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Common Sense in Formation for the Common Good - Justice White's Dissents in the Parochial School Aid Cases: Patron of Lost Causes or Precursor of Good News

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COMMON SENSE IN FORMATION FOR THE COMMON GOOD—JUSTICE WHITE'S DISSENTS IN THE PAROCHIAL SCHOOL AID CASES: PATRON OF LOST CAUSES OR PRECURSOR OF GOOD NEWS

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INTRODUCTION

Two centuries ago, the United States Constitution was amended to require that "Congress . . . make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1]

[1] U.S. CONST. amend. I. The Constitution, as originally adopted, did not mention religion except for the provision in article VI, clause 3: "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." *Id.* art. VI, cl. 3. On September 25, 1789, during the first session of the first Congress, the Bill of Rights, comprising the first ten amendments, was proposed. The amendments were approved as part of the Constitution on December 15, 1791, when Virginia became the eleventh state in the Union to ratify them. For an excellent discussion of the process of drafting the First

It was not until 1947, however, that the United States Supreme Court, in *Everson v. Board of Education*,[2] disseminated a strict-separationist interpretation of the First Amendment's two religion clauses.[3] Writing for the majority, Justice Hugo Black reasoned that New Jersey's provision of "spending tax-raised funds to pay the bus fares of parochial school pupils" was constitutionally permissible because it was analogous to "such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks."[4] Nonetheless, the implication of the reasoning was clear: any public aid beyond the provision of such general services would fail to comport with the First Amendment.[5] Essentially, the strict-separationist position asserts that the First Amendment's framers intended the words "Congress shall make no law respecting an establishment of religion" to fix a plenary divide between the political and religious spheres of American life.[6] It follows from this understanding of original intent that the Establishment Clause proscribes practically all forms of government aid to any school that offers religious instruction or activity as a component of its curriculum.

Two decades ago, the separationist position germinated in *Lemon v. Kurtzman*,[7] when the Supreme Court declared that Pennsylvania and Rhode Island statutes which provided forms of direct public aid to parochial schools constituted an impermissible establishment of religion.[8] Under the Pennsylvania program, non-

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Amendment, see THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 193-222 (1986).

[2] 330 U.S. 1 (1947).

[3] *Id.* at 15-18 ("The First Amendment has erected a wall between church and state . . . [which] must be kept high and impregnable.").

[4] *Id.* at 17-18.

[5] *See id.*

[6] *See* Lemon v. Kurtzman, 403 U.S. 602, 624-25 (1971). Although the Court has acknowledged that "total separation [between church and state] is not possible in an absolute sense," *id.* at 614, it has stated:

> Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.

Id. at 625. For a fuller discussion of the strict separationist position, see Carl H. Esbeck, *Five Views of Church-State Relations in Contemporary American Thought*, 1986 B.Y.U. L. REV. 371, 379-85.

[7] 403 U.S. 602 (1971).

[8] *Id.* at 606-07.

public elementary and secondary schools were to be reimbursed by the state for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects.[9] The Rhode Island plan called for the state to pay a supplement of fifteen percent of the annual salary of teachers of secular subjects in nonpublic elementary schools.[10] In striking down the statutes, the Court framed a tripartite standard that would become the watershed through which all subsequent Establishment Clause litigation must pass.[11] To withstand constitutional challenge after *Lemon*, a program must have a secular purpose, a primary secular effect, and must not result in an excessive entanglement of the government with religion.[12]

Two years later, with the no-aid position firmly rooted, the Court, in the pivotal case of *Committee for Pub. Educ. & Religious Liberty v. Nyquist*,[13] invalidated a New York statute that provided modest tuition reimbursements or tax deductions based on income levels to parents with children in nonpublic schools, and even more modest money grants to nonpublic schools serving low-income families for maintenance and repair of school facilities.[14] After finding that direct aid to the parochial schools and assistance to parents with children in such schools violated original intent,[15] the Court pursued a polliniferous pattern of strict-separationist interpretation of the First Amendment in the parochial school aid cases.[16] Consequently, opponents of parochial school aid maintain

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[9] *Id.* at 609.

[10] *Id.* at 607.

[11] *Id.* at 612-13; *see also* School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 383 (1985) ("We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children.").

[12] *See Lemon*, 403 U.S. at 612-13.

[13] 413 U.S. 756 (1973).

[14] *Id.* at 762-66. The New York statute provided reimbursements of $50 to $100 per pupil to parents with incomes of less than $5,000, tax deductions of $100 to $1000 for parents with incomes of $25,000 or less, and grants of $30 to $40 per student to nonpublic schools serving low-income families. *Id.*

[15] *See* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE—RELIGION AND THE FIRST AMENDMENT 175 (1986) ("[F]inancial aid to religion . . . constitute[s] an establishment of religion.").

[16] *See, e.g.*, Aguilar v. Felton, 473 U.S. 402 (1985) (striking down New York City's use of federal funds to pay salaries of public school employees who taught certain courses to educationally deprived children from low income families in parochial schools); School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) (striking down Grand Rapids, Michigan school district program under which public school teachers taught secular remedial and enrichment courses in parochial schools); Wolman v. Walter, 433 U.S. 229 (1977) (striking down Ohio program that provided, inter alia, certain educational services, instructional materials and

that the matter is now well settled.[17]

To the contrary, Justice Byron R. White has persistently dissented from the Supreme Court's strict-separationist, no-aid position.[18] As the lone dissenter in *Lemon*, Justice White rejected the notion that the intent of the framers of the Establishment Clause provided a definitive answer.[19] He wrote that "neither affirmance nor reversal of any of these cases follows automatically from the spare language of the First Amendment, from its history, or from the cases of this Court construing it . . . even though reasonable men can very easily and sensibly differ over the import of that language."[20] Justice White's dissent in *Nyquist* was joined by Chief Justice Warren E. Burger and Justice William H. Rehnquist.[21] The three-member dissent admonished that "the parochial school sys-

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equipment as well as funds for field trips); Meek v. Pittenger, 421 U.S. 349 (1975) (striking down Pennsylvania program that supplied educational materials such as maps, periodicals, charts, photographs, and films to parochial schools); Sloan v. Lemon, 413 U.S. 825 (1973) (striking down Pennsylvania program that provided public funds to reimburse parents for portion of tuition expenses incurred in sending their children to nonpublic schools); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973) (striking down New York program pursuant to which nonpublic schools were reimbursed for expenses incurred in administering certain tests and reports).

[17] *See* LEVY, *supra* note 15, at 174-75. Even prior to *Lemon*, Justice Douglas quoted President Kennedy's comment at a news conference in support of the proposition that Everson v. Board of Educ., 330 U.S. 1 (1947), had settled the issue:

> [T]he Constitution clearly prohibits aid to . . . parochial schools. . . .
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> The Everson case, which is probably the most celebrated case, provided only by a 5 to 4 decision was it possible for a local community to provide bus rides to nonpublic school children. But all through the majority and minority statements on that particular question there was a very clear prohibition against aid to the school direct.

Tilton v. Richardson, 403 U.S. 672, 690 (1971) (Douglas, J., dissenting) (quoting John F. Kennedy, News Conference (Mar. 1, 1961), *in* 1961 PUB. PAPERS 142-43).

[18] *See, e.g.*, *Lemon*, 403 U.S. at 670 (White, J., dissenting in part, concurring in part) ("I cannot hold that the First Amendment forbids an agreement between the [church] school and the State . . . ."). A rapid succession of cases followed *Lemon*: Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 813 (1973), which provided the opportunity for Justice White's second major dissent, and which was followed, on the same day, by his dissent in *Levitt*, 413 U.S. at 482 (separate opinion not filed); *Sloan*, 413 U.S. at 835, where Justice White's dissent in *Nyquist* was applied; *Meek*, 421 U.S. at 387, where Justice White joined Justice Rehnquist's opinion dissenting in part and concurring in part; *Wolman*, 433 U.S. at 255, which struck down forms of aid to parochial schools, and where for the reasons stated in Justice White's dissent in *Nyquist* and in Justice Rehnquist's dissent in *Meek*, both Justices dissented from that part of the majority opinion; and finally, *Grand Rapids*, 473 U.S. at 400, where Justice White, consistent with his prior dissents, filed a brief dissent which was later applied to *Aguilar*, 473 U.S. at 414.

[19] *Lemon*, 403 U.S. at 662 (White, J., concurring in part, dissenting in part).

[20] *Id.*

[21] *Nyquist*, 413 U.S. at 813 (White, J., dissenting).

tem[] has encountered financial difficulties, with many schools being closed and many more apparently headed in that direction . . . ."[22] Justice White predicted that the Court's invalidation of parochial school aid legislation would render it "more difficult, if not impossible, for parents to follow the dictates of their conscience and seek a religious as well as secular education for their children."[23]

Now the sad reality verifies Justice White's then alarming forecast.[24] Increasingly, parochial schools have been forced to close as the traditional sources of income, including contributions from parishioners and tuition paid by parents, have proved insufficient to support the requirements of modern education.[25] Although most parochial schools in this country are affiliated with the Roman Catholic Church, the loss resulting from their closing has not been limited to students from Catholic families.[26] It has particularly affected a significant number of non-Catholic students and their families in poor urban areas, where the parochial schools serve as

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[22] *Id.* at 815 (White, J., dissenting).

[23] *Id.* at 820 (White, J., dissenting).

[24] *Id.* at 816-18 (White, J., dissenting). In 1972, there were approximately 12,000 Catholic parochial schools in the United States and approximately 4,100,000 students. *See* CATHOLIC ALMANAC 558 (Felician A. Foy, O.F.M. ed. 1985). In 1979, the numbers dropped to 9,782 schools educating 3,233,422 students. *See* CATHOLIC ALMANAC 526-29 (Felician A. Foy, O.F.M. ed., 1990) [hereinafter CATHOLIC ALMANAC 1990]. These figures fell even more in 1989 where there were only 8,913 schools educating 2,632,245 students. *Id.* Thus, during the sixteen-year period, from *Nyquist* to 1989, more than 2,000 parochial schools closed and the student population decreased by more than 1,400,000. This represents a reduction of approximately 20% in the number of schools and approximately 30% in the size of the student population.

[25] *See* Ari L. Goldman, *Interfaith Coalition Acts To Aid Catholic Schools*, N.Y. TIMES, Jan. 30, 1991, at B7. For example, confronted with inadequate funding and school closures, the Archbishop of New York, John Cardinal O'Connor, recently announced a one hundred million dollar fund-raising campaign involving a coalition of Christian and Jewish business leaders in an effort to keep parochial schools open in the poor areas of New York. *Id.*

[26] *See* JAMES S. COLEMAN, EVALUATING THE WELFARE STATE: SOCIAL AND POLITICAL PERSPECTIVES 273-93 (1983) [hereinafter COLEMAN, WELFARE STATE], *reprinted in* JAMES S. COLEMAN, EQUALITY AND ACHIEVEMENT IN EDUCATION 250 (1990) [hereinafter COLEMAN, EQUALITY]. The distribution of student population in parochial schools demonstrates that several other major religious denominations sponsor schools:

> [O]nly about 10% of American children attend schools other than those of the single public school system. . . .
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> In the private sector, by far the largest number of schools are those sponsored by religious bodies, and of those, the largest number are Catholic, with about two-thirds of the total private school enrollment. Baptist schools are next in size, but with only about one-twentieth of the Catholic enrollment, and then Jewish schools, with about half the enrollment of the Baptist schools.

Id.

the only viable educational alternative to the public school system.[27] If the alarming trend of parochial school closing continues unabated, many poor and middle-class families will simply have no choice in education.

The Court's tradition of noble dissent has long enabled individual Justices to serve as prophetic voices preparing the way for advances to come.[28] As Justice Charles Evans Hughes once put it, "A dissent in a Court of last resort is an appeal to the broadening spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error in which the dissenting judge believes the court to have been betrayed."[29] Mindful of this

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[27] *See* Goldman, *supra* note 25 at B7. Of the 140 Catholic schools in poor areas of the Archdiocese of New York, about 90% of the 51,428 students are black and Hispanic, and only about half of them are Roman Catholic. *Id.* "[T]he schools range from St. Pius V in the South Bronx, where 80 percent of the pupils are Catholic, to Transfiguration in Chinatown, where 80 percent are Buddhists and Confucianists." *Id.* The situation in New York seems typical of the service rendered to poor families nationwide, particularly in poor urban areas of the country. In 1972, Justice White noted that "[s]ixty-two percent of nonpublic school students [were] concentrated in eight industrialized, urbanized States: New York, Pennsylvania, Illinois, California, Ohio, New Jersey, Michigan, and Massachusetts." *Nyquist*, 413 U.S. at 816-17 (White, J., dissenting). Statistics indicate that of the total of 2,632,245 Catholic school students in 1989, 1,585,911 were concentrated in the same "eight industrialized, urban States." CATHOLIC ALMANAC 1990, *supra* note 24, at 526-29.

[28] *See* William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 431 (1986) (dissents reveal "the perceived congruence between the Constitution and the 'evolving standards of decency that mark the progress of a maturing society' ") (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion)); *see also* John J. Hoeffner, *One Hundred Years of Solitude: Dissent in the Second Circuit, 1891-1991*, 65 ST. JOHN'S L. REV. 875 (1991).

> The benefits of dissent are of two types: the first type reflects broad, system-wide concerns; the second, concerns limited to the particular issues on which the dissent is based. The broad, system-wide benefits are unlikely to act as a conscious influence upon the decision to dissent in most cases, but in assessing the value of dissent, such benefits are of more than incidental importance.

Id. at 882-83. The early decisions of the Supreme Court were issued with each Justice offering individual opinions seriatim. Laura K. Ray, *Justice Brennan and the Jurisprudence of Dissent*, 61 TEMP. L. REV. 307, 308 (1988). In 1801, under the leadership of Chief Justice John Marshall, the Court began to issue a single opinion—very often one prepared by the Chief Justice. *Id.* Thomas Jefferson, with an anticlerical allusion, complained that this new procedure found the justices " 'huddled up in conclave'." *Id.* at 308 n.12 (quoting Letter from Thomas Jefferson to Thomas Ritchie, December 25, 1820, *in* THE WORKS OF THOMAS JEFFERSON 175 (1905)). Despite Jefferson's criticism, the role of dissents became well-established by the turn of the century. Consider the two well-known examples of Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("This case is decided upon an economic theory which a large part of the country does not entertain.") and Plessy v. Ferguson, 163 U.S. 537, 554-55 (1896) (Harlan, J., dissenting) ("In my opinion, the judgment this day rendered will, in time, prove to be quite . . . pernicious . . . .").

[29] CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1928). In

important role, this Article adopts Justice White's dissents as a starting point, and on this basis attempts to articulate a revised approach to the parochial school aid issue. The compelling public policy reasons in support of parochial school aid are considered in Part I. Next, a critical examination of the historical foundation and concrete applications of the *Lemon* standard is conducted in Part II. It is proffered that the exigencies of public policy ought no longer be denied on the ground of a legal doctrine whose foundation is erroneous and whose application is in disarray. Finally, in Part III, the voucher concept is endorsed as a form of parochial school aid that would not offend stare decisis, and, at the same time, would afford the opportunity to prevent a tragic loss of the parochial schools.

Whether Justice White's voice will be ultimately recognized as prophetic, of course, remains to be seen. Nonetheless, there are portentous indications of a vernal season with regard to First Amendment jurisprudence, and its inception may well infuse new life into Justice White's position.[30] To be sure, it would signify

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addition to the purpose of paving the way for possible corrections of erroneous majority opinions, dissents can serve to clarify the majority position, prompt legislative changes, and sharpen debate on controversial and important matters of social policy. *See generally* Stanley H. Fuld, *The Voices of Dissent*, 62 COLUM. L. REV. 923, 927 (1962) ("A dissent . . . is, in a very real sense, . . . an antidote for judicial lethargy . . . .").

[30] Several Justices currently serving on the Court have expressed general dissatisfaction with the Court's First Amendment jurisprudence. In Meek v. Pittenger, 421 U.S. 349 (1975), Justice Rehnquist noted in dissent:

> I am disturbed as much by the overtones of the Court's opinion as by its actual holding. The Court apparently believes that the Establishment Clause of the First Amendment not only mandates religious neutrality on the part of government but also requires that this Court go further and throw its weight on the side of those who believe that our society as a whole should be a purely secular one. Nothing in the First Amendment or in the cases interpreting it requires such an extreme approach . . . .

Id. at 395 (Rehnquist, J., concurring in part, dissenting in part). Justice O'Connor, dissenting in Aguilar v. Felton, 473 U.S. 402 (1985), labeled as "tragic" the majority's decision to strike down a New York City program under which federal funds were used to pay the salaries of public school teachers who entered parochial schools to offer remedial instruction to educationally deprived children from low-income families. *Id.* at 431 (O'Connor, J., dissenting). She flatly "reject[ed] [the majority's] theory and the analysis in *Meek v. Pittenger* on which it is based." *Id.*

More recently, in County of Allegheny v. ACLU, 492 U.S. 573 (1989), a case that raised Establishment Clause concerns over the display of a Christmas creche, Justice Kennedy was joined in dissent by Chief Justice Rehnquist and Justices White and Scalia. *See id.* at 655 (Kennedy, J., concurring in part, dissenting in part). Rejecting the majority holding that the display was unconstitutional, the four-member dissent stated that "[t]his view of the Establishment Clause reflects an unjustified hostility toward religion, a hostility inconsistent with

hope of new life for equal educational opportunity, for family choice in education, and for the free exercise of religion.

I. PUBLIC POLICY: TOWARDS A CONSTITUTIONAL THEORY CONSONANT WITH SOCIAL REALITY AND THE FUNDAMENTAL DIGNITY OF THE INDIVIDUAL

Consistent with Justice White's admonition that the "most profound reasons" of public policy sustain the need for parochial school aid, the denial of such aid forebodes dire societal consequences.[31] One such consequence lies in the fact that for many low-income families in urban areas, parochial schools offer the only promise of equal educational opportunity. Another concerns the constitutional right of parents as the primary educators of their children. A third is raised by a consideration of the free exercise right. In the absence of parochial schools, these constitutional guarantees amount to "a language of rights as abstract opportunities to enjoy certain advantages rather than a language of the concrete and actual experience of social life" for many children from low- and middle-income families.[32]

Constitutional theory demands praxis. The parochial schools are for many the concrete experience of the three constitutional rights. I will suggest that the parochial schools are able to secure these guarantees for the poor and powerless, precisely because of the role they fulfill as local, nongovernmental institutions. In the original constitutional scheme, such subsidiary structures were assumed to be inherent to the fabric of a just society. Thus, a legislative effort for the provision of aid may be justified by compelling public policy considerations grounded in constitutional theory and praxis.

A. Constitutional Theory and Local, Nongovernmental Educational Institutions

1. The Transformation of American Education

Although the image of the public school administered by a professional class of educators under the auspices of the state may

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our history and our precedents . . . ." *Id.*

[31] *See Nyquist*, 413 U.S. at 819 (White, J., dissenting).

[32] ROBERTO M. UNGER, KNOWLEDGE AND POLITICS 74 (1974).

have become sacrosanct during this century, the current system of American education is now in question.[33] What is considered a sacrilege in the contemporary popular imagination may be nothing less than an attempt to retrieve forfeited insight of the Constitution's framers. At the time of the adoption of the Constitution and the Bill of Rights, an array of nongovernmental structures served as crucial mediators in societal life. James Madison envisioned a kind of social order composed of a "multiplicity of interests and sects" to enable a vigorous social pluralism.[34] Culture was to be shaped and formed by local, nongovernmental structures and not by an "omnicompetent society-state."[35] Among other societal entities, the extended family, churches, and schools constituted the fabric and actual experience of American life.

