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Separation of Church and State: And the Wall Came Tumbling Down

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The Supreme Court’s first significant encounter with the First Amendment establishment clause was not until the 1947 case of *Everson v. Board of Education.* Justice Black, after tracing the history of the clause, suggested that its purpose was to erect a wall of separa-

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1. 330 U.S. 1, 18 (1947). Note that in *Everson* the establishment clause was first held to be applicable to the states. Prior to this time the affairs of church establishment were left to the states. This “incorporation” has been challenged by later commentators and judges. See, e.g., Jaffree v. Board of School Comm’rs of Mobile County, 554 F.Supp. 1104 (S.D. Ala. 1983), upholding prayer activities conducted by teachers in public schools, later reversed on appeal, Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983). It has been suggested that the clause was designed primarily as a federalist limitation, i.e., established churches existed in many states when the Bill of Rights was adopted and the main purpose of the clause may have simply been to keep Congress out of the area. See Cord, The Court’s Impact on Religious Freedom, in A CONFERENCE ON JUDICIAL REFORM: THE PROCEEDINGS 100-101 (1982), arguing that Jefferson’s use of the “wall of separation” metaphor referred only to a limitation on Congressional authority. Note that Professor Cord as well as the three other panelists at the Conference all argued that the establishment clause was not intended to apply to the states. *Id.* at 101-114. Professor Cord has expanded on his thesis in his book entitled SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982). He also suggests that neither Madison nor Jefferson were the strict absolutists that Black portrayed them to be in *Everson.* See also Howe, Religion and the Free Society: The Constitutional Question, in SELECTED ESSAYS 1938-62, 31 (1963). These authorities rely heavily on the Blaine Amendment, proposed several years after the adoption of the 14th Amendment, which would have added a provision explicitly prohibiting states from making laws respecting an establishment of religion. It is argued that the restriction would have been superfluous if the 14th Amendment already made the establishment clause binding on the states. However, as Justice Brennan explains, at the time the Blaine Amendment was proposed, it also contained a prohibition against laws interfering with religion—at a time when the 14th Amendment had already been interpreted as protecting against state violation of the free exercise of religion. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 254-55 (1963). Thus this history is not conclusive. See also Curtis, Judge Hand’s History 86 W. VA. L. REV. 109 (1983), criticizing the *Jaffree* court’s historical analysis as defective, for failing to consider Republican legal, political and philosophical thought in the Civil War period, which supports the incorporationist view.
tion between Church and State, a wall "which must be kept high and impregnable." He borrowed the metaphor from Thomas Jefferson, who had been instrumental in fighting the battle for religious freedom in Virginia in 1785—six years before the constitutional amendment was adopted. Ironically, the Supreme Court decision, while citing the metaphor, went on to uphold a New Jersey statute permitting tax-raised funds to pay the bus fares of parochial school pupils as part of a general welfare program providing transportation for all students. Four dissenters argued forcefully that this use of tax dollars violated the purpose of the clause, which 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 of religion.”

The uncertainty as to the meaning and purpose of the Amendment, reflected in this early decision, has never been resolved. Although Everson continued to be a key decision in many "parochial" cases, its "wall of separation" theme failed to provide clear solutions to the difficult questions facing the Court. Despite the absolutist language, between 1965 and 1970 federal assistance to religious schools totaled $250 million. Chief Justice Burger in a 1971 decision suggested that the line of separation "far from being a 'wall,' is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." The Supreme Court has developed a detailed test for analyzing establishment clause problems, but the opinions reflect a gradual erosion of the enunciated standard—an ero-

2. Everson, 330 U.S. at 18. He stated that the Establishment Clause precludes laws which favor one religion as well as laws favoring all religions. Id. at 15.
3. Jefferson's January 1, 1802 letter to the Danbury Baptist Association is quoted in 8 THE WRITINGS OF THOMAS JEFFERSON 113 (Washington ed. 1861). Note the Jeffersonian statement first appeared in Reynolds v. United States, 98 U.S. 145, 164 (1878). Although Jefferson's use of the metaphor reflected his fear that religion would corrupt politics, it has been suggested that Roger Williams, who feared corruption of religion from the taint of politics, first used the phrase. Gorman, Toward a More Perfect Union, in THE WALL BETWEEN CHURCH AND STATE, 41 (1963); Kurland, Of Church and State and The Supreme Court, 29 U. CHI. L. REV. 1, 4 (1961). See also P. MILLER, ROGER WILLIAMS (1953).
5. Id. at 31-32. Note also the language used by Justice Frankfurter in McCollum v. Board of Educ. 333 U.S. 203, 231 (1948): "Separation means separation, not something less. Jefferson's metaphor in describing the relation between church and state speaks of a 'Wall of Separation,' not of a fine line easily overstepped."
8. See infra notes 24-28 and accompanying text.
sion which is probably inevitable in light of the inconsistencies and the internal confusion in its "test."

The Supreme Court's most recent decisions appear to mark the deepest erosion of the wall of separation. In 1983 the Court upheld both tuition tax credits for parochial education,9 and the practice of having prayers and paying a chaplain's salary in a state legislature.10 This year it upheld a city's practice of using tax dollars to display a nativity scene during the Christmas season.11 Outside the judicial arena there have also been numerous attempts to further erode the wall. Congressional bills to remove the prayer issue from the federal courts and to permit periods of silence or voluntary prayer in public schools are being pushed with increased vigor.12 The Reagan administration's proposal of a constitutional amendment to permit prayer in public schools was defeated in the Senate by a vote of 56-44 in March, 1984.13 It is also seeking to aid parochial education through

12. Senator Jeremiah Denton of Alabama is sponsoring a bill that would deny federal aid to school districts that did not allow students at any grade level to use classrooms for religious meetings. S. 1059, 98th Cong., 1st Sess. (1983) (presently on the Senate Calendar, but with no date set for action). Senator Mark Hatfield of Oregon has introduced a similar bill that would extend such privileges only to students in grades 7-12. S. 815, 98th Cong., 1st Sess. (1983).
13. The proposed prayer amendment provides: "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any state to participate in prayer." S.J. Res. 73, 88th Cong., 1st Sess. (1983). President Reagan stated, "The amendment we'll propose will restore the right to pray. . . . Changing the Constitution is a mammoth task. It should never be easy. But in this case I believe we can restore a freedom that our Constitution was always meant to protect." N.Y. Times, May 7, 1982, at B. 10, col. 1. The Senate Judiciary Committee added an amendment, suggested by Senator Thurmond that: "Neither the United States nor any state shall compose the words of any prayer to be said in public schools." This obviously does not cure the essential evil of official government sponsorship of prayers chosen by government officials. It was this proposal that lost in the Senate by at 56-44 vote on March 21, 1984. See 33 CONG. REC. 2901. An alternative amendment, sponsored by Senator Hatch, is limited to permitting silent prayer or meditation in public schools as well as allowing student religious groups equal access to public school facilities. S.J. Res. 212, 98th Cong., 1st Sess. (1984). Note that the Supreme Court has never held that public schools may not set aside a moment of silence, nor that they cannot allow student religious groups to use the facilities (see infra notes 109-110), thus rendering such an amendment unnecessary, while at the same time creating a likelihood of divisiveness across the nation. Note, however, that the Supreme Court recently granted certiorari in the case of Wallace v. Jaffree, 705 F.2d 1526 (11th Cir. 1983), challenging Alabama's statute authorizing "voluntary prayer" in public schools, consisting of one minute of nonactivity for meditation or silent prayer. 52 U.S.L.W. 3713 (April 3, 1984).
the provision of tax incentives. Further, a presidential proclamation was issued making 1983 "the Year of the Bible." And 1984 began with Reagan's formal recognition of the Vatican—a step that other Presidents have refused to take for 165 years.

This lecture will examine the development of the wall, as well as its gradual erosion in recent years. Should the wall be reconstructed—how much entanglement between church and state does the Constitution tolerate? The apparent inconsistencies and the unworkability of the present test suggests the need for new standards.

A. CONSTRUCTION OF THE WALL

The First Amendment reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." The provision thus contains both non-establishment and free-exercise requirements—requirements which at times appear to be in conflict. While some have suggested that the paramount aim of the Religion Clauses was to avoid an establishment of religion, others have argued that the free exercise phrase was intended to be the dominant one. The history behind the provision fails to provide

the Schempp decision. About 150 separate measures by 111 Congressmen to amend the Constitution so as to permit prayer recitation, Bible reading, or both, in the public schools were introduced into Congress. The history of some of these early measures is traced in L. PFEFFER, GOD, CAESAR, AND THE CONSTITUTION, 213-218 (1975). It is interesting that despite the opinion polls indicating that some 80% of Americans favor prayer in the schools, a constitutional amendment has never been adopted. Pfeffer explains that this may be due in part to opposition expressed by religious leaders. He also notes, however, that the trend appears to be moving in favor of a constitutional amendment. For example, the Catholic Church which originally took an anti-school prayer position until 1948, then a pro-prayer position from 1948 to 1963, appeared to accept the Supreme Court's decision in Schempp until 1973. Since that time, however, the Catholic Church has adopted a pro-prayer position. Id. at 355.


17. U.S. CONST. amend. I. Note that the words were proposed by James Madison in the House of Representatives on June 8, 1789. R. CORD, SEPARATION OF CHURCH AND STATE, 5 (1982).

any clear cut answers. The framers were obviously cognizant of the religious wars, especially the Thirty Years' War in the Seventeenth Century, which had decimated Europe from the Reformation on, culminating in the Glorious Revolution of 1688, the dominance of the established Church of England, and the ill treatment of dissenting Protestants and Catholics.\textsuperscript{19} Justice Black, in invoking the wall of separation metaphor, noted that a large proportion of the earlier settlers of this country came from Europe to escape the bondage of laws that compelled them to support government-favored churches. Yet ironically the same practices of the Old World were transplanted to and began to thrive in the colonies where, based on grants from the English Crown, individuals and companies began to erect religious establishments which all residents were required to support and attend.\textsuperscript{20}

The most immediate precursor of the First Amendment was the struggle in Virginia where Thomas Jefferson and James Madison lead the battle in 1785 to reject the renewal of a Virginia tax levy for support of the established church.\textsuperscript{21} Seventeen years after this struggle Jefferson uttered his famous words on the separation of church and state.\textsuperscript{22} The constitutional amendment, ratified in 1791, lay dormant, however, for the first one hundred and fifty-eight years of constitutional history, until the \textit{Everson} decision in 1947. Then after a period of some respite, the 60's brought a sudden great agitation and litigation over church-state relations. The upsurge coincided with the general assertion of civil rights during this period as well as the emergence of voluntary organizations, such as the American Jewish Congress, Protestants and Other Americans United for Separation of Church and State, and the National Catholic Welfare Conference, whose purpose was to champion religious freedom.\textsuperscript{23}


\textsuperscript{21} The Virginia Assessment Bill, a taxing measure for the support of religion, was designed to revive the payment of tithes, a practice which had been suspended since 1777. \textit{See Everson}, 330 U.S. at 36 (1947) (Rutledge, J., dissenting).

\textsuperscript{22} See supra note 2.


Although there was very little litigation during the first 185 years in this country, this does not mean that the separation of church and state did not exist. By the mid 1830's ten states had voluntarily abandoned their establishments of religion. During the 19th Century only one state, Massachusetts, passed a law requiring a reading of the Bible in public schools. Most of the Bible reading laws challenged in the 1960's...
The outcome of this increased litigation was the Supreme Court's expansion of its separationist theory. In a series of cases in the early 60's rejecting school prayer, the Court stated that to withstand the strictures of the establishment clause a government practice had to have a secular legislative purpose and a primary effect that neither advanced nor inhibited religion. Later decisions added a third requirement—that the law not create excessive entanglement between government and religion. The importance of this third prong has remained less than clear. It was first suggested in a decision upholding tax-exempt status for church property. It was then used in Lemon v. Kurtzman to strike down various forms of state aid to sectarian education, which the Court believed would require intolerable government surveillance to assure its dollars were not spent on the religious goals of the schools. In the same decision, Justice Burger expanded on this notion of entanglement to include a concern for the divisive political potential of such programs—a concern reflected in some of the subsequent parochial cases. Later in a 1973 decision, the Court struck several state efforts to aid parochial education below the college level, this time relying primarily on the "effects" prong.

Even as the Court began to solidify a test, it was clear that there was much disagreement on the bench as to which parts were most

were products of the 20th Century. See Johnson and Yost, Separation of Church and State in the United States, 33 (1948).

25. Walz v. Tax Comm'n, 397 U.S. 664 (1970). Generally the courts have found entanglement implicated when the practice at issue brings government officials into close, ongoing contact with the affairs of religious institutions, thereby endangering the independence and integrity of both church and state.
26. Id. at 670, 674-76.
27. 403 U.S. 602 (1971).
28. Id. at 622-24.
29. See, e.g., Meek v. Pittinger, 421 U.S. 349 (1975). Note, however, that the Court has not yet relied on the potential for political divisiveness as the sole basis for invalidating a statute under the establishment clause. The Court expressly refuses to do so in Lynch v. Donnelly, 104 S. Ct. 1355, 1356 (1984). Citing Mueller v. Allen, 103 S. Ct. 3062, 3071, n.11 (1983), the Lynch decision notes that political divisiveness should be explored only in cases which involve a direct subsidy to religious institutions. Lynch, 104 S. Ct. at 1356. A vigorous dissent rejected this limited use of political divisiveness as contrary to precedent, i.e., the concept first appeared in the context of tax exemptions which were viewed as an "indirect" benefit to religion, Id. at 1374-75, n.9 (Brennan, J., dissenting). See Note, The Forbidden Fruit of Church-State Contacts: The Role of Entanglement Theory in its Ripening, 16 Suffolk U.L. Rev. 725, 741 (1982). See also, Decker v. O'Donnell, 661 F.2d 598 (7th Cir. 1980) (payment of federal CETA funds to religious elementary and secondary schools invalidated based solely on political divisiveness).
relevant and how they should be applied. Indicative of the division on the Court is the *Meek v. Pittinger* decision of 1975.\(^{31}\) In that case a Pennsylvania statute was challenged which provided auxiliary services and the loan of instructional materials to parochial schools, as well as text book loans to all children enrolled in non-public elementary and secondary schools. The Court held that aside from the text book loan provision, which paralleled a program upheld in an earlier Supreme Court case,\(^{32}\) the act violated the establishment clause. The Court reasoned that the effect of the aid was directly and substantially to advance religious activity because of the predominantly religious character of the schools.\(^{33}\) The Court set out a four-part test, focusing upon secular legislative purpose, primary effect, the avoidance of excessive entanglement, and political divisiveness. It held that the auxiliary services would require excessive entanglement and would create the danger of creating a politically divisive atmosphere.\(^{34}\) It stated that a program would not be invalidated simply because aid makes it more likely for some children to attend sectarian schools. However, the instructional materials constituted aid which although ostensibly secular, resulted in direct and substantial advancement of religion.\(^{35}\)

Significantly the Court split three-three-three in the decision. Justices Brennan, Douglas and Marshall would have invalidated all three types of programs. They argued that the more recent decisions had overruled the earlier case upholding text book loans, because of the divisive political potential of yearly appropriation debates as well as the excessive entanglement as to the choice of text books.\(^{36}\) Justices Burger, Rehnquist and White felt that all three programs should be approved. The plurality, they said, had ignored the record which demonstrated non-entanglement; simply the potential of entanglement is an insufficient basis to invalidate this type of government assistance.\(^{37}\) Finally Justices Stewart, Blackmun and Powell, voted to uphold only the text book loan program. They found that the instructional materials and equipment constituted direct aid to the school, i.e., they had the primary effect of advancing religion ($12,000,000 was

\(^{33}\) Meek v. Pittinger, 421 U.S. at 363.
\(^{34}\) *Id.* at 372.
\(^{35}\) *Id.* at 366.
\(^{36}\) *Id.* at 378-79.
massive aid); and the auxiliary services were struck mainly because of the entanglement problem. Another part of the act would have permitted the state to provide therapeutic services to students attending parochial schools. A majority held the services could not be rendered on school property because the pressure of the parochial environment on the therapist might cause him to aid in the religious mission. A dissenter responded, "The notion that by setting foot inside a sectarian school a professional therapist or counselor will succumb to sectarianization of his or her professional work is not supported by any evidence." The Court's desire to maintain its separationist posture appeared to approach the ludicrous. The textbook loan program, the only surviving form of assistance, was upheld on the basis of an earlier Supreme Court decision; stare decisis, rather than any true analysis, was the basis for validating this part of the act.

Thus, although the Supreme Court has appeared to apply a clear standard looking to purpose, primary effect, entanglement, and political divisiveness, it is deeply divided as to how the factors should be applied. The distinctions between objectionable and non-objectionable forms of assistance are clearly unsatisfactory. Diagnostic services on school premises are permitted; therapeutic services are not. Math textbooks may be loaned to children in parochial schools; math flash cards or other types of auxiliary services are forbidden. As one commentator observed, the opinions read "like a complicated settlement hammered out at the bargaining table after the give-and-take of negotiation, rather than the product of rational and consistent adjudica-

39. Id. at 367-370.
40. Id. at 369.
41. Id. at 392. (Rehnquist, quoting district court).
42. Id. at 359-362. Note that in the subsequent decision of Wolman v. Walter, 433 U.S. 229 (1977) the Court again upheld a textbook loan program. It admitted in a footnote the discrepancy between Allen and subsequent cases, but concluded that it would not overrule the decision but would simply fail to extend it beyond the textbook loan situation. Id. at 251 n.18. In the same decision the Court upheld the provision of therapeutic services to students off school property, thereby eliminating the constitutional defect in Meek where the services were offered on school grounds. Id. at 247.

