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Grand Rapids School District v. Ball: An Educational Perspective on the Evolution of Lemon

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Grand Rapids School District v. Ball: An Educational Perspective on the Evolution of *Lemon*

I. INTRODUCTION

In *Lemon v. Kurtzman*,[1] the Supreme Court established a three-prong test to determine whether state financial aid to sectarian schools violates the first amendment's establishment clause. First, "the statute must have a secular legislative purpose"; second, "its principal or primary effect must be one that neither advances nor inhibits religion"; and third, "the statute must not foster an excessive government entanglement with religion."[2] While each prong's requirements may be stated with relative simplicity, the Court's attempts to apply these general principles have been confused.[3] Most recently, in *Grand Rapids School District v. Ball*[4] and *Aguilar v. Felton*[5] the Court applied *Lemon*'s latter two prongs in striking down a Michigan shared time program and a New York Title I program aimed at incorporating a state remedial and non basic curriculum into religious schools.[6] Though it did not find that either program violated *Lemon*'s secular purpose requirement, the Court invalidated the Michigan program under the primary effect prong,[7] and the New

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1. 403 U.S. 602 (1971). Rhode Island and Pennsylvania statutes provided salary supplementation for teachers of secular subjects in nonpublic schools. The Supreme Court struck down the programs because they created a "relationship pregnant with dangers of excessive government direction of church schools and hence of churches." *Id.* at 620. For an in-depth analysis, see Giannella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*, 1971 SUP. CT. REV. 147; Note, *Lemon v. Kurtzman: First Amendment Religion Clauses Reexamined*, 33 U. PITT. L. REV. 330 (1971).

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

3. *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Sloan v. Lemon, 413 U.S. 825 (1973); Commmittee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973).

4. 105 S. Ct. 3216 (1985)

5. 105 S. Ct. 3232 (1985).

6. The *Grand Rapids* program provided for art, music and physical education classes, as well as remedial and enrichment math and reading. 105 S. Ct. at 3218. The *Aguilar* Title I program provided for remedial reading, reading skills, remedial mathematics, English as a second language and guidance classes. 105 S. Ct. at 3235.

7. *Grand Rapids*, 105 S. Ct. at 3223-30.

York program under the excessive entanglement prong.[8] *Grand Rapids* and *Aguilar* thus provide significant insight into the development of constitutional restrictions on state aid to parochial schools.

This note analyzes the first of these sister cases—*Grand Rapids*—and its effect on *Lemon*'s evolving primary effect prong. It then focuses on *Grand Rapids*' departure from the Court's general direction in applying *Lemon*, and the far-reaching impact the emerging test may have on state aid to sectarian schools. This note concludes that, if applied strictly, the *Grand Rapids*' test renders all forms of state aid to parochial schools unconstitutional.

II. The Primary Effect Prong

The primary effect prong, as described in *Lemon*, apparently requires that state aid remain neutral, neither advancing nor inhibiting religious belief.[9] *Lemon* provided no direction in determining when a program would violate this standard, because the challenged program in *Lemon* was found to violate the excessive entanglement prong of the newly-promulgated test.[10] Consequently, the *Lemon* Court itself never reached the effect prong.

In the ensuing decades, the Court issued opinions which seemed to endorse two approaches, embodying different notions of neutrality.

In *Hunt v. McNair*,[11] the Court held that a state could provide financial assistance to parochial school building and development programs. The Court specifically rejected the argument that any state aid advanced a school's religious beliefs simply because it allowed the school to divert money from a secular to a

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8. *See Aguilar*, 105 S. Ct. at 3236-39. While *Aguilar* significantly affects *Lemon*'s excessive entanglement prong, that is beyond the scope of this article.

9. *Lemon*, 403 U.S. at 612.

10. *Id.* at 613-14. At least one author has criticized the Court for unnecessarily creating multi-pronged analytical hurdles. These hurdles "distance the Justices from both their audience, the American public, and their text, the Constitution. In an effort to retain the authority of the text, the Court is instead displacing it; in an effort to persuade that audience, the Court is instead excluding it." Nagel, *The Formulaic Constitution*, 84 Mich. L. Rev. 165, 165 (1985).

