Pepperdine Law Review

Volume 5 | Issue 2 Article 11

1-15-1978

Limitations on Permissible State Aid to Church-Related Schools Under the Establishment Clause: Wolman v. Walter

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Case Notes

Limitations on Permissible State Aid to Church-Related Schools Under the Establishment Clause: *Wolman v. Walter*

The issue of constitutional limitations on state aid to pupils in church-related elementary and secondary schools imposed by the establishment clause[1] of the first amendment has been a recurring one before the United States Supreme Court in recent years,[2] as well as the subject of a large volume of legal commentary.[3] In June of 1977, the Supreme Court once again addressed itself to the issue of state aid to parochial[4] schools in the case of *Wolman v. Walter*.[5]

Although the product of a sharply divided Court, the decision in *Walter* apparently clears the way for the states to increase substantially the amount of assistance, within carefully specified categories, that they may provide pupils in church-

1. The establishment clause provides: "Congress shall make no law respecting an establishment of religion, . . ." U.S. CONST. amend. I.

2. *E.g.*, Roemer v. Board of Pub. Works, 426 U.S. 736 (1976); Meek v. Pittenger, 421 U.S. 349 (1975); Sloan v. Lemon, 413 U.S. 825 (1973); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Hunt v. McNair, 413 U.S. 734 (1973); Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973); Tilton v. Richardson, 403 U.S. 672 (1971); Lemon v. Kurtzman, 403 U.S. 602 (1971); Board of Educ. v. Allen, 392 U.S. 236 (1968); Everson v. Board of Educ., 330 U.S. 1 (1947).

3. Recent literature of special note on the subject includes: Kirby, *Everson to Meek and Roemer: From Separation to Detente in Church-State Relations*, 55 N.C.L. REV. 563 (1977); Zoeteway, *Excessive Entangelement: Development of a Guideline for Assessing Acceptable Church-State Relationships*, 3 PEPPERDINE L. REV. 279 (1976); Nowak, *The Supreme Court, The Religion Clauses and the Nationalization of Education*, 70 NW. U.L. REV. 883 (1976); Piekaski, *Nyquist and Public Aid to Private Education*, 58 MARQ. L. REV. 247 (1975); Boles, *The Burger Court & Parochial Schools: A Study in Law, Politics, & Educational Realities*, 9 VAL. U.L. REV. 459 (1975).

4. "Parochial", as used herein, is defined as private or nonpublic elementary and secondary schools run or supported by a religious organization or church.

5. 97 S. Ct. 2593 (1977).

related elementary and secondary schools.[6] By ruling most of the Ohio law in question constitutional, the Court has impliedly given its approval to other states to enact similar new legislation providing for aid to parochial schools.

In order to assess the potential impact and significance of the *Walter* decision, it first will be necessary to trace, through an examination of previous Supreme Court decisions, the development and application of the three-part establishment clause test in the context of state aid to parochial schools. Next, the *Walter* decision itself will be analyzed with special emphasis on the competing points of view expressed in the various opinions. Finally, the implications of *Wolman v. Walter* with respect to future state efforts to aid church-related schools will be discussed.

THE DEVELOPMENT OF THE TEST

The first Supreme Court decision to deal with the establishment clause in the narrow context of state aid to parochial schools was *Everson v. Board of Education*[7] in 1947. In *Everson* the Court held that New Jersey could constitutionally provide public funds to pay for the cost of transporting children to and from parochial schools. Justice Black, writing for the majority in this five to four decision, concluded that an acceptable stance of neutrality toward religion was maintained by the statute in question. Furnishing transportation to all schoolchildren, public and nonpublic alike, was viewed by Justice Black as a legitimate exercise of the state's power to protect the health and safety of its school age children.[8] Any benefit to parochial schools themselves by virtue of this aid program was incidental, rather than direct.[9] The rationale undergirding the *Everson* decision has since been labled by commentators as the "pupil benefit theory."[10]

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6. Los Angeles Times, June 25, 1977, § 1, at 1, col. 5.

7. 330 U.S. 1 (1947). The establishment clause was presumed applicable to the states via the fourteenth amendment in *Everson. Id.* at 15. Subsequent establishment clause cases have expressly held it applicable to the states. *See, e.g.*, McCollum v. Board of Educ., 333 U.S. 203, 210 (1948); Board of Educ. v. Allen, 392 U.S. 236, 242 (1968).

