STATE AID TO STUDENTS IN RELIGIOUSLY AFFILIATED SCHOOLS: 
AGOSTINI v. FELTON

R. COLLIN MANGRUM†

I. INTRODUCTION

Few problems in our jurisprudence have been more perplexing 
and contentious than discerning the proper relationship between reli-
gion and the state. The United States Supreme Court remains as be-
fuddled as the rest of us in mapping out principles, guidelines, or sign 
posts that would provide assistance in answering difficult church and 
state issues. Interpretivist paradigms become more famous from the 
criticisms they receive than for their critical insight. Specific out-
comes to practical problems remain tentatively impermanent rather 
than confidently fixed. Perhaps that is how it should be. Perhaps the 
dialogue and debate that occurs in plurality opinions, concurring opin-
ions, dissenting opinions, lower court rulings, congressional enact-
ments, law reviews, and news reports allow for a refinement of issues 
and analyses.

One of the most controversial areas of Establishment Clause ju-
risprudence questions the propriety of various forms of public funding 
of religious schools. For years public funding for education that ex-
tended equally to public and religious schools for bus transportation, 
texts, film projectors, diagnostic testing, assistance for the handi-
capped, remedial assistance, and vouchers has been debated, legis-
lated, and litigated. Consequently, the Supreme Court’s recent 
reversal in Agostini v. Felton,1 of its earlier position in Aguilar v. Fel-
ton2 relative to Title I public funding of remedial aid in sectarian 
schools, promises to be an important directional statement for church 
and state observers. Although Agostini certainly does not answer all 
the questions relative to the circumstances under which the state may 
provide public funding for sectarian schools, the majority opinion con-
fesses that since Aguilar the Court has had such a change of heart or 
vision regarding Establishment Clause jurisprudence to justify over-
ruling earlier precedent.

The Court in Agostini justified their overruling of Aguilar, 
notwithstanding the normal deference given to the principle of stare

† Professor of Law, Creighton University School of Law
decisis, reasoning that stare decisis is not controlling whenever "the court is 'convinced that [its prior decision] is clearly erroneous and would work a manifest injustice.'"\(^3\) This Article reviews Agostini's contention that the Court's Establishment Clause jurisprudence has changed such that manifest injustice would abound if Aguilar were not overruled, explains the Establishment Clause paradigms that are currently relied upon by the present Supreme Court justices, and offers an alternative establishment paradigm for consideration in the ongoing debate relative to religion and state relationships.

II. AGOSTINI V. FELTON

A. PRIOR HISTORY: AGOSTINI V. FELTON

Agostini v. Felton,\(^4\) arose in the context of New York City's efforts to provide remedial education to disadvantaged children.\(^5\) In 1965, Congress enacted Title I of the Elementary and Secondary Education Act of 1965,\(^6\) to "provide full educational opportunity to every child regardless of economic background."\(^7\) Title I funds are channeled through local educational agencies to provide remedial education, guidance, job counseling, mentoring, and other related services to disadvantaged children.\(^8\) The targeted public school children include those who reside "within the attendance boundaries of a public school located in a low-income area"\(^9\) and are failing, or at risk of failing, the state's performance standards.\(^10\) Title I additionally provides that eligible students attending private schools must receive equitable services and other benefits.\(^11\) The constitutional challenge for Title I has been fashioning an effective means for delivering Title I services and benefits to children attending religiously affiliated schools without violating the Establishment Clause.

Establishment concerns are reflected in the additional constraints imposed on the distribution of Title I services to children enrolled in private schools. Title I services cannot be used on a "school-wide" basis in private schools, but instead can be provided only to those chil-

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dren qualifying for eligibility.\textsuperscript{12} Title I services can only be provided “through public employees or other persons independent of the private school.”\textsuperscript{13} Control over Title I funds as well as title to all materials used to provide Title I services must be kept by “local educational agencies” (“LEA”).\textsuperscript{14} Most importantly, Title I services must be “secular, neutral, and nonideological,” and must only “supplement, and in no case supplant, the level of services already provided by the private school[s].”\textsuperscript{15}

The Board of Education of the City of New York (“Board”) first applied as an LEA for Title I funds in 1966.\textsuperscript{16} The most pressing challenge for the Board was determining how to provide Title I services to students attending private schools, 90% of which were sectarian.\textsuperscript{17} Initially the Board arranged to transport the eligible students to an after-school program conducted at the public schools.\textsuperscript{18} The program was discontinued because attendance was poor, teachers and students were tired, and the parents were concerned for the safety of their children.\textsuperscript{19} The Board next tried after-school instruction conducted on the private school campuses, as Congress initially intended.\textsuperscript{20} Due to lack of success, the Board adopted yet an alternative plan which was challenged and invalidated in Aguilar v. Felton.\textsuperscript{21}

The “Aguilar Plan” permitted Title I services to be provided on private school premises during school hours.\textsuperscript{22} Public school employees were assigned on a voluntary basis to private schools largely with religious affiliations different from their own.\textsuperscript{23} Most of the teachers moved from school to school, spending less than the full week at any particular school.\textsuperscript{24} The rules imposed on these teachers provided: (i) the teachers were accountable only to public school supervisors; (ii) they could teach only those children whom they determined met Title I eligibility requirements; (iii) their materials and equipment could not be used in any other programs; (iv) they could not team teach with

\begin{itemize}
  \item \textsuperscript{13} \textit{Agostini}, 117 S. Ct. at 2004; 20 U.S.C. § 6321(c)(1), (2).
  \item \textsuperscript{14} \textit{Agostini}, 117 S. Ct. at 2004; 20 U.S.C. § 6321(a)(1), (2).
  \item \textsuperscript{15} \textit{Agostini}, 117 S. Ct. at 2004; See 20 U.S.C. § 6321(a)(2); 34 C.F.R. § 200.12(a).
  \item \textsuperscript{16} \textit{Agostini}, 117 S. Ct. at 2004.
  \item \textsuperscript{17} Felton v. Secretary, United States Dep’t of Educ., 739 F.2d 48, 51 (2d Cir. 1984), aff’d, 473 U.S. 402 (1985).
  \item \textsuperscript{18} \textit{Felton}, 739 F.2d at 51.
  \item \textsuperscript{19} \textit{Id.}
  \item \textsuperscript{21} \textit{Agostini}, 117 S. Ct. at 2004 [hereinafter known as the “Aguilar Plan”].
  \item \textsuperscript{22} \textit{Id.}
  \item \textsuperscript{23} \textit{Felton}, 739 F.2d at 53.
  \item \textsuperscript{24} \textit{Id.}
\end{itemize}
private school teachers; (v) they could neither teach nor become involved in any way with the religious activities of the private school; (vi) they were not to permit any religious symbols to be placed in the classrooms where they provided Title I services; (vii) any consultation between Title I teachers and private school teachers had to be limited to those related to professional concerns regarding the student's education; and (viii) a field supervisor was to attempt to make at least one unannounced visit to each teacher's classroom every month to ensure strict compliance with the secularization of the Title I educational experience.\textsuperscript{25}

Notwithstanding these strict measures to sanitize Title I services from religious influences, in 1978, six federal taxpayers sued the Board in the District Court for the Eastern District of New York seeking an injunction against use of Title I funding in religious schools.\textsuperscript{26} They claimed that any use of Title I money on religious school premises violated the Establishment Clause.\textsuperscript{27}

The district court granted summary judgment for the Board, but on appeal the United States Court of Appeals for the Second Circuit reversed.\textsuperscript{28} The Second Circuit determined that despite the "much good and little, if any, detectable harm," the "Aguilar Plan" violated the Establishment Clause.\textsuperscript{29} The United States Supreme Court, granted certiorari, and, in a 5-4 vote, affirmed the court of appeals on the ground that the "Aguilar Plan" entailed "excessive entanglement of church and state in the administration of [Title I] benefits" and had the impermissible effect of advancing religion.\textsuperscript{30} On remand, the district court permanently enjoined the Board's use of Title I services on the premises of sectarian schools.\textsuperscript{31}

As a consequence of the Supreme Court's ruling, the Board reverted to providing Title I services at public sites, at leased sites, and in mobile instructional units.\textsuperscript{32} These alternative delivery systems cost an average of $15 million a year "off-the-top" in New York City for each of the following ten years, thus reducing Title I money otherwise available for remedial education.\textsuperscript{33}

In the fall of 1995, the Board, joined by a group of parents, filed motions in the district court seeking relief pursuant to Federal Rule of

\textsuperscript{25} Id.
\textsuperscript{26} Agostini, 117 S. Ct. at 2005.
\textsuperscript{27} Id.
\textsuperscript{28} Felton, 739 F.2d at 72.
\textsuperscript{29} 739 F.2d at 72.
\textsuperscript{30} Aguilar, 473 U.S. at 414.
\textsuperscript{31} Agostini, 117 S. Ct. at 2005.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
Civil Procedure 60(b) from the previous injunction issued by the district court on remand from the Supreme Court's decision in Aguilar.34 The petitioners argued that because the decisional law regarding the Establishment Clause had changed significantly since Aguilar, the permanent injunction no longer made sense.35 The motion was denied by the district court denied; the Second Circuit Court of Appeals affirmed.36 The Supreme Court granted certiorari37 and reversed.38

B. THE SUPREME COURT DECISION

1. Justice O'Connor's Majority Decision

Justice O'Connor, writing for a five justice majority in Agostini,39 held that because Aguilar v. Felton40 could no longer be squared with intervening Establishment Clause jurisprudence, the New York Board of Education was entitled under Federal Rule of Civil Procedure 60(b)(5) to relief from the district court's permanent injunction.41 Procedurally, the Court held that "it is appropriate to grant a Rule 60(b)(5) motion when the a party seeking relief from an injunction or consent decree can show 'a significant change either in factual conditions or in law.'"42 The Court noted that while there had been no significant change in factual conditions, the Establishment Clause jurisprudence had changed to such a significant extent that the holding in Aguilar no longer reflected the current law.43 Accordingly, the Court determined, relief under Rule 60(b) was appropriate.44 In concluding that Establishment Clause jurisprudence has changed since Aguilar, the Court critiqued both the prior decision's application of the Lemon test to the facts and the viability of the Lemon test itself.45

34. Id. at 2006.
35. Id.
36. Id.
42. Id. at 2006 (quoting Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1992)).
43. Id. at 2010.
44. Id. at 2017-19.
45. Id. at 208-10. For a discussion of the Lemon test, see infra notes 48-49 and accompanying text.
a. The Agostini Majority’s Critique of the Prior Court’s Application of the Lemon Test in Aguilar and Ball

Justice O’Connor, writing for the majority in Agostini, observed that if the Court were to evaluate whether the rationale of Aguilar and the companion case of School District of Grand Rapids v. Ball had since been eroded, it would be necessary to review the underlying rationale of these cases. Reviewing the Court’s earlier decision in Aguilar, the Court noted that the delivery of publicly funded remedial programs in sectarian schools had been invalidated by a five justice majority because such practices were thought by them to violate the three-part test set forth in Lemon v. Kurtzman. Although the majority ultimately did not decide Agostini on the basis of the Lemon test, the Court reviewed the facts of Agostini from a Lemon perspective, and held that the “Aguilar Plan” would not even have violated the Lemon test, if it had been properly applied.

i. Permissible Educational Purpose

The majority in Agostini observed that the Court, when previously considering both Aguilar’s Title I remedial program and Ball’s shared time program, had found that both programs had legitimate secular purposes of enhancing the educational opportunities of the disadvantaged. Because the secular legislative purpose was never contested in either Aguilar or Ball, the Court in Agostini did not have to review this issue. However, the Court observed that this secular purpose factor, the overriding neutral secular purpose of helping enhance the disadvantaged’s educational opportunities, ultimately controlled the analysis of the other factors. Whatever the principled explanation, a majority of the Court held that merely delivering remedial educational benefits on-site to qualified students should not be deemed violative of the Establishment Clause even if some of the sites happen to be sectarian schools.

51. Id. at 2008.
52. Id. at 2014.
53. Id. at 2015.
54. Id. at 2016.
ii. Impermissible Effect of Advancing Religion Reconsidered

The Court’s previous invalidation of the “Aguilar Plan” turned largely on the prior assessment that the plan had an impermissible effect of enhancing religion. The Court’s reversal in Agostini can be explained by the Court revising the “impermissible religious effect” conclusion in favor of a permissible “incidental effect” conclusion given the neutrally justified purpose of enhancing educational opportunities for the disadvantaged.

The Court in Ball and Aguilar had previously found that the “Aguilar Plan” of on-site delivery of remedial aid had an impermissible religious effect in at least three ways. First, the Court in both earlier cases found that any teacher participating in educational programs within sectarian schools would presumptively become involved in intentionally or inadvertently inculcating religious ideas as part of their teaching. Second, the Court found that the presence of public teachers on sectarian school grounds created a symbolic union between church and state. Third, according to the Court, the programs impermissibly financed religious indoctrination directly. The Court in Agostini reversed each of these “impermissible religious effect” findings.

The majority in Agostini held that the Supreme Court in Zobrest v. Catalina Foothills School Dist. and Witters v. Washington Department of Services for Blind had modified Aguilar’s finding of impermissible effect of advancing religion in three ways. First, the Court in Zobrest rejected Aguilar’s “presumption of inculcation”: that a publicly employed interpreter would presumptively seek to inculcate religion if they were allowed to teach on parochial school grounds. Second, the Court in Zobrest rejected the notion “on which Ball and Aguilar turned: that the presence of a public employee on private school property creates an impermissible ‘symbolic link’ between government and religion.” Third, the Court in Agostini also held that the direct subsidies to religious schools do not necessarily have an “impermissible religious effect” justifying a flat ban as the Court in Ball

55. Id. at 2008.
56. Id.
57. Id.
58. Id. at 2009.
59. Id. at 2014 (citing Ball, 473 U.S. at 367-73, 385-87, 395-97; Aguilar, 473 U.S. at 409-13).
63. Id. at 2010-11.
64. Id. at 2011.
and Aguilar implied.\textsuperscript{65} Justifying a less restrictive “endorsement test” in place of Lemon’s wall-of-separation orientation, Justice O’Connor noted that the Court in Witters held that the Establishment Clause did not bar a state from funding a vocational tuition grant to a blind person who wished to attend a Christian college to become a pastor, missionary or religious youth director.\textsuperscript{66} Similarly, she reminded the dissenters that in Zobrest the Court permitted the state to fund an interpreter for a deaf student in a sectarian school.\textsuperscript{67} In both of these cases the Court validated public funding for eligible students for neutral secular purposes despite the student’s use of the funds in the context of a religious school.

In response to Justice Souter’s dissent that the broad subsidies allowed under Agostini’s Title I programs were clearly distinguishable from the less direct and more limited programs validated in Zobrest and Witters, Justice O’Connor explained that the distinctions identified by Justice Souter were of no significance in principle.\textsuperscript{68} First, contrary to the dissenters’ assertion that Title I services are distributed directly to religious schools, rather than to qualified students, she noted that Title I funds are actually distributed to a “local educational agency . . . that dispenses services directly to the eligible students within its boundaries, no matter where they choose to attend school.”\textsuperscript{69} The Court also pointed out that the dissent had not explained how the more direct aid to eligible students “results in a greater financing of religious indoctrination simply because those students are not first required to submit a formal application.”\textsuperscript{70} Second, with regard to the issue of whether Title I services relieve a religious school of an expense that it would otherwise have had to assume, Justice O’Connor refused to speculate whether all religious schools would have been willing and able to provide comparable remedial instruction and guidance counseling.\textsuperscript{71} Third, despite the likelihood that Title I programs do extend to more students than the programs validated in Zobrest and Witters, the majority reasoned: “[n]or are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid.”\textsuperscript{72}

\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} Agostini, 117 S. Ct. at 2011 (citing Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993)).
\textsuperscript{68} Id. at 2011-13.
\textsuperscript{69} Id. at 2013; 20 U.S.C. §§ 6311, 6312.
\textsuperscript{70} Agostini, 117 S. Ct. at 2013.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
iii. Entanglement

In addition to the findings of “impermissible religious effect” present in Aguilar and Ball, the Supreme Court in Aguilar also found an excessive entanglement.73 The New York Board of Education had implemented a “system for monitoring the religious content of the publicly funded Title I classes.”74 Even though the Board adopted the monitoring system because of the judicially recognized presumption that the teachers would seek to inculcate religion, the Court in Aguilar found that the very necessity that monitoring take place created an excessive entanglement.75

In Agostini, Justice O’Connor rejected the Aguilar and Ball’s conclusion that the delivery of on-site Title I services violated Lemon’s “excessive entanglement” test.76 In reviewing the “excessive entanglement” test, the Court observed that originally the “excessive entanglement” issue was merely an aspect of determining whether the program has an impermissible effect of advancing religion.77 While the Court in Lemon identified “entanglement” “as a factor separate and apart from ‘effect,’”78 the Court in Agostini observed that the facts relevant in determining whether an entanglement is “excessive” are similar to the factors we use to examine ‘effect.’”79 Additionally, the Court in Agostini explained that because “[i]nteraction between church and state is inevitable,” any entanglement facts would necessarily have to be truly “excessive’ before it runs afoul of the Establishment Clause.”80

As applied to the facts of the case, the Court in Agostini rejected the Court’s earlier finding in Aguilar that the fact of “administrative cooperation” and the “dangers of ‘political divisiveness’” were sufficient by themselves to create an “excessive” establishment.81 The Court noted that these factors were present with the currently authorized off-premise services.82

73. Id. at 2010.
74. Id. at 2009 (citations omitted).
75. Id. at 2009-10 (citing Aguilar, 473 U.S. at 409, 412-14; Lemon, 403 U.S at 619).
76. Id. at 2014-16.
77. Id. at 2015 (citing Walz v. Tax Comm’n of City of New York, 397 U.S. 664, 674 (1970)).
78. Id. (citing Lemon, 403 U.S. at 612-13).
79. Id. at 2015.
80. Id. (citing Bowen v. Kendrick, 487 U.S 589, 615-17 (1988) (permitting governmental review and monitoring of adolescent counseling program established by religious institutions); Roemer v. Board of Pub. Works of Md., 426 U.S. 736, 764-65 (1976) (permitting audits of religious colleges to ensure that state grants are not used for religious purposes)).
82. Id.
Also, because the Court rejected the "presumption of inculcation," the Court also could reject the assumption that pervasive monitoring of Title I is required, thus diminishing the risk of "excessive entanglement."\(^{83}\) So much for Aguilar's "excessive entanglement" finding.

b. The Agostini Majority's Critique of the Lemon Test as Applied in Aguilar and Ball in Favor of an "Endorsement Test"

While the Agostini majority argued that Aguilar and Ball should have been decided differently even under the Lemon test, Justice O'Connor's majority opinion turns on the argument that the Court's establishment jurisprudence has turned away from Lemon toward less separationist standards. The persistent criticism of the Lemon test, both before and after Aguilar and Ball, are well known. The coherence and reach of alternate establishment paradigms have been much more problematic. Justice O'Connor used her majority opinion to advocate her "endorsement test" alternative to the Lemon test.

Essentially her argument is that on-site Title Services are constitutionally permissible because a reasonable observer would understand that Title I endorses equal educational opportunities for the disadvantaged, rather than religion. According to Justice O'Connor, because the Title I services are allocated to both public and private schools on a neutral basis (educational need coupled with financial qualification), there is less of a likelihood that the extension of these services to sectarian schools will have the effect of advancing religion by creating a financial incentive for the students to attend sectarian schools:

This incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. Under such circumstances, the aid is less likely to have the effect of advancing religion.\(^{84}\)

Justice O'Connor's majority opinion rejects the reasoning of both Ball and Aguilar, in part, because neither case gave any weight or consideration to the neutrality of the Title I program and consequently each failed to consider whether the program would be interpreted more as a permissible "endorsement" of neutral remedial aid for education rather than an "impermissible endorsement" of religion. In support of the distinction between "impermissible religious endorsement" and "permissible neutral aid," Justice O'Connor pointed out that both before and after Ball and Aguilar, the Court "sustained

\(^{83}\) Id. at 2015-16.
\(^{84}\) Id. at 2014 (citing Widmar v. Vincent, 454 U.S. 263, 274 (1981)).
programs that provided aid to all eligible children regardless of where they attend school.\textsuperscript{85} Applying Justice O'Connor's "endorsement test" rationale, the Court upheld New York's Title I program and overruled \textit{Aguilar} and \textit{Ball}:

We therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here. The same considerations that justify this holding require us to conclude that this carefully constrained program also cannot be viewed as an endorsement of religion.\textsuperscript{86}

By overruling \textit{Aguilar} and \textit{Ball}, the Court did not merely change the result in this particular case, but also reconfirmed the fact that a majority of the justices are so committed to a shift in establishment jurisprudence as to justify an erosion of the principle of \textit{stare decisis}.

c. Justification of Overruling Precedent

The circumstances of \textit{Agostini} presented the Supreme Court with a jurisprudential dilemma. Ordinarily the Court prefers to change the law incrementally by distinguishing out of existence, rather than directly overruling, prior unsatisfactory authority. Because \textit{Agostini} involved a review of a prior permanent injunction where no essential facts had changed, the Court could not distinguish its holdings in \textit{Aguilar} and \textit{Ball} from \textit{Agostini}. Writing for the majority, Justice O'Connor acknowledged that the holding in \textit{Agostini} overrules both \textit{Ball} and \textit{Aguilar} and, therefore, the principles of both \textit{stare decisis} and "law of the case."\textsuperscript{87} However, Justice O'Connor explained that "[t]he doctrine of \textit{stare decisis} ... has only a limited application in the


\textsuperscript{86} \textit{Id.} at 2016.

\textsuperscript{87} \textit{Id.} at 2017.
field of constitutional law." Similarly, the doctrine “law of the case” is inapplicable if “the court is ‘convinced that [its prior decision] is clearly erroneous and would work a manifest injustice.” The Court, therefore, justified overruling Ball and Aguilar because continued reliance upon the wall-of-separation view of the Establishment Clause that they are dependent upon would work manifest injustice.

2. Justice Souter’s Dissent

Justice Souter, lamenting the loss of Lemon’s form of separatism, dissented on the ground that the majority had erroneously misread the Court’s Establishment Clause cases. According to Justice Souter, Aguilar v. Felton and its companion case School District of Grand Rapids v. Ball, properly adhered to Lemon’s wall-of-separation prohibiting (a) the direct subsidization of religion, (b) the endorsement of religion and (c) the excessive entanglement between church and state. From the perspective of Justice Souter’s dissent, the majority opinion in Agostini obliterated the wall-of-separation and, in doing so, disregarded the principle of stare decisis not only embodied in these cases, but also well founded in other establishment cases. Justice Souter’s dissent, in effect, longs for the Lemon days of Aguilar and Ball that the majority would put in the distant past. He repudiates a paradigmatic shift of the Court’s establishment jurisprudence and critiques the majority opinion on the basis of the “Aguilar Plan’s” violation of the Lemon test.

a. Lemon’s Strict Separationism: Flat Ban on Direct Religious Subsidies as an Impermissible Religious Effect

In the spirit of strict separationism, Justice Souter decried the majority opinion as unconstitutionally “authoriz[ing] direct state aid to religious institutions on an unparalleled scale, in violation of the Establishment Clauses’ central prohibition against religious subsidies by the government.” He argued that history, policy and wall-of-sep-

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88. Id. at 2016 (quoting St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 94 (1936) (Stone and Cardozo, JJ., concurring in result)).
89. Agostini, 117 S. Ct. at 2017 (quoting Arizona v. California, 460 U.S. 605, 618 n.8 (1983)).
90. Id. at 2017-18.
91. Agostini, 117 S. Ct. at 2019 (Souter, J., dissenting). Justices Stevens and Ginsburg also joined Justice Souter’s dissent. Justice Breyer also joined in the dissent, in part. Id.
95. Id. at 2022 (Souter, J., dissenting).
96. Id. at 2021-22 (Souter, J., dissenting).
97. Id. at 2019 (Souter, J., dissenting).
aration reasoning mandate a “flat ban” on public subsidies to religion as proposed in the “Aguilar Plan.” He suggested that, with the exception of *Rosenberger v. Rector and Visitors of University of Virginia*, the “flat ban on subsidization antedates the Bill of Rights and has been an unwavering rule in Establishment Clause cases. . . .” According to Justice Souter’s dissent, the majority’s rejection of this flat ban eliminates any line-drawing of permissible and impermissible subsidies to religious schools: “If a State may constitutionally enter the schools to teach in the manner in question, it must in constitutional principle be free to assume, or assume payment for, the entire cost of instruction provided in any ostensibly secular subject in any religious school.”

b. Improper Effect: Endorsement

Applying Justice O’Connor’s own “endorsement test” against the majority opinion, Justice Souter explained: “Governmental approval of religion tends to reinforce the religious message (at least in the short run) and, by the same token, to carry a message of exclusion to those less favored views.” For Justice Souter, the presence of state employees teaching within the walls of sectarian schools creates a “symbolic union” between church and state and therefore, an impermissible effect of endorsement.

98. 515 U.S. 819 (1995). In *Rosenberger*, the United States Supreme Court upheld a university’s right to authorize payment of outside contractors for their printing costs of student publications. *Rosenberger*, 515 U.S. at 845-46. The Court upheld such payments on First Amendment grounds. *Id.*
100. *Id.* at 2021-22 (Souter, J., dissenting).
101. *Id.* at 2020 (Souter, J., dissenting) (quoting *Ball*, “[a]n important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their religious choices”); *Lee*, 505 U.S. at 606-07 (Blackmun, J., concurring) (stating that, “When the government puts its *imprimatur* on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs. A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some.”).
102. *Agostini*, 117 S. Ct. at 2020. The Court in *Lemon* distinguished permitting the state to supply secular books to sectarian schools, while forbidding state employees to teach in sectarian schools: “[T]eachers have a substantially different ideological character from books [and] [i]n terms of potential for involving some aspect of faith or morals in secular subjects, a textbook’s content is ascertainable, but a teacher’s handling of a subject is not.” *Lemon*, 403 U.S. at 617.
103. *Agostini*, 117 S. Ct. at 2021. Justice Souter denounced state teachers teaching within sectarian schools, as compared with state employees providing remedial teaching at off-premise sites, a result legitimated after *Aguilar* and *Ball*. *Id.*
c. Entanglement

In addition to violating a flat ban on direct subsidies to religion and avoiding improper endorsement, Justice Souter recommended retention of Lemon's "excessive entanglement" requirement present in Aguilar and Ball as part of the Establishment Clause inquiry.\textsuperscript{106} He suggested that the presence of state teachers within the walls of sectarian schools presents an insoluble "entanglement" problem:

the placement of state-paid teachers into the physical and social settings of the religious schools was not only the consequent temptation of some of those teachers to reflect the schools' religious missions in the rhetoric of their instruction, with a resulting need for monitoring and the certainty of entanglement.\textsuperscript{107}

Justice Souter concluded that while the objectives of Title I were worthy and the off-site teaching solution required in Aguilar and Ball was inefficient, the wall-of-separation drawn by these cases was a principled means of avoiding establishment violations.\textsuperscript{108} The majority opinion, to the contrary, in Justice Souter's opinion, permitted encroachment of the wall-of-separation in favor of an unprincipled sympathetic result.\textsuperscript{109}

3. Justice Ginsburg's Dissent

Justice Ginsburg, joined by Justices Stevens, Souter and Breyer, wrote a separate dissenting opinion on the procedural ground that "re-litigation of the legal or factual claims underlying the original judgment is not permitted in a Rule 60(b) motion or an appeal therefrom."\textsuperscript{110} Because there had been no significant change in factual conditions, because Aguilar had not been overruled, and because "lower courts lack authority to determine whether adherence to a judgment of this Court is inequitable,"\textsuperscript{111} it was inappropriate for the Court to have relied upon a 60(b) motion to pass the case up to the Supreme Court.\textsuperscript{112} It is interesting to note that while Justice Ginsburg's dissent of Agostini attacks only the procedural aspects of the case, the four justices connected with this dissent have all separately expressed their commitment to a wall-of-separation view of the Establishment Clause.

\textsuperscript{106} Id. at 2021.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Agostini, 117 S. Ct. at 2027 (Ginsburg, J., dissenting).
\textsuperscript{111} Id. at 2028 (Ginsburg, J., dissenting) (citing Rodriguez de Quijas v. Shearson/ American Express, Inc., 490 U.S. 477, 484 (1989)).
\textsuperscript{112} Id. (Ginsburg, J., dissenting).
III. ANALYSIS OF THE PROCEDURAL ISSUE IN AGOSTINI

The procedural issue in Agostini, critiqued by Justice Ginsburg in dissent, is one of the most curious aspects of the case. The Court explained that the petitioners were entitled to relief under Rule 60(b)(5) because “our Establishment Clause law has ‘significantly change[d]’ since we decided Aguilar.”113 Indeed, at one point of the opinion Justice O'Connor noted that “it was Zobrest—and not this case—that created ‘fresh law.’”114 The Court’s conclusion that their own opinions since Aguilar have so significantly changed Establishment Clause reasoning as to effectively overrule Aguilar certainly is plausible notwithstanding the wistful dissents to the contrary. If it were plausible, a Rule 60(b)(5) motion may have been an appropriate vehicle given the interpretation that such a motion is appropriate if either the facts or law have so changed. So far so good.

However, the Court then indicated:

[w]e do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.115

The practical consequence of this analysis applied to the facts of the case is that the petitioner properly filed the Rule 60(b)(5) motion despite the fact that petitioners were fully aware that the district court could not grant it. Also, the district court properly entertained the motion, “but it was also correct to recognize that the motion had to be denied unless and until [the Supreme] Court reinterpreted the binding precedent.”116

This interpretation seems strange to say the least. Certainly all judges are obligated to follow the Constitution above and beyond their obligation to follow precedent. Indeed, if the rationale of the precedent has been “changed” by subsequent Supreme Court opinions, in what sense could it be said that the previous “incorrect” precedent is binding? Does not the more recent authority that “changed” the interpretivist meaning of the Establishment Clause control?

Further, what practical sense does it make to say that the district court had to deny the motion? What difference would it have made to

114. Id. at 2011.
115. Id. at 2017 (quoting Quijas, 490 U.S. at 484).
116. Id.
the Supreme Court had the district court granted the motion because of the Supreme Court's changed establishment jurisprudence? Surely the Supreme Court would not have reversed because the district judge did not have the authority to decide that Aguilar had been effectively overruled even while deciding from their own perspective that Aguilar had in fact been effectively overruled. The procedural aspects of Agostini remain dubious, but appear to offer an opportunity for litigants to challenge old precedent through a new procedural mechanism.

IV. ANALYSIS OF THE ESTABLISHMENT ISSUE IN AGOSTINI

Although the establishment issue in Agostini arises in an unusual procedural context that may have significant implications in future cases, the real significance of Agostini lies in the majority's announcement that the Court's Establishment Clause jurisprudence has so changed in the past decade as to require the overruling of Aguilar and Ball. The majority opinions in Aguilar and Ball were unquestionably dominated by the Lemon test and qualified separationism, which the majority in Agostini clearly reject. Of the five "separatism" members of the Court in Aguilar who formed the majority and concurring opinion, only Justice Stevens remains on the Court. Of the four justices in Aguilar and Ball who dissented on the basis of their criticism of Lemon's separatism, Chief Justice Rehnquist (then Associate Justice) and Justice O'Connor remain on the Court. Their dissenting views in Aguilar and Ball form the basis of the majority opinion in Agostini.

In writing the majority opinion, Justice O'Connor was fully aware of the confused state of affairs relative to Establishment Clause reasoning. Regarding the difficulty of fashioning an appropriate interpretivist paradigm in establishment cases, Justice O'Connor had previously admitted that "[e]xperience proves that the Establishment Clause, like the Free Speech Clause cannot be reduced to a single test." Elsewhere she asserted that "[w]hen bedrock principles collide, they test the limits of categorical obstinacy and expose the flaws and dangers of a Grand Theory that may turn out to be neither grand nor unified." Nonetheless, neither she nor the other justices have abandoned the search for such a grand theory in explaining the ra-

118. Id. at 403. Justice Brennan wrote the majority opinion, in which Justices Marshall, Blackmun, Powell and Stevens joined. Id. Justice Powell also wrote a separate concurring opinion. Id.
121. Rosenberger, 515 U.S. at 852 (O'Connor, J., concurring).
tionale of their establishment decisions. In writing the majority opinion in Agostini, she judicially noticed the Court’s discernible shift away from Lemon’s qualified wall-of-separation reasoning as manifest in Aguilar and Ball toward either a less restrictive “endorsement test” or an even more permissive “accommodationist” standard. To understand these models and the significance of this shift for future cases, a review of the respective establishment paradigms and their present advocates and critics on the Supreme Court may be useful.

A. STRICT SEPARATIONISM

The wall-of-separation metaphor has long inspired strict separationists and secular humanists. The notion arises out of the Enlightenment tradition where the secular state is defended on the authority of pure reason unfettered by the vagaries and irrationalities of organized religion. The first judicial use of the wall-of-separation metaphor is found in Reynolds v. United States. It is the moment the Court denied a Mormon free exercise challenge to federal statutes having both a purpose and effect of targeting the religiously inspired practice of polygamy, the Court announced the wall-of-separation metaphor. The reference came by way of an excerpt of a quote found in a letter written by Thomas Jefferson to the Danbury Baptist Association eighteen years after the First Amendment had been enacted: “I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between church and state.”

The wall-of-separation metaphor first made its way from a free exercise case into our establishment jurisprudence in Everson v. Board of Education, and has ever since mesmerized many jurists and scholars. Critiquing the claim that Jefferson’s use of the phrase indicates that it exemplifies the Framers’ intent, Chief Justice

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122. 98 U.S. 145, 164 (1879).
125. 330 U.S. 1, 16 (1947).
126. Jaffree, 472 U.S. at 92 (Rehnquist, J., dissenting). On the issue of relevancy of the Jefferson wall-of-separation metaphor on the issue of the Framers’ intent, Justice Rehnquist observed that Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.
(then-Justice) Rehnquist, in his dissent in *Wallace v. Jaffree*, commented: "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 40 years."127 Notwithstanding Chief Justice Rehnquist's protests to the contrary, the wall-of-separation metaphor continues to capture the attention of many church and state pundits and explains, in part, the Supreme Court's decisions in *Aguilar* and *Ball*. According to this wall-of-separation view of the Establishment Clause, religion is inappropriate in the public forum generally and more particularly inappropriate in the public school context where impressionable children may misinterpret the state's permissive regard with respect to religious activities within the school. For similar reasons, strict separationists argue that while private schools are permitted to inculcate religion throughout their curriculum, public assistance of these religious efforts would violate the wall-of-separation. According to strict separationists, religious activities are only appropriate within self-supported private forums.

Although many justices and many more scholars have relied upon strict separationist rhetoric, the inevitability of some form of state support for religion, if nothing more than police, fire, and military protection, has relegated this paradigm to the theoretical, rather than the real. For the realist separationist, separationism is an illusive goal to be maximized, but ultimately never fully realized. Of the present Supreme Court Justices, Justices Stevens comes the closest to being a strict separationist; Justice Ginsburg follows as a close second.

**B. Qualified Separationism**

The inevitability of some form of interaction between church and state compels the strictest of separationists to acknowledge that some form of qualification of the principle of separationism is necessary. Even Justice Black's famous invocation of the wall-of-separation metaphor in the earliest modern establishment case, *Everson v. Board of Education*,128 is illustrative. Despite adopting Jefferson's wall-of-separation metaphor as stating the proper paradigm for establishment reasoning, the Court upheld the constitutionality of local legislation permitting parents of both private and public schools to be reimbursed for fares paid for the transportation of their children to school by public buses.129 The rhetoric of a strict wall of separation yielded to the

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reality of what could be characterized as a neutral accommodation. The issue after Everson has been reconciling the rhetoric of the wall-of-separation metaphor with the reality that a more complex relationship necessarily exists. The Lemon test, applied in Aguilar and Ball, for many years has remained the most persistent qualified separationist paradigm.

1. Lemon's Qualified Separationism

The Supreme Court announced the most famous version of qualified separationism in Lemon v. Kurtzman. According to the Court in Lemon, while interaction between church and state must inevitably occur, the relationship should be governed by a tripart qualified-separationist test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." Despite persistent criticism of Lemon, the test ever since has remained the most dominant paradigmatic interpretation of the Establishment Clause. Both state and federal judges, unable to discern from the Supreme Court's jurisprudence any alternative consensus view, have repeatedly fallen back on the Lemon test as the default establishment paradigm. Justice Blackmun's concurring opinion in Lee v. Wiseman, responding to the persistent assault on Lemon, reminded the Court of the frequency of which Lemon's tripart test is applied.

Along with the stricter separationists, Justices Stevens, Ginsburg, Souter and Breyer consistently follow some form of Lemon "qualified separationism." Not surprisingly, these four justices filed the dissenting opinions in Agostini. To each of these separationists, public funding of sectarian schools clearly violates the wall-of-separation that should be maintained between church and state. Their separationist views, and the critical response of the other present justices, generally can be seen in their previously decided establishment cases arranged from the perspective of the factual context in which establishment issues traditionally arise.

130. 403 U.S. 602 (1971).
a. Public Prayer Cases

*Lemon* separationists strictly proscribe prayer in the public forum as contrary to basic wall-of-separation principles. Carrying the banner of separationism even against long-standing tradition, Justice Stevens dissented in *Marsh v. Chambers* to the Court’s refusal to hold legislative prayer unconstitutional. For Justice Stevens, the historical fact that legislative prayer has had an unbroken tradition dating back to the time the Establishment Clause itself was adopted did not validate the practice as a matter of principle.

Not surprisingly, therefore, when Justice Stevens received the opportunity to write the majority opinion in *Wallace v. Jaffree*, he relied upon *Lemon’s* qualified separationist paradigm as the rationale for holding unconstitutional Alabama’s statute providing for a moment-of-silence in public schools for purposes of “meditation or voluntary prayer.” Justice Stevens’s majority opinion held that Alabama’s statute was constitutionally defective because it failed *Lemon’s* “secular purpose” test. According to Justice Stevens, a review of the legislative history indicated that the Alabama legislature had been motivated by a desire to return voluntary prayer to the public school, a clearly religious purpose. Of course the legislative prayer in *Marsh* had an even clearer religious purpose, but the public school context of the “moment of silence” in *Wallace* persuaded a majority of the Court to proscribe a less blatant religious exercise notwithstanding the authority of *Marsh*.

b. Neutral Benefits: Public Funding

In addition to building a high wall proscribing public prayer, separationists also have insisted on maintaining a wall prohibiting direct government funding of religion, especially religious indoctrination. In this regard, separationists have consistently dissented in the recent line of cases which have permitted neutral state aid to religious institutions, the very cases Justice O’Connor holds in *Agostini* previously overruled *Aguilar* and *Ball* as a matter of principle.