43. Meek, at 371 n.21. Note the concurring opinion of Justice Burger suggesting that withholding these important benefits penalizes children because of their parent's choice of religious exercise. Id. at 386. The state clearly has a secular purpose in assisting physically and psychologically handicapped children to reach their maximum potential. The fact that some of these children find themselves in parochial schools should be irrelevant.
44. Id. at 367-373.
tions... on the issue of constitutionality." However, certain trends are apparent. Although until 1970 most forms of aid were approved, the Walz decision and its introduction of an "entanglement" standard, led to disapproval of almost all forms of assistance, thus basically maintaining the wall of separation.

The same separationist approach is reflected outside the context of aid to parochial education. In the 1982 decision of Larkin v. Grendel's Den, Inc., the Court struck a state statute that gave schools and churches the power to prevent the issuance of liquor licenses for establishments within a 500-foot radius of their premises. While conceding that the statute had a secular purpose, (protecting churches and schools from the commotion associated with liquor outlets), the Court struck the statute on the second prong, i.e., the law gave the churches standardless political power, thus having a primary effect of advancing religion. The Court conceded that the city could have passed a direct prohibition in the form of a zoning ordinance which would have been permissible. The constitutional defect, however,

46. Lemon v. Kurtzman, 403 U.S. 602 (1971); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Meek v. Pittenger, 421 U.S. 349 (1975); Wolman v. Walter, 433 U.S. 229 (1977). This line of cases, however, should be contrasted to the Court's approach regarding financial aid to higher institutions, i.e., Tilton v. Richardson, 403 U.S. 672 (1971) (upholding federal construction grants, provided no part of the project is used for sectarian instruction or religious worship); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (upholding Maryland's annual grants to sectarian institutions); Hunt v. McNair, 413 U.S. 734 (1973) (upholding South Carolina construction grants to colleges and universities). At least one authority has challenged the logic of this distinction: "... it is highly questionable to conclude that the risk of sectarian instruction creeping into a parochial school's physical education course is greater than the risk of a similar entry into a college history course." Giannella, Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement, 1971 Sup. Ct. Rev. 147, 175.

Thus despite the Court's reliance on a four prong test, arguably it is really applying a sliding scale approach balancing several factors, i.e., the nature of the benefit or program—is it secular and can the secular be separated from the sectarian? Will the separation require extensive government entanglement? Is the benefit so large as to impermissibly advance religion? Second, looking to the nature of the beneficiary or the character of the institution, the Court has noted the pervasive religiosity at the elementary and secondary school level as contrasted to the environment at a university level. Third, the Court looks at whether the aid goes to parents or directly to the institution; if to the latter, does it free up large amounts of money which can now be spent to promote religion? Fourth, does the aid go to all children or just children attending parochial schools, i.e., how broad is the class of beneficiaries?

47. 103 S. Ct. 505 (1982).
48. Id. at 511.
49. But see, Krebs, The Establishment Clause and Liquor Sales, 59 Wash. L.
was in vesting veto power in a church entity, thereby giving the appearance "of a joint exercise of legislative authority by Church and State" and enmeshing churches in the exercise of substantial government power contrary to the entanglement prong. Further the provision created the danger of political fragmentation and divisiveness along religious lines.

Significantly the Court's 1982 decision relied upon Thomas Jefferson's metaphor of a "Wall" between religious and government as a "useful signpost." It discussed the "symbolic benefit" to religion which would occur from the exercise of such a veto power and it remarked that "the framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions." In short, the Court exhibited a pronounced preoccupation with the possibility of religious strife where the Kingdom of God and the Kingdom of Man find themselves at close quarters. The strong language in Larkin suggests a trend towards even greater disassociation of church and state, perhaps even challenging such church/state cooperative ventures as government-aided religious hospitals and military chaplains. Commentators interpreted Larkin to mean that the wall would be breached whenever government vested discretionary power in religious bodies. Thus, despite the growth of the Moral Majority, the Reagan administration proposals, and the Congressional prayer bills, it appeared that the judiciary at least was going to maintain the wall of separation. Indeed the signals from the Larkin case indicated a rigid separationist approach to the church/state question.

B. THE SUPREME COURT IN 1983-1984: THE WALL BEGINS TO CRUMBLE

Despite the verbiage in Larkin focusing on the wall of separation, three recent major decisions, decided within less than a year, indicate that the wall is not as sturdy as the commentators believed. Further, the decisions reflect the continuing deterioration and the un-

50. Larkin, 103 S. Ct. at 511.
51. Id. at 512.
52. Id. at 510.
53. Id. at 512.
workability of the established test. The two 1983 decisions were so significant as to have led Supreme Court watcher Jessie Choper to call it "The Year of Religion and the Constitution." Although the 1982-83 term began with the Larkin decision, the two subsequent cases reflect a sharp departure from the analysis in that case—a departure which continues in the Court's 1984 decision.

In *Mueller v. Allen* the Supreme Court again struggled with the question of aid to parochial education. As explained earlier, the trend had been to invalidate almost all forms of such assistance. In one of the leading decisions, *Committee for Public Education v. Nyquist*, the Supreme Court in 1973 invalidated a New York Financial Aid program which included a tuition reimbursement plan for low income parents as well as a tax relief system permitting deduction from gross income for middle income parents for each child attending school. The sections were found to have the "impermissible effect of advancing religion." The Minnesota statute challenged in *Mueller* was quite similar to the New York provision in that it allowed state taxpayers to deduct expenses incurred in providing tuition, text books and transportation for their children attending elementary and secondary schools. In the earlier *Nyquist* opinion, Justice Powell wrote that the assistance was impermissible. This time, in *Mueller*, he became part of a five-Justice majority to uphold the scheme.

The Court had little difficulty finding valid secular purposes for the tax relief provision, i.e., it assisted parents in meeting the rising cost of educational expenses, it assured the continued vitality of private schools which relieved the public school system of a tremendous financial burden, and it provided a wholesome competition with public schools.

Much less persuasive was the Court's analysis of the "effects" prong. It reasoned that the deduction was a "true tax deduction"
unlike the provision in *Nyquist* where the system consisted of outright grants to low income parents and where the deduction for middle income parents was unrelated to the amount of money actually expended by any parent on tuition.\(^6^1\) This distinction does not appear to be very relevant. Whether the tax adjustment takes the form of a credit, modification, or deduction appears to be much less significant than the impact of the measure; and here the substantial state-granted benefit to parents who send their children to sectarian schools is clear. Further, the Court stressed that the deduction was available for educational expenses incurred by all parents, including those whose children attend nonsectarian private or public schools. The provision of benefits "to a broad spectrum of groups" was found to mitigate the impermissible effect.\(^6^2\) Again *Nyquist* was distinguished as a case where tuition grants were provided only to parents of children in nonpublic schools. However, as a practical matter 95% of the deductions taken under the Minnesota statute were by parents of parochial school children.\(^6^3\) Thus the primary effect was as much to aid religion as it was in *Nyquist*.

The *Mueller* decision is significant for several reasons. It shows the Court's manipulation of its standard, thus again illustrating the weakness in the three-prong analysis. In addition, as the dissent points out, the assistance here was not restricted to the secular function of the schools, in contrast to the earlier decisions of *Everson* and *Allen* where only textbooks and buses were provided.\(^6^4\) It represents the first time that the Supreme Court has upheld financial support for religious institutions without any reason to assume that the support would be restricted to the secular function of the schools and would not be used to support religious instruction. It may be that the majority properly recognized the important contribution made by private educational institutions and the double expense borne by parents who choose parochial education, thus justifying its equalization of any benefit that can be derived from the statutory classification. The difficulty is that the Court's analysis is weak, failing to provide any analytically sound way of examining the question of aid to parochial education.

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61. *Id.* at 3068.
62. *Id.*
63. *Id.* at 3065.
64. *Id.* at 3072. Note that in *Everson* the assistance was limited to bus fare, whereas in *Mueller* the statute was specifically limited to books which the state had approved for use in public schools.
In a second significant case, *Marsh v. Chambers*, the Court totally abandoned its earlier analysis and adopted an historical approach in order to uphold a practice that could clearly not meet the traditional analysis. The Nebraska legislature began each day of its session with a prayer by a chaplain appointed and paid by the state legislature. In fact, the state elected the same individual, a Presbyterian minister, since 1965 and paid him $319.75 for each month the legislature was in session. The Supreme Court in a 6-3 decision upheld the practice as being one deeply embedded in the history and tradition of the nation. It relied heavily on the fact that a statute providing for the payment of chaplains was enacted by the U.S. Congress in 1789, just a few weeks prior to passage of the Bill of Rights. According to the majority, this unique history indicates that the framers did not view paid legislative chaplains and opening prayers to be a violation of that amendment. Further, the Court stressed the two-century practice as indicating that legislative prayer presents no potential for establishment. The Court found it irrelevant that one chaplain had been selected for sixteen years and had given prayers all in the Judeo-Christian tradition, commenting that the long tenure of the chaplain was due to his performance and the acceptance of the body appointing him, and the content of the prayers was irrelevant where there was no indication that the prayer opportunity had been exploited to advance any one faith or belief.