11. 413 U.S. 734 (1973). This action challenged the validity of a South Carolina statute providing for the issuance of revenue bonds to assist parochial colleges in financing construction of general education buildings. The statute specifically prohibited the use of such aid in financing any building primarily used for sectarian study or religious worship.

religious area.[12] In addition, the Court established a presumption that "in absence of evidence to the contrary"[13] state aid furthered the school's secular aims and not its religious goals. Thus, the Court seemed to indicate that the primary effect prong merely required that aid remain *primarily* neutral; a program which only indirectly advanced or inhibited the school's religious beliefs would be permissible.

The Court modified these guidelines four years later in *Wolman v. Walter*.[14] In *Wolman*, the state attempted to aid religious schools by providing textbooks, instructional materials,[15] on-site health care, funding for standardized tests, and field trip subsidization. While the Court did not go so far as to reverse *Hunt*, it narrowed the scope of permissible aid to religious schools.[16] The Court asserted that even though the instructional aid "was limited to neutral and secular instructional material and equipment, it inescapably had the primary effect of providing a direct and substantial advancement of the sectarian enterprise."[17] On this basis, the Court struck down the instructional materials program and seemed to suggest that the primary effect prong required state-aid to remain *entirely* neutral; no aid which even slightly advanced the school's religious beliefs could pass constitutional muster.[18]

Some years later, however, the Court again shifted ground in *Committee for Public Education v. Regan*.[19] *Regan* involved a New York attempt to subsidize the costs of administering state-required tests in parochial schools. The Court held such aid constitutional, finding no direct benefit to the religious schools.[20] In

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12. *Id.* at 742-43 ("[T]he Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.").

13. *Id.* at 744.

14. 433 U.S. 229 (1977).

15. The instructional material included maps, charts, graphs, pictures, movie and filmstrip projectors, overhead projectors, phonographs and cassette players.

16. *Wolman*, 433 U.S. at 249-51, 254 (striking down instructional material aid and field trip subsidization).

17. *Id.* at 250.

18. The Court apparently believed that instructional materials provided a direct benefit, but textbooks, *id.* at 236-38, testing and scoring materials, *id.* at 240-41, and therapeutic health services *id.* at 248, did not. The distinction is difficult to see.

19. 444 U.S. 646 (1980).

20. As in *Wolman* v. *Walter*, 433 U.S. at 240, "[t]he nonpublic school does not control the content of the test or its result"; and here, as in *Wolman*, this factor "serves to prevent the use of the test as a part of religious teaching," *ibid.*, thus avoiding the kind of direct aid forbidden by the Court's prior cases.

so holding, the Court repeated its refusal to accept " 'the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.' "[21]

Although the analysis in these cases was somewhat confusing, the Court consistently advanced one specific guideline in determining whether a program violated the primary effect test: state aid to religious schools was permissible unless it advanced the religious enterprise. The mere fact that such a program freed school secular funds for use in religious areas was not, standing alone, enough to invalidate the state program.[22]

Grand Rapids rejects this previously established guideline, and holds that any program which allows the parochial school to shift present or future funds from secular to religious programs is unconstitutional.[23] At the same time, *Grand Rapids* creates an entirely new test: If the state program creates the appearance of a crucial symbolic link between church and state, it is unconstitutional.[24] The case echoes the Court's previous holding in *Meek v. Pittenger*[25] that the mere risk of religious inculcation is sufficient to invalidate state aid.

A. *The Facts in* Grand Rapids

The Grand Rapids School District created a shared time program in which public teachers taught classes designed to supplement the "core curriculum" in parochial schools.[26] The pro-

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Id. at 656.

21. *Id.* at 658 (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973).

22. *Regan*, 444 U.S. at 658; *Hunt*, 413 U.S. at 742-43.

23. 105 S. Ct. at 3229-30.

24. *Id.* at 3226-27.

25. 421 U.S. 349 (1975). In *Meek*, plaintiffs challenged the constitutionality of Pennsylvania statutes providing for state aid to all nonpublic schools. Among other things, these statutes appropriated funds allowing state-employed professional teachers and staff to provide auxiliary services in the nonpublic schools. The Court struck down the program, finding a significant "danger that religious doctrine will become intertwined with secular instruction." *Id.* at 370.

