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Constitutional Law - First Amendment - Establishment Clause

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CONSTITUTIONAL LAW—FIRST AMENDMENT—ESTABLISHMENT
CLAUSE—The United States Supreme Court has held that state
educational programs providing remedial and enrichment courses
within leased parochial school facilities violate the Establishment
Clause of the first amendment.


In 1976, the School District of Grand Rapids, Michigan, began
providing classes to nonpublic school students on nonpublic school
premises through its Community Education and Shared Time pro-
grams.\(^1\) Forty of the forty-one participating schools were secta-
rian.\(^2\) The school district paid the cost of the programs; including
the cost of leasing nonpublic school classrooms.\(^3\)

Both programs were administered by a public school employee
with input from private school administrators as to which classes
would be provided.\(^4\) The courses offered by the two programs had
not previously been taught in the nonpublic schools.\(^5\) Each class-
room utilized in either program had to be secular in appearance
while in program use; a sign identifying the classrooms as public
school facilities was posted during program classes.\(^6\) While the two
programs were administered similarly, there was one significant

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program provided classes attended by nonpublic school students during the normal school
day and was offered only in the nonpublic schools. All of the classes were also provided in
the public schools on a regular basis. Id. at 3218. The Community Education Program was
offered to children and adults in various locations throughout the school district. These
classes were offered in nonpublic school facilities and were held at the conclusion of the
regular school day. Id. at 3218-19.

2. Id. 3220. Twenty-eight of the schools participating in the program were Roman
Catholic, seven were Christian Reformed, three were Lutheran, one was Baptist, and one
was Seventh Day Adventist. Id. at 3220 n.4.

3. Id. at 3218. Each elementary school classroom was leased at a cost of $6 per week
and each secondary school classroom was leased at a cost of $10 per week. Americans United
for Separation of Church and State v. School Dist. of Grand Rapids, 514 F. Supp. 1071, 1077

4. 105 S. Ct. at 3219.

5. Id. at 3218-19. The Shared Time Program courses included subjects such as art,
music, physical education, remedial reading, remedial mathematics, enrichment reading and
enrichment mathematics. The Community Education Program included courses in various
arts and crafts, personal enrichment, and language subjects. Id.

6. Id. at 3220. In addition, any religious symbols were removed from the classrooms
while program courses were taught; common hallways, however, could contain indicia of the
religious nature of the schools. Id.
difference between them. The Shared Time program utilized only full-time employees of the school district while the Community Education Program utilized full-time teachers from the non-public schools hired by the school district as part-time public employees.7

Challenging the constitutionality of the two programs, six taxpayers filed suit in the United States District court for the Western District of Michigan against the School District of Grand Rapids and a number of state officials.8 The basis of the taxpayers' challenge was that the programs violated the Establishment Clause of the first amendment of the United States Constitution.9 Following a lengthy hearing, the district court permanently enjoined the school district from operating either program, holding that the effect of the programs was to provide a constitutionally impermissible direct benefit to sectarian institutions.10 The school district appealed to the Court of Appeals for the Sixth Circuit, which affirmed.11 The United States Supreme Court granted certiorari12 and affirmed, holding that: "[T]he Community Education and Shared Time programs have the 'primary or principal' effect of advancing religion and therefore violate the dictates of the Establishment Clause of the First Amendment."13

Justice Brennan, writing for the majority of the Court,14 began by delimiting the scope of the Establishment Clause.15 According to Justice Brennan, the Establishment Clause was not limited to a prohibition of a single designated state religion, nor was it restricted to a guarantee against state discrimination among reli-

7. Id. at 3219.
9. 105 S. Ct. at 3221. The Establishment Clause of the first amendment provides that: "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.
11. Americans United for Separation of Church and State v. School Dist. of Grand Rapids, 718 F.2d 1389 (6th Cir. 1983). According to Judge Edwards, writing for the majority of the panel: "The [Programs] . . . violate the Establishment Clause of the United States Constitution because the programs have the primary effect of advancing religion, and because the programs involve an excessive entanglement with religion." Id. at 1405.
13. 105 S. Ct. at 3230.
15. Id. at 3221-22. See U.S. CONST. amend. I.
gions. Rather, the clause was to prohibit support of, or involvement in, religion by government. The Court based its analysis of the disputed programs on the three-part test first enunciated in Lemon v. Kurtzman, which provided that the Establishment Clause prohibits state action having a non-secular purpose or a primary effect of promoting or hindering religion or which would involve an excessive entanglement of church and state.

The Court held that both the Shared Time and Community Education programs had secular purposes and therefore satisfied the first part of the Lemon test. Justice Brennan then evaluated the primary effects of the disputed programs to determine their compatibility with the second prong of the Lemon test. Focusing this investigation on the nature of the schools in which the programs operated, Justice Brennan found that the sectarian nature of the schools was undeniable. As a result, the Court held that the programs in question tended to promote religion in three distinct ways: The teachers involved in classes at such sectarian schools could intentionally or accidentally teach religious ideals; the children could perceive the government (school district) programs as supportive of their respective religions; and, the programs could advance religion by subsidizing the schools' religious purposes.

Taking each of the three aspects in turn, Justice Brennan first noted that the teachers could be influenced by the religious environment in which they were to teach and convey a religious message to their students. This could not be permitted, asserted Jus-

16. 105 S. Ct. at 3221.
17. Id. at 3221-22.
18. 405 U.S. 602 (1971). See infra note 83. In Lemon, the Court struck down a Pennsylvania statute which purported to provide for the purchase of certain secular education services from parochial schools by reimbursing such schools for teachers' salaries, textbooks, and instructional materials associated with secular subjects (A Rhode Island statute which sought to supplement parochial school teachers' salaries was also invalidated as part of a consolidation of cases by the Court). Id. For an extended discussion of Lemon, see infra notes 82-102 and accompanying text.
20. 105 S. Ct. at 3223.
21. Id. See supra text accompanying note 2.
23. Id. Justice Brennan pointed out that the Community Education Program was especially prone to utilization by teachers as a vehicle for religious messages because full-time teachers in religious schools would have difficulty putting their desire to further the religious nature of their schools aside. Id. at 3225.