The majority made no pretense of applying traditional establishment clause standards, for clearly those standards could not be met. The purpose of legislative prayer is preeminently religious rather than secular; the primary effect is clearly religious; and extensive entanglement is problematic where the state is required to monitor and oversee religious affairs to insure that the chaplain limits himself to suitable prayers. As Brennan points out in dissent, the mere appearance of a joint exercise of legislative authority by church and state provides a significant symbolic benefit to religion. Further, the problem of

66. Id. at 3332.
67. Id. at 3334.
68. Id. at 3334 n.10.
69. Id. at 3336. Note Justice Stevens in dissent keys in on this designation of a member of one religious faith for 16 years as constituting a preference of one faith over another. Id. at 3351-52.
70. Id. at 3339. (Brennan, J., dissenting). Recall the Supreme Court's emphasis on symbolic benefits to religion in the earlier Larkin decision, discussed supra notes 47-54 and accompanying text.
divisive political potential had become a reality, the issue having split the Nebraska Legislature on religious grounds. In short, the analysis clearly departs from the Court's earlier opinions, which stressed the separation and neutrality principles of the establishment clause.

Even the Court's reliance on legislative history is misplaced. Brennan points out that Madison, who was one of those voting for the bill authorizing the payment of the first Congressional chaplain, later expressed the view that the practice was unconstitutional. Although sometimes both he and Thomas Jefferson strayed from a strict separationist approach, both recognized the need to protect

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71. Marsh v. Chambers, 103 S. Ct. at 3339.
72. Justice Brennan summarized the serious problems with legislative prayer as follows:
   It intrudes on the right to conscience by forcing some legislators either
to participate in a 'prayer opportunity,' with which they are in basic
disagreement, or to make their disagreement a matter of public comment
by declining to participate. It forces all residents of the state to support
a religious exercise that may be contrary to their own beliefs. It requires
the state to commit itself on fundamental theological issues. It has the
potential for degrading religion by allowing a religious call to worship
to be intermeshed with a secular call to order. And it injects religion
into the political sphere by creating the potential that each and every
selection of a chaplain, or consideration of a particular prayer, or even
reconsideration of a practice itself, will provoke a political battle along
religious lines and ultimately alienate some religiously identified groups
of citizens.

Id. at 3344.

73. Id. at 3344. Others have similarly contested the constitutionality of
   legislative prayer. See A. Stokes and L. Pfeffer, Church and State in the United
   States, 479-81 (1950).

   The author notes that Jefferson secured passage of a treaty with the Kaskaskia In-
   dians pledging the U.S. Government to give $300 to assist them in erecting a Roman
   Catholic church, and for several years, $100 towards the support of a priest. He also
   approved land grants to an evangelical order to propagate "the gospel among the
   heathens." Id. Cord elaborates on this theme in his book Separation of Church and
   State (1982), 36-46. He also notes that James Madison in 1785 sponsored a bill in the
   Virginia Assembly punishing "Sabbath Breakers," as well as a Bill for Public Fasting
   and Thanksgiving. Id. at 217-220. He concludes that the Supreme Court's separationist
   thesis misconstrues history. The historical data is at best inconclusive. As Justice Brennan
   noted in a lengthy footnote in his opinion in Walz v. Tax Comm'n, 397 U.S. 664 (1970),
   Madison in a later essay argued against tax exemptions for churches, the chaplaincy
   practice in Congress as well as in the army and navy, and presidential proclamations
   of days of Thanksgiving. Id. at 684-85, n.5. Jefferson also refused on Establishment
   Clause grounds to declare national holidays of thanksgiving or fasting, viewing such
   as "religious exercises." 11 Jefferson's Writings 428-30 (1905). See also L. Pfeffer,
   Church, State and Freedom, 266 (1967).
against the religious strife which the prayer issue is generating today. Brennan stressed that *Marsh* is a narrow opinion with little impact, but there are obviously other traditional practices that might be subject to the same form of analysis, such as government sponsored Christmas displays.

The decision raises the general question as to whether history and tradition are a sufficient basis for upholding practices which are of dubious constitutionality. Even if history and tradition could be clearly ascertained and reduced to single precepts, the obvious difficulty with an historical approach is that it would condone such onerous practices as race segregation, a tradition once firmly embedded in this country which the Supreme Court has recently denounced even in the face of a free exercise claim. Moreover, as the Court has acknowledged, "No one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence." More specifically as to the religion question, a rigid historical approach fails to recognize that our nation is far more religiously heterogeneous today than it was at the time the Founding Fathers sought to protect religious liberty. Thus, as Justice Brennan noted in the school prayer case, "practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the non-believers alike." Although perhaps *Marsh* cannot generally be read as favoring an historical approach, it does indicate the Supreme Court's willingness to abandon its own doctrine.

In the Supreme Court's most recent encounter with the establishment clause, *Lynch v. Donnelly*, the Court upheld a display by Pawtucket, Rhode Island, of an admittedly religiously significant symbol, a creche, as part of an officially sponsored holiday display. The five-man majority basically followed the *Lemon* analysis, but, as Bren-
nan points out in dissent, its "less than vigorous application of the Lemon test suggests that its commitment to those standards may only be superficial." Indeed, the majority states that it has never felt itself to be confined to any single test. The tenor of the decision is reflected in Justice Burger's introductory remarks. He notes that the wall of separation metaphor is "not a wholly accurate description" of church-state relations in this country. He states that the Constitution mandates accommodation and he gives an exhaustive list of church-state interactions which have been tolerated in the past.

Despite these remarks, the Court proceeds nevertheless to follow the traditional Lemon analysis, finding first that the purpose of displaying a nativity scene is simply to celebrate a national holiday and to depict the origins of that holiday. The most significant point made in the Court's rather fatuous discussion of purpose is its assertion that a law should be invalidated on this ground only where there is no question that the activity is motivated "wholly by religious considerations," thus requiring plaintiffs to meet an extremely difficult standard. The majority rejects Justice Brennan's persuasive argument that the existence of non-sectarian means to accomplish secular goals impugns the city's assertion of a non-religious purpose. The inclusion of a creche which has such a distinctively religious nature tends to demonstrate that sectarian purposes really motivated the city's decision. If any doubt remained, such should have been dispelled by the city's response to the law suit—a major crusade led by the mayor of Pawtucket himself to "keep Christ in Christmas." This suggests that what the city has done is to accept and implement the view of its predominantly Christian citizens that the religiously significant creche should be kept in the Christmas display.

As to the effects standard, the Court simplistically concludes that any benefit to religion is indirect, remote and incidental—in short, no more an advancement of religion than the exhibition of religious paintings in governmentally supported museums. The fact that the city owns the creche and that it expends time, energy, and dollars

80. Id. at 1370-71 (Brennan, J., dissenting).
81. Id. at 1358-59.
82. Id. at 1359.
83. Id.
84. Id. at 1360-61.
85. Id. at 1363.
86. Id.
87. See District Court's findings, 525 F. Supp., at 1173.
88. 104 S. Ct. at 1364.
displaying it, indicates that the city has placed its imprimatur of approval on a particular religious belief. The same significant symbolic benefit to religion that the Court so recently decried in the 1982 Larkin decision has been approved here.89

Finally, the Court found no violation of the entanglement prong in that the display did not require day to day on-going interaction between church and state. Further, it was found that the only political divisiveness came as a result of the commencement of the law suit. There was no evidence of political friction or divisiveness over the creche in the forty year history of Pawtucket's Christmas celebration. What the majority has failed to acknowledge is that its decision will likely result in competing efforts by other groups to gain and maintain their own religious symbols. Further, as Brennan notes in dissent, the quiescence of opponents to the creche may have reflected nothing more than their sense of futility in opposing the majority. Thus divisiveness may have existed during earlier years and clearly the controversy over whether local government can adopt religious symbols will continue to fester.90

The Court states that the symbol poses no real danger to the establishment of religion because it is merely a "passive symbol," and that striking its use would be a "stilted overreaction."91 This is offensive to those for whom the creche has profound significance as a recreation of the birth of their Messiah, an event which lies at the heart of the Christian faith. It is equally offensive to those who do not view the story of Christ as an unavoidable element of our national heritage. Inclusion of a creche in a Christmas display is clearly not necessary to accommodate individual religious expression;92 nor is it in any way necessary to serve secular goals. As Brennan cogently notes in dissent, "... to say that government may recognize the holiday's traditional, secular element of gift giving, public festivities and community spirit, does not mean that government may indiscriminately embrace the distinctively sectarian aspects of the holiday."93 Brennan views the city's action as a "coercive . . . step towards establishing

89. See supra, notes 47-54 and accompanying text.
90. 104 S. Ct. at 1373-75 (Brennan, J., dissenting).
91. Id. at 1365.
92. Note that after the lower court's ruling, a private citizen group, formed by the Mayor, purchased the creche from the city and refurbished it, planning to display it on private property in future years. The fact that a private citizen group can so easily continue the practice of displaying its desired religious symbol indicates the lack of any strong justification for government to do so.
93. Id. at 1378.
the sectarian preferences of the majority at the expense of the minority. . . ."94 Thus although the Court's decision to uphold this practice may not seem terribly critical in comparison to the school prayer or parochiaid cases, it is a significant indication of the Court's willingness to distort its own doctrine and to erode the wall of separation. Thus it too suggests the need for a new analysis.