26. *Grand Rapids*, 105 S. Ct. at 3218. The statute also provided for a community education program, which financed various "hobby" classes in the parochial schools. Teachers at the parochial school normally taught the classes, and thus were recognized as "part time public school employees." *Id.* at 3219. The Court found the program unconstitutional mainly because " 'virtually every Community Education course conducted on facilities leased from nonpublic schools has an instructor otherwise employed full time by the same nonpublic school.' " *Id.* (quoting Americans United for Separation of Church and State v. School Dist., 546 F. Supp. 1071, 1079 (W.D. Mich. 1982)). It found a "substantial risk, that, overtly or subtly, the religious message [the teachers] are ex-

gram offered such courses as art, music, and physical education as well as remedial and enrichment math and reading. Some of the teachers it employed had previously taught in nonpublic schools. Statutory regulations mandated that all religious symbols be removed from the room during the program period and further required the teacher to post a sign stating that the area was a public school classroom.[27]

Ball and five other taxpayers brought suit against the school district claiming that the shared time program violated the first amendment's establishment clause.

B. Analysis

The Court invalidated the shared time program as a violation of *Lemon*'s primary effect prong, citing the three following reasons:

> First, the teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs. Second, the programs may provide a crucial symbolic link between government and religion, thereby enlisting—at least in the eyes of impressionable youngsters—the powers of government to the support of the religious denomination operating the school. Third, the programs may have the effect of directly promoting religion by impermissibly providing a subsidy to the primary religious mission of the institutions affected.[28]

The Court's analysis under each of these three points attempts to give new insight into the requirements of the primary effect prong. The following sections of this note identify three significant results of this analysis. First, if a substantial risk exists that the program will inculcate religion, the state aid is unconstitutional. No evidence of such a risk is necessary; rather, the possibility that a program might inculcate religion is sufficient. Second, the program may not create any symbolic link be-

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pected to convey during the regular school day will infuse the supposedly secular classes they teach after school." *Grand Rapids*, 105 S. Ct. at 3225. Because analysis of the community education program insignificantly affects *Lemon*'s development, this note will not discuss it further.

27. *Grand Rapids*, 105 S. Ct. at 3220 & n.2. The signs read: "GRAND RAPIDS PUBLIC SCHOOLS' ROOM. THIS ROOM HAS BEEN LEASED BY THE GRAND RAPIDS PUBLIC SCHOOL DISTRICT, FOR THE PURPOSE OF CONDUCTING PUBLIC SCHOOL EDUCATIONAL PROGRAMS. THE ACTIVITY IN THIS ROOM IS CONTROLLED SOLELY BY THE GRAND RAPIDS SCHOOL DISTRICT."

28. *Id.* at 3223-24.

tween the state and parochial school. Third, if any possibility exists that the parochial school will implement a similar secular program in the future, the state program is invalid because it directly aids the religious school by allowing it to funnel "future secular funds" to religious activities.

1. Inculcating particular religious beliefs

A major concern of the *Grand Rapid*'s Court was the suspicion that the state-sponsored instruction in parochial schools could not remain purely secular in an atmosphere where "the advancement of religious belief is constantly maintained."[29] Therefore, even though no evidence existed that such indoctrination had occurred in the past or would occur in the future,[30] and even though a vast majority of public teachers in the program did not subscribe to the beliefs espoused by the parochial school sponsors,[31] the Court found that the mere *risk* of religious inculcation posed by the program infringed the first amendment's guarantee against state-established religion.[32] Moreover, proof of such inculcation was not necessary; it was sufficient that the state program "pose[d] a substantial risk of state-sponsored indoctrination."[33] Such a standard "substitutes presumption for proof that religion is or would be taught in state-financed secular courses,"[34] and mandates that courts presume unconstitutional any program which creates risk of religious inculcation, even if evidence indicating such inculcation is totally absent.[35]

This standard is not inconsistent with the Court's earlier

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29. *Id.* at 3224-25 ("Teachers in such an atmosphere may well subtly (or overtly) conform their instruction to the environment in which they teach, while students will perceive the instruction provided in the context of the dominantly religious message of the institution, thus reinforcing the indoctrinating effect."). This is not the first time the Court has held that the mere risk of inculcation violates the establishment clause. *See* Meek v. Pittenger, 421 U.S. 349 (1975).

30. *Grand Rapids*, 105 S. Ct. at 3231 (O'Connor, J., dissenting in part) ("Nothing in the record indicates that Shared-Time instructors have attempted to proselytize their students.").

31. "In fact, only 13 Shared Time instructors have ever been employed by any parochial school, and only a fraction of those 13 now work in a parochial school where they were previously employed." *Id.* (O'Connor, J., dissenting in part).

32. *Id.* at 3225.