Until the end of the nineteenth century, American education was consistent with the constitutional assumption of a vigorous social pluralism. No one "system" of American public education existed. The decentralization of authority for education permitted "the multiplicity of interests and sects" to have a voice in what children learned.[36] Schools were responsive to families, neighborhoods, and communities and, as such, made a significant contribution to community life.[37] Diversity, autonomy, and personalism, rather than governmental control, bureaucracy, and secularism, were the hallmarks of American education.

Perhaps, the current crisis in American education can be

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[33] *See* JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS & AMERICA'S SCHOOLS (1990); PAUL E. PETERSON, THE POLITICS OF SCHOOL REFORM, 1870-1940 (1985); DAVID B. TYACK, THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION (1974).

[34] THE FEDERALIST No. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961). Defending the separation of powers in the proposed federal government, Madison explained:

> Whilst all authority in it [the United States] will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects . . . .

Id. at 351-52.

[35] *See* JOHN C. MURRAY, S.J., WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 35 (1960). The First Amendment favors a "government of limited powers, whose limitations are determined by the consent of the people." *Id.* at 47.

[36] *See* CHUBB & MOE, *supra* note 33, at 3-6; TYACK, *supra* note 33, at 18-27.

[37] TYACK, *supra* note 33, at 13-39 (presenting persuasive evidence that rural schools and local schools in urban neighborhoods were significant contributors to sense of community life up until end of nineteenth century).

traced to the first half of the twentieth century, when a nationwide institutional reform of the public schools dramatically changed American education.[38] The change was rooted in the Progressive era and highlighted the "building [of] a rational system of schools for the nation as a whole, triumphing over the parochialism, fragmentation, and party machines of an unenlightened past."[39] A primary tenet of the reform held that the optimal educational setting was neutral and secular, free from the prejudices associated with religion.[40] To this end, education was to be placed in the hands of impartial professional administrators and teachers who would create "the one best system."[41] This professional class even fabricated a "conventional historiography" that conveniently neglected the persuasive and profound religious influence in American public education up to the time of the reform.[42]

Now viewed with the chastened perspective of hindsight, the reform has been roundly criticized by those who do not agree that it resulted in the "one best system."[43] Unfortunately, the real winners of the reform were not "the less powerful segments of the American population: the lower classes, ethnic and religious minor-

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[38] *See* LAWRENCE A. CREMIN, THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION, 1876-1957 (1961); JOSEPH M. CRONIN, THE CONTROL OF URBAN SCHOOLS: PERSPECTIVE ON THE POWER OF EDUCATIONAL REFORMERS (1973); PETERSON, *supra* note 33.

[39] CHUBB & MOE, *supra* note 33, at 4.

[40] *See* JOHN DEWEY, A COMMON FAITH 1-28 (1934). John Dewey, one of the reform movement's leading theorists, steadfastly propagated the tenet. Distinguishing between "religion" and "the religious," Dewey argued that their "opposition . . . [was] not to be bridged" since the latter was opposed to the aims of liberal education while the former was essentially a general and secular human experience. *See id.* at 3, 28. In Dewey's thought, "religion . . . always signifies a special body of beliefs and practices having some kind of institutional organization . . . ." *Id.* at 9. Instead, "[t]he religious attitude signifies something that is bound through imagination to a *general* attitude. This comprehensive attitude . . . is much broader than anything indicated by 'moral' in its usual sense. The quality of attitude is displayed in art, science and good citizenship." *Id.* at 23. Dewey concluded that "because the release of these values is so important, their identification with the creeds and cults of religions must be dissolved." *Id.* at 28.

[41] TYACK, *supra* note 33, at 39-59.

[42] David B. Tyack, *The Kingdom of God and the Common School, Protestant Ministers and the Awakening of the West*, 36 HARV. EDUC. REV. 446, 448 (1966).

[43] TYACK, *supra* note 33, at 269-91. Most recently, the critique was persuasively argued by John Chubb and Terry Moe. *See* CHUBB & MOE, *supra* note 33, *passim*. For a general discussion regarding educational reform in the United States, see SAMUEL BOWLES & HERBERT GINTIS, SCHOOLING IN CAPITALIST AMERICA: EDUCATIONAL REFORM AND THE CONTRADICTIONS OF ECONOMIC LIFE (1976); MICHAEL B. KATZ, CLASS, BUREAUCRACY AND SCHOOLS: THE ILLUSION OF EDUCATIONAL CHANGE IN AMERICA (1971); and PETERSON, *supra* note 33.

ities, and citizens of rural communities."[44] These groups were disenfranchised by the reforms and "control over local schools was . . . largely transferred to the new system's political and administrative authorities—who, according to what soon became official doctrine, knew best what kind of education people needed and how it could be provided most effectively."[45]

The ideal of public education ought not to be confused with the institutional reforms that were dedicated to building a uniform system of schools for the nation to replace the diversity and autonomy in public education that preceded the reform movement. When the Constitution was framed, the order of education was autonomous from the government, and this distinction, was viewed as crucial to the functioning of a healthy democratic republic.[46] If the government was to be one of limited powers, it would be necessary for the order of ideas propagated in society to be distinct from the government itself. An educated citizenry was considered a prerequisite to insure that government and its policies would not be the sole or determinative factor of what the people would think and value, and the *sine qua non* of the independent, intelligent, and respectful exchange of ideas in society. It was essential that the government's power to curtail and inhibit the propagation and exchange of ideas be limited lest the government become synony-

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[44] CHUBB & MOE, *supra* note 33, at 4.

[45] *Id.*

[46] *See id.* at 3-6; TYACK, *supra* note 33, at 13-39. In fact, the relationship between the state and education was characterized by both approbation and appropriation of state public funds for certain schools that were founded by and remained under the authority of churches. *See* JOHN T. NOONAN, JR., THE BELIEVER AND THE POWERS THAT ARE: CASES, HISTORY AND OTHER DATA BEARING ON THE RELATION OF RELIGION AND GOVERNMENT 137-40 (1987). Judge Noonan has culled the following illustrative examples of this relationship from the nation's first decades: (1) the declaration of the Continental Congress in 1787 encouraging religious schools as "being necessary to good government and the happiness of mankind," *id.* at 137 (citing An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, ch. 8, art. III, 1 Stat. 50, 51-53 (1789)); (2) the adjustment by Congress of the Northwest Ordinance to conform to the First Amendment, *id.* at 138 (citing Act of August 7, 1789, ch. 8, 1 Stat. 50 (1789)); (3) the award by Congress of a land grant to the Baptist-founded Columbian College (later George Washington University) in 1832, *id.* (citing Act of July 14, 1832, ch. 248, 4 Stat. 603 (1832)); (4) a similar land grant to the Roman Catholic Georgetown College in 1833, *id.* (citing Act of March 2, 1833, ch. 86, 6 Stat. 538 (1833)); and (5) the refusal at the Massachusetts Constitutional Convention of 1820 to alter the Unitarian control of the Harvard University Board of Overseers on the ground that the institution, which received substantial public funding, was beyond control of the State, *id.* at 139 (citing Massachusetts Constitutional Convention, JOURNAL 71 (1853)).

mous with and subsume culture.[47] The loss of local, nongovernmental stewardship over the schools, however, is inconsistent with the vigorous social pluralism envisioned by the architects of the Constitution. That the constitutional vision for education continues to be necessary for a just society is demonstrated by a consideration of the common good in relation to the parochial schools.[48]

2. Parochial Schools and the Common Good

Public education is a direct manifestation of the state's invocation of the common good. Thomas Jefferson recommended that "[n]o other sure foundation . . . be devised for the preservation of freedom and happiness" than "the diffusion of knowledge among the people."[49] On more than one occasion, the Supreme Court has "acknowledged that public schools are vitally important 'in the preparation of individuals for participation as citizens' and as vehi-

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[47] *See* MURRAY, *supra* note 35, at 35. "Government submits itself to judgment by the truth of society; it is not itself a judge of the truth in society." *Id.* The "order of politics" is distinct from the "order of culture." *Id.* This is perhaps nowhere more obvious than in the constitutionally guaranteed right of free speech. The right does not rest on the tenuous theory that one ought to be free to say whatever one thinks merely because one thinks it. To the contrary, the right is at least in part a recognition that before citizens can be called upon to submit to governmental policies that require them to bear burdens and to sacrifice individual liberties, they have the right to discuss and pass judgment on such policies. *See id.* at 34-35. This is particularly the case in a pluralistic society where viewpoints and opinions are certain to conflict, and where minority positions may easily be overlooked.

[48] *See generally* Will v. Michigan Dep't of State Police, 491 U.S. 58, 70 n.9 (1989) (stating that " 'body politic or corporate' as '[a] social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all should be governed by certain laws for the common good' "). For an explication of the common good from a leading legal theorist, see JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 134-93 (1980). The principle of common good is not limited to natural law. It is equally consistent, for example, with the functional approach adopted by the law and economics movement. *See* Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 20 (1989). Thus, services such as bus transportation to school—at issue in *Everson*—appropriately may be state-funded since they provide an inherently "secular function" and "neither add[] to nor subtract[] from the religiosity of the educational experience." *Id.*

[49] Letter from Thomas Jefferson to George Wythe (Aug. 13, 1786), *reprinted in* THE PORTABLE THOMAS JEFFERSON 399 (1975). As the Virginia Assembly met to revise its Code of Laws, Jefferson urged Wythe to

> [p]reach . . . a crusade against ignorance; establish and improve the law for educating the common people. Let our countrymen know that the people alone can protect us . . . and that the tax which will be paid for this purpose is not more than the thousandth part of what will be paid to kings, priests and nobles who will rise up among us if we leave the people in ignorance.

Id. at 399-400.

cles for 'inculcating fundamental values necessary to the maintenance of a democratic political system.' "[50] When considering the issue of parochial school aid, it seems fair to inquire whether the parochial schools share this noble mission.

Justice White has observed that the parochial schools fulfill a dual function in American society, furthering both secular and religious ends.[51] The secular education that parochial schools afford to hundreds of thousands of American children each year is, of course, an uncompensated donation to the common good. If the parochial schools had failed to offer quality instruction in secular subjects, it seems unlikely that they would have survived in the face of fully tax-supported public schools.[52] Given the complexities and requirements of modern secular education, particularly in response to the burden created by the increased regulatory role of the state, it is remarkable that the parochial schools have endured.[53] Their vitality stems in large part from the benevolence of the parents of parochial school children who pay public school taxes and at the same time relieve the state from the financial burden of educating their children. Fundamental justice beckons that they ought to receive some form of compensation from the state.[54]

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[50] Board of Educ. v. Pico, 457 U.S. 853, 864 (1982) (quoting Ambach v. Norwick, 441 U.S. 68, 76-77 (1979)).

[51] Lemon v. Kurtzman, 403 U.S. 602, 663 (1971) (White, J., concurring in part, dissenting in part).

[52] A recurring theme in Justice White's rationale is that parochial schools are able to provide secular education of a quality comparable to that provided by the public schools. *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 818 (1973) (White, J., dissenting); *see also Lemon*, 403 U.S. at 666-67 (White, J., concurring in part, dissenting in part) (teachers testified that education was comparable). For statistical evidence demonstrating that parochial schools provide superior secular education to students from low-income families, see *infra* notes 66-71.

[53] *See* County of Allegheny v. ACLU, 492 U.S. 573, 655, 657-58 (1989) (Kennedy, J., concurring in part, dissenting in part).

> In this century, as the modern administrative state expands to touch the lives of its citizens in such diverse ways and redirects their financial choices through programs of its own, it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality.

Id. at 657-58.

Several authors have suggested that neutrality is impossible with the advent of the modern regulatory state. *See* Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: The Nonestablishment Principle* (pt. 2), 81 HARV. L. REV. 513, 522-26 (1968); *cf.* McConnell & Posner, *supra* note 48, at 7-8 (present day pervasive state regulations prevent reference to colonial period when determining whether state advances or inhibits religion).

[54] *See Nyquist*, 413 U.S. at 814 (White, J., dissenting).

Dissenting in *Nyquist*, Justice White suggested that "constitutional considerations aside, it would be understandable" to give parents of parochial school children "a call on the public treasury up to the amount it would have cost the State to educate the child in public school, or . . . up to the amount the parents save the State by not sending their children to public school."[55] Therefore, the absence of remuneration amounts to a penalty levied against those parents who elect to send children to nonpublic schools.[56]

While the secular purpose of the parochial schools advances the common good, their religious purpose does not detract from it. No one ought to be disinclined to acknowledge that religious instruction and opportunities for worship are a constitutive part of the parochial school education.[57] Religious formation is valued by churches because it is believed to lay the foundation for a mature faith. It also contributes to individual development of students by reinforcing self-control, inculcating moral standards, and encourag-

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> The parents of such [parochial school] children pay taxes, including school taxes. They could receive in return a free education in the public schools. They prefer to send their children, as they have the right to do, to nonpublic schools that furnish the satisfactory equivalent of a public school education but also offer subjects or other assumed advantages not available in public schools.

Id.

[55] *Id.*; *see also* Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools-An Update*, 75 CAL. L. REV. 5, 13-14 (1987) (suggesting that aid to parochial schools should be upheld where secular purpose exists and where amount of government expenditure does not exceed value of secular services provided).

[56] Saint Thomas Aquinas divided justice into two types, commutative and distributive. Commutative justice concerns the allocation of resources in transactions between individuals, whereas distributive justice concerns the allocation of resources in society. *See* THOMAS AQUINAS, SUMMA THEOLOGICA, II-II, q. 61, art.1 (London 1920); *see also* FINNIS, *supra* note 48, at 177-79. Consistent with the Thomistic distinction, John Finnis notes that "[a] disposition is *distributively just* . . . if it is a reasonable resolution of a problem of allocating some subject matter that is essentially common but that needs (for the sake of the common good) to be appropriated to individuals." *Id.* at 166-67; *see also* MURRAY, *supra* note 35, at 148 (system that does not allocate resources to satisfy educational needs of segment of community is not distributively just).

[57] McConnell & Posner, *supra* note 48, at 4-5. The value of religious formation was recently extolled from an economic perspective:

> Religious institutions provide many things: instruction about universal and transcendental truths; opportunities for ritual and worship; guidance about how to lead an ethical and satisfying life; care for the poor, the sick, the orphaned, and the alien; facilities for promoting fellowship and a sense of community. Church schools offer ethical and religious training and an atmosphere designed to keep the children of church members within the faith, as well as secular training designed to prepare children for civilized and productive life.

Id.

ing acts of charity and self-sacrifice.[58] Certainly nothing in such formation is antithetical to the Constitution or to the common good.[59] At the same time, however, few would dispute that a salubrious separation of church and state warrants responsibility for religious formation to reside solely with the various sects and faiths in a pluralistic society. It would be beyond acceptable parameters for the government to aid religious formation by building chapels, purchasing catechisms, or paying the salaries of religious teachers. No program of parochial school aid to be considered by the Court has ever included such kinds of direct aid to religious formation. The truths that the parochial schools serve a religious purpose and that the government ought not propagate religion have never been in dispute.

Not only is the common good not depreciated, but certain secular benefits also accrue to it from the parochial schools' religious purpose. The first benefit stems from the nature of religious formation of children. If formation to live life in recognition of a divine being and transcendental values benefits churches and individual members, it also serves to enhance the general quality of life in society. A paradox of life in the modern liberal state is that while freedom is often defined as the absence of government constraint on the individual, the quality and even continuance of life in the state depends on acts of individual self-sacrifice, often enough of heroic proportions. Religious training arguably increases the probability that individuals within a society will be disposed to serve societal interest by sometimes setting self-interest aside in both ordinary and heroic ways.

Apart from nurturing a certain individual formation, parochial schools, by realizing their religious purpose, enhance the common good in an even more fundamental way. Consistent with the

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[58] *See* FINNIS, *supra* note 48, at 168. Pointing to a nexus between the common good and individual development, John Finnis argues that "the common good is fundamentally the good of individuals . . . . [T]he fundamental task . . . is self-constitution or self-possession; inner integrity of character and outer authenticity of action are aspects of the basic good . . . as are freedom from the automatism of habit and from subjection to unintegrated impulses and compulsions . . . ." *Id.*

[59] *See* Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (holding that state may not require students to attend public schools if nonpublic schools satisfy secular education requirements). However, the Supreme Court has observed that " '[t]o maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good.' " Bowen v. Roy, 476 U.S. 693, 702 (1986) (quoting United States v. Lee, 455 U.S. 252, 259 (1982)).

Madisonian ideal of a vigorous social pluralism, the common good prospers in a social fabric characterized by numerous and diverse local, nongovernmental institutions. Such subsidiary structures tend to foster a greater degree of initiative, responsibility, and ownership for the common task than that fostered by state-controlled ventures.[60] Because a material dividend often inures, the principle of subsidiarity posits that what can be competently accomplished by smaller associations, groups, and communities must not be appropriated by the state.[61] As the revised history of the American public school has revealed, the assumptions of the framers about education were consistent with this principle. Despite the fabrication of a thoroughly secular system of education in this century, it is perhaps not without irony that the parochial schools reflect fealty to the framers' assumptions precisely because they have retained their religious identity.[62]

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[60] *See* FINNIS, *supra* note 48, at 155. The common good may be described as "a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other . . . in a community." *Id.* The notion involves a recognition that "[f]ew will flourish, and no one will flourish securely, unless there is an effective collaboration of persons, and co-ordination of resources and of enterprises." *Id.* at 165; *see also* AQUINAS, *supra* note 56, I-II, q. 90, art. 2 & 3.

[61] Pope Pius XI, *Quadragesimo Anno* (1931), *in* WILLIAM J. GIBBONS, S.J., SEVEN GREAT ENCYCLICALS 125, 147 (1963). A classic description of the principle of subsidiarity has been formulated as follows:

> [I]t is a fundamental principle of social philosophy, fixed and unchangeable, that one should not withdraw from individuals and commit to the community what they can accomplish by their own enterprise and industry. . . . [I]t is an injustice and at the same time a grave evil and a disturbance of right order, to transfer to the larger and higher collectively functions which can be performed and provided for by lesser and subordinate bodies. Inasmuch as every social activity should, by its very nature, prove a help to members of the body social, it should never destroy or absorb them.

Id.

[62] *See generally* Thomas Hoffer et al., *Achievement Growth in Public and Catholic Schools*, 58 SOC. OF EDUC. 74 (Apr. 1985), *reprinted in* COLEMAN, EQUALITY, *supra* note 26, at 302 (noting educational primacy of Catholic schools). Summarizing extensive comparative studies of public school and Catholic school performance, a group of prominent social scientists has noted:

> American educators and educational researchers typically assume that Catholic schools are academically inferior to public schools. They attribute this inferiority to larger classes, less-professional teacher training, more limited resources, smaller per-pupil costs, and religious narrowness, which they believe restricts thought and imagination. To show that Catholic schools, for all their apparent weaknesses, are not worse than public schools may not be too unsettling. But to suggest, as we have, that in terms of academic outcome they might be somewhat better is such a reversal of conventional wisdom that one might well expect intense debate. How

Even if state control of a particular task might yield a higher material dividend, the decision regarding allocation of the task must still include a recognition of the less tangible factors of the assurance of individual rights and the continuance of community activity.[63] The religious nature of the parochial school engenders a sense of community among students and their families. Serving as a corrective to the dehumanizing aspects of life in the modern secular state, the parochial school communicates the fundamental dignity of the individual. It is this fundamental dignity upon which all constitutional praxis, including the rights of equal educational opportunity, parents as primary educators, and free exercise of religion, ultimately depend. A revised theory of First Amendment jurisprudence ought to permit the Court to consider the contribution of parochial school education to the common good in reaching its pronouncements on the constitutional validity of public aid.

