The Catholic Lawyer

Volume 35
Number 3 *Volume 35, Number 3*

Article 7

Education Litigation

Kevin T. Baine

EDUCATION LITIGATION: PROSPECTS FOR CHANGE

KEVIN T. BAINE

INTRODUCTION

The Establishment Clause provides that Congress shall make no law respecting an establishment of religion.[1] The first paragraph of our constitutional law nutshell explains that there is a wall of separation between church and state. Another section of the nutshell argues that there is little or no role for religion in the public schools and only a restricted role for public assistance for parochial schools. The nutshell gets at least this much right: education law has always been at the heart of the Establishment Clause. This principle promises to continue to be true. In fact, the Supreme Court of the United States currently appears to be poised to rethink the Establishment Clause in the context of one or more education cases. But, whatever the context, such a reconsideration will almost certainly revolutionize education law.

I. HISTORY OF THE ESTABLISHMENT CLAUSE

The Establishment Clause was originally adopted, not to banish religion from public life, but to simply prevent Congress from interfering with the ability of the states to choose whether or not to establish their own religions.[2] In the words of Justice Story, under the Establishment Clause "the whole power over the subject of religion [was] left exclusively to the State governments, to be acted upon according to their own sense

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1 U.S. CONST. amend I. Known as the Establishment Clause, this amendment provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Id.*

2 *See* Raul M. Rodriguez, *God Is Dead: Killed By Fifty Years of Establishment Clause Jurisprudence*, 23 ST. MARY'S L.J. 1155, 1161-70 (1992) (asserting that history surrounding adoption of Clause is contrary to Supreme Court jurisprudence).

of justice . . . ."[3] Accordingly, the Establishment Clause was not designed to take the government out of the business of religion; rather it was designed to simply remove the federal government from the business of religion and to leave it to the states.

The adoption of the Establishment Clause was necessary because the states were far from unanimous on the subject of religion. For example, some states like Virginia opted for a total disestablishment of religion. Others, like Massachusetts, chose to establish their own religion. In fact, Massachusetts retained its established religion well into the nineteenth century.[4] Accordingly all states, regardless of whether they had established or had disestablished a religion, were suspicious that Congress would try to interfere with their right to religious self-determination. The phrasing of the Establishment Clause reflects the states' double concern. The Clause does not state that Congress could not enact laws that establish religion since that might have implied that Congress was free to require disestablishment. Instead, what the Clause says is that Congress cannot enact laws *respecting* an establishment of religion. Thus, it forbids Congress from passing laws that either establish a religion or prohibit the states from establishing their own religions.

The Establishment Clause was enacted to prevent federal interference with the religious affairs of the states; this is the only evil against which it is directed. The Clause was not designed to prohibit all cooperation between church and state. For instance, at the time of the Clause's adoption, religion was seen as a benefit to be fostered by the state, not as an evil to be eradicated by it. That position is clear not only from the language of the Clause, but also from our nation's early history. For example, one day after the House of Representatives voted to adopt what was to become known as the Religion Clauses, a resolution was intro-

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[3] *See* Ex Parte Garland, 71 U.S. 333, 397 (1866) (quoting Justice Story's COMMENTARIES ON THE CONSTITUTION 1878).

[4] Until 1833, Part I Article III of the Massachusetts Constitution read, in part, as follows:

> As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality; and as these cannot be generally diffused through a community, but by the institution of the public worship of God, and of public instructions in piety, religion and morality: Therefore to promote their happiness and to secure the good order and preservation of their government, the people of this commonwealth have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion and morality, and in all cases where such provision shall not be made voluntarily.

MA. CONST. art. III (amended 1833).

duced in Congress calling on President Washington to proclaim a day of prayer and thanksgiving to God. That resolution passed the Congress and President Washington responded with the proclamation recommending "to the people of the United States a day of public thanksgiving and prayer to be observed by acknowledging with grateful hearts the many signal favors of Almighty God especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness."[5] Virtually all Presidents since Washington have issued this type of proclamation.