33. *Id.*

34. Lemon v. Kurtzman, 403 U.S. 602, 670 (1971) (White, J., concurring in part and dissenting in part).

35. *See supra* note 30.

holding in *Meek v. Pittenger*,[36] wherein the Court held that a state aid program violates the primary effect prong if a danger exists "that religious doctrine will become intertwined with secular instruction."[37] However, this substantial risk standard extends the constitutional inquiry far beyond *Lemon*'s second prong. The test is no longer whether the state-aid program has the primary *effect* of advancing or inhibiting religion. Instead, the inquiry must now focus on whether the state-aid program *risks* advancing or inhibiting religion.

The impact of this new test becomes apparent when applied outside the parochial school environment. Public school teachers, similar to those in Michigan, may work every day in school districts with even higher religious concentrations than were at issue in *Grand Rapids*.[38] In such an environment, "whether the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists."[39] That danger, while recognized by the Court,[40] has never been considered sufficient to render public education programs unconstitutional. The willingness of the Court to accept this risk in public schools, while finding it unacceptable in the parochial environment, indicates that the risk of religious inculcation alone should not render state aid programs unconstitutional.[41]

2. *Crucial symbolic link*

In further evaluating the primary purpose of Michigan's shared time program, the *Grand Rapids* Court stated:

> [A]n important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.[42]

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36. 421 U.S. 349 (1975).

37. *Id.* at 370.

38. In fact, the Supreme Court has recognized that in some circumstances, a substantial risk exists that public school teachers may advance or inhibit relgious beliefs. *See* Wisconsin v. Yoder, 406 U.S. 205, 211-12 (1972).

39. Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3225 (1985).

40. *See supra* note 38; *see also* McConnell, *Political and Religious Disestablishment*, 1986 B.Y.U. L. REV. 405, 434-42.

41. *See supra* note 29.

42. *Grand Rapids*, 105 S. Ct. at 3226.

The Court found such state endorsement because secular classes were taught in the same building as religious classes, and students moving from classroom to classroom "would be unlikely to discern the crucial difference between the religious school classes and the public school classes, even if the latter were successfully kept free of religious indoctrination."[43]

A "graphic symbol of the 'concert or union or dependency' of church and state,"[44] especially in the eyes of an impressionable youngster, may indeed violate constitutional principles. However, the definition of "crucial symbolic link" remains elusive.[45] Indeed, the Court's language supports two different theories.

The first theory is suggested by the language that a symbolic link is created if governmental action "is likely to be perceived by adherents of the controlling denominations as an endorsement, *and* by the nonadherents as a disapproval of their religious choices."[46] This language requires some evident discrimination. In other words, a state creates a "crucial symbolic link" when it treats one segment of the public differently than it treats another. For example, if Michigan decided to aid only religious schools in its shared time program, such a program would discriminate between religious and nonreligious beliefs, thereby creating a crucial symbolic link.

The second theory is suggested by the Court's observation that "[g]overnment promotes religion . . . when it fosters a close identification of its powers and responsibilities with those of *any* . . . religious denomination . . . ."[47] This passage indicates that discrimination is not necessary; rather, any aid sufficient to create the appearance of "concert or union or dependency"[48] is sufficient. If this is the standard, the Court must merely decide if the aid program creates a joint venture between church and state to find it unconstitutional. Whether it discriminates among religious beliefs is irrelevant.

Grand Rapids is the first case in which the Court specifically mentioned the crucial symbolic link test in analyzing

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43. *Id.* at 3227.

44. *Id.*

45. Prior to *Grand Rapids*, no Court decision had ever specifically referred to a "crucial symbolic link" in examining state aid to parochial schools.

46. *Grand Rapids*, 105 S. Ct. at 3226 (emphasis added).

47. *Id.* (emphasis added).

48. *Id.* at 3227.

Lemon's primary effect prong. Unfortunately, the Court does not make clear which of the above two standards it applied in striking down the Michigan program.

a. The "discrimination" theory. Although not specifically discussing the new crucial symbolic link test, previous Court statements support the discrimination theory. In *Everson v. Board of Education*[49], in which the Court upheld state transportation aid to parochial schools, the Court held that the first amendment commands that the state "cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual . . . members of any . . . faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation."[50] This statement indicates that public welfare programs must include individual members of religious organizations, regardless of whether such programs appear as joint ventures between church and state.