8. 330 U.S. at 17-18. Justice Black characterized the statute as a nondiscriminatory general welfare program comparable to sewer maintenance and police and fire protection. *Id.*

9. *Id.* at 16. Although finding that a position of neutrality was maintained since the primary beneficiaries of the state aid were pupils and their parents rather than parochial schools, Justice Black indicated that the plan was on the "verge" of being an unconstitutional establishment. *Id.*

10. *See* Piekaski, *Nyquist and Public Aid to Private Education*, 58 MARQ. L. REV. 247, 257 (1975); Note, *The Establishment Clause: Drawing the Line on*

After *Everson* the Court began to develop a test for determining what constitutes impermissible aid to religion under the establishment clause rather than relying on a case by case approach to the question. In *Abington School District v. Schempp*,[11] although not a state assistance case,[12] Justice Clark announced the test to be applied in establishment clause cases: "[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[13]

This two-pronged test was applied when the Supreme Court sustained, against an establishment clause challenge, a New York textbook loan law in *Board of Education v. Allen*.[14] The statute in question provided for the loan of secular textbooks at state expense to all schoolchildren, whether they attended public or nonpublic schools. Reasoning that the secular and religious educational functions of parochial schools are separate and distinct, the Court ruled that as long as the state took meaningful steps to ensure that the books loaned were suitable only for secular instruction, the primary purpose and effect of the aid program was to advance the secular education of the pupils.[15]

Aid to Religious Schools, 54 N.C.L. REV. 216, 219 (1976). Despite his holding, Justice Black expressed a point of view in his opinion in *Everson* which seemed to be at odds with the outcome. In forceful language which has often been quoted, he enunciated a strict separationist, or no-aid, view of the establishment clause: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion . . . . In the words of Jefferson, the clause against the establishment of religion by law was intended to erect a 'wall of separation between Church and State.'" 330 U.S. at 16.

11. 374 U.S. 203 (1963).

12. The state law at issue in *Schempp* was a Pennsylvania statute which required Bible recitals in public schools. *Id.* at 205-08.

13. *Id.* at 222. The Court in *Schempp* was unable to find a valid secular legislative purpose, and found that the Bible recitals were a "religious exercise", hence, unconstitutional. *Id.* at 223.

14. 392 U.S. 236 (1968). The Court based its *Allen* decision on a dual rationale, relying not only on the purpose and effect test announced in Abington School Dist. v. Schempp, 374 U.S. 203 (1963), but also on the "pupil benefit theory" of Everson v. Board of Educ., 330 U.S. 1 (1947). The majority again characterized the aid programs as public welfare legislation, benefiting parochial pupils directly and parochial schools only incidentally. 392 U.S. at 244. Interestingly, Justice Black, who wrote the majority opinion in *Everson* dissented vigorously in *Allen*. *Id.* at 250. *See* notes 8-10, *supra* and accompanying text.

15. *Id.* at 245-48. The Court concluded that the requirement that all textbooks be approved by public school officials for use in public schools was a

A third criterion, "excessive entanglement", was added to the establishment clause test in *Walz v. Tax Commission*.[16] The case involved a property tax exemption granted by New York to religious organizations.[17] In his majority opinion upholding the New York law, Chief Justice Burger indicated that in addition to examining the purpose and effect of aid programs under the establishment clause, the Court also would examine the relationship established between church and state by the program.[18]

The Court further refined the concept of excessive entanglement in the 1971 companion cases of *Lemon v. Kurtzman*[19] and *Tilton v. Richardson*.[20] These cases indicated that there are two branches of the excessive entanglement test. Under the first branch, the Court must determine whether an aid program re-

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sufficient means of ensuring that they would be used only for secular educational purposes. *Id.* at 244-45. This reasoning was criticized severely by Justice Douglas in his dissenting opinion. *Id.* at 254.

16. 397 U.S. 664 (1970).

17. While *Walz* did not involve state assistance to parochial schools per se, the establishment clause question involved was identical. What made *Walz* unique was the factual situation. First, the state practice of granting property tax exemptions to religious institutions predated the Constitution itself. *Id.* at 683 (Brennan, J., concurring). Second, the "aid program" challenged did not involve any flow of state funds to religion. Instead, it involved state abstention from the exercise of its power to tax. The Court concluded that continuing the tax exempt status of religious institutions created less entanglements between church and state than those which would arise out of taxing church property. *Id.* at 674.

18. *Id.*

19. 403 U.S. 602 (1971). In Lemon v. Kurtzman, the Pennsylvania and Rhode Island aid programs at issue each made provision for the state to bear some of the costs of secular education provided by nonpublic schools. *Id.* at 607-10. To examine whether these statutory aid plans gave rise to excessive entanglement the Court examined three criteria: (1) the character and purposes of the institutions which were benefited; (2) the nature of the aid provided by the state; and (3), the resulting relationship between the government and the religious institution. *Id.* at 615. Applying these three criteria, the Court in *Kurtzman* concluded that the resulting church-state relationship would give rise to excessive entanglement. The same criteria were applied in Wolman v. Walter, 97 S. Ct. at 2608-09. *See* notes 73-76, *infra* and accompanying text.