Chief Justice Burger and Justice O'Connor, who dissented as to the Shared Time Program, agreed with the majority that the use of parochial school teachers was a fatal flaw in the Community Education Program. See infra notes 32 & 37 and accompanying text.
tice Brennan, since the prohibition of government-aided religious indoctrination is absolute and therefore risks of indoctrination are to be avoided. The fact that no incidents of indoctrination in either program had been reported was inconclusive in the Court's view because there had been no public monitoring of the program classes, and the parties involved would have had no incentive to report such incidents.

As to the second reason for the impermissible effect of the disputed programs, Justice Brennan noted that the state must avoid fostering a symbolic appearance of government support of religion in the eyes of either proponents or opponents of religion. The two programs involved impressionable children who could not be expected to perceive the government presence as less than a showing of state approval of their religious choice. Such a perception, said Justice Brennan, would not be dissolved simply by posting classrooms as public school facilities.

Finally, Justice Brennan indicated that religious institutions could benefit from state financial assistance only incidentally or indirectly if the mandates of the Establishment Clause were to be satisfied. Because the religious schools involved in these programs were seen to have dual but inseparable functions of secular and sectarian education, state assistance which relieved the need for secular curriculum expansion would, according to the Court, substantially and directly benefit the institution.

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24. 105 S. Ct. at 3224. The Court supported the absolute prohibition concept by citing Stone v. Graham, 449 U.S. 39 (1980) (per curiam) (Kentucky statute requiring posting of ten commandments in public school classrooms held unconstitutional), Meek v. Pittenger, 421 U.S. 349 (1975) (Pennsylvania statute providing instructional equipment which could be used to teach religious subjects as well as secular subjects held unconstitutional), and Lemon v. Kurtzman, 403 U.S. 602 (1971). See also cases cited infra note 103.


26. 105 S. Ct. at 3226. See also infra text accompanying note 98 (suggesting specific dangers attendant to public perceptions of church-state cooperation).

27. 105 S. Ct. at 3226-27. "The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice." Id. at 3226. Cf. Tilton v. Richardson, 403 U.S. 672 (1971) (maturity of college students an important factor in approval by the Court of government assistance to religiously affiliated colleges).

28. 105 S. Ct. at 3227.

29. Id. at 3228. The Court cited as an example of a permissible incidental benefit, a program providing state-funded bus transportation to nonpublic school students. See Everson v. Board of Educ., 320 U.S. 1 (1947). For an extended discussion of Everson, see infra notes 58-62 and accompanying text.

30. 105 S. Ct. at 3229-30. The Court reasoned that although the ultimate beneficiaries of the programs would be the children, "[N]o meaningful distinction can be made
Having held that the Shared Time and Community Education programs had the effect of promoting religion in the three ways discussed above, the Court considered an evaluation of the entanglement portion of the Lemon test to be unnecessary.31

Chief Justice Burger concurred in the judgment of the Court with regard to the Community Education program, but, for the reasons stated in his dissent in Aguilar v. Felton,32 he dissented as to the invalidation of the Shared Time program.33 The Chief Justice had asserted in Aguilar that the invalidation of a program providing public remedial classes in parochial schools, without showing how these classes would lead toward establishment of religion, was erroneous.34 Such an action, according to the Chief Justice, reflected nothing more than an unfounded fear that religious school sponsors would exploit the programs for religious ends.35

Justice O'Connor also concurred in the Court's judgment with regard to the Community Education program but dissented with respect to the Shared Time program.36 While agreeing with the majority that the Community Education program had the actual effect of advancing the religious goals of the parochial schools because of the influence of full-time parochial school teachers on stu-

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32. 105 S. Ct. 3285 (1985) (Burger, C.J., dissenting). In Aguilar, a case decided the same day as Grand Rapids School Dist., a New York City program which provided public school teachers for certain remedial courses of instruction within religious schools was invalidated by the Court. In this respect, the New York City program was very much like the Community Education program offered in Grand Rapids. Unlike the Community Education program however, the New York City program did provide some public supervision of the public employees while in parochial schools. According to the Aguilar Court, this supervision resulted in an excessive entanglement of church and state and therefore the New York program was found unconstitutional. Id. at 3226.

The Aguilar decision, in conjunction with the Grand Rapids School Dist. decision, demonstrates the difficulty which inheres in simultaneously satisfying the effects element and the entanglement element of the Lemon test. For a further discussion of this difficulty, see infra notes 100-102 and accompanying text.

33. 105 S. Ct. at 3231 (Burger, C.J., concurring in part and dissenting in part).
34. Aguilar, 105 S. Ct. at 3242 (Burger, C.J., dissenting). See also infra note 46 and accompanying text.
35. Id.
36. 105 S. Ct. at 3231 (O'Connor, J., concurring in part and dissenting in part).
Justice O'Connor's dissent distinguished Shared Time program teachers as full-time public employees who, based on the record, had never sought to indoctrinate their students with religious tenets. Justice O'Connor also dissented as to the Shared Time program for the reasons stated in her dissent in Aguilar.

In her Aguilar dissent, Justice O'Connor had noted a logical flaw in the Court's conclusion that public offerings of remedial education services in parochial schools directly subsidized religious efforts. In particular, Justice O'Connor was critical of the suggestion by the majority that the parochial schools, by being relieved of the burden of providing certain courses themselves, would be directly and unconstitutionally subsidized in their religious function. According to Justice O'Connor, this conclusion did not square with the decision by the Court in Wolman v. Walter, in which publicly funded courses provided to parochial school students off the parochial school premises were adjudged constitutional. Justice O'Connor asserted that parochial schools would be relieved of no greater financial burden when classes were held inside parochial schools than when they were provided outside as approved in Wolman.

Justice Rehnquist, in a dissenting opinion, stressed that neither program in Grand Rapids could be said to pose an unreasonable risk of indoctrinating students in religion when no evidence of such indoctrination had been presented. In addition, Justice Rehnquist asserted that the disputed programs created less of a symbolic link of church and state than other governmental activities which the Court had approved in prior cases. But most

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37. Id.
38. Id. See also infra note 46 and accompanying text.
39. 105 S. Ct. at 3231 (O'Connor, J., concurring in part and dissenting in part). See also Aguilar, 105 S. Ct. at 3243 (O'Connor, J., dissenting). See also infra notes 40-42 and accompanying text.
40. 105 S. Ct. at 3245-46 (O'Connor, J., dissenting).
41. Id.
42. 433 U.S. 229 (1977). For a detailed discussion of the Wolman decision see infra notes 112-122 and accompanying text.
43. See 433 U.S. at 247.
44. Aguilar, 105 S. Ct at 3246 (O'Connor, J., dissenting).
46. Id. at 3232 (Rehnquist, J., dissenting) According to Justice Rehnquist, "Not one instance of attempted religious inculcation exists in the records of the school aid cases decided today, even though both the Grand Rapids and New York [Aguilar] programs have been in operation for a number of years." Id.
47. Id. See Lynch v. Donnelly, 104 S. Ct. 1355 (1984) (upholding municipal erection
damaging to the majority's conclusions, according to Justice Rehnquist, was the reliance on case law which for some time had misconstrued the mandate of the Establishment Clause as being a total prohibition of state support of religion.48 In fact, Justice Rehnquist insisted, such a complete prohibition was not required under the clause.49

Justice White, in a dissenting opinion,50 also insisted that the decision of the Court was not required by the Establishment Clause.51 Justice White pointed to his dissenting opinions in *Lemon v. Kurtzman*,52 and *Committee for Public Education v. Nyquist*,53 as providing the reasons for his dissent.54

of a nativity scene as part of a municipal Christmas display despite religious significance of creche); *Marsh v. Chambers*, 103 S. Ct. 3330 (1983) (upholding payment of legislative chaplain with public funds).

48. 105 S. Ct. at 3132 (Rehnquist, J., dissenting). Compare, e.g., *McCollum v. Board of Educ.*, 333 U.S. 203, 248 (1947) (Reed, J., dissenting) ("I agree that [governmental entities] cannot 'aid' all or any religions . . . . But 'aid' must be understood as a purposeful assistance directly to the church itself or to some religious group or organization doing religious work of such a character that it may be fairly said to be performing ecclesiastical functions.") [and] F.W. O'BRIEN, JUSTICE REED AND THE FIRST AMENDMENT (1958) with *School Dist. of Abbington Twp. v. Schempp*, 374 U.S. 203 229 (1962) (Douglas, J., concurring) ("Financing a church either in its strictly religious activities or in its other activities is equally unconstitutional, as I understand the Establishment Clause.") See also infra notes 49 & 60.

49. 105 S. Ct. at 3231-32 (Rehnquist, J., dissenting) Justice Rehnquist also cited *Wallace v. Jafree*, 105 S. Ct. 2479, 2508-20 (1985) (Rehnquist J., dissenting) as providing reasons for his conclusion that the Court has misinterpreted the mandate of the Establishment Clause. In *Wallace*, following a lengthy historical analysis of the Establishment Clause, Justice Rehnquist concluded that the Clause prohibits nothing more than the creation of a state religion and governmental discrimination between religions. State assistance to religious institutions, if provided in a non-discriminatory way, according to Justice Rehnquist, should be permitted. 105 S. Ct. at 2516-19 (Rehnquist, J., dissenting).


52. 403 U.S. 602 (1971) (White, J., dissenting). In *Lemon*, Justice White had emphasized a need to consider the Free Exercise Clause of the first amendment in conjunction with the Establishment Clause when evaluating aid to parochial schools. According to Justice White, the Free Exercise Clause at least permits states to purposely fashion secular programs which would indirectly benefit religious institutions. Since Justice White considers the secular and religious functions of parochial schools to be separable, he believes that state aid to the secular function should be permitted even though the religious function may also incidentally benefit. *Id. at 664* (White, J., dissenting). For a general discussion of the interplay of the Establishment Clause and the Free Exercise Clause see *Young, Constitutional Validity of State Aid to Pupils in Church-Related Schools; Internal Tension Between the Establishment and Free Exercise Clauses*, 38 OHIO ST. L.J. 783 (1977).

53. 412 U.S. 756 (1973) (White, J., dissenting). In *Nyquist*, Justice White asserted that a significant public interest was served by government programs which helped maintain the financial viability of parochial schools. As long as the public aid given to the schools was
The Supreme Court's reliance on Lemon in its Grand Rapids decision was consistent with its accepted practice when considering cases involving church-state relationships in the field of education. And yet, the Court cautioned that the Lemon test should not be mechanically applied, but serves only as a guideline for evaluations of possible breaches of the Establishment Clause. For this reason an examination of the development of the Lemon test is indispensable to an understanding of the flexibility and breadth of the Court's Establishment Clause analysis in education cases. An analysis of the origin of each of the Lemon test elements - purpose, effect, entanglement - will be particularly useful.

In Everson v. Board of Education the Court evaluated a New Jersey program which provided reimbursement to parents of parochial school students for the cost of bus transportation between home and school. The central issue, according to the Court, was whether the program in question had breached the wall of separation between church and state which the Framers had intended when the Establishment Clause was included in the first amendment. In upholding the program, the Court adopted a theory of

directed to a secular function, the removal of some of the financial burden of the parochial schools and the improved chance of the survival of such schools was not only permissible, but was admirable. Id. at 822-24 (White, J., dissenting). See also infra notes 98-99 and accompanying text.


55. See Grand Rapids School Dist., 105 S. Ct. at 3222. As the Court noted, "We have particularly relied on Lemon in every case involving the sensitive relationship between government and religion in the education of our children." Id.

56. Id.


Actually, the purpose and effects elements of the Lemon text can be further traced to cases as early as Everson v. Board of Educ., 330 U.S. 1 (1947) (See infra notes 58-63 and accompanying text) and School Dist. of Abbington Twp. v. Schempp, 374 U.S. 203 (1963) (See infra notes 64-68 and accompanying text).


59. Id. at 3.

60. Id. at 18. The concept of the Establishment Clause erecting "a wall of separation between church and state" arose in a letter written by Thomas Jefferson shortly after the adoption of the first amendment. According to Jefferson, "I contemplate . . . that act of the whole American people which declared that their Legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof' . . . [as erecting] a wall of separation between Church and State." 8 WRITINGS OF THOMAS JEFFERSON 113 (H. Washington ed. 1861).