Everson is arguably similar to *Grand Rapids* in that both involve state programs which attempt to promote public welfare. The program in *Everson* extended transportation to all public and private school students; the program in *Grand Rapids* extended remedial and nonbasic curriculum programs to all public and private school students. *Everson* seems to expressly hold such programs constitutional.

Under the discrimination theory, Michigan's general aid program would not violate the crucial symbolic link test, since the Michigan public school curriculum already included remedial programs. The state was merely attempting to extend those programs to all nonpublic schools.

b. The "joint venture" theory. The joint venture theory is a much narrower approach in determining crucial symbolic link. If it appears that church and state are involved in a joint venture, a crucial symbolic link exists.[51] In *Grand Rapids*, the Court stated:

> Our cases have recognized that the Establishment Clause guards against more than direct, state-funded efforts to indoc-

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49. 330 U.S. 1 (1947). Plaintiff brought action against a New Jersey board of education seeking to set aside a board resolution providing school transportation for both public and private school children.

50. *Id.* at 16 (emphasis in original).

51. *Grand Rapids*, 105 S.Ct. at 3227 ("This effect—the symbolic union of government and religion in one sectarian enterprise—is an impermissible effect under the Establishment Clause.").

> trinate youngsters in specific religious beliefs. Government promotes religion as effectively when it fosters a *close* identification of its powers and responsibilities with *those of any—or all*—religious denominations as when it attempts to inculcate specific religious doctrines.[52]

Two difficulties exist in applying the joint venture theory. First, the theory may conflict with the free exercise clause. As the Court stated in *Everson,* free exercise does not allow a state to withhold public welfare benefits solely on the basis of religious belief.[53] For example, assume in order to combat nutritional deficiency, a state provides free hot lunches for all school children. Such a program would surely be deemed a public welfare program, yet when instituted in parochial schools, it could also be viewed as a joint venture between church and state. In such a situation, the *Everson* and *Grand Rapids* holdings are difficult to reconcile. Upholding the program would create a crucial symbolic link and violate the establishment clause. Yet, witholding the public welfare benefit solely because of religious belief would violate the free exercise clause.

Even if the Court resolves this problem in the future, a second difficulty arises. The Court states that a "close identification" with religion is sufficient to create a crucial symbolic link.[54] Yet, it gives no indication how that identification should be determined. Absent such criteria, legislatures and lower courts are left to the Court's past decisions to determine whether a specific type of identification violates the standard. This is difficult since the Court never mentioned crucial symbolic link before *Grand Rapids.* The appropriate boundaries are far from clear. For example, Court decisions have upheld grants for transportation,[55] construction,[56] textbooks,[57] testing and scoring,[58] and diagnostic health care.[59] It has struck down programs that provide for

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52. *Id.* at 3226 (emphasis added).

53. 330 U.S. at 16 (". . . New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation.") (emphasis in original).

54. *Grand Rapids,* 105 S. Ct. at 3226.

55. Everson v. Board of Educ., 330 U.S. 1 (1947).

56. Tilton v. Richardson, 403 U.S. 672 (1971).

57. Wolman v. Walter, 433 U.S. 229, 236-38 (1977); Board of Educ. v. Allen, 392 U.S. 236 (1968).

58. *Wolman,* 433 U.S. at 238-42.

59. *Id.* at 241-44.

maintenance and repair,[60] tuition reimbursement,[61] instructional materials,[62] field trip subsidies[63] and on-site therapeutic services.[64] It is extremely difficult to identify a principled basis on which to call the impermissible programs "joint ventures". In short, the crucial symbolic link test, as presently formulated by the Court, leaves lower courts and legislators totally without guidance in formulating and evaluating state programs giving aid to parochial schools.

3. Subsidy of the school's primary religious mission

In evaluating Michigan's program, the Court observed that it subsidized the primary mission of religious schools. In so doing, the Court purported to follow the "direct aid" test stating that if the program is directed primarily at helping the student and gives only indirect aid to the school, it is constitutionally permissible.[65] After its evaluation, however, the Court concluded:

> The programs challenged here, which provide teachers in addition to the instructional equipment and materials, have a similar—and forbidden—effect of advancing religion. This kind of direct aid to the educational function of the religious school is indistinguishable from the provision of a direct cash subsidy to the religious school that is most clearly prohibited under the Establishment Clause.[66]

