THE FEDERAL JUDICIARY AND ESTABLISHMENT CLAUSE JURISPRUDENCE:
APPLICATION OF THE LEMON TEST SINCE MITCHELL V. HELMS

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The issue of religion and its place in society has been a topic of controversy and debate since long before the creation of our constitutional republic. The relationship between religion and government has witnessed some of its most intense conflicts when the governmental entity in question involves public education. As our country moved into the 20th century, legal challenges in the field of public education began to emerge calling into question the constitutionality of various policies and practices at both the state and local levels. This dissertation examined the legal methodology that was initially developed and then subsequently modified as the judicial branch has interpreted how the Establishment Clause delineates the relationship between religion and public education.

Because the United States Supreme Court has not overturned its decision in Lemon v. Kurtzman, the tri-partite test it established still remains the law of the land. Subsequent decisions by the Court leading up to their ruling in Mitchell v. Helms, however, have continued to modify the judiciary's approach toward the use of the Lemon test in Establishment Clause jurisprudence. This research analyzed the decisions of the various federal courts subsequent to the ruling issued in Mitchell to discern both the present position of the federal judiciary as it relates to the continued validity of Lemon and theorizes how the future course of any Establishment Clause legal challenges may ultimately be resolved by the federal courts.

The analysis suggested that, while the Supreme Court has avoided Lemon’s three-part test as the standard for evaluating Establishment Clause claims, the lower courts
continue to place a strong emphasis on the importance of the test established in *Lemon* as the basis for how they render their decisions with issues that involve public education. This data indicated that *Lemon* continues to be an important tool for determining the validity of state programs and policies involving federal questions related to the Establishment Clause.
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CHAPTER 1

INTRODUCTION

The issue of religion and its place in our society has been a topic of controversy and debate since long before the creation of our constitutional republic. The concept of religious expression which currently exists in the United States can be witnessed in a multitude of situations and environments, some of which can be traced back to the earliest settlements more than 375 years in our past. Even prior to the United States declaring its independence from the British Empire and the subsequent ratification of the United States Constitution in the latter quarter of the eighteenth century, the founders of our country recognized the importance of religion in the American colonies and struggled to find a balance between the formation of a national secular government, while at the same time respecting the divergent religious views of its citizens. This challenge was recognized at the earliest beginnings of what would eventually become our present form of government, when it was noted that the “representatives at the Constitutional Convention in Philadelphia in 1787 were loath to address the issue [of religion] lest the convention founder on the shoals of religious dissention” (Alexander & Alexander, 2009, p. 173).

Governmental leaders at the federal, state and local levels have continued to struggle with how to maintain this equilibrium between the role of religion in our
society and the responsibilities of our various civil authorities throughout the country well after the ratification of the United States Constitution. As noted by Thomas (2007), even at the beginning of our constitutional republic, the assertion by the founders that while “they were creating a secular government in which church and state were separated, the Christian culture of the nation-planners’ backgrounds invested government institutions with an obvious Judeo-Christian cast” (p. 30). As the United States has progressed through more than four centuries of history, the challenge of defining an acceptable level of interaction between the state and religion that is constitutionally permissible continues to be an elusive target.

This relationship between religion and government has witnessed some of its most intense conflicts when the governmental entity in question is an institution of public education. While there is clearly a separation between religious indoctrination and the public school environment today, most historians acknowledge that education and religion have worked in tandem with one another throughout most of our nation’s existence. Substantial evidence of this relationship between religion and the earliest school systems in our country has been extensively documented (Current, Williams, & Freidel, 1979; Thomas, 2007; Waldman, 2008). One brief example should help to demonstrate the historical pervasiveness of religion in the public school setting.

One of the most widely recognized symbols in practically every part of the nation’s public schools during the colonial period and throughout much of our
history as a young republic was one of its earliest textbooks, *The New England Primer*. As noted by Morison (1936), this small volume sold more than 6 million copies between 1687 and the mid-1800s (p. 79). Even the most cursory review of *The New England Primer* reveals a strong religious slant. As noted by Thomas (2007), *The New England Primer* was clearly designed to address the dominant religious philosophy in colonial America that children were born into sin, and that through education, they could be brought out of sin. An example of this belief is clearly noted from one of the early lessons in the *Primer* which focused on teaching the letters of the alphabet. The lesson, entitled the “Alphabet Poem,” presented each letter of the alphabet along with a woodcut drawing and a brief verse. A sample of the verses from this lesson included the following:

A - In Adam's fall, We sinned all.  
B - Thy life to mend, God's Book attend.  
C - The Cat doth play, And after slay.  
D - A Dog will bite A thief at night.  

(*The New England Primer, 1846, p. 11*)

Each of the verses in the “Alphabet Poem” followed a similar style, providing children with a variety of lessons focused on leading a decent, moral, Christian life. The final portion of this particular lesson concluded with the following verses:

W - Whales in the sea God's voice obey.  
X - Xerxes the Great did die, And so must you and I.  
Y - Youth forward slips, Death soonest nips.  
Z - Zaccheus, he Did climb a tree, His Lord to see.  

(*The New England Primer, 1846, p. 14*)

In the introduction to one of the most recent reproductions of *The New England Primer*, Hare (2010) noted that:
Besides instruction in the alphabet, *The New England Primer* also served to indoctrinate young minds in the stern and somewhat morbid Protestantism of that time and place. Depending on your viewpoint, it is either yet another example of how religion has been excised from the public schools in the United States, or a quaint sample of what our forefathers considered acceptable as "moral education." (*The New England Primer, 2010*)

Thomas (2007) observed that throughout the early history of the United States, the public education system had a definitive slant toward Christianity in general, and Protestantism in particular (p. 25).

The historical record reflects a significant degree of evidence related to the integration of religion into the public school environment at the community level. It is important to note, however, that this relationship extended well beyond the individual classroom and into the various legislative bodies that existed originally with the colonial assemblies, and continued well beyond the American Revolution into the state legislatures. These legislative bodies not only recognized the importance of establishing a system of public schools in order to benefit society at large with an educated populace, but they also realized the importance of funding those schools through the taxation of the local citizens throughout the community (Waldman, 2008). In 1647, the Massachusetts Legislature became the first legislative body to pass a statute that required “every community of fifty households or more to establish a school that all students would attend” (Thomas, 2007, p. 25). While the establishment of a series of public schools throughout the Massachusetts colony was a novel idea, the rationale for this legislative action was also worthy of consideration. According to Thomas (2007), the legislative intent behind the
creation of a public education system was based on the premise that the schools would assist in preventing “that old deluder, Satan, to keep men from the knowledge of the Scriptures” (p. 26). As observed from this commentary, it could be inferred that one of the Puritans’ primary reasons for establishing colonial schools was for the purpose of advancing their religion.

Conceptual Framework

A strong relationship between religion and our public education system has existed throughout much of the history of the United States. As our country moved into the twentieth century, a number of legal challenges began to emerge calling into question the constitutionality of a variety of policies and practices at both the state and local levels. Throughout the second half of the twentieth century, the federal judiciary has dealt with a wide range of issues involving the relationship between religion and the public schools. Topics have ranged from those as fundamental as prayer in schools and the integration of various religious viewpoints and activities into the school’s curriculum, to complex and often more subtle questions such as the use of public school funds in order to advance the ideas of one or more religious denominations from both within as well as outside the traditional public school environment. The United States Supreme Court as well as the lower trial and appellate courts have attempted to define the boundaries of what is legally permissible within the limits of the United States Constitution. Rather than focusing on a single topic within the extensive body of Establishment Clause law, or the
considerable variety of church/state issues faced by the courts, this dissertation examined the legal methodology that was developed, and then subsequently modified, as the judicial branch has interpreted the Establishment Clause of the First Amendment with respect to how it delineates the relationship between religion and public education.

In order to provide an adequate foundation for the analysis of this topic, it was important to begin with an examination of the significant historical and legal issues that have led to the present circumstances in the debate over the relationship between church and state. Extensive research (Ackerman, 2001; Alexander & Alexander, 2009; Alley, 1996; Duker, 1966; Freund & Ulich, 1965; Haynes, Chaltain, Ferguson, Hudson, & Thomas, 2003; Valente & Valente, 2001), in educational law historically has focused on both the ratification of the United States Constitution and the subsequent passage of the Bill of Rights as the starting point for a discussion of how judicial decisions have defined the relationship between church and state. This research, however, began with an overview of some of the major historical and philosophical events prior to the establishment of any form of national government in America. It has been suggested that any examination of the history of America must begin with “the European world from which the colonists came, the stock of tradition and prejudices which they inherited from their fathers, and the special characteristics of the age in which they lived” (Greene, 1922, p. 1). This background information was critical as it provided the context for the views of the framers of our founding documents with respect to the role of religion in society and how they
believed the federal government should deal with the issue of freedom of conscience.

After an examination of the leading factors related to the initial exploration of North America, the focus of this study turned to the establishment of the various colonial settlements and the influences that began to develop in the seventeenth century. This examination then continued with an analysis of the major factors that would eventually lead to the colonists’ break from the British Empire and their fight for independence from British rule. Morison (1936) noted that it was difficult to separate the political reasons for the colonists’ desire to gain their independence from the British Empire from the strong religious viewpoints to which they adhered because the American colonies “differed from the other English colonies in that [they were] founded largely for the purpose of trying an experiment in Christian living” (p. 5).

This review next focused on the efforts of the recently emancipated American colonies to create a new federal government after the revolution had come to a conclusion. While provisions had been made for the establishment of a national government with the adoption of the Articles of Confederation in 1777, the absence of a strong federal authority not only gave rise to numerous conflicts among the several states but also hampered the ability of the new Continental Congress to deal effectively with international issues. The role of religion and its place in the new federal government was a major topic of debate when it was finally determined in 1787 that a new constitutional convention should be formed. In addition to a
review of the historical events that surrounded the drafting and eventual adoption of the United States Constitution, a brief overview of the major philosophical viewpoints of those primarily responsible for the creation of the new federal constitution provided an insight into the intent of its framers as they created a new governmental framework. This aspect of the review was extremely important as it set the stage for many of the arguments that continue even to the present day about the intent of the Founding Fathers and what they perceived to be the role between religion and government. The debate over the original intent of the Founding Fathers has become important for those on either end of the political spectrum as they seek to bolster their arguments with evidence of what they assert to be the aim of the drafters of the United States Constitution. Waldman (2008) noted that in an attempt to gain control “over the spiritual lives of the Founding Fathers, both sides distort history” (p. x). Because of the tremendous influence of the framers, it was important to review how those individuals sought to balance the role between church and state.

This evaluation of the historical record continued with an examination of some of the earliest legal decisions rendered by the United States Supreme Court. Through this segment of the review, the path of the Court is followed in its pursuit to interpret the Establishment Clause of the United States Constitution and how this aspect of the First Amendment has been applied to various questions involving the role of religion in the public school environment. As this examination revealed, the approach used by the Court continued to drift throughout much of the early
jurisprudence history of the United States until a definitive standard for inquiry was established in the landmark case of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Prior to the decision rendered in *Lemon*, the Supreme Court had determined that various aspects of private, religiously-affiliated educational institutions could be supported through the use of public tax revenue. This financial assistance was curtailed, however, when the Supreme Court determined that two state statutes allowing for the supplementation of private, sectarian teacher's salaries through public tax funds, violated the Establishment Clause of the United States Constitution. In rendering its decision in *Lemon*, the Supreme Court set forth the criteria for what would come to be known as the *Lemon* test. Alexander and Alexander (2009) noted that the Court’s decision in *Lemon* “first enunciated the three-part test of [the] constitutionality of state acts pertaining to the establishment of religion” (p. 190). In rendering its decision in *Lemon*, the Supreme Court declared that an action of the state met the constitutional standard set forth in the Establishment Clause if it: 1) had a secular purpose, 2) had a primary effect that neither advanced nor inhibited religion, and 3) did not create an excessive entanglement between religion and the state.

While the decision reached in *Lemon v. Kurtzman* was viewed as a major milestone in the Establishment Clause jurisprudence of the Supreme Court, the legal principles initially set forth in the Court’s three-part test have experienced significant modifications in the intervening years. The final portion of this review focused on the decisions rendered by the Supreme Court subsequent to its ruling in
Lemon that appear to have substantially altered the Court’s methodology in determining what was considered to be a legally permissible action as it related to the constitutionality of state conduct in the arena of public education. As noted by Alexander and Alexander (2009), while the more recent rulings of the Supreme Court have not had the effect of “directly overruling Lemon and its three-prong test, [they] did nevertheless reinterpret Lemon in such a way as to greatly reduce its strength” (p. 200).

The final aspect of this review concluded with an examination of the decision rendered by the Supreme Court in Mitchell v. Helms, 530 U.S. 793 (2000). In analyzing the approach of the Court through its ruling issued in Mitchell, a foundation was established for how the judicial philosophy of the Court has evolved over time. Based on the judicial record beginning with the decision rendered by the Supreme Court in Lemon v. Kurtzman and ending with its modified approach in Mitchell v. Helms, the objective of this research was to discern if any trends could be established that would provide both policy analysts and school administrators with an indication as to how the federal judiciary might rule in any future potential litigation involving the Establishment Clause of the First Amendment.

Research Questions

Because the United States Supreme Court has not overturned its decision in Lemon v. Kurtzman, the tri-partite test it established remains the law of the land. However, subsequent decisions by the Supreme Court leading up to their ruling in
*Mitchell* have continued to modify the judiciary’s approach toward the use of the *Lemon* test in Establishment Clause cases involving issues associated with public education. On the basis of both the historical record and the various constitutional interpretations rendered by the federal judiciary, this dissertation was designed to address the following research questions:

1. Has the federal judiciary cited the precedent established by *Mitchell* in Establishment Clause litigation involving public school systems subsequent to the decision reached by the United States Supreme Court in *Mitchell v. Helms*?

2. Has the federal judiciary either maintained or abandoned the Supreme Court’s traditional three-prong test established in *Lemon v. Kurtzman* as the method for analyzing Establishment Clause disputes involving public school systems in those cases where the court has cited *Mitchell*?

The federal judiciary’s approach with respect to Establishment Clause jurisprudence continues to provide a degree of uncertainty in the role between government and religion. The objective of this research was to analyze the decisions of the various federal courts subsequent to the ruling issued in *Mitchell v. Helms* in an attempt to discern not only the present position of the federal judiciary as it related to the continued validity of *Lemon*, but also to theorize how the future course of any Establishment Clause legal challenges may ultimately be resolved by the federal judicial system.
Relevance to School Administrators

Duker (1966) observed that “the relationship between religion and education, particularly public education, deeply affects people with respect to their most cherished values and beliefs” (p. ix). Because of the wide diversity of stakeholders involved in the public school arena, school administrators need to be cognizant of the balance they must strike between respecting the values of their community, while at the same time, adhering to the legal guidelines that have been established through both the legislative and judicial processes. Finding this proper balance becomes an even greater challenge when the legal and statutory boundaries are not clearly defined. Because of the diversity of views, even within the judicial branch where the ultimate authority to interpret our most basic governing documents resides, school administrators and policy analysts alike are often left with the responsibility of implementing legal decisions that at times appear to contradict reality (Cohen, 1989).

This research focused on one aspect of constitutional law within the context of the public school environment with the intent of providing a small degree of clarity in what is clearly a field of study that is extraordinarily broad and complex. Among the wide-ranging tasks that are assigned to school administrators in today's public educational system, they have a responsibility to implement many of the policies that are determined, in part, as a result of the decisions rendered by our judicial systems at both the state and federal levels. This responsibility becomes an
even greater challenge when it involves issues that are often considered to be among the most basic of our rights as members of a free and open society.

The intense emotions that often accompany the disputes addressed by school administrators involving incidents having at least some background in the relationship between church and state can quickly ignite the passions of those on all sides of the issue. This compounds the challenge for the school administrator not only to resolve the specific controversy at hand, but to do so in a manner that adheres to the ever-changing legal boundaries that have been established by the judicial system. Haynes and Thomas (2001) aptly noted that:

Nowhere is it more important – or more difficult – to address our growing ideological and religious diversity than in the public schools. Not only are our schools a key battleground in the culture wars, they are the principal institution charged with enabling Americans to live with our deepest differences. (p. 3)

The issues of both the relationship between church and state as well as how the federal judiciary has sought to define the parameters of what is constitutionally permissible in the public school environment are extremely complex. It was the goal of this research to provide additional insight for those involved in the daily practice of school administration with a deeper understanding of how to address these matters in a manner that is consistent with the principles set forth by the United States Constitution and interpreted by our federal legal system.
CHAPTER 2

HISTORICAL BACKGROUND

The relationship between religion and government has been a part of the culture of the United States throughout its history. From the founding of the earliest colonial settlements in the New World to the present day, examples of the involvement between church and state can be observed at the federal, state and local levels. When analyzing the complexity of America and its culture, it is difficult to imagine any aspect of society that has not had at least a minimal level of interaction with some facet of religion. Among the various governmental entities existing throughout the United States, this interrelationship has historically experienced some of its strongest ties in the field of public education.

In order to develop a deeper understanding of these divergent views as they pertain to the relationship between church and state, this research began with a brief overview of what constituted the main philosophical viewpoints at the time of the earliest colonial settlements. While this review was not intended to provide an exhaustive examination of the various worldviews of the role between church and state, it did provide a contextual background for how the early European inhabitants approached the relationship between the government and religion.

This chapter concluded with a review of the earliest legal disputes examining how the courts have applied the concept of separation between church and state in
matters involving the public school system. Analysis of how the United States Supreme Court originally defined and then subsequently modified its position demonstrates how the complexity of this issue has been addressed throughout the early history of legal jurisprudence in the area of church and state conduct as it relates to topic of Establishment Clause litigation involving public education.

Economic Influences

In order to understand the perspectives of the early colonial settlers, it was important to begin with a brief examination of the dominant historical, political, and philosophical events that were taking place on the European continent at the time of the westward expansion into the New World. Most historians acknowledge that the period of exploration of the territory that would eventually become the Americas began in the latter portion of the fifteenth century. As the European continent emerged from the Middle Ages, one of the most significant changes observed in Western Europe was the development of a new middle class. The emergence of the middle class would form an important new segment of the population between the nobility and the ordinary citizenry that had previously not existed during the feudal period. This new middle class was primarily characterized by the rise of merchants who established trading posts from Europe eastward in order to bring the many goods being exported from the Orient to the major population centers of the west. As these markets continued to grow in Europe, struggling to meet the rising demand for the various resources of the Far East, so too did the desire of the developing
merchant class to find new trade routes in order to bring those goods to Europe more efficiently and economically. Current, Williams, and Freidel (1979) noted that under the existing trade routes:

[The] Italian and Arab merchants added their profits and commissions, and various rulers added their tolls and taxes, so that by the time oriental wares reached the Atlantic nations the price was outrageously high, and excessive amounts of money were drained away to the East. (p. 6)

The desire to decrease the cost of goods and to subsequently increase the profit margins of the European merchants provided a strong catalyst for searching out a more direct route to the Orient from what was generally considered to be an empty ocean to the west of the European continent.

The desire to establish a more direct trade route with the Far East was an important factor in the discovery and exploration of the Americas, however, it was clearly not the sole purpose for the many westward voyages that took place beginning in the second half of the fifteenth century and continued throughout the next 150 years. During this period of time, several European nations undertook an ongoing series of westward journeys to discover a more direct route to the Far East. As a greater understanding of the vast resources the New World offered came to be realized, the primary objective gradually shifted from merely exploring these new territories toward a goal of expanding the imperial holdings of several European countries into the New World. Current, Williams, and Freidel (1979) noted that as the Europeans continued to explore the Americas, they began to realize that the extensive resources of these new lands could provide a “source of wealth rivaling
and even surpassing the original Indies” (p. 10). As the exploration of the Americas continued, the next logical step for these European nations was the establishment and eventual expansion of colonial settlements throughout the New World.

As previously noted, the original goal of the various European explorers had been the discovery and exploration of more economical trade routes to the Orient. This initial objective was subsequently transformed toward one of expanding the imperial holdings of several of the European monarchies. Many of these European nations also had another significant incentive for their westward expansion. The inclination to explore these new territories along with the desire to convert the native inhabitants to Christianity provided a strong spiritual justification for many European countries to promote the expansion of their empire-building goals into the new lands of the Americas. As noted by Norton, et al (1982), many “[f]ifteenth-century Europeans were convinced that Christianity was the only true religion and that it was their duty to spread Jesus Christ’s message across the world” (p. 6). These assorted motives ranging from improving the efficiency of trade routes and expanding the imperial holdings of several European countries to the European’s desire to spread Christianity throughout the world, all provided a strong incentive for the major powers of Europe to explore and develop the vast resources throughout the Americas.