Most Presidents, including Madison and Jefferson, and recently George Bush, have likewise publicly prayed to God for God's blessing in their inaugural speeches. Moreover, in Washington's case, immediately following his inauguration, the President and both Houses of Congress retired to St. Paul's Chapel in New York for a prayer service conducted by the Episcopal Bishop of New York. The prayer service had been specifically provided for in a joint resolution of Congress.

Congress has always prayed as well. As the Supreme Court noted in *Marsh v. Chambers*,[6] during the week Congress proposed the Establishment Clause to the states, it also voted to appoint and to pay for a chaplain for each House of Congress.[7] In *Marsh*, the Supreme Court noted that James Madison, the drafter of the Establishment Clause, was a member of the committee that proposed hiring the chaplain[8] and had himself voted in favor of the bill.[9] However, what the Court failed to add was that the House chaplains were specifically authorized not only to offer daily prayer, but also to conduct regular Sunday church services in the hall of the House of Representatives.[10] It has been documented that both Presidents Jefferson and Madison often attended those services.

Moreover, the Supreme Court prayed and still does. In fact, the Court's practice of opening its sessions with the invocation "God save this Honorable Court" dates from at least the time of Chief Justice John Marshall, the author of *Marbury v. Madison*.[11] But the historical record on religion is not limited to a favorable view of prayer by the three branches of government. Similar types of historical precedents demonstrate that religious education was also favored by both the early Con-

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5 This Thanksgiving proclamation was issued in 1789. *See* 132 CONG. REC. H1153-02 (1986) (statement of Mr. Kemp).

6 463 U.S. 783 (1983).

7 *Id.* at 788.

8 *Id.* at 788 n.8.

9 *Id.*

10 *See Rodriguez, supra* note 2, at 1165 n.66 (explaining that House of Representatives elected chaplains to open sessions with prayer and that Congress enacted statute to provide for payment for chaplains).

11 5 U.S. (1 Cranch) 137 (1803).

gresses and Presidents. Nobody viewed those positions as unconstitutional or remarkable.

For example, on the same day in 1789 that Madison introduced in Congress what was to become the Bill of Rights, the House of Representatives took up the question of reenacting the Northwest Ordinance.[12] The Ordinance was reenacted with a provision that stated as follows: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[13] During the next fifty-six years, Congress issued land grants in the Northwest Territory for both public schools and religious schools.

Until 1897, Congress consistently appropriated money to pay churches and religious organizations for the religious education of Indians. For example, one of the treaties that Thomas Jefferson entered into with the Kaskaskia Indians provided, in part, that "whereas the greater part of said Tribe have been baptized and received into the Catholic church, to which they are much attached, the United States will give annually for seven years one hundred dollars toward the support of a priest of that religion . . . and . . . three hundred dollars to assist the said Tribe in the erection of a church."[14] The government's practice of making payments like this did not stop until 1897, a century after the adoption of the Establishment Clause. The practice, however, was not stopped because it was thought to violate the Establishment Clause. Rather, Congress discontinued the practice because it decided that it was too expensive. Congress had reached the point where it was appropriating a half million dollars each year for the religious education of Indians. Nevertheless, the practice was never thought to be unconstitutional. A congressional provision for religious education was generally assumed to be no different than a congressional provision for congressional and military chaplains—provisions which continue to be in effect today.

II. THE SUPREME COURT AND THE ESTABLISHMENT CLAUSE

A. *Everson v. Board of Education—A Jurisprudential Earthquake*

In 1947, a jurisprudential earthquake took place with the Supreme Court's decision in *Everson v. Board of Education*.[15] In *Everson*, the Supreme Court held that the Establishment Clause incorporated the notion of liberty contained in the Fourteenth Amendment and would henceforth be adopted and applied to the states. In addition, after quoting a

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12 Ordinance of 1787: The Northwest Territorial Government (July 13, 1787).

13 Ordinance of 1787, Art. III.

14 *See* Jaffree v. Board of School Commissioners of Mobile County, 554 F. Supp. 1104, 1117 (S.D. Ala. 1983).

15 330 U.S. 1 (1947).

small portion of a private letter written by President Jefferson, the Court announced that the purpose of the Establishment Clause was to "erect 'a wall of separation between Church and State.'"[16] Despite this conclusion, the Court was sharply divided over whether providing school bus transportation to parochial school students violated the wall of separation.

It is difficult to overstate the magnitude of the shift in analysis that had taken place in the Court. As a theoretical matter, incorporating the Establishment Clause into the Fourteenth Amendment did not simply broaden or extend the reach of the Clause. Rather, the incorporation completely reversed what the Establishment Clause was originally intended to accomplish.[17] Remember, the Establishment Clause was crafted to prevent Congress from interfering with the states' ability to establish their own religions. Following *Everson*, the Supreme Court stated that the states could not establish their own religions—something that the Establishment Clause was designed to prevent. Not only were the states prohibited from establishing their own religions (something that they had lost interest in doing anyway), but now they were forced to observe a rigid wall of separation between church and state.

The terms of the debate have forever been changed because of the *Everson* decision. The debate which occurred in the first Congress concerned how much government land the religious schools needed. In contrast, following the *Everson* decision, the debate in the Supreme Court has been reduced to whether or not the Constitution permits the free use of school buses. *Everson* was only the starting point in the evolution of Establishment Clause thinking. Over the next forty years, the Court struggled to apply what it had initiated in *Everson*.

B. Cases After Everson—No Clear Standard

In attempting to build its wall of separation, the Supreme Court has decided a series of education cases that, read together, simply defy comprehension. For example, the Court has held that states could lend parochial school children geography textbooks,[18] but not maps.[19] These ap-

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[16] *Id.* at 16.

[17] For an interesting article challenging the incorporation of the Establishment Clause to the states, *see generally* Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700 (1992). The author's main premise is that the Framers intended the clause to embody the concept of federalism. *Id.* at 1703. For this reason, the author argues, the Establishment Clause was a "uniquely poor candidate for incorporation." *Id.* at 1700; *see also* William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L.R. 1191 (1990) (asserting clause was meant to be applied only against national government).

[18] Board of Education v. Allen, 392 U.S. 236 (1968).

[19] Meek v. Pittenger, 421 U.S. 349, 362-66 (1975).

parently conflicting decisions caused Senator Daniel Patrick Moynihan of New York to quip that the next case will have to be about atlases, which are books of maps. In addition, the Court has held that the Constitution permitted a state to lend parochial school children history books, but not film strips;[20] science textbooks, but not science kits. Moreover, the Court has said that a state could pay for bus transportation to parochial schools,[21] but not from parochial schools to field trip sites.[22] States could conduct speech and hearing services inside parochial schools,[23] but could only give the required therapeutic services elsewhere.[24]

Contributing to the uncertainty caused by the Court's decisions is that the results were achieved by an ever-shifting majority and series of pluralities of Justices. Some Justices, from time to time, confessed that the Court's Establishment Clause cases were confused, unsettled or even downright unprincipled. Sometimes even the majority would concede the same. For example, in *Walz v. Tax Commission*,[25] then Chief Justice Burger, writing for the Court, admitted that there was considerable internal inconsistency in the Court's Establishment Clause cases.[26]

The Burger Court, in *Lemon v. Kurtzman*, crafted the three-part *Lemon* test which was designed to relieve some of the inconsistency.[27] This test provides that governmental actions do not violate the Establishment Clause if they: (a) have a secular purpose; (b) have a primary effect that does not advance religion; and (c) do not result in what the Court called excessive entanglement between religion and the state.[28] Unfortunately, the three-part *Lemon* test has only managed to confuse Establishment Clause issues further. Ten years ago, the Court conceded, with considerable understatement, that the *Lemon* test has sacrificed clarity and predictability for the benefit of flexibility. In fact, the *Lemon* test is so flexible that in the case of *County of Allegheny v. American Civil Liberties Union*,[29] the Court managed to uphold the public display of a menorah and Christmas tree,[30] yet struck down the display of a

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20 *See* Wallace v. Jaffree, 472 U.S. 38, 110-11 (1985).

21 *See Everson*, 330 U.S. 1 (1947).

22 Wolman v. Walter, 433 U.S. 229, 252-55 (1977).

23 *Id.* at 241.

24 *Meek*, 421 U.S. at 367, 371.

25 397 U.S. 664 (1970).

26 *Id.* at 678-79.

27 Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). For an opposing view on the *Lemon* case, *see* Ivan C. Bodensteiner, *The "Lemon Test," Even With All Its Shortcomings, Is Not the Real Problem in Establishment Clause Cases*, 24 VAL. U. L. REV. 409, 414 (1990) (asserting the *Lemon* test flexible enough to be applied).

28 *Lemon*, 403 U.S. at 612-13.

29 492 U.S. 573 (1989).

30 *Id.* at 575.

creche.[31] More enigmatic, however, was that all nine Justices purported to apply some variation of the *Lemon* test yet managed to write four different opinions. Only two justices agreed with the case's two holdings.

In addition to its lack of clarity and predictability, the *Lemon* test suffers from an additional flaw. The interplay of the *Lemon* test's effects and entanglement provisions has created a catch-22 for parochial schools. This irreconcilable position was best illustrated by the Supreme Court's decisions in *Aguilar v. Felton*[32] and *School District of Grand Rapids v. Ball*.[33] In both cases, the Court held that the state's providing remedial educational services to educationally and economically deprived school children who attended parochial school violated the Establishment Clause. The court reached this conclusion in *Aguilar* by reasoning that the overbearing surveillance that would be necessary to prevent a violation of the effects test would itself violate the entanglement test.[34] The Court's concern was that public employees teaching in what the Court termed a "pervasively sectarian"[35] atmosphere would succumb to the pressures of the environment and begin to conform their instruction to the sectarian environment.[36] Accordingly, the parochial school students would either be subjected to indoctrination in the particular religious tenets at public expense, thus violating the effects test, or the government would have to undertake such overbearing surveillance, thus violating the entanglement test.

A series of cases in the lower courts has stretched the *Aguilar* decision even further. These cases present the question of whether *Aguilar* permits remedial services to be provided in mobile vans parked on or adjacent to parochial school property. In *Pulido v. Cavazos*,[37] the Eighth Circuit ruled that those vans could constitutionally be parked on or adjacent to the school property.[38] However, in *Walker v. San Francisco Unified School District*,[39] a district court in California disagreed with the *Pulido* decision and held that those mobile vans, which were replacing the parochial school classrooms that the *Aguilar* Court said could not be used, had to be parked off the church property.[40] The court ruled that the vans could not be brought onto the churches' or the schools' parking

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31 *Id.* at 574.

32 473 U.S. 402 (1985).

33 473 U.S. 373 (1985).

34 *Aguilar*, 473 U.S. at 412-14.

35 *Grand Rapids*, 473 U.S. at 385.

36 *Id.*; *cf. Aguilar*, 473 U.S. at 412-14.

37 934 F.2d 912 (8th Cir. 1991).

38 *Id.* at 919.

39 761 F. Supp. 1463 (N.D. Cal. 1991).

40 *Id.* at 1471.

lots. Identical cases are presently before the Sixth Circuit and the Eastern District of New York.

The foregoing cases demonstrate how far from its origins the Establishment Clause analysis has wandered.[41] As mentioned, the First Congress did not quibble over whether school children could receive government supported education on parochial school property. Rather, in some cases Congress actually gave property to parochial schools. Even assuming that *Aguilar* was correctly decided, the holding in that case was based on the existence of a so-called "pervasively sectarian atmosphere" within the parochial school building. Does the inside of a public van somehow acquire a pervasively sectarian atmosphere merely because it has been driven onto a parking lot of a church or a school? Religiosity does not seep like radon gas up from the ground and into the structure of the van. *Aguilar*'s analysis would be completely irrelevant to whether or not services could be offered in nondenominational vans devoid of religious symbols parked temporarily near or on the property of a church school.

C. A Call For Reexamination

In their present posture, the Establishment Clause cases are not considered "great" constitutional cases. They are, in many ways, silly cases. But one or more of them may ultimately yield great results. Even before Justices Souter and Thomas joined the Court, at least four Justices had indicated their willingness to undertake a very basic reexamination of the Supreme Court's Establishment Clause cases. In his dissent in *Wallace v. Jaffree*,[42] then Justice Rehnquist, now Chief Justice Rehnquist, specifically called for such a reexamination.[43] He recounted some of the same history described earlier in this article. Chief Justice Rehnquist concluded: "As its history abundantly shows, . . . nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means."[44] Justice White, writing a separate dissent,

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41 *See* A.E. Dick Howard, *The Wall of Separation: The Supreme Court a Uncertain Stonemason, in* RELIGION AND THE STATE 85, 113 (James E. Wood, Jr. ed., 1985).

> The years since *Everson* have brought so much gloss on the First Amendment that the Court has fallen into habit—natural to judges as to lawyers—of putting gloss on gloss. Thus, it becomes more important to reconcile an opinion with *Allen* or *Lemon* than to go back to first principles.

Id.

42 472 U.S. 38 (1985).

43 For an article describing Rehnquist's views, *see* Russel M. Martyn, *The Rehnquist Court and the New Establishment Clause*, 19 HAST. CONST. L.Q. 567, 573-77 (1992).

44 *Wallace*, 472 U.S. at 113 (Rehnquist, J., dissenting).

agreed with Justice Rehnquist in calling for a reexamination of Establishment Clause.[45]

Likewise, in *Edward v. Aguillard*,[46] Justice Scalia called for a reexamination of what he termed the Court's "embarrassing Establishment Clause jurisprudence."[47] In *Allegheny*, Chief Justice Rehnquist, Justices White and Scalia all joined Justice Kennedy's separate opinion which announced his belief that "[s]ubstantial revision of our Establishment Clause doctrine may be in order."[48] Justices Souter and Thomas have yet to write an opinion on the Clause. Yet if either of them is willing to join the others in reexamining the Establishment Clause, five votes would be present to do so and the results could be momentous. Justice O'Connor has already stated her position on the Establishment Clause, saying that it prohibits governmental "endorsement" of religion.[49] In contrast, Justices Blackmun and Stevens have continued to fully embrace the *Lemon* test.

The next school funding cases to arrive at the Court may well be the occasion for a reexamination not only of *Aguilar*, but also of some forty years of parochial school aid cases. In fact, the three-part *Lemon* test itself is already under siege. In *Lee v. Weisman*, a graduation school prayer case, the petitioners explicitly urged the Court to abandon the *Lemon* test and much of its Establishment Clause analysis.[50] They asked the Court to hold that the only governmental actions which violate the Establishment Clause are those that are coercive. Moreover, the Solicitor General asked the Court to abandon the *Lemon* test, at least in the context of civic acknowledgment of religion cases involving menorahs, crucifixes, crosses, and other religious symbols. The Solicitor General has argued that in such cases, the Court should apply a less restrictive coercion test.

Predictions are always risky, but the best guess is that the Supreme Court will eventually do to the Establishment Clause what it did to the

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45 *Id.* at 91 (White, J., dissenting).

46 482 U.S. 578 (1987).

47 *Id.* at 639 (Scalia, J., dissenting). *See* Note, *The Establishment Clause and Justice Scalia: What the Future Holds for Church and State*, 63 NOTRE DAME L. REV. 380, 389-92 (1988) (describing Justice Scalia's dissent in *Aguillard*).