B. Constitutional Praxis and Parochial Schools

1. The Facts Concerning Equal Educational Opportunity: The Untold Story of Catholic Schools

The Equal Protection Clause of the Fourteenth Amendment guarantees that no child will be deprived of an equal educational opportunity by reason of race, religion, or national origin.[64] In

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> could schools that have always been thought to be somewhat less effective be more effective, and how could schools thought to undermine the American ideal of the common school somehow be closer to that ideal than the public schools?

Id.

[63] *See* FINNIS, *supra* note 48, at 169. John Finnis has argued that justice to the individual and community requires subsidiarity even where it may be less financially advantageous than a state effort:

> [C]ommon enterprises should be regarded, and practically conducted, not as ends in themselves but as means of assistance, as ways of helping individuals to "help themselves" or, more precisely, to constitute themselves. And in all those fields of activity . . . where individuals, or families, or other relatively small groups, can help themselves by their own private efforts and initiatives without thereby injuring (either by act or omission) the common good, they are entitled in justice to be allowed to do so, and it is unjust to require them to sacrifice their private initiative by demanding that they participate instead in a public enterprise; it remains unjust even if the material dividend they receive from the public enterprise is as great as or even somewhat greater than the material product of their own private efforts would have been.

Id.

[64] U.S. CONST. amend. XIV. This right has been held to be essential to the preservation of the democratic and egalitarian foundations of the American constitutional system. *See*

1964, section 402 of the Civil Rights Act mandated the conduct of social policy research "concerning the lack of availability of equal educational opportunities."[65] The mandate marked the inception of several decades of extensive and comprehensive studies conducted by a team of social scientists under the direction of University of Chicago Professor James S. Coleman. In 1966, social scientists reached two conclusions: First, that children belonging to racial minorities from low-income families "have a serious educational deficiency at the start of school, which is obviously not a result of school"; and second, "they have an even more serious deficiency at the end of school, which is obviously in part a result of school."[66]

During the course of the ensuing twenty-five years, follow-up studies and reports have indicated that despite massive efforts to reform public education in this country, the achievement of children from poor minority families has not greatly improved.[67] Con-

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Brown v. Board of Educ., 347 U.S. 483, 493 (1954); *see also* Board of Educ. v. Pico, 457 U.S. 853, 864 (1982) (quoting Ambach v. Norwick, 441 U.S. 68, 76-77 (1979)) ("[P]ublic schools are vitally important 'in the preparation of individuals for participation as citizens,' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system.' ").

Beneath the constitutional guarantee of equal educational opportunity lies a deeper question concerning the meaning of "equality" in education. *Cf.* San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 23-24 (1973) (upholding greater level of funding for wealthy school districts). John Rawls has suggested that equality necessitates removing the "accidents of natural endowment and the contingencies of social circumstance." JOHN RAWLS, A THEORY OF JUSTICE 15 (1971). Robert Nozick has responded to Rawls by arguing that the human condition itself gives rise to innate and acquired skills. He contends that the individual alone has the right to decide how to use these skills in the free community. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 235-38 (1974). John Coleman criticizes both positions as "extreme": the implication of Rawls' theory being that children ought to be taken from their parents and raised as wards of the state, while for Nozick all education ought to be private and paid for by each family according to its resources and preferences. *See Rawls, Nozick and Educational Equality*, PUB. INTEREST, Spring 1976, at 121, *reprinted in* COLEMAN, EQUALITY, *supra* note 26, at 55.

[65] Civil Rights Act of 1964, tit. IV, § 402, Pub. L. No. 88-352, 78 Stat. 241, 247.

> The Commissioner shall conduct a survey and make a report to the President and the Congress, within two years of the enactment of this title, concerning the lack of availability of equal educational opportunities for individuals by reason of race, color, religion, or national origin in public educational institutions at all levels in the United States, its territories and possessions, and the District of Columbia.

Id. (repealed by Pub. L. No. 95-561, tit. I, § 101(c) 92 Stat. 2200 (Nov. 1, 1978)).

[66] *Equal Schools or Equal Students?*, PUB. INTEREST, Summer 1966, at 70-75, *reprinted in* COLEMAN, EQUALITY, *supra* note 26, at 123.

[67] *See generally* CHUBB & MOE, *supra* note 33, at 110 (providing most recent comprehensive summary of test results concerning failure of American public education). In addition, Coleman and his colleagues have conducted several follow-up studies that confirm

sequently, one is obliged to conclude that considerable government effort and expense to provide equal educational opportunity in the public schools over the past twenty-five years have been largely ineffective.

The efforts of Coleman and his colleagues included longitudinal studies that compared the racially heterogeneous student populations of the urban Catholic schools with those of urban public schools.[68] The government-sponsored research showed that the parochial schools constitute an attractive alternative to the educational plight of the urban poor.[69] Specifically, racial minorities from low-income families in Catholic high schools consistently achieved significantly higher levels in verbal and mathematics skills than did similarly situated children in public schools.[70] Fur-

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their initial results. *See* ON EQUALITY OF EDUCATIONAL OPPORTUNITY 146-67 (Frederick Mosteller & Daniel P. Moynihan eds., 1972), *reprinted in* COLEMAN, EQUALITY, *supra* note 26, at 134-65; *see also* NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM 5 (1983) ("[T]he educational foundations of our society are presently being eroded by a rising tide of mediocrity."); *cf.* ERNEST L. BOYER, HIGH SCHOOL: A REPORT ON SECONDARY EDUCATION IN AMERICA *passim* (1983) (identifying 12 priorities necessary for improvement of schools).

[68] *See* COLEMAN, WELFARE STATE, *supra* note 26, at 273, *reprinted in* COLEMAN, EQUALITY, *supra* note 26, at 250-68.

[69] *See* Hoffer et al., *supra* note 62, at 272-73. By 1981, it had become apparent that

> [a]mong Catholic schools, achievement of students from less advantaged backgrounds—blacks, Hispanics, and those whose parents are poorly educated—is closer to that of students from advantaged backgrounds than is true for the public sector. Family background makes much less difference for achievement in Catholic schools than in public schools. This greater homogeneity of achievement in the Catholic sector (as well as lesser racial and ethnic segregation of the Catholic sector) suggests that *the ideal of the common school is more nearly met in the Catholic schools than in the public schools. This may be because a religious community continues to constitute a functional community to a greater extent than does a residential area, and in such a functional community there will be less stratification by family background, both within a school and between schools.*

Quality and Equality in American Education: Public and Catholic Schools, 63 PHI DELTA KAPPAN 159 (1981), *reprinted in* COLEMAN, EQUALITY, *supra* note 26, at 247 (emphasis added).

For statistical evidence supporting the claim that Catholic schools generally reflect less segregated student populations than do public and other private schools, see COLEMAN, WELFARE STATE, *supra* note 26, at 256.

[70] *See* Hoffer et al., *supra* note 62, at 272-73. Longitudinal tests designed to measure the change in school effects between the sophomore and senior years of high school revealed that

> [t]he combined test score of the public-school students increased from 37.22 to 44.22, while the test score of the Catholic-school students increased from 47.51 to 56.78. Thus, between the sophomore and senior years, the Catholic-school advantage in vocabulary, reading, math, and writing increased from 10.29 correct answers to 12.56—an increase of 2.27 items. Note that this is not a repetition of the

thermore, it was discovered that the attrition rate for children who attended Catholic high schools was considerably lower than for those in public schools.[71]

On the basis of extensive research, Coleman concluded that the difference must be attributed in large part to "the community surrounding the Catholic school, a community created by the church."[72] In his words, "this church-and-school community, with its social networks and its norms about what teenagers should and should not do, constituted *social capital* beyond the family that aided both family and school in the education of the family's children."[73] The "social capital" provided by the parochial schools seemed to compensate for the breakdown of the traditional family structure.

A child from a single-parent, low-income family in parochial school was much more likely to remain in school than was a child from a single-parent family in public school.[74] Moreover, religious observance alone could not account for these effects since urban Catholic schools tended to be religiously heterogeneous.[75] Particu-

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sophomore finding. For the purpose of this analysis, the sophomore standing is taken as the starting point. Thus, *we find not a sustained Catholic-school advantage . . . but an increased Catholic-school advantage.*

Id. (emphasis added).

[71] *Families and Schools*, 16 EDUC. RESEARCHER 32 (1987), *reprinted in* COLEMAN, EQUALITY, *supra* note 26, at 334. Comparisons of attrition rates conducted on public and Catholic school populations between 1980 and 1982 revealed that "in the public schools, 14.3% of sophomores had left school without graduating by 1982; in the non-Catholic private sector, 11.9% had left; and *in the Catholic sector, 3.4% had left, only a fourth to a third as many as in the other two sectors.*" *Id.* (emphasis added).

[72] *Id.*

[73] *Id.* (emphasis added). In 1985, Hoffer, Greely, and Coleman confirmed the "Catholic school advantage" as a result of a series of longitudinal studies of sophomore and seniors in American high schools. Hoffer et al., *supra* note 62, at 302. They suggested that "social capital" enables the Catholic schools to make certain demands on minority students not made in public schools. *Id.*

> Catholic schools place in an academic track many students whose sophomore achievement would relegate them to a general or vocational track in public schools. Catholic schools demand more homework and advanced coursework, especially from those who are disadvantaged in one way or another and especially from those who are not in the academic track . . . . Catholic schools are especially beneficial to the least-advantaged students—the minorities, the poor, and those whose initial achievement is low. For these students, the lack of structure, lower demands, and lower expectations found in many public schools are especially harmful.

Id.

[74] *See Families and Schools*, *supra* note 71, at 334-35.

[75] *See, e.g.*, Brief for the Catholic League of Religious and Civil Rights at 4-13, Mueller

larly notable was that the dropout rate in Jewish and Protestant schools, which tended to be religiously homogeneous but also permeated with a sense of community, was almost identical to that of the Catholic schools.[76]

Currently, parochial schools serve as the only financially realistic option open to children from low- and middle-income families in many of the nation's largest urban areas. Without parochial schools, hundreds of thousands of these children essentially would be deprived of an equal educational opportunity. Because this effort is financed almost entirely by parents and the church, the society at large, in particular the government and private business sector, is receiving an untold financial benefit.[77]

2. Parents As the Primary Educators

The parental right to select the kind of school children attend, provided that the school meets state-imposed standards for secular instruction, has long been recognized under the Fourteenth Amendment's Due Process Clause. In *Pierce v. Society of Sisters*,[78] the Court struck down an Oregon statute that mandated public

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v. Allen, 463 U.S. 388 (1983) (No. 82-195) (noting that although most parochial schools affected by Minnesota tax deduction were Roman Catholic, many students similarly affected were not; 53% of blacks in inner-city Catholic schools are Protestant and 31% of entire school population is Protestant); *see also supra* note 27 and accompanying text (discussing parochial schools as educational alternative for many non-Catholics). Nationwide, Catholics constitute about 90% of the Catholic school population. Seventeen percent of Catholics attend Catholic schools, and 81% of Catholics attend public schools. *See* COLEMAN, WELFARE STATE, *supra* note 26, at 253-54.

Moreover, Coleman discovered that "Catholic students in public schools who attended church regularly had considerably lower dropout rates than did Catholic students who never attended church, but the dropout rates for both were much higher than for their counterparts in Catholic schools." *Families and Schools*, *supra* note 71, at 335.

[76] *See Families and Schools*, *supra* note 71, at 335.

[77] *See An Education President for All?*, N.Y. TIMES, Apr. 19, 1991, at A1. Recognizing the contribution, President George Bush has unveiled "America 2000," a strategy calling for corporate and private investment in the nation's schools, including the parochial schools. *Id.* In response, parochial schools have made attempts to secure private funding. For example, Archbishop of New York John Cardinal O'Connor has announced plans to raise $100 million from corporate sources to keep parochial schools open in the poor areas of New York. *See* Goldman, *supra* note 25, at B7. Nevertheless, the response has not been limited to major urban areas. In response to America 2000, Bishop John G. Vlazny of Winona, Minnesota formed the "Bishop's Committee on the future of Catholic Secondary Education in Winona," which would identify sources of corporate and private funding for the Winona parochial schools. *See* Press Release, Bishop Appoints Committee To Plan 'Bold New Future' for Cotter High (Aug. 20, 1991) (available through Public Info. Office, St. Mary's College).

[78] 268 U.S. 510 (1925).

school attendance and held that "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."[79] The Court reasoned that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[80] Similarly, in *Prince v. Massachusetts*,[81] the Court stated that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[82]

The *Pierce* Court justified its position under the doctrine of *Meyer v. Nebraska*.[83] In *Meyer*, the Court recognized that parents are entrusted with a "natural duty" to educate children.[84] It is interesting to observe that the Court plainly acknowledged a "natural parental right" that is protected under the due process proviso but that transcends the parameters of the Constitution.[85] Although

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[79] *Id.* at 535.

[80] *Id.*

[81] 321 U.S. 158 (1944).

[82] *Id.* at 166. The Court's recognition of the fundamental responsibility and right of parents to educate their children is consistent with the teaching of the Catholic Church. The Second Vatican Council in the Document *Gravissimum Educationis* 3 stated that "[s]ince parents have conferred life on their children, they have a most solemn obligation to educate their offspring. Hence, parents must be acknowledged as the first and foremost educators of their children." THE DOCUMENTS OF VATICAN II 637, 641 (Walter M. Abbott ed., 1966); *see also* 1983 CODE c.226, § 2 ("Because they gave life to their children, parents have the most serious obligation and right to educate them.").

[83] 262 U.S. 390 (1923).

[84] *Id.* at 400.

[85] *See Pierce*, 268 U.S. at 534-35. The questions of whether there is in fact a natural law, and, if so, its proper relationship to the positive law, are far beyond the entirely more modest scope of this discussion. Suffice it to say that Saint Thomas Aquinas, building principally on the thought of Aristotle, argued that certain general, transcendent, and universal principles "written on the hearts of all" were available to the human mind through the use of right reason. AQUINAS, *supra* note 56, I-II, q. 94, art. 6; *see also* Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 365-409 (1928-29) (discussing natural law theory of Locke and Jefferson); FINNIS, *supra* note 48, at 134-93 (excellent contemporary argument in favor of natural law theory and discussion of its correct relation to positive law).

The role of natural law theory in the Court's jurisprudence is the subject of a long-standing debate. In 1798, Justices Chase and Iredell expressed opposing positions in Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798). Writing for the majority, Justice Chase reasoned that the goal of any positive law was "to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence." *Id.* at 388.

today it may no longer be fashionable for the Supreme Court to invoke natural law, it does not seem unreasonable to suggest that the constitutional guarantee has a connection to some conception of a more basic moral order.[86] The conception of the moral order articulated in *Pierce* seemed to presume an entire structure of social and economic organization with the traditional family as its basic building block.

Coleman has studied numerous factors that indicate a decline in the traditional family structure, with profound implications for society and education.[87] One of the most telling is the gradual but steady increase in households without young children. Census Bureau statistics demonstrate that in 1870, only about twenty-five

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He held that a post facto law contrary to these goals could not "be considered a rightful exercise of legislative authority." *Id.* To the contrary, Justice Iredell argued that the Court did not have the power to invalidate legislation "merely because it is, in their judgment, contrary to the principles of natural justice." *Id.* at 398 (Iredell, J., concurring). He reasoned that "[t]he ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject." *Id.*

Iredell may have been prophetic. Oliver Wendell Holmes, Hugo Black, and Felix Frankfurter all denied any validity to such a philosophical basis to the Court's jurisprudence. To the contrary, Roscoe Pound, Learned Hand, and William O. Douglas maintained that the natural law was indispensable. Until the mid-twentieth century, it was not unusual for the Court to justify its holdings on the basis of the natural law. For an insightful analysis of the Court's expressed and implicit reliance on natural law theory, particularly with regard to its decisions upholding racial equality and freedom of speech, see JOHN FOLEY, NATURAL LAW, NATURAL RIGHT AND THE "WARREN COURT" (1965).

[86] *See* RONALD M. DWORKIN, TAKING RIGHTS SERIOUSLY 149 (1977) (arguing that moral philosophy is essential to coherent theory of individual rights against state and recommending work of Rawls, *see supra* note 64, to constitutional lawyers). A term such as "moral theory" is usually intended to signify a method of reason or analysis that yields general principles—or rules where possible—that transcend the case at bar and treat like cases alike. *Cf.* ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 87 (1970) (suggesting that constitutional decisions must rely on "the method of reason familiar to the discourse of moral philosophy").

[87] *See Families and Schools*, *supra* note 71, at 327-28. Describing the shift in the role of the family in American society, Coleman suggests that the implications are less than positive:

> In the old social structure, dependency was not a public phenomenon. The streets of New York and Philadelphia were not populated with homeless men and women, and foster care institutions were not populated with children who had two live and healthy parents. Dependency was absorbed by the family and its extensions. Families took care of their aged; unmarried men and women lived in the households of their married siblings, as aunts and uncles; and children were fully ensconced within the household.
>
> In short, *the household was the principal welfare institution of society.* Beyond the household were the extended family and kin group, and they constituted the secondary, or backup welfare institution in society.

Id.

percent of all American households had no children under the age of eighteen.[88] This percentage has significantly increased in each succeeding year, such that by 1980 approximately sixty-five percent of all households were without children under eighteen years.[89] In a parallel development, the number of households with two wage earners and no children has markedly increased since 1970.[90] Concurrently, children under five years of age became the age group in the general population with the highest percentage of poverty.[91] If this trend continues, these children are likely to grow up in single-parent families.[92] It follows that the schools will be populated with increased numbers of children from low-income families, and, as previously discussed, children from such families are not often afforded equal opportunity in education.

When the disadvantages confronting children from low income families are considered in conjunction with the advantage offered by parochial school education, perhaps there is cause to recall the natural parental right.[93] Faced with inadequate funds, many low-income parents often have no choice but to place their children in public schools with an established record of inadequate education. The absence of choice prolongs the poverty cycle. It is precisely the parochial school's ability to create a community environment that provides the social capital to compensate for the decline in the traditional family structure and to enable the learning of fundamental educational skills. Thus, a partial solution may lie in a retrieved recognition of the crucial societal role of local, nongovernmental institutions such as the parochial school.

3. Free Exercise and the Emergence of the "Hybrid Case Doctrine"

As a corrective to the Court's exclusive focus on the Establish-

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[88] *Id.* at 329.

[89] *Id.* at 328.

[90] *Id.*

[91] *Id.* (citing Samuel H. Preston, *Children and the Elderly*, 251 SCI. AM. 44-49 (1984)).

[92] *Cf. id.* (unmarried parents and their children lived with "their married siblings" in old social structures).

