



SHIFTING BOUNDARIES: THE ESTABLISHMENT CLAUSE AND GOVERNMENT FUNDING OF RELIGIOUS SCHOOLS AND OTHER FAITH-BASED ORGANIZATIONS

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The debate over government funding of religious groups and institutions raises some of the thorniest issues in the ongoing discussion about the appropriate relationship between church and state. Most legal scholars agree that the Establishment Clause in the First Amendment to the U.S. Constitution limits at least some government funding of religion, but they disagree sharply on exactly what is permissible.

Participants in the debate fall roughly into two camps: On the one side are “separationists,” who broadly interpret the Establishment Clause – which prohibits all laws “respecting an establishment of religion” – to require that government refrain from aiding or promoting religion or religious institutions. Strict separationists therefore claim that most, or even all, government funding of religion is unconstitutional. On the other side are those who interpret the Establishment Clause much more narrowly, contending that government funding of religion is constitutional as long as the funding is neutral, meaning it does not favor religion over non-religion or favor a particular faith over other faiths.

Although the U.S. Supreme Court has embraced each of these viewpoints at different times in its history, many of the court’s decisions in this area do not wholly adopt either approach. Instead, much of the constitutional law on the subject has rested on the broad principle that government funding of religion is permissible as long as the funding does not make the government responsible for advancing a particular set of religious beliefs.

Before the landmark 1947 decision *Everson v. Board of Education*, only two Establishment Clause disputes about government funding of religion reached the Supreme Court. In both of these earlier cases, the court refrained from



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providing broad pronouncements on the clause’s meaning. In *Everson*, however, the high court ruled that the Establishment Clause applied not only to the federal government but also to state and local governments. The court also declared that the Establishment Clause erected a “wall of separation between church and state,” and this metaphor shaped the court’s interpretation of the Establishment Clause for the next 50 years. During this time, however, the high court also found many exceptions to this separationist view. Furthermore, between 1997 and 2002, the court set forth doctrines in three key decisions that made these exceptions the norm, thus signaling a move away from separationism and toward an approach that considers government funding of religion constitutional as long as the funding does not favor religion over non-religion or favor one particular faith.

As a result of this shift, some scholars and judges have criticized this area of the law for what they argue are its inconsistencies. But while the case

law on government funding of religion has shifted away from separationism in recent years, courts have consistently maintained that the government may not support religious instruction.

PUBLIC FUNDING OF RELIGIOUS ACTIVITY IN 18TH-CENTURY AMERICA

Before the American Revolution, most of the original colonies used tax dollars to support religious activity. Indeed, several colonies chose a single church as their officially established religion, and these churches enjoyed many privileges not extended to other religious groups. For instance, the Anglican Church enjoyed government support in some of the Southern colonies, while the Congregational Church held sway in New England. Other colonies supported religion more generally by requiring citizens to pay taxes that would be used partially to fund religious institutions; these colonies allowed individual taxpayers to direct their payments to the Protestant denomination of their choice. Only Delaware, New Jersey, Pennsylvania and Rhode Island did not compel any taxpayer support for religion.

During and immediately after the American Revolution, however, government funding of religion came under attack. Religious minorities, including Baptists and Methodists, argued that government support of religion infringed upon the liberty that the colonists fought to win from the British crown. In response, defenders of religious establishments countered that the government needed to fund religion because public virtue depended on vigorous religious institutions,

which, they argued, could not survive with purely private support. But between 1776 and 1790, critics of religious establishments gained the upper hand, as Maryland, New York, North Carolina, South Carolina and Virginia adopted constitutional provisions prohibiting the establishment of religion.

Before the American Revolution, most of the original colonies used tax dollars to support religious activity.

The debate in Virginia profoundly influenced future discussions about public funding of religion; indeed, Virginia’s experience served as the primary historical example in the Supreme Court’s pivotal *Everson* decision more than 160 years later. The debate in Virginia arose after the state’s General Assembly sought in 1784 to pass a bill that would provide public funds to support teachers of Christianity. Future presidents James Madison, a member of the Virginia House of Delegates at the time, and Thomas Jefferson, then-U.S. minister to France and previously the governor of Virginia, urged the legislature not to pass the bill. In a famous 1785 pamphlet, Madison made several key arguments against the bill, including the claim that religion will flourish only if it is supported entirely by voluntary contributions. The Virginia General Assembly rejected the bill to support Christian teachers and, one year later, adopted Jefferson’s Act for Establishing Religious Freedom, which he had written in 1779, the same year he became Virginia’s governor. The measure provided that “no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever.”

In 1789, the newly formed U.S. Congress adopted the Bill of Rights, including the Establishment Clause. The states ratified the Establishment Clause and other proposed constitutional amendments in 1791. Many scholars believe that the states ratified the Establishment Clause under the impression that the clause barred Congress both from establishing a national religion and from interfering with existing state establishments. And, indeed, until 1947 the U.S. Supreme Court did not interpret the clause to apply to state and local governments.

THE IMPACT OF CATHOLIC IMMIGRATION AND THE BLAINE AMENDMENTS

In *Bradfield v. Roberts* (1899), the first of its two pre-*Everson* Establishment Clause cases, the high court upheld the federal government’s funding of a religiously owned and operated hospital because, the court reasoned, the hospital’s primary function was to provide secular care and treatment. Similarly, in *Quick Bear v. Leupp* (1908), the high court upheld federal funding of a Catholic school that served a Sioux reservation in South Dakota. The court determined that the funding was constitutional because the government supported the school with money derived from a Sioux trust fund. According to the court, the Establishment Clause did not limit how the government used funds belonging to the American Indian tribes, which were sovereign groups and legally independent of the United States. Rather, the court explained, the clause applied only to how the federal government used taxpayer dollars.

SUPREME COURT CASE

BRADFIELD V. ROBERTS (1899)

MAJORITY:	GRAY	WHITE
PECKHAM	BREWER	MCKENNA
FULLER	BROWN	
HARLAN	SHIRAS	

Although federal courts rarely heard Establishment Clause cases during this time, disputes over religion and funding were relatively common in the states, primarily as a result of the spread of public education in the 19th century and the dramatic increase in Catholic immigration between 1800 and 1850. Specifically, some Catholics were troubled that the public schools' reading material included the King James version of the Bible, which was favored by Protestants; most public schools at the time did not allow Catholic students to read the Catholic version of the Bible in class. This practice led Catholics to establish their own private, parochial school systems. To block these Catholic schools from receiving government financial aid, Protestants opposed to Catholic immigration amended many state constitutions to prohibit all public funding of religious schools.

The tension between Protestants and Catholics rose to national political prominence in the 1870s when Republicans accused Democrats of being the party of "rum, Romanism and rebellion." In December 1875, Republican President Ulysses S. Grant, while considering a run for a third term, expressed support for a federal constitutional amendment that would forbid public financial support of "sectarian" schools – a word widely understood at the time to mean Catholic.

Soon after, U.S. House Speaker James Blaine, who also sought the 1876 Republican presidential nomination, proposed a similar amendment pro-

hibiting states from funding religious schools. Though Blaine's proposed amendment was approved by the House of Representatives, it fell four votes short of passage in the Senate and never became part of the U.S. Constitution. The Senate's rejection of Blaine's proposed amendment prompted all but 11 states to add similar amendments to their constitutions. Today, 37 of these state constitutional provisions remain in place and are known collectively as Blaine Amendments.

The various Blaine Amendments differ in scope. While some specifically forbid funding of religious schools, others more broadly forbid funding of all religious groups and institutions. Although most state supreme courts have construed their Blaine Amendments narrowly to permit some state funding of religious institutions, some state courts have interpreted their amendments broadly to place strict limitations on such funding. For example, after the U.S. Supreme Court unanimously ruled in *Witters v. Washington Department of Services for the Blind* (1986) that the Establishment Clause permitted a student at a religious college to use state vocational training funds to pursue a career in the Christian ministry, the Washington Supreme Court held that the state's Blaine Amendment prohibited this use of state funding. Similarly, after the U.S. Supreme Court in *Zelman v. Simmons-Harris* (2002) upheld a Cleveland, Ohio, program that provided vouchers to low-income parents who chose to send their children to eligible private schools, including religious schools, a Florida court held that a similar voucher program in Florida violated that state's Blaine Amendment. Some legal scholars have argued that Blaine Amendments violate the Free Exercise Clause – the other religion clause in the First Amendment to the U.S. Constitution – which protects people's ability to "freely exercise" their religion. Many of these scholars contend that the creation of Blaine Amendments stemmed from animus toward

THE ESTABLISHMENT CLAUSE AND GOVERNMENT FUNDING OF RELIGION: SIGNIFICANT SUPREME COURT RULINGS

Bradfield v. Roberts (1899)

Upheld the federal government's funding of a hospital because even though the hospital was owned and staffed by a religious order, its primary function was to provide secular health care services.

Everson v. Board of Education (1947)

Applied the Establishment Clause to state and local governments and announced that the clause erected a "wall of separation" between religion and government; upheld a New Jersey statute that allowed local school boards to reimburse parents for the cost of busing their children to religious schools.

Board of Education v. Allen (1968)

Upheld a New York state program that required local school boards to loan textbooks at no cost to students in both public and private schools, including religious schools.

Lemon v. Kurtzman (1971)

Announced an important Establishment Clause standard, now known as the "Lemon test"; invalidated Rhode Island and Pennsylvania programs that in various ways subsidized instruction in secular subjects in private schools, most of which were religious.

Tilton v. Richardson (1971)

Upheld the 1963 Higher Education Facilities Act, a federal statute that awarded construction grants to colleges and universities, including those affiliated with religious institutions; declared that government-funded buildings must not officially be used for school-sponsored religious activities.

Committee for Public Education v. Nyquist (1973)

Invalidated a New York state program that granted tuition tax credits to parents of children in private schools, many of which were religious; invalidated grants for maintenance and repair of these schools because the facilities were used for worship and religious instruction.

Mueller v. Allen (1983)

Upheld a Minnesota statute that allowed parents to deduct from their state income taxes any money they spent on "tuition, textbooks and transportation" for their children attending elementary and secondary schools, including religious schools.

Aguilar v. Felton (1985)

Invalidated a federal program that paid New York City public school teachers to provide remedial secular instruction to students living in low-income areas. This instruction was provided to students in both public and private schools, a substantial number of which were religious.

Grand Rapids School District v. Ball (1985)

Invalidated two Grand Rapids, Mich., school programs that provided public funds for supplemental secular instruction in private schools, many of which were religious.

Witters v. Washington Department of Services for the Blind (1986)

Upheld the use of a tuition grant at a religious college in accordance with a Washington state program that paid tuition for blind people at institutions of higher education or vocational training.

Bowen v. Kendrick (1988)

Upheld the eligibility of religious groups to receive funding under the 1981 Adolescent Family Life Act, a federal program that awarded grants to private groups that provided teen sex education.

Zobrest v. Catalina Foothills School District (1993)

Ruled that the Establishment Clause allowed the government to provide a sign-language interpreter for a hearing-impaired student during instruction at his religious high school.

Agostini v. Felton (1997)

Overruled *Aguilar v. Felton*, thus upholding a federal program that offered secular remedial services inside New York City religious schools; more generally held that the government may directly provide aid to religious institutions when the aid is secular and the government provides safeguards to ensure that recipients use the aid for secular purposes.

Mitchell v. Helms (2000)

Upheld a federal program that provided instructional materials and equipment to public and private schools, including religious schools, that educated children who lived in low-income neighborhoods.

Zelman v. Simmons-Harris (2002)

Upheld a Cleveland, Ohio, program that gave vouchers to low-income parents who chose to send their children to eligible private schools, most of which were religious.

Locke v. Davey (2004)

Upheld a Washington state program that denied scholarships to students pursuing theology degrees at religious schools.

Hein v. Freedom From Religion Foundation (2007)

Denied taxpayers the right to challenge the executive branch's use of discretionary funds for programs that support religious groups.

Catholics and that the Free Exercise Clause forbids laws targeting particular faith traditions. Scholars also argue that Blaine Amendments violate the Free Exercise Clause because they specifically exclude religious groups from participating in programs receiving public funds and thus intentionally disadvantage religious organizations.

To date, however, no court has accepted the proposition that a Blaine Amendment violates the U.S. Constitution. Indeed, in *Locke v. Davey* (2004) the U.S. Supreme Court weakened such claims. The case involved a Washington state policy of not giving state scholarships to students who wished to use the funds to pursue a theology degree at a religious school. The high court, by a 7-2 vote, found that even though this exclusion discriminated on the basis of religion, it did not violate the Free Exercise Clause because, the court held, states may choose to enforce more separation between church and state than the Establishment Clause requires. Some scholars believe that the decision in *Locke* applies only in the special context of using public funds to train members of the clergy. But others contend that the decision should be read more broadly as granting each state the discretion to fund secular groups without funding their religious counterparts.

EVERSON AND THE WALL OF SEPARATION

Roger Williams, the 17th-century Baptist theologian who founded Rhode Island, coined the phrase that many people today think sums up the Establishment Clause. In his theological writings, Williams asserted that there existed a “wall of separation between the garden of the church and the wilderness of the world.” Thomas Jefferson

helped popularize the phrase by writing in an 1802 letter to a Baptist group that religious minorities in America should not fear persecution because the Establishment Clause “buil[ds] a wall of separation between Church & State.” But not until nearly 150 years later, in the 1947 case *Everson v. Board of Education*, would the phrase begin to guide the Supreme Court’s understanding of the Establishment Clause.

The controversy in *Everson* involved a New Jersey statute that allowed local school boards to reimburse parents for the cost of busing their children to school. The law allowed these reimbursements for transportation to public and private schools, including religious institutions. A taxpayer in a New Jersey town sued, arguing that the New Jersey Constitution as well as the U.S. Constitution prohibited the town from reimbursing parents who sent their children to religious schools because, the taxpayer argued, such a policy effectively subsidized religious instruction. The taxpayer originally brought his suit in a New Jersey court, but after he lost his suit in the highest court of the state, he appealed to the U.S. Supreme Court. There, he argued that the town’s reimbursement policy violated the Establishment Clause. The *Everson* case thus presented the Supreme Court with the opportunity to determine whether the Establishment Clause applied to state and local governments.

SUPREME COURT CASE

EVERSON V. BOARD OF EDUCATION (1947)

MAJORITY:

BLACK
VINSON
REED
DOUGLAS
MURPHY

MINORITY:

RUTLEDGE
BURTON
JACKSON
FRANKFURTER

Although the high court split 5–4 in ruling that the reimbursements were indeed constitutional, all nine members agreed, with little discussion, that the Establishment Clause applied not only to the federal government but also to state and local governments. In previous cases, the court had decided that the Free Exercise Clause applied to the states, reasoning that the 14th Amendment’s Due Process Clause prohibits the states from depriving people of certain unspecified liberties, including the right to free exercise of religion. (See the Pew Forum’s *A Delicate Balance: The Free Exercise Clause and the Supreme Court*.) Citing one of these cases, *Murdock v. Commonwealth of Pennsylvania*, the court found that the Establishment Clause also extended to state and local governments.

The entire high court in *Everson* also agreed that because Madison’s and Jefferson’s writings on church–state relations were so influential in creating the Establishment Clause, the court needed to look to their writings to understand the purpose and scope of the clause. Citing Jefferson and Madison, the court wrote that the Establishment Clause created a “wall of separation” between church and state. According to the court, this wall signifies that, at a minimum, “[n]o 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.”

But while the justices agreed that the Establishment Clause created a wall of separation that applied to both the states and the federal government, they disagreed sharply on how this concept applied to the facts at hand. The five-justice majority, in an opinion written by Justice Hugo Black, held that the New Jersey bus subsidies did not violate the Establishment Clause because the subsidies primarily benefited the parents and schoolchildren, not the religious schools. In addi-

tion, the majority argued, the government provided the subsidies to *all* parents who bused their children to school, not just those parents who sent their children to religious schools. Thus, the majority concluded, the subsidies were a generally available benefit, just like police or fire protection, which had always been available to religious groups and individuals.

In Everson, the court wrote that the Establishment Clause created a “wall of separation” between church and state.

The dissenters, led by Justices Wiley Rutledge and Robert Jackson, argued that the subsidies were unconstitutional because the Establishment Clause categorically prohibits the government from funding religious instruction, even when the government does so indirectly by reimbursing parents rather than the religious schools themselves. This disagreement in *Everson* over the precise size and shape of the wall of separation would arise in many cases in the coming years.

PUBLIC FUNDING FOR RELIGIOUS SCHOOLS

After the *Everson* ruling, the Supreme Court did not hear a single case involving public funding of religion for more than 20 years. Beginning in 1968 and over the next 10 years, however, the high court heard a rapid succession of funding

cases, a dozen in all. The increase in funding cases was tied to efforts on the part of some states in the 1960s and 1970s to help inner-city Catholic schools that were struggling with reductions in revenue due to the flight of middle-class Catholic families from urban areas to the suburbs. These schools also had to pay more for teachers because fewer men and women were entering the religious orders that traditionally provided parochial school teachers at relatively low salaries. Faced with decreasing revenue and increasing costs, the parochial schools often could not repair their aging buildings. Looking for financial support, many of these schools turned to state legislatures, some of which, in return, enacted a variety of aid packages.

Almost immediately, however, those who favored strict church-state separation challenged this type of state assistance as a violation of the Establishment Clause. The first such case to reach the Supreme Court was *Board of Education v. Allen* (1968). It involved a New York state program that required local school boards to loan textbooks at no cost to all public and private school students. Because a substantial majority of the private school students attended Catholic schools, various school boards claimed that the program violated the Establishment Clause.

In a 6-3 decision, the high court held that the program did not violate the Establishment Clause. First, the court argued, the program did not officially favor religious schools because it required school boards to loan textbooks to *all* students, not just those attending religious schools. In addition, the court stated, the program advanced the legitimate secular purpose of promoting education. Finally, the court said, while religious schools could request whatever books they wanted, the school boards could always turn down requests deemed improper, such as those for religious books.

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In a dissenting opinion, Justice Black, who had authored the majority opinion upholding the bus subsidies in *Everson*, claimed that New York's textbook loan program was unconstitutional because its primary purpose was to aid parochial schools. Furthermore, he argued, the program would have the effect of promoting religion because parochial school teachers might use the loaned textbooks as part of their religious instruction. In this sense, Black pointed out, New York's loaned textbooks were unlike bus subsidies, which could not be used for religious purposes. Thus, Black concluded, if the government loaned a book to a religious school that then used the book to teach religion, the government would be responsible for the resulting religious instruction.

Together, the majority opinions in *Everson* and *Allen* helped outline a permissible means for the government to support religious schools. The rule derived from these decisions is that the government may provide aid to religious schools as long as the aid is (1) secular in content, such as funding for bus subsidies or secular textbooks; (2) generally available to students in both public and private schools; and (3) primarily directed toward students rather than toward schools.

This route, however, proved to be too limited for many parochial schools, which needed more resources to address their growing fiscal crises. Many state legislatures responded by enacting more robust school aid packages, which included paying teacher salaries, repairing school facilities and providing student tuition.

THE LEMON TEST

Just three years after *Allen*, the Supreme Court addressed two such aid packages in *Lemon v. Kurtzman* (1971). One was a Rhode Island plan that paid 15 percent of the salaries of private school teachers who taught exclusively secular courses. The other was a Pennsylvania plan that reimbursed private schools for teaching secular subjects, and, in addition, paid private schools for the cost of secular books and other secular instructional materials.

SUPREME COURT CASE

LEMON V. KURTZMAN (1971)

MAJORITY:	STEWART	BLACK
BURGER	BLACKMUN	BRENNAN
HARLAN	DOUGLAS	WHITE

(MARSHALL DID NOT PARTICIPATE IN THE DECISION.)

In *Lemon*, the high court began its analysis by setting out a three-part test for determining when a law violates the Establishment Clause. Looking to its own precedents, the court concluded that for a law to comply with the Establishment Clause, it must (1) have a secular purpose; (2) have a predominantly secular effect; and (3) not foster “excessive entanglement” between government and religion. Applying this test, the high court found the

Rhode Island and Pennsylvania programs to be unconstitutional. While both programs met the first criterion of the *Lemon* test, because they had secular purposes, it was not clear that they met the *Lemon* test’s second criterion, because while the aid was intended for secular use, it was not entirely secular in effect. Indeed, Chief Justice Warren Burger wrote for the court, the aid went to parochial schools, which, as “pervasively sectarian” institutions, were likely to add religious content to secular classes.

But the court determined that it did not even need to resolve whether or not the programs actually violated the second criterion because the court found that both programs failed the *Lemon* test’s third criterion by excessively entangling state administrators with the operations of parochial schools. Since the programs required public administrators to ensure that the parochial schools used the state aid only for secular instruction, the court deemed that the programs required constant government monitoring of lesson plans, instruction and expenditures. The court concluded that such monitoring would excessively entangle the government in religious education.

The *Lemon* test would become an extremely influential legal doctrine, governing not only cases involving government funding of religious institutions but also cases in which the government promoted religious messages. Over the years, however, many justices have criticized the test because the court has often applied it to require a strict separation between church and state. One such case was *Committee for Public Education v. Nyquist* (1973). *Nyquist* involved a New York state program consisting of three parts: direct grants for repair and maintenance of certain private schools; tuition reimbursements for low-income families of private school students; and tax credits for families of private school students if their families did not

qualify for the tuition reimbursements. Like the Pennsylvania and Rhode Island programs at issue in *Lemon*, the state aid challenged in *Nyquist* primarily benefited Catholic schools.

The court held 6–3 that all parts of the New York program violated *Lemon*'s second criterion because, by reducing expenses for the religious schools, they had the primary effect of supporting religion. But in an influential dissent, Justice William Rehnquist, joined by Chief Justice Burger and Justice Byron White, argued that although the direct grants for repair of private schools were unconstitutional, the tuition reimbursements and tax credits were permissible because they did not provide aid directly to the schools but rather to the parents. The dissenting justices pointed out that, in this regard, these two components were similar to the bus subsidies upheld in *Everson* and the loaned textbooks upheld in *Allen*.

The Lemon test would become an extremely influential legal doctrine, governing not only cases involving government funding of religious institutions but also cases in which the government promoted religious messages.

Decades later, this reasoning would persuade a majority of justices to uphold programs that provided aid indirectly to religious schools through the independent decisions of parents. But, despite strong dissents from Rehnquist and others, the majority of the court largely adhered to strict

separationism throughout the 1970s and 1980s. Indeed, this wall of separation would reach its apex in two 1985 decisions: *Grand Rapids School District v. Ball* and *Aguilar v. Felton*.

The *Ball* case involved a challenge to two Grand Rapids, Mich., school programs: a community education program, which paid private school teachers to teach a variety of secular classes in private school classrooms, and a shared time program, which assigned public school teachers to teach math, reading and arts in private schools during the school day. A majority of the court in *Ball* found that both these programs had the primary effect of promoting religion, and thus violated *Lemon*'s second prong. First, the court explained, the teachers assigned to religious schools might incorporate religious content into the instruction, thinking that it would be appropriate to do so while in a religious school. Second, the majority reasoned, the students at religious schools might think that the state was showing its support for religious education by sending these schools state-financed instructors. Finally, the court determined, the programs subsidized religious education because, by providing secular instruction, they allowed the schools to dedicate more of their own resources to religious instruction.

The *Aguilar* case involved a federal program that paid New York City public school teachers to provide remedial instruction to students who lived in low-income neighborhoods. The teachers delivered these services at public and private schools, a substantial number of which were religious. The court began its analysis in *Aguilar* by noting the similarities between this program and the Grand Rapids programs struck down in *Ball*. The court then acknowledged that the program at issue in *Aguilar* was different in one important way: Unlike the Grand Rapids programs, the program at issue in *Aguilar* required the government to monitor

whether the government-funded teachers incorporated religious content into their secular instruction. Because of this distinction, the court explained, the program in *Aguilar* might not violate *Lemon's* second prong. Nevertheless, the court concluded, the program was still unconstitutional because the government's monitoring of instruction excessively entangled government and religion, thus violating *Lemon's* third criterion.

In an influential dissenting opinion, Justice Sandra Day O'Connor argued that the court's interpretation of the *Lemon* test had created a constitutional catch-22 for governments seeking to help religious schools by providing them with public school teachers. When the government sent its teachers into religious schools, *Lemon's* second criterion required the government to monitor these teachers to ensure they did not provide religious instruction. But at the same time, O'Connor pointed out, *Lemon's* third criterion prohibited the government from monitoring the religious schools in ways that created excessive entanglement. To eliminate this catch-22, O'Connor urged the court to presume that public school teachers, as public servants, would obey government regulations prohibiting them from engaging in religious instruction. This way, she explained, the government would not need to monitor so extensively and thus there would be no violation of the *Lemon* test's third criterion.

O'Connor's dissent in *Aguilar* would prove influential in dismantling the strict separationist perspective that had dominated the court throughout the 1970s and early 1980s. Indeed, just a dozen years after *Aguilar*, O'Connor wrote a similar opinion – but this time for the majority – in a decision that overruled *Aguilar* and thereby signaled the end of strict separationism.

THE DEMISE OF STRICT SEPARATIONISM

While the wall of church-state separation reached its apex in the 1985 *Ball* and *Aguilar* cases, other Supreme Court decisions around the same time started to put some cracks in the wall. In some cases, the court upheld *indirect* government funding of religion – that is, situations in which the government gave aid to an individual who then chose to use the aid to support a religious activity or group. In other cases, the court found *direct* government funding of religious groups and institutions to be constitutional in situations in which there was some assurance that the group would not use the aid for religious purposes.

INDIRECT AID FOR RELIGIOUS INSTITUTIONS

A significant case that signaled an eventual move away from strict separationism was *Mueller v. Allen* (1983), which the high court decided two years before the influential *Ball* and *Aguilar* cases. The court's decision revolved around the "child-benefit theory," the seeds of which could be found in *Everson* and *Board of Education v. Allen*. According to the child-benefit theory, the government may give aid to religious organizations if the primary purpose and effect of the aid is to benefit children.

SUPREME COURT CASE

AGUILAR V. FELTON (1985)

MAJORITY:	STEVENS	MINORITY:
BRENNAN	POWELL	BURGER
MARSHALL		WHITE
BLACKMUN		O'CONNOR
		REHNQUIST

While the wall of church-state separation reached its apex in the 1985 Ball and Aguilar cases, other Supreme Court decisions around the same time started to put some cracks in the wall.

While Justices Rehnquist and White wrote several dissenting opinions in the 1970s laying out the foundation for this theory, no majority opinion explicitly adopted it until *Mueller*, a case in which the court retreated from separationism, due largely to changes in the court's membership.

In *Mueller*, the Supreme Court upheld, by a 5-4 vote, a Minnesota statute that allowed parents to deduct from their state income taxes any money they spent on "tuition, textbooks and transportation" for their children attending public and private elementary and secondary schools. The court concluded that the program was constitutional because it assisted religious schools only indirectly by giving tax benefits to parents who decided to send their children to such private schools.

The court expanded this line of reasoning in *Witters v. Washington Department of Services for the Blind* (1986), which, as previously mentioned, involved a Washington state program that helped blind people by giving them tuition assistance to attend higher education or vocational training institutions. In the case, an individual wanted to use his benefits to pursue a career in the Christian ministry. The state would not allow him to do so, claiming that using public funds in this way would

violate the Establishment Clause. But all nine justices rejected the state's argument. The court explained that because the program provided so many secular educational and vocational choices, the state was not responsible for the student's decision to pursue a religious education. Therefore, the court concluded, the Establishment Clause did not bar the student from using the tuition benefits for religious purposes.

The court extended the *Witters* rationale in *Zobrest v. Catalina Foothills School District* (1993), a case involving a hearing-impaired student who asked the school district to provide him with a sign language interpreter at his religious high school, pursuant to a state program to aid the hearing-impaired. The school district denied the student's request on the ground that providing the interpreter would violate the Establishment Clause because the interpreter would need to communicate any religious material taught in his classes. But a five-justice majority rejected the school district's argument. The interpreter, the court explained, did not provide an independent source of religious content; rather, the interpreter merely conveyed a teacher's lessons. Moreover, the court said, it was the hearing-impaired child, not the religious school, that benefited from the interpreter. Thus, the court concluded, providing the interpreter would not violate the Establishment Clause because such indirect aid would not make the state responsible for the child's religious instruction.

Almost a decade later, in *Zelman v. Simmons-Harris* (2002), the court issued its most influential decision on indirect aid for religious institutions. As previously mentioned, the *Zelman* case involved an Ohio program that gave various types of aid to students in Cleveland's schools, some of which were among the worst-performing schools in the nation at the time. The lawsuit challenged the constitutionality of giving vouchers to low-

SUPREME COURT CASE

ZELMAN V. SIMMONS-HARRIS (2002)

MAJORITY:

REHNQUIST
SCALIA
KENNEDY

O'CONNOR
THOMAS

MINORITY:

BREYER
SOUTER
GINSBURG
STEVENS

income parents who chose to send their children to eligible private schools. Although all accredited private schools in the city could participate in the program, more than 80 percent of the participating private schools had a religious affiliation since the government's voucher amount was not sufficient to cover the expensive tuitions often charged by secular private schools.

By a 5-4 vote, the court ruled that Ohio's tuition aid plan was constitutional under the principle of "true private choice," as articulated in *Mueller*, *Witters* and *Zobrest*. In his majority opinion, Chief Justice Rehnquist noted that, under the court's precedents, a government program that funds religion indirectly is constitutional if the funding goes to individuals who have true private choice in deciding whether to use the funding for religious purposes. Rehnquist then wrote that to determine whether the Cleveland parents exercised true private choice, the court had to consider all the options available to the parents. In analyzing these options, the court found it significant that the Cleveland plan supported public charter schools and public magnet schools in addition to private schools. Including these public schools in the equation, the court found, meant that secular alternatives significantly outnumbered the available seats in religious schools. Because parents enjoyed this broad range of choices, the court concluded that the government was not responsible for the religious instruction of the children whose parents

chose to use public funds to send them to religious schools.

The court's decision in *Zelman* opened a wide range of possibilities for public funding of religious groups and institutions, including public funding of religious education at the elementary and secondary levels (though, as discussed above, some state constitutions specifically bar public funding of religious schools, even if that funding is indirect). Additionally, the court's decision in *Zelman* has been used to justify government funding of other religious services outside of education. For example, in *Freedom from Religion Foundation v. McCallum* (2003), the 7th U.S. Circuit Court of Appeals held that the Establishment Clause allowed public funding of a religious group's substance abuse treatment program because its beneficiaries exercised true private choice in determining whether to use public funds for religious or secular treatment.

DIRECT AID FOR RELIGIOUS INSTITUTIONS

The high court also has found permissible several instances of direct government funding of a religious group or institution. The high court has eased restrictions on direct funding in two ways. First, it has held that religious institutions may receive secular aid, such as textbooks, as long as the aid is not used for religious purposes and the institution is not "pervasively sectarian," such as a house of worship. Second, the court has expanded this rule, allowing aid to flow even to these religious institutions as long as there is some assurance that the support will not be used for religious purposes.

Ironically, on the same day that the Supreme Court decided the *Lemon* case, which created the three-part test later used to support separationism, the high court limited the reach of separationism in another case, *Tilton v. Richardson* (1971). In *Tilton*,

the court upheld the Higher Education Facilities Act (HEFA), a federal statute that awarded construction grants to colleges and universities, including those affiliated with religious institutions. The lawsuit had charged that the Establishment Clause prohibited the government from giving these grants to four Connecticut colleges and universities affiliated with religious denominations. But a 5–4 majority upheld the grants to these religiously affiliated colleges because HEFA specifically barred all grant recipients, whether religious or secular, from using the grant-funded buildings for religious instruction, worship, or seminary or divinity school classes. Moreover, the court explained, the four religiously affiliated colleges in question were unlikely to violate this prohibition because, apart from their religious affiliations, these colleges were just like secular colleges in that “the schools were characterized by an atmosphere of academic freedom rather than religious indoctrination.”

Almost two decades later, in *Bowen v. Kendrick* (1988), the court applied the *Tilton* reasoning to the federal government’s funding of faith-based groups that provide sex education. The case involved a challenge to the 1981 Adolescent Family Life Act (AFLA), a federal program that allowed religious groups to receive grants to provide instruction on teen sexuality. The lawsuit alleged that AFLA violated the Establishment Clause because the statute did not prohibit the religious grant recipients from incorporating religious messages into their instruction. The high court, by a 5–4 vote, upheld the program, but with important limitations. Following its precedents, the court explained that the government may not directly fund pervasively sectarian organizations or specifically religious activities. Because it was unclear whether administration of the AFLA program had actually complied with these requirements, the Supreme Court sent the case back to the trial court to resolve these factual issues.

Ultimately, the U.S. government agreed to a settlement stipulating that all AFLA-funded groups must not incorporate religious references into their sex education programs and that these groups must not offer their programs in locations that provided space for religious worship or that featured religious symbols.

Nine years later, the court ruled in *Agostini v. Felton* (1997) that the government may directly provide aid to religious schools as long as the aid itself is secular, such as secular textbooks, and as long as the government provides safeguards to ensure that the school uses the aid for secular purposes. In *Agostini*, the court was asked to re-evaluate its earlier decision in *Aguilar*, the case that 12 years earlier had invalidated a federal program that provided remedial instruction in New York City private schools, including religious schools. The court’s basis for its ruling in *Aguilar* had been that the government would excessively entangle itself with religious matters (thus violating the *Lemon* test’s third criterion) in its efforts to ensure that its public school teachers did not provide religious instruction in religious schools.

SUPREME COURT CASE

AGOSTINI V. FELTON (1997)

MAJORITY:	KENNEDY	MINORITY:
O’CONNOR	THOMAS	SOUTER
REHNQUIST		GINSBURG
SCALIA		BREYER
		STEVENS

In reconsidering the constitutionality of the federal program, Justice O’Connor, writing for the majority in *Agostini*, harkened back to her *Aguilar* dissent, in which she had argued that the majority in *Aguilar* had wrongly presumed that public school teachers sent to provide instruction in religious schools would incorporate religious content into

their lessons. As she had written 12 years before, O'Connor explained that instead of presuming that public school teachers would violate government regulations, courts should presume instead that teachers, as public servants, would teach only the secular content they were charged to teach. With this reversed presumption, O'Connor concluded, the government need not excessively monitor its teachers, and the program therefore did not violate the *Lemon* test's third criterion.

The *Agostini* ruling led to *Mitchell v. Helms* (2000), which further limited the reach of separationism. The case involved a constitutional challenge to a federal program that provided all schools, both public and private, with instructional materials and equipment, including computers and film projectors. Six justices voted in *Mitchell* to uphold the program, but they disagreed on the reasons for finding it was constitutional. Justice Clarence Thomas, joined by three other justices, claimed the program was constitutional because it provided secular benefits to schools without regard to whether they had a religious affiliation. Justices O'Connor and Stephen Breyer, while agreeing that the program was constitutional, did not join Thomas' opinion because they thought it deviated too far from the *Agostini* ruling. Writing for herself and Breyer, O'Connor reasoned that the *Agostini* ruling allowed the government to provide secular aid to any institution as long as the aid did not directly support religious activities. Therefore, she explained, the government must take reasonable steps to ensure that aid recipients use the aid only for secular activities. O'Connor concluded that the federal program at issue in *Mitchell* satisfied this requirement, largely because of three features of the program: (1) it prohibited schools from using the aid for religious purposes; (2) it limited the aid to supplemental materials, such as computers, that were not already available in the schools; and (3) it did not transfer ownership of the materials to the schools.

Justice O'Connor reasoned that the Agostini ruling allowed the government to provide secular aid to any institution as long as the aid did not directly support religious activities.

In a Supreme Court decision with no majority opinion, the narrowest opinion supporting the result becomes the controlling law. In this case, O'Connor's concurring opinion is narrower because, under her reasoning, a funding program would be constitutional only if it ensured that recipients used the aid strictly for secular activities. Thomas' opinion is broader because it does not impose such limits on religious schools' use of funds, as long as assistance is provided to religious and secular schools on an evenhanded basis. Thus, O'Connor's narrower ruling now governs when the government may directly support religious institutions.

