STATE AID TO RELIGIOUS SCHOOLS: FROM *EVERSON* TO *ZELMAN* A CRITICAL REVIEW

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I. INTRODUCTION

The Supreme Court's decision in *Zelman v. Simmons-Harris*[1] was the latest salvo in a long conflict over state aid to religious schools in America, but will not end the battle over this controversial issue. Both sides in the argument continue to press their position before various branches and levels of government.[2] To fully understand the implications of the *Zelman* decision, it is important to have a sense of case history in this area. To that end, Part II of this article presents a critical review of most of the major cases involving state aid to religious schools prior to *Zelman*. Part III of this article briefly examines the social and educational pressures that have pushed public opinion and school officials toward increasing acceptance of voucher programs. Part IV offers a focused discussion of *Zelman* following which I conclude that voucher programs, if properly designed, are constitutional. In keeping with the Court's decision, I argue that to find such programs constitutional the Court must conclude that the state is neutral as between the religious and nonreligious school choice. To conclude that the state is acting in a neutral

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1. 536 U.S. 639 (2002).

2. *See, e.g.*, Associated Press, *House Approves a Voucher Plan for Poor Washington Students*, N.Y. TIMES, Sept. 6, 2003, at A12 (reporting that the House of Representatives had approved a voucher plan for Washington D.C.).

manner, the Court must determine that the state is not coercing parents to register their children in religious schools. In deciding whether parents are coerced, the Court may look at the entire range of options available to parents when choosing a school for their child, including public schools not formally a part of the voucher program as designed by the state.

II. CONSTITUTIONAL HISTORY: RELIGIOUS SCHOOLS AND THE STATE

A. The Early Cases: Everson, McCollum, *and* Zorach

Everson v. Board of Education[3] was the first case in which the Supreme Court considered whether the state might offer any assistance to those who wish to attend sectarian schools. In *Everson*, the question was whether the state of New Jersey could authorize local school boards to reimburse parents of children attending parochial schools for money they spent on bus transportation to and from school.[4] The New Jersey taxpayer who objected to the statute argued that the statute "forced inhabitants to pay taxes to help support and maintain schools which are dedicated to, and which regularly teach, the Catholic Faith."[5]

After a brief, and somewhat incomplete,[6] review of the history surrounding the adoption of the Establishment Clause, Justice Black concluded:

> 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 tax in any amount,

3. 330 U.S. 1 (1947). The Court had earlier taken up the question of whether the state can prohibit parents from sending their children to sectarian schools in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), but that case involved no state aid to religious schools.

4. *Everson*, 330 U.S. at 5.

5. *Id.*

6. Justice Black's analysis led him to conclude that the Establishment Clause was intended to provide the same protection against governmental intrusion on religious liberty as the Virginia Bill for Religious Liberty, originally written by Thomas Jefferson. *Id.* at 12-13. *Contra* Wallace v. Jaffree, 472 U.S. 38, 91-99 (1985) (Rehnquist, J., dissenting) (arguing that the Court is mistaken in assuming that the Establishment Clause protections and prohibitions mirror those found in the Virginia statute).

> large or small, can be levied to support any religious activities or institutions . . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."[7]

Despite this strong language, the Court held that the New Jersey statute was constitutional, noting that the state of New Jersey was acting in a neutral manner because it was authorizing the reimbursement "as part of a general program under which it pays the fares of pupils attending public and other schools."[8] According to the *Everson* Court, neutrality was the key to understanding the Establishment Clause as it relates to state support of religious education.[9] The Court noted that the Establishment Clause "requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."[10]

Justice Rutledge, joined by Justices Frankfurter, Jackson, and Burton, dissented and argued for a much more restrictive interpretation of the Establishment Clause:

> The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.[11]

The kind of complete and permanent separation for which the dissent argued was, of course, impossible to achieve absent a willingness to deny religious institutions the most basic services offered by the state. As the majority opinion pointed out, the wall of separation had already been breached

7. *Everson*, 330 U.S. at 15-16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).
8. *Id.* at 17.
9. *Id.* at 18.
10. *Id.*
11. *Id.* at 31-32.

when the state provided police and fire protection as well as sewage treatment and sidewalks to churches.[12] Unless the Constitution requires that the state stand by and watch churches burn to the ground or rabbis be mugged in broad daylight, complete separation is not possible.

Next, the Court was called upon to decide whether children could participate in a "release time" program when religious education classes were taught on public school grounds. In *Illinois ex rel. McCollum v. Board of Education*,[13] a local school board in Illinois agreed to allow religious instruction teachers of various faiths to teach in public schools. In order for children to participate, their parents had to sign a request card granting permission for the student to attend the classes.[14] Children whose parents did not want them to take such classes were required to continue their regularly scheduled classes.[15]

The Court struck the program down on the grounds that the program utilized a "tax-established and tax-supported public school system to aid religious groups to spread their faith."[16] The Court made no effort to devise an Establishment Clause "test" beyond endorsing the dissenters' views in *Everson* by arguing that the "First Amendment has erected a wall between church and state which must be kept high and impregnable."[17] The Court said that the Establishment Clause required that "[n]o 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."[18]

Justice Reed, the lone dissenter in *McCollum*, took issue with the idea of interpreting the Establishment Clause as requiring a wall of separation between church and state. Justice Reed pointed out that Thomas Jefferson, the author of that phrase, supported the teaching of religion at the Univer-

12. *Id.* at 16, 17.
13. 333 U.S. 203 (1948).
14. *Id.* at 207.
15. *Id.* at 209.
16. *Id.* at 210.
17. *Id.* at 212. The Court further indicated its approval of the dissenting view in *Everson* with two footnotes that quoted the dissenters at length. *Id.* at 210 nn.6 & 7.
18. *Id.* at 210.

sity of Virginia, which he founded.[19] Justice Reed argued that the actions of people like Thomas Jefferson and James Madison were better indicators of their views regarding the First Amendment than abstract "figures of speech"[20] like "wall of separation" between church and state. Justice Reed's dissent is particularly salient given that Jefferson penned the ubiquitous phrase in a private letter to the Danbury Baptist Association fourteen years after the adoption of the Bill of Rights.[21] Logic dictates that official public speeches and actions of individuals during, or shortly after the period when the First Amendment was passed provide better, albeit imperfect, insights into their interpretation of the Establishment Clause than does private correspondence a decade and a half later. After all, those who might have been inclined to rely on Jefferson's lead could hardly be expected to have based their decision on statements he made in private correspondence fourteen years *after* they considered the issue.

In *Zorach v. Clauson*,[22] the Court was called upon to decide if New York State could release students, during the school day and at their parents' request, to attend religious instruction classes. Unlike the local school board in *McCollum*, however, New York State required that the classes be taught off public school property.

In what may appear to be paradoxical language, the Court found the "release time" program constitutional, stating

> There cannot be the slightest doubt that the First Amendment reflects the philosophy that the Church and State should be separated. And so far as interference with the "free exercise" of religion and an "establishment" of religion are concerned, the separation must be complete and unequivocal . . . . The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concern or union or dependency one on the other.[23]

The language appeared paradoxical because the Court

19. *McCollum*, 333 U.S. at 245-46.
20. *Id.* at 247.
21. *Id.* at 244 n.8.
22. 343 U.S. 306 (1952).
23. *Id.* at 312.

seemed to suggest that the Constitution required a wall of separation that was "complete and unequivocal . . . and absolute," while maintaining that this absolute rule did not apply in "every and all respects."[24] Properly understood, the apparent contradiction in the Court's opinion disappears. The Court was simply suggesting that in cases where the state was actually attempting to establish a church or interfere with anyone's free exercise rights, the wall of separation was absolute. In cases like *Zorach*, however, where no one could reasonably argue that the state's intention was to actually "establish" a religion, the Constitution allowed states leeway. Provided that the state abides by the rule that "[t]he government must be neutral when it comes to competition between sects,"[25] the states had room to accommodate the religious desires of their citizens.

The approach taken in *Zorach* was, as the Court suggested, in keeping with "the common sense of the matter."[26] If the state's action suggested an intention to actually "establish" a church, favor one church over another, or interfere with anyone's freedom of conscience, the Constitution would require an impregnable wall of separation. As the state's action moved further and further away from "establishment" or "interference," the Court would interpret the Constitution as permitting greater interplay between church and state. The neutrality approach insisted upon by the Court allowed those parents who wanted formal religious training to be a part of their children's schooling to obtain such education.[27] Similarly, it allowed those parents who did not want their children exposed to religious views of any kind to shield their offspring from religious education.[28]

The Court next took on the issue of school prayer in *Engel v. Vitale*.[29] In *Engel*, parents of ten students sued New York for allowing children to recite the following voluntary nondenominational prayer in its public schools: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our

24. *Id.*
25. *Id.* at 314.
26. *Id.* at 312.
27. *Id.* at 314.
28. *Zorach*, 343 U.S. at 314.
29. 370 U.S. 421 (1962).

Country."[30]

The Court held that New York had violated the Constitution by allowing its Board of Regents to compose the prayer and by further allowing students to recite it in public schools.[31] Once again, the Court made no attempt to offer any Establishment Clause "test" for use in such cases. The Court did argue that the neutrality requirement established in *Everson* and *Zorach* would not be sufficient to save public school prayer: "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause."[32]

In *Zorach*, the Court had established the principle that the closer the state's action came to "establishing" an official religion, the greater the degree of scrutiny the Constitution required. *Engel* extended this principle by noting that a more demanding standard of review would apply to action that "does not amount to a total establishment of one particular religious sect to the exclusion of all others."[33] The Court indicated just how far it was willing to extend the scope of the Establishment Clause's prohibition when it noted that "the governmental endorsement of that prayer seems relatively insignificant when compared to the governmental encroachments upon religion which were commonplace 200 years ago."[34] The Court found justification for this expansion of scrutiny to cases involving "relatively insignificant" acts of encroachment in James Madison's *Memorial and Remonstrance Against Religious Assessments*.[35] Quoting Madison,

30. *Id.* at 422.
31. *Id.* at 430.
32. *Id.*
33. *Id.* at 436.
34. *Id.* This acknowledgement by the Court seems very enlightening. It concedes that the generation that proposed and adopted the First Amendment acted as if it believed the Clause allowed much greater interplay between religion and the state. It also appears to acknowledge that the Court cast aside the actions, beliefs and desires of this broader group of founders in favor of the views of Madison and Jefferson. This seems an especially suspect mode of interpretation given that Jefferson played no role in drafting the Bill of Rights and the words of Madison most frequently relied upon by the Court were not written in response to the First Amendment. *See* discussion *infra* pp. 706-07.
35. James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* 8 THE PAPERS OF JAMES MADISON 298-306 (William T. Hutchinson et al. eds., 1962).

the Court wrote:

> It is proper to take alarm at the first experiment on our liberties . . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?[36]

Implicitly or explicitly, this language appears to underlie many of the Court's decisions to strike down actions of the state over the ensuing decades. As a result, it is important to pay particular attention to how the Court interprets this language in *Engel*.

The Court argued that Madison's warnings suggest a need to strike down state actions that fall well short of "establishing" official state religions.[37] The attempt to support such a conclusion with Madison's *Memorial and Remonstrance*, however, was flawed in at least two respects.

The first problem with the Court's use of Madison's language is that Madison wrote the text to protest a bill before the Virginia legislature.[38] Implicitly, the Court would have us accept that because James Madison was the author of the *Memorial and Remonstrance* in Virginia and helped draft the First Amendment, his thoughts in the former case are applicable to the latter. To establish a conclusion of this kind, the Court needs much more convincing evidence than it has ever offered. While there may have been a great deal of overlap between Madison's positions in both instances, that fact does not preclude the possibility that there may have been significant differences also.[39] That Madison was capable of great

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36. *Engel*, 370 U.S. at 436.

37. *See id.*

38. Madison's *Memorial and Remonstrance* was written in opposition to a bill before the Virginia legislature entitled "Bill Establishing a Provision for Teachers of Religion" in 1785. The Bill of Rights was taken up in the first session of Congress and ratified in 1791. *See generally* CHARLES F. JAMES, DOCUMENTARY HISTORY OF THE STRUGGLE FOR RELIGIOUS LIBERTY IN VIRGINIA (1971) (describing fully the events leading up to Madison's publication of *Memorial and Remonstrance*).

39. *Cf.* Wallace v. Jaffree, 472 U.S. 38, 91, 93 (1984) (Rehnquist, J., dissenting) (arguing that Madison's remarks in support of the Establishment Clause, unlike his opposition to religious taxes in Virginia, "were less those of a dedi-

shifts in position is clear. As one of the authors of the *Federalist Papers*, for instance, he was one of the nation's great spokespersons for the federalist position; but, by the time he arrived at the first session of Congress, he had become a leading advocate of the anti-federalist position.[40]

Second, even if the *Memorial and Remonstrance* did shed light on a document it did not address, the Court can fairly be said to have misinterpreted its meaning because the Court relied too heavily upon the abstract language of the first sentence of the quote. It fell prey to the mistake Justice Reed had attempted to warn about in his dissent in *McCollum* regarding Jefferson's "wall of separation between church and state" statement. Read by itself, the abstract language in the first sentence of Madison's *Memorial and Remonstrance* can be interpreted as requiring super-sensitivity to any action by the state involving religion.[41] As Justice Reed had suggested in *McCollum*, however, reliance upon such "figures of speech" can be very misleading.[42]

Had the Court examined the remainder of the quoted passage, it would have concluded that Madison was not arguing for super-sensitivity in every instance. Madison provided us with specific examples of what he considered the kinds of "first experiments with our liberties" that ought to arouse alarm.[43] The actual establishment of Christianity in exclusion to all other religions ought to alarm us, according to Madison, as should the imposition of even a small tax to support an established religion.[44]

What the Court ought to have noticed about Madison's examples is that they involve actual establishment of one kind or another—Christianity over all other kinds of religion

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cated advocate of the wisdom of such measures than those of a prudent statesman . . ."). Rehnquist continued to note that, in a letter to Jefferson, Madison suggested that he did not even feel a Bill of Rights was necessary. *Id.* at 98.

40. *See, e.g.*, EDWARD MCNALL BURNS, JAMES MADISON: PHILOSOPHER OF THE CONSTITUTION (1938); NEAL RIEMER, JAMES MADISON: CREATING THE AMERICAN CONSTITUTION (1986); ROBERT MORGAN, JAMES MADISON ON THE CONSTITUTION AND BILL OF RIGHTS (1988); *cf.* LANCE BANNING, THE SACRED FIRE OF LIBERTY, JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC (1995).

41. *See* Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 247 (1948) (Reed, J., dissenting).

42. *See id.*

43. Madison, *supra* note 35, at 300.

44. *Id.*

in the first case, and a tax to support an established church in the second. Madison's examples strongly suggest that the trip wire attached to our Establishment Clause early warning system ought to break if, and only if, there is some legitimate threat whereby the state's action may lead to the establishment of state religion. There is no reason to read Madison's words as a directive to declare state actions unconstitutional if those actions pose no realistic threat of a state establishing a church.[45]

B. Creating a Test: Schempp, Allen, Walz, *and* Lemon

In *School District of Abington v. Schempp*,[46] the Court took the first steps in laying down an Establishment Clause "test." The question before the Court in *Schempp* was whether the state of Pennsylvania could allow the school day to begin with readings from the Bible in public schools.[47] The state excused students from the reading if their parents objected. The Court held:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of the legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[48]

The Court found that Bible reading constituted "a religious ceremony and was intended by the State to be so."[49] The state's purpose was therefore to advance religion. The Court again noted "that the religious practices here may be relatively minor encroachments on the First Amendment."[50] And, once again, the Court cited Madison's language from the

45. It is possible to conclude that when a state composes a prayer and allows it to be recited in public schools that this action is sufficiently close to actual "establishment" to be a cause for alarm. The nondenominational nature of the prayer and the fact that participation is voluntary certainly mitigates these concerns to some degree. Whether school prayer, under such circumstances, constitutes a genuine threat of establishment or is, in the Court's language, a relatively insignificant action, I am happy to leave for others to decide for now.

46. 374 U.S. 203 (1963).

47. *Id.* at 205.

48. *Id.* at 222.

49. *Id.* at 223.

50. *Id.* at 225.

Memorial and Remonstrance to the effect that "it is proper to take alarm at the first experiment on our liberties"[51] as justification for striking down a "relatively minor encroachment."[52] For whatever reason, the Court chose to quote only the most abstract language from Madison's work, neglecting to provide readers with Madison's own examples of the kinds of "first experiments with our liberties" that ought to cause alarm.

The Court did offer another implicit justification for striking down "relatively minor encroachments" on the First Amendment when it argued that "the First Amendment, in its final form, did not simply bar a congressional enactment *establishing a church;* it forbade all laws *respecting an establishment of religion.* Thus, this Court has given the Amendment a 'broad interpretation' . . . ."[53]

The implicit argument was that the First Amendment did not just ban the establishment of religion; it banned actions "respecting" establishment of religion. The Court was entitled to give a broad reading to the prohibitions of the First Amendment because it banned much more than just the actual establishment of a religion. The modifier "respecting" justified expanding the reach of the First Amendment to strike down laws that involved "relatively minor encroachments" of the state into the field of religion.

Building upon this premise, the Court shifted the nature of the enquiry away from the neutrality standard required in *Everson* and devised the two-part test of *Schempp.* The standard would no longer require the state to be neutral on the issue of religion, rather the state's action must have neither the purpose nor effect of promoting religion.

In several respects, the Court's analysis was once again flawed. First, the Court, in neither *Schempp* nor *McGowan v. Maryland*[54] offered us historical evidence to substantiate its interpretation of the word "respecting." The use of the word "respecting" does clearly modify the terms "establishment of religion." Thus, the First Amendment's requirement that "Congress shall make no law respecting an establishment of

51. *Id.*

52. *Schempp*, 374 U.S. at 225.

53. *Id.* at 220 (quoting McGowan v. Maryland, 366 U.S. 420, 441-42 (1961) (upholding Sunday closing laws against a First Amendment challenge)).

54. 366 U.S. 420 (1961), quoted in *Schempp*, 374 U.S. at 220.

religion"[55] implies a broader prohibition than the words, "Congress shall make no law establishing religion." The extent of this broadness is difficult to measure because neither the first Congress nor Madison left very much legislative history on point.

Just as the inclusion of the word "respecting" implies a broadening of the prohibitions of the First Amendment, so too the word "establishment" implies some limitations on those prohibitions. The failure to recognize this fact leads to the second flaw in the Court's interpretation. In striking down state actions which result in "relatively minor encroachments" on religion,[56] the Court appeared to be reading the First Amendment as if it provided that "Congress shall make no law respecting religion." The First Amendment does not prohibit Congress from making laws respecting religion; it prohibits Congress from making laws respecting the *establishment* of religion. The "establishment" modifier must be given the same interpretive weight as the word "respecting."

The language appears to provide the Court with justification for striking down laws that fall short of actual establishment, provided they could reasonably be considered laws respecting establishment. Had the founders wished to provide the nation with the broader prohibition insisted upon by the Court in *Schempp*, they were certainly skilled enough to draft such language. Representative Samuel Livermore had, in fact, put forth a proposal that the Amendment should read, "Congress shall make no laws touching religion, or infringing the rights of conscience."[57]

In *Board of Education of Central School District No. 1 v. Allen*,[58] the Court relied on the two-part test established in *Schempp* to determine that a New York statute requiring local school boards to loan textbooks to students free of charge was constitutional.[59] The Court said that the "express purpose" of the New York statute was the furtherance of educational opportunities for students.[60] The statute passed the first prong of the *Schempp* test because its purpose was nei-

55. U.S. CONST. amend. I.
56. *Schempp*, 374 U.S. at 225.
57. 1 ANNALS OF CONG. 759 (Joseph Gales ed., 1789).
58. 392 U.S. 236 (1968).
59. *See id.* at 243-44.
60. *Id.* at 243.

ther to advance nor inhibit religion.[61] The Court never explicitly addressed the second prong of the test, which requires that the "primary effect" of the statute neither advance nor inhibit religion. The Court did, however, reject the plaintiff's argument that the secular and religious components of parochial education could not be separated with respect to textbooks.[62] Had the Court not reached this conclusion, the statute would almost certainly have failed the second prong of the test. If the Court found that textbooks in all subjects were useful to the religious mission of sectarian education, then certainly the lending of a math or physics text would have had the "primary effect" of advancing religion. The Court, at least temporarily, rejected this argument.[63]

Next, the Court was called upon to decide if tax exemptions for religious property violated the Establishment Clause. In *Walz v. Tax Commission of the City of New York*,[64] the appellant sought to prevent the city from granting tax exemptions to religious properties that were used exclusively for religious purposes. Such tax exemptions "indirectly require[d] the appellant to make a contribution to religious bodies"[65] which violated the prohibitions of the Establishment Clause, according to the appellant. The Court rejected the claim.

Applying the two-part test first used in *Schempp*, the Court found that "[t]he legislative purpose of the property tax exemption is neither the advancement nor the inhibition of religion."[66] Underlying this portion of the Court's decision

61. *Id.*

62. *Id.* at 245.

63. The Court reversed itself and rejected this conclusion in dicta in *Hunt v. McNair*, 413 U.S. 734, 743 (1973), noting that "[a]id normally may be thought to have the primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission . . . ." This statement suggested that the Court would no longer look at the content of instructional materials but rather at the content of the overall education to decide if the instructional materials aid the religious mission. *See id.* at 749 (upholding, on other grounds, a statute that allowed the state to issue revenue bonds that were used to finance a capital project for Baptist College at Charleston); *see also* Meek v. Pittenger, 421 U.S. 349 (1975) (Using this language, the Court declared the portion of a Pennsylvania statute that provided instructional material and equipment to religious schools unconstitutional.).

64. 397 U.S. 664 (1970).

65. *Id.* at 667.

66. *Id.* at 672.

was the Court's recognition that New York "has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups."[67]

Next, the Court turned to the second "effect" prong of the *Schempp* test. The "effect" that the Court said must be avoided was "excessive government entanglement with religion."[68] Excessive entanglement occurred when the statute in question results in a relationship between church and state that requires "official and continuing surveillance" by the government of church affairs.[69] The Court found that "[t]he exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches."[70]

Finally, the Court pulled together the various prongs of the Establishment Clause test it had begun articulating in *Schempp* and *Walz* into a single three-prong test in *Lemon v. Kurtzman*.[71] In *Lemon*, two states, Rhode Island and Pennsylvania, passed legislation that would have supplemented the pay of religious school teachers (Rhode Island) or reimbursed religious schools for teachers' salaries, textbooks, and instructional materials (Pennsylvania).[72] In both instances, the statutes prohibited the state from spending tax revenues to support religious instruction, texts, or instructional materials. Teachers in Rhode Island had to sign a statement pledging not to teach a course in religion while receiving salary supplements.[73] In Pennsylvania, the state required participating schools to maintain financial records that demonstrated the cost of secular education, with such records being subject to state audit.[74]

The Court struck down the statutes in both states.[75] The

67. *Id.* at 673.
68. *Id.* at 674.
69. *Id.* at 675.
70. *Walz*, 397 U.S. at 676.
71. 403 U.S. 602 (1971).
72. *Id.* at 606-07.
73. *Id.* at 608.
74. *Id.* at 609-10.
75. *See id.* at 607.

three part "*Lemon* test" required that "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[76] The Court found no violation of the secular legislative intent prong and declined an analysis of the primary effect prong.[77] Instead, it moved directly to the third "excessive entanglement" prong of the inquiry.[78]

In both Rhode Island and Pennsylvania, the Court claimed that the essential mission of the sectarian schools was instruction in religious faith.[79] It also claimed that the teachers in such schools were "under religious control and discipline."[80] These factors led the Court to conclude that teachers "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."[81] In order to be "certain" that teachers in religious schools keep the religious and secular components of education separate, the state would be required to engage in "comprehensive, discriminating, and continuing state surveillance" of the religious institution.[82] As an example of such surveillance, the Court cited Rhode Island's requirement that the state continually determine what portion of the school's budget was directed to religious as opposed to secular education.[83] In Pennsylvania, the statute failed not only because the state provided continuing aid directly to the religious schools, but also because the terms of the grant required the state to audit the financial records of the schools.[84] All of these monitoring provisions led to "excessive entanglement" between church and state, according to the Court.[85]

In his dissent, Justice White argued that the Court had

76. *Id.* at 612-13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)) (citations omitted in original).

77. *Lemon*, 403 U.S. at 613-14.

78. *See id.* at 614.

79. *Id.* at 618.

80. *Id.* at 617.

81. *Id.* at 618.

82. *Id.* at 619.

83. *Lemon*, 403 U.S. at 620.

84. *See id.* at 621-22.

85. *Id.* (describing this "entanglement" as "an intimate and continuing relationship between church and state").

created a test that imposed contradictory requirements, which states could not pass:[86]

> The Court thus creates an insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught—a promise the school and its teachers are quite willing and on this record able to give—and enforces it, it is then entangled in the 'no entanglement' aspect of the Court's Establishment Clause jurisprudence.[87]

History proved Justice White's criticism trenchant. As he suggested, *Lemon* created a catch-22 for states seeking to provide aid for children attending religious schools. If states failed to provide the "comprehensive, discriminating, and continuing state surveillance" needed to guarantee that teachers of secular subjects were not influenced by religious beliefs, they failed the "primary effect" prong of *Lemon*.[88] If the state did provide the requisite surveillance so that it could insure aid was not diverted to religious purposes, it failed the "excessive entanglement" prong of *Lemon*.

Finally, the Court said that a "broader base of entanglement" was "presented by the divisive political potential"[89] of both states' programs. The threat of political divisiveness followed from the fact that partisans of different religious faiths, as well as those that shared no faith, would fight not only over resources, but also over whether the state should even be engaged in funding such programs. For all of these reasons, the Court declared both states' statutes unconstitutional on the grounds that both involved excessive entanglement of church and state.[90]

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86. *See id.* at 668.

87. *Id.*

88. The Court's "unwillingness to accept the District Court's express findings that on the evidence before it none of the teachers here involved mixed religious and secular instruction" made the hurdle of the "primary effect" prong even more difficult to address. *Id.* at 666 (White, J., dissenting).

89. *Lemon*, 403 U.S. at 622.

90. *Id.* at 625.

C. *The Post-*Lemon *Cases*

1. Construction Grants for Religious Colleges: Tilton v. Richardson

In *Tilton v. Richardson*,[91] the Court applied the *Lemon* test to a case in which the federal government provided grant funds that Catholic colleges and universities used to construct buildings. The legislation prohibited the funds from being used to build facilities that would be used for religious purposes.[92] The federal government also retained a twenty-year interest in any facility constructed with the funds.[93] If the colleges or universities violated the twenty-year restriction, the government was "entitled to recover an amount equal to the proportion of its present value that the federal grant bore to the original cost of the facility."[94]

Applying the first prong, the Court found that the government had the legitimate secular objective of providing facilities for higher education.[95]

As to the second prong, the appellant claimed that the legislation had the primary effect of advancing religion because it freed up money for religious purposes that would otherwise have been spent on buildings.[96] The Court acknowledged that the fungibility of money inevitably meant that the government provided some aid to religious institutions, but it denied that this fact proved that the legislation's primary effect was to advance religion.[97] Moreover, the Court noted that none of the colleges had violated the restrictions that prohibited them from using the funds to build facilities that were used for religious purposes.[98]

Unlike *Lemon*, the Court found that religion did not permeate "the secular education provided by church-related colleges," and that the religious and secular educational func-

91. 403 U.S. 672 (1971). *Tilton* was actually decided on the same day as *Lemon*, but I am treating it as a post-*Lemon* case because it was decided according to the test established in *Lemon*.

92. *Id.* at 675.

93. *Id.*

94. *Id.*

95. *See id.* at 679.

96. *See id.*

97. *Tilton*, 403 U.S. at 681-82.

98. *Id.* at 680.

tions were separable.[99] This finding appeared to rest on the fact that the colleges in question made no attempt to regulate the content of courses, and that professors retained sole control over such content.[100] The Court dismissed documents that showed "certain religious restrictions on what could be taught" because "other evidence showed that these restrictions were not in fact enforced and that the schools were characterized by an atmosphere of academic freedom rather than religious indoctrination."[101]

The Court did find the twenty-year restriction on the use of the funds unconstitutional, although it did not indicate on what grounds.[102] The Court said that the federal government continues to retain an interest "while the building has substantive value" because they were built, in part, with federal funds.[103] Finally, the Court turned to the third prong of the *Lemon* test, "excessive entanglement," and again found no constitutional violation.[104] The Court distinguished *Tilton* from *Lemon* primarily on the grounds that religion was less likely to permeate secular education at the college level than at the grade school level.[105] This conclusion was based on the Court's observation that college and university professors were less likely to be influenced by the fact that they were teaching at religious institutions rather than at elementary and secondary schools.[106] The Court also noted that "common observance" supported the view that college students were less susceptible to religious indoctrination than elementary and secondary age school children.[107] As a result, the Court found that government aid to higher education would far less likely support religious activities than aid to elementary and secondary schools.[108] There was less chance of excessive entanglement because the government would not have to monitor the schools to make certain that the funds were not being

99. *Id.*
100. *Id.* at 681-82.
101. *Id.* at 681.
102. *Id.* at 683.
103. 403 U.S. at 683.
104. *Id.* at 688.
105. *Id.* at 686-87.
106. *See id.* at 686.
107. *Id.*
108. *Id.* at 686.

used to advance religion.[109]

2. State Funds for Maintenance, Tuition Reimbursment, and Tax Relief: Committee for Public Education & Religious Liberty v. Nyquist

In *Committee for Public Education & Religious Liberty v. Nyquist*,[110] New York State passed legislation that provided three kinds of financial aid programs to nonpublic elementary and secondary schools. The first program provided direct money grants to schools to be used for maintenance and repairs of schools.[111] In order to qualify for this aid, schools had to be nonpublic and nonprofit and serve a high concentration of pupils from low-income families.[112] The maintenance and repair grants were limited to fifty percent of comparable expenses in the public schools.[113] The second program established a tuition reimbursement plan for parents of children attending nonpublic elementary and secondary schools.[114] To qualify, a parent's taxable income had to be less than $5000.[115] The third program was designed to give tax relief to parents failing to qualify for tuition reimbursement.[116] The tax relief was graduated and cut off completely once the taxpayer's earnings exceeded $25,000.[117] Eighty-five percent of the students in question attended nonpublic religious schools, practically all being Catholic schools.[118] The Court applied the *Lemon* test to each section of the statute separately.

As to all three sections, the Court concluded that "each measure is adequately supported by legitimate, nonsectarian state interests."[119] Thus, none of the three types of aid violated the first prong of the *Lemon* test.

The Court found that the maintenance and repair section of the statute violated the second prong of the *Lemon* test, as

109. *Tilton*, 403 U.S. at 687.
110. 413 U.S. 756 (1973).
111. *Id.* at 762.
112. *Id.* at 762-63.
113. *Id.* at 763.
114. *Id.* 764.
115. *Id.*
116. *Nyquist*, 413 U.S. at 765.
117. *Id.* at 765-66.
118. *Id.* at 768.
119. *Id.* at 773.

the funds had the primary effect of advancing religion.[120] The Court noted that no controls were exercised which would have guaranteed that the money was spent on facilities that were used solely for nonreligious purposes.[121] The Court distinguished this case from *Everson* (bus fares), *Allen* (lending textbooks), and *Tilton* (construction of buildings) on the grounds that in all three of those cases, the secular aspect of the activity could be separated from the religious.[122] The Court recognized that the kind of aid provided in cases like *Everson*, *Allen*, and *Tilton* "served indirectly and incidentally to promote the religious function by rendering it more likely that children would attend sectarian schools and by freeing the budgets of those schools for use in other nonsecular areas."[123] But the Court argued that incidental benefits to religious schools had never been grounds for finding a statute unconstitutional.[124]

The Court noted that the state might have claimed that it could insure that the maintenance and repair funds did not have the primary effect of advancing religion because they were limited to fifty percent of the amount spent on comparable public schools.[125] The apparent underlying assumption was that sectarian schools would spend at least fifty percent of the public school's budget on secular upkeep; thus, the maintenance cost supported these nonreligious activities.[126] The Court rejected this "statistical" argument insisting that the state had to actually demonstrate, rather than provide a statistical guarantee, that its funds were not being used for religious activities.[127]

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120. *Id.* at 774.
121. *Id.*
122. *Nyquist*, 413 U.S. at 775.
123. *Id.*
124. *Id.* at 775.
125. *Id.* at 777.
126. *Id.*
127. *Id.* at 776-79. The Court cited *Earley v. DiCenso*, 403 U.S. 602 (1971), a companion case to *Lemon*, as authority for this portion of its decision. In *Earley*, the Court rejected a "statistical guarantee" argument similar to that found in *Lemon*. *Id.* at 620. There, the state of Rhode Island authorized fifteen percent salary supplements to teachers of secular subjects. *Id.* at 607. Rhode Island had claimed that it was statistically true that teachers in Catholic schools spent at least fifteen percent of their time teaching secular subjects. *Id.* at 607-09. The Court rejected this argument on two grounds. *See id.* at 615-20. First, it said that the state could not avoid the Establishment Clause violation by merely assuming that its teachers could separate their religious beliefs from

It is worth noting that the Court offered virtually no argument to support this conclusion. The Court cited *Early v. DiCenso*[128] in which it had struck down a Rhode Island law that provided salary supplements to teachers of secular subjects in religious schools on the grounds that the state could not assume "that its teachers would succeed in segregating 'their religious beliefs from their secular educational responsibilities.'"[129] However, the statistical argument in *Nyquist* did not rely upon teachers being able to separate their religious beliefs from their secular educational functions. It claimed, instead, that teachers spend a certain percentage of any school day teaching nonreligious subjects that are not subject to influence by religious beliefs.[130] If the subject matter is not susceptible to religious interpretation, separation is unnecessary. The Court was merely required to recognize that teachers spend at least fifty percent of their day addressing nonreligious subjects. If the Court had wished to refute this claim it might have offered some evidence that Jews, Christians, and atheists teach geometry and algebra differently. Had the Court presented such evidence, it might also have enlightened us as to which of these approaches was appropriate for public schools where, presumably, teachers also have beliefs about religion. Having found a violation of the second prong of the *Lemon* test, the Court declined to apply the "excessive entanglement" prong of the test.[131]

Turning to the tuition reimbursement section of the statute, the Court also found a violation of the "effect" test under *Lemon*.[132] The state, relying on *Everson* (bus fare) and *Allen* (textbooks), argued that because the reimbursement funds were paid directly to parents, the "wall of separation" between church and state had been maintained.[133] The Court acknowledged that it had considered payments to parents rather than to the religious schools a factor in deciding *Everson* and *Allen*, but it maintained that that fact alone did not

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their secular educational responsibilities. *Id.* at 616-18. Second, it claimed that statistical guarantees would open the door to extensive subsidies of religious education by the state. *Id.* at 618-20.

128. 403 U.S. 602 (1971).

129. *Nyquist*, 413 U.S. at 778 (citing *Earley*, 403 U.S. at 619).

130. *Id.* at 779.

131. *Id.* at 780.

132. *Id.*

133. *Id.* at 781 n.37.

provide per se immunity to such aid.[134] Payment to parents rather than to schools was only one of many factors to be considered in such cases.[135]

One of those many factors was that bus fares and textbooks, at least textbooks that addressed secular subjects, were distinguishable on the grounds that they did not support any religious function. Textbooks and bus fares were no different than police and fire protection, in that they did nothing to further religion.[136] In the statute under review in *Nyquist*, however, the Court stated that New York made no attempt to ensure that the monies provided under the tuition grants aided only secular education.[137] Moreover, the program was limited to parents whose children attended private schools, the vast majority of which were religious schools.[138] This meant that the aid was being used to further religious education.[139] The very purpose of the tuition reimbursement plan was to assure that economically depressed parents could afford to have a sectarian school option for their children.[140] The tuition reimbursement program therefore had the "primary effect" of advancing religion.[141]

Finally, the Court addressed the tax relief portion of the New York statute. New York defended the tax relief program on two grounds.[142] The first defense was premised upon the argument that the state made payments directly to parents and not to schools.[143] The Court dismissed this defense by referring readers to its reply to the same defense in the tuition reimbursement portion of the case.[144]

In its second defense, the state claimed that the tax credits were no different than the tax exemptions that the Court had previously upheld in *Walz*.[145] The Court rejected this

134. *Id.* at 781.
135. *Nyquist*, 413 U.S. at 781.
136. *Id.* at 781-82.
137. *Id.* at 784.
138. *Id.*
139. *Id.* at 789.
140. *See id.*
141. *Nyquist*, 413 U.S. at 785. The Court also said that it was important that in *Allen* and *Everson* the aid was offered to all schoolchildren whether they were in public or private schools. *Id.* at 782 n.38.
142. *Id.* at 793.
143. *Id.*
144. *Id.* at 790-91.
145. *Id.* at 791.

claim on several grounds, arguing that the tax exemption granted to church property in *Walz* had a long history of acceptance by all fifty states and Congress, whereas the tax credits offered to parents in *Nyquist* had only recently been enacted.[146] The reasoning underlying the long history of tax exemptions for church property was more important. According to the Court, tax policy had been used as a means of religious oppression,[147] and tax exemptions for church property were merely evidence of the state's attempt to remain neutral with respect to religious issues. The Court stated that "special tax benefits" did not comply with the principle of neutrality, since they "aid and advance" religion, violating the second prong of *Lemon*.[148] As Justice Rehnquist pointed out in his dissent on behalf of three members of the Court, this anomalous decision would have us believe that tax exemptions provided directly to churches do less to advance religion than do tax credits to parents who send their children (largely in search of secular education) to religious schools.[149]

3. Textbooks, Instructional Materials and Equipment: Meek v. Pittenger

In *Meek v. Pittenger*,[150] the state of Pennsylvania was sued for enacting two acts that provided aid to religious schools. The first of these two statutes, Act 195, provided such schools with textbooks, instructional materials, and equipment (projectors, maps movies, charts, etc.).[151] Reviewing the portion of Act 195 that provided for the loan of textbooks, the Court found the statute constitutional,[152] relying upon its earlier decisions in *Everson*[153] and *Allen*.[154] As in *Everson* and *Allen*, the Court said that states were not prohibited from spending tax funds to provide certain services such as bus fare (*Everson*) or textbooks (*Allen*), provided they did so as part of a general program that pays for all students,

146. *Id.* at 792.
147. *Nyquist*, 413 U.S. at 793-94.
148. *Id.* at 793.
149. *Id.* at 808 (Rehnquist, J., dissenting).
150. 421 U.S. 349 (1975).
151. *Id.* at 353-55.
152. *Id.* 362.
153. 330 U.S. 1 (1947).
154. 392 U.S. 235 (1968).

whether in public or private school.[155] As in *Allen*, the Court stressed that the Pennsylvania statute loaned books directly to students and their parents rather than to parochial schools, so that the financial benefit was to parents, not to schools. Again, as in *Allen*, the Court conceded that when the state provides free textbooks to children attending religious schools, such children become more likely to attend parochial schools, but it denied that this fact alone was sufficient to render the statute unconstitutional.[156]

Turning to the portion of Act 195 that loaned instructional material and equipment directly to religious schools, the Court declared the law unconstitutional.[157] Applying the first prong of the *Lemon* test, the Court found no problem with the state's secular legislative purpose.[158] The Court agreed that, in providing instructional material to students, the state was merely attempting to assure "ample opportunity to develop their intellectual capacities."[159]

Applying the second prong of *Lemon*, the Court found that, because the state loaned instructional materials directly to religious schools, the materials had the "unconstitutional primary effect of advancing religion."[160] The Court pointed out that seventy-five percent of the schools that received the aid under the program were "church-related or religiously affiliated."[161] The Court acknowledged that a state may, as part of general legislation, include "church-related schools in programs providing bus transportation, school lunches, and public health facilities."[162] The state could provide such services to religious institutions because the services were "secular and nonideological" and "unrelated to the primary, religious-oriented educational function of the sectarian school."[163] Moreover, according to the Court, the benefits of such services were "indirect and incidental."[164]

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155. *Meek*, 421 U.S. at 359-60.
156. *Id.* at 360.
157. *Id.* at 363 ("But we agree with the appellants that the direct loan of instructional material and equipment has the unconstitutional primary effect of advancing religion . . . .").
158. *Id.*
159. *Id.*
160. *Id.*
161. *Meek*, 421 U.S. at 364.
162. *Id.*
163. *Id.*
164. *Id.*

In contrast, the Court claimed that the "massive aid" provided for by the instructional aid program was "neither indirect nor incidental."[165] This conclusion was premised upon the fact that Pennsylvania authorized just under $12 million of direct aid in the form of instructional materials[166] which "flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission."[167] The Court came to this conclusion despite acknowledging that "the material and equipment that are the subjects of the loan—maps, charts, and laboratory equipment, for example—are 'self-polic[ing], in that starting as secular, nonideological and neutral, they will not change in use.'"[168] Given the size of the loans, and the fact that they were made directly to religious schools, the Court concluded that the instructional aid could not be limited to the secular functions of the schools without supporting the religious functions.[169] The Court therefore concluded that the aid had the effect of advancing religion.[170]

The Court insisted that the $12 million in aid, coupled with the religious nature of the schools into which it was channeled, made the instructional materials portion of the statute unconstitutional.[171] This conclusion cannot be squared with the textbook portion of the case. Because the state spent $4,670,000 on the textbooks it loaned the schools, Justice Brennan's dissent (with respect to the textbook portion of the decision) correctly charges the plurality with failing to "explain how the [cost] factor weighs determinatively against the validity of the instructional materials loan provisions, and not also against the validity of the textbook loan provisions."[172] Contrary to the Court's apparent assumption, nothing about the Establishment Clause indicates that the founders intended to set a dollar amount that would trigger the provi-

165. *Id.* at 350.
166. *Id.*
167. *Meek*, 421 U.S. at 366 (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)).
168. *Id.* at 365 (quoting Meek v. Pittenger, 374 F. Supp. 639, 660 (E.D. Pa. 1974)).
169. *Id.* at 365-66.
170. *See id.* (citing *Hunt*, 413 U.S. at 743).
171. *See id.*
172. *Id.* at 378.

sion.[173]

Nor was there any conceivable distinction between the textbooks and instructional materials in terms of the Court's ability to "separate secular educational functions from the predominantly religious role performed by . . . church-related elementary and secondary schools."[174] If textbooks are not converted to a religious purpose merely because they are delivered to schools in which religion is so ubiquitous that a significant percentage of its function is subsumed in the religious mission, then certainly neither are instructional materials. The Court conceded this idea when it acknowledged that instructional materials "are self polic[ing], in that starting as secular, nonideological and neutral, they will not change in use."[175]

Because instructional aid was provided directly to religious schools, this case, at first glance, logically appears distinguishable from *Everson* and *Allen*. Justice Rehnquist's dissent casts serious doubt upon this assertion. Rehnquist argued:

> [T]he fact that the school is the bailee [cannot] be regarded as constitutionally determinative. In the textbook loan program upheld in *Allen, supra*, the private schools were responsible for transmitting the book requests to the Board of Education and were permitted to store the loaned books on their premises. I fail to see how the instructional materials and equipment program can be distinguished in any significant respect. Under both programs "ownership remains, at least technically, in the State."[176]

Moreover, the Court did not appear to premise its conclusion upon this distinction, focusing instead on the amount of the aid and the religious nature of the schools that received the aid. But neither of these elements were distinguishable from the textbook issue. The Court left states in an anomalous position—able constitutionally to provide religious schools with maps printed within books but unable to provide

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173. Madison in his *Memorial and Remonstrance*, a paper that the Court often considers when seeking to interpret the Establishment Clause, suggested that forcing a "citizen to contribute a three pence of his property" would violate the principle of anti-establishment. *See* Madison, *supra* note 35, at 300.

174. *Meek*, 421 U.S. at 365.

175. *Id.* at 366 (quoting *Meek*, 374 F. Supp. at 660).

176. *Id.* at 391 (quoting Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)) (citations omitted in original).

maps which pulled down in front of blackboards.[177]

Next, the Court considered Act 194, which authorized the state to supply professional staff that provided auxiliary services (remedial and accelerated instruction, guidance counseling and testing, speech, and hearing services) directly to nonpublic school children.[178] The Court noted that "the services [were] provided only on the nonpublic school premises, and only when 'requested by nonpublic school representatives.'"[179] The Court conceded the right of the state "to make free auxiliary services available to all students in the Commonwealth, including those who attend church-related schools."[180] The issue was merely whether such services could be provided on the religious school's grounds.[181]

Once again, the Court did not question the state's secular legislative purpose or the primary effect of the Act, thus obviating the need to apply the first and second prongs of the *Lemon* test.[182] The Court, however, did find a violation of the third prong of *Lemon*.[183]

The Court rejected the district court's finding that "no continuing supervision of the personnel providing auxiliary services would be necessary to establish that Act 194's secular limitations were observed" or to ensure that a teacher did not "'succumb to sectarianization of his or her professional work.'"[184] Citing *Lemon v. Kurtzman*, the Court argued that the state could not rely upon the professionalism of teachers to ensure they did not succumb to the desire to "inculcate religion."[185] Instead the Court held that the state would be forced to maintain "a comprehensive, discriminating, and continuing state surveillance" to ensure that the First Amendment was respected.[186] However, the Court argued that if the state were to do so, it would violate the third prong of the *Lemon* test, which required the state to avoid "excessive en-

177. *See id.* at 389-90 (Rehnquist, J., dissenting).
178. *Id.* at 367.
179. *Id.* (citing Dep't of Ed., Commonwealth of Pennsylvania, Guidelines for Administration of Acts 194 and 195 § 13).
180. *Meek*, 421 U.S. at 368 n.17.
181. *See id.* at 368.
182. *Id.* at 367-68.
183. *See id.* at 372.
184. *Id.* (citing Meek v. Pittenger, 374 F. Supp. 639, 657 (E.D. Pa. 1974)).
185. *Id.* at 369.
186. *Meek*, 421 U.S. at 370 (quoting Lemon v. Kurtzman, 403 U.S. 602, 618-19 (1971)).

tanglements" between church and state.[187]

Lemon presented a significantly different set of facts, however, as Justice Rehnquist pointed out in his dissent.[188] In *Lemon*, the state attempted to supplement the salaries of teachers who were employed by the religious schools.[189] There, the Court had specifically emphasized that, by virtue of the fact that religious schools employed them, the teachers were under "religious control and discipline."[190] In *Meek*, the state employed the teachers, and their only connection to the religious school was that they went there to assist children.[191] In addition, Act 194 specifically limited the substantive areas that the public school officials could address to those that "are presently or hereafter provided for in public school[s]."[192] The district court's evidentiary record clarified that this restriction had been fully observed.[193]

As Justice White had predicted in his dissent in *Lemon*, the "primary effect" and "excessive entanglement" prongs of *Lemon* were combining to become tests that its takers could only fail.[194] When Pennsylvania provided language in the statute that merely limited the instructional materials to "the subjects and activities prescribed by the standards of the State Board of Education,"[195] without providing some monitoring provision that guaranteed the aid would not advance religion, it failed the primary effect test. And, when the state included the monitoring provisions necessary to guarantee that professional staff and auxiliary services did not have the "primary effect of advancing religion," it failed the "excessive entanglement" test. Not surprisingly, Justice Rehnquist questioned whether the possibility of meeting the entanglement test was now anything more than "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will."[196]

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187. *Id.*
188. *Id.* at 393 (Rehnquist, J., dissenting).
189. *Lemon*, 403 U.S. at 617.
190. *Id.*
191. *Meek*, 421 U.S. at 352-53.
192. *Id.* at 393 (quoting Act 194, § 1(b)).
193. *Id.* at 368-69, 392 (Rehnquist, J., dissenting).
194. *Lemon*, 403 U.S. at 668.
195. *Meek*, 421 U.S. at 363.
196. *Id.* at 394 (citing Edwards v. California, 314 U.S. 160, 186 (1941) (Jackson, J., concurring)).

4. Tax Deductions for School Expenses: Mueller v. Allen

In *Mueller v. Allen*,[197] the Court began to consider allowing states to increase their level of support, pursuant to general welfare programs, for children attending religious schools.[198] In *Mueller*, the Court was asked to decide whether the state of Minnesota could constitutionally allow taxpayers whose children attended religious schools to deduct expenses associated with such education (regular, summer, and remedial tuition, cost of various types of rental equipment, pencils, and notebooks, etc.).[199]

In applying the first "secular legislative purpose" prong of *Lemon*, the Court found no constitutional problem with the statute.[200] The state's interest in educating its children, the significant reduction in cost to the state for children attending religious schools, and the "wholesome competition" that private schools generated for public schools all provided the state with sufficient secular purpose.[201]

The more difficult challenge for the legislation was the second prong, the "primary effect" test. The Court found three reasons why the tax deduction did not have the "primary effect" of advancing religion. First, the education expense deduction was only one of many deductions available under the statute.[202] Additional deductions were available for medical expenses and charitable contributions.[203] The Court inferred that the broad range of deductions indicated that Minnesota had not singled out parents of children attending religious schools for special treatment.[204] Moreover, the Court claimed that states were entitled to "substantial deference" when deciding how to equalize tax burdens among its citizens.[205]

197. 463 U.S. 388 (1983).
198. *Id.*
199. *See id.* at 391.
200. *Id.* at 394-95.
201. *Id.* at 395.
202. *Id.* at 396.
203. *Mueller*, 463 U.S. at 396.
204. Although the Court does not cite *Lemon*, it seems to suggest that the wide range of deductions ensured that Minnesota avoided the problem Pennsylvania faced when it "singled out a class of its citizens for a special economic benefit." Sloan v. Lemon, 413 U.S. 825, 832 (1973).
205. *Mueller*, 463 U.S. at 396. The Court distinguished this case from *Nyquist* on the grounds that the *Nyquist* Court had "expressed considerable doubt" that the tax benefits in that case "could be regarded as part of a genuine system

Second, the Court argued that it was a "material consideration" that any benefit that might result to the parochial schools resulted from the "numerous private choices of individual parents," rather than from direct assistance to the schools.[206] This reasoning signified that no "imprimatur of state approval" had been "conferred on any particular religion, or on religion generally."[207] The Court further said, "[t]he historic purposes of the Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case."[208]

Third, the Court argued that the availability of the deductions to all parents, including those whose children attended public and nonsectarian private schools, indicated "an important index of secular effect."[209] The Court took pains to distinguish *Mueller* from *Nyquist* in this respect. In *Nyquist*, New York provided tuition deductions for a limited class of individuals whose children attended private schools.[210] In *Mueller*, deductions were available for parents of children attending both private and public schools.[211] The Court argued that the Minnesota legislation was akin to *Allen* and *Everson* in that the aid was part of a program that benefited "a broad spectrum of citizens."[212]

In response to this third argument, appellants claimed that the Court ought to ignore the facial neutrality of the statute because, at least with respect to the tuition deduction, the statute primarily benefited parents of children in religious schools.[213] The Court swept aside such statistical evidence on the grounds that it failed to "provide the certainty that this field stands in need of."[214] The Court stated, "[w]e would be loath to adopt a rule grounding the constitutionality

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of tax laws." *Id.* at 396 n.6. Most of the tax benefits in *Nyquist* were better understood as mere tuition grants according to the Court.

206. *Id.* at 399.
207. *See id.* (citing Widmar v. Vincent, 454 U.S. 236, 274 (1981)).
208. *Id.* at 400.
209. *Id.* at 397 (quoting *Widmar*, 454 U.S. at 274).
210. *See id.* at 398.
211. *See Mueller*, 463 U.S. at 398.
212. *Id.* at 397 (quoting *Widmar*, 454 U.S. at 274).
213. *Id.* at 400.
214. *Id.* at 401.

of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."[215] Such an approach makes sense, since nothing about the First Amendment suggests that its application varies depending upon this sort of statistical argument. The appellant's approach would force the Court to decide that the First Amendment was violated only when some arbitrary percentage of participants took deductions for sectarian tuition.

The Court also argued that there was evidence that some public school parents were able to take advantage of the tuition deduction and all public school parents were able to take deductions for other items under the statute.[216]

Finally, in response to the appellants' disparate impact argument, the Court argued, "whatever unequal effect may be attributed to the statutory classification can fairly be regarded as a rough return for the [savings] . . . provided to the State and all taxpayers by parents sending their children to parochial schools."[217]

Turning to the third prong of *Lemon*, the Court claimed it had "no difficulty in concluding that the Minnesota statute does not 'excessively entangle' the state in religion."[218] The Court found no evidence that the state would be required to maintain "comprehensive, discriminating, and continuing state surveillance" to insure that the tax deduction statute did not violate the Establishment Clause.[219] The only possible monitoring requirement would be to insure that the textbooks for which parents took deductions were limited to secular purposes. The Court claimed that the situation here did not differ substantially from *Allen*, where the state had an ongoing duty to monitor whether the textbooks loaned to students attending religious schools were limited to secular use.[220]

As to the "political divisiveness" variation of the "excessive entanglement" prong, the Court cut short any discussion of the test by holding that the issue only arose in cases

215. *Id.*

216. *Id.* at 401 n.9. The Court also stated that parents of public school children were able to take advantage of the deductions for things like summer school programs, private tutoring, and schools supplies, all of which were deductible items under the statute. *Id.* at 391 n.2.

217. *Mueller*, 463 U.S. at 402.

218. *Id.* at 403.

219. *Id.* (quoting Lemon v. Kurtzman, 403 U.S. 602, 619 (1971)).

220. *See id.*

"where direct financial subsidies are paid to parochial schools or to teachers in parochial schools."[221]

Justice Marshall's dissent, on behalf of Justices Brennan, Blackmun, and Stevens, argued that the deductions had the "primary effect" of advancing religion.[222] This conclusion followed from the fact that the overwhelming majority of parents who took the deduction had children in sectarian schools.[223] He argued that the majority had erred in claiming that taking such "statistical evidence" into account would lead to constitutional uncertainty.[224] In the dissent's view, "The only factual inquiry necessary is the same as that employed in *Nyquist* and *Sloan v. Lemon*: whether the deduction permitted for tuition expenses primarily benefits those who send their children to religious schools."[225]

Just how the dissent would define "primarily" was unclear. Marshall did not indicate what percentage of children needed to attend public schools in order for such a deduction to be found constitutional. Nor did he cite any evidence to support the claim that the Establishment Clause was intended to turn on such an inquiry. The dissenters provided some portent of how they would define the term "primarily" when they indicated that they were prepared to overturn *Allen*. Marshall claimed that the Court, in deciding *Allen*, had

> [B]elieved at that time that it lacked sufficient experience to determine "based solely on judicial notice" that "the process of secular and religious training are so intertwined that secular textbooks furnished to students by the public [will always be] instrumental in the teaching of religion." This basis for distinguishing secular instructional materials and secular textbooks is simply untenable, and is inconsistent with many of our more recent decisions concerning state aid to parochial schools.[226]

The decision in *Allen* was premised on the fact that the loan of textbooks to children attending religious schools was part of a general program in which books were loaned to all children in the state regardless of whether they attended pub-

221. *Id.* at 403 n.11.
222. *Id.* 409 (Marshall, J., dissenting).
223. *Mueller*, 463 U.S. at 410-11.
224. *Id.* at 409 (Marshall, J., dissenting).
225. *Id.* at 409-10.
226. *Id.* at 415.

lic or religious schools.[227] There can be little doubt that in 1968, the overwhelming majority of students in New York were attending public schools. Hence, the benefit of the textbook loan program fell "primarily" to parents of students attending public schools. Nonetheless, even in that situation the dissenters indicated they now found a violation of the "primary effect" test.[228] The "primarily" threshold evidently meant (in the view of the dissenters) that no aid whatsoever could find its way to religious schools regardless of how incidental or de minimis it was.

5. Public Teachers in Religious Schools: Grand Rapids v. Ball *and* Aguilar v. Felton

In *Grand Rapids v. Ball*[229] and *Aguilar v. Felton*,[230] the Court revisited the issues raised in *Meek v. Pittenger*.[231] In *Ball*, Michigan adopted two programs (Shared Time and Community Education) that offered educational programs to students in private sectarian and nonsectarian schools.[232] *Ball's* Shared Time program offered remedial and enrichment classes in mathematics, reading, art, music, and physical education.[233] Teachers in the Shared Time program were full-time public school employees who went to religious schools to teach the remedial and enrichment classes.[234]

The Community Education program, available on the grounds of religious schools, offered classes in arts and crafts, home economics, Spanish, gymnastics, yearbook production, Christmas arts and crafts, drama, newspaper, humanities, chess, model building, and nature appreciation.[235] Although hired as public employees for the limited purposes of the Community Education program, virtually all teachers in the program were "otherwise employed full time by the same" religious school in which they taught.[236]

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227. *See id.*
228. *Id.* at 414-15.
229. 473 U.S. 373 (1985).
230. 473 U.S. 402 (1985).
231. 421 U.S. 349 (1975).
232. *Ball*, 473 U.S. at 375.
233. *Id.*
234. *Id.* at 375-76.
235. *Id.* at 376-77.
236. *Id.* at 377 (quoting Ams. United for Separation Between Church & State v. Sch. Dist. of Grand Rapids, 546 F. Supp. 1071, 1079 (W.D. Mich. 1982)).

Similarly, in *Aguilar*, New York was using federal funds to pay public school employees to teach and provide guidance counseling in parochial schools.[237] The state targeted the program to poor children in low-income neighborhoods and included remedial reading, reading skills, remedial mathematics, English as a second language, and guidance services.[238] The one major difference between *Aguilar* and *Ball* was that New York provided a monitoring mechanism to ensure that teachers did not indoctrinate students with religious beliefs.[239] To that end, New York provided for "occasional unannounced supervisory visits" by supervisors of the program.[240]

With respect to the programs in *Ball*, the Court found three violations of the "primary effect test."[241] Relying upon *Meek v. Pittenger*,[242] the Court found first that teachers "influenced by the pervasively sectarian nature of the religious schools in which they work, may subtly or overtly indoctrinate the students in particular religious tenets at public expense."[243] Second, the Court said that having public teachers in sectarian schools created a "symbolic union of church and state . . . [that] threatens to convey a message of state support for religion to students and to the general public."[244] Third, the Court found that the programs support sectarian schools by relieving them of the duty they otherwise had to teach secular subjects.[245]

In *Aguilar*, the Court insisted that the supervisory system established to insure that teachers did not indoctrinate students in religion resulted in "excessive entanglement" in violation of the third prong of *Lemon*.[246] The Court also found two additional grounds for a violation of the "excessive entanglement" prong of *Lemon*.[247] In the first instance, the Court found that the "administrative cooperation" required to implement the program "entangles church and state in still an-

237. Aguilar v. Felton, 473 U.S. 402, 404-06 (1985).
238. *Id.* at 406.
239. *Id.* at 409.
240. *Id.* at 407.
241. *Ball*, 473 U.S. at 397.
242. 421 U.S. 349 (1975).
243. *Ball*, 473 U.S. at 397.
244. *Id.*
245. *Id.*
246. *Aguilar*, 473 U.S. at 409.
247. *See id.* at 413-14.

other way that infringes interests at the heart of the Establishment Clause."[248] Second, the Court argued that the "numerous judgments that must be made by agents of the city [concerning] matters that may be subtle and controversial [and] . . . of deep religious significance" would foster "political divisiveness along religious lines."[249]

Combined, these decisions meant that in order to provide remedial and enrichment programs to students in religious schools, the state could no longer use the less expensive and less complicated method of moving a few teachers to sectarian schools. Instead, the state had to undertake the expense, and additional administrative headache, of bussing a much larger number of religious school students to public schools.[250]

Once again, what Justice Rehnquist called the "'Catch-22' paradox" of the "primary effects/excessive entanglement" prongs of *Lemon* reared its ugly head.[251] When, as in *Ball*, the state attempted to meet the needs of students by supplying teachers to provide remedial or enriched educational experiences, the Court raised the specter of teachers indoctrinating students into the faith.[252] As a result, the state failed the "primary effect" test, despite the Court's acknowledgement that there was no actual evidence of such indoctrination in the many years of the program's existence.[253] If, by providing a monitoring system as in *Aguilar*, the state attempted to guarantee no indoctrination occurred, it would fail the "excessive entanglement" test.

6. Vocational Rehabilitation Funds for Handicapped Students Attending Christian Colleges: Witters v. Washington

In *Witters v. Washington*,[254] the Court agreed that the Establishment Clause did not prevent the state of Washington from providing vocational rehabilitation funds that were then used by a blind student to pay for theological studies at

248. *Id.* at 413.
249. *Id.* at 414.
250. *See* Agostini v. Felton, 521 U.S. 203, 213 (1997) (documenting the additional expense involved in bussing a large number of religious school students to public schools).
251. *Aguilar*, 473 U.S. at 420.
252. *Ball*, 473 U.S. at 389.
253. *Id.* at 388.
254. 474 U.S. 481 (1986).

a Christian college.[255] In a rare instance of unity in judgment, but not reasoning, all nine Justices agreed that such aid did not have the "primary effect" of advancing religion.[256]

Writing for the Court, Justice Marshall pointed to several key factors that led to the Court's decision. Marshall began by noting that any state aid that ended up in the hands of a religious institution did so because of the "genuinely independent and private" choices of individual recipients.[257] Moreover, the program provided aid to recipients without regard to the religious-secular standing of the institution that ultimately received the funds.[258] Nor, according to Marshall, did the program provide any incentives that encouraged the recipients to choose a religious institution.[259] Finally, there was no evidence to suggest "that any other person has ever sought to finance religious education or activity" through the program.[260] Given these facts, the Court concluded that the program could not reasonably be viewed as state sponsorship or endorsement of religion.[261]

Three separate concurring opinions by Justices White, Powell (joined by Burger and Rehnquist), and O'Connor all appear to agree that the precedent set down in *Mueller* should have guided the decision in this case.[262] Powell's con-

255. *Id.* at 483.
256. *Id.* at 489.
257. *Id.* at 487.
258. *Id.* at 487-88.
259. *Id.* at 488.
260. *Witters*, 474 U.S. at 488.
261. *Id.* at 488-89. The Court said that all parties agreed that Washington State had a "secular purpose" in creating the program. *Id.* at 485. In addition, the Court declined to address the "entanglement" issue because there had been no decision on this issue by the district court. *Id.* at 486 n.3. The opinion did invite the lower courts to take up the "entanglement" issue. *Id.* Therefore, at least for the time being, the state did not run afoul of the first and third prongs of *Lemon*. *Id.* at 486, 489 n.3.
262. Given the apparent agreement among all five Justices that this case should have been decided according to the principle set down in *Mueller*, it is not clear why none of these five wrote the opinion of the Court. In all three concurring opinions each Justice carefully articulates his or her agreement with the other concurring opinions. Moreover, no concurring author cites any differences with the other concurring authors, with the exception of Justice White who, while not disagreeing with Justice Powell, did express some apparent reservation when he wrote that he agreed with "most" of what Justice Powell wrote "with respect to the relevance of Mueller v. Allen." *Id.* at 490. Perhaps Justice White's small measure of qualification explains why these five Justices did not form a majority, but even that reasoning is not clear since Justice White did not explain why he agreed with only "most" of what Powell wrote.

currence, for instance, argues that *Mueller* explicitly provides that state programs which are "neutral in offering [aid] to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of individual beneficiaries."[263] Powell argued that under *Mueller*, the fact that the petitioner was the only individual to attempt to use the state assistance to pay for tuition at a religious college is irrelevant.[264] According to Powell, *Mueller* held that the state could pass aid along to religious institutions provided that two conditions are met. First, the state must make the aid available to everyone in the class regardless of religious affiliation.[265] Second, any aid that ends up in the hands of religious institutions must do so as a result of the genuine choices of individuals who have not been pressured or influenced by the state.[266]

7. Sign Language Interpreter in Religious High School: Zobrest v. Catalina Foothills School District

The next significant public funding of private sectarian educational case, *Zobrest v. Catalina Foothills School District*,[267] also involved a disabled petitioner. James Zobrest, who was deaf, sued to force a public school district to provide him with a sign-language interpreter to accompany him to a Catholic high school.[266] The school district denied him the interpreter on the grounds that such aid would violate the Establishment Clause.[269] Both the district and appellate courts agreed with the school district.[270]

The Supreme Court reversed, continuing its recent trend of allowing state aid that is allocated in a religiously neutral manner to flow through parents to religious schools. The Court premised its holding and analysis on *Mueller* and *Witters*, both of which required the benefits of a state program to

263. *Id.* at 491 (citing Mueller v. Allen, 463 U.S. 388 (1983)); *see also id.* at 493 (O'Connor, J., concurring) (citing the same language from *Lemon* that Justice Powell cited in his concurrence).
264. *Id.* at 492.
265. *Id.* at 491.
266. *Witters*, 474 U.S. at 491.
267. 509 U.S. 1 (1993).
268. *Id.* at 4.
269. *Id.*
270. *Id.* at 4-5.

be available to all parents within the class regardless of whether their children attend public/secular, private/secular, or private/sectarian schools.[271] This requirement emphasized the neutrality issue, in that it forced the state to show no preference for religion. The *Mueller* Court also required that whatever aid found its way to religious schools had to do so as a result of "private decisions of individual parents," without any incentive to choose sectarian education.[272]

The school district claimed that the Court should distinguish *Zobrest* from *Mueller* and *Witters* because the aid requested would require a "public employee [to be] physically present in a sectarian school."[273] The school district argued that the facts of *Zobrest* more closely resembled those of *Meek* and *Ball*.[274] The Court said this argument failed for two reasons.[275] In the first instance, the type of programs in *Meek* (teaching material and equipment) and *Ball* (teachers, instructional material, and equipment) "relieved sectarian schools of costs they otherwise would have borne in educating their students."[276] In contrast, the school district in *Zobrest* was not "relieved of an expense that it otherwise would have assumed in educating its students."[277]

According to the Court, the second distinction was that the sign language interpreter, unlike the teachers or equipment in *Meek* and *Ball*, "will neither add to nor subtract from" the educational process.[278] In making this point, the Court stated that "the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school."[279] The Court argued that "[s]uch a flat rule, smacking of antiquated notions of 'taint,' would indeed exalt form over substance."[280] For the first time, the Court appeared willing to accept that religion was not a disease that public employees automatically caught by virtue of walking into sectarian schools.

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271. *Id.* at 8-9.
272. *Id.* at 10.
273. *Zobrest*, 509 U.S. at 11.
274. *Id.*
275. *Id.* at 12.
276. *Id.*
277. *Id.*
278. *Id.* at 13.
279. *Zobrest*, 509 U.S. at 13.
280. *Id.*

Unfortunately, the Court did not spell out the significance of the second distinction. The Court appeared to assume that if interpreters faithfully interpret exactly what the religious schoolteacher says in class, and do not add anything to what is already present in the classroom, they could not be said to actively contribute to the indoctrination of religious beliefs.[281] Three members of the dissent clearly believed in this interpretation of the majority opinion.[282] The dissenters argued that the Establishment Clause absolutely prohibits government involvement in "indoctrination" of religious beliefs.[283] This prohibition included interpreters provided at state expense in religious schools, because the Establishment Clause "always proscribed the provision of benefits that afford even the 'opportunity for the transmission of sectarian views.'"[284]

8. Public School Teachers Revisited: Agostini v. Felton

In *Agostini v. Felton*,[285] the petitioners, the New York City School Board, sought relief from the remedy imposed by the Court's earlier decision in *Aguilar*.[286] The underlying program and legal issues were the same in both cases. New York City wished to use federal Title I funds to provide "remedial education, guidance, and job counseling" to students in low income areas who were at risk of failing to perform up to state standards.[287] *Aguilar* had declared unconstitutional New York's attempt to provide such services by placing public school teachers in religious schools.[288] In *Agostini*, the New York City School Board asked the Court to allow it to resume this practice.[289]

According to the school board, cost considerations moti-

281. *See id.*

282. Justice O'Connor, the fourth member of the dissent, did not join the others on this point.

283. *Zobrest*, 509 U.S. at 21.

284. *Id.* (citing Wolman v. Walter, 433 U.S. 229, 244 (1977)). All four of the dissenters would have refused to hear the case on the grounds that rendering a decision on the constitutionality of the school district's actions was not unavoidable. *See id.* at 14-17.

285. 521 U.S. 203 (1997).

286. *Id.* at 208-09.

287. *Id.* at 209.

288. *Id.*

289. *Id.* at 208.

vated its request for relief.[290] The Court noted that there had been no dispute that *Aguilar* had imposed "significant" additional cost.[291] The Court cited evidence that as a result of *Aguilar* the school board had incurred an additional $100 million cost to supply the same services.[292] The additional expenses were attributed to "computer-aided instruction, leasing sites and mobile instructional units, and transporting students to those sites."[293] Moreover, the federal regulations specified that the additional costs imposed by *Aguilar* were to be deducted from Title I funds, and that any other state or federal funds could not cover them.[294] The cost of complying with *Aguilar* meant a dollar for dollar reduction in services offered to economically underprivileged at-risk students under Title I.

The issue turned on whether subsequent decisions had rendered *Aguilar*, and its companion case *Ball*, "no longer good law."[295] The Court reiterated the three assumptions justifying its conclusion in *Ball*, which held that placing public employees in religious schools had the "impermissible effect of advancing religion."[296] First, when public employees provide services on the grounds of religious schools, they aid in the inculcation of religion.[297] Second, when public employees work in sectarian schools, a symbolic union is created between church and state.[298] Third, "any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking."[299]

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290. *Id.* at 213-14.
291. *Agostini*, 521 U.S. at 213.
292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.* at 209.
296. *Id.* at 222.
297. *Agostini*, 521 U.S. at 222.
298. *Id.*
299. *Id.* The Court's summation of these three assumptions differs from the court's summation of issues in *Ball*, principally with respect to the third assumption related to decision making. In *Ball*, the Court stated that the third reason for finding the program promoted religion was that "the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." Grand Rapids v. Ball, 473 U.S. 373, 397 (1985). The resulting difference was critical, according to the dissent. *Agostini*, 521 U.S. at 247 (Souter, J., dissenting).

The Court then addressed each of these assumptions in light of the petitioner's claims that more recent decisions had undermined *Ball* and *Aguilar*.[300] In response to the first assumption, the Court, citing *Zobrest*, argued that it had "abandoned the presumption erected in . . . *Ball* that the placement of public employees on parochial school grounds inevitably result[ed] in the impermissible effect of state-sponsored indoctrination or constitutes symbolic union between government and religion."[301]

The dissent argued that *Zobrest* could not be cited as authority for such a conclusion.[302] In the dissent's view, *Zobrest* was limited to those few situations where the public employee role was so "circumscribed" that the individual could not possibly add any religious content to the classroom.[303] The sign language interpreter in *Zobrest* had been nothing more than a "hearing aid," according to the dissent, and thereby incapable of aiding in the indoctrination of religion.[304]

In response, the majority argued that *Zobrest* had not relied upon the assumption that a sign language interpreter had no opportunity to inject religious content.[305] Had the *Zobrest* Court made such an assumption, it would not have bothered to examine the record for evidence that the signer had violated his or her professional duty by adding such religious content.[306]

In fairness to the dissent, it must be noted that the *Zobrest* majority did go out of its way to argue that a professional oath forbidding interpreters from adding or subtracting from the message that he or she relayed constrained the signer.[307] The Court might instead have acknowledged that it

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When, as in *Ball* or *Agostini*, the publicly supported programs relieved the parochial schools of a substantial portion of their educational burden, they result in "direct and substantial" aid to religion, which is a violation of the Establishment Clause. *Id.* at 252.

300. *Agostini*, 521 U.S. at 222.

301. *Id.* at 223.

302. *Id.* at 248 (Souter, J., dissenting).

303. *Id.* at 248-49 (Souter, J., dissenting).

304. *Id.*

305. *Id.* at 224-25.

306. *Agostini*, 521 U.S. at 225.

307. Chief Justice Rehnquist's opinion argued that "the task of a sign-language interpreter seems to us quite different from that of a teacher or a guidance counselor . . . . The sign-language interpreter they have requested will

was expanding upon the principle established in *Zobrest*.[308] Either way, a majority of the Court had apparently been waiting for an opportunity to overrule the decisions in *Aguilar* and *Ball*.[309]

The Court likewise rejected *Ball's* second assumption that the presence of public employees on religious school grounds creates an impression of "symbolic union" between church and state.[310] The majority noted that many lower court decisions upheld the provision of Title I services in mobile units located just off religious school grounds.[311] According to the Court, these decisions implicitly suggested that the symbolic union disappears once the teacher walks from the classroom to the mobile unit parked outside.[312] This majority went on to point out that such analysis reduces the constitutional question to one of mere location, the "degree of cooperation between Title I instructors and parochial school faculty is the same no matter where the services are provided."[313] Resting the finding of "symbolic union" on location alone was "nei-

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neither add to nor subtract from that environment, and hence the provision of such assistance is not barred by the Establishment Clause." Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13 (1993).

308. Such an approach would have presented procedural problems for the majority inasmuch as Rule 60(b) of the Federal Rules of Civil Procedure, pursuant to which the appeal in *Agostini* had been made, did not allow the Court to relitigate the claims underlying the original judgment in *Aguilar*. *See* FED. R. CIV. P. 60(b)(5). Rule 60(b)(5) does, however, allow a court to relieve a party from the conditions of a previous judgment when "it is no longer equitable that the judgment should have a prospective application." *Id.* In order to grant "equitable" relief under Rule 60(b), the majority was forced to argue that the original judgment in *Aguilar* had already been so undermined as to make the continued enforcement of the judgment inequitable. *Agostini*, 521 U.S. at 217-18. That argument required the majority to argue that *Zobrest* had already acknowledged that an interpreter could inject content into the interpretation, something the Court had not actually done in *Zobrest*. *Id.* at 225. The majority obviously recognized the problem it confronted with Rule 60(b), but nonetheless concluded that a great inequity would result if it required the school board to continue incurring the millions in additional cost required by *Aguilar* while it waited for the Court to get around to doing in a latter case what it was clearly prepared to do immediately. *Id.* at 240.

309. Five Justices had expressed the view that Aguilar should be reconsidered as early as 1994 in *Bd. of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994).

310. *Agostini*, 521 U.S. at 227.

311. *Id.*

312. *Id.*

313. *Id.*

ther 'sensible' nor 'sound.'"[314]

As to the third assumption, the Court claimed that its decisions in *Witters* and *Zobrest* had undermined the holding in *Ball* that all aid which supports religion violates the second prong of *Lemon*, the "primary effect" test.[315] *Witters*, for instance, allowed the state to provide a vocational tuition grant to a blind student with full knowledge that the student would use the money to attend a Christian college.[316] The key fact in *Witters* and *Zobrest* had been that the state had distributed the funds in a manner that was neutral with respect to religion. In both cases, the state had not taken notice, one way or the other, of whether the institution that ultimately received the funds was sectarian or nonsectarian. This scenario was no different than the state issuing a paycheck to a state employee knowing that the individual intended to contribute some of the proceeds to a church.[317] According to the Court, this same neutrality applied in *Agostini* because the state dispensed Title I aid to students without regard to the religious nature of the school they chose to attend.[318]

The dissent argued that the manner in which the state distributed the aid in *Agostini* vitiated its neutrality because it was paid "directly to the religious school[]."[319] Moreover, the dissent implied that because the state distributed Title I funds without requiring individual students to apply, these distributions did not result from private decision-making of individual parents, as had been the case in *Zobrest* and *Witters*.[320]

The majority rejected these contentions on several grounds. In the first instance the majority pointed out that, contrary to the dissent's claim, none of the funds were paid "directly to the religious schools."[321] Instead federal Title I funds passed through the hands of the school board and went directly to public agencies who provided services to students.[322] For that reason none of the funds ever reached the

314. *Id.* at 227-28.
315. *Id.* at 225.
316. *Agostini*, 521 U.S. at 225.
317. *Id.* at 226.
318. *Id.* at 229.
319. *Id.* at 252.
320. *Id.*
321. *Id.* at 228.
322. *Agostini*, 521 U.S. at 228.

"coffers of the religious schools" directly or indirectly.[323] The majority also rejected the claim that providing Title I services directly to students, without requiring them to first fill out an application, increased the state's financing of religious indoctrination.[324] The majority noted that the level of financial support for religious indoctrination neither increased nor decreased depending upon whether a student fills out an application prior to receiving the Title I services.[325]

The majority opinion came close to suggesting that, in those situations where no public funds ended up in the hands of the religious schools, there is no need to demonstrate that aid was given to the student as a "result of the private decision of individual parents."[326] Perhaps the need for parents to act as a prophylactic between church and state diminishes when the aid is given directly to the student and never turned over to the religious school, as such aid does not have the "primary effect" of advancing religion.

The majority might have reached a contrary conclusion if it accepted the dissent's argument that the Title I aid "subsidized the religious functions of the parochial schools by taking over a significant portion of their responsibility for teaching secular subjects."[327] The majority rejected this claim for several reasons. Title I regulations forbade sectarian schools to reduce the services they normally provided and replace them with publicly funded services.[328] Nor was there any evidence in the trial record of the sectarian schools violating this regulation.[329]

Moreover, according to the majority, the alternative proposed by the dissent did not provide any greater assurances that the sectarian schools would not be equally relieved of their responsibilities.[330] Under the dissent's solution the same Title I services would be offered to students in mobile units parked at the curb in front of the religious school.[331] The dis-

323. *Id.*
324. *Id.* at 229.
325. *Id.* at 229.
326. *Id.* at 226 (quoting Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10 (1993)).
327. *Id.* at 250 (citing Grand Rapids v. Ball, 473 U.S. 371, 396-97 (1985)).
328. *Agostini*, 521 U.S. at 229.
329. *Id.*
330. *Id.* at 230.
331. *Id.* at 227-28.

sent failed to "explain why a sectarian school would not have the same incentive to 'make patently significant cutbacks' in its curriculum no matter where Title I services are offered, since the school would ostensibly be excused from having to provide the Title I-type services itself."[332]

The dissent offered no rebuttal to this argument other than the unsupported assertion that "off-premises teaching is arguably less likely to open the door to relieving religious schools of their responsibilities for secular subjects."[333] The dissent did not explain why a religious school would cut back its responsibilities for teaching such subjects when a public school teacher is in one of its classrooms, but not in response to the same teacher providing the same services in a mobile van parked sixty feet away.

Although Justice Souter thought that the majority's argument on this point "might prove too much," he shied away (perhaps for good reason) from explaining this remark.[334] He may have meant to suggest that the majority had demonstrated that providing Title I type aid to students *anywhere* would relieve sectarian schools of substantial secular educational burdens. If so, he would be driven to conclude that once students chose to attend a sectarian school, the state must shun them by denying them any kind of educational support *anywhere*. Presumably the constitutional implications of this position were untenable even for most of the dissenting members in this decision. The Court has long maintained that the Constitution does not require the state "to be hostile to religion."[335] It is difficult to imagine how a Court decision that forced states to refuse *any* remedial help to students *anywhere*—simply because they chose to attend sectarian schools—might be interpreted as anything but hostility toward religion.

In addition to finding that the Title I program had the impermissible "effect of advancing religion," the *Aguilar* Court had also found that the program resulted in excessive entanglement between church and state.[336] The *Agostini* Court also addressed that issue. The Court said that in the

332. *Id.* at 230 (quoting Souter, J., dissenting).
333. *Id.* at 247.
334. *Agostini*, 521 U.S. at 246.
335. Zorach v. Clauson, 343 U.S. 306, 314 (1952).
336. Aguilar v. Felton, 473 U.S. 402, 414 (1985).

past, the issue of excessive entanglement had been considered as both part of the "effect" test and "as a factor separate and apart from 'effect.'"[337] The Court then proposed ceasing to treat the analysis of "excessive entanglement" as an issue separate from the "effect" inquiry on the grounds that the inquiry was "similar" in either instance.[338] In both cases, the Court looked at the "character and purpose of the institutions benefited" and the "nature of the aid that the State provides."[339] The second and third prongs of *Lemon* thus became a single inquiry.

The Court argued that the finding of "excessive entanglement" in *Aguilar* rested upon three assumptions: "(i) the program would require 'pervasive monitoring by public authorities' to ensure that Title I employees did not inculcate religion; (ii) the program required 'administrative cooperation' between the Board and parochial schools; and (iii) the program might increase the dangers of 'political divisiveness.'"[340] The Court argued that under its current interpretation of the Establishment Clause, the last two considerations standing alone were insufficient to cause the "excessive entanglement."[341] The Court pointed out that no court had held that the state could not offer the services provided under Title I off campus.[342] Regardless of where the state offered the services, the same level of "administrative cooperation" and the same incentives for "political divisiveness" were present.[343] Since even the dissent was willing to brook the same level of "administrative cooperation" and "political divisiveness" when assistance was offered off campus, the Court saw those factors as insufficient to find a violation of the Establishment Clause.[344]

As to the issue of "pervasive monitoring," the Court also found no grounds for an Establishment Clause violation.[345] The *Aguilar* Court had assumed that public school teachers could not be trusted to avoid inculcating religious values

337. *Agostini*, 521 U.S. at 232.
338. *Id.* at 232, 233.
339. *Id.* at 232.
340. *Id.* at 233 (quoting *Aguilar*, 473 U.S. at 413-14).
341. *Id.* at 233-34.
342. *Id.* at 234.
343. *Agostini*, 521 U.S. at 233-34.
344. *Id.*
345. *Id.* at 233.

while on parochial schools grounds.[346] As a result, the Court further assumed that the state would require "pervasive monitoring."[347] The *Zobrest* Court, however, had rejected the assumption that teachers would violate the restrictions on inculcating religion.[348] If the Court did not assume that teachers would violate the prohibition against inculcating religion, then it need not assume that the state would require "pervasive monitoring." The Court was satisfied that the (unannounced) monthly visits by public school officials, which it did not regard as "pervasive monitoring," would provide adequate protection against violations by public school teachers.[349] Thus, the Court appears to have resolved the "catch-22" dilemma established in *Lemon*, at least for now.

III. IMPETUS FOR SCHOOL VOUCHERS

There is widespread concern that America's public schools, particularly those that service poor inner city areas, are not doing an adequate job of educating children.[350] A variety of evidence suggests that American children's test results are dropping both over time and in comparison to interna-

346. *Id.* at 234.

347. *Aguilar*, 473 U.S. at 412-13.

348. *Agostini*, 521 U.S. at 234.

349. *Id.*

350. *See generally* DIANE RAVITCH, NATIONAL STANDARDS IN AMERICAN EDUCATION: A CITIZEN'S GUIDE (1995); John E. Chubb & Terry M. Moe, *Effective Schools and Equal Opportunity*, *in* PUBLIC VALUES, PRIVATE SCHOOLS (Neal E. Devins ed., 1989); PETER W. COOKSON JR., SCHOOL CHOICE: THE STRUGGLE FOR THE SOUL OF AMERICAN EDUCATION (1994). *Cf.* Raymond Domanico, Catholic Schools in New York City (2001), *at* http://www.heartland.org/PolicyBotTopic.cfm?artTopic=424 (unpublished report prepared for New York University, Program on Education and Civil Society). This report compares the academic performance of New York City's Catholic elementary schools to the city's public schools, and finds that

> Data analysis indicates that private schools in New York City are bringing their students to higher levels of achievement than are public schools, regardless of the number of poor and minority students. The higher achievement of Catholic schools is much more pronounced in grade 8 than in grade 4. In English language arts, there is a 17-point difference between Catholic school and public school eighth graders and a 20-point difference in mathematics. Catholic schools come closer to breaking the link between race, family income, and student achievement than do public schools. Catholic schools are more successful at maintaining a basic level of achievement than are public schools. The performance of poor and minority students in Catholic schools demonstrates the educability of the city's youngsters.

Id.

tional averages.[351]

One of the more intriguing proposals for responding to this educational crisis is the concept of school vouchers. Although specific proposals vary in their details, the general concept involves providing parents with a check that they can use to purchase private school education for their children.[352] The idea is that parents, operating under free market principles, will seek out the best possible education for their children thus maximizing individual good. In addition, the competition that results from these individual decisions will force all schools to improve the quality of their educational programs in order to compete, consequently maximizing public good.

The impetus for the idea's growing popularity, however, extends beyond free market theory.[353] The real force behind this movement probably lies in the growing body of literature suggesting that private schools, particularly religious based private schools, do a better job of educating children in urban areas than do public schools.[354] Of course, not all researchers agree about the positive impact of either vouchers or religious

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351. *See* Michael Heise, *Choosing Equal Educational Opportunity: School Reform, Law and Public Policy*, 68 U. CHI. L. REV. 1113, 1115 (2001) (reviewing JAY P. HEUBERT, LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATION EQUITY (1999) and SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW (Stephen D. Sugarman & Frank R. Kemerer eds., 1999)) (noting that National Assessment of Educational Progress test results indicate that science proficiency declined significantly for seventeen-year-olds from 1969 to 1990, with some improvement during the 1980s but not enough to meet 1970s levels, and citing the Third International Mathematics and Science Study, which demonstrates that American students fall further and further behind their international counterparts as they progress through the American educational system).

352. *See* Allison M. Olczak, Note, *Scaling the Wall Between Church and State, An Analysis of the Constitutionality of School Vouchers*, 89 KY. L.J. 507 (2000/2001) (providing a brief summary of the conceptual history of school vouchers as developed by John Stuart Mill and Milton Friedman).

353. Milton Friedman, an economics professor at the University of Chicago, launched the modern debate over school vouchers with the publication of CAPITALISM AND FREEDOM in 1962. *See generally* MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962).

354. *See generally* JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS (1990); JAMES S. COLEMAN ET AL., EQUALITY OF EDUCATION (1966); JAMES S. COLEMAN & THOMAS HOFFER, PUBLIC AND PRIVATE HIGH SCHOOLS: THE IMPACT OF COMMUNITIES (1987); Raymond Domanico, Catholic Schools in New York City (2001) (unpublished manuscript prepared for New York University, Program on Education and Civil Society).

based education.[355]

Nonetheless, many parents of children in failing public schools appear willing to take a chance on private religious schools, if only because they have given up on the public school system.[356] Unlike scholars,[357] parents do not care why religious based private schools appear to outperform public schools; they simply want their children to receive a quality education. Absent a drastic improvement in the performance of inner city public schools, or a significant dip in the performance of private religious schools, the pressure for more widespread use of vouchers is likely to continue.[358] Parents of children dramatically shortchanged by public schools will be held at bay by constitutional arguments about separation of church and state for only so long. Justice Stevens, for instance, writes in the opening remarks of his dissent in *Zel-*

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355. *See generally* KARL L. ALEXANDER & AARON M. PALLAS, PRIVATE SCHOOLS AND PUBLIC POLICY: NEW EVIDENCE ON COGNITIVE ACHIEVEMENTS IN PUBLIC AND PRIVATE SCHOOLS (1983); *see also* Marla E. Sukstorf et al., *A Re-examination of Chubb and Moe's Politics Markets and America's Schools*, *in* SCHOOL CHOICE: EXAMINING THE EVIDENCE 209 (Edith & Richard Rothstein eds., 1993).

356. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 682 n.7 (Thomas, J., concurring). Justice Thomas noted

> Minority and low-income parents express the greatest support for parental choice and are most interested in placing their children in private schools. "The appeal of private schools is especially strong among parents who are low in income, minority, and live in low-performing districts: precisely the parents who are the most disadvantaged under the current system." Nearly three-fourths of all public school parents with annual income less than $20,000 support vouchers, compared to 57 percent of public school parents with an annual income of over $60,000. In addition, 75 percent of black public school parents support vouchers, as do 71 percent of Hispanic public school parents.

Id. (Thomas, J., concurring) (quoting TERRY M. MOE, SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC 164 (2001)); *see also* Frank Newport & Joseph Carroll, *No Public Consensus Yet on School Voucher Programs*, GALLOP NEWS SERVICE POLL ANALYSES (Jan. 15, 2001) (presenting a more comprehensive set of data regarding public opinion and school vouchers).

357. *See generally* Stephen L. Morgan, *Counterfactuals, Causal Effect Heterogeneity, and the Catholic School Effect on Learning*, 74 SOC. OF EDUC. 341 (2001) (arguing that it is insufficient to offer only descriptive modeling justifications for the impact of Catholic schools without offering what is causing the impact).

358. Polling data suggest that the school vouchers concept is gaining acceptance in the public's mind. Gallup data, for instance, indicates a general increase in support over the last decade. *See* The 30th Annual Phi Delta Kappa/Gallup Poll of the Public's Attitudes Toward the Public Schools, *available at* http://www.gallup.com/content/?ci=2122.

man:

> I think that we should ignore three factual matters that are discussed at length by my colleagues. First, the severe educational crisis that confronted the Cleveland City School District when Ohio enacted its voucher program is not a matter that should affect our appraisal of its constitutionality . . . . Of course, the emergency may have given some families a powerful motivation to leave the public school system and accept religious indoctrination that they would otherwise have avoided, but that is not a valid reason for upholding the program.[359]

Such remarks undoubtedly seem callous to parents with children whose future prospects are rapidly diminishing. In the end, the living, breathing Constitution will have to accommodate the changing needs of the American educational system or face the wrath of poor, angry parents who want equal educational opportunities for their children.

As the case review in Part II suggest, at the same time that policy considerations moved public opinion toward acceptance of school vouchers, the Supreme Court was slowly laying the legal groundwork for constitutional accommodation.

IV. SCHOOL VOUCHERS: *ZELMAN V. HARRIS*

In *Zelman v. Harris*,[360] the Court was asked to determine whether the state of Ohio could continue to run a program that allowed parents to pay tuition costs at religious schools in part with public funds. The program consisted of two kinds of aid: tuition scholarships, in the form of vouchers for students who chose private schools within the district or public schools outside their district, and tutorial aid for students who remained in public schools.[361]

Ohio devised the voucher plan partly in response to the fact that "for more than a generation . . . Cleveland's public schools have been among the worst performing public schools in the Nation."[362] The schools performed so poorly that a fed-

359. *Zelman*, 536 U.S. at 684. Justice Stevens offered no evidence to support his conclusion that parents were being forced to accept "religious indoctrination" against their wishes if they wanted to send their children to private schools. *Id.*

360. 536 U.S. 639 (2002).

361. *Id.* at 645. The respondents did not question the constitutionality of the tutorial program.

362. *Id.* at 644.

eral district court relieved the local school board of its authority and placed the entire city school system under state control.[363] According to a state audit, the Cleveland school district "failed to meet any of the 18 state standards for minimal acceptable performance" and "[o]nly 1 in 10 ninth graders could pass a basic proficiency examination."[364] More than two-thirds of the city's students failed or dropped out prior to graduation.[365]

The scholarship portion of the program allowed parents to use the voucher at any public or private school, including religious schools that met statewide educational standards.[366] Public schools were eligible to receive the $2250 per-student tuition scholarship voucher, plus the standard amount of state aid the school normally received for each additional student it enrolled.[367] Payment to nonpublic schools varied according to the financial needs of individual students and their families.[368] The plan provided that "[f]amilies with incomes below 200% of the poverty line are given priority and are eligible to receive 90% of private school tuition up to $2,250."[369] The program restricted participating private schools to a co-payment no greater than $250 for the lowest income families.[370] All families not meeting the lowest income requirements were eligible for tuition grants of up to $1875 with no co-payment restrictions.[371] But "[t]hese families receive tuition aid only if the number of available scholarships exceeds the number of low-income children who choose to participate."[372]

Fifty-six private schools participated in the program, the majority of which were religious institutions.[373] None of the area's public schools adjacent to the city agreed to participate in the program.[374] Over 3700 students took part in the schol-

363. *Id.*
364. *Id.*
365. *Id.*
366. *Zelman*, 536 U.S. at 645.
367. *Id.*
368. *Id.* at 646.
369. *Id.*
370. *Id.*
371. *Id.*
372. *Zelman*, 536 U.S. at 646.
373. Specifically, eighty-two percent, or forty-six schools in the program were religious. *Id.* at 647.
374. *Id.* at 647.

arship program, of which ninety-six percent enrolled in religious schools.[375] Sixty percent of the participating students were members of families defined as impoverished.[376]

In response to the poor performance of the regular public schools, Cleveland also developed, separate and apart from the voucher program, public community and magnet schools.[377] The ten public community schools operating in the Cleveland district in 1999-2000 enrolled over 1900 students.[378] These schools, which were forbidden to have any religious affiliation, received twice the state funding as participating religious schools received in the program.[379] Independent public school boards ran the community schools.[380] In the same year, the twenty-three magnet schools enrolled more than 13,000 students for which they received $7746 in aid per student (the same amount as the students enrolled in traditional public schools).[381]

Applying the *Lemon* test as revised by *Agostini*, the Court found that the program had the valid secular purpose of assisting a "failing public schools system."[382] The only remaining question for the Court was whether the program had the unconstitutional "effect" of advancing religion.[383] The majority found the program passed the "effect" test because it dispensed benefits on a religiously neutral basis and because any state aid that ended up in the hands of religious schools did so only as a result of the genuine and independent choices of private individuals.[384] From the perspective of the majority, those choices included remaining in traditional schools with or without "tutoring," enrolling in community and magnet schools, or attending private secular or religious schools.[385]

Led by Justice Souter, the dissenters found neither neutrality nor choice in the Cleveland program. Regarding neutrality, Justice Souter made two claims. First, he argued that

375. *Id.*
376. *Id.*
377. *Id.*
378. *Zelman*, 536 U.S. at 647.
379. *Id.*
380. *Id.*
381. *Id.* at 647-48.
382. *Id.* at 649.
383. *Id.* at 649.
384. *Zelman*, 536 U.S. at 662.
385. *Id.* at 655.

since parents could not spend the vouchers at public schools within the district, those schools should not be considered one of the options available to students when determining if the program was neutral.[386] He argued that the only schools that the Court could consider in the neutrality debate were those that were a viable option for voucher recipients.[387] Having taken the public schools out of the neutrality analysis, he then argued that the amount of the voucher, $2250, was insufficient to pay tuition at most of the city's secular private schools.[388] According to Justice Souter, the voucher's insufficient funding level forced parents to choose religious schools whose tuition was considerably lower.[389] As a result, the program was not neutral in its treatment of religion because it forced parents to choose religious schools for their children.[390]

Second, he compared the amount that the program's "tutoring" option made available to students who chose to stay in public schools ($324 annually) to the amount that the program made available to students who chose the voucher option ($2400 annually), and concluded that the significant disparity implied bias in favor of religion.[391] Once again, the program was not neutral in Justice Souter's view, because it made more funds available for religious than for public schools.[392]

For much the same reason, the dissent also maintained that the program failed to provide true choice to aid recipients.[393] Justice Souter argued that the majority "confused choice in spending scholarships with choice from the entire menu of possible educational placements."[394] From the dissent's perspective, the list of "choices" was limited to those schools that actually could accept the voucher as payment.[395] The dissent rejected the notion that public schools should be considered in the choice question because once individuals chose the voucher program, they could no longer opt to spend

386. *Id.* at 697 (Souter, J., dissenting).
387. *Id.* at 697, 704-05.
388. *Id.* at 704-05.
389. *Id.* at 706-07.
390. *Zelman*, 536 U.S. at 705-07.
391. *Id.* at 697-98.
392. *Id.* at 697-98.
393. *Id.* at 698-99.
394. *Id.*
395. *See id.*

the money at those public schools within the district.[396] Once again, as in the neutrality analysis, Justice Souter argued that the amount of the voucher, $2250, was insufficient to pay tuition at most of Cleveland's secular private schools.[397] In the smaller pool of choices available to voucher recipients, eighty-two percent of the participating schools turned out to be religious schools.[398] Therefore, the program did not satisfy the choice requirement because parents did not have a significant number of nonreligious schools from which to choose.[399]

The dissent found further evidence of the lack of choice in the fact that ninety-six percent of the students who participated in the voucher program chose to attend religious schools.[400] According to Justice Souter, this lack of choice resulted because there were too few slots available in private secular schools for voucher holders, and because the amount of the voucher was insufficient to cover tuition costs at private secular schools.[401] Nor could this overwhelming selection of religious schools be a reflection of parents' religious choices, since two-thirds of the children attended schools not of their faith.[402]

Not surprisingly, the majority saw the case quite differently. Justice Rehnquist began his analysis by arguing that the Court's decisions had drawn a "consistent distinction" between state sponsored programs that gave aid directly to religious schools and neutral programs of "true private choice," where state aid reached religious schools "only as a result of the genuine and independent choices of private individuals."[403]

According to Justice Rehnquist, the determining issue in the neutrality analysis was whether "the program differentiates based on the religious status of beneficiaries or providers

396. As noted earlier, none of the public schools in the adjacent districts that could have received the funds chose to participate in the program. *See Zelman*, 536 U.S. at 647.

397. *Id.* at 706-07.

398. *Id.* at 647.

399. *Id.* at 707.

400. *Id.*

401. *Id.*

402. *Zelman*, 536 U.S. at 704.

403. *Id.* at 649 (citing *Muller*, *Witters*, and *Zobrest*).

of services."[404] Receipt of benefits was not conditional on any sort of religious commitment, or lack thereof, by parents, children, or schools.[405] The program allowed parents to spend the aid at any private school within the district, or any public school in an adjacent district, regardless of religious or nonreligious affiliation.[406] According to the majority, the program gave public schools located outside the district a special financial incentive to participate that was not provided to religious schools.[407] The Court found additional evidence of neutrality in the impetus for the program: the state designed the program to provide assistance to children in a failing school system.[408] Any benefit to religion was incidental to the state's goal of aiding children, rather than a result of the state's preference for religion.[409] Justice Rehnquist noted that the only preference in the program was for students from low-income families.[410]

Further, the Court found proof of the program's neutrality in the fact that there were no "'financial incentives' that 'skew[ed]' the program toward religious schools."[411] On the contrary, the state built disincentives into the program for parents wishing to choose religious schools and for religious schools themselves. Parents who chose private religious (or private nonreligious) schools had to pay tuition co-payments that parents choosing public community or magnet schools did not have to pay.[412] Private schools received state assistance one-half to two-thirds less than community or magnet schools, respectively.[413] Again, participating public schools in adjacent school districts were eligible to receive two or three times the government assistance that private religious schools could receive under the program.[414] To the extent that the program was skewed at all, argued the majority, it

404. *Id.* at 654 n.3.
405. *Id.* at 653.
406. *Id.*
407. *Id.*
408. *Zelman*, 536 U.S. at 655.
409. *Id.*
410. *Id.* at 653.
411. *Id.* (quoting Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 487-88 (1986)).
412. *Id.* at 654.
413. *Id.* at 654.
414. *Zelman*, 536 U.S. at 654.

pushed parents toward public schools.[415]

In addition, the majority argued that Justice Souter miscalculated the total amount of aid available to students who chose the "tutoring" program.[416] