is likely that the Court would implement its traditional nonestablishment rhetoric to find a compelling state interest which would justify any discrimination established.

In the last analysis, the success of any such claim to equal protection or free exercise must ultimately rest upon a substantive conception of those rights. It is unlikely that the present Court will embark upon the journey from a limited conception of formal legal equality to a broad conception of substantive social equality; and perhaps it should not, if it must do so by the imposition of a constitutional mandate upon the states. However, the Court should not stand as an obstacle to the enactment of state legislation recognizing the substantive content of individual rights—in particular, the right to the free exercise of religion.[210] The Court's recent approach can lead only to continued invalidation of state legislation coupled with an increase in state-federal antagonism and a consistent undercurrent of public criticism.

One of the most persistent problems for the Supreme Court in constitutional decision-making is maintaining its own legitimacy. The

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207. Follett v. Town of McCormick, 321 U.S. 573 (1944).

208. In his dissenting opinion in Meek v. Pittenger, Justice Burger criticized the Court for precisely this omission. 421 U.S. at 387.

209. In the case of a challenge to state aid to parochial schools, for instance, the state might argue that the failure to provide such assistance would result in a denial of the equal protection of the laws to children (and parents) who attend religiously oriented schools. Such aid, the state might argue, does not advance religion, but merely equalizes the secular educational benefits of all children attending schools within the state. Since the decision not to provide equal benefits to all such children would necessarily impinge upon the fundamental right to the free exercise of religion (e.g., choice of parochial over public school), any such decision must be based upon a compelling state interest to offset what would seem, on its face, to be a suspect classification (defined by religious criteria) and to interfere with a fundamental right.

210. See the earlier discussion of the proper role of the Supreme Court in mandating constitutional behavior as opposed to forbidding unconstitutional behavior, *supra* at 43-44.

Court is not, after all, asked to decide important questions of law which are at the same time important problems of social, political, and economic relations simply because it is the repository of superior wisdom. It is authorized by the Constitution to decide cases and controversies arising under the "Constitution [and] the Laws of the United States . . ."[211] It ought, therefore, to exercise a reasonable amount of circumspection in repeatedly invalidating state legislative efforts in such a sensitive area of law.

The conception of a federal government with strong but clearly defined and limited powers is one which dominated the constitutional convention at Philadelphia.[212] The judiciary, like the two political branches of the new government, was given limited authority. The essential concern of the founding fathers which formed their conception of limited sovereignty for the federal government was their jealousy of state sovereignty.[213] While their very presence at the convention bespeaks their recognition of a need for a strong central authority, it does not indicate a unanimity of opinion as to how and to what extent the central government should be so empowered. The present constellation of state and federal powers was not contemplated by the original framers. It is instead the result of social, economic, and political change. But the substantial redistribution of authority from the state to the federal government ought not to be interpreted as a total abdication of state sovereignty. The states retain significant autonomy in matters of educational policy and public welfare.[214] Only when the constitutional mandate is clear and unequivocal should the Supreme Court strike down efforts by state legislatures to provide public welfare benefits to more citizens when the rights of other citizens are not compromised in any measurable way.

It is surely too late in the development of contemporary legal consciousness to suggest that the exercise of prudential judgment should be left to the legislature alone in the exercise of the sovereign authority delegated to it. Similarly, it no longer seems plausible from our post-realist perspective to argue that the judiciary is by its very nature confined to the articulation and application of legal rules. Conceding the foregoing propositions, it is nevertheless useful to suggest that, as limiting conceptions, these ideas continue to mediate between our fear of

211. U.S. CONST. art. III, § 2, cl. 1.

212. M. FERRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 42-52 (1913). *See also* FEDERALIST PAPERS, nos. 6, 9-10, 21, 23, 41, 45, & 85.

213. J. MADISON, FEDERALIST PAPERS No. 45.

214. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

judicial tyranny and our eschatological expectations of judicial activism when the "political" departments seem inadequate to deal with the problems of the day. We are neither willing to delegate wholesale legislative powers to the judiciary nor are we ready to demand a return of these "quasi-legislative" powers assumed by it under the guise of interpretation, application, and review of existing legislation. Somewhere between judicial hegemony and impotence lies a realm of activism tempered with appropriate restraint. This is an extraordinarily difficult concept of sovereignty to define because it is one which must of necessity be capable of expansion and contraction as circumstances warrant. But it does have limits and the best judges are those who most accurately perceive, in any given temporal or conceptual framework, the boundaries within which their judicial power must be exercised.

Judges are motivated by ideological considerations as well as by the legal and political constraints under which they operate. There is nothing new in the suggestion that legal thought, like other categories of intellectual inquiry, is infused with the ideological biases of its creators.[215] That fact, however, remains a persistent thorn in the side of a judiciary seeking to maintain its legitimacy in a world of perpetual social and political flux.

The religion clauses are peculiarly susceptible to ideological interpretation because of the pervasive impact of religious ideology on categories of thought. America has been a predominantly Protestant culture, and remains so in spite of its large proportion of non-Protestant population. The insistence of the Supreme Court on imposing a single, inflexible standard upon church-state relationships throughout the states under the establishment clause has not contributed to the creation of a climate in which non-Protestant ideology can flourish in the public arena. Although it is clear from legislation reaching the Court that sympathy for other religious groups has risen, particularly in the area of education, it is equally apparent that the Court's flexibility quotient in the area of establishment has not risen. It has, if anything, diminished.

It is perplexing that as the judicial tolerance for political compromise in the area of religion has decreased, the Court's expressed concern for "political divisiveness" engendered by religious issues has increased.[216]

215. Not only has the ideological character of thought been a major preoccupation of such theorists as Marx, Weber, and Mannheim, but legal scholars and judges, as well, have labored to expose and criticize the manifestations of ideological biases in legal thought. The political polemics of Justice Felix Frankfurter as well as pleas from academics, such as Professor Wechsler, *e.g.*, H. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), are illustrative.

216. *See, e.g.*, Meek v. Pittenger, 421 U.S. 349, 372, 374-75 (1975); PEARL v. Nyquist,

The proliferation of legislation accommodating diverse religious groups in the free exercise of their respective faiths tends to support the conclusion that the "political divisiveness" of such legislative solutions has diminished. Nevertheless, the Court's continuing rejection of these legislative solutions appears to be creating just the potential for political divisiveness it purportedly seeks to prevent[217] by keeping the issues alive in state legislatures seeking to discover ways to overcome the constitutional obstacles raised by the Court in this area.[218]

State legislatures are, in the final analysis, better barometers of the social and political climate in America than the Supreme Court, which tends to be more isolated from the realities of political life. It would be dangerous and incorrect to suggest that public opinion ought to be a reason for altering clear and unequivocal constitutional principles. But there is often a relevant distinction to be drawn in the constitutional decision-making process between questions of constitutional permissibility and questions of constitutional mandate. This is especially true when the language of the Constitution itself is less than decisive.

One of the means by which the Court could extricate itself from the presently irreconcilable morass of judicial opinions under the religion clauses of the first amendment would be to give greater recognition to the distinction between permissible and mandatory constitutional results.[219] By permitting greater autonomy to state legislatures in the resolution of problems of equality of access to educational benefits which touch upon church-state relations, the Court might nevertheless uphold the great tradition of noncoercion which has, in theory, characterized religious toleration in the United States.[220] In so doing, it would promote

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413 U.S. 756, 796-97 (1973); Lemon v. Kurtzman, 403 U.S. 602, 623 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 694-95 (1970) (Harlan, J. concurring).

217. Chief Justice Burger chided the majority on this point in Meek v. Pittenger when he said, "[i]ndeed, I see at least as much potential for divisive political debate in opposition to the crabbed attitude the Court shows in this case." 421 U.S. at 386.

218. The Court, by its own acknowledgement, recognizes the dilemma it has created. Justice Powell in his opinion for the Court in PEARL v. Nyquist, rejecting New York's tax credit plan, quipped, "[O]ur cases, however, have long since foreclosed the notion that mere statistical assurances will suffice to sail between the Scylla and Charybdis of 'effect' and 'entanglement.' " 413 U.S. at 787-88.

219. A recent example of such a distinction can be found in cases dealing with the requirement of a jury trial under the fourteenth amendment. *E.g.*, Apodaca v. Oregon, 406 U.S. 404 (1972); Williams v. Florida, 399 U.S. 78 (1970).

220. The increasing difficulties faced by private schools in our country are no reason at all for this Court to readjust the admittedly rough-hewn limits on governmental involvement with religion which are found in the First and Fourteenth Amendments. But, quite understandably, these difficulties can be expected to lead to efforts on the part of those who wish to keep alive pluralism in

not only greater equality of educational opportunity for all American school children, but legislative autonomy and responsibility as well. It would thereby transform *PEARL v. Nyquist* and *Meek v. Pittenger* into the "*Lochners*" of a new era of expanded freedom of religion for all Americans.