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138. Id. at 56.
139. Id.
Justice Blackmun's dissent, joined by Justices Stevens, Brennan and Marshall, in *Bowen v. Kendrick*141 is illustrative. At issue was the constitutionality of the Adolescent Family Life Act ("AFLA"), which authorized federal grants to public or nonprofit private providers for services and research in the area of premarital adolescent sexual relations and pregnancy.142 AFLA was challenged under the Establishment Clause for permitting public funding of religious instruction regarding adolescent sexual matters.143 Chief Justice Rehnquist writing for a five justice majority, upheld the statute as neutral public funding for an important secular purpose.144 However, Justice Blackmun, applying the *Lemon* test, dissented on the ground that "AFLA does not pass muster under *Lemon*’s 'effects' prong" and does involve an excessive entanglement.145

Similarly, in *Zobrest v. Catalina Foothills School District.*,146 Justice Souter joined Justice Blackmun in dissenting to the majority's requirement that the state under the Individuals with Disabilities Education Act ("IDEA") provide a sign-language interpreter to accompany a deaf child to classes at a Roman Catholic high school.147 The dissent complained that the Court had never before allowed any public funding of sectarian education that could further religious indoctrination: "Until now, the Court never has authorized a public employee to participate directly in religious indoctrination. Yet this is the consequence of today's decision."148

Justice Blackmun's dissent in *Zobrest* reviewed what he acknowledged to be difficult but clear lines previously drawn by the Court relative to the limited circumstances under which state aid could constitutionally benefit religious institutions.149 He noted the line permitting state aid for public bus transportation to and from both public and sectarian schools, but prohibiting public funded buses for sectarian school field trips; permitting state aid for secular textbooks used in parochial schools, while prohibiting state provisions of instructional materials that could be used to convey a religious message, such as projectors, recorders, record players, and the like; permitting state-paid diagnostic testing for speech and hearing on parochial school

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143. *Bowen*, 487 U.S. at 597.
144. *Id.* at 621-22. Justices White, O'Connor, Scalia and Kennedy joined Chief Justice Rehnquist's majority opinion. *Id.* at 591.
146. 509 U.S. 1, 18 (1993) (Souter, J., dissenting).
149. *Id.* at 19 (Blackmun, J., dissenting).
premises, while prohibiting state-paid remedial teachers lest they seek to inculcate religious beliefs.150

He observed that "[t]hese distinctions perhaps are somewhat fine, but "lines must be drawn,“ . . . our cases make clear that government crosses the boundary when it furnishes the medium for communication of a religious message."151 Consequently, Justice Blackmun concluded that if the state were permitted to employ a sign-language interpreter who would serve as a conduit for the student's religious education, then the state would, in effect, be unconstitutionally involved in the financing of religious indoctrination.152

For similar reasons, Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, dissented in Rosenberger v. Rector & Visitors of University of Virginia, 153 to the University of Virginia funding on a neutral basis the publication of a student magazine that was avowedly Christian.154 Justice Souter in Rosenberger insisted that the state university's direct funding of a core religious activity, even on a neutral basis, violated the Establishment Clause.155 According to Justice Souter, direct subsidization of religious activity "is categorically forbidden under the Establishment Clause, and if the Clause was meant to accomplish nothing else, it was meant to bar this use of public money."156

c. Neutral Benefits: Free Speech and Equal Access

Justice Stevens, writing the lone dissent in Westside Community Board of Education v. Mergens,157 relied on Lemon to argue that requiring public schools to give religious student groups equal access to the public school for extracurricular activities may violate the Establishment Clause by permitting, in effect, "organized prayer" and "religious ceremonies" on school premises.158 Citing Lemon, Justice Stevens suggested that the Equal Access Act may be unconstitutional under the principles of Jaffree because Congress passed the Act not to protect free speech in general, but religious speech in particular.159

150. Id. at 19-22 (Blackmun, J., dissenting) (citing Meek v. Pittinger, 421 U.S. 349, 371 (1975)).
151. Id. at 22 (Blackmun, J., dissenting) (citing Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 398 (1985)).
152. Id. (Blackmun, J., dissenting).
155. Rosenberger, 515 U.S. at 873-74 (Souter, J., dissenting).
156. Id. at 874-75 (J. Souter, dissenting).
159. Mergens, 496 U.S. at 285 n.21 (Stevens, J., dissenting).
Justice Stevens observed that the Court has "always treated with special sensitivity the Establishment Clause problems that result when religious observances are moved into the public schools." According to Justice Stevens, the wall-of-separation intent of the Establishment Clause not only permits but affirmatively mandates, viewpoint discrimination of religious speech on public school premises.

d. Free Exercise Based Exemptions

If separationists conclude that the Establishment Clause does not justify even the neutral protection of religious speech within the public forum, then certainly preferential treatment to religion, even Free Exercise Clause inspired exemptions, presents an easier case. Justice Stevens joined Justice Brennan's plurality opinion in Texas Monthly, Inc. v. Bullock, invalidating a Texas state tax exemption for religious periodicals, on the basis that in considering free exercise based exemptions to otherwise general regulatory statutes, the Establishment Clause trumps the Free Exercise Clause. The plurality opinion held that the preferential treatment given exclusively to religious periodicals amounted to a religious purpose, in violation of the Establishment Clause. However, this result is difficult to reconcile with Justice Stevens joining the majority opinion in Corporation of Presiding Bishop v. Amos. In Amos, the Court upheld a statutory exemption for religious institutions to Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of religion. It is not clear why separationists would allow a religious exemption in Amos, while decrying a similar exemption in Texas Monthly.

e. Religious Symbolism

Justice Stevens and Justice Ginsburg each wrote separate "separationist" dissents in Capitol Square Review and Advisory Board v. Pinette, justifying viewpoint discrimination of private free speech displayed on public property. Justice Stevens argued that the problematic nature of the Ku Klux Klan placing an unattended Latin cross on a commonly used public square in front of the Ohio State Capitol in

160. Id. at 287.
response to "the Jews" earlier placing a menorah in the same square, "illustrates the importance of rebuilding the 'wall of separation between church and State' that Jefferson envisioned."\textsuperscript{168} Despite the fact that the public square in question had been used for years as a public forum and despite the fact that the display contained a sign disclaiming government sponsorship or endorsement, Justice Stevens would have held that the Establishment Clause prohibited the religious display.\textsuperscript{169} According to Justice Stevens, the Establishment Clause, in effect, justified viewpoint discrimination against religious speech in the public forum to avoid encroaching the wall of separation.

Similarly, Justice Ginsburg, expressing a separationist perspective, argued that the Establishment Clause compelled this type of viewpoint discrimination. In her view, even private religious speech displayed in a public forum ran contrary to the Establishment Clause's aim "to uncouple government from church..."\textsuperscript{170}

2. Critique of Lemon's Qualified Separationism

While the above examples demonstrate continued support by Justices Stevens, Souter, Ginsburg and Breyer for some form of Lemon inspired separationism, most of the other present justices have repudiated Lemon and the stricter form of separationism which Lemon entails. However, even those justices who have repeatedly rejected Lemon often feel an obligation to follow the Lemon analysis, if only for purposes of criticism. Indeed, even the majority in Agostini, while ultimately rejecting the Lemon test, analyzed the facts from the perspective of Lemon's tripart test.

a. Critique of Lemon by Justice O'Connor's "Endorsement Test"

Justice O'Connor, the spokesperson of an "endorsement test" alternative to Lemon, which was relied upon by the majority in Agostini, also has repeatedly criticized the inadequacies of Lemon. Perhaps nowhere has Justice O'Connor's criticism of Lemon been more persistent than in its tendency to proscribe even neutral benefits to religion. In fact, Justice O'Connor observed an inherent tension between the Lemon test and any and all efforts by the state to accommodate the free exercise of religion in Jaffree:

On the one hand, a rigid application of the Lemon test would invalidate legislation exempting religious observers from generally applicable government obligations. By definition, such

\textsuperscript{168} Capitol Square, 515 U.S. at 797 (Stevens, J., dissenting) (citing Reynolds v. United States, 98 U.S. 145, 164 (1879)).
\textsuperscript{169} Id. at 814-15 (Stevens, J., dissenting).
\textsuperscript{170} Capitol Square, 515 U.S. at 817-18 (Ginsburg, J., dissenting).
legislation has a religious purpose and effect in promoting the free exercise of religion. On the other hand, judicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause. Any statute pertaining to religion can be viewed as an 'accommodation' of free exercise rights.\textsuperscript{171}

Since \textit{Jaffree}, Justice O'Connor has advocated an “endorsement test” as a more principled way of analyzing establishment issues independent of \textit{Lemon}. Under Justice O'Connor's test, religion may constitutionally share in the benefits of government, so long as the benefits received do not signal an endorsement of any particular religion or religion in general.

b. Critique of \textit{Lemon} by the Accomodationists

Chief Justice (then-Associate Justice) Rehnquist dissenting in \textit{Jaffree}, highlighted the inadequacies of \textit{Lemon}'s qualified separationism and recommended a more historically sound theory of accommodationism.\textsuperscript{172} First, he debunked the theory that the wall-of-separation metaphor identified with Jefferson's letter to the Danbury Baptist Association properly stated the Framers' intent.\textsuperscript{173} He noted that Thomas Jefferson was in France when the Bill of Rights were passed by Congress and ratified by the states.\textsuperscript{174} Also, he noted that the so-called letter was but a "short note of courtesy, written 14 years after the Amendments were passed by Congress."\textsuperscript{175} Moreover, he argued that James Madison, the more active architect of the First Amendment, "saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion."\textsuperscript{176}

Justice Scalia, dissenting in \textit{Lee v. Weisman}\textsuperscript{177} to the majority's invalidation of an ecumenical high school graduation prayer delivered by a rabbi, expressed the accommodationist hope, which to the present has not been realized, that \textit{Lee} may represent a death-knell for \textit{Lemon}:

[o]ur religion-clause jurisprudence has become so bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-ac-

\textsuperscript{171} \textit{Jaffree}, 472 U.S. at 82 (O'Connor, J., concurring).
\textsuperscript{172} \textit{Jaffree}, 472 U.S. at 91-114 (Rehnquist, J., dissenting).
\textsuperscript{173} \textit{Id.} at 91-92 (Rehnquist, J., dissenting).
\textsuperscript{174} \textit{Id.} at 92 (Rehnquist, J., dissenting).
\textsuperscript{175} \textit{Id.} (Rehnquist, J., dissenting).
\textsuperscript{176} \textit{Id.} at 98 (Rehnquist, J., dissenting).
\textsuperscript{177} 505 U.S. 577 (1992).
cepted constitutional traditions. Foremost among these has been the so-called Lemon test... which has received well-
earned criticism from many members of this Court...... The Court today demonstrates the irrelevance of Lemon by essen-
tially ignoring it, ... and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision.\

Justice Scalia also went out of his way in Lamb's Chapel v. Center Moriches Union Free School District179 to condemn the "ghoul" of the Lemon test. In Lamb's Chapel, Scalia concurred in result only to the Court's permitting a religious group to use public school facilities during nonschool hours on an equal access basis and stated with respect to the Lemon test:

As to the Court's invocation of the Lemon test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurispru-
dence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: our decision in Lee v. Weisman, 505 U.S. 577, 586-587 (1992), conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion re-
peatedly), and a sixth has joined an opinion doing so ... The secret of the Lemon test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will ... When we wish to strike down a practice it forbids, we invoke it ... when we wish to uphold a practice it forbids, we ignore it entirely ... Sometimes we take a middle course, calling its three prongs 'no more than helpful signposts' ... Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him. For my part, I agree with the long list of constitutional scholars who have criticized Lemon and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.180

Again, Justice Scalia, writing for the Court in *Capitol Square Review and Advisory Board* v. *Pinette,*\(^{181}\) in critiquing the separationist dissents of Justices Stevens and Ginsburg who would justify viewpoint discrimination of religious speech displayed on public forums, lamented:

> It will be a sad day when this Court casts piety in with pornography, and finds the First Amendment more hospitable to private expletives . . . than to private prayers. This would be merely bizarre were religious speech simply as protected by the Constitution as other forms of private speech; but it is outright perverse when one considers that private religious expression receives preferential treatment under the Free Exercise Clause.\(^{182}\)

In addition to Chief Justice Rehnquist and Justice Scalia’s persistent accommodationist critiques of *Lemon,* Justice Kennedy, in his dissent in *County of Alleghany v. American Civil Liberties Union, Greater Pittsburgh Chapter,*\(^{183}\) found the Lemon test unusable and recommended some form of “coercion qualified” accommodationism based on historical experience.\(^{184}\) Again, in his concurring opinion in *Lamb’s Chapel,* Justice Kennedy agreed with Justice Scalia “that the Court’s citation of *Lemon* . . . is unsettling and unnecessary.”\(^{185}\) However, Justice Kennedy in *Lee v. Weisman,*\(^{186}\) qualified his accommodationist critique of *Lemon,* by insisting that a historical justification can never justify an accommodation of a “coercive” religious practice, such as a high school graduation prayer, thus preserving in principle some form of *Lemon’s* no-impermissible-religious effect.\(^{187}\)

C. **Justice O’Connor’s Endorsement Test**

Justice O’Connor has repeatedly advocated, and several other justices have, in limited circumstances, adopted an “endorsement test” as an alternative “Establishment Clause” paradigm. The “endorsement test” focuses on a *Lemon*-like examination of the purpose and effect of state acts implicating the Establishment Clause. However, rather than raising *Lemon’s* tripart inquiry which would invalidate neutral accommodation of religion, the “endorsement test” involves a unitary inquiry of whether a reasonable observer would interpret the state ac-

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\(^{182}\) *Capitol Square,* 515 U.S. at 767 (1995).