48 *County of Allegheny*, 492 U.S. at 656 (Kennedy, J., concurring in part, dissenting in part).

49 *See* Note, James M. Lewis & Michael L. Vild, *A Controversial Twist of Lemon: The Endorsement Test as the New Establishment Clause Standard*, 65 NOTRE DAME L. REV. 671, 673-97 (1990) (analyzing the endorsement test). The author asserts that such a test would make it more likely for the court to find governmental establishment clause violations. *Id.* at 697.

50 The Supreme Court has now decided this case. *See* Lee v. Weisman, 112 S.Ct. 2649 (1992). The Court determined that it was not necessary to reassess the *Lemon* test at the time due to the "pervasive" degree of government involvement with religious activity.

Free Exercise Clause in the *Smith*[51] case. In *Smith*, Justice Scalia wrote that neutral laws of general applicability do not violate the Free Exercise Clause.[52] The *Smith* test raises all sorts of questions and interesting problems for the Free Exercise Clause. Justice Scalia had first adopted that test in the case of *Barnes v. Glen Theater, Inc.*,[53] which involved an Indiana public nudity statute. Justice Scalia stated that the "neutral laws of general applicability" test should apply in the free speech area to determine the constitutionality of a law.[54] Moreover, last term, in another free speech case, *Cohen v. Cowles Media Company*,[55] the Court applied a similar analysis. In that case, the Minneapolis Star tried to avoid liability for breach of contract or promissory estoppel based upon its reporter's violation of a promise of confidentiality to a source.[56] The newspaper argued that the law of promissory estoppel did not apply to it in this context because of the Free Speech and Free Press Clause. The Supreme Court rejected that position, holding that neutral laws of general applicability can be applied to the press without violating the Free Press or the Free Speech Clauses.[57]

A similar test could be applied to Establishment Clause cases. If that were the case, a state program would not violate the Establishment Clause if it were a neutral program of general applicability—in other words, a program that is available generally to all citizens, and not just to those of a particular faith. Title I programs of remedial services, for example, would easily pass that test. Those services are available to economically and educationally deprived school children wherever they attend school. Providing those services in the child's regular school building, public or private, would therefore be no problem. Consequently, *Aguilar* would be overruled and tuition tax credits would be upheld. In addition, voucher programs would be constitutional as would be virtually all other forms of assistance that have been challenged for the last quarter century, so long as they were neutral programs of general applicability.

Are there any clues beyond what the Court has said in the free speech and free exercise areas? Yes, there are some. At the oral argument in *Lee*, Justice Scalia repeatedly asked why should not the test under the Establishment Clause be whether the state action was nonsectarian and noncoercive. Justice Kennedy suggested a similar test in his *Allegheny* opinion, an opinion that was joined by Chief Justice Rehnquist

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51 Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).
52 *Id.* at 880-82.
53 111 S.Ct 2456 (1991).
54 *Id.* at 2467.
55 111 S.Ct 2513 (1991).
56 *Id.* at 2514-15.
57 *Id.* at 2518-19.

and Justices White and Scalia. In that case, Justice Kennedy wrote that the Establishment Clause prohibits "coercive" practices.[58] Thus, it prohibits "obvious effort[s] to proselytize on behalf of a particular religion."[59] But, Justice Kennedy added that "noncoercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage."[60] Among the practices that Justice Kennedy indicated that were accepted as a part of our national heritage was "governmental support for religious education."[61]

CONCLUSION

The standards that have been discussed—whether state action is nonsectarian and noncoercive and whether a program is a neutral one of general applicability—would comport very well with the history of the Establishment Clause. It is suggested that such a standard, or something approaching it, will become the next Establishment Clause test sometime in the near future. If so, the Establishment Clause will be returned more closely to its original roots, and the world will be a much safer place for parochial schools.

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[58] *County of Allegheny*, 492 U.S. at 576.
[59] *Id.*
[60] *Id.* at 662-63.
[61] *Id.* at 662.