20. 403 U.S. 672 (1971). In contrast to the holding in *Kurtzman*, the Court in *Tilton* upheld a program of federal construction grants to church-affiliated colleges. Applying the same three entanglement criteria as in *Kurtzman*, the Court concluded that, unlike parochial elementary and secondary schools, church-affiliated colleges and universities were characterized by an atmosphere of academic freedom rather than religious indoctrination. *Id.* at 681-82. The decision in *Tilton* is indicative of the greater willingness which the Court has shown to uphold federal and state aid to church-related colleges and universities, as opposed to programs designed to aid lower parochial education. *See also* Hunt v. McNair, 413 U.S. 734 (1973) (upholding a South Carolina act that assisted in the financing of construction at a Baptist college through the issuance of revenue bonds); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (upholding the constitutionality of a Maryland statute providing for annual noncategorical grants directly to church-affiliated colleges).

quires government to become overly involved with religion in details of administration.[21] Under the second branch, excessive entanglement results if the aid program fosters political divisiveness along religious lines.[22]

In a series of 1973 decisions involving state assistance programs, the Supreme Court struck down as unconstitutional a variety of state attempts to provide aid to parochial schools. In *Levitt v. Committee for Public Education and Religious Liberty*,[23] the Court declared unconstitutional New York legislation that reimbursed nonpublic schools for expenses related to state mandated testing and reporting. In *Sloan v. Lemon*,[24] it found that a Pennsylvania tuition grant scheme did not pass constitutional muster. And finally, in the most extensive and important decision of the three, the Court struck down in its entirety a New York law that provided for assistance in the form of building maintenance, tuition reimbursements, and tax benefits to parents of nonpublic schoolchildren, in *Committee for Public Education v. Nyquist*.[25]

The Court in *Nyquist* divided six to three. Justice Powell, writing for the majority, found that even though the tuition reimbursements and the tax benefits were carefully directed at the parents of parochial students rather than at the schools themselves, the effect of the aid was "unmistakably to provide desired financial support for nonpublic, sectarian institutions."[26]

21. Lemon v. Kurtzman, 403 U.S. 602, 615 (1971).

22. The Court in *Kurtzman* concluded: "Here we are confronted with successive and very likely permanent annual appropriations which benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines is likely to be intensified." *Id.* at 623. Conversely, the *Tilton* aid program was found not to contain the potential for divisive religious fragmentation in the political arena. 403 U.S. at 688-89.

23. 413 U.S. 472 (1973).

24. 413 U.S. 825 (1973).

25. 413 U.S. 756 (1973).

26. *Id.* at 783. Because the Court found that the challenged state assistance program impermissibly advanced religion, thus failing the "primary effect" test, they did not deem it necessary to proceed to apply the "excessive entanglement" test. *Id.* at 794. Therefore, one effect of *Nyquist* was to reaffirm the vitality of the "primary effect" test as an independent means of invalidating state laws aiding religion. Justice Powell also briefly discussed the potential for political divisiveness inherent in the challenged aid program, noting that it was not to be given equal weight with administrative church-state entanglements as a separate and distinct grounds for striking down state laws. According to

Finally, in 1975, the Court once again reaffirmed the use of the three-pronged establishment clause test in *Meek v. Pittenger*.[27] The Pennsylvania statute under consideration in *Meek* involved three forms of aid flowing to nonpublic elementary and secondary schools. Applying the test, the Court found that two of the forms of aid—the loaning of instructional materials and equipment[28] and the provisions for auxiliary services[29]—violated the "primary effect"[30] and "excessive entanglement"[31] parts of the test, respectively. The third form of aid, textbook loans, was upheld because it was patterned after the textbook loan program approved by the Court in *Board of Education v. Allen*.[32]

From an analytical standpoint, *Meek* is an especially important decision because it serves as a graphic illustration of the disposition of the present Supreme Court membership with respect to establishment clause issues. The Court can be divided readily into three voting blocs with three justices in each bloc: (1) the "accomodationist bloc", including Justices White, Burger, and Rehnquist; (2) the "super-separationist bloc", including Justices Brennan, Douglas,[33] and Marshall; and (3), the "moderately-separationist bloc", including Justices Stewart, Blackmun, and Powell.[34] In *Meek*, each bloc voted as a unit, with the swing vote of the moderately-separationist Justices—Stewart, Powell, and Blackmun—accounting for the difference in result between the textbook loan decision and the auxiliary services and instructional materials and equipment decision.