Both the majority and dissenting opinions in Everson found historical support for Jeffer-
government neutrality in dealings with religious institutions.\textsuperscript{61} Since the transportation program in \textit{Everson} was intended to provide general welfare assistance in the interest of safety for school children, the exclusion of parochial school students would, according to the Court, be more objectionable than the incidental benefits which accrued to parochial schools.\textsuperscript{62}

Neutrality of government action was satisfied by the challenged program according to the \textit{Everson} Court, because the state had been seeking to fulfill a social welfare purpose, and the effect was only incidentally, not primarily, to benefit religious institutions.\textsuperscript{63} But it was not until more than a decade later in \textit{School District of Abbington Township v. Schempp},\textsuperscript{64} that the Court specifically announced that the purpose and effect of a challenged statute was critical to the neutrality demanded by the Establishment Clause.\textsuperscript{65}

son's wall metaphor. But, while the majority believed that history revealed that the wall was meant to ensure government neutrality toward religion (see infra note 61), the dissenters believed that history called for a wall which would prohibit any government assistance from flowing to religious institutions. 330 U.S. at 33-34 (Rutledge, J., dissenting). \textit{But see Wallace v. Jafree}, 105 S. Ct. 2479, 2508-12 (1985) (Rehnquist, J., dissenting) in which Justice Rehnquist suggested that history did not support the wall of separation as being the intent of the Framers. \textit{See also supra} note 49. \textit{See generally} R. Cord, \textit{Separation of Church and State: Historical Fact and Current Fiction} 3-47 (1982).

61. 330 U.S. at 18. According to the \textit{Everson} Court, "[The First] Amendment requires the state to be 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." \textit{Id.}

The required neutrality was reflected in the Court's first attempt to comprehensively define the Establishment Clause:

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 or influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious belief or disbelief, 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.

\textit{Id.} at 15-16.

62. \textit{Id.} at 16. \textit{Cf. Wolman v. Walter}, 433 U.S. 229, 253 (1977) (cost of busing parochial school students on school-directed field trips may not be publicly subsidized since parochial schools control timing and content of field trips and could thus use the trips to benefit the school's religious function directly). \textit{See infra} note 115.


65. \textit{Id.} at 222. The \textit{Schempp} Court stated that the neutrality demanded by the interplay of the Free Exercise Clause and Establishment Clause yielded a "test [that] may be
In *Schempp*, the Court ruled that a Pennsylvania statute which required Bible readings within public schools violated the Establishment Clause's neutrality requirement. In the Court's view, the purposeful introduction of religious exercises into the public schools constituted a sufficient departure from state neutrality as to invalidate the statute. An evaluation of the effect of the statute was unnecessary since the absence of a secular purpose precipitated the statute's invalidation.

The Court's first specific application of both the purpose and the effect elements of the standard enunciated in *Schempp* came in *Board of Education v. Allen*. In *Allen*, the Court upheld a New York law which required local school boards to lend textbooks at no cost to parochial school students. The Court held that the statute had both a secular purpose and a primary effect that neither promoted nor repressed religion and was, therefore, consti-

stated as follows: what 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." *Id.*

66. 374 U.S. at 226. Even though the individual students were excused from participating in the Bible readings upon parental request, the Court noted that it is not necessary that individuals be coerced into religious involvement in order to have a breach of neutrality. *Id.* at 223.

67. *Id.* at 223-24. The proscription of religious exercises within public schools had previously been addressed by the Court in *McCollum v. Board of Educ.*, 333 U.S. 203 (1948). In *McCollum*, the Court held that an Illinois board of education which had permitted use of public school facilities for religious instruction had acted unconstitutionally. The Court insisted that its holding reflected no hostility toward religion but instead would protect religious interests by keeping government out of the sphere of religion. 333 U.S. at 211-12. Cf. Zorach v. Clauson, 343 U.S. 306 (1951). In *Zorach*, the Court upheld a New York program which permitted public school students to *leave the premises* in order to receive religious instructions. According to the Court, the release of students so that they might, of their own choice, attend religious instructions was an accommodation to religion which was necessary in order to maintain government neutrality toward religion. 343 U.S. at 315. For a further discussion of some of the accommodations to religious pluralism which are made by public schools, see *American Association of School Administrators, Religion in the Public Schools* 31-53 (1964).

68. 374 U.S. at 223-24. Relatively few statutes have been struck down by the Court because they lacked a secular purpose. Those which have are limited to statutes which sought to introduce religion into public schools. See *Wallace v. Jafree*, 105 S.Ct. 2479 (1985) (statute requiring a moment of silent prayer or meditation within public schools held to violate the Establishment Clause); *Stone v. Graham*, 449 U.S. 39 (1980) (statute requiring posting of ten commandments in public schools unconstitutional); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (statute prohibiting use in public schools of textbooks which disagree with biblical teachings was unconstitutional); and *Engle v. Vitale*, 370 U.S. 421 (1962) (statute providing an official state prayer for recital in public schools ruled unconstitutional). *See also supra* note 67.


70. *Id.* at 238.
The purpose of the law, which was the promotion of the educational enrichment of children, was clearly secular in the Court's view. This purpose was legitimately served by the statute because the loan of textbooks, like the provision of bus transportation approved in Everson, was simply making the benefits of a general social welfare program available to all children. The textbooks, which were provided directly to children, were only for secular subjects and were not considered to be helpful to the religious function of parochial schools, so the effect of the program was only to indirectly benefit religious institutions.

A program of much more substantial benefit to religious institutions, namely tax exemptions for religious property, was evaluated by the Court in Walz v. Tax Commissioner and was also found to be constitutional. Chief Justice Burger, in his majority opinion, asserted that the program had the legitimate secular purpose of preserving the contributions to community stability provided by churches and other tax-exempt organizations. The fact that churches benefited from the tax exemption did not, in itself, negate this legitimate purpose, said the Chief Justice, for as indicated by the Court's earlier decisions in Everson and Allen, government could be benevolent in its neutrality toward religion.