\(^{184}\) *County of Allegheny v. ACLU, Greater Pittsburgh Chapter,* 492 U.S. 573, 659 (1989) (Kennedy, J., dissenting).

\(^{185}\) *Lamb’s Chapel,* 508 U.S. at 397 (Kennedy, J., concurring).


tion as placing the power and authority of the state behind religious activity for the purpose promoting that religious activity.

The "endorsement test" provides some explanatory power for establishment analysis, but it also generates interpretivist problems of its own. Justice O'Connor has introjected the "endorsement test" as preferable to *Lemon* in a variety of contexts.

1. Application of the Endorsement Test by Justice O'Connor

a. Public Prayer Cases

Justice O'Connor first explained at length her "endorsement test" as an alternative to or refinement of *Lemon's* purpose and effect tests in her moment-of-silence concurring opinion in *Jaffree*:188

Under this view, *Lemon's* inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement. The endorsement test is useful because of the analytical content it gives to the *Lemon* -mandated inquiry into legislative purpose and effect. In this country, church and state must necessarily operate within the same community. Because of this coexistence, it is inevitable that the secular interests of government and the religious interests of various sects and their adherents will frequently intersect, conflict, and combine. A statute that ostensibly promotes a secular interest often has an incidental or even a primary effect of helping or hindering a sectarian belief. Chaos would ensue if every such statute were invalid under the Establishment Clause . . . The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. Such an endorsement infringes the religious liberty of the nonadherent, for "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."189

When Justice O'Connor applied her test to the facts of *Jaffree*, Alabama's "moment of silence" statute was deemed unconstitutional, not


because the Constitution "prohibits public school students from voluntarily praying at any time before, during, or after the schoolday," but because Alabama's legislative history indicated that the particular "moment of silence" legislation adopted was enacted as an "endorsement" of school prayer.\textsuperscript{190} Since recommending her "endorsement test" in \textit{Jaffree}, Justice O'Connor has consistently relied upon it in establishment cases as an alternative to \textit{Lemon}.

b. Neutral Benefits: Public Funding

Justice O'Connor wrote a brief concurring opinion in \textit{Witters v. Washington Department of Services for Blind},\textsuperscript{191} validating state aid paid to a blind student attending a Christian vocational college seeking to become a pastor, missionary, or youth director.\textsuperscript{192} She explained: "[n]o reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief."\textsuperscript{193}

Perhaps the most informative "public funding" case addressed by Justice O'Connor relative to the issues addressed in \textit{Agostini} is \textit{Board of Education of Kiryas Joel Village School District v. Grumet}.\textsuperscript{194} In \textit{Kiryas Joel}, the City of New York, responding to the Court's prior invalidation of the "Aguilar Plan" for on-site IDEA funding, intentionally drew the boundaries under the State's general village incorporation law to exclude all but members of a religious enclave of Satmar Hasidim Jews.\textsuperscript{195} The incorporation permitted a public school board to run a special education program for handicapped Satmar Hasidim children.\textsuperscript{196} Justice O'Connor concurred in the Court's holding the religious-specific incorporation unconstitutional under the Establishment Clause because, rather than being a general accommodation, the incorporation singled out a particular religious group for preferential treatment.\textsuperscript{197}

While Justice O'Connor argued that the religion-specific incorporation of the village violated the Establishment Clause by endorsing preferential treatment for a specific religious group, she argued that a

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\item \textsuperscript{190} \textit{Jaffree}, 472 U.S. at 67 (O'Connor, J., concurring).
\item \textsuperscript{191} 474 U.S. 481, 493 (1986) (O'Connor, J., concurring).
\item \textsuperscript{194} 512 U.S. 687 (1994) (O'Connor, J., concurring in part and concurring in judgment).
\item \textsuperscript{195} \textit{Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet}, 512 U.S. 687, 690-91 (1994).
\item \textsuperscript{196} \textit{Kiryas Joel}, 512 U.S. at 690-91.
\item \textsuperscript{197} \textit{Id.} at 716-17 (O'Connor, J., concurring in part and concurring in judgment).
\end{itemize}
more general accommodation would be permissible.\textsuperscript{198} Indeed, Justice O'Connor stated that the "Aguilar Plan," which the Court in \textit{Aguilar v. Felton}\textsuperscript{199} invalidated, was a valid example of just such a permissible accommodation, and therefore she invited the Court to revisit \textit{Aguilar}:

I also think there is one other accommodation that would be entirely permissible: the 1984 scheme, which was discontinued because of our decision in \textit{Aguilar}. The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discrimination against religion... If the government provides this education on-site at public schools and at nonsectarian private schools, it is only fair that it provide it on-site at sectarian schools as well. I thought this to be true in \textit{Aguilar}... and I still believe it today. The Establishment Clause does not demand hostility to religion, religious ideas, religious people, or religious schools... It is the Court's insistence on disfavoring religion in \textit{Aguilar} that led New York to favor it here. The Court should, in a proper case, be prepared to reconsider \textit{Aguilar}, in order to bring our Establishment Clause jurisprudence back to what I think is the proper track—government impartiality, not animosity, towards religion.\textsuperscript{200}

Justice O'Connor also stressed the usefulness of her "endorsement test" to justify her concurring opinion in \textit{Rosenberger v. Rector & Visitors of University of Virginia}.\textsuperscript{201} \textit{Rosenberger} raised the constitutionality of public funding of a variety of student publications at the University of Virginia.\textsuperscript{202} At issue was whether the university funding of Wide Awake Productions ("WAP"), a student magazine advocating a Christian way of life, violated the Establishment Clause.\textsuperscript{203} In concurring with the majority's validation of the funding on an equal basis with other student publications, Justice O'Connor explained: "Given this wide array of non-religious, anti-religious and competing religious viewpoints in the forum supported by the University, any perception that the University endorses one particular viewpoint would be illogical."\textsuperscript{204}

\textsuperscript{198} Id. (O'Connor, J., concurring in part and concurring in judgment).
\textsuperscript{199} 473 U.S. 402 (1985).
\textsuperscript{200} \textit{Kiryas Joel}, 512 U.S. at 717-18 (O'Connor, J., concurring in part and concurring in judgment).
\textsuperscript{203} \textit{Rosenberger}, 515 U.S. at 822-27.
\textsuperscript{204} \textit{Rosenberger}, 515 U.S. at 849 (O'Connor, J., concurring).
c. Neutral Benefits: Free Speech and Equal Access

Justice O'Connor, writing for the Court, also applied the "endorsement test" to uphold against an establishment challenge to the neutral statutory benefits of the Equal Access Act in Westside Community Board of Education v. Mergens. In Mergens, the issue was whether the Equal Access Act's requirement that a religious-inspired extracurricular group be given equal access to the school's facilities violated the Establishment Clause. In upholding the Act, the Court explained that the notion of "equal access" conveyed a message of "neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others it would demonstrate not neutrality but hostility toward religion."

d. Free-Exercise Based Exemptions

Justice O'Connor's endorsement test explains her concurring opinion invalidating free-exercise-inspired tax benefits afforded religious publications, in Texas Monthly, Inc. v. Bullock. The Court in Texas Monthly invalidated on establishment reasoning a legislative exemption for sales tax aimed exclusively at religious periodicals. Concurring in result, Justice O'Connor, with Justice Blackmun, opined that Justice Brennan's majority opinion would subordinate free exercise to establishment values even at the expense of longstanding precedent, and Justice Scalia's accommodationist opinion would subordinate establishment values to free exercise claims. As a compromise theory, Justice O'Connor stated that the Texas exemption offended the Establishment Clause because it nonneutrally preferred the dissemination of religious ideas. If, on the other hand, the exemption applied to atheistic literature as well, then Justice O'Connor conceded that it may have well survived Establishment Clause scrutiny.

On the other hand, Justice O'Connor, concurring in Corporation of Presiding Bishop v. Amos, upheld a religious exemption from Title VII's prohibition against discrimination in employment on the basis of religion. Justice O'Connor explained that "the relevant issue

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207. Mergens, 496 U.S. at 248.
211. Id. at 29.
212. Id.
is how the challenged action would be perceived by an objective observer, acquainted with the text, legislative history, and implementation of the statute." Despite the preferential nature of an exemption favoring religious employers, she concluded that "in my view the objective observer should perceive the Government action as an accommodation of the exercise of religion rather than as a Government endorsement of religion."

e. Religious Symbolism Cases

Justice O'Connor's "endorsement test" explains the different results she has reached in her concurring opinions in variant religious symbolism cases. In her concurring opinion in *Lynch v. Donnelly* she approved of the constitutionality of placing a creche in a public park because they were accompanied by other secular symbols of the holiday season, including reindeers and Santa Claus. According to Justice O'Connor, the context of the merchant-inspired holiday display undermined any apparent endorsement.

In comparison, in *County of Allegheny v. American Civil Liberties Union of Greater Pittsburgh Chapter* she concurred in the result both holding unconstitutional the placement of a creche placed unadorned by secular distractions in the "Grand Staircase" of the county courthouse and holding constitutional the placement of a menorah on a different public property site that traditionally was open to other messages. In distinguishing what could appear to be contradictory results, Justice O'Connor used her concurring opinion in *Allegheny* to further elucidate her "endorsement test" and why it explained the different results in this case:

Of course, the word "endorsement" is not self-defining. Rather it derives meaning from the other words that this Court has found useful over the years in interpreting the Establishment Clause. Thus, it has been noted that the prohibition against governmental endorsement of religion "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." ... Whether the key word is "endorse-

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216. *Id.* at 349 (O'Connor, J., concurring).
217. 465 U.S. 668, 693-94 (1984). This statement was quoted again in her concurring opinion in *Amos*, 483 U.S. at 348.
ment," "favoritism," or "promotion," the essential principle re-
mains the same. The Establishment Clause, at the very
least, prohibits government from appearing to take a position
on questions of religious belief or from "making adherence to
a religion relevant in any way to a person's standing in the
political community."222

The difficulty of applying the endorsement test to cases involving
religious symbolism is demonstrated by Justice O'Connor's concurring
opinion in Capitol Square Review and Advisory Board v. Pinette.223 At
issue in Capitol Square was whether the State of Ohio should have
permitted the Ku Klux Klan, against an Establishment Clause chal-
lenge, to display a cross on Capitol Square, a ten-acre, state-owned
plaza surrounding the Statehouse in Columbus, Ohio.224 The square
had been used for over a century as a gathering place for public
speeches and festivals advocating and celebrating a variety of secular
and religious causes.225 The Advisory Board having responsibility for
regulating public access to Capitol Square permitted a rabbi's applica-
tion to display a menorah in November of 1993, but denied in Decem-
ber of 1993, for establishment reasons, a responsive application by the
Klan to display a cross on the square.226

For Justice O'Connor, the cross, unadorned by secular distrac-
tions, might have failed the "endorsement test" if the test's beholder
was "the perceptions of particular individuals" or "isolated non-adher-
ents."227 However, she adopted the view that the applicable observer
is more of a hypothetically ideal community observer:

the applicable observer is similar to the "reasonable person"
in tort law, who "is not to be identified with any ordinary indi-
vidual, who might occasionally do unreasonable things" but is
"rather a personification of a community ideal of reasonable
behavior, determined by the [collective] social judgment." . . .
Thus, "we do not ask whether there is any person who could
find an endorsement of religion, whether some people may be
offended by the display, or whether some reasonable person
might think [the State] endorses religion." . . . It is for this
reason that the reasonable observer in the endorsement in-
quiry must be deemed aware of the history and context of the
community and forum in which the religious display
appears.228

joined in her concurrence by Justices Souter and Breyer.
225. Capitol Square, 515 U.S. at 757.
226. Id. at 758.
228. Id. (O'Connor, J., concurring)(citations omitted).
Applied to the facts, because a reasonable hypothetical observer in the community would have been aware of the traditional use of Capitol Square as a public forum where variant messages had been displayed, there existed “no realistic danger that the community would think that the [State] was endorsing religion or any particular creed.”