Wolman v. Walter

It was against this background that the Supreme Court re-

Justice Powell, potential for political divisiveness serves as a "warning signal" which should not be ignored. *Id.* at 797-98 (Powell, J., majority opinion).

27. 421 U.S. 349 (1975).

28. The Pennsylvania statute defined the term "instructional materials and equipment" to include such things as books, periodicals, recordings and projection equipment, tapes, films, slides, etc. *Id.* at 354-55 n.4.

29. "Auxiliary services" included remedial instruction, guidance counseling, speech and hearing testing and therapy, and the like. *Id.* at 352-53 n.2.

30. *Id.* at 363.

31. *Id.* at 370.

32. 392 U.S. 236 (1968). 421 U.S. at 362. The Court was divided sharply on this point. In his separate opinion, Justice Brennan questioned the Court's reliance on *Allen*, going so far as to imply that *Allen* should be overruled in light of subsequent Court decisions. *Id.* at 378 (Brennan, J., dissenting).

33. Shortly after the decision in *Meek*, Justice Douglas retired and President Ford appointed Justice John Paul Stevens to replace him. However, in light of his separate opinion in Wolman v. Walter, 97 S. Ct. 2593, 2614 (1977), it appears that Justice Stevens shares the same strict separationist, or no-aid, point of view as did Justice Douglas with respect to establishment clause issues.

34. *See* Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment?*, 1973 S. CT. REV. 57, 88 (1974).

viewed the constitutionality of the Ohio aid program in *Wolman v. Walter*.[35] This case constituted a challenge to all but one of the provisions of the Ohio statute[36] authorizing various forms of aid to nonpublic schools, most of them sectarian.[37]

In general terms, the Ohio aid program provided for a biennial appropriation of $88,800,000.00 to provide nonpublic school pupils with secular textbooks, standardized tests and scoring services, diagnostic and therapeutic services, instructional materials and equipment, and transportation for field trips.[38]

Applying the three-pronged establishment clause test previously developed by the Supreme Court, a three-judge federal district court found the entire enactment constitutional.[39] On direct appeal,[40] the Supreme Court upheld the decision, except for that portion dealing with the use of public funds for instruc-

35. 97 S. Ct. 2593 (1977).

36. OHIO REV. CODE ANN. § 3317.06 (Page Supp. 1976). The predecesor Ohio statute to § 3317.06 was pending an appeal from a district court judgment holding it unconstitutional at the time Meek v. Pittenger, 421 U.S. 349 (1975), was decided. Wolman v. Essex, 342 F. Supp. 399 (S.D. Ohio 1972). The Supreme Court reversed and remanded to the district court for further consideration in light of its decision in *Meek*. 421 U.S. 982 (1975). On remand, the district court adjudged it unconstitutional. However, in the meantime, the predecessor statute had been repealed and replaced by the present, successor statute. Accordingly, appellants shifted their challenge to the present statute. 97 S. Ct. at 2597-98 n.1.

37. The parties stipulated to the fact that of the 720 chartered nonpublic schools in Ohio during the 1974-1975 school year, all but 29 were sectarian. 97 S. Ct. at 2598. Further, it was also stipulated that more than 96% of the pupils enrolled in nonpublic schools attended sectarian schools; and of these, more than 92% attended Catholic schools. *Id.*

38. *Id.*

39. Wolman v. Essex, 417 F. Supp. 1113 (N.D. Ohio 1976) *aff'd in part and rev'd in part sub nom.* Wolman v. Walter, 97 S. Ct. 2593 (1977). The district court ruled, in essence, that: the textbook provisions were indistinguishable from those upheld by previous decisions of the Supreme Court (*id.* at 1117); the lending of instructional materials and equipment was not substantially different from the lending of textbooks (*id.* at 1119); the challenged diagnostic services were constitutional because they were health services involving limited pupil contact (*id.* at 1121); the removal of the therapeutic services from parochial school premises cured any first amendment difficulties in them (*id.* at 1123); the testing and scoring services were valid by reason of standardization (*id.* at 1124); and the field trip transportation was not substantially different from the busing between home and school previously approved by the Supreme Court (*id.* at 1124-25).

40. 28 U.S.C. § 1253 (1970) allows direct appeal to the Supreme Court from a judgment of a three-judge district court concerning the constitutionality of a state law.

tional materials and equipment, and for field trip transportation.

Justice Blackmun, speaking for the Court, reiterated that the three-part establishment clause test provides the guidelines for the Court's analysis of state programs of aid to parochial schools.[41] As in previous establishment clause cases, the Court quickly disposed of the first prong of the three-pronged test, "secular purpose". Furthermore, the Court acknowledged that in assessing the "primary effect" and "excessive entanglement" prongs of the test, it looked to the Court's numerous, "firmly-rooted" precedents for "substantial guidance".[42]

The Court upheld the secular textbook loan provision by a six to three margin.[43] This provision was described as bearing a "striking resemblance" to the textbook loan programs approved in *Board of Education v. Allen*[44] and *Meek v. Pittenger*.[45] In *Walter*, as in *Meek* and *Allen*, the aid statute was carefully drafted so that the state assistance ran directly to the parochial students and their parents—not to the parochial schools. The books were to be used strictly for secular purposes, and the overall state textbook loan program benefited all schoolchildren in Ohio equally.[46]

By an identical six to three margin,[47] the Court upheld the provision authorizing the use of public funds to supply nonpublic school pupils with standardized tests and scoring services identical to those in use in the public schools in Ohio.[48] The

41. 97 S. Ct. at 2599. In the words of the Court: "In order to pass muster, a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion."

42. *Id.*

43. *Id.* at 2600. The dissenting triumvirate consisted of the "super-separationist bloc"—Justices Brennan, Marshall, and Stevens. Of this trio, Justice Brennan would have struck down the Ohio aid program in its entirety (*id.* at 2610); Justice Marshall would have upheld only the diagnostic services and the provision for psychological, speech, and hearing therapy (*id.*); and Justice Stevens would have upheld only the provisions for diagnostic and therapeutic services (*id.* at 2615).

44. 392 U.S. 236 (1968).

45. 421 U.S. 349 (1975). As in *Meek*, all textbooks must have been approved by the public school officials for use in public schools. 97 S. Ct. at 2599. The only distinction between the Ohio provision and the provision upheld in *Meek* was that the Ohio statute defined "textbook" as "any book or book substitute." The Court found this difference in wording inconsequential. *Id.* at 2600.

46. *Id.* at 2600 n.6. A separate statutory provision provided for textbook loans to public school pupils. *Id.*

47. Once again the dissenting votes were cast by Justices Brennan, Marshall, and Stevens.

48. 97 S. Ct. at 2601.

Court easily distinguished the teacher-prepared testing program invalidated in *Levitt v. Committee for Public Education*[49] from the standardized testing program in the Ohio statute.[50] The absence of any nonpublic school control as to either the content or the results of the tests negated any possibility of diversion of the tests to religious uses, as well as any need for continuing state supervision.[51]

Next, the Court overwhelmingly[52] approved the expenditure of state funds to provide speech, hearing, and diagnostic services to nonpublic school pupils, asserting that "[t]his Court's decisions contain a common thread to the effect that the provision of health services to all schoolchildren—public and nonpublic—does not have the primary effect of aiding religion."[53] The rationale of the Court was that a brief, single encounter between diagnostician and pupil did not have the potential to either foster religious beliefs or create excessive church-state entanglements.

The remedial and therapeutic services provisions of the Ohio aid program included services such as remedial reading, guidance counseling, and programs for disturbed and handicapped students. Citing the fact that, unlike the auxiliary services program in *Meek v. Pittenger*,[54] the Ohio act required these services to be furnished off the nonpublic school premises,[55] the Supreme Court upheld this provision by a vote of seven to two.[56]

49. 413 U.S. 472 (1973).

50. Appellants contended that even though the tests were standardized, unlike the teacher-prepared exams in *Levitt*, they still constituted impermissible aid as "an integral part of the teaching process", and a form of direct aid to parochial schools rather than to individual students. Brief for Appellant at 15.

51. 97 S. Ct. at 2601.

52. The sole dissenting vote was cast by Justice Brennan. *Id.* at 2609 (Brennan, J., concurring in part and dissenting in part).

53. *Id.* at 2602.

54. 421 U.S. 349, 367 (1975). The similar auxiliary services program invalidated by the Court in Meek v. Pittenger was distinguished because it had combined state aid for diagnostic services to be performed on nonpublic school premises (permissible) with remedial and therapeutic services also to be performed on nonpublic school premises (impermissible). 97 S. Ct. at 2603.

55. Each subsection specified that the services could be furnished in three types of locations: (1) public schools, (2) public centers, or (3) in mobile units parked off the nonpublic school premises. *Id.* at 2603-04 n.12.

56. *Id.* at 2605. The two dissenting votes were cast by Justices Brennan and Marshall. The third "super-separationist," Justice Stevens, had misgivings about the provision, but was not of the opinion that it was unconstitutional on its face. *Id.* at 2615.

The majority reasoned that the danger of the relationship between therapist and student or between counselor and student resulting in the transmission of religious beliefs was negated by the change of environment from parochial schools to "religiously neutral locations."[57]

Justice Marshall, however, in his separate opinion pointed out the fallacy in the Court's reasoning. Despite the language in the majority opinion to the contrary,[58] the nature of the relationship between student and counselor or therapist remained the same regardless of where the services were offered. As indicated by Justice Marshall, the real issue before the Court was whether or not the services offered—especially guidance and counseling services—ultimately had the impermissible effect of advancing religion.[59]

Turning next to the provision authorizing the loan of instructional materials and equipment directly to nonpublic schoolchildren or their parents, the Court voted six to three to strike down this portion of the Ohio aid program because, "[i]n view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools."[60] Faced with the inconsistency between the "presumption of neutrality" afforded to secular textbooks in *Board of Education v. Allen*[61] and its subsequent rulings,[62] the Court refused to extend the textbook presumption

57. *Id.* at 2605. In an amicus brief for the appellants, Leo Pfeffer characterized the Ohio statute as an attempt to evade rather than to comply with previous Supreme Court decisions, especially *Meek v. Pittenger*:

> What we are witnessing is a sort of historic chess game played between ingenious lawyers and legislators on one side and this Court on the other side of the chessboard of the Establishment Clause, with each move by the former checked by the latter, but the game continuing in the hope that a successful move will ultimately be found. Brief of National Coalition for Pub. Educ. and Religious Liberty at 10.

58. In the words of Justice Blackmun, writing for the Court: "[s]o long as these types of services are offered at truly religiously neutral locations, the danger [that publicly employed personnel might transmit religious beliefs] perceived in *Meek* does not arise." 97 S. Ct. at 2605.

59. *Id.* at 2612 (Marshall, J., concurring in part and dissenting in part). And since Justice Marshall was of the opinion that any form of aid which directly or indirectly provided educational assistance to parochial schools constituted "assistance to the religious mission of sectarian schools", he would have found it impermissible for any public employee to assist parochial students in "developing meaningful educational and career goals" or in "[p]lanning school programs of study" as provided by the Ohio statute. *Id.*

60. *Id.* at 2607. Once again the Court voted according to blocs. The superseparationist and moderately-separationist blocs voted against the provision and the accomodationist bloc—Justices Burger, White, and Rehnquist—voted to uphold the provision. *Id.* at 2609.

61. 392 U.S. 236, 241-44 (1968).

62. *E.g.*, Meek v. Pittenger, 421 U.S. 349 (1975) (striking down a similar

created by *Allen* to include any additional educational materials or equipment.[63] Instead, the Court labeled the presumption in *Allen* "unique", thus continuing the tension which exists between *Allen* and subsequent establishment clause decisions.[64]

The language employed by the Court in discussing the material and equipment loan provision, however, is strongly indicative of the fact that the rationale of *Allen*—if not its holding—has been rejected by the present Court. In *Allen* the Court upheld a loan of secular textbooks directly to parochial students on the assumption that the secular and religious educational functions of parochial schools are separate and distinct.[65] Similarly, the educational materials and equipment at issue in *Walter* were for secular educational uses only and were loaned directly to parochial students and their parents, rather than to the parochial schools as was the case in *Meek*.[66] Yet the majority of Justices concluded that "[d]espite the technical change in legal bailee, the program in substance is the same as before. . . ."[67] "Substantial aid to the educational function of such

provision for the loan of equipment and materials directly to parochial schools which contained no express prohibition against lending items capable of diversion to religious use); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (holding unconstitutional a tuition reimbursement program in which the aid flowed directly to the parents of parochial students).

63. 97 S. Ct. at 2607-08 n.18. Although the Ohio statute did not specify the exact nature of the materials and equipment, the parties stipulated that it would be similar to the items listed in the predecessor Ohio aid statute which had been ruled unconstitutional. *See* note 36, *supra*. Equipment provided under the predecessor statute included projectors, tape recorders, record players, maps and globes, science kits, and weather forecasting charts. *Id.* at 2606. In addition, the statute as presently amended contained an express prohibition against lending items capable of being diverted to religious uses. *Id.*

64. *Id.* at 2607-08 n.18. Justice Marshall would have resolved this tension by overruling *Allen*: "I am now convinced that *Allen* is largely responsible for reducing the 'high and impregnable' wall between church and state erected by the First Amendment . . . to a 'blurred, indistinct, and variable barrier' . . . incapable of performing its vital function of protecting both church and state." *Id.* at 2610 (Marshall, J., concurring in part and dissenting in part).