Continuing his inquiry into the validity of tax exemptions for religious properties, Chief Justice Burger noted that the effect of government actions must not be "an excessive government entanglement with religion." Since the disputed tax exemptions would entail less government involvement with religious institutions than assessing and taxing church property, the entanglement was not

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71. Id. at 243.
72. Id.
73. Id. The Court noted that, "Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. The law merely makes available to all children the benefits of a general program to lend school textbooks free of charge." Id.
74. Id. at 248. In the Court's view, "[W]e cannot agree . . . that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." Id. But see infra note 90 and accompanying text.
76. Id. at 673.
77. Id.
78. Id. at 669. See also supra notes 62 & 74 and accompanying text.
79. 397 U.S. at 674. The Court emphasized that, "In analyzing either alternative [taxation or exemption from taxation], the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." Id. at 675.
considered excessive.\textsuperscript{80}

It was unclear at the time of the \textit{Walz} decision whether the Court intended the entanglement of church and state to be merely illustrative of the sort of effect which would advance or inhibit religion, or whether "entanglement" was being added to the "purpose" and "effect" requirements announced in \textit{Schempp}.\textsuperscript{81} But just one year later in \textit{Lemon v. Kurtzman}\textsuperscript{82} entanglement was listed by the Court as the final criteria in the now-famous three-part test for analyzing Establishment Clause cases.\textsuperscript{83} Not only was entanglement given a role independent of the effect consideration but the role was a significant one.\textsuperscript{84}

Since the \textit{Lemon} test has been heavily relied upon in subsequent Establishment Clause cases, a careful examination of the \textit{Lemon} decision is essential to a proper understanding of the scope and significance of \textit{Grand Rapids School District}.\textsuperscript{85}

In striking down Pennsylvania and Rhode Island statutes which sought to subsidize nonpublic education,\textsuperscript{86} the \textit{Lemon} Court's entanglement analysis was more extensive than the simple lesser-or-

\textsuperscript{80} Id. at 674.


\textsuperscript{82} 403 U.S. 602 (1970). See also supra note 18 and accompanying text.

\textsuperscript{83} Id. at 612. Specifically, the Court noted that,

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion [citations omitted] finally, the statute must not foster "an excessive entanglement with religion" [citation omitted].

\textit{Id}. at 612-13. See also supra note 58.

\textsuperscript{84} 403 U.S. at 613-14. In fact, the entanglement criteria was the deciding factor in the Court's decision in \textit{Lemon}. \textit{Id}.

\textsuperscript{85} Indeed, the \textit{Lemon} test has been utilized by the Court in every subsequent case in which the constitutionality of government assistance to parochial education has been questioned. See supra note 55 and accompanying text.

\textsuperscript{86} See supra note 18.
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two-evils approach enunciated in Walz. Again writing for the Court, Chief Justice Burger noted that the first step in the analysis of entanglement was an examination of the nature of the recipient of governmental assistance, along with the type of assistance flowing to the recipient. Such a preliminary investigation would make it possible to determine whether excessive entanglement inhered in the relationship created by the statute.

In Lemon, most of the recipients of state assistance were parochial schools having an avowed purpose of inculcating religion. The challenged assistance was a subsidy of that part of teachers' salaries attributable to secular education. Despite state requirements that were supposed to limit assistance to non-religious education, the Court noted that the continuing danger of the teachers injecting religious principles during subsidized class time would require extensive state monitoring of both school administration and the classroom. The resulting entanglement of church and state was, according to the Court, intolerable, and the statutes were struck down as violative of the Establishment Clause.

The Lemon Court also noted a significant difference between the Pennsylvania teacher-subsidy program and the busing and books assistance approved by the Court in Everson and Allen, respectively. In both of these prior cases, financial assistance was provided to the children or their parents, whereas the Pennsylvania

87. See supra notes 79-80 and accompanying text.
88. Lemon, 403 U.S. at 615.
89. Id.
90. Id. at 608. Both the Pennsylvania and Rhode Island statutes directed assistance to all nonpublic schools, but in each case over 90% of the schools receiving assistance were church-related schools and most of those were affiliated with the Roman Catholic Church. Id. at 608-10.
91. Id. at 607. Justice Douglas in a concurring opinion in Lemon strongly asserted that parochial schools could not separate their religious mission from their secular mission. "A school which operates to commingle religion with other instruction cannot completely secularize its instruction. Parochial schools in large measure, do not accept the assumption that secular subjects should be unrelated to religious teaching." Id. at 636-37 (Douglas, J., concurring).
92. Id. at 609-10. The Rhode Island statute required that any teacher, to be eligible for assistance, teach only secular subjects and employ only materials also in use in public schools. Each Rhode Island teacher also had to agree in writing to avoid teaching any religion as long as his or her salary was being supplemented by the state. The Pennsylvania program required schools seeking reimbursement to follow specific accounting methods in order to differentiate time spent in secular and in sectarian education. The state would then audit the school's accounts. Id.
93. Id. at 619.
94. Id. at 620.
95. Id. at 621. See supra notes 58-63 & 69-74 and accompanying text.
program sought to subsidize parochial schools directly.96 This direct influx of governmental financial assistance into parochial schools exacerbated the level of entanglement by necessitating an ongoing public audit of the parochial schools.97

In delivering a dissenting opinion in \textit{Lemon}, Justice White stressed the value of parochial education to society as a whole,98 and insisted that the secular and sectarian functions of parochial schools are separable.99 The interplay of the effects and entanglement elements of the \textit{Lemon} test, according to Justice White, would make legitimate government assistance to secular education in these schools difficult if not impossible.100 Both the parochial schools and the states providing assistance would be willing to take steps to insure that government aid would not have the effect of promoting religion, but, as a result of such steps, the church and state would automatically become impermissibly entangled.101 In short, Justice White asserted that the Court had created an “insoluble paradox” for the states.102

\textbf{96.} \textit{Id.} The Rhode Island program had directly subsidized the school teachers rather than the parochial schools employing them. \textit{See supra} notes 18 & 92.