C. SHOULD THE WALL BE RECONSTRUCTED: HOW MUCH ENTANGLEMENT DOES THE CONSTITUTION TOLERATE?

As the previous discussion indicates, it has become very clear that establishment clause doctrine must be reconsidered. The old test is logically unsound, unworkable and in fact sometimes ignored by the Court itself when it desires.95 Problems abound both in terms of logic and policy. As to secular purpose, the Court appears at times to be ignoring reality when it "discovers" some type of a secular purpose to justify an enactment.96 Lower courts have done likewise. For example, it has been held that a nine-foot concrete cross or a crucifix serves as a war memorial and thus has a secular purpose.97 The

94. Id. at 1386.
95. Several Justices as well as other authorities have suggested alternative approaches. For example, it has been proposed that the two clauses in the first amendment really serve a single value, i.e., the protection of the individual's freedom of religious beliefs and practices. Thus in any case implicating religion, the free exercise value should predominate. See A. Corwin, A Constitution of Powers in a Secular State, 113-16 (1951) (establishment clause does not protect freedom in same sense as do other Bill of Rights guarantees); L. Tribe, American Constitutional Law, § 14-17 (1978) (free exercise principle should prevail in conflict with anti-establishment principle to tolerate religion as broadly as possible); Gianella, Religious Liberty, Nonestablishment, and Doctrinal Development: Part I, The Religious Liberty Guarantee, 80 Harv. L. Rev. 1381, 1389 (1967) (free exercise clause outweighs establishment clause in cases of conflict). Such an approach, however, would appear to unduly benefit religion contrary to at least one of the purposes of the clauses. Others have suggested that the two clauses be read as making the Constitution "religion blind", i.e., that the clauses connotate a "single precept that government cannot utilize religion as a standard for action or inaction because these clauses . . . prohibit classification in terms of religion either to confer a benefit or to impose a burden." See Kurland, Of Church and State and the Supreme Court, 29 U. Chi. L. Rev. 1, 96 (1961). For a critical response see Pfeffer, Religion Blind Government, 15 Stan. L. Rev. 389 (1963). More recently Jessie Choper has suggested that a statute should be found violative of the establishment clause only if its purpose is to aid religion and its effect endangers religious liberty by coercing, compromising or influencing religious beliefs. Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict, 41 U. Pitt. L. Rev. 673, 675 (1980).
96. As Professor Tribe has noted, "the court will usually find in the statutory language or elsewhere a secular purpose for the challenged law — any purpose that is arguably non-religious — . . . ." L. Tribe, American Constitutional Law, 836 (1978).
97. In Lowe v. City of Eugene, 254 Or. 518, 463 P.2d 360 (1969), cert. denied,
Supreme Court's recent findings that the display of a nativity scene serves the secular purpose of celebrating the origin of "a national holiday" is equally disingenuous, especially in light of the Mayor's crusade to "keep Christ in Christmas." The inquiry into motive is often a speculative and fruitless venture. Further the requirement may create a tension with the free exercise clause which at times requires the government to carve out special exceptions in order to accommodate a person's religion.

The effects prong also has proved to be problematic. Many laws have numerous effects, both secular and sectarian, and the Court has never clarified how much of a sectarian effect invalidates a provision.

397 U.S. 1042 (1970), the lower court had ordered a city to take down a 51 foot concrete cross erected in a public park by a private party. It found the primary purpose was to permit the majority to display its preferred religious symbol. In the interim city voters approved a charter amendment accepting the cross as a gift to the city for use as a war memorial. This time the Court upheld the challenged cross. Eugene Sand & Gravel v. City of Eugene, ___ Or. ___, 558 P.2d 338 (1976), cert. denied, 434 U.S. 876 (1977). Note similarly Fox v. City of Los Angeles, 139 Cal. Rptr. 180 (1978), upholding an L.A. resolution authorizing the lighting of windows in the city building on Christmas and Easter (at a cost of $103 each illumination) as serving the secular purpose of symbolizing peace and fellowship; Paul v. Dade County, 202 So.2d 833 (Fla. Dist. Ct. App. 1967), cert. denied, 207 So.2d 690 (Fla. 1967), cert. denied, 390 U.S. 1041 (1968), holding that a cross composed of lights displayed on the side of the courthouse during the Christmas season was a yule decoration designed to attract holiday shoppers rather than a religious symbol. Note that the Fox decision was subsequently reversed by the California Supreme Court, relying on the California constitution which the court stated was more comprehensive than the U.S. Constitution. Fox v. City of Los Angeles, 22 Cal. 3d 792, 587 P.2d 663 (1978). See Comment, Municipal Display of Religious Symbol Enjoined in California, 31 MERCER L. REV. 637 (1979-80); Comment, Fox v. City of Los Angeles: Preference of Religion and the Use of Independent State Constitutional Grounds, 68 CALIF. L. REV. 666 (1980). On the other hand, contrast the more recent decision of American Civ. Lib. Union of Ga. v. Rabun County, 678 F.2d 1379 (11th Cir. 1982), aff'd on reh'g, 698 F.2d 1098 (11th Cir. 1983), holding that the erection of a cross at a state park violated the establishment clause. There the cross was dedicated on Easter Sunday, and a Chamber press release stated that it was "a symbol of Christianity for millions of people in this great nation"—making any assertion of any secular interest virtually impossible. Id. at 1381-82.

98. See supra, note 87, and accompanying text.

99. For example, in Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court held that an exception to the state's compulsory education laws had to be carved out for members of the Amish Church who declined to send their children to public school after completing the eighth grade. The Court addressed the Establishment Clause problem, specifically finding that it must give way where the exemption is vital to the protection of free exercise rights. Id. at 214. The same is expressed in the concurring opinion of Justice White. Id. at 240-41.

100. See L. PFEFFER, GOD, CAESAR AND THE CONSTITUTION 287 (1975); Note, The Establishment Clause, Secondary Religious Effects, and Humanistic Education, 91 YALE L.J. 1196 (1982) (distinguishing various types of secondary religious effects, and pro-
In every school aid case it is apparent that any functional assistance to parochial education frees other dollars for use in support of the school's religious mission. Further, any assistance to parents such as tax credits, results in increased enrollment in parochial schools, thus advancing religion. And yet such practices have been upheld by the Court.  

As to excessive entanglement, if the establishment clause mandates separation of church and state, government is required to see that dollars are not spent to promote religious interests. Yet the type of surveillance that the establishment clause appears to require, is just the type that is now forbidden under the excessive entanglement prong. The confusion the test has generated is not surprising.

In seeking a new approach it is useful to note that establishment clause cases can generally be divided into two categories: those cases where government is rendering aid to a religious entity while furthering secular goals and those where government appears to be interjecting religion into the government realm or is otherwise promoting religion. These two types of cases generate different concerns and thus should trigger different analyses.

1. Where Government Provides Financial Assistance to Religious Entities The Purpose Must be Secular and the Assistance must be Uniformly Provided.

Where government is rendering aid to a religious entity, it can be argued that if government has an identifiable secular purpose for a practice which merely has an incidental benefit on religion, a lesser scrutiny is triggered. An analogy can be drawn to cases dealing with free speech where the Court has frequently noted that when government seeks to promote interests unrelated to the suppression of speech, a lesser standard is appropriate. Thus in the case of United

posing a balancing of secular purpose and secondary effect on religion to determine constitutionality).