Until the Supreme Court abandons its assumptions that true religious liberty can be achieved for all people under the first amendment within its antiseptic separationist model of religious and secular activity, the guarantee of religious freedom for all people within the United States will remain elusive. To the extent that the establishment clause continues to be infused with the Protestant ideal of complete separation of public and private spheres of activity the establishment clause will stand as a barrier to true religious freedom for millions of Americans.[221]

If we are not to arrive by indirection at that point of religious intolerance which we avoid by design, we must persuade the Supreme Court that sensitivity by state legislatures to the needs of non-Protestant religious groups seeking social equality does not constitute a first step

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education to obtain through legislative channels forms of permissible public assistance which were not thought necessary a generation ago. Within the limits permitted by the Constitution, these decisions are quite rightly hammered out on the legislative anvil. If the Constitution does indeed allow for play in the legislative joints . . . the Court must distinguish between a new exercise of power within constitutional limits and an exercise of legislative power which transgresses those limits. I believe the Court has failed to make that distinction here, and I therefore dissent.

413 U.S. at 813 (Rehnquist, J., dissenting).

221. I think the Court's mechanistic concept of the Establishment Clause is historically unsound and constitutionally wrong. I think the process of constitutional decision in the area of the relationships between government and religion demands considerably more than the invocation of broadbrushed rhetoric . . . . And I think that the guarantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief or disbelief. . . . I think our Constitution commands the positive protection by government of religious freedom . . . for each of us . . . . With all respect, I think it is the Court's duty to face up to the dilemma posed by the conflict between the Free Exercise Clause of the Constitution and the Establishment Clause as interpreted by this Court . . . . For so long as the resounding but fallacious fundamentalist rhetoric of some of our Establishment Clause opinions remains on our books, to be disregarded at will as in the present case, or to be indiscriminately invoked as in the *Schempp* case, so long will the possibility of consistent and perceptive decision in this most difficult and delicate area of constitutional law be impeded and impaired. And so long, I fear, will the guarantee of true religious freedom in our pluralistic society be uncertain and insecure.

Sherbert v. Verner, 374 U.S. 398, 415-17 (1963) (Stewart, J., concurring) (citations omitted).

toward establishment. Rather it represents a step toward a more substantive conception of free exercise.

What is needed in this sensitive and important area of constitutional law is a model for decision-making which is relevant to the contemporary social, political, and economic context. Such a model must be built upon a revised set of assumptions about the establishment and free exercise clauses of the first amendment. First, these clauses must be seen as inextricably related to one another, infused with a common goal of promoting and assuring religious liberty for all Americans. Second, the meaning of nonestablishment must be revised to comport with a reasoned assessment of its function in the contemporary world. Visions of the Spanish Inquisition are not useful as models of the eventualities against which the establishment clause must guard in the closing decades of the twentieth century. We have been fighting too many paper tigers and may ultimately lose the real battle to secure religious freedom against the effects of prejudice and coercion. A balance must be struck between permissible and impermissible state involvement with the religious enterprise. This balance must assure freedom of religion while preventing the unfortunate consequences of establishment and it must provide adequate guidance to legislators, in order to avoid the continuing confrontation between the states and the Supreme Court over these constitutional issues.

One established conception which must be abandoned is the notion that only a total separation of secular and religious functions can assure our freedom from established religion. Without the interment of this fundamentally Protestant world view, religious freedom will exist for many Americans only at the cost of foregoing substantial secular benefits available to those whose views conform to the separationist ideology. We might return to the mode of analysis suggested by Mr. Justice Frankfurter in *McGowan v. Maryland*: "once it is determined that a challenged statute is supportable as implementing other substantial interests than the promotion of belief, the guarantee prohibiting religious 'establishment' is satisfied."[222]

This would render irrelevant all issues of peripheral or incidental aid to religion. It would permit the state to provide secular benefits to all individuals who belong to the category requiring them, without exempting those who for reasons of faith are to receive those benefits within a sectarian environment. As long as the secular benefits in fact flow to the individuals sought to be benefited, there should be little need for the

222. 366 U.S. at 466.

state to concern itself with any incidental benefit which may inure to institutions, whether secular or religious.

In this way, those whose religious ideology requires integration of the secular and religious aspects of life would be able to share equally in the multitude of public benefits without sacrificing their religious beliefs. This would enhance the substantive quality of the right to free exercise and would in no conceivable way tend toward establishing any religion.

In the words of Chief Justice Burger,

> One can only hope that, at some future date, the Court will come to a more enlightened and tolerant view of the First Amendment's guarantee of free exercise of religion, thus eliminating the denial of equal protection to children in church-sponsored schools, and take a more realistic view that carefully limited aid to children is not a step toward establishing a state religion. . . .[223]

223. Meek v. Pittenger, 421 U.S. at 387 (Burger, C.J., dissenting).