The earliest European explorations focused primarily on the lands of the Caribbean and Central America. As these voyages continued throughout the remainder of the fifteenth century and well into the sixteenth century, significant
portions of the New World came under both the political and spiritual influence of several powerful European empires. The exploration and eventual colonization of the New World began with the Portuguese, and was then subsequently expanded upon by the Spanish, French, Dutch, and then finally the English. While the influence of each of these countries would have far-reaching implications on the development of the original thirteen American colonies, there was another important development taking place in Europe at roughly the same time that would have an equally significant impact on the establishment and growth of what would eventually become the United States.

Challenges Against the Catholic Church

Virtually all of Europe was Roman Catholic throughout the Middle Ages. As Current, Williams, and Freidel (1979) noted, the supremacy of the Pope was recognized in all spiritual matters (p. 13). The beginning of the sixteenth century, however, witnessed several major challenges to the authority of the Catholic Church. The first of these confrontations took place in 1517 when Martin Luther, a German priest, challenged several aspects of the Church’s doctrine and practices. While Martin Luther had many concerns about the perceived corruption of the Church’s authority on a number of theological issues, Luther’s most recognized dispute was his disagreement with the Church’s practice of selling indulgences as a means of absolving sin. Martin Luther’s challenge against papal authority and his eventual break from the Catholic Church signaled the beginning of the Reformation
in Western Europe. As stated by Current, Williams, and Freidel (1979), the European continent became “divided between Catholics and those who protested, or Protestants, of whom there came to be many sects” (p. 13). While Martin Luther's theological campaign was an important episode in the evolving role of religion, it was only the first of many events that would transform religion in Western Europe.

John Calvin, another Protestant leader, would lead a revolt of his own against the authority of Catholicism shortly after Martin Luther’s break from the Church. In the case of Calvin, he would not only leave the Church but would eventually establish a church-state relationship in Switzerland based on his own writings and philosophies. In 1536, John Calvin published his religious doctrines in the treatise, *The Institutes of the Christian Religion*. Through this discourse, Calvin noted the principal components of his religious views. They included:

- that God was all-knowing and all-powerful,
- that man was weak, helpless, and born in sin. Furthermore, Calvin asserted that man could not save himself by his own efforts; he had to rely on God for salvation,
- that the future of every soul was pre-ordained long before a person’s birth,
- that God’s chosen people would demonstrate their future glory in heaven through the moral lives they lived on Earth, and
- that others who were not pre-ordained for heaven still had a duty to honor God and to conform to His path of righteousness.

(Current, Williams, & Freidel, 1979, p. 13)

Current, Williams and Freidel (1979) observed that the forthrightness of Calvinism appealed to many people who had become disenchanted with the scandals of the Roman Catholic Church (p. 13). While the Reformation witnessed the rise of several religious movements, the theological advancements led by Martin Luther and John
Calvin were considered the most influential religious developments to have taken place in the sixteenth century. The changes advocated by both of these religious leaders would have political as well as theological implications that would extend well beyond the Renaissance.

While the Reformation played an important role in the evolving religious and political developments taking place throughout Western Europe, it would be the eventual break between the Roman Catholic Church and King Henry VIII of England in 1534 that would have the most profound consequences on the philosophies of those who would ultimately be responsible for the formation of the United States and its form of government more than two centuries later. Because of the strong influence of the British Empire on the future American colonies, it was important to briefly explore the events that eventually led to the establishment of the Church of England.

The Catholic Church co-existed to a greater or lesser degree with the various monarchies across Western Europe throughout the Middle Ages. From time to time, those relationships would become strained due to a perceived shift in the balance of authority from the secular rule of the monarchy to the religious influence exerted by the Church. As Willson (1972) indicated, periods of strong anti-clerical sentiment were observed at various stages leading into the Renaissance Period of the fifteenth century (p. 167). Among the range of complaints advanced by several of the secular governments of Europe, the primary disagreement focused on the absence of any meaningful input into the selection of clergymen by the monarchy. This issue was
particularly a concern of the various imperial sovereignties as it related to the selection of clergymen at the upper levels of the church hierarchy, which were made as a result of the ecclesiastical appointments by the Pope in Rome. In addition to their lack of any meaningful input into the selection of the clergy holding high ecclesiastical offices in their respective countries, the various European monarchies also exhibited varying degrees of frustration with the ability of the Church to generate revenue through its power to assess and collect tithes. These vast sources of revenue would go directly into the coffers of the Church; either at the local level, or alternatively, back to the Pope in Rome. Several secular governments at various points in history responded to the Church’s authority through an assortment of decrees that required “the Church pay its full share of taxation and suggest[ed] that the lands of the monasteries be confiscated by the Crown” in response to this perceived imbalance of power with the Church (Wilson, 1972, p. 167).

While several of the European monarchies experienced temporary phases marked by tension and even open hostility toward the Roman Catholic Church, those controversies were eventually resolved and led to periods of general stability between secular and religious leaders. A series of events between the British monarchy and the Catholic Church began to unfold starting in 1529, however, that would ultimately result in not only the suppression of the entire hierarchy of the Catholic Church in the British Empire but would lead to the establishment of the Church of England with King Henry VIII as its supreme leader in 1534. Because of its position as the eventual imperial power having the greatest influence over the
growth and development of the American colonies, it was important to examine not only the balance of power between the Catholic Church and the British monarchy, but also the relationship that was established once the British monarch became both the spiritual and temporal leader of his kingdom. This series of events is considered a major focal point in the struggle for the supremacy of power between the authority of a secular government and the dominance of an established and highly influential, religious denomination. The confrontation leading to the eventual split between the British Empire and the Roman Catholic Church had repercussions that transcended more than two centuries of history and would have a profound impact on the establishment of the temporal sovereignty that would eventually become the United States.

King Henry VIII “became concerned about the validity of his marriage to Catherine of Aragon, who had been his brother’s widow” in the early part of the sixteenth century (Willson, 1972, p. 231). The Pope had granted the British monarch a special dispensation even though Church law prohibited this type of marriage. While his marriage to Catherine had initially been a happy occurrence, Henry VIII ultimately became concerned about his successor to the throne since Catherine had not been able to produce a surviving male heir. All but one of King Henry’s children had either died at birth or in early infancy during his marriage to Catherine. The only surviving child from Henry’s marriage to Catherine was a girl, Princess Mary. The British monarch became persuaded that the absence of a suitable male successor was God’s punishment for his transgression of canonical law.
Furthermore, Henry became convinced that the Pope had exceeded his canonical authority when the original dispensation had been granted in 1509.

In addition to the concerns of Henry VIII as they related to his union with Catherine, the royal escapades of the young King with one of Catherine’s ladies in waiting had produced an illegitimate child. It was conceivable that the child could one day mount a challenge to succeed Henry VIII as the rightful heir to the throne even though he had been born out of wedlock. While even Henry viewed his illegitimate son as a possible successor to the British Empire, he was certain that Catherine would defend the rights of their daughter as the legitimate heir to the throne. Willson (1972) noted that the British monarchy ultimately realized that “[w]ithout the assurance of a strong and lasting dynasty there could be no permanent peace; [and] the anarchy and civil wars of the fifteenth century could easily return” (p. 231).

As if the issues of royal succession were not scandalous and complex enough, Henry VIII further complicated matters when he initiated a romantic affair with Anne Boleyn; a young lady at court and nearly half the age of Catherine. Henry VIII ultimately decided to seek a pronouncement from the Pope that the original dispensation that had been granted nearly two decades earlier was in error. Henry VIII was convinced that with the papal pronouncement he could resolve both the issue of his romantic attachment to Anne Boleyn, as well as his concern about the potential conflict with his successor to the British Crown. Once he received the papal
decree, his marriage to Catherine would be considered invalid, and Henry would be free to marry whomever he chose.

While Henry VIII was contemplating his marital circumstances, the Catholic Church was also struggling to resolve several of its own controversies with the various monarchies across the European continent. The Church was facing a growing lack of support from the laity in addition to the friction between the Church hierarchy and several European rulers. As Willson (1972) observed, “[t]here was little doubt that in the later Middle Ages, the Church had been drawn away from its ideals, that it contained many weaknesses, and that reform was long overdue” (p. 234). Most of the citizenry expressed a growing resentment with the various fees and tithes collected by the Church that were viewed as a means of supporting an affluent, although corrupt, religious aristocracy. Along with this growing dissatisfaction of the populace and the increasing calls for significant reforms coming from individuals such as Martin Luther and John Calvin, the controversy initiated by Henry VIII over his marriage to Catherine of Aragon created a set of circumstances that would prevent the Church from resolving the issue without having a profoundly negative impact on its authority regardless of the decision ultimately reached by the Pope.

As the events of the controversy between the monarchy and the Catholic Church began to unfold, Henry VIII called the British Parliament into session. A series of legal proclamations were issued beginning in 1529 that eventually led to the suppression of the Catholic Church in the British Empire. Throughout the period
referred to as the Reformation Parliament, these statutes were passed with the purpose of forcing the Pope to yield to the wishes of Henry VIII and to issue the papal pronouncement clearing the way for the British monarch to end his marriage to Catherine while formalizing his union with Anne Boleyn. When the Reformation Parliament first came into session in 1529, it immediately passed a series of statutes designed to regulate what many in England had viewed as the long-standing abuses of the Church against the citizenry. Willson (1972) observed that Henry VIII gave the British Parliament the latitude to determine the course of its debate, allowing the House of Commons not only to set the agenda for the legislation they were to discuss but also to design the regulations they would eventually pass (p. 240). While Parliament’s intent was to address what they saw as the long-term abuses of what was generally considered a noble institution that had been corrupted by the greed of the clergy, the King was determined to use the power of the English Parliament to force the Pope into granting the papal pronouncement.

The Pope refused to yield to the will of Henry VIII as each series of statutes was passed. With each successive legislative session, the British Parliament further regulated the affairs of the Catholic Church in England. The British Parliament eventually passed legislation in 1532 giving the King the authority to withhold all sources of revenue generated in England from going to the Pope in Rome. When Pope Clement VII continued in his refusal to grant the pronouncement, Parliament responded with a final series of statutes that recognized Henry VIII as the Supreme
Head of the Church of England, thereby establishing it as the official religious institution of the British Empire.

The events that led to the break between England and Rome as well as the establishment of the Church of England continued to weaken the authority of the Catholic Church across the European continent. In concert with the other attacks against the authority of the Church, these actions would have an impact on the emergence of a variety of religious denominations seeking to gain their independence from the previously unilateral dominance of the Catholic Church. Many of these newly created religious sects would attempt not only to increase their influence within the countries where they were instituted, but would also seek to broaden their standing as the various European empires sought to expand their dominance as they continued to explore and then eventually established colonial settlements throughout the Americas.

In summary, there were three primary aspects from the history of Western Europe that would have an impact not only on the founding of the thirteen colonial settlements in North America that would eventually develop into the United States, but more importantly, on the philosophical and political systems that first came to light at the end of the Middle Ages. Over time, these theories would be transformed into many of the principles established by the Founding Fathers in the organizing documents of the United States. This first aspect focused on the emergence of the middle class. As previously noted, this largely merchant-based segment of society sought to locate and develop more efficient methods for moving goods from the Far
East to the European continent. Through the various explorations of several European countries beginning with the Portuguese in the mid-fifteenth century and ending with the English nearly 150 years later, a vast continent between Europe and the Orient was discovered; one with enormous natural resources which allowed these countries to expand their imperial influence beyond the borders of their respective homelands on the European continent.

The second facet having a major impact on the establishment and growth of the colonial settlements in the Americas was evidenced through the evolving relationship between many of the secular governments of Western Europe and the hierarchy of the Roman Catholic Church. As previously observed, a strong relationship existed between many of the European monarchies and the leadership of the Catholic Church at the beginning of the Renaissance. This interrelationship was important for two reasons. First, the imperial desires of several European countries were crucial not only to their temporal aspirations to expand their imperial holdings but also to their more altruistic desires to extend the influence of Christianity to the native inhabitants of the New World. The second reason for the importance of this relationship between church and state was demonstrated through the rise of the Protestant Movement from reformers including Martin Luther and John Calvin. Due in large part to the perceived corruption of the Church hierarchy, the rise of Protestantism occurred because large segments of the populace had lost their faith in the leadership of the Roman Catholic Church. While the rise of Protestant Movement was religious in nature, its influence on the secular
activities of the monarchies of Western Europe led to the expansion of these rival philosophical and religious viewpoints that eventually began to emerge in the New World.

Finally, the extraordinary events that led to the break between the British Empire and the Roman Catholic Church, along with the subsequent rise of the Church of England, had repercussions that influenced not only the internal structure of the British monarchy but how the empire would exert its own religious tenets on the vast imperial holdings it began to accumulate over the course of the next 150 years, including the territories that would eventually become the United States. While these historical events long preceded the independence of the United States from the British Empire, many of the recurring themes related to the relationship between church and state can trace their origins back to this period of European history. The sentiments and writings of many of the Founding Fathers which led to the creation of the United States Constitution and the Bill of Rights with its guarantees for what they considered to be freedom of conscience can be evidenced in the religious and social philosophies that developed as the European continent emerged from the Middle Ages and into what historians commonly consider the beginning of the Modern Era. From this historical perspective, this analysis next turned to the events leading up to the time of the American Revolution and the establishment of the federal constitution.
The Colonization of North America

As noted previously, the exploration of the New World was undertaken by most of the monarchies of Western Europe throughout the sixteenth century. The overwhelming majority of these expeditions were classified into one of two categories as the focus on these formerly undiscovered lands gradually shifted from one of exploration into the early cultivation of the vast resources of the New World. Early settlements were either established as seasonal summer camps designed to take advantage of the abundant fishing grounds off the coast of the North Atlantic, or they were created as small trading outposts built for the purpose of facilitating commerce with the indigenous tribes that populated the eastern seaboard of North America. Norton, et al (1982) observed that these encampments were initially viewed by most explorers as temporary, with the majority of individuals eventually returning to Europe (p. 9). The desire to establish permanent settlements in America gained in importance as the commercial implications for cultivating the resources of the New World became more apparent toward the end of the sixteenth century.

While the commercial aspect of the early colonization in America was an important factor in the development of the settlements of both the sixteenth and seventeenth centuries, there were other considerations that influenced the advancement of the colonies in North America as well. Current, Williams, and Freidel (1979) noted that the desire to expand was a result of not only the economic changes taking place on the European continent but also as a consequence of the
religious and political struggles taking place at the time (p. 21). Each settlement assumed many of the customs and traditions of its native homeland as the Europeans began to explore and eventually colonize the New World. Included among those practices were the various forms of Christianity spreading across the European continent. As the number of colonies in North America continued to grow, so too did the variety of religious sects. A primary motivation for the establishment of many of these new colonies, particularly in the New England region of North America, was the belief of the colonists that they could no longer “practice their religion freely” in their country of origin (Norton, et al, 1982, p. 22).

Most of the countries on the European continent participated in the early exploration and development of the colonial settlements in America. Great Britain, however, became the dominant imperial power in the colonization of the territory that would become the United States. Current, Williams, and Freidel (1979) noted that the colonization of North America resulted not as a single, unified plan to expand the imperial desires of Great Britain, but rather, the evolution of the British Empire and its influence on the American colonies came about due to a variety of circumstances (p. 21). Those who came to the newly established American colonies did not seek to create a life that was independent from their previous one in England, but rather they sought the opportunity “to build in the New World a better England, one that would be free from the imperfections of their native land, one that would give them greater opportunities for personal happiness” (Current, Williams, & Freidel, 1979, p. 31).
Most historians acknowledge the central role religion played in the organization and governance of nearly all the settlements in America as the formation and expansion of the colonies continued throughout the seventeenth century. Throughout this era of colonial development, every colonist within the community was generally expected to participate in the religious services of the settlement, regardless of their membership status (Current, Williams, & Freidel, 1979, p. 33). The vast majority of colonists throughout this period viewed the roles of both the church and the local governmental structure as complimentary of one another. As noted by Thomas (2007), it was the dominant view of the colonists that “[t]he colonial church cared for the inhabitants’ spiritual needs and provided the moral foundations for [the] towns’ and villages’ secular responsibilities” (p. 24).

The reason for this relationship between religion and the community they served was one of practicality as well as spirituality. Life in colonial America was exceedingly difficult, especially during the earliest periods of establishing new settlements along the eastern coastal regions. Waldman (2008) observed that the rationale behind mandatory participation in and adherence to the religious tenets of the colony was based on a belief that extensive “worship would secure God’s favor and give settlers the strength and moral wherewithal to cope with the crushing burdens of disease, Indian attacks, and internal squabbles” (p. 5). Thomas (2007) provided a thoughtful perspective of colonial life when he aptly noted that:

... for most people of faith in the colonies, religion was a source not of discord, but of strength. Countless settlers created families, grew communities, and survived against great odds in large part because of their
faith in Jesus Christ. These stories do not generally make the history books because they deal with the mundane, and awesome, power of God in people’s lives. It’s quite possible none of us would be here today if their religious beliefs and practices hadn’t enabled the Puritans, Pilgrims, and Jamestown settlers to persevere gruesome odds. (p. 17)

These early settlements generally followed the practice established in Europe of a single-church philosophy throughout the colonial period (Alexander & Alexander, 2009, p. 175). The preferences for one religion over another grew over time in most of the colonies, and in some instances, the primary religious perspective of a colony would shift from one form of Christianity to another. It was a common practice for the colonial government to collect taxes for the maintenance and support of the dominant religious faith of the settlement throughout this period of colonization. While most colonial settlements followed the tradition of providing financial assistance to the primary religious faith of the colony, there were exceptions to the practice. Some of the colonies established a more tolerant approach toward the promotion of religious freedom by not allowing for the establishment of a dominant religious faith. One settlement even took the additional step of prohibiting the use of tax-generated revenue for the support of any religious sect.

The most prominent of the settlements promoting the concept of religious freedom and the philosophy of a separation of religion and the government was the colony of Rhode Island established by Roger Williams in 1636. Alexander and Alexander (2009) observed that the prototype for religious tolerance that would eventually become the dominant philosophy in creating a federal government
separate and apart from the tenets of any established religion could trace its roots back to the establishment of the Rhode Island colony (p. 176). While Roger Williams is credited with the formation of a colony without ties to a specific organized religion, it was more than a century before those ideas were refined to the point where they formed the basis for what would become the dominant political philosophy for the concept of separation between church and state.

The colonists began to establish many of the organizational aspects of a more complex society as the population throughout the various New England settlements continued to flourish. Current, Williams, and Freidel (1979) noted that throughout this early period of colonization many of the settlers were concerned that “civilization [would] be lost in the wilderness” (p. 79). One of those areas of concern focused on the need to provide for the educational requirements of the children within the colony. Many of the local governing assemblies began establishing local schools in their communities in response to the importance of providing a more formalized educational system for the children of the settlement. In the earliest colonial settlements, the primary responsibility for the education of children was delegated to the religious establishment of the colony. Waldman (2008) observed that in addition to the establishment of local churches, the creation of “a remarkable system of schools” with an emphasis on promoting a philosophy of “widespread literacy” was viewed as an important example of a colonial settlement’s development (p. 8).
The colonial assemblies took a greater interest in the support of a universal education system as the settlements in North America continued to develop. As previously noted, the Massachusetts Legislature became the first parliamentary assembly to require the establishment of schools throughout the colony. Thomas (2007) observed that “[t]his step toward ensuring that all children and youths would become literate was soon taken by the other colonies as well” and that through these legislative actions “publicly supported schooling for the general populace was on its way” (p. 26). This historical review next turned to the events leading up to the establishment of our present form of government and how those who were ultimately responsible for the drafting of its originating documents addressed the relationship between the secular and religious aspects of the new country.

The Move to Independence

The American colonies prospered with little oversight in their affairs from the British government throughout the remainder of the 1600s and into the first half of the eighteenth century. The task of administering the day-to-day activities of the colonies fell to the local political institutions within each of the settlements. Current, Williams, and Freidel (1979) noted that from the perspective of the British government, the supervision of the colonial settlements “remained decentralized and inefficient” (p. 86). The colonists were given great latitude to determine the course of their actions, and as a result, had created an environment allowing them to
regulate their affairs through the organizational frameworks they had established in each of the colonies. The role of these local leaders continued to grow until they were responsible for making decisions on a variety of issues impacting the religious as well as the secular aspects of their communities (Norton, et al, 1982, p. 52).

