

# The Burger Court Opinion Writing Database

## *School District of Grand Rapids v. Ball*

473 U.S. 373 (1985)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

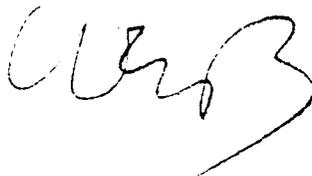
June 24, 1985

Re: No. 83-990 - Grand Rapids School District v. Ball

Dear Bill:

Enclosed is a typed copy of my separate opinion in this case.

Regards,



Justice Brennan

Copies to the Conference

No. 83-990, Grand Rapids School District v. Ball

CHIEF JUSTICE BURGER, concurring in the judgment in part and dissenting in part.

I agree with the Court that, under our decisions in Lemon v. Kurtzman, 403 U.S. 602 (1971), and Earley v. DiCenso, 403 U.S. 602 (1971), the Grand Rapids Community Education program violates the Establishment Clause. As to the Shared Time program, I dissent for the reasons stated in my dissenting opinion in Aguilar v. Felton, \_\_\_ U.S. \_\_\_ (1985).

To: Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **The Chief Justice**

Circulated: JUN 25 1985

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-990

GRAND RAPIDS SCHOOL DISTRICT OF THE CITY  
OF GRAND RAPIDS, ET AL., PETITIONERS *v.*  
PHYLLIS BALL ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

[June —, 1985]

CHIEF JUSTICE BURGER, concurring in the judgment in  
part and dissenting in part.

I agree with the Court that, under our decisions in *Lemon v. Kurtzman*, 403 U. S. 602 (1971), and *Earley v. DiCenso*, 403 U. S. 602 (1971), the Grand Rapids Community Education program violates the Establishment Clause. As to the Shared Time program, I dissent for the reasons stated in my dissenting opinion in *Aguilar v. Felton*, — U. S. — (1985).

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

December 10, 1984

No. 83-990

School District of City of Grand Rapids  
v. Ball

No. 84-237) Aguilar v. Felton  
)  
) Secretary, U.S. Dept.  
No. 84-238) of Education v. Felton  
)  
) Chancellor of Bd. of  
) Education of City of  
No. 84-239) New York v. Felton

Dear Chief,

I'll try my hand at opinions for the Court in  
these cases.

Sincerely,

The Chief Justice

Copies to the Conference

To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Brennan**

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-990

GRAND RAPIDS SCHOOL DISTRICT OF THE CITY  
OF GRAND RAPIDS, ET AL., PETITIONERS *v.*  
PHYLLIS BALL ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

[April —, 1985]

JUSTICE BRENNAN delivered the opinion of the Court.

The School District of Grand Rapids, Michigan, adopted two programs in which classes for nonpublic school students are financed by the public school system, taught by teachers hired by the public school system, and conducted in "leased" classrooms in the nonpublic schools. Most of the nonpublic schools involved in the programs are sectarian religious schools. This case raises the question whether these programs impermissibly involve the government in the support of sectarian religious activities and thus violate the Establishment Clause of the First Amendment.

I

A

At issue in this case are the Community Education and Shared Time programs offered in the nonpublic schools of Grand Rapids, Michigan. These programs, first instituted in the 1976-1977 school year, provide classes to nonpublic school students at public expense in classrooms located in and leased from the local nonpublic schools.

The Shared Time program offers classes during the regular school day that are intended to be supplementary to the "core curriculum" courses that the State of Michigan requires as a

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

May 15, 1985

Dear Thurgood, Harry, Lewis and John:

I would like to suggest a change in the paragraph at pages 8-9 of the draft opinion in School District of Grand Rapids v. Ball along the lines of the attached. Would you let me know if this, or something like it, meets with your approval?

Sincerely,



Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Stevens

Attachment

To replace paragraph at pp. 8-9 of Grand Rapids draft:

In Lemon v. Kurtzman, 403 U.S., at 612-613, we stated:

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' Walz [v. Tax Commission], 397 U.S. 664, 674 (1970))."

The Lemon test arose not from a single case, but instead reflected the lessons of the developing body of this Court's Establishment Clause jurisprudence. See, e.g., School District of Abington Township v. Schempp, supra, at 222. Although various parties with divergent views of the mandates of the Establishment Clause have pointed to perceived failings in the Lemon test over the years, we have never adopted any other general test for detecting state action that transgresses the limits of the Establishment Clause. The Lemon test concentrates attention on the issues--purpose, effect, entanglement--that determine whether a particular state action is an improper "law respecting the Establishment of religion." We therefore reaffirm that state action alleged to violate the Establishment Clause must be measured against the Lemon criteria.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

May 16, 1985

Dear Thurgood, Harry, Lewis and John:

The change I suggested in the Grand Rapids opinion was satisfactory to Thurgood and Harry. John, however, has suggested that the last two sentences of the revision instead be added to the paragraph as it stands in the current draft. The two sentences read as follows: "The Lemon test concentrates attention on the issues--purpose, effect, entanglement--that determine whether a particular state action is an improper 'law respecting the Establishment of religion.' We therefore reaffirm that state action alleged to violate the Establishment Clause must be measured against the Lemon criteria." This is fine with me.