65. 392 U.S. at 245-48. *See* note 14, *supra* and accompanying text.

66. Whereas the predecessor Ohio statute (*see* note 36, *supra*) had authorized material and equipment loans directly to nonpublic schools, the statute was amended in light of Meek v. Pittenger to channel the loans directly to nonpublic school pupils and their parents. 97 S. Ct. at 2606-07.

67. *Id.* at 2607.

schools . . . necessarily results in aid to the sectarian school enterprise as a whole."[68]

Because the Court invalidated the educational material and equipment loan provisions on "primary effect" grounds, they did not discuss the potential for church-state entanglements in these provisions. However, with respect to the final form of aid provided by the Ohio statute—transportation for field trips—they relied on both "primary effect" and "excessive entanglement" grounds to strike it down.[69] The Court readily distinguished the transportation provision at issue from the home-to-school transportation reimbursement program in *Everson v. Board of Education*,[70] reasoning that in the Ohio situation, the field trips so aided constituted "an integral part of the educational experience."[71]

Furthermore, as in *Lemon v. Kurtzman*,[72] the Court looked to the character and purpose of the nonpublic schools benefited, the nature of the aid provided, and the resulting church-state relationship created.[73] The findings of the Court were: that the parochial schools in question and their personnel were dedicated to inculcating religious beliefs in their pupils; that the statutory provision at issue left details of timing, destination, and content of field trips up to parochial school personnel; and, that close supervision would be required to insure that field trips were used strictly for secular purposes.[74] Therefore, the Court concluded that the "primary effect" of providing busing for nonpublic school field trips was "an unacceptable risk of fostering of religion."[75] Attempts to curtail diversion of the field trips to such religious use by means of close supervision would result in excessive entanglement.[76] Hence, in substance, if not in form, the result was that direct state assistance impermissibly flowed to support the sectarian purposes of parochial schools.

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68. *Id.* at 2606 (*quoting* Lemon v. Kurtzman, 403 U.S. 602, 657 (1971) (opinion of Brennan, J.)).

69. *Id.* at 2609.

70. 330 U.S. 1 (1947). *See* note 7, *supra* and accompanying text.

71. 97 S. Ct. at 2608. Justice Powell disagreed, expressing the opinion that this aid was "indistinguishable in principle" from the transportation aid upheld in *Everson*. *Id.* at 2614 (Powell, J., concurring in part and dissenting in part).

72. 403 U.S. 602 (1971).

73. *See* note 19, *supra*.

74. 97 S. Ct. at 2608-09. This even though the parties stipulated that the trips would consist of visits to governmental, industrial, cultural, and scientific centers designed to enrich the secular studies of the students. *Id.* at 2608.

75. *Id.*

76. *Id.* at 2609.

Walter produced separate opinions from Justices Brennan, Marshall, Powell, and Stevens. Justice Brennan's opinion was brief and to the point. He viewed the Ohio aid program as a "sophisticated" attempt to "fashion a statute that avoids an affect or entanglement condemned by the Establishment Clause."[77] He also indicated that the Court should have examined the potential for political divisiveness inherent in the Ohio aid program, especially in light of the large sum of money appropriated to finance the first two years of the program.[78] Yet the very fact that Justice Brennan questioned the amount of money appropriated to finance the Ohio aid program is conceptually in conflict with his strong separationist, or no-aid, establishment clause stance. His comments in *Walter*, analyzed apart from his previous establishment clause opinions, could easily be taken as supportive of the view that a small amount of aid to students attending parochial schools is acceptable, but a great deal of aid is unconstitutional.

Justice Marshall's opinion advocated a shift by the Court from blind reliance on the establishment clause precedents established by virtue of the three-pronged test analysis. Instead, he called for the Court to institute a new black and white factual test drawing the line between "general welfare programs that serve children in sectarian schools", which would be acceptable, and "programs of educational assistance", which would not.[79]

Applying his proposed analysis to the aid program at issue in *Walter*, Justice Marshall concluded that only the diagnostic services and the provision for psychological, speech, and hearing therapy were constitutionally permissible because "these services promote the children's health and well-being, and have

77. *Id.* (Brennan, J., concurring in part and dissenting in part).

78. *Id.* at 2610. Justice Brennan was of the opinion that "divisive political potential" in and of itself provided sufficient grounds to strike down the Ohio aid statute in its entirety. *Id.* Conversely, Justice Powell, writing for the Court in Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 797-98 (1973), stated that potential for political divisiveness serves as a "warning signal" not to be overlooked, rather than as a separate and distinct ground for striking down state laws. *See* note 26, *supra*.