In addition to this relaxed atmosphere with respect to the British Empire’s control over the colonies in North America, the eighteenth century also witnessed the rise of a new philosophical movement. This ideological development was referred to as the Enlightenment. The doctrine of this new philosophy was based on the theory that “human reason could be used to combat ignorance, superstition, and tyranny, [in order] to build a better world” (Brians, 2000). While many of the leading proponents of Enlightenment theory in Europe aimed their criticisms at the long-standing establishments of both the aristocracy and religion, in the American colonies, this movement took a more pragmatic approach to addressing the issues facing the colonists. Thomas (2007) noted that the theories of the Enlightenment had a tremendous influence on many of those who eventually became the founders of the United States (p. 26). While historians point to the influence of the Enlightenment and its theories on the founders of our country, there was yet another development taking place during this same period of time that had an equally powerful influence on many of those who ultimately became responsible for the formation of the United States.

In the early part of the eighteenth century there was a gradual decline in the adherence to several of the tenets of organized religion for many of the colonial
settlers. Many colonists found it increasingly difficult to maintain their connection with the formal aspects of a structured religion due in large part to the continuous westward expansion of the colonial settlements. Along with the growth of thought associated with the Enlightenment, many colonists “were tempted to doubt whether any particular denomination, even their own, possessed a monopoly of truth and grace” (Current, Williams, & Freidel, 1979, p. 77). This steady trend away from formalized religion was abruptly reversed when a revival movement known as the Great Awakening swept across the colonies.

The importance of the Great Awakening was rooted in its challenge of the status quo in the colonial settlements. Norton, et al (1979) asserted that in colonial America, the “common folk were expected to accept the authority of their ‘betters’, whether wealthy gentry, government officials, or educated clergymen” (p. 81). For the colonists who became fervent supporters of the Great Awakening, the convictions that led them to a renaissance in their faith also aroused a strong desire to proclaim their yearning for liberty. This challenge against the traditional standing toward authority gave rise to a questioning of not only religion but also of the conventional theories of government. Thomas (2007) observed that a central component behind the colonist’s move toward independence from the British Empire was due, in part, to the enthusiasm exhibited by those who became participants in the revivalism of the Great Awakening (p. xii). Norton, et al (1979) noted that while the Great Awakening had initially “called into question [the]
habitual modes of behavior in the secular as well as the religious realm,” the American colonists soon began “to challenge English rule as well” (p. 82).

The colonists took a commensurately more critical view toward the sovereignty of both the monarchy and the British Empire as they began to exert greater control over their own affairs. The colonists began to resist the attempts of the British government to exert its dominance over what they regarded as an increasingly independent existence from England. This point of view was illustrated through a widespread belief by the colonists that not only was “life in America simpler, purer, and less corrupt than life in England,” but also that America’s “remoteness from [the] centers of power and influence also conveyed immunity to the vice that automatically accompanied the exercise of power” (Norton, et al, 1982, p. 67). With the mounting tensions between the American colonies and the British monarchy, a growing dissatisfaction with the role of the British Empire and its perceived meddling in the affairs of the colonial settlements developed. Current, Williams, and Freidel (1979) observed that “the policies of the British government increasingly offset the divisive tendencies within the colonies and caused Americans to look at the disadvantages of the Empire more closely than at its benefits” (p. 97).

In an effort to re-assert control over the American colonies, the British government instituted a number of fiscal policies designed not only to bring greater efficiency to the administration of the colonies but also to expand the government’s ability to collect revenues in order to pay for the costs associated with the operation and defense of its imperial possessions. The colonists viewed the imposition of
British authority as a direct attack on their ability to raise and expend revenue, and more importantly, to have a meaningful role in the policies impacting their lives. Current, Williams, and Freidel (1979) observed that the goal of self-determination was not “something new and different that these Americans were trying to get,” but rather, “something old and familiar that they desired to keep” (p. 99). The colonial legislatures responded to the implementation of these new fiscal policies by the British Parliament with a series of their own resolutions that declared the “Americans possessed all the rights of Englishmen, especially the right to be taxed only by their own representatives” (Current, Williams, and Freidel, 1979, p. 99). In response to the outcry from both the American colonists as well as the concerns raised by merchants in England, the British government quickly retreated from its policies and repealed much of the legislation aimed at the colonies. It is important to note, however, that the actions of both the British Parliament and the response from the colonial assemblies had set the stage for the inevitable conflict that eventually erupted between the United States and Great Britain.

While many of the grievances advanced by the American colonists focused on the economic association with England, there were other aspects of the Anglo-American relationship that caused increased tension between the American people and the British Crown. It was during this period of history that the American colonies began to find their voice in both the political essays of men such as Thomas Paine, Patrick Henry, and Benjamin Franklin and the spiritual writings of John Wesley, George Whitefield, and Jonathan Edwards. The critical observations of these
individuals as well as those of numerous others, either through their participation as members of their respective provincial assemblies or merely as the outward expressions of the growing dissatisfaction with what the colonists perceived as the increasingly tyrannical authority of the British Empire, continued to expand in both frequency and intensity. An important aspect of this growing resistance to the authority of the British government was based in large part on the influence of the philosophical tenets of both the Enlightenment as well as the ideas expressed through the Great Awakening. Current, Williams, and Freidel (1979) noted that throughout the period of time leading up to the colonists’ eventual declaration of independence from the British Empire, it was “the preachers of New England who taught that no man need obey a government when it violated the will of God as set forth in the Scriptures” (p. 105). While these views were certainly an important example of the colonists’ desire to express their aspirations for self-determination, they were also fundamental to establishing a philosophical basis for how many of those responsible for the creation of our founding documents approached the events leading up to the break from the British Empire.

The growing tension between Great Britain and the American colonies temporarily subsided in the early 1770s. This short-lived period of relative peace came to an abrupt end however, when the British Parliament passed a series of statutes in 1774 designed to address a succession of ongoing disputes with the Massachusetts colony and its resistance to the authority of the British government. From the perspective of the British government, the objective of these acts was to
isolate Massachusetts from the remaining colonies. While the intended purpose of these statutes was to isolate the Massachusetts colony from the remaining American settlements, the opposite effect occurred, bringing all of the colonies together in opposition to the authority of the British Empire. These laws became known as the Coercive Acts, and for many of the colonists, they signaled the beginning of the final move toward declaring the independence of the American colonies from British rule.

Shortly after the passage of the Coercive Acts, the British Parliament passed the Quebec Act. The Parliament’s stated purpose of the Quebec Act was to grant political rights to the French-speaking, Roman Catholic inhabitants of the Ohio Valley. Many of the Protestants in the thirteen American colonies however, saw this move as a further attempt on the part of the monarchy to limit the geographical boundaries of the colonies in order to regain control over their imperial holdings (Current, Williams, and Freidel, 1979, p. 106). Based on the history between the British monarchy and the Roman Catholic Church, many colonists viewed the theological differences between the Catholic Church and the Church of England to be exceedingly minimal. The passage of the Quebec Act gave rise to a growing fear from many of the colonists not only “that Catholicism and Anglicanism were about to be merged,” but they also “became convinced that a plot was afoot in London to subject Americans to the tyranny of the pope” (Current, Williams, & Freidel, 1979, p. 108). The colonists viewed the Quebec Act as the fifth, and final, in the series of statutes that came to be known as the “Intolerable Acts.” With the passage of this final
statute, it only became a matter of time before the tensions between the American colonists and the British Empire erupted into open hostilities. Current, Williams, and Freidel (1979) noted that the citizens “from New Hampshire to South Carolina prepared to take a stand” with this final action on the part of the British government (p. 108).

As previously submitted in the introductory section of this study, the purpose in presenting this background information was not to provide an exhaustive examination of the philosophical beliefs and historical events leading up to the drafting of the United States Constitution. The intent was, however, to provide a contextual framework for the way in which those various events influenced the individuals that were ultimately responsible for drafting the Constitution and its subsequent Bill of Rights. From this historical perspective, this review next turned its attention to the framers of the organizing documents for the United States and their perceptions as to how this relationship between religion and the new federal government should exist.

The Early Constitutional Republic

The origins of what is commonly referred to as the separation of church and state can be traced back to the colonial settlements of the New World. Alexander and Alexander (2009) observed that the ongoing conflicts throughout the history of Europe served as a strong reminder for those given the responsibility of drafting a new constitution for the United States (p. 173). One of the most contentious
concerns faced by the Founding Fathers was how to address the dilemma of the
interrelationship between church and state. There was a strong sentiment among
many of the delegates taking part in the Constitutional Convention that any attempt
to address the relationship between religion and the government would result in a
failure to ratify the new constitution. The concerns of many members of the
Constitutional Convention were reflected by John Adams when he noted that
“Congress [should] never meddle with religion further than to say their own
prayers, and to fast and to give thanks once a year” (Greene, 1941, p. 83). While
many of the delegates had serious concerns about the inclusion of any reference to
religion in the new constitution, other participants believed that the founding
document granted tacit approval for the establishment of a state-sponsored religion
because of the absence of any reference to the relationship between church and
state.

The general consensus among the delegates was that since the newly drafted
federal constitution failed to address the issue of a separation of powers between
church and state, most of the state conventions would have serious reservations
about the ratification of the new document. Several states did, in fact, refuse to
approve the new constitution until there were guarantees that a bill of rights would
be drafted to provide for a variety of specified freedoms, including the right of
religious freedom and the prohibition against the establishment of a state-
sponsored religion by the newly created federal government. Alexander and
Alexander (2009) noted that the “uncertainty itself of whether such rights were
implied in the Constitution was evidence enough that a Bill of Rights protecting religious freedom and ensuring disestablishment was necessary” (p. 173).

The underlying reason for the difference of opinion in what is considered permissible under the United States Constitution often focuses on the various arguments about the original intent of the framers when they wrote both the Constitution and the Bill of Rights. Waldman (2008) observed that the ability to discern the intent of the framers has not been a topic of debate limited to today's legal scholars but was also a challenge for the Founding Fathers themselves as “they struggled to figure out some of the Constitution's original intent, and they were the ones who had done the intending” (p. xiii). The challenge in determining the intent of the Founding Fathers is also difficult since there was no one single philosophy that represented the beliefs of those responsible for the development of the Constitution. Views varied from those like Patrick Henry, who were strong advocates for the support of religious institutions by the state; to those on the other end of the philosophical spectrum led by individuals like James Madison, who strongly believed that the new country required a strict separation of church and state. Because there was such a diversity of views held by the framers, Waldman (2008) stated that it was important not to “generalize too much about what the Founding Fathers believed” (p. xv). Proponents on both sides of the church-state issue often refer to the writings of the Founding Fathers in support of their specific arguments. Waldman (2008) observed that in attempting to identify a specific
purpose with respect to the framers of the Constitution, “the original intent was, intentionally, murky” (p. xiii).

In addition to the difficulty of attempting to discern the intent of the Founding Fathers, it is also important to consider the practical realities faced by the leaders of the new constitutional republic and how they related to the issue of separation between church and state. As noted by Current, Williams, and Freidel (1979), many of “the responsibilities facing the first president and the first Congress were in some ways greater than those facing any president or Congress to follow” (p. 153). While the Constitution provided a general framework for how the new government was to be organized, the specifics were left to the new members of both the executive and the legislative branches of government. The president and Congress also had the responsibility of establishing the parameters of the judicial branch for the new federal government. Cohen (1989) observed that both at its inception and throughout its early history, the Supreme Court was not an institution that met at frequent intervals. Fewer than a dozen cases were heard on an annual basis in the early years of the Court. Additionally, it is important to note that cases involving the First Amendment “were unknown in the Supreme Court prior to the twentieth century” (Cohen, 1989, p. 12). It is difficult to determine how the Founders would have interpreted the Establishment Clause on the basis of the judicial record because legal issues that focused on church-state relationships were never confronted by the federal court system during the early history of the United States.
Finally, is it important to note that the issue of public education was not addressed in the newly ratified federal constitution. The passage of the Tenth Amendment in 1791 as part of the initial Bill of Rights explicitly stated that any “powers not specifically delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people” (*United States Constitution*, 1791). As Waldman (2008) observed, for even those Founding Fathers who took a strict constructionist’s view of the Constitution, they would “reluctantly have to concede that the First Amendment would only apply to the federal government, not to state or local governments, which could aid – or even oppress – religion as much as they wanted” (p. xiii). This sentiment was echoed by Alexander and Alexander (2009) as they noted that during the early history of the new republic, many of the states had “instances of religious opposition to the creation of public schools intertwined with attempts by various religious groups to encroach on the public school curriculum and to obtain tax funds to support their own sectarian schools” (p. 180).

The historical record is filled with examples from across the United States of the extensive interrelationship between the public schools and a variety of religious denominations throughout the nineteenth century and well into the first half of the twentieth century. Beginning with the second half of the twentieth century however, the federal judiciary began to address a variety of issues related to the association between religion and the government. As this review continued into the next phase of its examination, the legal precedents established through the various rulings of
the Supreme Court from the previous century provided an opportunity to discern how the judicial branch would begin to interpret the federal government’s responsibility of ensuring that the constitutional principle of disestablishment extended into the sphere of public education.

The Establishment of a Judicial Standard

A significant relationship between the sectarian and secular components of American society has existed throughout most of the nation’s history. As previously observed, prior to the middle of the twentieth century, the federal judiciary had not been called upon to render any decision with respect to the Establishment Clause and its applicability to the states. In leading up to the landmark decision of the United States Supreme Court in the case *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this segment of the review focused on the judicial history prior to the Court’s ruling in *Lemon* and the legal path the Court took in arriving at that judgment.

The historical record with respect to the applicability of the First Amendment to governmental entities other than at the federal level, begins with the case *Cantwell v. Connecticut*, 310 U.S. 296 (1940). In *Cantwell*, the United States Supreme Court determined that a state statute had the effect of violating the religious expression guarantees of the First Amendment as applied to the individual states through the Due Process Clause of the Fourteenth Amendment when it reversed a ruling of the State Supreme Court of Connecticut. While the specific aspects of the case focused on the rights of Newton Cantwell and his two sons to
peacefully promote their religious beliefs without having to fulfill a state-mandated requirement to obtain a permit from the local secretary of the public welfare council, the relevance of Cantwell is evidenced through the legal precedent established by the Supreme Court.

The Court declared that a Connecticut statute requiring a permit be obtained before the Cantwells could promote their religious beliefs “deprive[d] them of their liberty without due process of law in contravention of the Fourteenth Amendment” (Cantwell v. Connecticut, 1940, p. 303). Furthermore, the Court held that “the fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment” (Cantwell v. Connecticut, 1940, p. 303). The importance of the decision reached by the Court in Cantwell was in its determination that the freedoms established under the First Amendment no longer applied to only the federal government, but that through the application of the Due Process Clause of the Fourteenth Amendment, the individual states were now held to the same constitutional standard.

The impact of the Supreme Court’s decision in Cantwell opened a variety of federal legal challenges in areas previously considered the exclusive domain of the states. As a political subdivision of the state, public school systems increasingly became one of the targets of legal disputes questioning the constitutionality of a number of long-standing practices and policies, some having been in place for significant periods of time. The first case to challenge the constitutionality of a state’s education policy was heard by the Supreme Court only six years after the
decision in Cantwell when the case Everson v. Board of Education of the Township of Ewing, 330 U.S. 1 (1947) was argued before the high court.

In Everson, the Supreme Court was faced with the question of whether a New Jersey statute authorizing local school districts to reimburse parents for the daily travel-related expense of sending their children back and forth to a parochial school violated both the Due Process Clause of the Fourteenth Amendment as well as the Establishment Clause of the First Amendment. The Court was asked to address two legal issues in rendering its decision in Everson. The first question examined by the Court, related to whether the New Jersey statute violated the Due Process Clause of the Fourteenth Amendment on the grounds the state had taken the private property of one individual through the process of taxation and then given it to another individual to be used for his or her own private purpose. In dismissing this first argument, the Court declared “that a public purpose will be served by using tax raised funds to pay for the bus fares of all school children, including those who attend parochial schools” (Everson v. Board of Education, 1947, p. 6). The Court additionally asserted that when “a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need” (Everson v. Board of Education, 1947, p. 6). The Supreme Court also acknowledged the precedent established in Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930) in further support of its finding where the Court had previously declared that the use of tax funds to provide free text books for
both public as well as private school children did not violate the Due Process Clause of the Fourteenth Amendment.

The Supreme Court next focused on the assertion that the New Jersey statute also violated the Establishment Clause of the First Amendment. In responding to this second question, the Court began with an extensive examination of the early history of the United States along with many of the practices that took place throughout the colonial period. In support of its assertion that the federal constitution required the state and religious institutions to operate independently of one another, the Court noted that “the centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by the established sects determined to maintain their absolute political and religious supremacy” (Everson v. Board of Education, 1947, p. 8). The Court also acknowledged that it was a direct result of many of these practices having transpired during the infancy of America’s history that gave rise to the adoption of the First Amendment with its guarantees for religious freedom.

As part of its extended discussion, the Court noted that because many of these religious practices “became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence,” the colonists throughout the early American settlements responded to the relationship between civil and religious authority with a strong “sentiment that culminated in [the] adoption of the Bill of Rights’ provisions embracing religious liberty” (Everson v. Board of Education, 1947, p. 11). It is also
important to note that in arriving at its decision, the Court relied, at least in part, on some of the writings of the Founding Fathers. The Court specifically acknowledged the writings of both Thomas Jefferson and his authorship of the *Virginia Bill for Religious Liberty* as well as James Madison’s *Memorial and Remonstrance Against Religious Assessments* as further examples of the proposition that it was necessary for the roles of church and state to operate independently of one another.

The Court defined what it perceived to be the role of the Establishment Clause in rendering its decision in *Everson* when it noted, in part, that:

... the First Amendment means at least this: neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbelief, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. (*Everson v. Board of Education*, 1947, p.15-6)

The Court once again issued its well known declaration, first delivered in the case *Reynolds v. United States*, 98 U.S. 145 (1878), when it observed that “the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and state’” (*Everson v. Board of Education*, 1947, p.16).

In resolving the Establishment Clause aspect of the dispute at issue in *Everson*, the Court noted that it would have to balance its approach in order to protect “the citizens of New Jersey against state-established churches” while simultaneously ensuring that its decision would “not inadvertently prohibit New
Jersey from extending its general state law benefits to all citizens without regard to their religious belief[s]” (*Everson v. Board of Education*, 1947, p. 16). In upholding the decision of the New Jersey appellate court, the Supreme Court determined that the First Amendment required “the state to be neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary” (*Everson v. Board of Education*, 1947, p. 18). The Court once again referenced Thomas Jefferson’s famous “wall of separation” metaphor in its concluding remarks, noting that “the First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach” (*Everson v. Board of Education*, 1947, p.18).

Alexander and Alexander (2009) observed that the decision rendered by the Court in *Everson* reaffirmed its support of a legal concept referred to as the child benefit doctrine (p. 184). In upholding the decision in *Everson*, the Court determined that the New Jersey statute had been designed for a general purpose. The Court “reasoned that the funds were expended for the benefit of the individual child and not for religious purposes” under the philosophy of the child benefit doctrine (Alexander & Alexander, 2009, p. 184). While the Supreme Court continued to address a number of issues in the ensuing years as they related to the relationship between religion and public education, the next significant advancement in the legal jurisprudence that revolved around the constitutionality of state actions involving the public education system was addressed by the Court when it rendered its

In *Board of Education v. Allen*, the Supreme Court was asked to review a decision of the Court of Appeals for the state of New York after the state appellate court had upheld the legality of a statute requiring local public school systems to provide all secondary students with the opportunity to use state-provided textbooks without cost to the child. The statute applied to any student that attended any school meeting the compulsory attendance laws of the state that resided inside the boundaries of the district. The Court of Appeals noted in its decision that the state legislature had amended § 701 of the New York Education Law in order to provide textbooks to all students based on a determination that "public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state" (*Board of Education v. Allen*, 1967, p. 114).

The Supreme Court upheld the findings of the state appellate court in its declaration that New York's policy for loaning textbooks to all students did not violate the Establishment Clause of the federal constitution. The Court noted the precedent set forth in *Everson* as being applicable to the textbook program at issue in *Allen*. The Court also took note of the growing body of federal case law that provided the legal foundation for upholding New York's textbook policy as permissible under the Establishment Clause. In referencing its previous decisions, the Supreme Court noted that two tests for determining the constitutionality of a
state action had evolved. First, the Court recognized that the stated goal of the action under scrutiny was required to have a secular purpose. The Court affirmed the secular purpose of the state textbook statute when it recognized “that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience” (Board of Education v. Allen, 1968, p. 247).

The second test the Court recognized through its ruling in Allen was the primary effect test. Citing the precedent established in School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203 (1963), the Court reaffirmed its position that a statute must have “a primary effect that neither advances nor inhibits religion” (Board of Education v. Allen, 1968, p. 243). In applying the primary effect test to § 701 of the New York Education Law, the Court found that no evidence had been presented that indicated there were any aspects “about the necessary effects of the statute that [were] contrary to its stated purpose” (Board of Education v. Allen, 1968, p. 243).

In addition to its support of the two tests previously enunciated by the Court, the decision in Allen also addressed the argument that supplying textbooks was significantly different from providing reimbursement for transportation expenses due to the fact that textbooks were considered an integral component of the instructional process. The Court noted that while parochial schools did perform a sectarian function, it was also important to acknowledge that “a wide segment of informed opinion, legislative and otherwise, had found that those schools do an
acceptable job of providing [a] secular education to their students” (*Board of Education v. Allen*, 1968, p. 248). The Court opined that it was on the basis of the secular, not the religious aspects of the parochial school’s educational program, that the New York legislature’s decision to extend the availability of textbooks to all secondary school students did not violate the Establishment Clause of the First Amendment.

Alexander and Alexander (2009) noted that the ruling in *Allen* “created many questions on the part of both public and parochial school leaders throughout the country” (p. 189). Based on the ruling in *Allen*, many educators believed that almost any aspect of a parochial school’s instructional program could be funded through public tax revenue as long as a secular purpose could be demonstrated. As a result of the Court’s ruling in *Allen*, “state legislatures were suddenly flooded with hundreds of bills to provide state support to parochial schools” (Alexander & Alexander, 2009, p. 189). Three years later, the Supreme Court would rule on whether this expanded perception of public support for sectarian schools was constitutionally permissible when it rendered its decision in the case *Lemon v. Kurtzman*, *403 U.S.* 602 (1971).

In issuing its decision in *Lemon*, the Supreme Court struck down the statutes of two states, Pennsylvania and Rhode Island, on the grounds that each states’ plan to provide salary supplements for nonpublic school teachers violated the Establishment Clause of the First Amendment. As previously noted, the uncertainty created by the Supreme Court through its ruling in *Allen* resulted in several state
legislatures electing to provide additional financial support for the nonpublic elementary and secondary schools in their states. In Rhode Island, this support for private, religiously-affiliated educational institutions was initiated through the state legislature’s approval of the Salary Supplement Act in 1969. The Act gave state officials the authority “to supplement the salaries of teachers of secular subjects in nonpublic elementary schools by paying directly to the teacher an amount not in excess of 15% of his current annual salary” (Lemon v. Kurtzman, 1971, p. 607). The Act also required the state’s Commissioner of Education to evaluate the financial records of any nonpublic school participating in the program to determine if the expenditures were attributed to the secular aspects of the school’s instructional course of study. A federal court in Rhode Island concluded that the Act violated the Establishment Clause because “it fostered ‘excessive entanglement’ between government and religion” (Lemon v. Kurtzman, 1971, p. 609).

The Pennsylvania Legislature adopted a program that had many of the features that were similar to the statute enacted in Rhode Island. As the Court noted, Pennsylvania’s Nonpublic Elementary and Secondary Education Act, passed in 1968, gave the state’s Superintendent of Public Instruction the authority “to ‘purchase’ specific ‘secular educational services’ from nonpublic schools” (Lemon v. Kurtzman, 1971, p. 609). As with the Rhode Island program, the Pennsylvania statute required the schools contracted under the Act to maintain financial records that were subject to audit by the state. The Pennsylvania program, however, was different from its counterpart in Rhode Island in one significant respect. In Pennsylvania, the Act gave
the state the authority to “directly reimburse nonpublic schools solely for their actual expenditures for teacher’s salaries, textbooks, and instructional materials” *(Lemon v. Kurtzman, 1971, p. 609)*. The Rhode Island program, on the other hand, provided its financial assistance directly to any teacher of a nonpublic school meeting the criteria established by the state legislature who applied to the state for the salary supplement. In Pennsylvania, a federal court had determined that the Act was not a violation of the religious protection guarantees of the federal constitution.

In rendering its decision, the Supreme Court remarked on the challenges facing the legal system in interpreting what it referred to as “the lines of demarcation in this extraordinarily sensitive area of constitutional law” *(Lemon v. Kurtzman, 1971, p. 612)*. The Court noted that based on its own judicial history, three tests had evolved in order to determine the legitimacy of state actions with respect to the federal constitution’s Establishment Clause. The first test focused on the secular legislative purpose of the issue in question. The second test, as clarified in Allen, was the primary effect test that ensured the state’s action neither advanced nor inhibited religion. The final test, as established by the Court in *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), declared that a state action could not foster an excessive entanglement between the government and religion.

In its application of the first component of this three-part test, the Court concluded that in both the Rhode Island statute as well as the one in Pennsylvania, the legislative intent of each statute was to advance a secular purpose. Because the Court could find no basis in the argument that either state had enacted its respective
salary supplement statute in an effort to advance a religious organization, it reaffirmed the precedent established in *Allen* when it noted that the actions of the state legislatures “must be accorded [their] appropriate deference” (*Lemon v. Kurtzman*, 1971, p. 613). The Court did, however, find a defect in both laws when it applied the third test, related to the excessive entanglement between government and religion. Before its lengthy discussion into the rationale as to why both statutes violated the Establishment Clause on the basis of the excessive entanglement prong of its three-part test, the Court briefly noted that it was not necessary to “decide whether these legislative precautions restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses, for we conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves [an] excessive entanglement between government and religion” (*Lemon v. Kurtzman*, 1971, p. 613-4).

In addressing the legal defect of both statutes, the Court began with an acknowledgment that the activities permitted on the basis of its earlier rulings had found that the “secular, neutral, or nonideological services, facilities, or materials,” that were “common to all students were not thought to offend the Establishment Clause” (*Lemon v. Kurtzman*, 1971, p. 616-7). The Court observed, however, “that teachers have a substantially different ideological character from books” (*Lemon v. Kurtzman*, 1971, p. 617). While the Court did not assert that the teachers of secular subjects participating in each state’s respective salary-supplement program would intentionally violate the provisions of the state’s legislative plan of action, it did
recognize “that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral” (*Lemon v. Kurtzman*, 1971, p. 618).

In addition to the legal defects previously noted, the Supreme Court also acknowledged that the obligations imposed by each state law to implement their respective statutes required an ongoing process of monitoring the nonpublic schools by the state in order to guarantee that the use of public funds would not be utilized in any sectarian aspect of the parochial school’s instructional program. The Court differentiated both of the salary supplement programs with their extensive monitoring requirements from the cases it had previously adjudicated when it noted that “unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and [the] subjective acceptance of the limitations imposed by the First Amendment” (*Lemon v. Kurtzman*, 1971, p. 619). The Court noted that in order to guarantee that the principle of disestablishment would not be violated, “a comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that those restrictions are obeyed and the First Amendment otherwise respected” (*Lemon v. Kurtzman*, 1971, p. 619).

In striking down the salary support programs of both Rhode Island and Pennsylvania, the Court asserted that it was neither the value of nonpublic schools nor the quality of the instructional services they provided that were at issue in this case. The Court stated that its primary concern was how the implementation of these programs could be achieved against the backdrop of the religious clauses of
the First Amendment. The Court recognized that “while some involvement and entanglement are inevitable, lines must be drawn” (*Lemon v. Kurtzman*, 1971, p. 625). After the Supreme Court’s ruling in *Lemon* and the establishment of its three-pronged test, Alexander and Alexander (2009) noted that the rules created by the Court in *Lemon* continued to be applied for the following two decades (p. 199). While the tri-partite tests have been modified in some respects since they were first enunciated in 1971, the Court has continued to recognize the precedent it first established in *Lemon*. It was not until the final decade of the twentieth century, that the Court began to retreat from the tests it had instituted more than 20 years earlier. The final segment of this review examined how the Court has continued to draw back from its decision in *Lemon* in its ongoing attempt to discern the constitutional parameters of the Establishment Clause.

**The Move Away from Lemon**

The precedent established by the Supreme Court in *Lemon v. Kurtzman*, continued to be applied in a number of education-related, Establishment Clause cases subsequent to the Court’s initial decision in 1971. While continuing to recognize the standard established in *Lemon*, the Court began to retreat from its previous stance with respect to the importance it placed on the three tests it had devised in determining the constitutionality of state actions. Shortly after the Supreme Court had rendered its decision in *Lemon*, the tests it had devised were referred to as merely a “guideline” in the Court’s decision in *Committee for Public*

The Supreme Court upheld a decision of the United States Court of Appeals for the Eighth Circuit in Mueller, when it determined that a provision of a Minnesota state law which provided a tax deduction for certain expenses related to the education of elementary and secondary children did not violate the Establishment Clause of the First Amendment. The Court acknowledged that the Lemon test and its application in Establishment Clause case law had been “well settled,” however, the Court noted that “our cases have also emphasized that it provides ‘no more than [a] helpful signpost’ in dealing with Establishment Clause challenges” (Mueller v. Allen, 1983, p. 394). After highlighting this differentiation in the Supreme Court’s approach to resolving Establishment Clause issues, the Court proceeded to analyze the facts presented in Mueller in accordance with the three-prong test it had established in Lemon.

In its analysis, the Court observed that the provision of the Minnesota state law giving tax deductions for educationally-related expenses did not violate any of the tests outlined in Lemon. In addressing the first test, the Court noted that “a State’s efforts to assist parents in meeting the rising costs of educational expenses plainly serves [the] secular purpose of ensuring that the State’s citizenry is well
educated” (*Mueller v. Allen*, 1983, p. 395). The Court also rejected the argument that the statute violated the third prong of the *Lemon* test based on the assertion that it created an excessive entanglement between the state and religion. In dismissing this argument, the Court noted that the oversight required from the state in approving or rejecting specific tax deductions would “not differ substantially from making the types of decisions [already] approved in earlier opinions of this Court” (*Mueller v. Allen*, 1983, p. 403).

The Court took a more detailed approach, however, in its analysis of the second prong of the *Lemon* test. In addressing whether the tax deduction granted by Minnesota violated the primary effect aspect of the *Lemon* test, the Court emphasized the fact that not only was the tax deduction for educational expenses one of many possible benefits that were afforded the citizens of Minnesota, but also that the deduction was “available for educational expense incurred by all parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools” (*Mueller v. Allen*, 1983, p. 397). The Court also observed that a tax deduction “that neutrally provide[d] state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause” (*Mueller v. Allen*, 1983, p. 399).

The Supreme Court also rejected an argument that suggested the tax deduction violated the primary effect test because it had been specifically created only for the benefit of those citizens whose children attended private, religiously- affiliated schools. In dismissing this final dispute, the Court opined that the scrutiny
of statistical evidence demonstrating the impermissible effect of the statute on the basis of how any single tax benefit might be utilized was not an appropriate area of legal inquiry. In rejecting the argument, the Court stated that it “would be loath to adopt a rule grounding the constitutionality of a facially neutral law on [the basis of] annual reports reciting the extent to which various classes of private citizens claimed benefits under the law” (Mueller v. Allen, 1983, p. 401). After the Supreme Court’s decision in Mueller, the Court continued to recede from its position in Lemon when it noted one year later that “we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area” (Lynch v. Donnelly, 1984, p. 679).

Alexander and Alexander (2009) observed that when the Court rendered its decision in the case Lee v. Weisman, 505 U.S. 577 (1992), “there was speculation that the Supreme Court would overturn Lemon or establish a new test” (p. 199). The Court declared in its ruling in Lee, however, that it could “decide the case without reconsidering the general constitutional framework by which public schools’ efforts to accommodate religion are measured” (Lee v. Weisman, 1992, p. 587). As noted by Alexander and Alexander (2009), in place of the three-pronged test devised in Lemon, the Court now “applied a new standard – the coercion test” (p. 199). The Court observed through its decision in Lee, that “at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so’” (Lee v. Weisman, 1992, p. 587). While several of
the Supreme Court’s decisions have either altered or ignored the tests established by the Court in *Lemon*, the first substantive challenge to the authority set forth in *Lemon* was advanced by the Court when it handed down its ruling in the case *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993).

In *Zobrest*, the Court ruled whether the use of a sign language interpreter funded through the Individuals with Disabilities Education Act (IDEA) for a student attending a sectarian, nonpublic school, violated the Establishment Clause of the First Amendment. The Court determined that providing a sign language interpreter for a deaf student attending a parochial school was consistent with the Court’s philosophy “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” (*Zobrest v. Catalina Foothills School District*, 1993, p. 8). The precedent cited by the Court in asserting this authority was based on its decision in both *Mueller v. Allen*, 463 U.S. 388 (1983), as well as its ruling in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986). In both instances, the Court noted that the precedential value for each of the cases in support of its ruling in *Zobrest* was based on the fact that each of the previous cases dealt “specifically with government programs offering general educational assistance” (*Zobrest v. Catalina Foothills School District*, 1993, p. 9).

It is important to note that the premise for the Court’s decision in *Zobrest* relied on the concept of a government program that provided its benefits on a
neutral basis. The neutrality theory advanced by the Court in Zobrest was based on its previous rulings in both Mueller and Witters. As previously noted, the Supreme Court asserted in Mueller that the specific tax deduction for educationally-related expenses were generally available to all of the parents of school-aged children throughout the state. Additionally, the Court observed that this particular deduction was only one of many tax deductions that were established for the taxpayers of Minnesota. Likewise, in Witters, the Court determined that the extension of Washington state’s vocational assistance program to a blind student electing to attend a private Christian college to study for a career as a pastor was “part of a general state program” and that “any aid provided under Washington’s program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients” (Witters v. Washington Department of Services for the Blind, 1986, p. 487). The rulings of the Court in both Mueller and Witters established a foundation for the decision handed down in Zobrest. This evolving philosophy of Establishment Clause jurisprudence would continue to be transformed only a few years later when the Court announced its finding in the case Agostini v. Felton, 521 U.S. 203 (1997).

In Agostini, the Court was asked to determine if its Establishment Clause jurisprudence had been substantially modified to the point where its previous ruling in Aguilar v. Felton, 473 U.S. 402 (1985), the precursor to Agostini, was no longer valid. In Aguilar, the Supreme Court had declared that New York City's Title I federal educational program which was responsible for providing supplementary remedial
instructional services to disadvantaged children enrolled in both public as well as nonpublic schools, violated the Establishment Clause of the First Amendment. The Court had determined in *Aguilar* that the “Title I program necessitated an ‘excessive entanglement of church and state in the administration of [Title I] benefits’” as the program had been implemented for the students enrolled in the parochial schools (*Aguilar v. Felton*, 1985, p. 414). After the decision of the Supreme Court in *Aguilar*, the trial court was required to issue a permanent injunction against the New York City schools that prevented the district from using funds from the Title I program to provide educational services to eligible students on the premises of any sectarian school in the city. When the Supreme Court was called upon to address the issue of federal funding once again in *Agostini*, it noted that every local school district across the country had been required to significantly “modify its Title I program so it could continue serving those students who attended private religious schools” (*Agostini v. Felton*, 1997, p. 213). The Court also noted that as a consequence of its ruling in *Aguilar*, local school districts were now forced to incur substantially increased costs as a “result of implementing alternative delivery systems to comply with the requirements of *Aguilar*” (*Agostini v. Felton*, 1997, p. 213).

Based on a number of Supreme Court rulings subsequent to its initial decision in *Aguilar*, a group of parents of parochial school children filed suit requesting the injunction be lifted as a consequence of the changes in the “decisional law” of the Supreme Court. In rendering its decision in *Agostini* and ordering the district court to vacate its permanent injunction against the New York City public
school system, the Supreme Court noted that its approach in determining the effect prong of the *Lemon* test had been altered in two significant respects due to the outcome of several intervening Establishment Clause decisions. First, the Court acknowledged that since its ruling in *Aguilar*, the Court no longer held the opinion “that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state sponsored indoctrination or constitutes a symbolic union between government and religion” (*Agostini v. Felton*, 1997, p. 223). In dismissing this first argument, the Court cited its decision in *Zobrest*, noting that it had “refused to presume that a publicly employed interpreter would be pressured by the pervasively sectarian surroundings to inculcate religion by ‘adding to or subtracting from’ the lectures translated” (*Agostini v. Felton*, 1997, p. 224). The decision in *Zobrest* rejected the arguments advanced in *Aguilar* that a state employee’s presence in a sectarian school automatically indicated the employee was instilling the tenets of a particular faith in the students they served.

The second aspect of Establishment Clause jurisprudence that had changed as a result of the Supreme Court’s rulings since *Aguilar*, was the presumption “that all government aid that directly aids the educational function of religious schools is invalid” (*Agostini v. Felton*, 1997, p. 225). In resolving this second argument, the Court referenced its finding in *Witters* stating that funds “were made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted” (*Witters v Washington Department of Services for the Blind*, 1986, p. 487). The Court concluded that as a result of the decisions rendered
through both Zobrest and Witters, the Title I program previously declared unconstitutional in Aguilar, could no longer “as a matter of law, be deemed to have the effect of advancing religion through indoctrination” (Agostini v. Felton, 1997, p. 226).

Alexander and Alexander (2009) observed that the decision reached by the Court in Agostini had significantly changed how the Supreme Court interpreted Establishment Clause law (p. 200). The impact of the Court’s decision in Agostini did not substantially change the purpose test in the first prong established by Lemon. The philosophy of Establishment Clause jurisprudence based on the Court’s new interpretation, however, had significantly altered both the effect test of the second prong in Lemon as well as the excessive entanglement test of the third prong. With the decision rendered in Agostini, the Court continued to transform its views related to the permissibility of state action in the arena of Establishment Clause jurisprudence. The Supreme Court’s new pronouncement of the legitimacy of state actions with respect to the Establishment Clause was examined through the final case presented in this review with the Court’s decision in the case Mitchell v. Helms, 530 U.S. 793 (2000).

The issue addressed by the Supreme Court in Mitchell focused on the ability of private schools, including those with a religious affiliation, to participate in a federal aid program designed to supplement the instructional resources made available to schools. The specific issue in Mitchell dealt with whether private, religiously-affiliated schools receiving aid from Chapter 2 of the federal Educational
Consolidation and Improvement Act of 1981 violated the Establishment Clause of the First Amendment. As the Court noted, the aid program in Chapter 2 allowed “for the acquisition and use of instructional and educational materials, including library services and materials” (Mitchell v. Helms, 2000, p. 801). In its decision, the Court not only remarked on “the case’s tortuous history” over the span of the 15 years since the suit had initially been filed in 1985, but also acknowledged the challenges faced by the lower courts of the federal judiciary when it observed “the degree to which our Establishment Clause jurisprudence has shifted in recent years, while nevertheless retaining anomalies with which the lower courts have had to struggle” (Mitchell v. Helms, 2000, p. 804).

In recounting the extensive history of the case, the Court noted that once the issue had reached the United States Court of Appeals for the Fifth Circuit, the appellate court was faced with the dilemma of attempting to reconcile the disparate differences in the various rulings of the Supreme Court over the preceding several years. Additionally, the Court noted the difficulty with which the judicial system had “consistently struggled to apply these simple words in the context of governmental aid to religious schools” when attempting to interpret the Establishment Clause of the First Amendment (Mitchell v. Helms, 2000, p. 807).

In rendering its decision in Mitchell, the Court acknowledged the precedent established in Agostini and its modification of the three tests that had originally been enunciated in Lemon. In restructuring its modified tests for Agostini, the Court now only noted two tests: the first being the secular purpose test, and the second
being the primary effect test. While the Court did not reject the excessive entanglement test established in Lemon, it observed “that our cases discussing excessive entanglement had applied many of the same considerations as had our cases discussing primary effect, and we therefore recast Lemon’s entanglement inquiry as simply one criterion relevant to determining a statute’s effect” (Mitchell v. Helms, 2000, p. 808). While not declaring Lemon to be invalid, the Court acknowledged that its decision in Agostini had altered the three original tests devised in Lemon. The Court did make a determination, however, that both Meek v. Pittenger, 421 U.S. 349 (1975) as well as Wolman v. Walter, 433 U.S. 229 (1977) were “anomalies in our case law” and declared “that they are no longer good law” (Mitchell v. Helms, 2000 p. 809).