2. Critique of the Endorsement Test

a. Critique of the Endorsement Test by the Separationists

Justice Stevens, dissenting in Capitol Square, also critiqued Justice O'Connor's version of an “endorsement test.” He complained that Justice O'Connor's observer, the focal point of her “endorsement test,” rather than being the embodiment of the reasonable observer, was “an ‘ultra-reasonable observer’ who understands the vagaries of this Court's First Amendment jurisprudence.” Indeed, Justice Stevens further suggests that “Justice O'Connor thus presumes a reasonable observer so prescient as to understand legal doctrines that this Court has not yet adopted.” Justice Stevens, in effect, highlights the unresolved problems associated with applying the “endorsement test.”

b. Critique of the Endorsement Test by Accommodationists

Justices Scalia and Kennedy, and Chief Justice Rehnquist in their dissenting opinion in Texas Monthly v. Bullock repudiated Justice O'Connor’s “bold but unsupported assertion ... that government may not ‘convey a message of endorsement of religion.’” Indeed they point out that the majority opinions are aimed at “a revolution in our Establishment Clause jurisprudence” which otherwise would be supportive of the “accommodation of religion’ rationale.”

Similarly, Justice Kennedy has repeatedly critiqued the “endorsement test.” In Westside Community Board of Education v. Mergens, Justice Kennedy, in a concurring opinion joined by Justice Scalia, condemned the plurality's use of the “endorsement test”:

It is true that when a government gives impermissible assistance to a religion it can be said to have “endorsed” religion;

230. Capitol Square, 515 U.S. at 799 (Stevens, J., dissenting).
231. Id. at 807 (Stevens, J., dissenting).
232. Id. at 802 n.7 (Stevens, J., dissenting).
235. Texas Monthly, 489 U.S. at 38 (Scalia, J., dissenting).
but endorsement cannot be the test. The word endorsement has insufficient content to be dispositive. And . . . its literal application may result in neutrality in name but hostility in fact when the question is the government's proper relation to those who express some religious preference.237

To the same effect, Justice Kennedy in Allegheny, critiqued the "endorsement test" because of its inability to explain such historically validated practices as placing "In God We Trust" on coinage, or permitting references to God in the Pledge of Allegiance:

If the endorsement test, applied without artificial exceptions for historical practice, reached consistent with history, my objections to it would have less force. But, as I understand the test, the touchstone of an Establishment Clause violation is whether nonadherents would be made to feel like "outsiders" by government recognition or accommodation of religion. Few of our traditional practices recognizing the part religion plays in our society can withstand scrutiny under a faithful application of the formula. . . . Either the endorsement test must invalidate scores of traditional practices recognizing the place religion holds in our culture, or it must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past, while condemning similar practices with no greater endorsement effect simply by reason of their lack of historical antecedent.238

Again in Lamb's Chapel v. Center Moriches School District,239 Justice Kennedy condemned the majority's "use of the phrase 'endorsing religion,' . . . , which . . . cannot suffice as a rule of decision consistent with our precedents and our traditions in this part of our jurisprudence."240

Justice Scalia, writing for the Court in Capitol Square, in upholding the constitutionality of permitting the Ku Klux Klan to display a cross on Capitol Square, a 10-acre, state-owned plaza surrounding the Statehouse in Columbus, Ohio, went out of his way to critique the "endorsement test" relied upon by Justice O'Connor in her concurring opinion and used against her by Justice Stevens in dissent:

We must note, to begin with, that it is not really an "endorsement test" of any sort, much less the "endorsement test" which appears in our more recent Establishment Clause jurisprudence . . . . We find it peculiar to say that government "promotes" or "favors" a religious display by giving it the

238. Allegheny, 492 U.S. at 655 (Kennedy, J., concurring in judgement in part and dissenting in part).
same access to a public forum that all other displays enjoy. And as a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion. . . . Where we have tested for endorsement of religion, the subject of the test was either expression by the government itself, . . . or else government action alleged to discriminate in favor of private religious expression or activity . . . . The test petitioners propose, which would attribute to a neutrally behaving government private religious expression, has no antecedent in our jurisprudence, and would better be called a "transferred endorsement" test.241

He then added in a footnote:

Contrary to what Justice O'Connor, Justice Souter, and Justice Stevens argue, the endorsement test does not supply an appropriate standard for the inquiry before us. It supplies no standard whatsoever . . . . And if further proof of the invited chaos is required, one need only follow the debate between the concurrence and Justice Stevens' dissent as to whether the hypothetical beholder who will be the determinant of "endorsement" should be any beholder (no matter how unknowledgeable), or the average beholder, or (what Justice Stevens accuses the concurrence of favoring) the "ultrareasonable" beholder. . . . It is irresponsible to make the Nation's legislators walk this minefield.242

D. ACCOMMODATIONISM

On the more permissive side of the church and state debate, accommodationists justify continued and expansive interaction between church and state. Indeed, accommodationists begin their analysis with a realistic assessment that "our system at the federal and state levels is presently honeycombed" with governmental support of religion.243 Whereas for the separationist these incidences of the "honeycomb" are challenges that should be rooted out as a matter of principle, the accommodationist finds in these historical examples support for their continued respect. Of the present justices generally favoring some form of accommodation, Chief Justice Rehnquist and Justices Scalia and Thomas consistently analyze establishment issues from an accommodationist paradigm. Justice Kennedy also most frequently favors accommodation, with a "non-coercion" caveat that at times suggests an alternative paradigm altogether.

241. Capitol Square, 515 U.S. at 762-64 (citations omitted).
242. Id. at 768 n.3 (citations omitted).
Accommodationists generally begin their establishment analysis with an acceptance of the historical reality that reveals pervasive incidences of governmental acknowledgement and support of religion. Thus, the traditionally accepted examples of "In God We Trust" on coinage, the words "under God" in the Pledge of Allegiance, the traditional ceremonial prayers opening legislative, judicial and executive sessions, the preference for religion implied by the words of the Free Exercise Clause itself, provide a Burkean justification for their continuance. The historical reality that we have a long-standing tradition of making religion part of the warp and the woof of society's fabric, argues in favor of its continuance. Moreover, the fact that the Framers participated in coincidental accommodation of religion in myriad ways effectively refutes any original intent argument offered by strict separationists to the contrary. Thus, the tradition of military and legislative chaplaincies, repeated Thanksgiving Day proclamations, the Northwest Ordinance's preservation of public lands for religious purposes, sectarian missionary work among the Indians, religiously-based exemptions from state obligations including draft laws and taxes, all provide historical ammunition favoring the accommodationist model over either strict or Lemon separationism. The accommodationist arguments can also be reviewed from the same factual context in which typical Establishment Clause issues arise.

1. Public Prayer Cases

The Supreme Court's historically based defense of prayer in the Nebraska Unicameral in *Marsh v. Chambers*, provides a useful illustration of accommodationist theory. Justices Rehnquist and O'Connor joined Chief Justice Burger's majority opinion upholding Nebraska's legislative prayer largely upon the rationale that "the opening sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." Thus, according to the these accommodationists, we can more safely look to the practices accepted by the Framers as evidence of what the Establishment Clause permits and proscribes than theoretical constructs such as the Lemon test.

While legislative prayer presented an easy case for the Court, Alabama's statute authorizing a moment-of-silence in all public schools "for meditation or voluntary prayer" proved much more contentious for the Court in *Wallace v. Jaffree*. The accommodationists, in dissent, suggested that "[t]he notion that the Alabama statute is a step

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244. 463 U.S. 783 (1983).
toward creating an established church borders on, if it does not trespass into, the ridiculous." 247 Chief Justice Burger suggested a failure to accommodate “manifests not neutrality but hostility toward religion.” 248 He advocated permitting the moment-of-silence as a neutral, non-coercive accommodation of religion:

If the government may not accommodate religious needs when it does so in a wholly neutral and non-coercive manner, the benevolent neutrality that we have long considered the correct constitutional standard will quickly translate into the callous indifference that the Court has consistently held the Establishment Clause does not require. 249

Justice Rehnquist also wrote a scathing dissent in Wallace attacking the history behind the wall-of-separation reasoning contained in Justice Steven’s majority opinion. 250 He concludes from his historical analysis the following Framer’s intent:

It would seem from this evidence that the Establishment Clause of the First Amendment had acquired a well-accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations. . . . The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the “wall of separation” that was constitutionalized in Everson. 251

Lee v. Weisman, 252 a case challenging the constitutionality of a public high school permitting a graduation prayer, proved more troublesome to some of the accommodationists. Typically aligned with the accommodationists, Justice Kennedy found himself leading a majority in Lee holding unconstitutional the traditional practice of permitting high school graduation prayers. 253 Rather than relying on the separationist analysis associated with many of the other justices who joined the majority, Justice Kennedy coupled Justice O’Connor’s “endorsement test” with his own “coercion test” as a constraint on the types of religious activity that the state ought to accommodate. 254 According to Justice Kennedy, the City of Providence, Rhode Island’s practice of

249. Id. at 90 (Burger, C.J., dissenting) (emphasis in original).
251. Id. (Rehnquist, J., dissenting).
254. Lee, 505 U.S. at 585-86.
inviting clergy from various religious communities to offer prayer at school graduation ceremonies violated the Establishment Clause both because it endorsed a form of a civic religion and coerced participation in a civic religious exercise.\textsuperscript{255} The "endorsement" came as a result of the school's participation in (1) deciding that an invocation and benediction be given; (2) choosing the religious participant, here a rabbi; and (3) giving the rabbi directions and guidelines that the prayer should be nonsectarian.\textsuperscript{256} This "degree of school involvement here made it clear that the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position."\textsuperscript{257}

Announcing what could be viewed as Justice Kennedy's own "coercion test" as an alternative establishment paradigm, Justice Kennedy expressed the view that the graduation prayer entailed "subtle coercive pressure" to participate or give the appearance of participating in state directed prayer.\textsuperscript{258} The Court explained that "[t]he undeniable fact is that the school district's supervision and control of the high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction."\textsuperscript{259} Thus, even though attendance at the ceremony as well as participation in the prayer were both voluntary, the Court determined that the state's choice to have the prayers constituted illegitimate "social pressure to enforce orthodoxy."\textsuperscript{260} According to the Court, coercion, in this sense, arose from peer pressure inviting conformity in a religious exercise.\textsuperscript{261} Thus, a social consequence of the state endorsing a religion is that the citizens will feel coerced into adopting the "endorsed" doctrine and standards.\textsuperscript{262}

The more traditional accommodationists, Justice Scalia, joined in dissent by Chief Justice Rehnquist and Justices White and Thomas, wrote a scathing criticism of Justice Kennedy's "coercion test" as inconsistent with the religious history of this country:

As its instrument of destruction, the bulldozer of this social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion, which promises to do for the Establishment Clause what the Durham rule did for the insanity defense. Today's opinion shows more force-
fully than volumes of argumentation why our nation's protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people.\textsuperscript{263}

Justice Scalia opined that "the Establishment Clause must be construed in light of the 'government policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage."\textsuperscript{264} Thus, because "[f]rom our Nation's origin, prayer has been a prominent part of governmental ceremonies and proclamations," such practices must not violate the intended strictures of the Establishment Clause.\textsuperscript{265} For Justice Scalia ceremonial prayer, even in a public school context, was consistent with tradition and served valid sociological purposes:

[n]othing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration — no, an affection — for one another than voluntarily joining together in prayer together, to the God whom they all worship and seek. Needless to say, no one should be compelled to do that, but it is a shame to deprive our public culture of the opportunity, and indeed the encouragement, for people to do it voluntarily. To deprive our society of that important unifying mechanism, in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law.\textsuperscript{266}

Accordingly, Justices Scalia and Thomas, as well as Chief Justice Rehnquist, would permit ceremonial public prayer as a useful "unifying" mechanism of our public culture.

2. \textit{Neutral Benefits: Public Funding}

Accomodationists approve of public funding of religion so long as it is merely incidental to a general governmental program. Of course this is the very issue involved in \textit{Agostini}. As the plurality suggested in \textit{Agostini}, the Court had previously paved this road with earlier cases.