101. See supra, notes 56-64, and accompanying text.

102. Tilton v. Richardson, 403 U.S. 672, 668 (1971) (White, J., concurring). Note too that in light of the recent decision in Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646 (1980) upholding a legislative scheme which reimbursed private schools for the cost of administering state mandated tests, but which required them to keep accurate accounting records, it has been questioned as to whether the entanglement prong is still viable. See, e.g., Note, Direct Public Aid to Secular Educational Function of Parochial Schools, 48 TENV. L. REV. 127, 140 (1980); Comment, Cessation of Excessive Entanglement Test and the Establishment of Religion, 7 OHIo N.U.L. REV. 975 (1980).
States v. O'Brien\textsuperscript{103} the Court held that when "speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on first amendment freedoms.\textsuperscript{104} Government is justified in prohibiting draft card burning even where this action is taken as a form of protest, because the government's interest in mandating possession and retention of draft cards has nothing to do with the suppression of ideas. Similarly it can be argued in the religion area that where government can sustain its burden of proving secular purpose for its enactment, the aid should be upheld, provided it does not in any way coerce belief nor favor certain beliefs over others.\textsuperscript{105}

Applying this analysis to earlier Supreme Court decisions, it would appear that the Court correctly upheld the payment of transportation costs to students attending religious schools. The government could show a substantial interest unrelated to the provision of aid to the religious mission, namely the protection and safe transportation of children to school. The same is true of the provision of diagnostic or therapeutic services. The state has an important secular interest in assisting physically or psychologically handicapped children, whether they are in parochial or public schools. Further, the assistance cannot be viewed as causing coercion of belief nor favoring certain beliefs over others, provided the reimbursement scheme applies to children attending schools of all religious faiths.

The more recent aid to parochial education cases involving tuition tax credits may also be able to meet this standard. It has been persuasively documented that private education on the elementary and secondary level may be keeping public education alive in some

\begin{itemize}
  \item The significance of secular purpose was clearly explained by Mr. Justice Frankfurter:
    \begin{quote}
      \ldots 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 of action of that belief or disbelief. \ldots
    \end{quote}
  
  With regulations which have other objectives the establishment clause, and the fundamental separationist concept which it expresses are not concerned \ldots. [O]nce 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.

\end{itemize}
parts of the country. As one New York lawmaker noted, "many of our great cities would be financially crippled if the private school systems had to close their doors . . . and hundreds of thousands of additional pupils appeared on the doorstep of the public schools." Statistics estimate that 10% of the students in elementary and secondary schools nationwide are educated in non-public schools and that the majority are enrolled in church related schools. For example, 90% of the non-public school students in New York attend parochial schools. Government at least in certain areas has a clearly secular purpose then in keeping these institutions alive. Provided it documents the financial advantage of aiding private educational institutions, and in dispenses the aid uniformly, in no way seeking to coerce belief, the assistance should be upheld.

Although the Supreme Court has never explicitly adopted this "free speech" analogy, this type of analysis is reflected in the recent decision of Widmar v. Vincent. There the University of Missouri altered its previous practice of allowing all registered student groups, including religiously oriented groups, to use the facilities on campus. When sued for its discriminatory policy, the University's defense was that permitting religious groups to use the facilities would violate the establishment clause. The Court rejected this defense, finding that the purpose of a neutral access policy is to provide a forum wherein students can exchange ideas and the primary effect is not religious, but governmental aid.


107. Id. See also NATIONAL CENTER FOR EDUCATIONAL STATISTICS. PROJECTIONS OF EDUCATION STATISTICS TO 1988-89, 19 (1978).

108. Note that the extent of the assistance becomes relevant only in ascertaining whether the government's purpose is truly secular. In this sense the standard proposed differs from the Lemon analysis of primary effect. If the same secular ends could equally be attained by means which do not have consequences for promotion of religion, the assistance cannot stand. Otherwise the aid should be upheld without engaging in a rather disingenuous, misleading inquiry into "primary effect." See supra note 100, and accompanying text.

The fact that a majority of nonpublic schools are affiliated with the Catholic Church (nationwide more than 80% of the students in non-public schools are enrolled in Catholic schools; see, supra, note 107) should not be problematic unless there was some showing that the purpose of aiding non-public schools was to support the Catholic mission.


110. Id. at 272. Note that allowing such groups to privately use university facilities differs from government interjecting religion into the public realm—a practice which this article suggests triggers a stricter analysis. See infra, notes 124-146 and accompanying text.
i.e., any religious benefits are incidental. In a sense the Court found a substantial interest on the part of the University that was totally unrelated to the provision of aid to religious groups and that the practice in no way favored certain beliefs over others.

Such a practice can be contrasted to the situation involving a high school which decides to permit communal prayer meetings on school premises before the commencement of classes. The narrow religious focus of such a decision would make it much more difficult for the government to argue that its intent is not related to the advancement of religion. Although, as discussed previously, the question of motive or purpose is often a difficult one, much of the confusion would be eliminated by a standard requiring the government to carry the initial burden of showing some substantial interest which has nothing to do with religion. Once the government has done this, the burden would shift to the plaintiffs to rebut the asserted secular government interest as chimerical or unsupported by legislative history.

As noted earlier, another challenge available to plaintiffs would be that the assistance, while serving secular interests, intentionally favors certain religious beliefs over others or somehow coerces belief. The Supreme Court recognized the need for a different approach to such discriminatory measures in the recent decision of Larson v. Valente. In that case Minnesota's Charitable Contribution Act provided that only religious organizations which received more than half of their total contribution from members or affiliated organizations would be exempt from the registration and reporting requirements of the Act. The apparent purpose of the Minnesota law was to withdraw tax benefits from certain religious groups, such as the "Moonies," who derive much of their funds from public solicitation. The Supreme Court struck the statute, but it did not apply the three-part test of Lemon v. Kurtzman. Instead it held that any statute which

111. Contrast the recent decisions in Brandon v. Board of Educ., 635 F.2d 971 (2nd Cir. 1980), cert. denied 102 S. Ct. 970 (1981), and Lubbock Civil Liberties Union v. Lubbock Independent School Dist. 680 F.2d 424 (5th Cir. 1982), cert. denied, 103 S. Ct. 800 (1983). Others have noted the distinction between elementary and secondary school, where attendance is compulsory and children are much more impressionable. Further, the residential nature of colleges creates a much greater need for accommodations of on-campus religious opportunities. See Howarth & Connell Students' Rights to Organize and Meet for Religious Purposes in the University Context, 16 VAL. U.L. REV. 103, 127-128 (1981).

112. See supra, notes 96-99 and accompanying text.

113. 456 U.S. 228 (1982).
grants a "denominational preference" must be subjected to strict scrutiny by the courts, i.e., the government has to show a compelling interest and no less drastic means when it promotes one religion over another. Justice Brennan stressed that the 50% rule set up a type of official denominational preference that the framers of the first amendment clearly forbade. Since historically one of the key purposes of the first amendment was to ban government favoritism of an established church, Brennan's logic in applying a strict scrutiny standard should be accepted.

The possible ramifications of such an analysis are significant. The Supreme Court in an earlier decision upheld Sunday closing laws as against an establishment clause challenge. It found that although the original purpose of such laws may have been sectarian, the laws today could be viewed as simply promoting the secular purpose of having a uniform day of rest. Using the Larson approach, however, it is arguable that even if there is a secular purpose to the law, its preference for Christians over non-Christians would trigger strict review, i.e., a requirement that government show a compelling interest and no less drastic means. It is debatable as to how compelling a uniform day of rest really is and certainly, although a uniform day of rest requires choice of one day, there is no rational explanation for the choice of Sunday, which has an adverse effect on Sabbatarians and others.

114. Id. at 246-47.
115. Id. at 242-45.
116. See supra notes 19-21 and accompanying text. Note especially Professor Cord's book SEPARATION OF CHURCH AND STATE, in which he suggests, relying heavily on Madison's "Memorial and Remonstrance," that the only purpose of the establishment clause was to protect against "the dangers of giving any religion a preferred status through the use of public funds and power." See Cord, supra note 1, at 20-21.
118. Id. at 444-45.
119. Note that the Supreme Court in a companion case to McGowan upheld Pennsylvania's Sunday closing laws as against a free exercise challenge by an Orthodox Jew arguing that his ability to earn a livelihood would be impaired by the law. Braunfield v. Brown, 366 U.S. 599 (1961). The Court reasoned that it was not necessary to apply strict scrutiny analysis because the legislation imposed only an indirect burden on the exercise of religion, i.e., it simply made the practice of religion more expensive, but it did not outlaw the religious practice itself. The court's characterization of the burden as being merely indirect has been criticized and it has been suggested that the analysis in the case fails to survive subsequent Supreme Court decisions which have been more protective of religious liberty. Compare Sherbert v. Verner, 374 U.S. 398 (1963) (finding that the state had no compelling interest to justify the denial of unemployment compensation to a Sabbatarian who refused to accept Saturday labor) and Thomas v. Review Board, 450 U.S. 707 (1981) (holding that a Jehovah's Witness who quit his job based on his religious conviction could not be denied unemployment compensation benefits).
A religious preference argument was also raised in the Donnelly case. In addition to their assertion that display of a city-owned nativity scene fails to meet the traditional three prong analysis, plaintiffs also contended that a strict scrutiny test had to be used because the creche favors Christianity over non-Christianity. Thus, even if the display of the nativity scene could somehow survive the traditional test, the action would still be unconstitutional if it impermissibly discriminates among religious groups. The Court summarily rejected the Larson argument with virtually no explanation. Under the analysis suggested here, however, the case fits more appropriately into the category of religious intrusion into the realm of government.