[93] *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 813-14 (1973) (White, J., dissenting) ("[T]he Due Process Clause of the Fourteenth Amendment to the Constitution entitles parents to send their children to nonpublic schools, secular or sectarian, if those schools are sufficiently competent to educate the child in the necessary secular subjects."); *see also* Lemon v. Kurtzman, 403 U.S. 602, 663 (1971) (White, J., concurring in part, dissenting in part) (discussing parental rights under Constitution).

ment Clause, Justice White has reasoned that the Court's approach to the parochial school aid cases must not omit a proper understanding of the free exercise of religion.[94] In a recent case, *Employment Division, Department of Human Resources of Oregon v. Smith*,[95] the Court found no violation of the Free Exercise Clause when a person who used peyote as part of a religious practice was denied unemployment benefits after being discharged for using an illegal substance.[96] In reaching its decision, the Court refused to evaluate the free-exercise claim under the compelling governmental interest test articulated in *Sherbert v. Verner*.[97] Justice Antonin Scalia, writing for the majority, suggested that the compelling governmental interest test was strictly limited to unemployment claims such as the one brought in *Sherbert*, where the petitioner was discharged for refusing to work on the Sabbath, and did not apply to discharge for the use of peyote.[98] Pursuant to *Smith*, a reasonable and generally applicable law will pass constitutional muster against a free-exercise claim. The *Smith* decision bodes the profoundly disturbing outcome that a political majority might now be able to impose its predilections about what religious practice will be accommodated and to which irreligious practices an individual must conform.[99] It was precisely such a draconian scenario that Madison's postulation of the multiplicity of sects and interests in a vigorous social pluralism was intended to preclude.[100]

Almost concomitantly with the promulgation of the *Smith* decision, Professor Michael McConnell persuasively argued that free-exercise exemptions from general laws were a constitutive feature

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[94] *See Lemon*, 403 U.S. at 665 (White, J., concurring in part, dissenting in part) (Free Exercise Clause coexists with Establishment Clause in First Amendment and therefore should be afforded deference).

[95] 494 U.S. 872 (1990).

[96] *Id.* at 890.

[97] *See* Sherbert v. Verner, 374 U.S. 398 (1963); *Smith*, 497 U.S. at 882-90.

[98] *See Smith*, 494 U.S. at 876-78, 884 (even if application of *Sherbert* balancing test was extended, it would not be used to "require general exemptions from a generally applicable criminal law").

[99] In the wake of the *Smith* decision, legislation was introduced in Congress to reverse its feared effects. For an analysis of the proposed law, the Religious Freedom Restoration Act, see Mark Chopko & John Liekweg, *Remedying a High Court Threat to Religious Liberty*, 21 ORIGINS (June 27, 1991). Alternatively, perhaps the *Smith* opinion is quite fact-specific, and as much, is intended only to prevent citizens from justifying the use of otherwise illegal narcotics on first amendment grounds. If the holding was intended only to address the particular case before the court in *Smith*, then it could be argued that the proposed legislation is unnecessary.

[100] *See supra* note 34 and accompanying text.

of the church-state situation at the time of the framing of the First Amendment.[101] Whereas the Court in *Smith* expressed qualms about approving exemptions from generally applicable law on the basis of conscience,[102] McConnell contended that the framers specifically designed the words "free exercise of religion" to protect religiously motivated conduct as distinct from secular claims of conscience.[103]

The language of the *Smith* opinion intimates that an exception to the reasonableness standard of review is in order for cases that involve the "[f]ree exercise clause . . . in conjunction with other constitutional protections, such as . . . the right of parents . . . to direct the education of their children . . . ."[104] The Court expressly identified *Wisconsin v. Yoder*[105] as such a "hybrid situation."[106] In *Yoder*, Amish parents of high-school age children successfully challenged Wisconsin's compulsory education law on free-exercise grounds. Requiring an exception to the reasonable state law, the Court invoked the Free Exercise Clause, stating that the Amish parents opposed the law because they found conventional high-school education contrary to the religious development of their young.[107] Citing *Pierce*, the Court further justified its holding on the ground of parents' right as primary educators under the Due Process Clause: "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture

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[101] *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1415, 1436-54 (1990) ("[E]xemptions were within the contemplation of the framers and ratifiers as a possible interpretation of the [F]ree [E]xercise [C]lause."). Realizing the lack of scholarly work on the subject, McConnell sought to analyze the history of the Free Exercise Clause in an attempt to gain insight into the framers' intent. *See id.* at 1414-15.

[102] *Smith*, 494 U.S. at 882 ("Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.") (quoting Gillette v. United States, 401 U.S. 437, 461 (1971)).

[103] McConnell, *supra* note 101, at 1480-1511. In discussing the Legislature's choice of words in drafting the First Amendment, McConnell noted that "[b]y deleting references to 'conscience,' the final version of the [F]irst [A]mendment singles out religion for special treatment." *Id.* at 1491.

[104] *Smith*, 494 U.S. at 881.

[105] 406 U.S. 205 (1972).

[106] *See Smith*, 494 U.S. at 881-82. The Court's use of the term "hybrid" seems to mean that each "ancestor" is a *sine qua non* of the result (e.g., a nectarine). However, if the same result would happen even if only one ancestor is present (the due process right), one must wonder how this is a hybrid.

[107] *Yoder*, 406 U.S. at 223 (Amish oppose formal public education beyond eighth grade "because it comes at the child's crucial adolescent period of religious development").

and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[108] Although it seems that the Court will require exceptions to a generally applicable law where free exercise and due process considerations come together, it remains to be seen whether such a hybrid situation might call for judicial deference to a legislative program of parochial school aid.

Given Justice White's position on the role of free-exercise considerations in the parochial school aid cases, he might be inclined to apply the hybrid case doctrine. The parental choice between purely secular education and secular education that includes a religious component may reflect fundamental differences in what it means to be an individual. Undoubtedly, many parents believe that a thoroughly secular environment is the optimal educational setting for their children. During the second half of this century, the Supreme Court's decisions with regard to the role of religion in the public schools have attempted to protect the sensibilities of those students who object to moments of prayer,[109] recitations of biblical verses,[110] the posting of the Ten Commandments in classrooms,[111] and moments of silence for meditation.[112]

Each of these decisions can be attributed at least in part to the Court's legitimate concern for the sensibilities of children and their parents who object to such religious formation in a secular school environment. Of course, the Court should protect the rights of individuals when a government program infringes upon those rights. For example, the Christian majority of a particular state or locality ought not be allowed to force its religious views on adherents of different faiths or on nonbelievers. At the same time, the Court's decisions during the last forty years have in fact been successful in eliminating religion from public education. Considered as a whole, these decisions reflect the conception that American society is best served by the exclusion of any recognition of a transcendent being from the formal education of the vast majority of American children.

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[108] *Id.* at 232.

[109] *See* Engel v. Vitale, 370 U.S. 421, 424 (1962) (finding state's school prayer inconsistent with Establishment Clause).

[110] *See* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 205 (1963) (finding such recitations violative of Establishment Clause).

[111] *See* Stone v. Graham, 449 U.S. 39, 41-43 (1980) (state statute had "no secular legislative purpose" and therefore violated Establishment Clause).

[112] *See* Wallace v. Jaffree, 472 U.S. 38, 59-60 (1985).

Just as some parents prefer that their children be educated in a thoroughly secular environment, many others believe that such an educational environment places a grave burden on the right to the free exercise of religion.[113] For such parents, the religious education of their children is an integral part of the formation of the whole person and is best conducted as a part of the entire school curriculum. Many Americans continue to subscribe to what will be described as the "theological anthropology" that originally motivated the framing of the religion clauses.[114] Pursuant to this anthropology, the free exercise of religion stems from the very dignity of the individual as a profoundly spiritual being.[115] At the time of the adoption of the First Amendment, education reflected the anthropological assumptions of the day by embracing religious training as a component of the curriculum and as a pervasive influence in the schools.[116] Under the current arrangement, the Court has decreed that all tax-supported education must be free of any religious instruction.[117] Such an arrangement leaves those who believe that religious formation is an indispensable and inseparable part of a child's education at a distinct disadvantage.[118]

C. *Summary*

At its inception, the Constitution presumed a social order dependent on the existence of numerous local, nongovernmental institutions as part of a vigorous social pluralism. Because the parochial schools continue to exemplify such subsidiary structures, they prove to be an invaluable component of the social fabric of the

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[113] For example, Canon 799 of the Code of Canon Law exhorts Roman Catholic parents to send their children to schools that provide both secular and religious training, and where parents are unable to do so, they are bound to provide religious education outside the school. *See* 1983 CODE c.799.

[114] *See infra* notes 144-171 and accompanying text. *See generally* ROBERT COLES, THE SPIRITUAL LIFE OF CHILDREN (1990) (based on 30 years of clinical observation, renowned Harvard psychiatrist concluded that children have spiritual life, formation of which is quite significant to their adult lives); ROBERT N. BELLAH ET AL., HABITS OF THE HEART, INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 219 (1985) ("Religion is one of the most important ways . . . in which Americans 'get involved' in the life of their community and society.").

[115] *See infra* notes 149-72 and accompanying text.

[116] *See infra* notes 139-43.

[117] *See supra* notes 13-17 and accompanying text.

[118] For example, under the type of release-time program approved of by the Court in Zorach v. Clauson, 343 U.S. 306 (1952), program participants must bear the burden of being dismissed from school while it is still in session, and their respective churches must expend all the funds needed for the program. *See id.* at 308-09.

pluralistic society. For a significant number of low-income families, the parochial schools serve as the exclusive providers of the constitutionally protected rights to equal educational opportunity and parental choice in education.[119] When either of these Fourteenth Amendment rights is juxtaposed with the free-exercise concern, the parochial school aid issue seems to fall under the logic of the hybrid-case doctrine.[120] Thus, the parochial schools reflect a harmony of constitutional theory and praxis. If the schools failed to fulfill important societal needs, both secular and religious, they would not have the continued approbation of pastors and parishioners who dispose of contributions, low- and middle-income families of various races and creeds who sacrifice to pay tuition, administrators and teachers who serve at low salaries, and individuals and organizations who donate private funds. To deny public aid to the parochial schools is to ignore social reality.

II. LEGAL DOCTRINE: THE NEED FOR A FUNDAMENTAL REVISION OF THE SUPREME COURT'S FIRST AMENDMENT JURISPRUDENCE

A. Anthropological Assumptions and the First Amendment

Although the First Amendment was adopted two hundred years ago, the rubric that has guided the Court's decisions in the parochial school aid cases is a more recent development. Prior to Justice White's appointment to the Supreme Court in 1962 by President John F. Kennedy, the Court had manifested a preference for the strict-separationist position. In 1947, the Court decided the seminal case of *Everson v. Board of Education*,[121] holding that it was constitutionally permissible for New Jersey to dispense public funds to provide for the cost of transporting children to and from parochial schools.[122] In contrast to its holding,

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[119] *See supra* notes 64-77 and accompanying text.

[120] *See supra* notes 94-118 and accompanying text.

[121] 330 U.S. 1 (1947).

[122] *Id.* at 18. In *Everson*, the Court opined that the Establishment Clause applied to the states. *Id.* at 5. The following year the Court relied on *Everson* to invalidate a state law pursuant to the Establishment Clause in McCollum v. Board of Education, 333 U.S. 203, 210 (1948). Previously, the Court had applied the Free Exercise Clause to the states in Cantwell v. Connecticut, 310 U.S. 296, 303 (1940), where the conviction of persons for disseminating religious literature was reversed. *Id.* at 311.

The issue of the incorporation of the religion clauses, however, continued to raise thorny issues. In School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963), Justice Brennan noted the special issue raised by application of the Establishment Clause to

much of the language in *Everson* reflected the view that the religion clauses were intended to fix a strict separation between church and state.[123] Justice Black, writing for the majority, determined that a "review [of] the background and environment of the period in which the constitutional language was fashioned"[124] was in order and ordained the following:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another . . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions . . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."[125]

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the states through the Fourteenth Amendment: such incorporation was conceptually troublesome inasmuch as the First Amendment expressly prohibited Congress from establishing a religion but at the time of the First Amendment's adoption, several of the states had, in fact, established religions. *See id.* at 254-55 (Brennan, J., concurring). Justice Brennan suggested the issue is irrelevant because the last formal state establishment of religion had been dissolved more than thirty years before the Fourteenth Amendment was ratified. *See id.* at 255. Although the incorporation issue now seems settled at least for judicial purposes, Justice Brennan's reasoning does not account for the clear historical evidence of far less than a strict regime of separation between church and state at the time of the framing of the First Amendment, quite apart from the issue of whether "formal establishments" existed. *See infra* notes 144-73 and accompanying text. The observation of Justice Oliver Wendell Holmes seems apt: "If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it. . . ." Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922).

[123] *See Everson*, 330 U.S. at 15-16; *see also* Reynolds v. United States, 98 U.S. 145, 164 (1878) (Establishment Clause intended to erect "a wall of separation between church and state").

[124] *Everson*, 330 U.S. at 8.

[125] *Id.* at 15-16 (citation omitted). The language of the majority opinion appears more consistent with the dissenting opinion filed by Justice Rutledge than with the actual holding of the case. Justice Rutledge argued that the avoidance of political divisiveness among religious sects was one of the chief underpinnings of the First Amendment. *Id.* at 53-54 (Rutledge, J., dissenting); *see* Paul A. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969) (political divisiveness resulting from sectarian strife was "one of the principal evils that the [F]irst [A]mendment sought to forestall"); *see also* Aguilar v. Felton, 473 U.S. 402, 414 (1985) (striking down program of state-funded and supervised remedial education in parochial schools on ground that state supervision increases "the dangers of political divisiveness along religious lines . . . ."). *But see* Mueller v. Allen, 463 U.S. 388 (1983).

> At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. The risk of significant religious or denominational control over our democratic

The dicta thus set down two rules: first, it canonized the Jeffersonian metaphor as the definitive truth behind the religion clauses; and, second, it effectively bifurcated the religion clauses by implying that cases brought pursuant to the Establishment Clause could be considered without reference to the Free Exercise Clause. In 1972, the dicta in *Everson* were transformed into law when they supplied the theoretical underpinning of the *Lemon* standard upon which the Court would invalidate various federal and state programs providing parochial school aid.[126]

1. Demythologizing the Jeffersonian Metaphor

Unwilling to acquiesce in the conventional understanding, Justice White has remarked that "one cannot seriously believe that the history of the First Amendment furnishes unequivocal answers to many of the fundamental issues of church-state relations."[127] Rather, he has suggested that "the courts have fashioned answers . . . as best they can . . . [the] history [of the Constitution] having left them a wide range of choice among many alternatives."[128] Justice White's incredulity is now shared by several of his colleagues.[129] In addition, numerous constitutional historians and academicians have expressed grievous reservations about the

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> processes—or even of deep political division along religious lines—is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court.

Id. at 400 (Powell, J., concurring in part, dissenting in part) (quoting Wolman v. Walter, 433 U.S. 229, 263 (1977)) (citation omitted).

[126] *See* Lemon v. Kurtzman, 403 U.S. 602, 625 (1971). *See generally* School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 381 (1985) (outlining key cases on Establishment Clause); Woman v. Walter, 433 U.S. 229, 253 (1977) (distinguishing *Everson* from *Lemon* on fact that while parental reimbursements are permissible, funds to parochial schools are not); Sloan v. Lemon, 413 U.S. 825, 832 (1973) (discussing limits on *Everson* as enunciated in *Lemon*); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 771-72 (1973) (reiterating limits of Establishment Clause as set forth in *Everson* and *Lemon*).

[127] *Nyquist*, 413 U.S. at 820 (White, J., dissenting).

[128] *Id.*

[129] *See* County of Allegheny v. ACLU, 492 U.S. 573, 576 (1989) (Kennedy, J., dissenting, joined by Rehnquist, C.J., and White and Scalia, JJ.) (repudiating formalism in the application of the *Lemon* standard as inconsistent with history of Establishment Clause, four member dissent stated that "[g]overnment policies of accommodation, acknowledgement and support for religion are an accepted part of our political and cultural heritage"); *see also* Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately, the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly [forty] years.").

conventional account.[130] Among scholars, the consensus seems to be growing that the historical evidence neither requires the strict-separationist position nor provides a conclusive answer to particular cases.[131] In the face of such significant dissatisfaction, a second look at "the environment and background" of the religion clauses seems long overdue. No attempt will be made to conduct an exhaustive examination of the historical evidence or to derive a comprehensive theory of church-state relations. Rather, it suffices for the present purposes to inquire whether the conventional account can bear the weight of the evidence. The argument for strict separation in *Everson* was based on historical authority.[132] If the historical evidence fails to corroborate the argument, however, the denial of parochial school aid cannot be sustained on this ground.

In *Everson*, Justice Black began by focusing almost exclusively on the writings of Jefferson and Madison.[133] It is true, as Black

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[130] *See e.g.*, CURRY, *supra* note 1, at 193-222; MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS 91-118 (1965); PAUL G. KAUPER, RELIGION AND THE CONSTITUTION 18 (1964); Arlin A. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1646-47 (1989); Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 842 (1986); McConnell, *supra* note 101, at 1430-36. For an earlier history, see SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA (1968). This Article draws heavily on the excellent historical accounts provided by McConnell and Curry.

[131] *See* Kurland, *supra* note 130, at 841-42. "History should provide the perimeters within which the choice of meaning may be made. History ordinarily should not be expected, however, to provide specific answers to the specific problems that bedevil the Court." *Id.*

[132] *See Everson*, 330 U.S. at 33 (Rutledge, J., dissenting) ("No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment.").

[133] *See id.* at 13. Black supported his position with a quotation from Virginia's "Bill for Religious Liberty," which was drafted by Jefferson in 1786: "[N]o man shall be compelled to frequent or support any religious worship, place or ministry whatsoever . . . ." *Id.* (citing 12 WILLIAM W. HENING, STATUTES OF VIRGINIA 84 (1823); H.S. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 125 (1944)).

As the Ambassador to France, Jefferson was in Paris when the Continental Congress framed the First Amendment. However, on January 1, 1802, then President Jefferson wrote a letter to the Danbury Baptist Association expressing his views of the Establishment Clause, and stated the commonly quoted metaphor that the First Amendment was enacted to create 'a wall of separation between church and State'. *See* Wallace v. Jaffree, 472 U.S. 38, 91-92 (1985) (Rehnquist, J., dissenting) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1879)). Jefferson's letter was intended to express his disapproval of the establishment of a Congregationalist church by the State of Connecticut—which continued to recognize the established church until 1818. Clearly, Jefferson's objection to state support of a particular religion was well known when the First Amendment was framed because of the widespread dissemination of his "Bill for Establishing Religious Freedom." Jefferson's influence on the framers' thinking has been exaggerated, however; simply stated, the adoption of the

recounted, that James Madison, a leading figure in the framing of the Bill of Rights, had joined with Jefferson in 1785-1786 to defeat the renewal of Virginia's tax in support of its established church.[134] Such information, however, seems less probative of the intent behind the religion clauses than an examination of the legislative process surrounding the clauses per se. The state conventions, which ratified the Constitution, called for a federal bill of rights.[135] In response, Congress framed the first ten amendments to the Constitution, but the congressional record of the discussion surrounding the religion clauses is surprisingly brief.[136] The legislatures of the several states were then required to ratify the amendments.[137] As we shall see, Justice Black's account in *Everson* is at variance

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religion clauses was not motivated by a unitary perspective, position, or practice. *See* CHESTER J. ANTIEAU ET AL., FREEDOM FROM FEDERAL ESTABLISHMENT *passim* (1964). *See generally* KAUPER, *supra* note 130, at 48-50 (discussing Jeffersonian and Madisonian ideas of religious liberty and role they play in deciphering meaning of First Amendment).

[134] *See Everson*, 330 U.S. at 11-12. As Black noted, there was significant opposition to the imposition of any tax to support members of the clergy. It was in opposition to the Virginia establishment of the Anglican Church that Madison wrote his famous *Memorial and Remonstrance*. *See* CURRY, *supra* note 1, at 143-47. At the same time in Massachusetts, taxes for the support of ministers and "public protestant teachers of religion and morality" were considered acceptable on the ground that " 'the happiness of a people and the good order and preservation of civil government [essentially] depend [] on piety, religion and morality.' " *Id.* at 163-64.