The Court once again utilized the concept of neutrality in providing its rationale for the decision rendered in Mitchell to determine if the issue under examination violated the effect test. In making a determination as to whether a particular action could be considered as religious indoctrination on the part of the state, the Court noted that it had:

... consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and areligious are all alike eligible for government aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government. (Mitchell v. Helms, 2000, p. 809)

The Court observed that the precedents established in Mueller, Witters, Zobrest, and Agostini all provided a foundation in support of the Court’s argument for the
principle of neutrality. Advancing the explanation first asserted in *Mueller* and subsequently re-affirmed in *Witters, Zobrest,* and *Agostini,* the Court reiterated its position that the benefits to individuals or groups were provided not at the direction of the government, but rather, were based on the “numerous private choices of individual parents of school-aged children” (*Mitchell v. Helms*, 2000, p. 813 citing *Mueller v. Allen*, 1983, p. 399).

In addition to the Supreme Court's explanation of how its changing Establishment Clause jurisprudence had restructured the three original tests it had devised in *Lemon,* the Court also responded in its opinion to the assertion advanced by the dissenting opinion of the Court that the Establishment Clause prohibited the distribution of funds to religiously-affiliated schools on the grounds that they were “pervasively sectarian” institutions. In a sharply-worded criticism of the dissent, the plurality opinion of the Court alleged that the hostility toward providing “aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow” (*Mitchell v. Helms*, 2000, p. 828).

The plurality opinion of the Court remarked on the extensive history of animosity that had been directed toward sectarian schools and acknowledged the consideration of the Blaine Amendment by the United States Congress during the nineteenth century as one such example of that hostility. The Court noted that this legislative action, had it passed, “would have amended the Constitution to bar any aid to sectarian institutions” (*Mitchell v. Helms*, 2000, p. 828). The Court further observed that from both a historical perspective, as well as under present
conditions, the use of terms such as “sectarian” and “pervasively sectarian” had been “applied almost exclusively to Catholic schools” (Mitchell v. Helms, 2000, p. 829). In rejecting the dissent’s perceived hostility toward sectarian schools, the plurality opinion of the Court noted that:

"... nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now." (Mitchell v. Helms, 2000, p. 829)

Alexander and Alexander (2009) observed that the decision reached by the Supreme Court in Mitchell has resulted in the “disassembling of the judicial precedents that had earlier in American history forbidden tax support for the benefit of sectarian schools” (p. 201). While not abandoning its decision in Lemon, the Court, through its subsequent decisions beginning with Mueller and Zobrest and ending with Mitchell has transformed a significant aspect of constitutional law. As noted in the introduction of this study, because of these significant modifications in the Supreme Court’s interpretation of Establishment Clause jurisprudence, the purpose of this dissertation was to address how the federal judiciary has continued to render its decisions in light of the uncertainty as evidenced by the Supreme Court through their various judicial rulings. The methodology was used in examining the research questions posed at the beginning of this study is presented in Chapter 3.
CHAPTER 3

THE METHODOLOGY OF LEGAL RESEARCH

A legal-historical approach was used to answer the research questions presented in Chapter 1. Schimmel (1996) observed that the legal research methodology can be described as an analytical process “that is neither qualitative nor quantitative” in nature, but rather, is viewed as “a systematic investigation involving the interpretation and explanation of the law” (p. 34). As first outlined in the introduction of this study and then more fully described in the historical review, the Establishment Clause became the subject of a significant level of litigation over the course of the past half-century. In order to more fully understand any future trends with respect to how the judicial system might address the potential constitutionality of specific state actions, the legal research model is utilized as the primary tool for analyzing the complex nature of a particular legal controversy. Through the careful application of legal analysis, a more comprehensive understanding of the law “will help educational leaders in discerning current responsibilities as well as in predicting future responsibilities and liabilities” (Redfield, 2002, p. xii).

Permuth and Mawdsley (2006) noted that due to “the historical nature of law and its reliance on precedent, legal research requires students to look to the past to locate authority that will govern the disposition of the question under investigation”
While the ultimate goal of the legal research model is the analysis of the law itself, the standard practice in beginning this method of examination is typically through the review of secondary sources of law. Wren and Wren (1986) noted that secondary sources are “essentially writings or commentaries about the law” (emphasis in original), and they generally “include such publications as legal treatises and law review articles” (p. 41). A generalized background about the particular topic is developed through the use of various secondary sources. Wren and Wren (1986) observed that the advantage of utilizing secondary sources as a starting point for legal research is the opportunity it provides to “develop an informed research approach” in order to determine the primary legal sources that will have to be used to answer the legal question under review (p. 65).

In order to have a deeper appreciation for the constitutional principles outlined in the historical review segment of this dissertation, the research for this study began with an overview of several secondary sources that focused specifically on an examination of the Establishment Clause of the First Amendment within the context of the public education system. While numerous resources were consulted as part of this study, the legal treatise *American Public School Law* (Alexander & Alexander, 2009) provided the fundamental background information on this topic. As more comprehensively explained earlier in this study, the concept of freedom of conscience along with the desire to achieve this goal has historically been one of the core beliefs of the American people and was reflected in many of the earliest organizing documents of the United States. In addition to the examination of this
topic from a legal perspective, it was important to provide a contextual background with respect to both the political and the philosophical perspectives from which many of these legal decisions have ultimately been rendered. This historical context was important not only for the purposes of this study, but has also been utilized by the judicial system itself as an occasional strategy in order to provide an appropriate frame of reference when rendering a decision about a particular legal issue. Blackman (2010) noted that when resolving questions related to the constitutionality of a particular issue, the judicial system has traditionally relied on a variety of historical documents in an effort to assist in its discernment of the original intent pertaining to the legal question they have been asked to address (p. 387). As with the legal aspects of this study, a similar approach was employed in the development of the contextual background for this research. While numerous secondary sources were utilized in order to develop the historical components of this study, the predominate narrative was drawn from American History: A Survey (Current, Williams, & Freidel, 1979).

Once the background information for a particular issue has been established, the primary source for any research involving a legal question is the law itself. Permuth and Mawdsley (2006) noted that the primary sources for legal researchers include: “constitutions, statutes (and their legislative histories), regulations (along with the administrative decisions and rulings that interpret them), and case law” (p. 8). Through the use of electronic finding tools, the legal researcher is able to search
the extensive online databases that contain millions of legal decisions (Permuth & Mawdsley, 2006, p. 19).

Because the research questions in this study focused on how the federal courts have interpreted the Establishment Clause of the First Amendment as it relates to the public school setting, the primary sources of law were limited to the published decisions of the United States Supreme Court and those of the lower courts within the federal judiciary. The resource that was used in order to conduct this search was the LEXIS/NEXIS® database. This electronic database provided accessibility to all published legal decisions at both the state and federal levels.

In order to answer the research questions presented in this study, a series of Boolean searches were utilized to locate the relevant cases for analysis. After limiting the parameters of the database search to only federal case decisions, a series of search terms were applied in order to locate the specific cases to be examined. The terms used in the search included: [name(school!) OR (educat!) AND “Helms w/2 Mitchell” AND “Establishment Clause”]. Through the use of these search terms, results were limited to federal cases that incorporated either the word “school” or some form of the term “educat!” within the text of the decision. The truncated use of the term “educat!” provided results that would include the following textual variations: “educate,” “education,” “educational,” “board of education,” and “educator.” The additional use of the AND connectors also limited results to those cases that included the term “Helms w/2 Mitchell,” in reference to the case *Mitchell v. Helms*, and the term “Establishment Clause,” requiring the
decision to reference the specific clause of the First Amendment under analysis. The search term "Helms w/2 Mitchell" limited the search of the database to only those cases that included the term “Helms” within two words of the term “Mitchell.” The purpose for the inclusion of the “w/2” link was to limit the database from producing results that might include only the names “Mitchell” or “Helms” within the text of the decision instead of returning those cases that specifically cited the case *Mitchell v. Helms*. A second search of the LEXIS/NEXIS® database included all of the terms from the first search with the additional term, “Lemon.” This second search provided results that also referenced the case *Lemon v. Kurtzman* within the text of the decision.

After the relevant cases were identified, each of the written opinions were individually reviewed, discarding those cases not specifically related to the research questions presented in Chapter 1. Through this search process, all of the published federal legal decisions subsequent to the judgment of the United States Supreme Court in *Mitchell v. Helms* in which the decision addressed an issue involving the Establishment Clause within the context of the public education setting were identified. This legal research process provided all of the relevant federal court decisions that were used to answer the research questions presented in this study. The analysis of each of those cases is presented in Chapter 4.
CHAPTER 4

CASE ANALYSIS

A total of 57 federal decisions citing the criteria referenced in Chapter 3 of the study were identified using the LEXIS/NEXIS® electronic database. As demonstrated in Figure 1, the breakdown of federal cases that included the terms “Establishment Clause” and “Mitchell w/2 Helms” consisted of 31 cases that were decided at the district court level, with an additional 23 decisions rendered by the various Circuit Courts of Appeal, and three cases that were decided by the United States Supreme Court.

Figure 1. Federal cases citing Mitchell and Establishment Clause.
A second search of the LEXIS/NEXIS® database was conducted with the same terms utilized in the first query, however, the second search also included the term “Lemon.” The results from the second inquiry are represented by the data presented in Figure 2. The distribution of cases identified with the additional search term included 25 cases that were decided at the district court level, with an additional 15 decisions rendered by the various Circuit Courts of Appeal, and only one case that was decided by the Supreme Court.

Figure 2. Federal cases citing Mitchell, Establishment Clause, and Lemon.

After the electronic searches were completed, each of the cases were reviewed to determine if the specific controversy presented in the legal dispute related to an issue associated with the research topic. Cases that were not related to
the field of public education were discarded. The analyses for each of the cases at the trial court level, the intermediate appellate level and the court of final appeal are presented in the subsequent sections of this chapter. In addition to a synopsis of each case, the analysis determined if the examining court utilized either the traditional three-pronged test established by the Supreme Court in *Lemon v. Kurtzman*, or if the revised test as outlined in *Mitchell v. Helms* was employed by the court as the judicial standard in rendering its decision. The first series of cases that were analyzed came from the decisions rendered at the district court level.

**District Court Decisions**

The LEXIS/NEXIS® database located a total of 31 Establishment Clause decisions that were rendered by the various federal district courts. As demonstrated in Figure 3, only eight of those decisions involved Establishment Clause issues within the context of public education. The remaining cases focused on a variety of topics ranging from the kosher food statutes in the State of New York (*Commmack Self-Service Meats, Inc. v. Rabbi Schulem Rubin*, 106 F. Supp. 2d 455 (E.D. N.Y. 2000)), and alleged violations of Title VII of the Federal Civil Rights Act of 1964 on the basis of religious discrimination (*Pedreira v. Kentucky Baptist Homes for Children, Inc.*, 186 F. Supp. 2d 757 (W.D. Ky. 2001)), to issues involving the provision of funding to churches as part of an overall city renewal plan to renovate portions of a downtown improvement district (*American Atheists, Inc. v. City of Detroit Downtown Improvement Authority*, 503 F. Supp. 2d 845 (E.D. Mich. 2007)), and the allocation of
funds to two churches through the general appropriations act of a state legislature (American Civil Liberties Union Foundation of Louisiana v. Blanco, 2007 U.S. Dist. LEXIS 74590 (E.D. La. 2007)). Of the eight cases that involved public education, the topics ranged from the content of an elementary school holiday program to the decision of a school district to hold its high school graduation ceremonies at a local church.

Figure 3. Public education cases decided by the district courts.

In addition to the eight cases meeting the criteria listed above, the LEXIS/NEXIS® search returned one additional case related to a question involving the Establishment Clause within the context of public education. The case Doe v. Indian River School District, 685 F. Supp. 2d 524 (Del. 2009), focused on the
constitutionality of a prayer policy at the beginning of school board meetings, however, it was selected as a result of an anomaly of the “Mitchell w/2 Helms” search criteria. The case was included among the search results due to the fact that the names of two of the school board members, Donna Mitchell and Reginald Helms, were listed as Defendants in the suit. Although the focus of Doe v. Indian River School District addressed an Establishment Clause question subsequent to the ruling of the Supreme Court in Mitchell v. Helms, the decision issued by the United States District Court for the District of Delaware did not render its findings on the basis of the precedents established by the Supreme Court in either Lemon or Mitchell. The analyses for each of the remaining eight cases that met all of the search criteria follows.

Sechler v. State College Area School District

The first district court case to raise an Establishment Clause question involving a public school system subsequent to the Supreme Court’s decision in Mitchell v. Helms took place in the United States District Court for the Middle District of Pennsylvania only a few months after the Supreme Court had rendered its decision in Mitchell. In Sechler v. State College Area School District, 121 F. Supp. 2d 439 (M.D. Pa. 2000), a federal district court considered whether the contents of an elementary school holiday program violated the Establishment Clause of the First Amendment on the grounds “that the Winter Holiday program was not ‘Christian enough’” (Sechler v. State College Area School District, 2000, p. 451).
The original suit, which initially contained two separate complaints, alleged that the practices of the school district with respect to both a volunteer program at State College Area High School and a winter holiday program at Corl Street Elementary School violated the First Amendment to the United States Constitution. The first part of the suit, alleging that Jarrod Sechler was prohibited from participating as a volunteer chaperone at the high school because of his role as a youth pastor at a local church was ultimately withdrawn. The district court was asked to render a decision as to the remaining question of whether the elementary school holiday program, along with a table display that included a variety of items related to the winter program, had created an environment that was hostile to the Christian religion. David Saxe alleged in his portion of the complaint that as he entered the school to attend the winter program, he “passed a table displaying a Menorah and a Kwanzaa candelabra” (Sechler v. State College Area School District, 2000, p. 441). In addition, the complaint noted that the table also contained books and other items that were generally related to the holiday season. Other than the Menorah and the candelabra, no additional religious artifacts were displayed.

Saxe also asserted in his complaint that the winter program contained a variety of secular holiday songs as well as two songs related to the celebration of Chanukah and one song identified with the observance of Kwanzaa. In his complaint, Saxe noted that “while the program encouraged participation in rituals related to Chanukah and Kwanzaa, there was no such encouragement to participate in rituals related to Christian Christmas” (Sechler v. State College Area School District, 2000, p.
In its decision, the district court went to great lengths to describe both the items represented on the table as well as the quantity and genre of the various songs performed at the holiday concert. In addressing the legal question as to whether the holiday program violated the Establishment Clause, the court noted the precedent set forth by the Supreme Court in *Lemon*.

The district court cited numerous prior examples related to the integration of secular as well as sectarian components in a variety of activities under the control of the state as being permissible under the Establishment Clause of the First Amendment. In rejecting Saxe’s complaint, the district court observed that none of the flaws as originally described in *Lemon* were present in *Sechler*. In dismissing Saxe’s allegation that the holiday program was “not Christian enough,” the court rejected “the argument that we somehow tally up points for religious symbols versus secular symbols. We also choose not to decide how many candy canes offset one Jesus” (*Sechler v. State College Area School District*, 2000 p. 451).

The only reference to the Supreme Court’s decision in *Mitchell* was mentioned in association with the three-pronged test established in *Lemon*. In a footnote to the *Sechler* decision, the district court noted that while Establishment Clause jurisprudence subsequent to the decision rendered by the Supreme Court in *Lemon* had modified the original three-part test, the Supreme Court had yet to declare the precedent established in *Lemon* was no longer valid.
The next case involving an Establishment Clause claim within the public school environment took place in the United States District Court for the District of Colorado. In this case, the court was asked to review the policies of the Jefferson County School District as they related to the modifications of an ongoing community art project at Columbine High School. The revisions were imposed in the aftermath of the student massacre that had recently occurred at the school. In *Fleming v. Jefferson County School District No. R-1*, 170 F. Supp. 2d 1094 (Colo. 2001), the policy decisions of several members of the local school board as well as individuals within the district’s administrative team were alleged to have violated both the Free Speech Clause and the Establishment Clause of the First Amendment. The suit, filed by the parents of several students who were victims of the Columbine High School massacre which had occurred in April of 1999, contended that the actions of school district officials had violated the parent’s First Amendment rights on the grounds that the district’s policies had created an environment hostile to religious expressions and as a result, had engaged in unconstitutional viewpoint discrimination.

Prior to the shooting incident at Columbine High School, two of the school’s art teachers had initiated what eventually came to be referred to as the “tile project.” As noted in the district court’s findings, the tile project, which had originally been confined to the high school Art Department, “consisted of the painting and preparation of ceramic tiles measuring approximately four inches by
four inches. The finished tiles were placed on the walls of the school hallways, initially in the art wing and the main hallways” (Fleming v. Jefferson County School District No. R-1, 2001, p. 1098). Due to the popularity of the project, it was eventually expanded to other academic departments within the school. The students continued to create ceramic tile images subsequent to the shooting incident in April of 1999. A significant number of these images now incorporated elements of the student massacre including depictions of broken hearts, tears, crosses, the names or initials of those students either killed or wounded in the incident, and the date of the student massacre.

During the summer of 1999, the school district decided that Columbine High School, which had been closed off and sealed by the Jefferson County Sheriff’s Department since the shooting, should be renovated and reopened for the beginning of the 1999 – 2000 school year. It was also proposed that the tile-painting project be utilized “as an activity to assist in community healing by allowing the community to ‘retake’ the school by participating in its restoration” (Fleming v. Jefferson County School District No. R-1, 2001, p. 1099). The expanded project was approved by the school district and continued throughout the summer of 1999. The expanded project not only included students and parents from Columbine High School but also permitted a variety of community stakeholders, who had been involved in some aspect of the response to the student massacre, to participate in the tile project as a part of the healing process.
The school district had developed some general guidelines that were to be used in conjunction with the modified tile project. As the court observed, the:

... primary concern with the continued tile project was that nothing be placed in the building that would be harmful to the students . . . to assure that the interior of the building would remain a positive learning environment and not become a memorial to the tragedy, [the administration] directed that there could be no references to the attack, to the date of the attack, April 20, 1999 or 4/20/99, no names or initials of students, no Columbine ribbons, no religious symbols, and nothing obscene or offensive. (*Fleming v. Jefferson County School District No. R-1*, 2001, p. 1099)

Several of the parents met with district administrators and expressed their concern over the restrictions that had been imposed by the school district. In a subsequent meeting, the school district relaxed some of its previous restrictions. However, the district continued to enforce its prohibition against incorporating religious symbols as a component of any tiles that would be displayed in the school. The parents filed suit in federal court alleging that the actions of the Jefferson County School District violated both the Free Speech and the Establishment Clauses of the First Amendment as well as the parents' free speech rights under the Colorado constitution. The parents sought an injunction from the court that would prohibit the school district from continuing its alleged discriminatory practices.

Much of the decision rendered by the court focused on the impermissible actions of the school district with respect to its alleged unconstitutional policy of limiting the free speech rights of the participants in the tile-painting project. The Court noted that the purpose of the tile project “was to promote the views and private expression of the Plaintiffs and other members of the community that were
invited to paint tiles as part of the healing process subsequent to the shootings” (Fleming v. Jefferson County School District No. R-1, 2001, p. 1107). In rendering its decision on the issue of the Free Speech violation, the district court determined that the tile project constituted private speech and that a reasonable observer would conclude that the content of the tiles were merely displayed but not endorsed by the school district.

In addressing the allegation that the Jefferson County School District also violated the Establishment Clause of the First Amendment, the court determined that the actions of the school district to prevent the display of those tiles that included religious symbols did not violate the requirements of the United States Constitution. The court noted that while the recent decisions of the Supreme Court had created a degree of uncertainty as to whether the Establishment Clause tests enunciated in Lemon were still valid, the district court would utilize the modified three-part test in determining if the school district’s actions violated the First Amendment. In dismissing the parent’s claim against the school district for the alleged Establishment Clause violation, the district court observed that the plaintiffs had failed to cite a single legal precedent in substantiating their argument that an unconstitutional action had been supported on the part of the school district. The court applied each of the criteria as set forth in Lemon and concluded that the effect of the school district’s policy did not violate any of Lemon’s three tests. While the court determined that the Jefferson County School District had not violated the Establishment Clause of the First Amendment as a result of its tile project policy, it
did find that the district’s actions were impermissible viewpoint discrimination under the Free Speech Clause. The district court ordered the school district to display the additional tiles that included religious symbols as a component of the tile’s design in addition to the other tiles that had already been installed.