Sincerely,



Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Stevens

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To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT.

SEE PAGES:

9-10, 15

From: Justice Brennan

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2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-990

GRAND RAPIDS SCHOOL DISTRICT OF THE CITY  
OF GRAND RAPIDS, ET AL., PETITIONERS *v.*  
PHYLLIS BALL ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

[May —, 1985]

JUSTICE BRENNAN delivered the opinion of the Court.

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I

A

At issue in this case are the Community Education and Shared Time programs offered in the nonpublic schools of Grand Rapids, Michigan. These programs, first instituted in the 1976-1977 school year, provide classes to nonpublic school students at public expense in classrooms located in and leased from the local nonpublic schools.

The Shared Time program offers classes during the regular school day that are intended to be supplementary to the "core curriculum" courses that the State of Michigan requires as a

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

April 8, 1985

83-990 - Grand Rapids School District  
of the City of Grand Rapids v. Ball

Dear Bill,

I shall await other writing in this  
case.

Sincerely yours,



Justice Brennan

Copies to the Conference

To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice White**

Circulated: JUN 19 1985

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

Nos. 83-990, 84-237, 84-238 AND 84-239

GRAND RAPIDS SCHOOL DISTRICT OF THE CITY OF  
GRAND RAPIDS, ET AL., PETITIONERS

83-990

v.

PHYLLIS BALL ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

YOLANDA AGUILAR, ET AL., APPELLANTS

84-237

v.

BETTY-LOUISE FELTON ET AL.

SECRETARY, UNITED STATES DEPARTMENT OF  
EDUCATION, APPELLANT

84-238

v.

BETTY-LOUISE FELTON ET AL.

CHANCELLOR OF THE BOARD OF EDUCATION OF  
CITY OF NEW YORK, APPELLANT

84-239

v.

BETTY-LOUISE FELTON ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

[June —, 1985]

JUSTICE WHITE, dissenting.

As evidenced by my dissenting opinions in *Lemon v. Kurtzman*, 403 U. S. 602, 661 (1971) and *Committee for Public Education v. Nyquist*, 413 U. S. 756, 813 (1973), I have long disagreed with the Court's interpretation and application of the Establishment Clause in the context of state aid

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

April 2, 1985

Re: No. 83-990 - Grand Rapids School District  
v. Ball

Dear Bill:

Please join me.

Sincerely,



T.M.

Justice Brennan

cc: The Conference

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DATE 11-19-2008 BY 60322 UCBAW/STP

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 15, 1985

Re: No. 83-990-School District of Grand Rapids v.  
Ball

Dear Bill:

I would go along with the change proposed in  
the paragraph on pages 8-9.

Sincerely,

*Jm.*  
T.M.

Justice Brennan

cc: Justice Blackmun  
Justice Powell  
Justice Stevens

H

✓

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 13, 1985

Re: No. 83-990, School District of City of Grand Rapids v. Ball

Dear Bill:

Please join me.

Sincerely,



Justice Brennan

cc: The Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 15, 1985

Re: No. 83-990, School District of Grand Rapids v. Ball

Dear Bill:

I would go along with the change proposed in the paragraph on pages 8-9.

Sincerely,



Justice Brennan

cc: Justice Marshall  
Justice Powell  
Justice Stevens

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 16, 1985

Re: No. 83-990, Grand Rapids School District v. Ball

Dear Bill:

I am still with you, and whatever you and John work out is all right with me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", is written above a horizontal line.

Justice Brennan

cc: Justice Marshall  
Justice Powell  
Justice Stevens

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W

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 9, 1985

83-990 Grand Rapids v. Ball  
84-237 Aguilar v. Felton

Dear Bill:

Please join me in these two cases.

I am circulating a concurring opinion in Aguilar that expresses additional views.

Sincerely,

*L. Brennan*

Justice Brennan

lfp/ss

cc: The Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 16, 1985

83-990 School District of Grand Rapids v. Ball

Dear Bill:

I could agree with either your suggested new language or with John's suggestion, provided in either case that the word "should" be substituted for "must" in the final sentence.

As my concurring opinions in the pending cases make clear, I fully support Lemon. I shy away from using the word "must," however, as it is stronger than necessary. Bearing Marsh v. Chambers in mind, it occurs to me that none of us can foresee whether in some future case application of the Lemon test alone would not be dispositive.

I think the changes - either yours or John's - are constructive.