[135] *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 248-50 (1833) (noting that state governments demanded Bill of Rights to limit power of federal government, not their own). Early decisions of the Supreme Court indicated that no part of the Bill of Rights was intended to be applicable to the states. In *Barron*, Chief Justice Marshall stated that the purpose of the amendments was "security against the apprehended encroachments of the general government—not against those of the local governments." *Id.* at 250. Although *Barron* raised the question in regard to the Fifth Amendment, Permoli v. First Municipality, 44 U.S. (3 How.) 589 (1845), specifically held that the Free Exercise Clause was inapplicable to the states, *id.* at 609-10. Shortly after the adoption of the Fourteenth Amendment's Privileges and Immunities Clause in 1868, the Court rejected the idea that the Bill of Rights was applicable to the states. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 77-78 (1872). Today, however, it seems indisputable that the Bill of Rights applies to all government bodies—federal, state, and municipal. *See* Brown v. Board of Educ., 347 U.S. 483, 495-96 (1954).

[136] *See* CURRY, *supra* note 1, at 199-207. Initially, Madison proposed adding the following words to Article I, § 9 of the Constitution: "The Civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established . . . . " *See id.* at 199. During its consideration by the House of Representatives, Fisher Ames suggested that Madison's proposal be restated in the affirmative, and that the word "Congress" be placed as a prefix to the clauses. *Id.* at 206. Based on the Ames proposal, the religion clauses were approved by a joint House and Senate Committee in September 1789. *Id.* at 207. The Congressional record does not reveal the reason for the grammatical changes or the addition of the word "Congress." *Id.* at 206.

[137] *See supra* note 1 and accompanying text.

with the predominant spiritual and theological understanding of what it meant to be human at the time of the adoption of the First Amendment. Justice Black's position is also inconsistent with the manifestation of this pervasive anthropology in the various church-state arrangements and in the common schools in the original states. As one constitutional scholar put it, the "basic error . . . derives . . . from its pretension that the framers spoke in a wholly Jeffersonian dialect. . . . building constitutional law upon history thus oversimplified."[138]

a. Rationalist Anthropology

Diverse understandings "of human nature, human destiny and the meaning of life" seem to have influenced the adoption of the religion clauses.[139] Jefferson's political thought was based on European political theory of the Enlightenment and, in particular, on the thought of John Locke.[140] Locke viewed the individual as an autonomous agent who enters into a social contract with the state.[141] According to Locke, the individual only has the capacity to know ideas alone, and knowledge is nothing more than an apprehension of the agreement or disagreement of ideas.[142] This emphasis on the subjective and rational nature of knowledge ultimately led Locke to conclude that freedom of conscience was indispensable in matters of religious doctrine.[143] Nonetheless,

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[139] HOWE, *supra* note 130, at 10-11; *see also* Flast v. Cohen, 392 U.S. 83 (1968) (Harlan, J., dissenting). As Justice Harlan stated:

> [W]e have recently been reminded that the historical purposes of the religious clauses of the First Amendment are significantly more obscure and complex than this Court has heretofore acknowledged. Careful students of the history of the Establishment Clause have found that "it is impossible to give a dogmatic interpretation of the First Amendment, and to state with any accuracy the intention of the men who framed it . . . . " Above all, the evidence seems clear that the First Amendment was not intended simply to enact the terms of Madison's Memorial and Remonstrance against Religious Assessments.

Id. at 125-26 (quoting ANTIEAU ET AL., *supra* note 133, at 142).

[139] John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CAL. L. REV. 847, 856-57 (1984).

[140] McConnell, *supra* note 101, at 1430-31.

[141] *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 269-78 (Peter Laslett ed., student ed. 1988) (3d ed. 1698).

[142] 2 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 226-43 (Alexander C. Fraser ed., 1984) (1690).

[143] *See* McConnell, *supra* note 101, at 1432. "Locke became an advocate of a sweeping toleration toward religious dissenters, with the exceptions of Catholics (because of their allegiance to a foreign prince), atheists (because they cannot be trusted to carry out their

Locke also argued that "the private judgment of any person concerning a law enacted in political matters, for the public good, does not take away from the obligation of that law, nor serves as a dispensation."[144] While professing to be a Christian, Locke urged that Christianity be "made more rational and tolerant but less engaged in questions of earthly significance."[145]

Locke's theory, particularly as it pertained to the relationship between church and state, exerted a significant influence on Jefferson and Madison, and Jefferson was indebted to Locke for many of the ideas expressed in the Bill for Establishing Religious Freedom.[146] In Virginia, where Jeffersonian thought was most influential, religious freedom had superseded the establishment of the Anglican Church. This displacement was facilitated after the establishment church was discredited for remaining loyal to the English Crown during the Revolutionary War.[147] Madison, who had collaborated with Jefferson in the effort to insure religious freedom in Virginia, later served as one of the principal architects of the Bill of Rights in the House of Representatives.[148]

b. Theological Anthropology

The rationalist understanding, however, was at odds with the understanding of the individual that was operative in the lives of the vast majority of Americans in the 1780's.[149] The prevalent theological anthropology found its roots in the Reformation.[150] Religious purpose permeated all of reality, and life without a biblical focus was simply life without salvation.[151] To be a human being meant either to be a profoundly spiritual being predestined to inherit the kingdom of God or to be counted among the "nonelect,"

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promises and oaths), and those who refuse to support tolerance for others." *Id.*

[144] John Locke, *A Letter Concerning Toleration*, *in* 6 WORKS OF LOCKE 43 (1963). "The *government's perception* of public need defines the boundaries of freedom of conscience." McConnell, *supra* note 101, at 1434.

[145] McConnell, *supra* note 101, at 1431.

[146] *See id.* at 1430-31.

[147] *Id.* at 1436.

[148] *See id.* at 1431.

[149] *See id.* at 1439-40. With the notable exception of Jefferson, most of the rationalists were at the same time practicing Christians. Like Madison, the rationalists were comfortable with the religious culture of the Congregationalists in New England and Anglicans in the South, who were viewed by the evangelicals as uninspired and corrupted by association with the state. *Id.* at 1440.

[150] *See* OWEN CHADWICK, THE REFORMATION 40-96 (1964).

[151] *See id.*

the "massa damnata."[152] Whereas the civil government was deemed necessary, the church represented the kingdom of God in the present by pointing to what was to come.[153]

Intensity of religious belief afforded the most significant political impetus behind the adoption of the religion clauses.[154] Evangelical Protestant sects, including Baptists, Quakers, and some wings of the Lutherans and Presbyterians, espoused the religion clauses because they wanted freedom to practice their zealously held religious beliefs without interference from the state.[155] The faith of the evangelicals was enthusiastic, fervent, and often emotional.[156] Dispersed throughout the original states, they were the constituents of the great religious revival that coincided with the founding of the new republic, and, as the number of "the elect" increased, so too did the force of their political voice.[157] The church and its members needed to be protected from the government and from governmental attempts to enforce conformity to the established religious doctrine.[158] If some positive law of the

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[152] This view was consistent with the theological anthropologies of Augustine of Hippo and Martin Luther. *See id.* at 40-96. For contemporary presentations of anthropology based on the Reformed theological tradition, see 2 REINHOLD NIEBUHR, THE NATURE AND DESTINY OF MAN, A CHRISTIAN INTERPRETATION 184-204 (1964); WOLFHART PANNENBERG, ANTHROPOLOGY IN THEOLOGICAL PERSPECTIVE (Matthew J. O'Connell trans., 1985).

[153] The dualism between church and state, as reflected in the idea of the "heavenly and earthly cities," was a characteristic of both St. Augustine, THE CITY OF GOD XVIII, 49 (Gerald G. Walsh, S.J. & Daniel J. Honan trans., 1954), and Martin Luther, *On Secular Authority: To what extent it should be obeyed , in* MARTIN LUTHER 363, 368-73 (John Dillenberger ed., 1961); *see also* REINHOLD NIEBUHR, CHRISTIAN REALISM AND POLITICAL PROBLEMS 124-38 (1953) (suggesting that, in Reformed understanding, while earthly empire bears marks of egoism and strife, it nonetheless serves divine function by effecting relative degree of peace, order, and justice).

[154] *See* McConnell, *supra* note 101, at 1437-43. *See generally* JOHN S. WHALE, THE PROTESTANT TRADITION (1950) (interpreting Protestant religion, its history, strengths, and weaknesses).

[155] McConnell, *supra* note 101, at 1439.

[156] *Id.*

[157] *See id.* at 1440.

[158] *See* HOWE, *supra* note 130, at 6-11. Howe identified two salient and diverse strands that he thought characteristic of the original intent. *See id.* at 5-11. The first strand focused on Jefferson's wall of separation, which was primarily intended to protect the state from misuse as an instrument of the church. *See id.* at 5-7. Together with the anticlerical bias of eighteenth-century rationalism, the history of church-state relations in colonial Virginia left Jefferson with a distrust of organized religion, particularly when ecclesiastical authorities interfered with public interests. *Id.* at 9-11. Howe suggested that the interpretation of the framers' intent as hostile to religion tended to obscure a second interpretation which focused on preserving religious values. *Id.* at 10-11.

Juxtaposed with Jefferson's wall metaphor was an earlier metaphor, chiefly ascribed to Roger Williams, which depicted church as a well-designed and maintained garden. Williams'

state conflicted with a dictate of religious conscience, then free exercise of religion mandated that the government allow an exception to the law.[159]

Although they shared a common theological anthropology, the evangelical movement for religious freedom was in large part a reaction to the mainstream Protestant churches.[160] In New England, the Congregationalists, descendants of the Puritan settlers, maintained a polity devised during the colonial era under which each town constituted a congregation and supported the church and minister through taxation.[161] Because the Congregationalist churches in Massachusetts, New Hampshire, Connecticut, and Vermont were associated with the patriots' cause during the Revolutionary War, their position in the new republic when the Bill of Rights was framed had only been strengthened.[162]

In ratifying the Constitution, the Massachusetts state representatives specifically recommended certain amendments in order to allay "fears and apprehensions" about federal encroachments on state power.[163] Massachusetts Congressman Fisher Ames proposed the version of the religion clauses that the House of Representatives sent to the Senate.[164] The first Congress essentially adopted Ames' version, which became the third of the twelve proposed amendments, the first two of which failed to be ratified by the requisite number of the states.[165] New Hampshire and Vermont were

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metaphor was primarily intended to protect religion against the "wilderness" of the government and the outside world. It could be attributed to the establishment of the episcopal form of religion during the Reformation in England and to the Puritan's subsequent flight to a new world to escape the state religion. *Id.* at 15-60.

[159] *See* McConnell, *supra* note 101, at 1443-49.

[160] *Id.* at 1441-43.

[161] *See* CURRY, *supra* note 1, at 209. Curry reminds us that it is important not to project modern conceptions of "establishment" onto the Americans of the eighteenth century: "Americans both before and after the Revolution thought of establishment as an exclusive government preference for one religion." *Id.* It follows that New Englanders did not view their system of municipal support for the local church as an impermissible establishment of religion, even though such an arrangement would clearly be considered so under the modern approach to the First Amendment.

[162] *See* COBB, *supra* note 130, at 483, 500; CURRY, *supra* note 1, at 12-13, 22, 88; McConnell, *supra* note 101, at 1437.

[163] 1 JONATHAN ELLIOT, ELLIOT'S DEBATES 322-23 (reprint ed., 1937) (1836). However, what would become the First Amendment of the Constitution was not included among those suggested by the Massachusetts delegates.

[164] *See* CURRY, *supra* note 1, at 206. The proposed amendment read: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." *Id.*

[165] *Id.* at 205-07.

among the first eleven states that voted to ratify the remaining ten amendments known as the Bill of Rights.[166] In light of the popular support the Congregationalist Churches enjoyed, it seems unlikely that the New England delegates intended to incorporate Jefferson's views on public support for religion into the Constitution.[167]

The "republican ideology" propagated by mainstream Protestant sects in New England and elsewhere conflicted with the "nonestablished" evangelical sects.[168] Building on a principle that could be traced to antiquity, adherents of republicanism espoused the ancient Greek and Roman notion that if one sought to foster virtue in a society, religion was an indispensable component.[169] Accordingly, the republicans sought a societal uniformity in matters of religious doctrine as a means of preserving order and peace. They believed that the individual was at the same time both a loyal citizen and an orthodox believer with no conflict between the law of the state and the precepts of the church, a view incompatible with religious pluralism.[170]

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[166] ELLIOT, *supra* note 163, at 340.

[167] *See* CURRY, *supra* note 1, at 205. With regard to the members of the House of Representatives, for example, Thomas Curry maintains that none of the members intended the amendment to require any of the states to alter their church-state arrangements: "Clearly, neither he [Madison] nor the members of the House detected in the proposal an invitation to the federal government to pass judgment on existing [c]hurch-[s]tate arrangements in the states." *Id.*

[168] Deeply held religious beliefs were the foremost cause of the various church-state arrangements at the time of the First Amendment. Professor McConnell has identified four distinct approaches to church-state relations in the original states at the time that the amendment was adopted. *See* McConnell, *supra* note 101, at 1421-25. Together with the arrangements in Virginia and New England states, the religious diversity of the population in pre-Revolutionary New York and New Jersey gave rise to a policy of religious toleration despite periodic efforts by royal governors to enforce conformity with the Anglican Church. This was especially true in the most densely populated four counties of metropolitan New York. By the time the Constitution was adopted, religious freedom was a fact. COBB, *supra* note 130, at 501-03; CURRY, *supra* note 1, at 62-73; McConnell, *supra* note 101, at 1424-25. A fourth type of arrangement existed in Maryland, Rhode Island, Pennsylvania, Delaware, and North and South Carolina, all of which had been founded to accommodate different groups of religious dissenters from mainstream Protestantism. The free exercise of religion first emerged as a legal principle when Lord Baltimore required that colonial Maryland not disturb Roman Catholics in the practice of their religion. COBB, *supra* note 130, at 503-07; McConnell, *supra* note 101, at 1425. For a fuller explanation of the historical development of each of the four approaches, see *id.* at 1430-43.

[169] *See* FORREST MCDONALD, NOVUS ORDO SECLORUM, THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 191-99 (1985); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 426-29 (1969).

[170] *See* McConnell, *supra* note 101, at 1469 (Massachusetts, along with Connecticut, allowed exemption from ministerial tax for Baptists and Quakers).

For the evangelicals, the republican notion was entirely too secular, for virtue did not belong to the political sphere but was completely dependent on the grace of God.[171] Moreover, they believed that the arrangement smacked of the union between church and state that characterized Roman Catholicism and had thoroughly corrupted the gospel. Despite the similarities in their understanding of the individual, the evangelical Protestants rejected the privileged position of the mainstream Protestant churches. In a more anomalous union, the evangelical and rationalist interests coalesced to form a powerful opposition to established religion even though their anthropological assumptions were antithetical.[172]

c. *Religion, Anthropology, and Education in the New Republic*

Assumptions about the nature of the individual by most citizens in the new republic were manifest in the order of education. The strict-separationist view that the framers were unanimously opposed to public support of schools that included religious instruction as part of their curriculum is inconsistent with the actual situation that existed at the time of the adoption of the Bill of Rights.[173] The imposition of a uniform and secular system of education that alone was entitled to public support was not the experience or expectation of the framers. As the American Jesuit, Father John Courtney Murray, put it: "Before it was canceled out by the rise of the modern omnicompetent society-state," there was "the distinction between the order of politics and the order of culture, or, in the language of time, the distinction between *studium* and *imperium*."[174] From the time of the first European settlers to colonial America to the westward expansion, formal education had been permeated with a religious purpose.[175] For at least the first

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[171] *See id.* at 1442.

[172] *See id.* at 1442-43.

[173] James Madison argued that even adherents of a particular religion should not be compelled to support teachers of the same religion since to do so was a deprivation of religious liberty. *See* THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776-1787, at 190 (1977).

[174] MURRAY, *supra* note 35, at 35.

[175] *See* Tyack, *supra* note 42, at 447-48 (describing pervasive presence of Protestantism in early American educational history, particularly in westward expansion). In 1789, the same year in which the Bill of Rights was proposed, the Continental Congress reenacted the Northwest Ordinance, which provided in part that " '[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.' " CURRY, *supra* note 1, at 218.

hundred years of the country's existence, education without Christian prayer, the memorization and exposition of the Decalogue, as well as explicitly religious study of the Biblical stories would have been unthinkable to most Americans.[176] Even as the fabric of American society unfolded to reveal an increasing religious pluralism, attempts to curtail Protestant religious training were unavailing.[177] Since religion was as important, if not more important, a part of the *studium* as mathematics or grammar, in effect a Protestant establishment abided in the common schools throughout the nineteenth century.[178] American education reflected the theological anthropology that to be human meant to be a creature of God with a profoundly spiritual nature.

With the reform of American education that characterized the first half of the twentieth century, the theological anthropology was superseded by a rationalist anthropology.[179] Originating in the

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[176] *See* HORACE MANN, TWELFTH ANNUAL REPORT OF THE STATE BOARD OF EDUCATION (1848), *reprinted in* LIFE AND WORKS OF HORACE MANN 4, 311-12 (1891). Horace Mann, one of the great advocates of public education, stated, "[O]ur system earnestly inculcates all Christian morals; it founds its morals on the basis of religion; it welcomes the religion of the Bible . . . ." *Id.* Prior to the Court's decision in School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963), which declared the recitation of the Lord's prayer and Bible verses in the public schools constitutionally impermissible, a total of 37 states permitted Bible reading in their respective school systems, and 17 states had statutes to this effect. DONALD E. BOLES, THE BIBLE, RELIGION AND THE PUBLIC SCHOOLS 48-53 (1965).

[177] *See* McDONALD, *supra* note 169, at 42 ("Some of the state constitutions adopted during the Revolution relaxed religious restraints, but so habituated were Americans to thinking in Protestant terms that few could conceive of a civil order in any other way."). It was not until the middle of the nineteenth century that the wave of non-Protestant European immigrants began to challenge this homogeneous religious culture. In 1854, a Catholic girl was expelled from a Maine public school for refusing to read from the King James version of the Bible. Rejecting an action brought to permit her to read from the Catholic version of the Bible, a state appellate court declared that "[t]he right of one sect to interdict or expurgate, would place all schools in subordination to the sect interdicting or expurgating." Donahue v. Richards, 38 Me. 376, 407 (1854). In 1859, Thomas Wall, a Roman Catholic boy attending a Boston Public School, was beaten by his teacher when he refused to read from a Protestant version of the Bible. When an action for battery was brought against the teacher, a Boston Court upheld the validity of the teacher's action. *See* 2 ROBERT H. LORD, A HISTORY OF THE ARCHDIOCESE OF BOSTON, 601-05 (1945). The practice of compulsory bible-reading enforced through corporeal punishment continued in Massachusetts until as late as 1865. *Id.*

[178] *See* Tyack, *supra* note 42, at 447; *see also* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 320 n.4 (1958) (observing that in America "almost all education is entrusted to the clergy"); Martin E. Marty, *Living with Establishment and Disestablishment in Nineteenth-Century Anglo-America*, 18 J. OF CHURCH & ST. 61-77 (1976) (suggesting existence of general Protestant establishment in nineteenth-century America).

[179] *See* BOLES, *supra* note 176, at 32-33 (growing opposition to sectarian instruction in public schools became increasingly evident during last half of nineteenth century).

Enlightenment, the rationalist anthropology did not remain static. Its subjective focus evolved so that the person is now understood as a radically autonomous individual who is often defined primarily by political ideology and the assertion of individual rights against the state.[180] Given the secular and political understanding of the person, belonging to a traditional religious community, which includes submitting to its creed, has become alien and artifactual.[181] Consistent with the evolved rationalist anthropology and its implications for education, the twentieth-century reformers put their faith in secular schools as the optimal learning environment.[182] While secularization was a legitimate response to the necessary demise of the de facto Protestant establishment, it seems fair to surmise that the vast majority of eighteenth- and nineteenth-century Americans, including the religious rationalist, would neither recognize the aculeated anthropology as their own

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[180] *Id.* at 33. This view corresponds with the thought of John Rawls. Adopting Locke's starting point, Rawls posits a rational individual who is not in relationship to others or to any community save for the decision to enter the social contract. RAWLS, *supra* note 64, at 11-16. He postulates the principle that "each person is to have an equal right to the most extensive basic liberty compatible with similar liberty for others." *Id.* at 60. A departure from the principle "cannot be justified by, or compensated for, by greater social and economic advantages." *Id.* at 61.

The implications of this precept were recently demonstrated when the American Civil Liberties Union ("ACLU") and the National Organization of Women ("NOW") persuaded a federal district court in Detroit to declare unconstitutional a Detroit public school plan to establish three all-male academies. The plan was effected to improve the alarmingly low test scores and the high drop-out rate among black boys in the city's high schools. Despite this urgent educational goal, the ACLU and NOW successfully argued that the plan discriminated against girls. *U.S. Judge Blocks Plan for All-Male Public Schools in Detroit*, N.Y. TIMES, Aug. 16, 1991, at A10.

[181] *See* BELLAH ET AL., *supra* note 114, at 163. Robert Bellah and his associates described the incompatibility between participation in traditional communities and the evolved rationalist perspective:

> Viewing one's primary task as "finding oneself" in autonomous self-reliance, separating oneself not only from one's parents but also from those larger communities and traditions that constitute one's past, leads to the notion that it is in oneself, perhaps in relation to a few intimate others, that fulfillment is to be found. Individualism of this sort often implies a negative view of public life. The impersonal forces of the economic and political worlds are what the individual needs protection against . . . . [I]t would seem that this quest . . . is illusory: it often ends in emptiness instead.

Id.

[182] *See* JOHN DEWEY, HUMAN NATURE AND CONDUCT 330 (1922). John Dewey opined that creating a sense of community in the school was obstructed by religion. Adherence to "cults, dogmas and myths," he argued, stifled individualism and caused one to lose a "sense of community and one's place in it." *Id.*; *see also* JOHN DEWEY, DEMOCRACY AND EDUCATION 327-28, 340-56 (1916).

nor approve of its irreligious implications for American education. To suggest that the original intent predetermined the eventual secularization of public education and proposed the limitation of public aid to such schools is plainly spurious.

2. Reuniting the Two Religion Clauses

The second erroneous rubric implicit in the *Everson* dicta and later adopted as law in *Lemon* is that the religion clauses are intended to function as unconnected, autonomous, and distinct provisions. To supplant the Court's exclusive focus on the Establishment Clause, Justice White has admonished his colleagues to recall that the two clauses "coexist" in the First Amendment, and "the latter is surely relevant in cases such as these."[183] At the least, he has suggested that

> [w]here a state program seeks to ensure the proper education of its young, in private as well as public schools, free exercise considerations at least counsel against refusing support for students attending parochial schools simply because in that setting they are also being instructed in the tenets of the faith they are constitutionally free to practice.[184]

The bifurcation of the religion clauses in the parochial school aid cases is incorrect for two reasons. First, to interpret the prohibition against establishment as a categorical absolute and to enforce it without regard to its effects on other constitutional guarantees is to adopt an analysis contrary to long-accepted principles of constitutional law. For example, when the Court considers challenges to other First Amendment guarantees such as the free exercise of religion,[185] and the freedoms of speech and association,[186] it

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[183] Lemon v. Kurtzman, 403 U.S. 602, 665 (1971) (White, J., concurring in part, dissenting in part).

[184] *Id.*

[185] *See, e.g.*, Employment Div. Dep't of Human Servs. of Oregon v. Smith, 494 U.S. 872, 879 (1990) (free exercise right involving religious use of peyote does not relieve individual of obligation to comply with "valid and neutral law of general applicability" that proscribes use of peyote); Bowen v. Roy, 476 U.S. 693, 712 (1986) (free exercise claim that appellees entitled to exemption from Food Stamp program's Social Security number requirement weighed against public interest in maintaining efficient and fraud-resistant system); Sherbert v. Verner, 374 U.S. 398, 408-09 (1963) (free exercise right violated where unemployment compensation rules substantially burdened sabbath observance and were not justified by compelling government interest).

[186] *See, e.g.*, United States v. Kokinda, 110 S. Ct. 3115, 3121-22 (1990) (free speech right to solicit on behalf of political organization not violated by reasonable governmental

generally prefers to balance competing interests rather than to develop absolute rules. The *Lemon* standard, however, requires the Court to focus solely on the prohibition of an establishment.

The Court has not always interpreted the Establishment Clause without regard to free-exercise considerations. In a 1952 decision, *Zorach v. Clauson*,[187] the Court shifted from the strict-separationist dicta of *Everson* to a more benevolent voice. *Zorach* upheld the validity of a New York City program which required public schools to release students, upon request of their parents, from attendance for a certain time period each week so that those students could attend religious instruction and devotional exercises.[188] Justice William O. Douglas eloquently stated for the majority:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of the government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.[189]

Only five years after the *Everson* opinion, the Court seemed to be suggesting that accommodation of religion was part of the underlying philosophy of the constitutional guarantee of religious freedom.[190] Moreover, the juxtaposition of the description of Amer-

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regulation prohibiting such activity outside post office); Young v. New York City Transit Auth., 903 F.2d 146, 157 (2d Cir.), *cert. denied*, 111 S. Ct. 516 (1990) (panhandlers alleged First Amendment speech interest outweighed by governmental interest in efficient and safe operation of New York City subways).

[187] 343 U.S. 306 (1952).

[188] *Id.* at 315.

[189] *Id.* at 313-14.

[190] *Id.* at 314. Justice Douglas stated that although the government may not constitutionally "finance religious groups," there is "no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Id.*

ican social reality in *Zorach* with the strict-separationist tenets set out in *Everson* points to a tension between anti-establishment and free-exercise values in the Court's decisions.[191]

This tension manifests itself in the majority and dissenting opinions in *Board of Education of Central Schools District No. 1 v. Allen*.[192] Here, the Court upheld the constitutional validity of a New York State statute that authorized officials of the public schools to distribute certain secular textbooks to all private schools, including parochial schools.[193] In a rare opportunity to write for the majority in a parochial school aid case, Justice White stressed the judicial emphasis owed to New York State's judgment that the provision of secular textbooks would aid the private schools in providing quality secular education.[194]

Three Justices dissented in separate opinions. Invoking the strict-separationist language of *Everson*, Justice Black acerbically asserted that the New York law was the work of "powerful sectarian religious propagandists . . . looking toward complete domination and supremacy of their particular brand of religion."[195] Notwithstanding his words in *Zorach*, Justice Douglas now expressed anguish that the majority holding would somehow further the ability of parochial schools to teach that "[t]he Crusades," "the slaughter of the Aztecs by Cortes," and "Franco's revolution in Spain," inter alia, were justified on religious grounds.[196] In a less colorful and briefer dissent, Justice Abe Fortas argued that the provision of secular textbooks to parochial schools was not within the principle of *Everson*.[197] In our pluralistic society, there are going to be divergent viewpoints on the value of religion and of religious education.[198] If the inclusion of the Free Exercise Clause in the First Amendment means anything, however, it indicates that

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[191] *See* County of Allegheny v. ACLU, 492 U.S. 573, 658 (1989) (Kennedy, J., dissenting in part) ('When the state encourages religious instruction . . . it follows the best of our traditions.') (quoting *Zorach*, 343 U.S. at 313-14); *see also* MURRAY, *supra* note 35, at 153 ("There is . . . every reason for applying in the area of education the fully developed principle of accommodation of the public service to the genuine spiritual needs of our religious people.").

[192] 392 U.S. 236 (1968).

[193] *Id.* at 248.

[194] *Id.* at 243-48.

[195] *Id.* at 251 (Black, J., dissenting).

[196] *Id.* at 260-61 (Douglas, J., dissenting).

[197] *Id.* at 271 (Fortas, J., dissenting).

[198] *Cf.* BELLAH ET AL., *supra* note 114, at 219-49 (religion has always been and continues to be "one of the most important" aspects of American life).

the First Amendment was not intended to engender hostility or to perpetuate prejudice against those individuals and communities who wish to practice their faith, thereby placing a great value upon the religious education of their young.[199]

Second, the bifurcation of the religion clauses has resulted in a betrayal of their intended purpose. In the words of the First Amendment historian, Monsignor Thomas Curry: "[T]o see the two clauses as separate, balanced, competing, or carefully worked out prohibitions designed to meet different eventualities would be to read into the minds of the actors far more than was there."[200] The bifurcation obscures the fundamental historical reality that the framers opposed an establishment precisely because of their desire to protect individual conscience in religious matters.[201] The Protestant perspective that gave rise to the religion clauses recognized a definite link between the Constantinian establishment of Catholicism and the following fifteen centuries of coerced orthodoxy to corrupted doctrine.[202] One aim of the religion clauses was to insure that such tyranny be prevented in the new republic.

The enactment of religious freedom in many of the original states and the exemptions allowed in those states that maintained official churches reflect an accommodation of religious beliefs. Because the framers understood the religion clauses as a unitary provision, the interpretation of the Establishment Clause was never intended to eviscerate the Free Exercise Clause. Neither intended to engender state hostility towards religion nor to propagate a secular state,[203] a large part of the actual purpose of the religious

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[199] *See generally* Engel v. Vitale, 370 U.S. 421, 433-34 (1962) ("It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion . . . . Nothing, of course, could be more wrong.").

[200] CURRY, *supra* note 1, 216. "One will look in vain for the analytical distinctions scholars presume the generation that enacted the First Amendment made . . . . To examine the two clauses of the amendment as a carefully worded analysis of Church-State relations would be to overburden them." *Id.* at 216.

[201] *See Engel*, 370 U.S. at 433. "It was in a large part to get completely away from this sort of systematic religious persecution that the Founders brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against any governmental establishment of religion." *Id.* Note, however, that the *Engel* Court struck down an official prayer for New York public schools despite the fact that it was not denominational. *See id.*

[202] *See* CURRY, *supra* note 1, at 144. Moreover, Americans of this period were keenly aware and thoroughly frightened by the fact that England had only recently approved the imposition of Catholicism as the official religion in Quebec. *See id.* at 174, 209.

[203] *See* Meek v. Pittenger, 421 U.S. 349, 395 (1975) (Rehnquist, J., dissenting).

I am disturbed as much by the overtones of the Court's opinion as by its actual

clauses was to protect the interests of religion from the state. To adopt the modern rationalist anthropology would be to construe the religion clauses in such a way that denies the very primacy of religion that the evangelicals sought to insure.

The notion that the free exercise of religion demands some degree of accommodation is perhaps one of the greatest contributions of the Constitution. The enduring heritage of this concept is evident in the fact that it was adopted by the Roman Catholic Church at the Second Vatican Council:

> [T]he human person has a right to religious freedom. This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and any human power, in such wise that in matters religious no one is to be forced to act in a manner contrary to his own beliefs. Nor is anyone to be restrained from acting in accordance with his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits.
>
> . . . [T]he right to religious freedom has its foundation in the very dignity of the human person . . . . This right of the human person to religious freedom is to be recognized in the constitutional law whereby society is governed.[204]

Several paragraphs later, the document admonishes that the state must foster religious life by creating conditions favorable to religious formation.[205] It is perhaps ironic that while the concept has been embraced by the very institution whose alleged abuses it was designed to prevent, it has been excluded from a major aspect of American church-state law.

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holding. The Court apparently believes that the Establishment Clause of the First Amendment not only mandates religious neutrality on the part of the government but also requires that this Court go further and throw its weight on the side of those who believe that our society as a whole should be a purely secular one. Nothing in the First Amendment or in the cases interpreting it requires such an extreme approach.

Id.

[204] *Declaration on Religious Freedom: On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious*, 2, *in* THE DOCUMENTS OF VATICAN II, at 678-79 (Walter M. Abbott ed., 1966). The American Jesuit John Courtney Murray was one of the principal authors of the document. For his own account of the legislative history of the text, see JOHN C. MURRAY, S.J., RELIGIOUS LIBERTY: AN END AND BEGINNING 15-42 (1966).

[205] *See Declaration on Religious Freedom, supra* note 204, at 5-6.

3. Summary

Both the canonization of the Jeffersonian metaphor and the bifurcation of the religion clauses are clearly erroneous rubrics: the former because it is a reduction of the complex historical situation that gave rise to the amendment,[206] and the latter because it imposes a legal formalism on the provision that eviscerates the true meaning.[207] Contrary to the implicit assumptions of the conventional historical account, most of the framers of the First Amendment did not share the rationalist anthropology of the Enlightenment but espoused instead the theological anthropology of the Reformation.[208] Their anthropological viewpoint was reflected in the schools that were permeated with a sense of Christian faith.[209]

Thus, even assuming *arguendo* that Justice Black had advanced a prima facie case on the basis of the writings of Jefferson and Madison, the evidence is considerably more complex than allows for a unitary voice, Jeffersonian or otherwise. To the extent that it is an argument dependent on historical authority, the strict-separationist reading of the religion clauses fails to bear the weight of the evidence.[210] A more thorough review of the "background and environment of the period in which that constitutional language was fashioned"[211] lends credence to Justice White's position that history simply lacks definitive answers to the sensitive and complex issues raised today by the religion clauses. Specifically concerning the issue of parochial school aid, considerations of public policy ought to be the focus of discussion, rather than a quest for an unachievable rule based on original intent.

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[206] *See generally* Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for 40 years.").

[207] *See supra* note 201 and accompanying text.

[208] *See Wallace*, 472 U.S. at 95-99 (Rehnquist, J., dissenting) (detailing statements made during House debates on religion clauses).

[209] *See id.* at 95-98 (Rehnquist, J., dissenting).

[210] *See id.* at 113 (Rehnquist, J., dissenting) ("As its history abundantly shows . . . nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means.").

[211] *Everson*, 330 U.S. at 18.

B. *Requiem for* Lemon

1. Piercing the Veil of Neutrality

It has been suggested that the Supreme Court's decisions "in the sensitive area encompassed by the two religion clauses of the [F]irst [A]mendment" ought to be guided by "neutral principles" so as to "rest 'on analysis and reasons quite transcending the immediate result that is achieved.' "[212] By framing the three-pronged *Lemon* standard, the Court endeavored to set down neutral principles to delineate what constitutes an impermissible establishment of religion.[213] In cases challenging the constitutionality of public aid to parochial schools, the Court has predicated its decisions on the ostensibly neutral issues: "purpose, effect and entanglement."[214] The Court has, in fact, refused to consider factors outside the scope of the *Lemon* standard such as the secular merit of the parochial schools.[215] The Court also eschews the inclusion of considerations raised by the free exercise clause in the constitutional calculus.[216]

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[212] Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: The Religious Liberty Guarantee* (pt. 1), 80 HARV. L. REV. 1381, 1381 (1967) (quoting Herbert Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959)). However, Wechsler's suggestion about discerning neutral principles has been criticized on the grounds that such an approach "does not by itself tell us anything useful about the appropriate content of those principles or how the Court should derive the values they embody." JOHN H. ELY, DEMOCRACY AND DISTRUST 55 (1980). For his part, Giannella seems to have been well aware that the Court's decisions reflected substantive value choices. For example, he argued that the Court's establishment clause cases reflected, inter alia, the value of "voluntarism," the position that the advancement of a church should come only from the voluntary support of its followers and not from the political support of the state. Giannella, *supra* note 53, at 516-18; *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-7, at 584 (2d ed. 1988).

[213] *See Lemon*, 403 U.S. at 612-13. Pursuant to the *Lemon* standard, in order to avoid classification as an establishment of religion, a state program must: (1) reflect a secular legislative purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster excessive entanglement with religion. *Id.*

[214] *See* School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 380 (1985); Meek v. Pittenger, 421 U.S. 349, 358 (1975). Although insisting that the three prongs of the *Lemon* standard are merely guidelines, the Court has never upheld a program of parochial school aid after determining that one of the three prongs has been violated.

[215] *See, e.g.*, *Lemon*, 403 U.S. at 625 ("The merit and benefits of [parochial] schools, however, are not the issue before us in these cases. The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses.").

[216] *See Ball*, 473 U.S. at 383 ("The *Lemon* test concentrates attention on the issues—purposes, effect, entanglement—that determine whether a particular state action is an improper 'law respecting an establishment of religion.' ").

In addition to its exclusive focus, the *Lemon* standard lends itself to rigid application.[217] If a program violates any prong, the Court must conclude that the program constitutes an establishment of religion.[218] Accordingly, the Court refuses to consider the possibility that a program's secular effect might, on balance, outweigh its failure to satisfy the entanglement prong.[219] In Justice White's view, a state's effort to "keep [its] parochial schools system alive and capable of providing adequate secular education to substantial numbers of students" apparently would suffice.[220] The exclusive focus and rigid structure of the *Lemon* standard belie its neutrality and disclose the strict-separationist hostility to parochial school aid it embodies.[221]

2. A Corpus of Law in Disarray

Since the advent of the *Lemon* standard, the Court's decisions in parochial school aid cases often appear to turn on casuistical distinctions that yield inconsistent and unpredictable outcomes.[222] For example, instruction by a state-employed remedial teacher can be reconciled with the framers' intent when offered to exceptional children in a trailer parked immediately outside the parochial school door,[223] but not when the same teacher must cross the

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[217] *See id.* at 400 (White, J. dissenting); *Meek*, 421 U.S. at 389-94 (Rehnquist, J., dissenting, joined by White, J.); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 821-24 (1973) (White, J., dissenting); *Lemon*, 403 U.S. at 663-69 (White, J., concurring in part, dissenting in part).

[218] *See, e.g., Nyquist*, 413 U.S. at 772-73 ("[T]he now well-defined three-part test . . . dictate[s] that to pass muster under the Establishment Clause the law in question first must reflect a clearly secular legislative purpose, . . . second, must have a primary effect that neither advances nor inhibits religion, . . . and, third, must avoid excessive government entanglement with religion.") (citations omitted).

[219] *See, e.g., id.* at 774 ("[T]he propriety of a legislature's purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between Church and State.").

[220] *Id.* at 823 (White, J., dissenting).

[221] *See* Note, *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606, 1678-1702 (1987) (arguing that Court's application of *Lemon* standard in parochial school aid cases does not reflect neutral rules, but adherence to certain "establishment clause values" predominant among which is value of strict separation).

[222] *See* Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) ("*Lemon* test has caused this Court to fracture into unworkable plurality opinions"); *see also* Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 680 (1980); William P. Marshall, *"We Know it When We See it": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 495-96 (1986); Note, *supra* note 221, at 1606, 1677.