FUNDING FOR FAITH-BASED SOCIAL SERVICES

The standard laid out by O'Connor in *Mitchell* dramatically increased the government's options for partnering with religious groups. For example, in 2001, prompted in part by the *Mitchell* ruling, President George W. Bush announced his faith-based initiative, which sought to eliminate all

federal policies that disqualified religious groups from participating in social welfare programs.

So far, the faith-based initiative has faced one challenge in the Supreme Court. That case, *Hein v. Freedom from Religion Foundation* (2007), focused on the question of whether taxpayers have legal standing (the right to sue) to challenge the government's funding of religion solely because they pay taxes. In the *Hein* case, a church-state watchdog group alleged that various federal executive agencies had violated the Establishment Clause by using tax dollars to promote the faith-based initiative. The group argued that it had standing to bring the suit because its members paid taxes. But the court dismissed the suit by a 5-4 vote, reasoning that taxpayer standing applies only when the *legislative* branch specifically authorizes the use of tax dollars for religious institutions or purposes, not when the *executive* branch uses discretionary dollars without that legislative authority.

The standard laid out by O'Connor in Mitchell dramatically increased the government's options for partnering with religious groups.

Even after the *Hein* decision, however, taxpayers still have standing in federal courts to challenge government funding of religion if the legislature has specifically authorized grants to religious entities. For example, in *Americans United for Separation of Church and State v. Prison Fellowship Ministries* (2007), the 8th U.S. Circuit Court of Appeals ruled that a church-state watchdog group had standing

to challenge a faith-based organization's provision of rehabilitative services because the state legislature specifically appropriated tax dollars to fund these services. Moreover, the court also held that the Prison Fellowship Ministries' use of religious instruction and worship in providing these services violated the Establishment Clause. The court explained that while the *Mitchell* ruling permitted direct government funding of a religious organization's secular activities, the ruling still prohibited direct public funding of religious activities.

The *Mitchell* standard is often difficult to apply to individual controversies. For example, if a group offers both secular social welfare services and religious instruction, it is unclear under the *Mitchell* standard whether the government may finance the group's overhead expenses, such as renting an office or photocopier. Similarly, it is unclear whether the government may pay a counselor who uses both secular and religious messages to help people suffering from substance abuse. The answers to these questions depend on the particular facts of the case, and turn on whether there is some assurance that the recipient of federal funding has actually segregated that funding from the group's religious programs. But courts continue to face difficult questions in determining precisely how much government monitoring and auditing the *Mitchell* standard requires.

Just as the *Mitchell* ruling eventually cleared the way for Bush's faith-based initiative, the ruling might also prove significant for President Barack Obama, who in February 2009 announced his own faith-based initiative. Although Obama's new White House Office of Faith-Based and Neighborhood Partnerships plans to broaden the scope of church-state partnerships, it is similar to its predecessor in many ways. As with Bush's faith-based office, Obama's initiative plans to promote greater involvement of faith-based organizations in

federal social welfare programs. In addition, Obama has surprised many observers by not immediately overturning the Bush administration's policy that religious groups may consider potential employees' religion when making hiring decisions, even when those groups receive federal funding. This has come as a surprise to many because during the presidential campaign Obama made statements suggesting that he might change the policy to prohibit all recipients of federal aid from hiring on the basis of faith. But in announcing the creation of his faith-based office, Obama retreated from this stance and said that his administration would instead take on the faith-based hiring issue on a case-by-case basis, consulting with the Department of Justice to determine when, if ever, it is permissible for a religious recipient of federal aid to hire on the basis of faith. (See the Pew Forum's Q & A *Faith-Based Hiring and the Obama Administration*.)

LOOKING AHEAD

As Obama's faith-based office illustrates, changes in presidents and political parties may change the character of church-state partnerships. But the effects of these changes are limited because the executive and legislative branches are obligated to respect the appropriate constitutional limitations, which are determined by courts. It is difficult to predict precisely how the appointments of Chief Justice John Roberts in 2005 and Justice Samuel Alito in 2006 might affect these boundaries, since the Supreme Court has not heard an Establishment Clause case since two Ten Commandment cases were decided several months before Roberts and Alito joined the court. (See the Pew Forum's *Religious Displays and the Courts*.) Nevertheless, there is some evidence that both justices will move the court even further away from strict sep-

arationism. For instance, in the 2007 *Hein* case, which involved the scope of the court's jurisdiction over Establishment Clause cases, both Roberts and Alito voted with the conservative majority that made it more difficult for people to bring such suits in federal courts.

As Obama's faith-based office illustrates, changes in presidents and political parties will often change the character of church-state partnerships.

It remains to be seen whether the high court will move further toward an approach that considers government funding of religious organizations constitutional as long as the funding does not favor religion over non-religion, or favor one particular faith, or whether it will return to a more separationist stance. If the past is any indication, however, the court will make changes slowly and will hew closely to core principles. Indeed, since the court embraced the metaphor of the wall of separation in *Everson* over 60 years ago, the law in this area has evolved in small increments rather than great leaps. Moreover, when examined as a whole, the underlying standards for government aid to religious institutions have remained relatively stable: the Supreme Court has continued to focus on whether the challenged practice renders the government responsible for supporting religious activity. This core principle appears likely to remain at the crux of all constitutional disputes over public funding of religion.

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