In \textit{Witters v. Department of Services for Blind},\textsuperscript{267} the Court upheld, without a single dissent, the State of Washington's funding of

\begin{itemize}
\item \textsuperscript{263} Lee, 505 U.S. at 632 (Scalia, J., dissenting) (citing Durham v. United States, 214 F.2d 362 (D.C. Cir. 1954)).
\item \textsuperscript{264} Id. at 631 (Scalia, J., dissenting) (quoting Allegheny, 492 U.S. at 657, 670 (Kennedy, J., concurring in judgment in part and dissenting in part)).
\item \textsuperscript{265} Id. at 633 (Scalia, J., dissenting).
\item \textsuperscript{266} Id. at 646 (Scalia, J., dissenting).
\item \textsuperscript{267} 474 U.S. 481 (1986).
\end{itemize}
vocational assistance to a blind person studying at a private Christian college to become a pastor, missionary, or youth director. The Court noted that (1) the state vocational rehabilitation assistance program was a general government program that neutrally distributed benefits to "visually handicapped"; (2) the recipient had a freedom to select a school of his choice for vocational training; (3) any state aid that flowed to the religious institution did so only as a result of an independent and private choice of the aid recipient; and (4) the aid created no incentive for the recipient to undertake sectarian education.

Chief Justice Rehnquist again adopted an accommodationist approach in *Bowen v. Kendrick* in denying a facial challenge to the Adolescent Family Life Act ("AFLA") permitting the federal government to publicly fund counseling programs regarding adolescent sexual matters despite the fact that some of the organizations funded were sectarian. Chief Justice Rehnquist observed that the problem Congress was attacking by enacting AFLA was the prevention of adolescent sexual activity, not the advancement of religion. In attacking this problem, Congress did recognize that religious organizations exert a powerful influence over issues of family life. Chief Justice Rehnquist noted that Congress also clearly intended to take advantage of this influence in funding the adolescent sexual counseling services of religious organizations. However, Chief Justice Rehnquist declined to find that the funding had an impermissible effect of advancing religion: "To the extent that this congressional recognition has any effect of advancing religion, the effect is at most 'incidental and remote.'" Chief Justice Rehnquist further explained that "this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs."

The validation of state aid to religious institutions predicated on neutral governmental benefits in *Witters* and *Bowen*, was reinforced by the Court in *Zobrest v. Catalina Foothills School District*. In *Zobrest*, Chief Justice Rehnquist wrote an accommodationist majority

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273. *Id.* at 606-07.
274. *Id.* at 607-08.
275. *Id.* at 607.
276. *Id.* at 609.
opinion requiring the state under the Disabilities Education Act ("IDEA") to provide a sign-language interpreter to accompany a deaf child to classes at a Roman Catholic high school.\textsuperscript{278} Chief Justice Rehnquist began his analysis with the realist insight of practical accommodation:

[i]f the Establishment Clause did bar religious groups from receiving a general government benefit, then "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair."\textsuperscript{279}

After establishing the practical necessity of permitting some forms of public financial assistance to religious institutions, Chief Justice Rehnquist explained that the relationship should be governed by a principle of neutrality:

Given that a contrary rule would lead to such absurd results, we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.\textsuperscript{280}

Applied to the facts of the case, the Court held that because (1) the IDEA was a general government program that distributed benefits to the "handicapped" neutrally; (2) the parents had a freedom to select a school of their choice for the children; (3) the state aid was directed to the handicapped children, not the sectarian school; and (4) the presence of the interpreter in a sectarian school was the result of a private decision of the parents; the incidental benefit to the sectarian school chosen by the parents of the state-paid interpreter did not offend the Establishment Clause.\textsuperscript{281}

Justice Scalia also dissented, on accommodationist grounds, to the Court's ruling in \textit{Kiryas Joel Village School District v. Grumet},\textsuperscript{282} invalidating the incorporation of the New York Village of Kiryas Joel for the purpose of accommodating the special education needs of a religious enclave of Satmar Hasidim Jews.\textsuperscript{283} Justice Scalia pointed out that \textit{Kiryas Joel} did not involve public funding to private religious schools, but public funding of a public school whose students shared

\textsuperscript{279} Zobrest, 509 U.S. at 8 (quoting Widmar v. Vincent, 454 U.S. 263, 274-75 (1981)).
\textsuperscript{280} Id. (citing Mueller v. Allen, 463 U.S. 388 (1983); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986)).
\textsuperscript{281} Id. at 10.
\textsuperscript{282} 512 U.S. 687, 732 (1994) (Scalia, J., dissenting). Justice Scalia's dissent was joined by Chief Justice Rehnquist and Justice Thomas.
the same religion. He argued that accommodating the special education needs of this religious minority in response to the erroneous decision in Aguilar did not violate the Establishment Clause. He urged the reversal of Aguilar, but in the meantime he advised the Court not to slip further into an antiaccommodationist direction:

I heartily agree [with Justices Kennedy and O'Connor] that these cases [Aguilar and Ball], so hostile to our national tradition of accommodation, should be overruled at the earliest opportunity; but meanwhile, today's opinion causes us to lose still further ground, and in the same antiaccommodationist direction.

While Justice Kennedy concurred in the judgment invalidating the religious-specific incorporation in Kiryas Joel, he went out of his way to validate neutral aid schemes made available to religious and nonreligious groups alike. He even opined that the Court's prior invalidation of such schemes in Aguilar and Ball, which created the need for the special accommodation afforded by the incorporation of the religious enclave, was the real problem that could be more constitutionally addressed by their reversal:

The decisions in Grand Rapids and Aguilar may have been erroneous. In light of the action before us, and in the interest of sound elaboration of constitutional doctrine, it may be necessary for us to reconsider them at a later date. A neutral aid scheme, available to religious and nonreligious alike, is the preferable way to address problems such as the Satmar handicapped children have suffered.

The neutral-benefit line of cases validating state aid to religious institutions was further bolstered by the Court's analysis in Rosenberger v. Rector & Visitors of University of Virginia. In Rosenberger, Justice Kennedy, writing for the majority, held that the University of Virginia could not use the Establishment Clause as a shield to justify discrimination against subsidizing on a neutral basis with other student publications a student "journal pervasively devoted to the discussion and advancement of an avowedly Christian theological and personal philosophy." Justice Kennedy's majority opinion rejected the qualified separationist argument that the Establishment Clause

285. Id. at 750 (Scalia, J., dissenting).
286. Id. (Scalia, J., dissenting).
287. Kiryas Joel, 512 U.S. at 722-23 (Kennedy, J., concurring).
288. Id. at 731 (Kennedy, J., concurring).
justifies viewpoint discrimination.\textsuperscript{291} Citing the neutral benefit cases \textit{Everson}, \textit{Kiryas Joel}, \textit{Witters}, \textit{Mueller}, \textit{Widmar}, \textit{Lamb's Chapel}, and \textit{Mergens}, he explained that the Court has consistently applied the neutrality principle to require accommodation rather than to justify discrimination: “a central lesson of our decisions is that a significant factor in upholding government programs in the face of Establishment Clause attack is their neutrality towards religion.”\textsuperscript{292}

In response to the separationist argument that direct public subsidies to religious advocacy violates the basic notion of separationism, Justice Kennedy explained that the neutrality of the program undertaken for the purposes of enhancing public discussion and free speech was distinguishable from “the levying of taxes upon the public for the sole and exclusive purpose of establishing and supporting specific sects.”\textsuperscript{293} The Court explained that the University's viewpoint discrimination, though premised on concern for establishment violations, was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires. There is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause.\textsuperscript{294}

Justice Thomas wrote a separate concurring opinion in \textit{Rosenberger} to contest the historical analysis of the Justice Souter's separationist dissent. Justice Thomas argued, “[a]lthough the dissent starts down the right path in consulting the original meaning of the Establishment Clause, its misleading application of history yields a principle that is inconsistent with our Nation's long tradition of allowing religious adherents to participate on equal terms in neutral government programs.”\textsuperscript{295} In support of his historical accommodationist argument, Justice Thomas cites as historical examples to the contrary the First Congress' direct public funding of elected chaplains and the historical fact that nondistinguishable property tax exemptions for religious bodies have been continuously in place for over 200 years.\textsuperscript{296} Justice Thomas also noted the fact that the First Congress ratified the Northwest Ordinance to set aside federal lands in the territories for the use of schools despite the fact that many of the benefited schools were church-affiliated sectarian institutions and the fact that the set aside was justified on the ground that “Religion, morality and knowl-

\textsuperscript{291.} \textit{Rosenberger}, 515 U.S. at 839 (citations omitted).
\textsuperscript{292.} \textit{Id.}
\textsuperscript{293.} \textit{Id.} at 840.
\textsuperscript{294.} \textit{Id.} at 845-46.
\textsuperscript{295.} \textit{Rosenberger}, 515 U.S. at 852-53 (Thomas, J., concurring).
\textsuperscript{296.} \textit{Id.} at 858-61 (Thomas J., concurring).
edge . . . being necessary to good government and the happiness of mankind, schools and the means of learning shall be encouraged.”

Justice Thomas observed that numerous other government funding benefits have been available on neutral terms.

Justice Thomas also chided the dissenting justices to the extent that they have been willing to permit equal access to public facilities, while at the same time rejecting in *Rosenberger* public funding on a neutral basis:

Stripped of its flawed historical premise, the dissent's argument is reduced to the claim that our Establishment Clause jurisprudence permits neutrality in the context of access to government facilities but requires discrimination in access to government funds.

Accordingly, Supreme Court authority following *Aguilar*, but antedating *Agostini*, illustrate that at least Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas approved of state aid to religious institutions on an accommodationist basis if delivered as part of a general government program administered on a neutral basis.

3. Neutral Benefits: Free Speech and Equal Access

Beyond neutral public funding of religion on an accommodationist basis, even fewer present justices are willing to prohibit on separationist grounds benefits to religion that are merely “incidental” (as opposed to primary and purposeful) to free speech and equal access purposes. Justice Kennedy, joined by Justice Scalia, in a concurring opinion in *Westside Community Board of Education v. Mergens*, stated that because the “accommodation” mandated by the Equal Access Act is a neutral one, “[a]ny incidental benefits that accompany official recognition of a religious club under the criteria set forth in [the Equal Access Act] do not lead to the establishment of religion. . . .”

Also, the Court in *Lamb's Chapel v. Center of Moriches School District.* without any justices dissenting, permitted an evangelical church to use school facilities during nonschool hours to show to the public a film series on Christian family values. Although the ra-

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297. Id. at 862 (Thomas, J., concurring).
298. Id. at 863 (Thomas, J., concurring) (citations omitted).
299. Id. at 858 (Thomas, J., concurring).
tionale for the justification was varied, the justices were unanimous in their conclusion that overt, viewpoint-based discrimination violates the Free Speech Clause and is not compelled by the Establishment Clause.305

4. Free-Exercise Based Exemptions

While most of the presently sitting justices would permit religion to benefit incidentally from general governmental programs, free-exercise inspired preferential treatment for religion is much more problematic. Historically, the clearest category of cases accommodating religious beliefs as a basis for creating judicially imposed exemptions on otherwise general legislation is found in the area of state unemployment compensation. The Court in Sherbert v. Verner,306 recognized that if the Court did not create a “compelling state interest” qualified judicial exemption for religiously inspired employment decisions, then a Sabbatarian would be required to choose between religious precepts and unemployment compensation benefits.307 The Court explained that disqualifying a religiously inspired employment decisions would

force [the claimant] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one to the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship.308

In so protecting the claimant’s free exercise rights by fashioning a judicial exemption, the Court held that such a neutral accommodation would not infringe the Establishment Clause:

In holding as we do, plainly we are not fostering the “establishment” of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face or religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall. . . .

This holding but reaffirms a principle that we announced a decade and a half ago, namely that no State may “exclude individual Catholics, Lutherans, Mohammedans, Baptists,

305. Lamb’s Chapel, 508 U.S. at 390.
308. Sherbert, 374 U.S. at 404.
Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.\textsuperscript{309}

The Court, adopting the same strict scrutiny test and compelling state interest analysis, accommodated the claimant's Jehovah's Witnesses' refusal to participate in the production of armaments in \textit{Thomas v. Review Bd. of Indiana Employment Security Div.}.\textsuperscript{310} The Court explained:

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.\textsuperscript{311}

Similarly, Justice Brenann, writing for the Court in \textit{Hobbie v. Unemployment Appeals Commission},\textsuperscript{312} invalidated the denial of unemployment benefits to a Seventh-Day-Adventist convert who refused to work on Saturday on the reasoning that "the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."\textsuperscript{313}

While all of these free-exercised-compelled judicial exemptions to general legislation were brought into question by Justice Scalia's majority opinion in \textit{Employment Division v. Smith},\textsuperscript{314} the notion that legislative exemptions were appropriate was not. Justice Scalia contended that when generally applicable laws impose unreasonable burdens on religious practices, the legislatures could accommodate the religious practice if they so desired.\textsuperscript{315} He also admitted that leaving the accommodation process strictly to the legislatures,

will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.\textsuperscript{316}

\begin{flushleft}
\textsuperscript{309} Id. at 409.  \\
\textsuperscript{310} 450 U.S. 707 (1981).  \\
\textsuperscript{312} 480 U.S. 136 (1987).  \\
\textsuperscript{313} Hobbie v. Unemployment Appeals Comm., 480 U.S. 136, 144-45 (1987).  \\
\textsuperscript{314} 494 U.S. 872 (1990).  \\
\textsuperscript{316} Smith, 494 U.S. at 890.
\end{flushleft}
The Court specifically upheld the constitutionality of legislative exemptions inspired by concern over free exercise in *Corporation of the Presiding Bishop v. Amos.*317 Justice White, writing for the Court in *Amos,* upheld a legislative exemption for religious entities from the Title VII's antidiscrimination provisions despite the arguably nonreligious nature of the activity involved.318 Directly at issue in *Amos* was whether a legislative exemption enacted for the very purpose of accommodating religion necessarily violates the secular purpose and effect tests of *Lemon.*319 The Court held that "[u]nder the *Lemon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."320 Again, the Court explained that purposeful accommodation of religion, by itself was not enough: "A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon,* it must be fair to say that the government itself has advanced religion through its own activities and influence."321

The clearest precedent to the contrary questioning the constitutionality of a legislative exemption enacted out of respect for free exercise concerns is *Texas Monthly, Inc. v. Bullock.*322 Dissenting from the Court's invalidation of a Texas publication tax that singled out religious literature for an exemption in *Texas Monthly,* Justice Scalia, joined by Chief Justice Rehnquist and Justice Kennedy, attempted to salvage the accommodationist perspective from the "demolition project" undertaken by Justice Brennan, writing for the majority. The dissenting justices insisted that one might "simply describe the protection of free exercise concerns, and the maintenance of the necessary neutrality, as 'secular purpose and effect,' since they are a purpose and effect approved, and to some degree mandated by the Constitution."323 Indeed, Justice Scalia characterized Justice Brennan's opinion as premised on the

[317. 483 U.S. 327 (1987).]
[319. *Amos,* 483 U.S. at 332-33.]
[320. Id. at 335.]
[321. Id. at 337.]
[322. 489 U.S. 1 (1989).]
of freedom of religion in the Constitution) that government may not "convey a message of endorsement of religion."\textsuperscript{324}

In brief, accomodationists would permit religion to benefit, not only from neutrally applicable laws, but also from legislative exemptions granting religion exemptions from generally applicable laws out of respect for free exercise.

5. Religious Symbolism Cases

Accomodationists often begin their justification for permitting religious symbolism to be retained in our communities, despite Establishment Clause challenges, with an historical analysis which emphasizes this country's persistent and pervasive use of religious symbolism throughout its history. Chief Justice Burger, joined by Justices White, Powell, Rehnquist and O'Connor, acknowledged the constitutionality of pervasive religious symbolism evident throughout our history in \textit{Lynch v. Donnelly}.\textsuperscript{325} In upholding the constitutionality of a nativity scene, adorned by other symbols of the festive holiday season, being displayed in a public park, the Court adopted an accomodationist over a separationist model:

Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. . . Anything less would require the "callous indifference" we have said was never intended by the Establishment Clause.\textsuperscript{326}

From a traditionalist perspective, the Supreme Court relied upon "an unbroken history of official acknowledgement of the role of religion in American life from at least 1789."\textsuperscript{327} To prove that "[o]ur history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders," the Court cited presidential proclamations since Washington naming Thanksgiving as a day of celebration made into a national holiday by Congress a century ago;\textsuperscript{328} our statutorily prescribed national motto "In god We Trust";\textsuperscript{329} Congress and the President's mandate that the national motto be placed on all of our currency;\textsuperscript{330} our Pledge of Allegiance which con-

\textsuperscript{324}. \textit{Texas Monthly}, 489 U.S. at 29-30 (Scalia J., dissenting).
\textsuperscript{327}. \textit{Lynch}, 465 U.S. at 674.
\textsuperscript{328}. \textit{Id.} at 675-76.
\textsuperscript{329}. \textit{Id.} at 676 (citing 36 U.S.C. § 186 (1982 ed.)).
\textsuperscript{330}. \textit{Id.} at 676 (citing 31 U.S.C. § 5112(a)(1)(1982 ed)).
tains the language "One nation under God," the National Gallery which regularly exhibits more than 200 religious paintings; the notable and permanent depiction of Moses with the Ten Commandments in the Supreme Court's chamber where oral arguments are given; congressional provision of chapels in the Capitol for worship and meditation; Congress direction to the President to proclaim a National Day of Prayer each year; as well as Presidential Proclamations commemorating Jewish heritage and holy days.

Dissenting to the majority's holding unconstitutional a creche placed in the grand staircase of a county courthouse in Allegheny County v. ACLU Greater Pittsburgh Chapter, Justice Kennedy reiterated as historical precedents to the contrary the above litany of examples earlier referenced in Lynch recognizing our persistent tradition of acknowledging "the part religion plays in our society. . . ." Based on these traditionally accepted incidences of religious symbolism recognizing our religious history, Justice Kennedy concluded:

In my view, the principles of the Establishment Clause and our Nation's historic traditions of diversity and pluralism allow communities to make reasonable judgments respecting the accommodation or acknowledgement of holidays with both cultural and religious aspects. No constitutional violation occurs when they do so by displaying a symbol of the holiday's religious origins.

Justice Kennedy thus anchors accommodationism in the historical traditions and pluralism of our culture.

V. CONCLUSION

As a matter of establishment jurisprudence, the United States Supreme Court in Agostini v. Felton properly restored the constitutionality of on-site delivery of Title I remedial education aid to all schools, even sectarian schools. In doing so, the Supreme Court made it clear that the direction of establishment jurisprudence is away from

331. Id. at 676.
332. Id. at 676-77 & n.4.
333. Id. at 677.
334. Id.
335. Id. (citing 36 U.S.C. § 169(h).
336. Id. (citing Presidential Proclamation No. 4844, 3 C.F.R. § 30 (1982)).
339. Allegheny, 492 U.S. at 679 (Kennedy, J., concurring in part and dissenting in part).
the separatism of Lemon v. Kurtzman toward an "endorsement test" or some form of accommodation. However, much remains to be said in the area of establishment jurisprudence before future outcomes will become predictable. In many ways the result in Agostini is as tenuous as the splintered views that the present justices hold regarding establishment principles.

A few predictions are possible. On the one extreme, Justice Stevens remains committed to separatism in its strictest form possible. Justice Stevens appears committed to arguing against any and all concession to either free exercise or equal protection values if such a concession would conflict with the principles of secular humanism's strict separation of religion from the public forum. On the other extreme, notwithstanding the Establishment Clause, Chief Justice Rehnquist and Justices Scalia and Thomas appear prepared to accommodate religion within the public forum on historical, free exercise, and equal protection principles, short of validating a nationally-preferred religion.

The predicted position of the other justices on any particular establishment issue is less clear cut, but not totally unpredictable. Justice O'Connor will almost certainly consider the constitutionality of any establishment issue from the "endorsement test" perspective of her "reasonably informed observer." If the state's involvement with, or concession to, religion appears neutral and arises out of a general scheme that only incidentally benefits religion, then she will predictably vote with the accommodationists. If, on the other hand, the concession to religion is merely historically based or is in any way preferential to religion even if the preference is free exercise inspired, then Justice O'Connor will likely vote with the separationists. Justices Ginsburg, Breyer and Souter all are inclined toward separatism and their vote normally can be predicted with separatism in mind, but a principled justification of some concessions to religion may occasionally win their votes.

With four justices (Chief Justice Rehnquist, Justices Scalia, Thomas and O'Connor) pitted against Lemon separatism in favor of either accommodationism or the neutral "endorsement test," and four justices (Justices Stevens, Ginsburg, Breyer and Souter) inclined toward Lemon separatism, the swing vote often will come from Justice Kennedy. For the most part Justice Kennedy can be counted to vote with the accommodationists and against Lemon separatism, but that is not always true. If he perceives any form of "coercion" accompanying the accommodationist position, he will vote with the separationists.

Apart from the predictive value of the dominant establishment paradigms, each can be evaluated from a combined historical and normative perspective. Strict separationism seems wrong from either a practical perspective or from the perspective of historicity. Strict separationism would elevate secular humanism over the meaning and morality inherent in both the Free Exercise Clause and the Equal Protection Clauses. At a minimum, for example, religious speech should be afforded free speech protection rather than relegated to the realm of pornography, obscenity, and fighting words.

A strictly historically derived accommodationism, in comparison, appears ad hoc and subjective. Certainly the neutrality of the "endorsement test" offers a principled explanation of why under equal protection reasoning religion can be accommodated on a neutral basis. However, neutrality does not protect, nor does it provide any explanation of why free exercise concerns should on occasion protect more than free speech, equal protection or privacy rights would.

A conceptual justification for a principled theory of accommodationism, named for purposes of discussion "reconciliationism," can be offered. Reconciliationism seeks to reconcile from both historical and normative perspectives the apparently conflicting values inherent in the respective Free Exercise and Establishment Clauses. From the perspective of free exercise, reconciliationism respects the core values of respect for individuality and autonomy common with deontological ethics. Reconciliationism celebrates the diversity and pluralism necessary to preserve any distinct microculture made possible by free exercise principles. Reconciliationism would demand that the state reconcile at a compelling state interest level utilitarian public needs with the competing deontological demands of religious claimants. Moreover, in seeking this reconciliation, the state does not unconstitutionally establish religion, but instead avoids both hostile discrimination against religion and preserves the possibility of free exercise.

Certainly liberalism's faith in strict neutrality at the macroculture level reflected imperfectly in Justice O'Connor's "endorsement test" states an equal protection minimum. However, under reconciliationism, religion is entitled to more than neutrality; the free exercise of religion sometimes mandates and in other instances permits granting religious beliefs and practices a preferred status in instances of conflict with legitimate state purposes. Thus religious claimants may be entitled to not only legislative exemptions from general laws as validated in Corporation of the Presiding Bishop v. Amos\textsuperscript{342}, but also compelling state interest qualified judicial exemptions from seemingly
neutral laws under the Free Exercise clause contrary to Employment Division v. Smith,\(^{343}\) without violating the Establishment Clause.

Reconciliationism recommends that establishment concerns be evaluated from the perspective of the core unifying values of respect for individual autonomy and tolerance for variant religious perspectives that the religious clauses were intended to preserve. Preserving the sanctity of each individual’s search for self and communal identity, expression and realization should animate the Free Exercise and Establishment Clauses controversy. The reconciliationist would reject the alternative establishment models for their failure to preserve these core values.

Strict separationism privatizes religion in an unnatural way. Religious beliefs cannot always be realized fully in a private context. For example, a conscientious objector will feel compelled to refuse military service despite the nation’s compelling need for his or her militaristic assistance. A strict separationist view, simply stated, allows religion a narrower scope than experienced by many religious adherents.

Much of the appeal of accommodationism stems from the fact that strict separationism is historically unsupportable and practically impossible. Accommodationism, however, suffers from its unprincipled resolution of the conflict between free exercise and establishment values. Too often the resolution is dependent upon historical continuity or policy constraints rather than defensible as a matter of legal or moral principle. As a result the accommodationist cases appear ad hoc, unpredictable and unprincipled.

The endorsement test offers an alternative resolution of the conflict between establishment and free exercise, but the outcome fails to capture the values forming the core of the religious clauses. The “endorsement test” flies in the face of the Free Exercise Clause itself. Notwithstanding Justice Scalia’s decision in Smith, the very existence of the Free Exercise Clause would seemingly acknowledge the special importance of the state reconciling its imposition of authority over religious claimants. From the perspective of Justice O'Connor's “endorsement test,” if a statute is facially neutral then it will be upheld even against serious free exercise claims.

Reconciliationism recommends respect for the variant religious views and traditions of our people even as they participate in the public sphere, while at the same time requires that no religious view or activity be legitimized or imposed on others. In many instances a public disclaimer that state tolerance of the variant religious traditions of

\(^{343}\) 494 U.S. 872 (1990).
our people is not intended to constitute endorsement would assist in highlighting the difference between compelled orthodoxy and tolerant respect for religious traditions. Justice Scalia, in his Lee v. Weisman dissent, suggested as much when he stated that notwithstanding the Court's ruling, graduation prayers should be permissible so long as school authorities make clear that anyone who abstains from screaming protest does not necessarily participate in the prayers. All that is seemingly needed is an announcement, or perhaps a written assertion at the beginning of the graduation program, to the effect that while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed, by rising to have done so.

Applied to the facts of Agostini, the courts should consider the free exercise and establishment issues involved from the sociological context of the dilemma presented to the parents and children involved. It has long since been established that one of the most fundamental of all social welfare benefits that state has a responsibility to offer to all of its inhabitants is education. Religious people who refuse to send their children to public school for religious reasons suffer an economic loss as a consequence. Though they are responsible for taxes that are used to fund public schools, they are unable for religious reasons to take advantage of the public benefit. Their free-exercise-protected choice to opt out of public education is compounded whenever their children suffer from special needs that the religious schools are not equipped to handle. Neutral public funding for the disadvantaged in both public and sectarian schools, therefore, can be justified as reconciling the equal protection and free exercise rights of parents and children, without constituting an establishment of religion. Agostini validates this correct moral and legal conclusion and, consequently, should be celebrated for its success.