79. 97 S. Ct. at 2611 (Marshall, J., concurring in part and dissenting in part). Justice Marshall indicated that adherence to the mode of establishment clause analysis he proposed would first necessitate overruling Board of Educ. v. Allen. *Id.*

only an indirect and remote impact on their education progress."[80]

Responding to what he termed the "blind absolutism" of the super-separationist segment of the Court, Justice Powell in his decision reaffirmed the validity of the three-pronged establishment clause test as developed and applied by the Court in recent years.[81] Although willing to concede that the strict no-aid point of view espoused by Justices Brennan, Marshall, and Stevens perhaps resulted in greater "analytical tidiness", Justice Powell strongly defended the right of the individual states to provide aid to parochial students, as long as the guidelines supplied by prior Supreme Court decisions were followed.[82] In his opinion, the possibility of state aid, wholly secular in nature and channeled directly to parochial students or their parents rather than to parochial schools, resulting in serious political division along religious lines is remote at this point in time. Further, when viewed in light of the "wholesome competition" with public schools, the high educational standards, and the lessened public school tax burden provided by parochial schools, "any such risk seems entirely tolerable."[83]

Finally, Justice Stevens, echoing the sentiments of Justices Brennan and Marshall, called for the Court to rebuild the "high and impregnable" wall between church and state by returning to the strict no-aid test enunciated by Justice Black in *Everson v. Board of Education*: "No tax in any amount, large or small, can be levied to support any religious activities or institutions . . . ."[84]

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80. *Id.* at 2612. Recognizing that student health and welfare programs might well make students more receptive to being educated as a side effect, Justice Marshall distinguished such indirect effects from programs, such as textbook loans, which provide direct educational assistance. *Id.* at 2611. In effect, Justice Marshall acknowledged that there may be some gray areas in his black and white factual test.

81. *Id.* at 2613. (Powell, J., concurring in part and dissenting in part). In the words of Justice Powell "[o]ur decisions have sought to establish principles that preserve the cherished safeguard of the Establishment Clause without resort to blind absolutism." *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 2614 (Stevens, J., concurring in part and dissenting in part), *quoting* Everson v. Board of Educ., 330 U.S. 1, 16 (1947). *See* note 10, *supra*. It is interesting to note that although Justice Stevens spoke in the same strict no-aid terms as did Justice Brennan, he did not find the Ohio aid program unconstitutional in its entirety, as did Brennan. Instead, like Justice Marshall, Justice Stevens concluded that a state can constitutionally provide public health services to children attending parochial schools.

CONCLUSION

The Supreme Court's decision in *Walter* constitutes both a victory and a defeat to proponents of government aid to church-related elementary and secondary schools. On the one hand, *Walter* certainly represents a high water mark of permissible state aid within carefully defined categories. In light of present economic realities, it is quite likely that legislators in other states will be encouraged to use the Ohio aid program as a basis for similar legislation. It remains to be seen whether states will be able to devise constitutionally acceptable aid provisions to encompass the two areas—field trip transportation and loans of educational materials and equipment—in which the Ohio statute at issue in *Walter* failed to pass constitutional muster.

On the other hand, *Walter* also reaffirms the Court's commitment to limiting permissible state aid to parochial education to the narrow confines of past precedents. In *Everson v. Board of Education*,[85] the Court emphasized that the aid must flow to the individual students or their parents—not to the parochial school itself. *Walter* gave warning that the Court will not tolerate state attempts to use parochial students or their parents as the indirect means of providing educational materials and equipment for parochial schools.

The Court's decision in *Board of Education v. Allen*[86] was premised on the view that the state can contribute funds for the secular education of parochial students, as long as that aid cannot be diverted to religious uses, and as long as the aid given to parochial students does not exceed that given to public school students. *Walter* reaffirmed the validity of state loans of secular textbooks directly to parochial school pupils or their parents, but the Court refused to accept the contention that other secular educational materials and equipment also should fall within the "presumption of neutrality" afforded to textbooks in *Allen*. The Court in *Walter* further concluded that there is no way to safeguard against the diversion of field trip transportation to religious uses without creating excessive church-state entanglement, as long as details of timing, destination, and content of the trips are determined by parochial school personnel.

85. 330 U.S. 1 (1947).
86. 392 U.S. 236 (1968).

Finally, in light of *Walter*, it can be asserted that the majority of the present Justices are still committed to the use of the three-pronged establishment clause test developed and refined by the Court in recent years, and to its careful application to the facts of each case.

TIMOTHY J. BLIED