The majority further found that the Michigan program " 'inescapably [has] the primary effect of providing a direct and substantial advancement of the sectarian enterprise.' "[67] The Court listed three reasons in support of this conclusion: (1) there was no way of knowing whether the religious schools would have offered these specific classes had the shared time program not offered them first; (2) even if the courses offered in the program were new to the school, their general subject matter was surely contained in the religious school's curriculum; and (3) such a program could eventually expand to provide funds for all secular

60. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973).
61. Sloan v. Lemon, 413 U.S. 825 (1973).
62. *Wolman*, 433 U.S. at 248-51.
63. *Id.* at 252-55.
64. *Id.* at 244-48.
65. *See supra* notes 11-25 and accompanying text.
66. *Grand Rapids*, 105 S. Ct. at 3229.
67. *Id.* (quoting *Wolman*, 433 U.S. at 250) (brackets Justice Brennan's).

classes at religious schools, allowing the school to use its funds to accomplish its religious purposes.[68] Thus, the general philosophy behind such a holding is that the religious school might save money as a result of the state program, and that such money would be reinvested in furthering the institution's religious goals.

With these statements, the *Grand Rapids* Court apparently rejected two long-standing constitutional presumptions. The first, discussed earlier, is that an aid program does not necessarily advance religious belief simply because it allows the school to shift money from a secular to a religious purpose. The presumption weighed in favor of the constitutionality of the state aid unless evidence to the contrary existed.[69] In *Grand Rapids,* the Court not only disregarded this presumption, it further held that state aid was unconstitutional if any possibility existed that the parochial school might spend its own funds in implementing the program at some point in the future.[70] The Court thus held that states may give no aid to parochial schools in areas where that school might be willing to spend its own money. Apparently, no evidence of such expected use is necessary; it is enough if a possibility exists that the school would implement the program sometime in the future.

Such reasoning, if extended to its logical conclusion, requires all parochial school aid to be halted, since all aid lies in areas in which the school, without public funds, might implement a similar program. In the past, the Court has upheld state grants for textbooks, transportation, record keeping, testing, and health-care services. If the Court truly adheres to the test it formulates, it must overrule this entire line of cases because the possibility exists that absent state funds, the parochial school would provide these services to its students.

The second assumption effectively destroyed by *Grand Rapids* is that not every program which indirectly aids parochial schools is constitutionally invalid.[71] Despite the *Grand Rapids*

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68. *Grand Rapids,* 105 S. Ct. at 3230.

69. *See supra* notes 11-25 and accompanying text.

70. *Grand Rapids,* 105 S. Ct. at 3230 ("[T]here is no way of knowing whether the religious schools would have offered some or all of these courses if the public school system had not offered them first.").

71. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 771 (1973) (It is "well established . . . that not every law that confers an 'indirect' . . . benefit upon religious institutions is, for that reason alone, constitutionally invalid."). *Accord,* Board of Educ. v. Allen, 392 U.S. 236 (1968); Everson v. Board of Educ., 330 U.S. 1 (1947).

Court's holding that the Michigan program had "the primary effect of providing a direct and substantial advancement of the sectarian enterprise,"[72] it is difficult to understand how the shared time program aids religious schools any more directly than the textbook program upheld in *Board of Education v. Allen*[73], or the transportation grants found constitutional in *Everson v. Board of Education.*[74] All such programs free religious school funds which may be used in advancement of religious beliefs. In fact, one might argue that textbook subsidies aid religious schools more than the program in *Grand Rapids* for three reasons. First, while a religious school might forego remedial instruction and other nonbasic courses, textbooks are fundamental educational components for all school courses. Second, while the textbook program provided books for all pupils, the Michigan program provided aid only to a significant minority needing special class offerings. Finally, textbook aid programs allow religious schools to shift *actual* money to other areas. In *Grand Rapids,* the Court only speculated that the program might free funds in the future should the religious school decide to offer the affected courses.

By rejecting these two long-standing presumptions, the Court severely limited state aid to parochial schools. Not only is such aid unconstitutional if it frees any religious school funds currently in use, it is also invalid if a possibility exists that the school might use its funds for such a program in the future. A program which aids student and state may thus be constitutionally suspect, even if it only indirectly advances the school's religious beliefs.