[223] *See* Wolman v. Walter, 433 U.S. 229, 248 (1977).

threshold and enter the parochial school to offer remedial assistance to children in special need.[224] Although allowed by the Constitution to reimburse parochial schools for the costs of administering state-created examinations,[225] the states are forbidden to pay for examinations created by parochial school teachers.[226]

Perhaps the only consistent effect of the *Lemon* standard has been to reaffirm the strict-separationist tendencies of the Court. Prior to the adoption of the *Lemon* test, the Court found the following state activities consistent with original intent: the disbursement of funds to pay for parochial school students' transportation to and from school;[227] the supplying of parochial school students with textbooks in secular subjects;[228] and the creation of tax subsidies to religious institutions.[229] Subsequent to *Lemon*, state actions

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[224] *See* Aguilar v. Felton, 473 U.S. 402, 412-13 (1985). The Court's entanglement analysis in *Aguilar* seemed to rest, at least in part, on a fear of a symbolic union between the state and any particular religious persuasion. Thus, the fact that public employees were permitted to provide instruction in parochial schools might lead to the inference that the state preferred a particular religion: "When the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers." *Id.* at 409; *see also* Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 357-61 (1986) (suggesting that parochial school aid conveys message that nonparticipants are "outsiders" and not "full members of the community"). In School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1986), the Court reasoned that

> [t]he inquiry into [the symbolic union] must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years. 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 390 (citations omitted). The Court has concluded that college students are less susceptible to influence by the symbolic union of church and state. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981) (upholding state university's provision of meeting facilities for religious groups). One wonders, however, whether children of "tender" and "formative" years are any better able to distinguish the state's role of providing trailers parked immediately outside the parochial school door, as in *Wolman*, from the alleged symbolic union created by public employees who cross the parochial school threshold in *Aguilar*.

[225] *See Wolman*, 433 U.S. at 240-41 (since neither content nor result of test under nonpublic school control, program did not directly aid religion).

[226] *See* Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472, 480-81 (1973) ("integral role of such testing in the total teaching process" means program constitutes impermissible aid to religion).

[227] *See* Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

[228] *See Wolman*, 433 U.S. at 236-38; Board of Educ. v. Allen, 392 U.S. 236, 248 (1968).

[229] *See* Walz v. Tax Comm'n of the City of New York, 397 U.S. 664, 667-700 (1970). Chief Justice Burger, writing for the majority in *Lemon*, expressed the view that its holding could be distinguished from that of *Walz* on the ground that "total separation between church and state . . . is not possible in an absolute sense." *Lemon*, 403 U.S. at 614.

rendered incompatible with original intent include the payment of bus transportation of parochial school children on secular field trips,[230] the supplying of educational materials such as periodicals, maps, charts, photographs, and films,[231] and the provision of direct financial aid to parochial schools.[232] Thus, not only the futile attempt to justify the strict-separationist position on original intent but also the utter disarray of the Court's decisions in the parochial school aid cases manifests the need for a fundamental revision of the legal doctrine.

3. The Erroneous Logic of the Three Requirements

Scrutiny of the internal logic of the tripartite standard discloses that it contains both a tautology and a paradox. The former lies in the redundancy of the secular purpose and effect requirements while the latter arises from the entanglement requirement.

No secular purpose and effect, no matter how compelling, have been deemed worthy to assure judicial deference to a program of parochial school aid. The secular purpose test is the easiest requirement of the tripartite standard to satisfy, and it is rarely determinative.[233] The Court generally accepts the legislature's statement of a secular purpose.[234] Even when a statute failed to express

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> This is not to suggest, however, that we are to engage in a legalistic minuet in which precise rules and forms must govern. A true minuet is a matter of pure form and style, the observance of which is itself the substantive end. Here we examine the form of the relationship for the light that it casts on the substance.

Id.

[230] *See Wolman*, 433 U.S. at 252-55.

[231] *See id.* at 229; Meek v. Pittenger, 421 U.S. 349, 366 (1975).

[232] *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 780 (1973). Regarding the New York tuition reimbursement program, the Court stated that "[t]here can be no question that these grants could not, consistently with the Establishment Clause, be given directly to sectarian schools." *Id.*

[233] *See* TRIBE, *supra* note 212, § 14-9, at 1205-11. Although Tribe does identify four cases in which the secular purpose requirement was decisive, none of these cases concerned parochial school aid. *See id.* (citing Edwards v. Aguillard, 482 U.S. 578, 585-89 (1987); Wallace v. Jaffree, 472 U.S. at 56 (1985); Stone v. Graham, 449 U.S. 39, 41-42 (1980) (per curiam); Epperson v. Arkansas, 393 U.S. 97, 103 (1968)).

[234] *See, e.g.*, *Lemon*, 403 U.S. at 613. "[T]he statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislatures meant anything else." *Id.* In Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), the Court found the secular purpose prong of the *Lemon* test to be satisfied, despite the Court's reliance on *Lemon* to strike down a New York statute that provided maintenance allotments to nonpublic schools, tuition reimbursements to poor parents, and tax deductions to other parents who send their children to nonpublic schools. *Id.* at 798. "New

a secular purpose, the Court was willing to infer one from an analysis of statutory provisions.[235] In fact, the Court has never invalidated a program of parochial school aid because of failure to satisfy the first prong.[236]

Justice White's understanding of the second prong is that "the test is one of 'primary' effect not *any* effect."[237] He has criticized the Court for finding the second prong violated when there is only an "incidental" benefit to religion in the face of an overriding secular consequence.[238] According to Justice White, the rule should be:

York's interest in preserving a healthy and safe educational environment for all of its schoolchildren" was served by the statute's provision of maintenance allotments to the nonpublic schools. *Id.* at 773. In addition, the New York statute was found to promote "pluralism and diversity among its public and nonpublic schools," presumably by increasing the economic feasibility of parochial schools and by alleviating some of the financial burden on parents who elected to send their children to such schools. *Id.* Moreover, the statute's concern for an overburdened public school system that would be hard-pressed to accommodate the number of children attending nonpublic schools satisfied the requirement. *Id.* Thus, the Court has indicated that legislative purposes in statutes such as that in *Nyquist*, although they exclusively concern nonpublic education, are acceptable.

[235] *See* Mueller v. Allen, 463 U.S. 388, 394-96 (1983). In *Mueller*, the Court expressly acknowledged its "reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute." *Id.* at 394-95. After conceding that the first requirement merited little attention, the Court concluded that Minnesota's "decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable." *Id.* at 395. The Court reasoned that because "[a]n educated populace is essential to the political and economic health of any community, . . . a State's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the State's citizenry is well educated." *Id.* The Court further reasoned that '[p]arochial schools . . . provide[] an educational alternative for millions of young Americans; they often afford wholesome competition [to the] public schools, and . . . relieve substantially the tax burden incident to the operation of public schools.' *Id.* (quoting Wolman v. Walters, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part, dissenting in part)). In School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985), the Court made a concession similar to that in *Mueller* and quickly determined that the statute at issue had a secular legislative purpose. *Id.* at 383; *see also* Aguilar v. Felton, 473 U.S. 402, 408-14 (1985) (Court did not even discuss first prong of *Lemon* test).

[236] This is not to suggest that the secular legislative purpose requirement is altogether meaningless. It would, of course, be difficult to discern a secular purpose in a government program that provided funds for catechisms, or religion teachers, or the construction of school chapels. Practically speaking, however, the possibility of a state legislature adopting such a program seems highly unlikely.

[237] *Nyquist*, 413 U.S. at 823 (White, J., dissenting); *see also* TRIBE, *supra* note 212, § 14-10, at 1215 (arguing that requirement of primary secular effect is misnomer since Court actually requires that any religious effect to be "remote, indirect and incidental").

[238] *See Nyquist*, 413 U.S. at 823-24 (White, J., dissenting). In Sloan v. Lemon, 413 U.S. 825 (1973), the Court struck down a Pennsylvania tuition reimbursement plan that provided funds to parents to cover the tuition expenses incurred in sending their children to nonpub-

"[A]s long as the aid to the school could fairly be characterized as supporting the secular educational functions of the school, whatever support to religion resulted from this direct, or indirect, contribution to the school's overall budget . . . [is] not violative of the primary effect test or of the Establishment Clause."[239]

Justice White does not dispute that public aid of the "secular function" performed by parochial schools "may substantially benefit" their religious mission.[240] He believes that "religion may indirectly benefit from government aid to secular activities of churches [without] convert[ing] that aid into an impermissible establishment of religion."[241] Such a principle accords with the reality that religious institutions do in fact receive large amounts of public aid to provide important social services to society such as health and child care. The secular and religious nature of such services, as well as the fact that the religious institutions providing such services benefit from public aid seem beyond question. Why parochial school aid for secular instruction does not fall under the same benign constitutional rubric as do other services remains to be elucidated.

A certain redundancy is implicit within the inquiries about the first two of the three requirements of the *Lemon* test. It is difficult to imagine how a legislative program that fulfilled the secular ef-

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lic schools. *Id.* at 830. Employing the primary effect test, the Court stressed that more than 90% of the children attending nonpublic schools in Pennsylvania attended parochial schools. *Id.* Similarly, the Court invalidated the provisions of the New York statute under scrutiny in *Nyquist* which allowed direct grants for tuition reimbursements to poor families with children in nonpublic schools and established a form of tax relief for families above a certain minimum income level. *Nyquist*, 413 U.S. at 789-94. In reaching its decision, the Court stated that the economic benefits of the New York law flowed primarily to parents of children attending sectarian schools. *See id.* at 783.

In Meek v. Pittenger, 421 U.S. 349 (1975), the Court invalidated two Pennsylvania programs that authorized lending nonpublic schools "instructional materials" (periodicals, photographs, maps, charts, sound recordings, films, or any other printed and published matter of a similar nature), "instructional equipment" (projection equipment, recording equipment, and laboratory equipment), and "auxiliary services" (counseling, testing, and related services for exceptional children, for remedial students and for the educationally disadvantaged) because more than 75% of the benefit would go to sectarian schools. *Id.* at 372. The primary effect, according to the majority, was to aid religion. *Id.* at 366. In a separate dissenting opinion, however, Justice Rehnquist argued that even if the percentage of aid given to sectarian schools is a relevant consideration, aid of a similar nature given to public schools under different statutes ought to be considered in a determination of the breadth of the class of beneficiaries in terms of "primary effect." *Id.* at 389 (Rehnquist, J., dissenting).

[239] *Nyquist*, 413 U.S. at 823 (White, J., dissenting) (citations omitted).

[240] *Lemon*, 403 U.S. at 664 (White, J., concurring in part, dissenting in part).

[241] *Id.*; *Nyquist*, 413 U.S. at 823 (White, J., dissenting).

fect requirement would not in the same instance possess a secular purpose. The existence of this redundancy may explain why the Court has given short shrift to the first part of the tripartite standard. The substantive issue is whether the secular effect of legislation is compelling enough to override any particular and indirect benefit to religion.[242] However, inclusion of the tautology in the *Lemon* standard forces courts applying the standard to be preoccupied with whether purpose and effect exist while neglecting to conduct the more crucial inquiry about how compelling the secular function of the legislation might be. Concern for satisfying the standard then obscures the substantive issue.

The addition of the third prong to the standard seemed to originate not from the customary inquiry but from an extraneous motive.[243] Justice White has pointed out that the three-pronged test "creates an insoluble paradox for the [s]tate and the parochial schools."[244] He has criticized the Court for telling the state on the one hand that it "cannot finance secular education if it permits religion to be taught in the same classroom," while on the other hand that "if it exacts a promise [from the school] that religion not be so taught . . . and enforces it," then the state is excessively entangled with religion.[245] In other words, while adequate state supervision is deemed necessary to preserve the secular character of public aid, that same supervision may often amount to excessive entanglement.[246] Thus, the appendage of the third requirement has

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[242] *See Lemon*, 403 U.S. at 664 (White, J., concurring in part, dissenting in part).

[243] *Cf. Nyquist*, 413 U.S. at 821 (White, J., dissenting) (quoting School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963)) (noting that until 1970, "the test for compliance with the [Establishment] Clause was whether there was 'a secular legislative purpose and a primary effect that neither advances nor inhibits religion' "). The third prong first appeared in Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) ("We must . . . be sure that the end result—the effect—is not an excessive government entanglement with religion.").

[244] *Lemon*, 403 U.S. at 668 (White, J., concurring in part, dissenting in part); *see also Nyquist*, 413 U.S. at 822 (White, J., dissenting) (arguing that striking down of statute was "insoluble dilemma for the [s]tates").

[245] *Lemon*, 403 U.S. at 668 (White, J., concurring in part, dissenting in part).

[246] *Cf.* Paul G. Kauper, *Public Aid for Parochial Schools and Church Colleges: The* Lemon, DiCenso *and* Tilton *Cases*, 13 ARIZ. L. REV. 567, 593 (1971) ("[I]t is perhaps ironic that to avoid entanglements the Court has proposed criteria which will require a . . . [government] agency to become embroiled in the issue of sectarianism."). Moreover, the Court's determination of how much entanglement is "excessive" has been less than consistent. In Wolman v. Walter, 433 U.S. 229 (1977), the Court held that the provision of diagnostic services on parochial school premises and remedial services in mobile units parked outside the parochial school did not create excessive entanglement. *Id.* at 248. However, in Aguilar v. Felton, 473 U.S. 402 (1985), the Court found a state's monitoring of its own employees who entered the parochial schools to provide remedial services to be excessive entanglement.

augmented the predominance of the existing strict-separationist position invalidating a statute despite its compelling secular purpose and effect.

To supplant the *Lemon* standard, Justice White would eliminate the tautology and jettison the paradox. He has said that legislation ought to pass constitutional muster as long as it finances "a separable secular function of overriding importance."[247] The proposed standard of review is consistent with Justice White's understanding that public policy concerns rather than legal formalism must be the focus of the parochial school aid cases.

4. The Permeation Argument

In *Lemon* the Court profiled the Rhode Island parochial schools, most of which were Catholic, as permeated by a religious atmosphere primarily because of the presence of members of religious orders who served as administrators and teachers.[248] Writing for the court, Chief Justice Burger, stated that "a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience

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Id. at 413-14.

[247] *Lemon*, 403 U.S. at 664 (White, J., concurring in part, dissenting in part); *see also* Roemer v. Board of Pub. Works, 426 U.S. 736, 768 (1976) (White, J., concurring) (upholding Maryland statute authorizing payments to private schools for non-sectarian purposes); Hunt v. McNair, 413 U.S. 734, 746 (1973) (upholding act authorizing financing transaction benefitting Baptist-controlled college).

[248] *See Lemon*, 403 U.S. at 615-16. This profile was based on the extensive factual findings made by the Rhode Island district court. *Id.* at 615. Proximity of the schools to churches allowed "instruction in faith and morals" that was "part of the total educational process." *Id.* Religious symbols could be found throughout the school building. *Id.* Perhaps most important, two-thirds of the teachers were religious sisters who created "an atmosphere in which religious instruction and religious vocations are natural and proper parts of life in such schools." *Id.* Several years prior to the *Lemon* decision, Giannella had remarked:

> Understandably, there is a lingering suspicion that religious perspectives permeate the entire curriculum at such schools. Even though this suspicion is probably unfounded with regard to certain subjects, a strongly religious atmosphere, replete with holy symbols, pervades the entire school day. Above all, as a recent study of Catholic parochial education points out: "The very presence of the religious [teachers and administrators] is in itself a dominant, unforgettable symbol." This pervasive atmosphere makes on the young student's mind a lasting imprint that the holy and transcendental should be central facets of life. It increases respect for the church . . . .
>
> In short, the parochial school's total operations serve to fulfill both secular and religious functions concurrently, and the two cannot be completely separated.

Giannella, *supra* note 53, at 573-74 (citations omitted). For a discussion of the profile and its implications, see LEONARD F. MANNING, THE LAW OF CHURCH-STATE RELATIONS IN A NUTSHELL 76-84 (1981).

great difficulty in remaining religiously neutral."[249] Moreover, the proximity of many schools to churches and the inclusion of religious symbols throughout the school building were suspected of enhancing the propensity of the religious teachers to catechize the impressionable elementary school children. In the majority's view, there was no need to find actual religious permeation of secular instruction; instead, a "potential for impermissible fostering of religion" was sufficient to declare the program violative of the Constitution.[250] The *Lemon* Court transposed its profile of the Rhode Island parochial schools onto the Pennsylvania program also at issue in that case.[251] This profile also influenced several subsequent parochial school decisions.[252]

The permeation argument relies on a truth in order to impart a caricature. The truth is that parochial schools are designed to serve a religious purpose. Until the start of the twentieth century, almost all American schools, both public and private, had a strong religious component that included daily prayer and religious instruction, often under the supervision of ordained Protestant ministers.[253] Given the theological anthropology that prompted the adoption of the religion clauses, it is untenable to hold that the framers intended the First Amendment to render all public education secular. Contrary to the strict-separationist assumptions of the majority in *Lemon*, the postulate that public aid to religious schools violates the First Amendment cannot be sustained on the authority of original intent.[254]

The religious mission of the parochial schools creates undeniable and concrete secular benefits. These schools function as subsidiary structures that are inherently more adept at fostering a sense of responsibility, participation, and belonging than are state-run

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[249] *Lemon*, 403 U.S. at 618. In a separate concurring opinion, Justice Douglas expressed the crux of the permeation argument against parochial school aid when he wrote that "religion permeates the whole curriculum, and is not confined in a single half-hour period of the day." *Id.* at 635 (Douglas, J., concurring) (quoting JOSEPH H. FICHTER, PAROCHIAL SCHOOL: A SOCIOLOGICAL STUDY 86 (1958)).

[250] *Id.* at 619.

[251] *Id.* at 620-21. Speaking of the Pennsylvania schools, the majority opined that "[t]he complaint describes an educational system that is very similar to the one existing in Rhode Island." *Id.* at 620.

[252] *See* MANNING, *supra* note 248, at 96-97 (discussing lingering effects of profile on parochial school aid cases).

[253] *See supra* notes 173-78 and accompanying text (discussing religion in American schooling).

[254] *See id.*

institutions. Sociological evidence has connected the religious identity of the schools with the ability to create a sense of community for students and families. It is this identity that has enabled parochial schools to compensate for the erosion of the educational process caused by the deterioration of the family. The benefit is particularly acute in the case of urban Catholic schools serving low-income families many of whom are not Catholic; without the parochial schools and their religious mission, students from these families would not have equal educational opportunities.[255] In a less tangible but equally significant way, the religious mission of the schools develops the societal fabric by forming citizens who will not be adverse to putting self-interests aside for the sake of the common good. Rather than viewed as suspect, the religious mission of these schools ought to be embraced as a healthy component of the vigorous social pluralism envisioned by the founding fathers.

The profile of the parochial schools is caricature for several reasons. First, if the permeation argument was ever valid, it is no longer so. The atmosphere attributed to the presence of members of religious communities in the schools might no longer be said to be pervasive since their numbers have dramatically decreased during the last twenty years.[256] Second, the suspicion raised in *Lemon* that the content of secular classes cannot be separated from religious instruction was plainly contradicted by the record.[257] Dissenting in *Lemon*, White described the majority's analysis as a "curious and mystifying blend" that was grounded in the theoretical possibility of religious content being introduced into secular courses rather than the factual findings made by the Rhode Island Federal District Court.[258] He argued "[t]hat the schools are operated to promote a particular religion is quite consistent with the view that secular teaching devoid of religious instruction can suc-

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[255] *See supra* notes 66-77 and accompanying text.

[256] *See* CATHOLIC ALMANAC 1990, *supra* note 24, at 530. During the past twenty years, the number of religious sisters, brothers, and priests who serve in parochial schools has decreased significantly. Today, in fact, the vast majority of parochial school teachers are laypersons. *See id.*

[257] *See Lemon*, 403 U.S. at 666 (White, J., concurring in part, dissenting in part).