2. Where Government Permits Religion to Intrude into the Public Realm or it Otherwise Acts for a Religious Purpose, it Must Meet Strict Scrutiny Analysis

When government decides to introduce prayer into its schools and legislatures, to hire chaplains for its servicemen, or to place religious symbols on its stamps, money, or property, its intent can only be viewed as a desire to interject religion into the public realm. Contrary to the Lemon analysis, however, the finding of a religious purpose should not necessarily spell defeat of a provision. Instead of seeking to manufacture some strained secular justification for an enactment, courts should more honestly face the difficult question of how far government can accommodate religious freedom without violating the wall of separation. Where government acts for the benevolent purpose of preserving or protecting religious freedom, there is a direct confrontation between the two religion clauses and a court must balance the need to reconcile the separation of church and state with the need to protect religious freedom. In such situations, Justice Douglas has suggested the importance of an “accommodating neutrality,” that the state cooperate with religious authorities in order to

120. Lynch v. Donnelly, 104 S. Ct. 1355 (1984). For the decisions below see Donnelly v. Lynch, 525 F. Supp. 1150 (D.R.I. 1981), aff’d 691 F.2d 1029 (1st Cir. 1982). The District Court applied the three prong Lemon analysis, finding that the city’s action in maintaining a nativity scene violated each aspect of the test. The Court of Appeals, relying on the intervening Larson v. Valente decision, see supra, notes 113-15 and accompanying text, applied a strict scrutiny test and found that the city’s action violated the establishment clause because it had no compelling government interest in erecting a nativity scene. 691 F.2d at 1035. Alternatively it affirmed the conclusions of the District Court on the tripartite establishment clause test set forth in Lemon.

121. See Brief of the Respondents, at 38-47.

122. But see supra, notes 78-90 and accompanying text.

accommodate spiritual needs. Justice Douglas stressed that the Constitution does not require government to show a callous indifference to religious groups. The difficult question though is when does too much accommodation lead to an establishment of religion?

It is clear that when the government purpose is admittedly religious, there is a much more direct confrontation with the wall of separation. The analysis is thus parallel to that in the free speech cases where the government purpose or aim is to halt a particular expression—a situation which triggers strict scrutiny. Similarly here, where the government’s purpose is a religious one, the standard must be more stringent. Historical arguments, such as those advanced by the Court to validate the practice of legislative chaplains, provide insufficient protection in light of today’s pluralistic society. The need for separation of church and state is accentuated by the present composition of our American society, and it demands a greater sensitivity than perhaps even the framers had in mind. Thus only if government can satisfy the heightened standard of compelling interest and necessary means should it be able to interject religion into the government sphere.

Although the standard is a difficult one, applying it to various situations indicates that it is not an impossible one. It is clear that in cases such as Marsh, the government probably would not be able to sustain its burden. It is very difficult to find a compelling justification for mandating religious prayer in the legislature and paying a chaplain to lead the group in worship. It is significant that in the Marsh opinion the Supreme Court made no attempt to come up with any justification, but rather relied solely on its historical argument.


125. Id. at 314. Note that the accommodating neutrality theory suggested in this decision was not adhered to in subsequent cases. The Supreme Court in Engel v. Vitale, 370 U.S. 421 (1962), returned to a more absolutist view, rejecting the unstructured accommodation principle. The concept was used, however, in pre-1962 lower court decisions. See, e.g., Baer v. Kolmorgen, 14 Misc. 2d 1015, 181 N.Y. 230 (1958) (upholding the display of a nativity scene on public school grounds as constituting merely a "passive accommodation" of religion).

126. Chicago Police Dept. v. Mosley, 408 U.S. 92, 96 (1972): "The First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."


128. See supra note 65-72 and accompanying text.
The fact that the Nebraska legislature had employed a Presbyterian minister for 16 years and had permitted only Judeo-Christian prayers further accentuates the impermissibility of such a practice, because it appears to favor certain religions over others. On the other hand, the practice of providing chaplains in the military suggests a closer case. Here again the government purpose is a benevolent one, protection of religious freedom. However, unlike legislative prayer, the government may be able to sustain its burden of showing a compelling need for accommodating the free exercise rights of men in the military, many of whom are not there voluntarily. Assuming the practice seeks to satisfy the religious needs of all denominations, it should be upheld against establishment clause challenges.129

A striking example of government’s attempt to protect religious freedom is found in the provision of Title VII of the Civil Rights Act of 1964, which bars religious discrimination in employment.130 The Supreme Court has never directly confronted the constitutional question of whether the enactment violates the establishment clause; it has ruled, however, that the Act does no more than require an employer to take steps to reasonably accommodate the religious needs of its employees. Thus it held in Trans World Airlines, Inc. v. Hardison131 that an employer is not required to bear more than a de minimus cost in order to comply with the law. At least two lower courts have found that Title VII’s religious accommodation obligation violates the establishment clause.132 The majority of federal courts,

129. The Supreme Court in the school prayer cases suggested the constitutionality of this practice. See School Dist. of Abington Township v. Schempp, 374 U.S. 203, 226, n.10 (1963). In addition to the arguable free exercise problem, it has also been urged that government-paid military chaplains may be deemed “necessary for the defense of the nation,” thus overriding the establishment clause. L. PFEFFER, GOD, CAESAR AND THE CONSTITUTION, 160-161 (1975). See also Figinski, Military Chaplains—A Constitutionally Permissible Accommodation Between Church and State, 24 MD. L. REV. 377, 409 (1964); Hermann, Some Considerations on the Constitutionality of the United States Military Chaplaincy, 14 AM. U.L. REV. 24, 34 (1964). The author notes that the establishment clause—free exercise problem would be better solved by permitting government employment of chaplains only where military or navy personnel are demonstrably unable to attend civilian churches or avail themselves of religious counseling. Note that an accommodation approach has been used to uphold the maintenance of a chapel in a penal institution. See People ex rel New York League for Separation of Church and State v. Lyons, 173 Misc. 821, 21 N.Y.2d 250 (1940).

130. 42 U.S.C. § 2000e-2(a)(1) (1976) provides that it shall be an unlawful employment practice for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s . . . religion.”


however, have upheld its constitutionality, reasoning that the purpose of the anti-discrimination provision is to achieve equality of employment opportunity; that the primary effect does not advance religion; and that it does not foster an excessive government entanglement with religion.\footnote{133} Utilizing the test suggested here, it can be argued that the government purpose is to preserve and protect religious freedom in this country. The government's interest is a compelling one that cannot be served by any less drastic means, i.e., it can only protect religious freedom by prohibiting discrimination on religious grounds and requiring at least minimal accommodation on the employer's part. The statute thus is not an unconstitutional violation of the establishment clause.

Another example is government's provision of tax-exempt status to religious bodies.\footnote{134} Even if government is acting for religiously motivated reasons, the practice is justifiable in light of the basic premise that the power to tax is the power to destroy.\footnote{135} Thus, government has a compelling interest in accommodating the free exercise rights of all religious denominations, many of which would be unable to function if taxation were permitted.\footnote{136}

As for the controversial school prayer issue, religious instruction and worship in the classroom cannot realistically be viewed as


\footnote{134. This practice was upheld in Walz v. Tax Comm'n, 397 U.S. 664 (1970).


\footnote{136. Although the Supreme Court has never ruled that taxation of church property would violate the free exercise clause, it has struck down municipal ordinances which required religious groups (Jehovah's Witnesses) to pay a license tax as a condition to the pursuit of their activities of spreading religious doctrine by distributing religious pamphlets. See, e.g., Murdock v. Pennsylvania, 319 U.S. 105 (1943), and Follett v. McCormick, 321 U.S. 573 (1944).}
serving any substantial government interest unrelated to the advancement of religion. Rather it should be conceded that government is seeking to accommodate the free exercise rights of its citizens. However, the opportunity for prayer and worship is clearly available off school premises. More significantly, even during school hours nothing in the present Constitution forbids individual prayer.\textsuperscript{137} It is only where government seeks to institutionalize prayer, composing prayers, dictating that teachers lead students in worship, or mandating a set time each day for prayer that the courts have stepped in to protect both religious freedom as well as freedom from religion. Government simply has no compelling reason for interjecting prayer into the classroom, where it risks offending the sensibilities of children compelled to attend school and their parents.\textsuperscript{138} This conclusion does not, as some have argued, reflect a hostility to religion. Rather it rests upon the well established premise that both religion and government can work to achieve their lofty aims if each is left free from the other within its respective sphere.\textsuperscript{139}

Applying this analysis to the question of a government supported nativity scene it is difficult to see how the state’s erection and maintenance of religious symbols can ever pass constitutional muster.\textsuperscript{140}

\begin{quote}
137. Two recent political cartoons reflect the confusion on this point. One is a Peanuts cartoon portraying Sally mournfully gazing down at her difficult exam thinking, “I wish they hadn’t outlawed school prayer.” The other depicts two children leaving school as a stern teacher looks on. The one exclaims, “Boy did I get into trouble in school today. I fell asleep and the teacher thought I was praying.” The cartoons, though humorous, depict the basic misconception in this area.