\textbf{97.} \textit{Id.} Justice Brennan, foreshadowing his majority opinion in \textit{Grand Rapids School Dist.}, delivered a concurring opinion in which he noted that, “A subsidy, involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from the taxpayers as a whole. . . . [The] state forcibly diverts the income of both believers and nonbelievers to churches.” \textit{Id.} at 652-63 (Brennan, J., concurring) (quoting Walz v. Tax Commission, 397 U.S. 664, 690-91 (1970) (Brennan, J., concurring)). \textit{See also supra} note 92 and accompanying text.

\textbf{98.} 404 U.S. at 662 (White J., dissenting). This viewpoint was also crucial to Justice White’s dissent in \textit{Grand Rapids School Dist.} \textit{See supra} notes 52-53 and accompanying text.

The majority in \textit{Lemon} had conceded that the parochial schools had value to society, but Chief Justice Burger, in dicta, introduced a further consideration in evaluating the interaction of church and state engendered by government assistance to parochial education. According to the Chief Justice, the programs in dispute in \textit{Lemon}, if approved, would be followed by continued and increasing demands for public financial aid to religious education. The resulting contest between those considering such appropriations warranted and those believing that tax dollars should be otherwise allocated would be carried to voting booths and to the floors of legislatures. This would divide communities on religious grounds and exacerbate church-state entanglement while diverting political attention from other matters of greater urgency. 403 U.S. at 622-23.

\textbf{99.} 403 U.S. at 663 (White J., dissenting). \textit{See also supra} note 52 and accompanying text.

\textbf{100.} \textit{Id.} at 668.

\textbf{101.} \textit{Id. But cf. supra} note 91 and accompanying text.

\textbf{102.} \textit{Id. Cf. Sloan v. Lemon, 413 U.S. 825 (1973),} in which the Supreme Court held a Pennsylvania program of tuition reimbursement to parents of parochial school students to be unconstitutional. According to the Court in \textit{Sloan},

In holding today that Pennsylvania’s post-\textit{Lemon v. Kurtzman} attempt to avoid the Establishment Clause’s prohibition against government entanglements with religion
Undaunted by Justice White's forecast of failure for state attempts to assist parochial education, a number of jurisdictions have, since *Lemon*, attempted to fashion programs which would pass constitutional muster. In an apparent effort to provide assistance which could be characterized as both neutral and insulated from the need for entangling surveillance, the Commonwealth of Pennsylvania, two years after *Lemon* developed several new programs of assistance to parochial schools. These programs, which provided auxiliary services within parochial schools, loans of instructional materials and equipment to those schools and loans of textbooks to parochial school students were evaluated by the Court in *Meek v. Pittenger*.

has failed to satisfy the parallel bar against laws having a primary effect that advances religion, we are not unaware that the appellants and those who have endeavored to formulate systems of state aid to nonpublic education may feel that the decisions of this Court have, indeed, presented them with an "insoluble paradox"... The "fault" lies not with the doctrines which are said to create a paradox but rather with the Establishment Clause itself.

103. See, e.g., *Mueller v. Allen* 463 U.S. 388 (1983) (Minnesota tax deductions for parents sending their children to nonpublic schools upheld); *Meek v. Pittenger*, 421 U.S. 349 (1975) (Pennsylvania loan of textbooks to parochial school students found constitutional but provision of counseling services, testing services, educational materials and certain health services struck down); *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472 (1973) (New York program seeking to reimburse parochial schools for teacher-prepared test administration and records administration costs struck down); *Sloan v. Lemon*, 413 U.S. 825 (1973) (Pennsylvania attempt to reimburse parents for parochial school tuition found unconstitutional); and *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973) (New York attempt to subsidize maintenance costs of parochial schools, provide tuition grants, and certain tax benefits found unconstitutional). For a general review of Supreme Court treatment of various sorts of assistance to nonpublic education, see generally Annot., 63 L. Ed.2d 804.

The states had some reason to believe that acceptable programs could be developed. In *Tilton v. Richardson*, 403 U.S. 672 (1971), a case decided by the Supreme Court on the same day as *Lemon*, the Court had determined that a federal program which provided construction grants to religiously affiliated colleges and universities was not violative of the Establishment Clause.

Chief Justice Burger, writing for the Court in *Tilton*, emphasized a critical difference between aid to institutions serving college students and aid directed toward grade school and high school students. The natural skepticism of college students, according to the Chief Justice, would serve as a barrier to religious indoctrination. Since the program was providing bricks and mortar which were inherently neutral, and since student skepticism as well as the predominantly secular nature of college level courses would obviate the need for monitoring the institutions, the effect and entanglement elements of the *Lemon* test were simultaneously satisfied. Furthermore, he noted, the construction grants would entail a single injection of government assistance rather than a continuing financial relationship between government and religion. 403 U.S. 672 (1971).


Justice Stewart, writing for the Court in *Meek*, noted that the
textbook loan program was indistinguishable from the one
approved by the Court in *Allen*, and was therefore constitutional.\(^{106}\)
But while the textbooks were loaned directly to students, the
instructional materials and equipment flowed directly to the paro-
chial schools.\(^{107}\) Given the religious nature of the recipient schools,
direct aid, even in the form of admittedly neutral charts, maps and
slide projectors, was impermissible.\(^{108}\) Direct assistance to schools
in which sectarian functions were predominate was considered di-
rect assistance to religion.\(^{109}\)

The flaw in the auxiliary services program, according to the
Court, was of a different nature. Those services, which included
counseling, testing, remedial and therapeutic services, although
provided directly to nonpublic school students in need of them,
were still held unconstitutional because they were provided within
parochial school facilities.\(^{110}\) Thus, in *Meek*, the Court revitalized
the "effect" prong of the *Lemon* test. Assistance which was, on its
face, neutral and non-sectarian, and which had no apparent need
of entangling government surveillance, could still be invalidated ei-
ther because of the nature of the recipient or the nature of the
premises on which the assistance was offered.\(^{111}\)

In *Wolman v. Walter*,\(^ {112}\) the considerations developed in *Meek*
were applied by the Court in its evaluation of an attempt by the
Ohio legislature\(^ {113}\) to assist nonpublic education.\(^ {114}\) The Ohio effort

\(^{106}\) *Id.* at 360-61.