[258] *Id.* Although the district court found that the Rhode Island parochial school teachers did not introduce religious instruction into secular course, *see* DiCenso v. Robinson, 316 F. Supp. 112, 117 (D.R.I. 1970), the district court struck down the statute because the legislation had the primary effect of supporting religious enterprises and resulted in excessive entanglement. *Id.* at 122.

cessfully be maintained."[259]

The Court's rigidity in applying the *Lemon* standard has been accompanied by a remarkable willingness to disregard the traditional function of an appellate court and to privilege its own speculation over the plain record in these cases.[260] The majority of the Court in *Lemon* determined that the Rhode Island program of salary supplements to parochial school teachers violated the rule against excessive entanglement because the theoretical possibility existed that priests, religious, and lay teachers would interject religion into their secular courses even though the record contained clear evidence to the contrary.[261] As the district court found, quality secular instruction is vital to the survival of the parochial schools,[262] and the content of the secular courses taught there does not substantially differ from that which is taught in the public schools.[263] One reason the parochial schools have been able to survive in the face of fully tax-supported public schools is that they offer secular education at least equal in quality to that available in the public schools.[264]

Justice White was also unable to reconcile the majority's suspicion of the potential for religious indoctrination by parochial school teachers with the Court's decision in *Tilton v. Richardson*.[265] The *Tilton* case upheld the constitutionality of direct Federal government grants to be used in the construction of buildings for specified facilities at institutions of higher education, including many that were founded and operated to serve a religious mis-

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[259] *Lemon*, 403 U.S. at 670 (White, J., concurring in part, dissenting in part).

[260] *See* Anderson v. Bessemer City, 470 U.S. 564, 574 (1985).

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Id. at 573-74; *cf.* FED. R. CIV. P. 52(a) ("Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given the opportunity of the trial court to judge of the credibility of the witnesses.").

[261] *See Lemon*, 403 U.S. at 667 (White, J., concurring in part, dissenting in part). As Justice White noted, "several teachers testified at trial that they did not inject religion into their secular classes, and one teacher deposed that he taught exactly as he had while employed in a public school." *Id.*

[262] *DiCenso*, 316 F. Supp. at 117-18.

[263] *Id.* at 117.

[264] *See supra* notes 69-77 and accompanying text.

[265] 403 U.S. 672 (1971).

sion.[266] By way of distinction, the Court has suggested that college students at a religious institution are less likely to be swayed in favor of a religious creed than parochial school children.[267] Calling such an explanation "make weight," Justice White thought it unconvincing in light of the fact that the public aid in the parochial school aid cases has always been limited to secular courses quite apart from religious instruction.[268] He further objected that there was simply no "basis for finding college clerics more reliable in keeping promises than their counterparts in elementary and secondary schools."[269] Yet, the Court was content to rest its conflicting decisions in *Lemon* and *Tilton* on such distinctions.

The propensity to privilege speculation over the record once again won the day in *Aguilar v. Felton*,[270] in which the Court struck down New York City's use of federal funds to supply public school teachers for certain types of remedial instruction to educationally disadvantaged students who attend parochial schools.[271] The majority reasoned that the prophylactic contact necessary to ensure that government-salaried remedial teachers who entered the parochial schools were not conveying religious messages to their students would constitute an excessive entanglement of church and state.[272] In a stinging dissent, Justice Sandra Day O'Connor objected stating that, despite the fact that in the nineteen-year history of the title I program "there ha[d] never been a single incident in which [an] instructor 'subtly or overtly' attempted to 'indoctrinate . . . students,' " the majority based its conclusion of constitutionally impermissible entanglement on the fear that such indoctrination was still possible.[273]

When suspicion is contradicted by the record in the case, it would seem only reasonable to put it aside in favor of fact. Al-

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[266] *Id.* at 689.

[267] *See id.* at 686 ("[C]ollege students are less impressionable and less susceptible to religious indoctrination.").

[268] *Lemon*, 403 U.S. at 668 (White, J., concurring in part, dissenting in part).

[269] *Id.*

[270] 473 U.S. 402 (1985).

[271] *Id.* at 414.

[272] *Id.* at 412-13. The majority held that the "monitoring" required "infringe[d] precisely those Establishment Clause values at the root of the prohibition of excessive entanglement." *Id.* at 413.

[273] *Id.* at 421, 424-25 (O'Connor, J., dissenting). Justice O'Connor added that "[i]n light of the ample record, an objective observer of the implementation of the . . . program . . . would hardly view it as endorsing the tenets of the participating parochial schools." *Id.* at 425 (O'Connor, J., dissenting).

though public aid to parochial schools would undoubtedly provide an incidental benefit to the religious mission of the schools, such a secondary consequence ought not be the excuse to deny the pressing and weighty public policy reasons in favor of such aid.[274]

5. Summary

The Court's First Amendment jurisprudence is flawed in two ways. First, the strict-separationist effort to justify the denial of parochial school aid on the ground of the intent of the framers of the First Amendment has yielded an oversimplified historical account. Second, it has produced a legal doctrine pursuant to which the religion clauses are erroneously bifurcated. In both cases the Court fails to appreciate the theological anthropology that inspired the adoption of the religion clauses. Moreover, even when the problematic historical foundation upon which the strict-separationist position rests is put aside, the introduction of the three-pronged *Lemon* test has failed to produce a neutral set of legal principles or a coherent corpus of case law. Justice White has faulted the Court for neglecting the "overriding secular function" of legislation in favor of a rigid adherence to *Lemon*'s three prongs. Speculation and caricature seemed to have supplanted the truth about the parochial schools. Such an approach is not surprising when one considers the strict-separationist prejudice embodied within the standard. The approach seems difficult to justify, however, once the erroneous historical underpinning of the standard is unveiled. Currently, a majority of the Court has joined Justice White in expressing dissatisfaction with the three-part test.[275] In the matter of parochial school aid, it now seems probable that the *Lemon* standard will be laid to rest.[276]

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[274] *See supra* note 247 and accompanying text (discussing Justice White's separable secular function of overriding importance test).

[275] *See, e.g.*, Allegheny v. ACLU, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in part, dissenting in part) ("[s]ubstantial revision of our Establishment Clause doctrine may be in order"); Edwards v. Aguillard, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting) ("pessimistic evaluation . . . of the totality in *Lemon* is particularly applicable to the 'purpose' prong"); *Aguilar*, 473 U.S. at 430 (O'Connor, J., dissenting) (quoting Choper, *supra* note 222, at 681 ("anomalous results in our Establishment Clause cases are 'attributable to [the] entanglement prong' "); Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) ("three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine").

[276] In Lee v. Weisman, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 59 U.S.L.W. 3635 (U.S. Mar. 18, 1991) (No. 90-1014), a case presently under consideration by the Court, presents an opportunity for it to reexamine the *Lemon* standard. The case involves an ob-

III. THE VOUCHER CONCEPT

Any legislative attempt to recognize the significant contributions of the parochial schools to the social fabric is certain to be tested in the federal courts pursuant to the First Amendment. Although past decisions may reflect erroneous historical assumptions and a formalistic doctrine, the Court's respect for *stare decisis* may render it less willing to overrule case precedent, even in the face of compelling reasons to do so.

An idea not yet tested before the Court is the voucher concept. Typically, parents use vouchers as a substitute for tuition or other admissions costs at any eligible and participating school.[277] Under a comprehensive voucher program, the term "public school" would be redefined to include any school to which funds flow from public sources—federal, state, or local. Alternatively, vouchers might be available to all students in nonpublic schools or only to low-income families.

Even under the narrow parameters of *Lemon*, a voucher program with a primary secular effect would probably be constitution-

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jection brought by a Jewish student at a Providence, Rhode Island Public High School to a prayer offered by a rabbi at the school's graduation ceremony. *Id.* at 1090. The United States Court of Appeals for the First Circuit affirmed a decision of the Rhode Island district court, which found that the prayer violated the effect prong of the *Lemon* standard. *Weisman v. Lee*, 60 U.S.L.W. 3635, 3352 (U.S. Mar. 18, 1991) (No. 90-1014). In its brief and during oral argument, counsel for the Providence public schools urged the Court to scrap the *Lemon* standard. *Id.* at 3352; *see also* Ralph D. Mawdsley & Charles J. Russo, *High Prayers at Graduation: Will the Supreme Court Pronounce the Benediction?*, 69 W. EDUC. L. REP. 189, 189-202 (1992); Henry J. Reske, *Does Prayer Belong at Graduation?*, 78 A.B.A. J. 47-49 (1992).

[277] *See* John E. Coons and Stephen D. Sugarman, *Family Choice in Education: A Model State System for Vouchers*, 59 CAL. L. REV. 321, 324 (1971). Under the Coons and Sugarman voucher plan, the percentage of a family's income devoted to education would increase according to (1) the tuition of cost of the school to which a family sends a child, and (2) the family's income. Thus, the program allows for a progressive reallocation of resources according to income. For example, a family with $15,000 annual income might be charged 1% of its total income to send a child to School A which spends $1,000 per pupil. The same family might be charged 1.5% of its income to send a child to School B which spends $2,000 per pupil. Now its own contribution would amount to $225 and the voucher would be for $1,775. Another family with an annual income of $50,000 would spend $500 and receive a voucher for $500 to send a child to School A. They would spend $750 and receive a voucher for $1,250 to send a child to School B. The authors would adjust the general taxes collected for education to ensure that parents who choose to send their children to the lowest costing schools would end up in a zero sum gain compared to the cost of public education which parents do not pay for other than through their taxes. The authors argue that such a program would increase parental decision making power with the field of schools reflecting a wide range of ideological and curricular responses. *See id.* at 336-400.

ally acceptable.[278] As Justice White observed, because the Court is prone to concede the secular purpose criterium and because "the validity of tuition grants or tax credits involving or requiring no relationships whatsoever between the [s]tate and . . . any church school" does not raise any entanglement issue, the primary effect of such a program is the real constitutional concern.[279] The Court's decision in *Mueller v. Allen*[280] tends to confirm Justice White's observation. *Mueller* upheld a Minnesota plan that allowed taxpayers to claim a tax deduction for the expense of tuition, textbooks, and transportation incurred in educating their children.[281] Three factors convinced the Court that the provision had a primarily secular effect. First, the scheme was only one of many deductions, such as those for medical expenses and charitable deductions, recognized under the Minnesota tax laws; thus, it was part of a broad attempt to distribute the tax burden equitably among all taxpayers.[282] Second, the deduction was available to all parents, including those with children in public and private schools.[283] The Court expressly distinguished this case from *Nyquist* on these grounds.[284] Third, the aid was given to parents, not directly to sectarian schools.[285]

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[278] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-9, at 846 n.33 (1978). Although *Norwood v. Harrison*, 413 U.S. 455 (1973), . . . would seem to forbid using such publicly subsidized vouchers at racially discriminatory private schools, the cases from *Everson* through *Wolman* indicate that . . . the [E]stablishment [C]lause should not pose an insuperable barrier to using such vouchers at parochial schools. Indeed, to exclude only church-related schools from such a voucher system might pose substantial free exercise problems.

Id.

[279] Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 822 (1973) (White, J., dissenting).

[280] 463 U.S. 388 (1983).

[281] *Id.* at 403.

[282] *Id.* at 396.

[283] *Id.* at 397.

[284] *See id.* at 398. The breadth of the class of beneficiaries is an important factor in sustaining forms of parochial school aid. *See* Mansfield, *supra* note 139, at 878 (suggesting that breadth of class benefitted may determine whether aid violates Establishment Clause, is required by Free Exercise Clause, or is matter of state discretion). For this reason, a voucher program that includes all school children—those in public as well as those in private schools—would almost certainly seem to present a broad enough class of beneficiaries to pass the primary effect test.

[285] *Mueller*, 463 U.S. at 399. This distinction increases the likelihood that a voucher initiative would survive constitutional attack. For example, it was important to the Court in *Mueller* that "public funds bec[a]me available only as a result of numerous private choices of individual parents of school age children." *Id.* at 399. The Court also noted that with the exception of *Nyquist*, all of the recent cases invalidating state aid to sectarian schools have "involved the direct transmission of assistance from the [s]tate to the schools themselves."

The distinction between direct aid to sectarian schools and aid to individuals also played an important role in *Witters v. Washington Dep't of Serv. for the Blind.*[286] In *Witters*, the Court ruled in favor of a blind petitioner who sought state vocational rehabilitation funds in order to attend a seminary.[287] As the majority opinion stated, "[a]id recipients' choices are made among a huge variety of possible careers . . . the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the [s]tate."[288] Since it is permissible for an individual to use state funds to finance a seminary education, common sense beckons approbation of a parent's choice to use a voucher at a parochial school with its beneficial consequences for the common good. Given the theoretical and practical problems with the *Lemon* standard, it would be preferable for the Court to reach a judgment about a legislative program of vouchers in light of White's proposed standard of review. The form of aid represented by vouchers appears to possess both the ability to satisfy the stringent requirements of *Lemon* and to fulfill the demands of public policy.

As manifested by the doomed fate of a recent New York Regents voucher proposal, the educational lobby has vehemently opposed the voucher concept, characterizing it as the "embodiment of everything that is threatening public education."[289] Apart from

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Id.

[286] 474 U.S. 481 (1986).

[287] *Id.* at 489.

[288] *Id.* at 488.

[289] CHUBB & MOE, *supra* note 33, at 217. On July 26, 1991, the New York State Board of Regents considered a proposal that provided for state-financed tuition vouchers to be used by parents who elected to send their children to private or parochial schools. *See* Sam Howe Verhavek, *Regents Reject Voucher Plan for Tuition: Vote on Pilot Program Is Surprisingly Close*, N.Y. TIMES, July 27, 1991, at 25. Pursuant to the proposal, any student attending one of the 59 public schools included on the Board of Regents list of "the worst performing schools" in the state would be eligible for the voucher. *Id.* Most of the 59 are located in urban areas with high concentrations of poor families. *Id.* Proponents argued that poor children, whom the state system of public education fails to provide with basic educational skills, would not be likely to break the cycle of poverty. *Id.* The program was intended as an experiment to test the possibility that parental choice in education would stimulate healthy competition by providing an incentive for both public and nonpublic schools to provide quality education. *Id.* Not surprisingly, "a broad coalition of educators and administrators expressed visceral opposition to the concept." *Id.* at 26. New York State Governor Mario M. Cuomo and New York City Schools Chancellor Joseph A. Fernandez added their voices to that of the politically powerful coalition. *Id.* In the face of such opposition, the Regents rejected the pilot program in a "surprisingly close vote" of eight against six. *Id.* Prior to the controversial vote, one of the six, Regents Vice Chancellor R. Carlos

the transparent self-interest at stake, their objection confuses the American ideal of public education with the present nationwide "one best system" of public education.[290] The reality that the current arrangement of American public education is not providing equal educational opportunity to all students demands that some degree of choice be instituted.[291] Vouchers would insure alternatives in education by enabling church-affiliated and other local community groups to finance the schools of their choice. A voucher program encourages increased parental involvement in education by empowering parents to choose the best available education for their children.[292]

Because many and various groups would be free to run their own schools, it might be objected that such a program could be manipulated to maintain racial segregation in education.[293] Only those schools, however, that meet standard state educational requirements and comply with federal and state laws against racial discrimination would be eligible to participate in the voucher program.[294] Moreover, the intended beneficiaries of public educa-

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Carballada, admonished his colleagues by referring to the 59 schools saying, "I know that none of you would allow your children to attend any of those schools." *Id.* After the vote, the Vice Chancellor indicated that the matter was not settled. *Id.* at 26.

[290] *See generally* CHUBB & MOE, *supra* note 33, at 3-6 (discussing American public education system as "one best system").

[291] *See generally* Thomas G. Tancredo, *The Case for Vouchers*, 71 W. EDUC. L. REP. 593, 597 (1992) (arguing that without choice no real improvement will occur in American education); Julie K. Underwood, *Choice in Education: The Wisconsin Experience*, 68 W. EDUC. L. REP. 229 (1991) (discussing funding of private schools through public funds and need for choice). *But see* Julie K. Underwood, *Choices Is Not a Panacea*, 71 W. EDUC. L. REP. 599, 608 (1992) (suggesting that choice through vouchers may result in racially segregated schools).

[292] *Cf.* Ronald D. Rotunda, *The Constitutional Future of the Bill of Rights: A Closer Look at Commercial Speech and State Aid to Religiously Affiliated Schools*, 65 N.C. L. REV. 917, 930 (1987) (arguing that voucher system would encourage parents who send children to parochial schools to vote for school tax increases since they would see reasonable portion of tax dollars returned in form of vouchers).

[293] *But see* Robert L. Woodson, *Race and Economic Opportunity*, 42 VAND. L. REV. 1017, 1035 (1989) (voucher legislation could include provision rendering it legally impermissible for school to accept only white children while receiving public aid through voucher program); *cf.* CHUBB & MOE, *supra* note 33, at 218 (suggesting that racial integration and religious issues could be addressed).

[294] A further objection might be that the program could enable "unusual" religious groups to operate their own schools. It should be remembered, however, that the free market would determine what kinds and quality of schools prosper as parents used vouchers to express their preferences. Moreover, the problem of defining religion would not exist because religious instruction would neither be a prerequisite nor an impediment to public aid. More importantly, perhaps, to restrict a policy on such fear would be to disempower the

tion—children from low-income families, especially racial, ethnic, and religious minorities—have become the victims of an educational system that often fails to provide them with basic educational skills.[295] The special success that parochial schools have had with the same population of students suggests that healthy competition would cause ineffective public schools to improve rather than monopolize public funds in a less than successful effort.[296]

CONCLUSION

Thus, this Article envisions a new order for public education in this country. Pursuant to the new order, a free market under appropriate government regulation rather than unchecked political authority would determine the flow of public aid to various schools. Such an order would enable parents to choose what kind of school, secular or sectarian, presents the most desirable educational environment. The new arrangement would also provide incentives for quality education, as schools now run by the state government would have to compete on an even field with schools that currently receive no public funds.

It has been almost twenty years since Justice White first expressed the view that the Supreme Court's invalidation of parochial school aid "was not required by the First Amendment and is contrary to the long range interests of the country."[297] The historical evidence now suggests the need for a substantial revision of the Court's approach to the meaning of the religion clauses. Not only should the new approach adopt a less formalistic doctrine that allows consideration of the secular merits of parochial schools, but it needs also to appreciate the theological anthropology and free-exercise concerns that inspired the adoption of the religion clauses.

While a fresh approach is desirable on the basis of the revised understanding of the First Amendment's meaning, more pressing and urgent public policy considerations demand it. The concrete

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majority of parents who seek a wholesome religious education for their children for the sake of deterring some unusual expressions of religious belief.

[295] *See supra* notes 65-71 and accompanying text.

[296] *See supra* notes 70-77 and accompanying text; *see also* Woodson, *supra* note 293, at 1035 (arguing that educational vouchers would serve to correct government policy that denies blacks and other minorities freedom of choice in selecting schools). Woodson's argument makes good sense in light of the fact that for many minority parents parochial schools are the only viable alternative in education.

[297] Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 820 (1973) (White, J., dissenting).

social reality is that the parochial schools are serving as the sole guarantors of several constitutional rights for a significant number of low- and middle-income families. In the absence of the parochial schools, the Fourteenth Amendment's promise of equal protection and due process as well as the First Amendment's free exercise guarantee run the risk of being reduced to mere rhetoric.

To the extent that it fails to consider both the true meaning of the First Amendment and the long-range interests of the country, the Supreme Court's constitutional theory amounts to a flight from reality. Through the medium of dissent, Justice White has challenged the Court to abrogate the argument based on historical authority and to entertain the compelling public policy justifications in support of parochial school aid. He has left open the possibility that parochial schools will not be added to the list of defunct subsidiary institutions. One can only hope that he may soon be recognized as a herald of good news.