138. Note that Justice Brennan argued in the school prayer cases that even if government could come up with some type of secular motive, i.e., the creation of a certain moral tone or atmosphere in the classroom, the provision would still have to be struck in that government could accomplish its purpose through non-sectarian means. Thus Brennan was borrowing the less drastic means requirement used in the strict scrutiny approach.

139. McCollum v. Board of Educ., 333 U.S. 203 (1948). The same concept is well expressed in the school prayer case, Engel v. Vitale, 370 U.S. 421 (1962), where the Court noted that a union of government and religion tends to destroy government and to degrade religion, and that the establishment clause was based in part on an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand. Id. at 431.

In the subsequent case of School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) the Court noted that although the free exercise clause prohibits the denial of free exercise of religion to any one, it does not mean that the majority can use the machinery of the state to practice its beliefs. Id. at 226.

140. Note though the case of State ex rel, Singelmann v. Morrisson, 57 So. 2d 238 (La. App. 1952), rehearing denied, 57 So. 2d 238 (La. 1952), upholding the erection of a statute of a Catholic nun in a public park which commemorated the nun’s charitable work in New Orleans. The decision was cited with approval by Justice Bren-
Obviously the more religious the symbol, the more difficult it is to assert secular purpose.\textsuperscript{141} To argue that a creche is not a religious symbol indicates an insensitivity to Christianity as well as to our pluralistic society. It is difficult to perceive that display and maintenance of a creche serves any government interest unrelated to the endorsement and advancement of religion. Indeed at oral argument the attorney for the plaintiff emphasized the factual findings of the district court that the Pawtucket creche had no economic, cultural or traditional purpose.\textsuperscript{142} The question then becomes whether, conceding a religious accommodation intent, government has a compelling interest in sponsoring the creche. The answer is apparent. Just as the Supreme Court held in Stone v. Graham\textsuperscript{143} that schools in Kentucky could not be required to display tablets recording the Ten Commandments, similarly it violates the establishment clause when government sponsors a creche which appears to invoke state imprimatur for the symbol. As one lower court commented, the display of a religious symbol "... permits an inference of official endorsement of the general religious beliefs which underlie that symbol ... persons who do not share those beliefs may feel that their own beliefs are stigmatized or officially deemed less worthy than those awarded the appearance of the city's endorsement."\textsuperscript{144}

\textsuperscript{nan}. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 298 n.74 (1963). Such monuments can be viewed as tributes to the individuals rather than to the religions for which they labored and are, therefore, constitutionally permissible.

\textsuperscript{141}. See Note, 1970 Wis. L. Rev. 1216, 1229. The author lists two factors to be considered in determining whether display of a religious symbol violates the establishment clause—the extent to which the article is religious and its permanence. Id. at 1234. The ease with which these factors can be manipulated indicates their unworkability. For example, in the earlier Lowe decision, see supra note 97, the court reasoned that a concrete cross was not permanent. Since the permit to build was revocable, the cross could be quickly removed and its existence was contingent on the will of the city council. Lowe, 451 P.2d at 123.

Note that some courts have looked to the expenditure of public funds on the erection, maintenance or display of religious symbols as being a critical factor. The fact that no public funds were expended was deemed critical in Fenske v. Coddington, 57 So. 2d 452 (Fla. 1952); Paul v. Dade County, 202 So. 2d 833, cert. denied 207 So. 2d 690 (Fla. 1967), cert. denied 390 U.S. 1041 (1967); and Baer v. Kolmorgen, 14 Misc. 2d 1015, 181 N.Y.S.2d 230 (1958).


\textsuperscript{143}. 449 U.S. 39 (1980). Note that in this case the Supreme Court was unmoved by the attempted secularization of a religious text and stated that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a proposed secular purpose can blind us to that fact." Id. at 41.

Although government should and constitutionally must protect the individual's right to religious freedom, it simply has no business placing its power and prestige behind the symbols of any religious group.145

CONCLUSION

Although over the years the Court has fairly consistently sought to maintain the wall of separation between church and state, recent decisions indicate a disturbing trend toward erosion of the barrier. The decisions come at a time when the Moral Majority as well as the administration in power and certain vocal Congressmen clamor for prayer in the schools, censorship of instructional material on "moral grounds" and generally religious solutions to difficult problems such as the abortion issue. This erosion also comes at a time when our society is growing more and more pluralistic, as new groups adhering to different religious tenets continue to enter our country. This article suggests a compromise of the competing concerns. Government should be permitted to support religious entities which aid in its accomplishment of various secular goals, serving the educational as well as the medical, psychological and charitable needs of its citizens. Provided the government assistance is nondiscriminatory and noncoercive, an incidental benefit to religion should not be held to violate the establishment clause.

However, when government seeks to interject religion into the public realm, or to otherwise act for religious purposes, much more serious concerns are triggered. Although strict scrutiny analysis has been reserved for the most fundamental of our liberties, i.e., only where important first amendment rights or other critical interests are implicated, underlying most establishment clause cases is the

145. As expressed by Mr. Justice Jackson in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943), "If there is any fixed star in our constitutional constellation, it is that no official high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ."

It has been argued that government display of religious symbols is at best a "minor encroachment" on the First Amendment. The Supreme Court, however, earlier rejected precisely that argument in the School Prayer cases noting that "the breach of neutrality that is today a trickling stream may all too soon become a raging torrent, and in the words of Madison 'it is proper to take alarm at the first experiment of our liberties.'" School Dist. of Abington Township v. Schempp, 374 U.S. 203, 225 (1963). Madison commented that the same authority which can establish Christianity, in exclusion of all other religions, can also establish with the same ease any particular sect of Christians, in exclusion of other sects. See Madison, Memorial and Remonstrance Against Religious Assessments, in 2 WRITINGS OF MADISON, 183, 185-86 (G. Hunt ed., 1980).
strong potential for coercion and interference with free exercise rights as well as more generally interference with freedom of belief. It is clear, for example, that when the state legislature, school or court of law places its imprimatur on a particular theological belief, it necessarily offends the sensibilities of both nonbelievers as well as devout believers who regard prayer as a private experience. It interferes with what Justice Brennan refers to as a right to conscience by "forcing individuals either to participate in a prayer opportunity with which they are in basic disagreement, or to make their disagreement a matter of public comment by declining to participate." The fact that only a minority are so offended is immaterial, because the whole purpose of the Bill of Rights is to protect certain basic freedoms from the will of the majority. In order for religious freedom and majority rule to coexist, the majority must recognize that, no matter how pure its intentions, it has no right under our system of government to exert its political power to gain a preferred place for its religious beliefs. Justice Brennan stressed the importance of the establishment clause as "a coguarantor, with the Free Exercise Clause, of religious liberty." Viewed in this light, only a strict scrutiny ap-

146. The coerciveness of so-called "optional prayer" is reflected in the testimony of Edward Schempp, the father of children who attended a school which sponsored prayer and Bible reading. Although such was presumably optional, the father testified that he chose not to have his children excused from attendance, fearing that the children would be "labelled as odd balls" or would be lumped together as atheists or atheistic communists. Further if the children were excused from Bible readings they would be required to stand in the hall outside their "homeroom", carrying the imputation of punishment for bad conduct. See School Dist. of Abington Township v. Schempp, 374 U.S. 203, 208-09, n.5 (1963) (quoting from trial court decision, 201 F. Supp. 815, 818 (E.D.Pa. 1962). See also Kauper, Prayer, Public Schools and the Supreme Court, 61 MICH. L. REV. 1031, 1065-66 (1963) ("Immature and impressionable children are susceptible to a pressure to conform and to participate in the expression of religious beliefs that carry the sanction and compulsion of the state's authority"). But compare Griswold, Absolute is in the Dark—A Discussion of the Approach of the Supreme Court to Constitutional Questions, 8 UTAH L. REV. 167, 177 (1963) rejecting the compulsion argument and supporting the practice as teaching religious tolerance.


148. This understanding of the Bill of Rights was cogently explained by Justice Jackson in West Virginia State. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943): The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

proach recognizes and exhibits the required sensitivity to the religious needs of the pluralistic society in which we live.

(Concurring opinion). See also Justice Rutledge's comments in Everson that " [e]stablishment' and 'free' exercise [are] correlative and co-extensive ideas, representing only different faces of the single great and fundamental freedom." Everson, 330 U.S. at 40 (Rutledge, J., dissenting).