\(^{107}\) *Id.* at 362-63. Section (e) of Act 195 read in relevant part: “Pursuant to requests from the appropriate nonpublic school official on behalf of nonpublic school pupils, the Secretary of Education shall have the power and duty to purchase directly...and to loan to such nonpublic schools, instructional materials and equipment, useful to the education of such children.” Act of July 12, 1972, No. 195 [1972] Pa. Laws 863 (codified at Pa. Stat. Ann. tit. 24, § 9-973 (Supp. 1975)).

\(^{108}\) 421 U.S. at 365.

\(^{109}\) *Id.* at 366. See also supra note 97 and accompanying text.

\(^{110}\) *Id.* at 367-69. Even though public employees would be providing the services, there was a significant risk, according to the Court, that the employees could succumb to the religious environment in which they were to work and unwittingly join in the school’s secta-
rian mission. The lack of safeguards against this risk, the Court concluded, left the program with at least a potential effect of advancing religion. *Id.* at 372.

\(^{111}\) See supra notes 97 & 110 and accompanying text.


\(^{113}\) See OHIO REV. CODE ANN. § 3317.06 (Page 1985).

\(^{114}\) 433 U.S. at 229. According to the Court, the Ohio effort was obviously an attempt to adapt a program of assistance to the Court’s earlier Establishment Clause cases. *Id.* at 233.

The Ohio program offered assistance in the form of textbook loans, standardized tests and
test scoring services, speech, hearing and psychological diagnostic services, therapeutic and
was largely successful as the Court found most of the forms of assistance to be constitutional.115

A textbook loan provision of the Ohio program was considered analogous to the provisions approved by the Court in Allen and Meek and was summarily approved by the Court on that basis.116 The Court also approved that provision of the Ohio program which provided standardized tests directly to parochial schools, noting that the tests were identical to those given in public schools.117 Like the secular textbooks, the tests were sufficiently insulated from adaptation to ideological presentation to satisfy both the effect and entanglement elements of the Lemon test.118

Diagnostic services provided to parochial school students were also insulated from adaptation to religious ends, noted the Wolman Court, even though they were provided within parochial schools.119 Public employees who provided the services could still be affected by the environment, but since their task within the parochial schools lacked educational content it was not viewed as sus-

remedial services, instructional materials and equipment loans to pupils, and field trip transportation services to parochial school students. Id. at 229.

115. Id. Only the loans of instructional materials and equipment and the provision of field trip transportation were found unconstitutional by the Court. According to the Court, the loans of instructional materials and equipment to students rather than to their schools did not sufficiently distinguish the Ohio provision from that which had been struck down in Meek. While provision of the materials directly to children was an important factor, the loaned materials and equipment were still utilized in parochial schools at the direction of parochial school teachers. As a result they could be used as tools in the process of religious instruction. Id. at 250.

The field trip transportation services were similarly distinguished by the Court from the transportation assistance approved in Everson. Unlike the Everson busing program, these field trips were directed by the parochial school administrators and geared toward curriculum which was considered to be enveloped in religion. Therefore, "[T]he schools, rather than the children, truly [were] the recipients of the service and . . . this fact alone may be sufficient to invalidate the program as impermissible direct aid." Id. at 253.


117. Id. at 239. The Court noted that in Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973), a New York program which reimbursed nonpublic schools for administration of both standardized and teacher-prepared tests had been held invalid. The basic difficulty in Levitt, however, and one not present in Wolman, was the risk that internally prepared tests could be drafted in such a manner as to test religious principles. Id. at 240.

118. Id. at 240-41. In the Wolman Court's view, "the inability of the school to control the test eliminates the need for the supervision that gives rise to excessive entanglement." Id.

119. Id. at 242. The Court in Meek, had noted that, "‘speech and hearing services' . . . at least to the extent such services are diagnostic, seem to fall within that class of general welfare services for children that may be provided by the State regardless of the incidental benefit that accrues to church-related schools." Meek v. Pittenger, 421 U.S. 349, 371 n.21 (1974).
ceptible to becoming a vehicle for ideology. Similarly, the Wolman Court upheld publicly provided therapeutic services, including guidance counseling and remedial education of parochial school students. Since those services were only furnished away from the parochial school premises, and by public employees, environmental pressures to utilize those services for religious ends were absent.

In Grand Rapids School District v. Ball, the Court addressed yet another state effort to provide educational services to parochial school students in a manner which would satisfy the Lemon test. The state strategy this time was to split the horns of the dilemma created by the effect and entanglement prongs of the Lemon test by secularizing the sectarian atmosphere of the parochial school. It was hoped that public leasing of classroom space in parochial schools and removal of religious objects from the classroom would at once overcome the environmental deficiencies inherent in Meek, while replicating the neutral-site characteristic of the programs approved by the Court in Wolman.

The fact that the Grand Rapids School District Court did not see the leasing of space in the parochial school as any real distinction from the program rejected in Meek is neither surprising nor unwarranted. The risk of teachers succumbing to their environment, which was crucial to the Meek decision, rested more with the teachers' perceptions of their environment than with the technical characterization of the classroom as publicly or religiously con-

120. 433 U.S. at 244.
121. Id. at 247.
122. Id. Neither would the provision of remedial services involve entanglement of church and state in the Wolman Court's view. "It can hardly be said that the supervision of public employees, performing public functions on public property creates an excessive entanglement between church and state." Id. at 248.
124. The school officials in Grand Rapids had reason to be optimistic about the success of their programs. A Michigan Appellate Court had, after Lemon, upheld the shared time and community education concepts. According to the Michigan court, the fact that the parochial school as lessor of the classroom space would have no authority concerning activity within the classroom was significant. Since the content of the activity in classes would be that of a public school, the Michigan alternative was considered distinguishable from the flawed Pennsylvania programs in Meek and Lemon. Citizens to Advance Pub. Educ. v. State Superintendent of Pub. Instruction, 65 Mich App. 168, 237 N.W.2d 232 (1976).

The Michigan Supreme Court, shortly before Lemon was decided, had also held that as long as the subject matter, teachers, and classrooms are controlled by public authorities, the coincidental location of the classroom in a nonpublic school building would not make a program unconstitutional. Traverse City School Dist. v. Attorney General, 384 Mich. 390, 185 N.W.2d 9 (1971).
Whether officially a public classroom or a parochial classroom, the teachers could not be expected to consider themselves more than guests, teaching parochial school students at the sufferance of parochial school administrators. When this perception is combined with the delivery of educational services which are prone to ideological presentation, the risk of religious indoctrination remains.

It seems therefore, that the ultimate decision in Grand Rapids School District would have been justified solely on the basis of the precedent set in Meek and Wolman. But the Court chose to enunciate not one, but three reasons that the Grand Rapids programs impermissibly affected the advancement of religion. In addition to the fact that they were offered on parochial school premises, the programs failed because they fostered a perception of governmental support of religion and because they relieved religious schools of the burden of providing classes at their own expense. Unfortunately, it is possible that the future significance of the Grand Rapids School District case may rest with these latter two flaws enunciated by the Court. By listing three reasons for the failure of the effects element of the Lemon test, the Court has laid the groundwork for what some may consider to be a test within a test.

A standard which would provide definition to the effects prong of the Lemon test would be welcome for the predictability which it could generate in future Establishment Clause evaluations. But

126. See supra note 110 and accompanying text.
127. See supra notes 111 & 121-22.
128. See supra notes 26-30 and accompanying text.
129. Potentially the “effect” prong of the Lemon could be construed to require satisfaction of a “Grand Rapids” test. If this should happen, it would not be the first time that the Court gleaned a new test from earlier efforts to describe the sort of effects which would be constitutionally impermissible. The entanglement element of the Lemon test was originally spoken of by the Court in Walz as an impermissible effect. See Walz, 397 U.S. at 674. See also supra notes 81-82 and accompanying text.
130. Justice White, in the majority opinion in Committee for Pub. Educ. v. Regan, 444 U.S. 646 (1980), remarking about the inconsistency of the Court’s holding in Establishment Clause cases noted that,

what is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the States ... produces a single, more encompassing construction of the Establishment Clause.

Id. at 662.

See also Wallace v. Jafree, 105 S. Ct. 2479 (1985) (O’Connor, J., concurring) where Justice
unless the elements of the standard are consistent with prior case law, confusion and not predictability would be produced. Herein would be the danger of adopting a three-part standard for evaluation of the effects of church-state relationships based on the three considerations listed by the Court in the Grand Rapids School District case.

The most glaring inconsistency in the Grand Rapids School District holding, as pointed out by Justice O'Connor in her dissent, is the contention that the disputed programs unconstitutionally supported religion by relieving parochial schools of the financial burden of providing such courses themselves. It is difficult to comprehend how the off-premises educational opportunities to parochial school students approved in Wolman are less a relief of financial burden for nonpublic schools than that occasioned by holding the classes within parochial school facilities. Indeed, off-premises classes would increase the costs of the programs to taxpayers due to the added costs associated with transporting the children to the neutral site and operating additional public school classrooms.

Beyond the fact that parochial schools would be relieved of financial burden whether classes are on or off the parochial school premises, the nature of the classes being offered is also relevant to the constitutional validity of the program. Since the classes included in the Grand Rapids programs were not required by the

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O'Connor, after noting the problematic nature of the Lemon test, stated,

[T]he standards announced in Lemon should be reexamined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment. We must strive to do more than erect a constitutional "signpost" to be followed or ignored in a particular case as our predilections may dictate. Instead, our goal should be "to frame a principle for constitutional adjudication that is not only grounded in the history and language of the first amendment, but one that is also capable of consistent application to the relevant problems."


131. See supra notes 41-43 and accompanying text.

132. 105 S. Ct. at 3230. See also supra note 30.

133. The Everson decision would seem to allow the use of public funds for the transportation of parochial school children to and from classes. See supra notes 59-62 and accompanying text.

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state for the nonpublic schools to maintain accreditation\(^{135}\) the burden being lifted was a potential burden only, relying on an assumption that the parochial schools would otherwise offer such courses.\(^{136}\) By comparison, the provision of loaned textbooks for “core” courses as approved in Allen, is a direct and certain reduction in the cost of parochial education, and property tax exemptions such as those approved by the Court in Walz, provide certain financial relief to religious institutions.

The Court's invalidation of the Grand Rapids programs for the additional reason that the programs fostered a perception of government support of religion is also attenuated by precedent. The approval of municipal erection of a nativity scene and government payment of a legislative chaplain in Lynch v. Donnelly\(^{137}\) and Marsh v. Chambers,\(^{138}\) respectively, belie the importance of public perceptions of government interaction with religion.\(^{139}\)

Moreover, there again seems to be an inconsistency in the suggestion that the perception of government support of religion would be greater if classes were held on parochial school premises than if held off-site. The break in routine attendant to movement of students from their own schools to public facilities could well be viewed by the children as preferred treatment by government. The added visibility of such an assistance program in action would also seem to heighten the public's perception of government support for religion. This would be especially true if the construction of new public facilities was necessary in order to accommodate the parochial school children receiving off-site instruction. And yet, as already noted, the provision of off-site educational services to parochial school students was explicitly allowed by the Court in Wolman.\(^{140}\)

In substance, the Grand Rapids School District decision has little to recommend it as a standard which would lend predictability to the effects element of the Lemon test, and its use in that fashion would be a mistake. More appropriately, the decision should be limited to its facts. To use it otherwise would add confusion to an

\(^{135}\) See supra note 5 and accompanying text.

\(^{136}\) 105 S. Ct. at 3230.


\(^{138}\) 103 S. Ct. 3330 (1983).

\(^{139}\) See supra note 47 and accompanying text. See also Tilton v. Richardson, 403 U.S. 672 (1971), and Roemer v. Maryland Pub. Works Bd., 426 U.S. 736 (1976) (two cases in which substantial financial aid to religiously affiliated colleges was approved by the Court). See also supra note 102 and accompanying text.

\(^{140}\) See supra note 122 and accompanying text.
already difficult constitutional problem. As Chief Justice Burger noted in *Walz*, "The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these [religion] clauses that seemed clear in relation to the particular cases but have limited meaning as general principles."\(^{141}\)

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\(^{141}\) *Walz*, 397 U.S. at 668.