Sincerely,

*Lewis*

Justice Brennan

lfp/ss

cc: Justice Marshall  
Justice Blackmun  
Justice Stevens

Moved  
From  
Wallace

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Stevens  
Justice O'Connor

From: Justice Rehnquist

Circulated: MAY 15 1985

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-990

GRAND RAPIDS SCHOOL DISTRICT OF THE CITY OF  
GRAND RAPIDS, ET AL., PETITIONERS v.  
PHYLLIS BALL ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

[May —, 1985]

JUSTICE REHNQUIST, dissenting.

I dissent for the reasons stated in my dissenting opinion in *Wallace v. Jaffree*, Nos. 83-812 and 83-929. In *Grand Rapids*, the Court relies heavily on the principles of *Everson* and *McCullum*, *post* at—(slip op., at 7, 8, 17, 18, 19) but declines to discuss the faulty “wall” premise upon which those cases rest. In doing so the Court blinds itself to the first 150 years’ history of the Establishment Clause.

A most unfortunate result of *Grand Rapids* is that to support its holding the Court, despite its disclaimers, impugns the integrity of public school teachers. Contrary to the law and the teachers’ promises, they are assumed to be eager inculcators of religious dogma requiring, in the Court’s words, “ongoing supervision.” See *ante* at —; *Aguilar v. Felton*, *post*, at—(slip op. at 10). Not one instance of attempted religious inculcation exists in the records of the school aid cases decided today, even though both the Grand Rapids and New York programs have been in operation for a number of years. I would reverse.

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To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Stevens  
Justice O'Connor

From: **Justice Rehnquist**

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P. 1

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-990

GRAND RAPIDS SCHOOL DISTRICT OF THE CITY OF  
GRAND RAPIDS, ET AL., PETITIONERS *v.*  
PHYLLIS BALL ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

[May —, 1985]

JUSTICE REHNQUIST, dissenting.

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The Court today attempts to give content to the “effects” prong of the *Lemon* test by holding that a “symbolic link between government and religion” creates an impermissible effect. *Post*, at —, slip op. at 11. But one wonders how the teaching of “Math Topics,” “Spanish,” and “Gymnastics,” which is struck down today, creates a greater “symbolic link” than the municipal creche upheld in *Lynch v. Donnelly*, 465 U.S. —, or the legislative chaplain upheld in *Marsh v. Chambers*, 463 U.S. 783 (1983).

A most unfortunate result of *Grand Rapids* is that to support its holding the Court, despite its disclaimers, impugns the integrity of public school teachers. Contrary to the law and the teachers’ promises, they are assumed to be eager inculcators of religious dogma requiring, in the Court’s words, “ongoing supervision.” See *ante* at —; *Aguilar v. Felton*, *post*, at—(slip op. at 10). Not one instance of at-

Moved  
from  
Wallace

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

April 2, 1985

Re: 83-990 - Grand Rapids School District  
v. Ball

Dear Bill:

Please join me.

Respectfully,



Justice Brennan

Copies to the Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

April 2, 1985

Re: 83-990, School District of Grand Rapids v. Ball

Dear Bill,

I will be writing separately in this case.

Sincerely,



Justice Brennan

Copies to the Conference

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

From: **Justice O'Connor**

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1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 83-990

GRAND RAPIDS SCHOOL DISTRICT OF THE CITY  
OF GRAND RAPIDS, ET AL., PETITIONERS *v.*  
PHYLLIS BALL ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

[June —, 1985]

JUSTICE O'CONNOR, concurring in the judgment in part  
and dissenting in part.

For the reasons stated in my dissenting opinion in *Aguilar v. Felton*, — U. S. —, — (1985), I dissent from the Court's holding that the Grand Rapids Shared Time program impermissibly advances religion. Like the New York Title I program, the Grand Rapids Shared Time program employs full-time public school teachers who offer supplemental instruction to parochial school children on the premises of religious schools. Nothing in the record indicates that Shared-Time instructors have attempted to proselytize their students. I see no reason why public school teachers in Grand Rapids are any more likely than their counterparts in New York to disobey their instructions.

The Court relies on the District Court's finding that a "significant portion of the Shared Time instructors previously taught in the nonpublic schools, and many of these had been assigned to the same nonpublic school where they were previously employed." *Americans United for Separation of Church and State v. School Dist. of Grand Rapids*, 546 F. Supp. 1071, 1078 (WD Mich. 1982), quoted *ante* at 2, 14, and n. 7. 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 pre-

Stylistic Changes Throughout

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

From: Justice O'Connor

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-990

GRAND RAPIDS SCHOOL DISTRICT OF THE CITY  
OF GRAND RAPIDS, ET AL., PETITIONERS *v.*  
PHYLLIS BALL ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

[June —, 1985]

JUSTICE O'CONNOR, concurring in the judgment in part  
and dissenting in part.

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