III. Forgotten Policies

In creating its new test, the *Grand Rapids* Court has disregarded critical educational considerations that have helped shape its rulings in the past. First, private schools relieve the public sector of a huge economic load. Five million students attend nonpublic elementary and secondary schools, saving taxpayers an estimated 14 billion dollars every year.[75] Nonpublic

72. *Grand Rapids,* 105 S. Ct. at 3228-29 (quoting Wolman v. Walter, 433 U.S. 229, 250 (1977)).

73. 392 U.S. 236 (1968).

74. 330 U.S. 1 (1946).

75. Esty, *American Private Schools: A Definition,* 66 Nat'l A. Secondary Sch. Principals Bull. 4, 5 (1982).

institutions of higher education annually expend over 23 billion dollars.[76] It is much less expensive for a state to subsidize remedial courses in parochial schools than to take over exclusive responsibility for educating the students enrolled in such courses. Viewed another way, the state is at least partially responsible to ensure that parochial pupils are capable. It is in the state's long-term economic interest to aid all students in developing basic skills, such as reading, whether they attend public or private schools. For these economic reasons, states have a great interest in supporting the continued existence of nonpublic schools.

Second, many forms of aid to parochial schools should be presumed valid for the same reasons that similar aid to public schools is presumed valid. The rationale for providing special educational services to certain categories of students, for example, would apply equally to all students in these categories. As one author states:

> If the purpose of a government policy or program is to strengthen the education received by a handicapped child, a disadvantaged child, a non-English speaking child, a gifted child, or a child lacking in basic academic skills, it should not matter to government whether that child is enrolled in a public or private school.[77]

Third, parents who send their children to parochial schools should receive the benefits of public welfare programs. These parents not only pay tuition to the religious school, but their taxes also support public school programs.[78] Thus, if a public welfare program exists providing transportation or remedial programs to public school youngsters, there is little reason not to allow those same programs to aid parochial school children, as long as the aid is non-discriminatory.

Finally, diversity in education is desirable in and of itself. This is so because "the schooling of a pluralistic society is too complex and sensitive a matter to tolerate homogenization; and because education . . . is benefited by a measure of competition

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76. Kearny, *The Urban Catholic School—A Valuable Part of American Education,* 66 NAT'L A. SECONDARY SCH. PRINCIPALS BULL. 38, 41 (1982).

77. Finn, *Public Service, Public Support, Public Accountability,* 66 NAT'L A. SECONDARY SCH. PRINCIPALS BULL. 67, 69 (1982).

78. *See* G. TUCKER, THE PRIVATE SCHOOL 32, 46-48 (1965); Donovan, *The Quality and Community Sense of Nonpublic Schools,* in GOVERNMENT AID TO NONPUBLIC SCHOOLS: YES OR NO?, 43 (G. Kelly ed. 1972); West, *An Economic Analysis of the Law and Politics of Nonpublic School Aid,* in NONPUBLIC SCHOOL AID, 1 (E. West ed. 1976).

and damaged by monopoly."[79] State aid should therefore be encouraged and presumed valid unless evidence exists showing harmful discrimination.

In short, secular instruction sponsored by the state in sectarian schools has significant positive effects upon the individual and society.[80] While these effects cannot override basic constitutional concepts, they merit consideration in the primary effect analysis.[81]

IV. Conclusion

The test in *Grand Rapids*, if strictly applied, renders any type of aid to parochial schools unconstitutional, and places states in a difficult position.[82] If states require religious schools to offer remedial programs without providing financial assistance, the costs of private education will inevitably increase. This would, in turn, place a heavy burden on society by causing the discontinuance of some parochial schools or otherwise forcing parochial students into the public school system. Yet, if states do not require parochial schools to implement remedial programs, students in critical need of such assistance will not receive it—to the long-term detriment of those students and ultimately the rest of society.

The strict requirements of *Grand Rapids* eliminate the simple answer to this dilemma: state aid to secular education in religious schools. By advancing a test which no longer looks to actual primary *effect*, but instead examines risk, symbolic impact, and potential subsidies, the Court has set an establishment clause standard no state-aid program can meet.

Von G. Keetch

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79. Finn, *supra* note 77, at 71.

80. *See supra* note 78 and accompanying text.

81. In Board of Education v. Allen, 392 U.S. 236, 247 (1968), the Court observed, "Underlying [the general desire to aid parochial schools] has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience."

82. Even if a state aid program could comply with all aspects of the *Grand Rapids* primary effect test, it must still satisfy *Lemon*'s excessive entanglement prong. *See* Aguilar v. Felton, 105 S. Ct. 3232 (1985).