*Kitzmiller v. Dover Area School District*

In *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707 (M.D. Pa. 2005), the United States District Court for the Middle District of Pennsylvania was asked to render a decision as to the constitutionality of a school board policy that required ninth grade biology teachers to read an introductory statement prior to the teaching of Darwin’s theory of evolution. The statement read, in part, that:

... because Darwin’s Theory is a theory, it continues to be tested as new evidence is discovered. The Theory is not a fact. Gaps in the Theory exist for which there is no evidence. A theory is defined as a well-tested explanation that unifies a broad range of observations.

Intelligent Design is an explanation of the origin of life that differs from Darwin’s view ...

With respect to any theory, students are encouraged to keep an open mind. The school leaves the discussion of the Origins of Life to individual students and their families ...

*(Kitzmiller v. Dover Area School District, 2005, p. 761)*

Several parents with children enrolled in the Dover Area School District filed suit in response to the adoption of the board resolution alleging that the policy violated both the Establishment Clause of the First Amendment as applied to the states through the Fourteenth Amendment as well as the Constitution of the
Commonwealth of Pennsylvania. The parents asserted that the policy violated the Establishment Clause on the grounds that intelligent design (ID) was not a scientific theory, but rather was an attempt by the school board to present an alternative view of the origins of life based on a premise that life had developed as the result of supernatural forces.

The district court recounted through a detailed analysis of the judicial history related to the teaching of the theory of evolution, the numerous cases that had been adjudicated at both the state and federal levels with respect to the issues of Darwin’s theory as well as competing theories of creation science. In addition, the court provided an exhaustive accounting of the expert witness testimony that was utilized by both parties to advance their individual arguments. In its decision, the district court noted that:

[After a six-week trial that spanned twenty-one days and included countless hours of detailed expert witness presentations, the Court is confident that no other tribunal in the United States is in a better position than are we to traiipse into this controversial area. (Kitzmiller v. Dover Area School District, 2005, p. 735)]

The court also noted that its detailed analysis was important not only because it was “essential to our holding that an Establishment Clause violation has occurred in this case, but also in the hope that it may prevent the obvious waste of judicial and other resources which would be occasioned by a subsequent trial involving the precise question which is before us” (Kitzmiller v. Dover Area School District, 2005, p. 735).

In determining the legal analysis to be applied in Kitzmiller, the court noted the legal precedents that had been established by both the United States Supreme
Court, as well as the rulings of the Third Circuit, which had jurisdiction over the district court. The court noted that both the Lemon test as defined by the Supreme Court and the endorsement test as implemented by the Supreme Court in the case County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989) provided the appropriate legal framework that was to be applied in Kitzmiller. In its application of the endorsement test, the court declared after an extensive account of the expert scientific testimony, that the ID policy approved by the Dover Area School District could only be viewed “as a strong official endorsement of religion” (Kitzmiller v. Dover Area School District, 2005, p. 724). The district court based its conclusion on the comprehensive expert witness testimony presented throughout the trial, which led to the determination that “the argument for ID is not a new scientific argument, but is rather an old religious argument for the endorsement of God” (Kitzmiller v. Dover Area School District, 2005, p. 718).

After making its determination that Dover’s ID policy failed on the basis of the endorsement test, the district court next applied both the secular purpose and the primary effect tests to determine if the Board’s ID policy could withstand constitutional scrutiny on the basis of Lemon. In addressing both aspects of the Lemon test, the court reviewed the extensive history of the Dover Area School District Board of Directors and the actions of two of its members in particular, as the Board sought to implement its ID policy. The court observed that while much of the testimony from school board members was “largely inconsistent and non-credible,” there were aspects of the district’s testimony that clearly demonstrated the basis
from which the Board made its decision to implement the ID policy (*Kitzmiller v. Dover Area School District*, 2005, p. 751). The court recounted the specific testimony of one of the board members in its ruling as only one of numerous examples of how the intent of the Board’s actions were not based on a secular purpose when the board member stated at a school board meeting prior to the adoption of the ID policy:

“I challenge you (the audience) to trace your roots to the monkey you came from.” He said that while growing up, his generation read from the Bible and prayed during school. He further said “liberals in black robes” were taking away the rights of Christians and he said words to the effect of “2000 years ago someone died on a cross. Can’t someone take a stand for him?” (*Kitzmiller v. Dover Area School District*, 2005, p. 752)

The court also observed that not only did most of the board members who voted to implement the ID policy lack the “background in science to evaluate ID,” but that several board members also stated “that they failed to understand the substance of the curriculum change adopted” by the Board (*Kitzmiller v. Dover Area School District*, 2005, p. 758).

Finally, in declaring that the ID policy of the Dover Area School District violated the Establishment Clause on the basis of its failure to pass both the endorsement test in *Allegheny* as well as the secular purpose test devised in *Lemon*, the court noted that while the theory of evolution was not perfect, those shortcomings should not serve as the basis for advocating the introduction of “an untestable alternative hypothesis grounded in religion into the science classroom”
(Kitzmiller v. Dover Area School District, 2005, p. 765). The district court concluded its decision by observing in a scathing commentary that:

Those who disagree with our holding will likely mark it as the product of an activist judge. If so, they will have erred as this is manifestly not an activist Court. Rather, this case came to us as the result of the activism of an ill-informed faction on a school board, aided by a national public interest law firm eager to find a constitutional test case on ID, who in combination drove the Board to adopt an imprudent and ultimately unconstitutional policy. The breathtaking inanity of the Board’s decision is evident when considered against this backdrop which has now been fully revealed through this trial. The students, parents, and teachers of the Dover Area School District deserve better than to be dragged into this legal maelstrom, with its resulting utter waste of monetary and personal resources. (Kitzmiller v. Dover Area School District, 2005, p. 765)

Bay Shore Union Free School District v. T.

The next legal challenge that involved an Establishment Clause claim within the public school environment was decided in Bay Shore Union Free School District v. T., 400 F. Supp. 2d 230 (E.D. N.Y. 2005). In Bay Shore, the local school district had appealed the decision of a special education administrative hearing officer that required the district to provide an instructional aide for an elementary school child who was attending a private, religiously-affiliated school. The special education placement committee had determined that the child met the requirements established for receiving special education services and had further decided that an instructional aide would be an appropriate service for meeting the instructional needs of the student. The committee noted, however, that any services provided by the aide would have to be rendered in a public school setting and not in the child’s
private school classroom. The special education placement committee stated that in order to receive the services provided by the school district, the child would have to travel from his private school campus to the public school. The school district asserted that the requirements of the New York Education Laws mandated that students enrolled in nonpublic schools could only “receive such services in regular classes of the public school and shall not be provided such services separately from pupils regularly attending the public schools” (Bay Shore Union Free School District v. T., 2005, p. 236).

In upholding the decision of the State Review Officer, the district court noted that the school district had previously provided instructional “services to children who attended private school if traveling between the private and public schools would cause too much disruption in the child’s school day and would take away from their academic experience” (internal quotes omitted) (Bay Shore Union Free School District v. T., 2005, p. 248). The court also addressed the ambiguity in the specific New York statutes that provided the legal framework for the issue in question. The court noted that:

In this important area of the law, courts and administrative agencies require guidance. An appeal to the Court of Appeals for the Second Circuit and certification to the New York Court of Appeals may be useful. The matter is of grave importance to the parties. It is likely to arise again and again. (Bay Shore Union Free School District, 2005, p. 234)

While the Establishment Clause was not specifically addressed by either of the parties in Bay Shore, the district court noted the precedent established by the United States Supreme Court in both Zobrest v. Catalina Foothills School District, 509
U.S. 1 (1993), as well as *Mitchell v. Helms*, 530 U.S. 793 (2000). The court observed that from a federal perspective, the decisions in both *Zobrest* and *Mitchell* demonstrated that the neutrally applied arrangement for special education services within the child's private school classroom could not be viewed as a violation of the Establishment Clause of the First Amendment.

*Katter v. Ohio Employment Relations Board*

In *Katter v. Ohio Employment Relations Board*, 492 F. Supp. 2d 851 (S.D. Ohio 2007), the United States District Court for the Southern District of Ohio was asked to render a decision as to the constitutionality of a provision of the state's collective bargaining statutes that exempted some public employees, if they met specific conditions as outlined in the law, from a requirement to join an employee organization. Carol Katter, a public school teacher employed by the St. Marys City Schools had never joined a labor union throughout her nearly 20-year career as an educator. Ms. Katter asserted that as a Roman Catholic, the tenets of her faith held a strong religious conviction as it related to the topic of abortion. Katter also asserted that because of those religious beliefs, she had never joined the local teacher's union because of its support for abortion rights. While Ms. Katter had never previously been required to join the local teacher's union, the union and the school district had "entered into a new collective bargaining agreement" that required Ms. Katter "to either join the Union or pay an agency fee to the Union as a condition of employment" (*Katter v. Ohio Employment Relations Board*, 2007, p. 854).
The Ohio State Collective Bargaining statutes provided an exemption from the membership requirements for those public employees who were “member[s] of and adhere[d] to established and traditional tenets or teachings of a bona fide religion or religious body” (Katter v. Ohio Employment Relations Board, 2007, p. 854). Additionally, the law allowed public employees who had an objection to joining an employee organization “to pay an amount of money equal to the fair share fee to a nonreligious charitable fund” after they were granted an exemption from the State Employment Relations Board (Katter v. Ohio Employment Relations Board, 2007, p. 854). The board denied Ms. Katter’s request for an exemption on the grounds that she could not provide any written documentation that the doctrines of her faith excluded her from joining a labor union. Carol Katter filed suit in federal district court alleging that the state’s exemption policy violated the Establishment Clause on the grounds she had been denied an “accommodation because she is not a member of a church with doctrines approved by the State of Ohio” (Katter v. Ohio Employment Relations Board, 2007, p.854).

In rendering its decision and declaring that the state statute violated the Establishment Clause of the First Amendment, the district court applied the revised, two-prong test as enunciated in Mitchell. Citing the principle of neutrality as articulated in Mitchell, the court noted that the statute “facially differentiate[d] between religions” and that the statute created “a denominational preference by providing special treatment to members of the religious organizations described in the statute” (Katter v. Ohio Employment Relations Board, 2007, p. 862). The court
observed that the statute only provided an exemption if the employee’s faith had demonstrated an historical objection to an adherent’s participation in an employee organization. The court determined that based on the language of the statute, the board provided preferential treatment through the exemptions it granted to members of some religious denominations while denying the requests of members belonging to other faiths. The district court declared that the statute violated the Establishment Clause and issued a permanent injunction preventing the state from its continued enforcement of the law.

*Incantalupo v. Lawrence Union Free School District No. 15*

The United States District Court for the Eastern District of New York was once again called upon to render a decision related to an Establishment Clause question in the field of public education when it heard the case *Incantalupo v. Lawrence Union Free School District No. 15*, 652 F. Supp 2d 314 (E.D. N.Y. 2009). In *Incantalupo*, the court reviewed the practices of the Lawrence Union Free School District and its proposed district Consolidation Plan. The court was asked to determine if the actions of the local school board through its implementation of the plan had violated the Establishment Clause of the First Amendment. In rendering its decision, the court recounted the history of the school district and its gradual population shift due to the influx of a large number of Orthodox Jewish citizens. The court noted that over time, as the Orthodox Jewish population continued to grow, many Orthodox Jewish families elected “to educate their children in private
seminaries, known as ‘yeshivas’” in order to pass on the religious heritage of their faith (Incantalupo v. Lawrence Union Free School District No. 15, 2009, p. 318). The court also acknowledged that as the Orthodox Jewish community continued to grow, larger numbers of Orthodox Jewish families opted to send their children to the yeshivas instead of the local public school system.

As the court noted, beginning in either 2000 or 2001, the “Orthodox community began to assert itself politically” (Incantalupo v. Lawrence Union Free School District No. 15, 2009, p. 318). The court also observed that over the course of several years, the school district began to experience difficulties in meeting their financial obligations. The school district’s superintendent stated that because the district’s financial reserves had been depleted, a tax increase would be required in order to maintain its operating budget. The court noted that for several years the district would “propose increased school spending, and each time the Orthodox community mobilized to defeat it” (Incantalupo v. Lawrence Union Free School District No. 15, 2009, p. 319). The court observed that in 2006 the results of the local school board election saw the ascension of four members of the Orthodox Jewish community to the Lawrence school board. The following year, two additional school board members were also elected to the Lawrence school board with the strong support of the Orthodox Jewish community. As the court noted, of the six-member majority of the Lawrence school board, five of the six members sent their children to the yeshivas and not the public schools.
In 2007, the school district hired a consulting firm to assist the district in studying options for the consolidation of several schools within the district. The court noted that the consulting firm eventually “issued its report, which allegedly recommended against implementing the Consolidation Plan” (Incantalupo v. Lawrence Union Free School District No. 15, 2009, p. 321). Despite the report from the district’s consultants which had recommended against proceeding with the Consolidation Plan, the school board announced its decision to close the newest elementary school in the district for a variety of reasons “ranging from declining enrollment to the present economic situation to safety concerns” (Incantalupo v. Lawrence Union Free School District No. 15, 2009, p. 321). Several parents filed suit in federal district court alleging that the decision of the school board had been made for political reasons and that the ultimate intent of the school board was “to sell or lease School Number 6 to a yeshiva” (Incantalupo v. Lawrence Union Free School District No. 15, 2009, p. 321).

In rendering its decision, the district court noted that the appropriate method for determining the validity of the allegations was the familiar three-pronged test devised by the Supreme Court in Lemon. The court focused on each of the tests in Lemon in reaching a conclusion that the school board’s decision to implement its Consolidation Plan was not a violation of the Establishment Clause. In addressing the secular purpose test from Lemon, the court noted that the overall goal of the plan was to generate revenue for the school district in order to lower the district’s tax rate. The court observed that decreasing the financial burden on all of
the taxpayers of the Lawrence school district was “indisputably, a secular purpose. Furthermore, [the] Plaintiff’s own pleadings acknowledge that this purpose is genuine and not a sham” (Incantalupo v. Lawrence Union Free School District No. 15, 2009, p. 323). In applying the primary effects test, the court noted that the District’s Consolidation Plan was not only facially neutral from a religious perspective, but that the benefit it provided to every individual taxpayer in the Lawrence school district through a lower tax rate would help the citizens of that community afford many things, including tuition for parochial education. The district court referenced the ruling of the Supreme Court and the high court’s decision in Mueller v. Allen, 463 U.S. 388 (1983), in support of its own finding that the school district’s Consolidation Plan had not been implemented in order to either advance or inhibit any religion. The district court stated that:

... if lower taxes and school spending are not unconstitutional by themselves (and they most assuredly are not), these policies do not become unconstitutional simply because some taxpayers might spend their own money as they see fit, in support of their own preferred religious institutions. (Incantalupo v. Lawrence Union Free School District No. 15, 2009, p. 326)

In addressing the third test established in Lemon, the court noted that the plaintiff’s assertion of impermissible entanglement came from the “alleged fact that most Orthodox Jews in Lawrence support the Consolidation Plan, while most of Lawrence’s other residents do not” (Incantalupo v. Lawrence Union Free School District No. 15, 2009, p. 328). In rejecting this final argument, the court noted that the plaintiff’s proposed remedy to the constitutionally protected right of the Orthodox Jewish community in Lawrence to have a difference of opinion about the
governance of the Lawrence Union Free School District and their desire to advocate for a religiously neutral policy of reducing the cost of operating the district “lies at the ballot box, not the federal court system” (Incantalupo v. Lawrence Union Free School District No. 15, 2009, p. 328).

Doe v. Mount Vernon City School District Board of Education

The next judicial proceeding that involved an Establishment Clause claim within the public school environment was rendered in Doe v. Mount Vernon City School District Board of Education, 2010 U.S. Dist. LEXIS 34590 (S.D. Ohio 2010). In this case, John Freshwater, a 22-year veteran teacher with the Mount Vernon City School District, had been terminated from his position as a result of an injury sustained by one of his eighth grade students during a science experiment. Several months after the science experiment incident, the parents discovered that Mr. Freshwater had several copies of the Ten Commandments on display in his classroom as well as a box of Bibles stored in a back corner of his room. The Bibles were used by the Fellowship of Christian Athletes, a student group for which Mr. Freshwater served as the faculty advisor.

Subsequent to the parents’ discovery of the religious materials in Mr. Freshwater’s classroom, they filed suit in federal district court alleging a violation of the Establishment Clause of the First Amendment on the part of both the school district and the teacher. Additionally, a battery charge was filed against the teacher for the science experiment incident from the previous semester. Mr. Freshwater
filed counterclaims against the parents, one for defamation and the second for intentional infliction of emotional distress “shortly after the start of the administrative procedure to terminate him from his Mount Vernon teaching position” (Doe v. Mount Vernon City School District Board of Education, 2010 p. 7).

While a significant portion of the court’s ruling focused on the defamation counterclaim by Mr. Freshwater, the court also addressed the alleged Establishment Clause violations asserted by the parents. The district court observed that “the long-standing (but not always applied) test for determining whether government action violates the Establishment Clause” articulated by the Supreme Court in Lemon was the appropriate legal standard to be applied in the present case (Doe v. Mount Vernon City School District Board of Education, 2010, p. 39). The court further noted that while individual members of the Supreme Court had expressed skepticism about the continued validity of Lemon, it was “bound to follow the Lemon test until the Supreme Court explicitly overrules or abandons it” (Doe v. Mount Vernon City School District Board of Education, 2010, p. 40). In addressing each of the prongs devised in Lemon, the district court noted that material issues of fact remained to be addressed under each of the three tests devised by the Supreme Court and as a result, the court could not issue a summary judgment as a matter of law. The court ordered that a trial take place in order to determine if the religious items in Mr. Freshwater’s science class constituted a violation of the Establishment Clause.
Does v. Elmbrook Joint Common School District No. 21

The final case adjudicated at the district court level was decided by the United States District Court for the Eastern District of Wisconsin when it rendered its decision in Does v. Elmbrook Joint Common School District No. 21, 2010 U.S. Dist. LEXIS 72354 (E.D. Wis. 2010). The case focused on the school district’s practice of holding the graduation ceremonies for its two high schools at a local church situated within the boundaries of the district. The school district had moved the commencement exercises out of each high school’s respective gym since neither of the existing gyms had adequate space to hold all of the graduating seniors and their families and guests. The court noted that the practice of holding the graduation ceremonies at an alternative site had been initiated by the students at each of the high schools several years earlier and that in subsequent years, either the senior class student officers or the full graduating class had elected to continue holding the commencement exercises at the local church. The court also acknowledged that the long-term plan of the district was “to construct gymnasiums that have the capacity and amenities to return [the] graduation exercises to their local campuses” (Doe v. Elmbrook Joint Common School District No. 21, 2010, p. 13).

Several parents of students enrolled in the Elmbrook school district filed suit in federal district court seeking an injunction prohibiting the school district from holding its commencement exercises at the local church in Elmbrook or at any other religious venue. In alleging the school district’s violation of the Establishment Clause, the parents contended that “they were ‘forced’ to attend the graduation
ceremonies at the church,” and that they had been “exposed to unwelcome religious symbols, which caused them mental anguish and distress” (*Does v. Elmbrook Joint Common School District No. 21*, 2010, p. 17).

In addressing the allegations against the Elmbrook school district regarding its practice of holding the high school commencement exercises at a church within the boundaries of the school district, the court noted the extensive history of judicial precedent that had been established by the Supreme Court as well as the United States Court of Appeals for the Seventh Circuit, which had jurisdiction over the district court. The court also noted that while the three tests established by the Supreme Court in *Lemon* had been devised “for determining whether a government practice violate[d] the Establishment Clause,” the Supreme Court had also “sidestepped Lemon in several Establishment Clause cases” (*Does v. Elmbrook Joint Common School District No. 21*, 2010, p. 22-3). In addressing the issues presented in the case against the Elmbrook school district, the court determined that a violation of the Establishment Clause had not occurred under the standards set forth in *Lemon*, nor through the application of the coercion test enunciated by the Supreme Court when it had rendered its decision in *Lee v. Weisman*, 505 U.S. 577 (1992).

The district court noted that it could not equate the circumstances in *Lee*, in which school district officials had invited members of the local clergy to offer prayers at their middle school and high school graduation ceremonies, with the Elmbrook school district’s practice of conducting its graduation exercises at a local church because of space limitations on the high school campus. The court dismissed
the coercion argument against the school district concluding that it would not consider “obligatory participation in a secular graduation ceremony, albeit in a church, sufficiently similar to obligatory participation, even through silence, in religious prayer” (Does v. Elmbrook Joint Common School District No. 21, 2010, p. 29).

In turning to its analysis under Lemon, the court noted that the parents did not allege that holding the graduation ceremonies at the church violated the secular purpose test. The parents did assert, however, that the commencement exercises at the church ran afoul of the Establishment Clause from the perspective of both the primary effects prong as well as the excessive entanglement component of the Lemon test. The district court rejected the parent’s primary effect argument when it observed that the graduation ceremonies were “secular and devoid of any religious activity or involvement of clergy” (Does v. Elmbrook Joint Common School District No. 21, 2010, p. 36). The court also noted that the school district’s use of a facility for a single event each year could not be considered an endorsement of religion by the school district. In concluding its analysis of the primary effects test, the court stated that a “reasonable observer would fairly understand that the District’s use of the Church for these events is based on real and practical concerns, and not an impermissible endorsement of religion” (Does v. Elmbrook Joint Common School District No. 21, 2010, p. 37).

Finally, in addressing the parent’s assertion that holding the graduation ceremonies at the church created an excessive entanglement between the school district and religion, the court observed that since the activity took place only once
each year, it was difficult for the plaintiffs to demonstrate how the use of the church could be considered excessive. The court also noted that the absence of any written agreement between the school district and the church as well as the church’s practice of removing all of the nonpermanent religious items prior to the commencement exercises taking place, argued against any assertion that the school district’s use of the church created an excessive entanglement between the two entities. In dismissing this final argument, the district court declared that “given the limited nature of the event-specific rental arrangements with the Church, excessive entanglement of the type proscribed by the Establishment Clause” was not evident (Does v. Elmbrook Joint Common School District No. 21, 2010, p. 41).

The next section of this analysis reviewed the decisions of the federal Circuit Courts of Appeal and how they addressed the various Establishment Clause issues within the context of the public school environment.

Circuit Court Decisions

The LEXIS/NEXIS® database located 23 Establishment Clause decisions that were rendered by the various federal Circuit Courts of Appeal. As demonstrated in Figure 4, only four of those decisions involved Establishment Clause issues within the context of public education. As with the results of the district-level cases, the majority of the judicial proceedings selected through the database search did not relate to an issue involving the public schools. Of the four remaining cases that included some aspect of public education, the topics ranged from a school district’s
creation of a volunteer counseling and mentor program for elementary and middle school students that was limited exclusively to members of the local clergy, to providing materials and other resources to a religiously-oriented student group on an equal basis with other student organizations on a high school campus. The analysis for each of these cases follows.

Figure 4. Public education cases decided by the circuit courts.


The first appellate case to raise an Establishment Clause question involving a public school system subsequent to the Supreme Court’s decision in Mitchell v. Helms came from the United States Court of Appeals for the Fifth Circuit the year after the Supreme Court had rendered its decision in Mitchell. In Doe by Doe v.
Beaumont Independent School District, 240 F. 3d 462 (5th Cir. 2001), the appellate court, sitting en banc, reviewed a decision from the United States District Court for the Eastern District of Texas. The district court had determined that the Beaumont school district’s Clergy in the Schools program, as one component of the school district's overall School Volunteer Program, was not a violation of the Establishment Clause. The plaintiffs appealed the decision of the district court to the Fifth Circuit, where a three-judge panel of the appellate court reversed the decision of the district court. The school district then requested an en banc review of the panel’s decision, and this request was granted. In a highly fractured ruling rendered by the full court of the Fifth Circuit, the decision of the panel was upheld and the case was remanded to the district court for further action.

The three-member controlling opinion of the Fifth Circuit noted that the Clergy in the Schools program, which was only one of several volunteer programs administered by the Beaumont Independent School District, was designed to provide group counseling for the district’s elementary and middle school students on a variety of secular issues ranging from peer pressure to drugs. The court also noted that the Clergy in the Schools program had been designed “to provide (1) meaningful dialogue between the clergy and students regarding civic values and morality; (2) a safe school atmosphere; and (3) volunteer opportunities” (Doe by Doe v. Beaumont Independent School District, 2010, 465).

Several parents filed suit after they requested the district expand the mentor program to include volunteers from other counseling professions. After the district
refused to expand the program, the parents filed suit alleging that the Clergy in the Schools program violated both the Establishment Clause of the federal constitution as well as the corresponding provisions of the Texas constitution. The court observed in its decision that student participation “in the program was voluntary, although no parental consent was required” (Doe by Doe v. Beaumont Independent School District, 2001, p. 465). Additionally, the court noted that the counseling sessions were limited to one or two visits during the course of the school year and that each session was limited to approximately 35 students.

In rendering its decision, the controlling opinion of the Fifth Circuit focused on two issues. First, the court addressed the assertion that the trial record related to the issue of standing was incomplete and had raised questions of material fact connected to the parent’s ability to bring suit against the school district. In addressing this issue, the court noted that the parents did have standing on the grounds that the “[o]pportunities for counseling and mentoring services are a needed and valued component of public education” and that the school district had “supported this program with its money and resources” (Doe by Doe v. Beaumont Independent School District, 2001, p. 467).

The second issue addressed in the court’s controlling opinion focused on the methodology to be utilized in determining if the school district’s program had resulted in an unconstitutional action. The court noted that it had used the “three lines of analysis developed by the Supreme Court” in order to evaluate “the merits of the Doe plaintiff’s Establishment Clause claim” (Doe by Doe v. Beaumont Independent
School District, 2001, p. 468). These three lines of analysis included the tri-partite test established by the Supreme Court in Lemon, the coercion test enunciated by the Court in Lee, and the endorsement test recognized by the Court in Allegheny. Beginning with the three-part test devised under Lemon, the appellate court noted that material issues of fact had been unresolved at the trial level that would prevent the circuit court from rendering a decision as to whether the Clergy in the Schools program violated the secular purpose test under Lemon. In addressing the second prong, the court observed that the impermissible effects under Lemon “dovetail[ed] with the coercion test of Lee” (Doe by Doe v. Beaumont Independent School District, 2001, p. 469). In declaring the school district’s mentoring program as permissible under both of these tests, the court noted that because the volunteers were “working in a secular setting with other volunteers who subscribed to different faiths . . . we presume that the volunteers will comply with the program’s secular guidelines” (Doe by Doe v. Beaumont Independent School District, 2001, p. 469).

Before examining the final test under Lemon, the court addressed the permissibility of the Clergy in the Schools program under the criteria specified in the endorsement test as outlined in Allegheny. Once again, the controlling opinion of the appellate court observed that the proceedings from the trial court had failed to resolve several material issues of fact and found that the case should be remanded with further instructions to resolve these remaining factual discrepancies. The appellate court noted that under the endorsement test, the district court would, on remand, have to review the Clergy in the Schools program within the context “of the
District’s entire menu of volunteer mentoring and counseling programs” in order to determine if they were neutral with respect to religion (Doe by Doe v. Beaumont Independent School District, 2001, p. 470). The court completed its analysis by briefly examining the school district’s Clergy in the Schools program through the excessive entanglement prong devised under Lemon. The plaintiffs argued that because the school district had oversight of the Clergy in the Schools program, this created an excessive entanglement between religion and the state. In rejecting the plaintiff’s excessive entanglement argument, the court noted that the school district’s administrative oversight of this program was consistent with its monitoring of all the volunteer programs offered by the district.

In the first of three dissenting opinions, Judge Jolly of the Fifth Circuit wrote a dissent that was joined by five other judges of the court. In his dissent, Judge Jolly asserted that the plaintiffs in this case lacked standing to file suit because they failed to demonstrate that they had suffered any type of injury that could be addressed through a judicial proceeding. This six-member faction of the court asserted that “the Plaintiffs in this case have failed even to allege - - - much less offer any proof of - - - any injury suffered as a result of attending schools that participate[d] in the Clergy in the Schools program” (Doe by Doe v. Beaumont Independent School District, 2001, p. 479). This faction of the court did not address any aspect of the case other than from the standpoint of the plaintiffs’ failure to articulate any type of injury that could be addressed through a legal proceeding.
The second dissenting opinion, which was comprised of five of the six judges from the previous dissent, additionally asserted that the three-judge controlling plurality of the court had erred in its finding that material issues of fact remained to be discovered in the case. This segment of the Fifth Circuit stated that the opinion issued by the controlling plurality of the court as well as the court’s third dissenting opinion had placed a tremendous amount of emphasis on the importance of the school district’s requirement “to defend a program that may reach only 60 – 70 students” (Doe by Doe v. Beaumont Independent School District, 2001, p. 480). The second dissenting opinion observed that the facts presented in the case demonstrated that “no constitutional fault in the content of the program” was present, and additionally declared that they could find “no government-sponsored religious speech and no inculcation or endorsement of religious beliefs” had been promoted by the Clergy in the Schools program (Doe by Doe v. Beaumont Independent School District, 2001, p. 480). In asserting the constitutionality of the Clergy in the Schools program, the second dissenting opinion referenced the prior decisions of the Supreme Court in both Agostini v. Felton, 521 U.S. 203 (1997) as well as Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993) as examples of the presumption that the combination of secular and sectarian elements should not automatically raise constitutional questions and that “the presence of clergy volunteers should not alone imply endorsement” (Doe by Doe v. Beaumont Independent School District, 2001, p. 482).
In the third and final dissenting opinion, the remaining six judges of the court agreed with the controlling plurality that the appropriate method for determining the constitutionality of the Clergy in the Schools program should be based on the three-part test established in *Lemon*, as well as the endorsement test outlined in *Allegheny* and the coercion test as applied in *Lee*. This dissenting faction, however, differed from the controlling opinion of the court in its view of how the Clergy in the Schools program was analyzed under each of the respective tests. This dissenting faction of the court contended that the Clergy in the Schools program should have been viewed as an independent program from the other volunteer programs offered by the school district. In referencing several of the same cases that were cited by the controlling plurality of the court, the dissenting faction asserted that the controlling plurality had inappropriately applied many of the tests that had been established by the Supreme Court. This dissenting faction of the court disagreed with the controlling plurality when it argued that due to the nature of the school district’s Clergy in the Schools program, the only appropriate method for evaluating whether the program violated the Establishment Clause was to examine the program independently of the other volunteer programs offered by the District and not as only one part of the school district’s full array of volunteer programs.

*Freedom from Religion Foundation, Inc. v. Bugher*

The next case involving an Establishment Clause claim within the public school environment took place when the United States Court of Appeals for the
Seventh Circuit was asked to review a decision that had been rendered by the United States District Court for the Western District of Wisconsin. In *Freedom from Religion Foundation, Inc. v. Bugher*, 249 F. 3d 606 (7th Cir. 2001), the appellate court examined a decision of the trial court that had found one aspect of a state program that subsidized telecommunications access for a variety of entities, including religiously-affiliated private schools, violated the Establishment Clause of the First Amendment. The district court held that the Educational Telecommunications Access program that provided access to either a data line or a video link at a substantially reduced cost was a valid use of public funds. As the court noted, however, the program was subsequently amended to provide direct cash grants to any entity that was currently participating in the program with additional funds in an amount that was equal to the current cost of either the data line or the video link. The court observed that the amended grant program required that “no statutory restriction is placed on the use of the funds, although a letter accompanying the grant provides that the funds are to be used for educational technology purposes” (*Freedom from Religion Foundation, Inc. v. Bugher*, 2001, p. 609).

The plaintiffs filed suit alleging that the unrestricted cash grants paid directly to private, religiously-affiliated schools violated the Establishment Clause. In addressing the constitutionality of the grant program, the court acknowledged the “three-pronged test [used] to determine whether a statute complies with the Establishment Clause” as the appropriate means for examining the issue in question (*Freedom from Religion Foundation, Inc. v. Bugher*, 2001. P. 610). The court further
recognized the modification of the Lemon test through the decision rendered by the Supreme Court in Agostini as an appropriate method to determine if the program violated the primary effects test under Lemon. In its analysis, the appellate court observed that both parties conceded that the grant program had “a secular purpose, that of encouraging schools to use and teach telecommunications, and that the program does not foster excessive entanglement with religion” (Freedom from Religion Foundation, Inc. v. Bugher, 2001, p. 611). The court also stated that under the effect prong of Lemon, as subsequently modified by Agostini, the grant program neither defined its recipients by religion nor was there any evidence of excessive entanglement involved in the administration of the program. The appellate court concluded that the only remaining question was whether the grant program violated the effect prong by advancing religion through governmental indoctrination.

The court concluded that the direct cash subsidies had created a primary effect that advanced religion. Citing the precedent established by the Supreme Court in Committee for Public Education v. Nyquist, 413 U.S. 753 (1973), the appellate court noted that the direct cash subsidies to the schools had “no real restrictions on the use of the grant money by the religious schools” and that as a result, the funds could have been used for a variety of purposes, including religious indoctrination, “instead of payment for the telecommunications links” (Freedom from Religion Foundation, Inc. v. Bugher, 2001, p.613). The court also noted that the circumstances in the present case were substantially different from the recent decision by the Supreme
Court in *Mitchell* where governmental funds were initially distributed to state and local agencies who then made the requested purchases before the materials were finally loaned to the private schools. Because of this significant difference, the appellate court determined that the precedent established by the Supreme Court in *Mitchell* could not be applied to the present case.

*Prince v. Jacoby*

In *Prince v. Jacoby*, 303 F. 3d 1074 (9th Cir. 2002), the United States Court of Appeals for the Ninth Circuit reviewed a decision of the United States District Court for the Western District of Washington as to whether a school district’s policy of treating a Bible club under different guidelines from other nonreligious student organizations violated both the Equal Access Act and the Establishment Clause. The Bethel School District had developed Policy 5525 in order to comply with the provisions of the Equal Access Act. Under the guidelines of Policy 5525, noninstructional, student-sponsored and student-initiated groups were allowed to meet at the school as long as the groups:

1. remain voluntary and student-initiated;
2. are not sponsored by the school or its staff;
3. hold meetings that do not materially and substantially interfere with the orderly operation of the school;
4. require that students, rather than outsiders, are responsible for the direction, control, and conduct of the meetings;
5. do not require students to participate in any religious activity;
6. do not use school funds for other than incidental and/or monitoring costs;
7. do not compel any staff member to attend; and
8. respect the constitutional rights of all persons.


In addition to the provisions granted to students to form noninstructional student groups under Policy 5525, the school district also allowed for the formation of student groups under the auspices of the Associated Student Body (ASB) club. Student organizations operating under the guidance of the ASB were provided much broader access to school facilities and resources including the “right to post flyers throughout the school, rather than on a single bulletin board, and the use of the public address system” (Prince v. Jacoby, 2002, p. 1078). Additionally, ASB clubs had the benefit of accessing school district resources through the use of school-related supplies and school-owned audio and visual equipment for the activities associated with their organization and access to district-owned vehicles in order to participate in club-related field trips.

Tausha Prince, an eleventh grade student enrolled in the Bethel School District filed suit alleging that the district’s treatment of her Christian Bible club as a Policy 5525 student organization rather than as an ASB group violated both the Equal Access Act and the Establishment Clause of the First Amendment. The school district asserted that recognition of the Bible club as an ASB organization “would destroy the careful balance between the Free Speech and Establishment Clauses of the First Amendment” (Prince v. Jacoby, 2002, p. 1078). The school district further argued that the administrative regulations associated with oversight of the ASB groups required an “increased scrutiny of budget, constitutions, bylaws, fund-
raising, and activities of ASB groups” to which the inclusion of the Bible club as an ASB group would result in an “excessive entanglement between the state and religion” (*Prince v. Jacoby*, 2002, p. 1078).

In its decision, the Ninth Circuit reversed the ruling of the district court and declared that the school district’s treatment of the Bible club violated both the Equal Access Act and the Free Speech Clause of the First Amendment. The primary emphasis of the court’s decision focused on the aspects of the student’s right to operate their religiously-oriented organization under the same guidelines as other noninstructional student groups under the provisions of the Equal Access Act. Citing the precedent established by the Supreme Court in *Widmar v. Vincent*, 454 U.S. 263 (1981), the appellate court noted that the “purpose of granting equal access [was] to prevent discrimination between religion or political groups on the one hand and other non-curriculum related student groups on the other” (*Prince v. Jacoby*, 2002, p. 1082). The court determined that the disparate treatment of the Bible club as a Policy 5525 student organization rather than an ASB group constituted viewpoint discrimination by the Bethel School District. The appellate court observed that while the school district was “not required to grant student clubs access” to the numerous benefits it provided the various ASB organizations, but that “having done so, it cannot deny access to some student groups because of their desire to exercise their First Amendment rights without a compelling government interest” (*Prince v. Jacoby*, 2002, p. 1091).
In addressing the school district’s assertion that its support of the Bible club as an ASB organization would have violated the Establishment Clause, the appellate court noted the recent decision of the Supreme Court in *Mitchell* when it had concluded that the provision of school district resources could be offered to sectarian schools on a neutral basis as long as the resources were secular in nature. The dissenting opinion of the appellate court noted its agreement with the majority opinion in all aspects of the court’s decision with the one exception of the school district’s ability to expend public resources on a religiously-oriented group. The minority opinion noted that the ability for the Bethel School District to provide “school vehicles, school supplies, and school audio and visual equipment, all paid for by public funds” was an impermissible expansion of the Supreme Court’s ruling in *Mitchell* (*Prince v Jacoby*, 2002, p. 1097). The minority opinion disputed the finding of the majority opinion in which it asserted that the expenditure of school district resources for the Bible club would create an excessive entanglement between the school district and religion.

*Holloman v. Harlan*

The final case adjudicated at the appellate court level was rendered by the United States Court of Appeals for the Eleventh Circuit when it reviewed a decision that had been handed down from the United States District Court for the Northern District of Alabama. In *Holloman v. Harland*, 370 F 3d 1252 (11th Cir. 2004), the appellate court was responsible for determining if a series of incidents that took
place in Fawn Allred’s senior Economics and Government class violated both the Free Speech and the Establishment Clauses of the First Amendment. The history of the case began with Michael Holloman, a student in Ms. Allred’s first period government class, being disciplined for his refusal to recite the Pledge of Allegiance during the morning announcements. In response to Holloman’s failure to recite the pledge, Ms. Allred verbally “chastised him in front of the class, saying that he had acted inappropriately and disrespectfully” (Holloman v. Harland, 2004, p. 1261). The teacher also informed George Harland, the building principal, of the events that had taken place in her classroom earlier that morning. In response to the student’s actions, the principal determined that Michael Holloman would have to serve a three-day detention for the infraction.

In addition to the Pledge of Allegiance incident, Ms. Allred had a practice of starting each morning’s class by asking the students if anyone had a “prayer request.” Ms. Allred would “frequently open this moment of silence by saying ‘Let us pray,’ and often ended it by saying ‘Amen’” (Holloman v. Harland, 2004, p. 1261). Because the state legislature had previously enacted a statute that required local school districts to develop a character education program for their students, Allred contended “that her daily moment of silent prayer was conducted in partial fulfillment of these character education requirements - it was intended to teach compassion” (Holloman v. Harland, 2004, p. 1262).

Shortly after the Pledge of Allegiance incident, Holloman filed suit in federal district court alleging that both Allred and Harland as well as the Walker County
Board of Education had violated his Free Speech rights. Additionally, Holloman asserted that Ms. Allred’s prayer requests violated the Establishment Clause of the First Amendment. The district court entered a summary judgment in favor of Allred and Harland on the grounds of qualified immunity and in favor of the school district on the grounds of sovereign immunity. Holloman appealed the ruling to the United States Court of Appeals for the Eleventh Circuit. In an extensive ruling, the court not only found that Allred, Harland, and the Walker County Board of Education were not entitled to immunity for their actions, but also that the actions of the school district and its personnel with respect to the Pledge of Allegiance incident had violated Michael Holloman’s First Amendment right of Free Speech. The appellate court further determined that Fawn Allred’s prayer requests and moment of silence activities violated the Establishment Clause of the First Amendment. In support of its conclusions, the court set forth a comprehensive set of precedents as they related to both the Free Speech claim as well as the Establishment Clause claim against the school district and its employees.

With respect to the Pledge of Allegiance incident, the appellate court noted the long-standing precedent established by the Supreme Court in the case *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), which “held that the right to be free from compelled speech protects public school students from being forced to participate in the flag salute” (*Holloman v. Harland*, 2004, p. 1268). Additionally, the appellate court noted the well-established precedent of the Supreme Court issued in *Tinker v. Des Moines Independent Community School*
District, 393 U.S. 503 (1969), which recognized students’ constitutionally protected right to free speech.

In reviewing the Establishment Clause claims against the school district and its employees, the court set forth an equally comprehensive history of the judicial precedents that clearly demonstrated Ms. Allred’s morning prayer “rituals” were undeniably a violation of the Establishment Clause. In evaluating the moment of silence and prayer request practices that took place in Fawn Allred’s classroom, the appellate court noted that “the Supreme Court had set forth its famous three-prong test for assessing the permissibility of statutes under the Establishment Clause” (Holloman v. Harland, 2004, p. 1284). The appellate court further observed that subsequent decisions of the Supreme Court had incorporated the excessive entanglement prong of Lemon into its primary effect analysis. Citing the decision rendered by the Supreme Court in Agostini, the Eleventh Circuit noted that “while the [Supreme] Court has folded its traditional ‘excessive entanglement’ inquiry into its ‘primary effects’ analysis, the substance of its Establishment Clause jurisprudence remains fundamentally unaltered” (Holloman v. Harland, 2004, p. 1285).

In finding that the prayer practices that took place in Fawn Allred’s classroom violated the secular purpose prong of the Lemon test, the court aptly noted that “while promoting compassion may be a valid secular purpose, teaching students that praying is necessary or helpful to promoting compassion is not” (Holloman v. Harland, 2004, p. 1285-6). The court also declared that the prayer
practices violated the second prong of the *Lemon* test as well on the basis that "an endorsement of an intrinsically religious activity is inconsistent with the Establishment Clause" (*Holloman v. Harland*, 2004, p. 1286).

In the final section of this analysis, the decisions of the United States Supreme Court and how it addressed the various Establishment Clause issues within the context of the public school environment were reviewed.

**Supreme Court Decisions**

The LEXIS/NEXIS® database search located only three Establishment Clause decisions that were rendered by the United States Supreme Court subsequent to the ruling issued by the Court in *Mitchell v. Helms*. As indicated in Figure 5, only two of those decisions involved a federal question within the context of public education. The third legal challenge addressed by the Court, *Locke v. Davey*, 540 U.S. 712 (2004), fell outside the limitations of the study, due to the fact that it involved a question related to a state action in the area of post-secondary education. The analysis for both of the remaining cases follows.
Good News Club v. Milford Central School

The first case addressed by the Supreme Court subsequent to its decision in Mitchell was rendered only one year later when it issued its ruling in Good News Club v. Milford Central School, 533 U.S. 98 (2001). In Good News Club, the Supreme Court reversed the decision of the United States Court of Appeals for the Second Circuit when it determined that a community use policy adopted by the Milford school district violated the Free Speech Clause of the First Amendment. While the primary emphasis of this case revolved around a federal question involving the Free Speech Clause, the Court also addressed the issue from the perspective of the Establishment Clause as well.
In accordance with New York state law, the Milford school district had adopted a community use policy that provided guidelines for the use of district facilities outside the regular instructional day. Subsequent to the adoption of the policy, two residents in Milford, Stephen and Darleen Fournier, sought to use the school for “the local Good News Club, a private Christian organization for children ages 6 to 12” (Good News Club v. Milford Central School, 2001, p. 103). The school district rejected the Fournier’s application on the grounds that the organization was considered “the equivalent of religious worship,” which was not permitted under the adopted community use policy (Good News Club v. Milford Central School, 2001, p. 103). The parents filed suit in federal court alleging that the community use policy violated the Free Speech Clause under the First Amendment as well as the Equal Protection Clause under the Fourteenth Amendment. Both the district court and the Court of Appeals for the Second Circuit ruled in favor of the school district, finding that the content of the materials presented by the Good News Club were “decidedly religious in nature, and not merely a discussion of secular matters from a religious perspective” which would have been permissible under the school district’s adopted community use policy (Good News Club v. Milford Central School, 2001, p. 104-5).

The Supreme Court reversed the decision of both the district court and the Second Circuit when it concluded that the school district had, in fact, violated the Free Speech Clause because it had engaged in impermissible viewpoint discrimination as a result of its rejection of the Good News Club’s request to use its facilities. The Court cited the precedents established in both Widmar v. Vincent, 454
U.S. 263 (1981), as well as *Lamb’s Chapel v. Moriches Union Free School District*, 508 U.S. 384 (1993), as being applicable to the facts that had been presented in *Good News Club*. In finding that the school district had violated the Free Speech Clause, the Court remarked that the school district could not assert it had acted on the basis of attempting to avoid a violation of the Establishment Clause by preventing the Club from using its facilities.

The Court acknowledged that the grounds for rendering its decision were on the basis of its analysis of the Free Speech Clause. However, the Court also determined that it should review the case from the perspective of the Establishment Clause claim as well. In conducting its Establishment Clause analysis, the Court noted the precedent of neutrality, as established in *Mitchell*, as being applicable to the facts in the present case. In support of this argument, the Court observed that “allowing the Club to speak on school grounds would ensure neutrality, not threaten it” and that the school district would face “an uphill battle in arguing that the Establishment Clause compel[led] it to exclude the Good News Club” (*Good News Club v. Milford Central School*, 2001, p. 114).

In a dissenting opinion, Justice Souter noted that the majority opinion of the Court had erred with respect to the question of the Establishment Clause claim. He observed that the Establishment Clause issue had never been addressed at either the trial court or at the appellate court levels. In the minority opinion, Justice Souter noted that no facts had been either presented or ruled upon by the trial court, and that no decision had been reviewed by the appellate court. Justice Souter opined
that because the Establishment Clause issues had not been adjudicated by the lower courts, it was improper for the Supreme Court to attempt to render a decision. In dismissing the findings of the majority opinion with respect to its decision in the Establishment Clause aspect of Good News Club, Justice Souter noted that “like the majority, I cannot say for sure how complete the record may be. I can, however, speak to the doubtful underpinnings of the majority's conclusions” (Good News Club v. Milford Central School, 2001, p. 141).

*Zelman v. Simmons–Harris*

The final case addressed by the federal judiciary subsequent to its decision in *Mitchell* was rendered by the Supreme Court when it handed down its ruling in *Zelman v. Simmons–Harris*, 536 U.S. 639 (2002). In *Zelman*, the Supreme Court reviewed a pilot voucher program designed to assist families who resided in the Cleveland City School District with an opportunity to send their children to an alternative school setting. The Court noted that “for more than a generation, the Cleveland public schools have been among the worst public schools in the Nation” (*Zelman v. Simmons-Harris*, 2002, p. 644). In recounting the dismal performance of the Cleveland public schools, the Court observed that “the District had failed to meet any of the 18 state standards for minimum acceptable performance” and that “only 1 in 10 ninth graders could pass a basic proficiency exam” (*Zelman v. Simmons-Harris*, P. 644). In response to the deplorable academic standards exhibited by the Cleveland public schools, the state legislature created the Pilot Project Scholarship
Program. The goal of the program was to provide “financial assistance to families in any Ohio school district that is or has been under federal court order requiring supervision and operational management of the district by the state superintendent” (Zelman v. Simmons-Harris, 2002, 644-5). As the Court noted, the Cleveland public school system was the only district in the state that met the criteria to participate in the program.

The program provided two types of financial assistance for the students enrolled in the Cleveland school district. Students could either receive financial assistance in order to obtain tutorial services if they chose to remain in the Cleveland public schools, or they could obtain tuition assistance to transfer to one of several types of alternative instructional settings. Among the choices students and their families could select was the opportunity to enroll in any private school that was located within the boundaries of the Cleveland school system. Additionally, students had the opportunity to enroll in a community school or a magnet school within the boundaries of the Cleveland school district, or any public school system that bordered the Cleveland schools which had elected to participate in the voucher program. The amount of the tuition vouchers varied depending on the economic status of the family as well as the type of alternative school selected. As the Court noted, the maximum tuition grant that could be received was $2250 per student who chose to enroll in a private school, or the same tuition amount “in addition to the full amount of per-pupil state funding” for any student who enrolled in an adjacent public school (Zelman v. Simmons-Harris, 2002, 645).
A group of Ohio residents filed suit in federal district court to stop the Pilot Project Scholarship Program on the grounds that the program violated the Establishment Clause of the United States Constitution. Both the district court and the United States Court of Appeals for the Sixth Circuit determined that the voucher program violated the Establishment Clause. The Sixth Circuit noted “that the program had the ‘primary effect’ of advancing religion in violation of the Establishment Clause” (Zelman v. Simmons-Harris, 2002, p. 648).

In reversing the decision of the lower courts, the Supreme Court noted the precedent it had established in three previous cases beginning with its ruling in Mueller v. Allen, 463 U.S. 380 (1983), and then further clarified by the Court’s decisions in both Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986), and Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993). The Supreme Court observed in each of these cases that the Establishment Clause did not prevent a “neutral government program that provided aid to a broad class of individuals” from being implemented (Zelman v. Simmons-Harris, 2002, p. 649). In relying on the precedents established by Mueller, Witters, and Zobrest, the Court noted that a program “of private choice, in which government aid reached religious schools only as the result of the genuine and independent choices of private individuals” did not violate the Establishment Clause of the United States Constitution (Zelman v. Simmons-Harris, 2002, 649). In applying the standards established by the Court to the Pilot Project Scholarship Program enacted by the state legislature in Ohio, the Court observed that “the program challenged here is a
program of true private choice, consistent with *Mueller, Witters* and *Zobrest*" *(Zelman v. Simmons-Harris, 2002, p. 653).*

This completed the analysis of all the federal cases involving some aspect of the public school environment that met the search criteria as outlined in the previous chapter. In the final segment of this study, the results from the case analysis were reviewed to determine if any observations can be made based on the various legal decisions rendered by the federal court system that would provide insight into any possible future trends that might take place with respect to Establishment Clause jurisprudence in the area of public education.
CHAPTER 5

DISCUSSION

A significant expansion in litigation involving the Establishment Clause of the First Amendment to the United States Constitution has transpired over the past half century. As detailed earlier in this study, the adjudication of legal disputes involving the Establishment Clause were not addressed by the federal judiciary prior to the twentieth century (Cohen, 1989). Even after the United States Supreme Court had established a standard for reviewing the constitutionality of state actions with its adoption of the three-part test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the federal judiciary has continued to struggle with its ability to interpret how the state can and should legally operate within the requirements dictated by the Establishment Clause. Through the analysis of the legal decisions of the federal court system subsequent to the initial ruling in *Lemon*, and the subsequent modifications as a result of numerous judgments by the Supreme Court leading up to the Court’s decision in *Mitchell v. Helms*, 530 U.S. 793 (2000), the objective of this dissertation was to discern how the judicial system has delineated the relationship between religion and public education in the area of Establishment Clause jurisprudence.

This final chapter reviewed the results of the various judicial decisions within the context of the public education environment to determine the methodology used by the federal courts as they have attempted to resolve an
assortment of education-related topics involving the Establishment Clause. Based on the findings observed from this legal analysis, possible trends that are represented by the data were identified. The final aspect of this dissertation focused on additional questions that were raised as a result of the information presented in this study and may be considered of interest for possible further research.

Summary of the Case Analysis

The information revealed through the electronic database search of federal judicial proceedings involving constitutional questions related to the Establishment Clause since the decision handed down by the United States Supreme Court in *Mitchell v. Helms*, 530 U.S. 793 (2000), indicated that the courts continue to address a number of topics in the area of First Amendment constitutional jurisprudence. In answering the first research question presented in this dissertation, the electronic database search outlined in the methodology section of this study revealed that a total of 57 federal cases citing the precedent established by the Supreme Court in *Mitchell* have been decided by the federal judiciary since the Court handed down its ruling nearly a decade ago. The majority of those decisions were rendered at the trial court level, with a successively smaller number of decisions having been decided at the intermediate appellate level, and only a small fraction of the total number of cases having been decided by the United States Supreme Court. As observed in the previous chapter, the vast majority of the decisions that were rendered at the district and intermediate appellate court levels, covered a wide
range of topics other than the issue of public education. By contrast, it is interesting to note that while the decisions of both the district courts and the Circuit Courts of Appeal referenced the precedent established by the Supreme Court in *Mitchell* on a variety of topics, the Supreme Court itself has made reference to its decision in *Mitchell* on only three occasions since the ruling had been handed down by the Court nearly a decade ago. It is also of interest that in the three cases that did cite the Court's precedent established in *Mitchell*, two of the three cases involved some aspect of the public education system, and the third case, *Locke v. Davey*, 540 U.S. 712 (2004), addressed a question involving post-secondary education.

In addressing the second research question related to whether the federal judiciary has either maintained or abandoned the three-prong test constructed by the Supreme Court in *Lemon* when a federal question has cited the precedent established by the Court in *Mitchell*, the following data were revealed. As demonstrated in Figure 6, of the eight cases that met all of the parameters of the search criteria, the decisions rendered by the district courts in half of the cases were decided on the basis of the test devised by the Supreme Court in *Lemon*. Two additional cases were decided on the basis of the *Lemon* test and either the endorsement test as outlined by the Supreme Court in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), or the coercion test devised by the Court in *Lee v. Weisman*, 505 U.S. 577 (1992). Only one case, *Katter v. Ohio Employment Relations Board*, 492 F. Supp. 2d 851 (S.D. Ohio 2007), was decided on the basis of the precedent established by the Court in *Mitchell*. The final case, *Bay...*
*Shore Union School District v. T.*, 400 F. Supp. 2d 230 (E.D. N.Y. 2005), focused primarily on the applicability of a state education statute as it related to the provision of special education services for an elementary school student enrolled in a private, sectarian school. The discussion of Establishment Clause issues were referenced during the course of the court’s decision in *Bay Shore*, however, the primary focus of the case did not revolve around an Establishment Clause question.

![Figure 6. Distribution of district court cases.](image-url)

The results of the individual case analyses at the intermediate appellate level also revealed a variety of approaches to the methodology used by the federal Circuit Courts of Appeal in determining federal questions within the context of the public
school setting. The distribution of results as it relates to how the appellate courts resolved each case is presented in Figure 7.

Figure 7. Distribution of circuit court cases.

In *Freedom from Religion Foundation, Inc. v. Bugher*, 249 F. 3d 606 (7th Cir. 2001), the United States Court of Appeals for the Seventh Circuit determined that the Wisconsin telecommunications subsidy program should be evaluated on the basis of the original three-pronged *Lemon* test as modified by the Court in *Agostini*. The Eleventh Circuit also determined in the case *Holloman v. Harland*, 370 F. 3d 1252 (11th Cir. 2004), that the resolution of the Establishment Clause aspects in the dispute between Michael Holloman and the Walker County Board of Education were appropriately resolved using the test devised by the Supreme Court in *Lemon* as
subsequently modified by the Court in *Agostini*. In *Doe by Doe v. Beaumont Independent School District*, 240 F. 3d 462 (5th Cir. 2001), the Fifth Circuit rendered its decision regarding the Clergy in the Schools program on the basis of the *Lemon* test in addition to both the endorsement and the coercion tests. Finally, the United States Court of Appeals for the Ninth Circuit in rendering its decision in *Prince v. Jacoby*, 303 F. 3d 1074 (9th Cir. 2002), determined that the Establishment Clause aspects of the Bethel school district’s Bible club on one of its high school campuses was most appropriately resolved using the principle of neutrality as enunciated in *Mitchell*.

When reviewing the methodology utilized by the United States Supreme Court, it is noteworthy to observe that both of the cases decided by the Court were rendered on the basis of the principle of neutrality as announced by the Court in *Mitchell*. Additionally, it is of interest to note that while the majority of cases at both the trial court and intermediate appellate court levels referenced the precedent established by the United States Supreme Court in *Lemon*, neither of the cases reviewed in this study that were decided by the Supreme Court made any reference to the Court’s prior decision in *Lemon* through the majority opinion of the Court.

**Judicial Trends**

The analysis of the decisions of the federal judiciary in the various cases selected for this study has yielded three observations. The first observation is the continued reliance of the federal courts on the three-pronged test originally devised
by the Supreme Court in Lemon as the primary method for determining the constitutionality of state actions within the context of the public education system. As noted in the decisions of the federal district courts, the use of the Lemon test continues to be applied in a significant number of Establishment Clause issues. While the appellate courts appear to be more willing to use a variety of methods in determining the constitutionality of state actions with respect to Establishment Clause jurisprudence, the test devised by the Supreme Court in Lemon continues to be an important tool for determining the validity of state policies and programs involving federal questions related to the Establishment Clause of the First Amendment.

The data give the impression of contradicting the assertions of Alexander and Alexander (2009) when they opined that the importance of public education “as an institution appears to perhaps be waning in its political strength relative to the political power of ecclesiastical schools” (p. 182). The data suggest that the influence of the Lemon test continues to be employed in a number of education-related issues. As noted from the previous chapter, only one of the cases adjudicated at the district court level, and one case from the appellate court level, utilized the rationale established by the Supreme Court in Mitchell. The majority of the decisions were based on either the original, three-pronged test established in Lemon, or the modified, two-pronged test set forth by the Court in Agostini. The contention by Alexander and Alexander (2009) that the “trend in reducing the wall of separation may foretell the slowly engulfing twilight for the public school experiment in
“America” may be premature, however, when balanced against the Establishment Clause jurisprudence of the federal judiciary since the Supreme Court’s ruling in Mitchell. The decision of the Eleventh Circuit in Holloman v. Harland, 370 F. 3d 1252 (11th Cir. 2004), exemplifies the continued reliance on the importance of the Lemon test when it observed that “while the [Supreme] Court had folded its traditional ‘excessive entanglement’ inquiry into its ‘primary effect’ analysis, the substance of its Establishment Clause jurisprudence remains fundamentally unaltered” (emphasis added) (Holloman v. Harland, 2004, p. 1285).

The second observation from the analyses of the cases presented in this study was the continued desire to abandon the Lemon test by at least a faction of the Supreme Court. The absence of any reference to the three-pronged test devised by the Court in Lemon in either of the majority opinions indicates that the Court may attempt to retire the Lemon test in the future if given an opportunity to do so. The likelihood of retiring Lemon will depend, at least in part, on the judicial philosophy of any new Justice who would be appointed to the Court and how he or she might interpret the Court’s continuing evolution in Establishment Clause jurisprudence.

Finally, it is of interest to note that the observations of Justice Thomas and his “pervasive sectarian” commentary in the dicta of his decision have not been widely adopted by the federal judiciary since the ruling in Mitchell was rendered. While Justice Thomas criticized what he perceived to be the hostility toward religion in general, and Catholicism in particular, as a “doctrine, born of bigotry, [that] should be buried now,” this aspect of his opinion in Mitchell was cited in only one of
the cases examined in this study. In *Freedom from Religion Foundation, Inc. v. Bugher*, 249 F. 3d 606 (7th Cir. 2001), the Seventh Circuit cited the pervasively sectarian commentary of Justice Thomas and his admonition against what he considered to be hostility toward religion. In citing the opinion of Justice Thomas, the Seventh Circuit noted that his interpretation had possibly created an “ambiguity as to the necessity of determining whether the schools were pervasively sectarian or not” (*Freedom from Religion Foundation, Inc. v. Bugher*, 2001, p. 612). The Seventh Circuit observed, however, that regardless of this determination, “states may not make unrestricted cash payments directly to religious institutions” (*Freedom from Religion Foundation, Inc. v. Bugher*, 2001, p. 612).

**Suggestions for Further Study**

The data revealed through this study suggested two areas that might be considered for future study. As noted in several of the decisions reviewed in this dissertation, questions related to other aspects of the First Amendment are often referenced either as a direct component in the decision-making process of the reviewing court or alternatively as ancillary issues not directly related to the primary aspect of the legal question under scrutiny. An analysis similar to the one conducted in this study with an emphasis on either the Free Speech or Free Exercise elements of the First Amendment might prove useful in determining if there are any trends with respect to those aspects of constitutional jurisprudence. Finally, several of the cases selected for this particular study also referenced questions related to
the constitutionality of state actions from the perspective of an individual state's constitution. The analysis of this topic from the viewpoint of a state constitution might provide additional insights into the permissibility of specific state actions from a state as opposed to a federal standpoint.
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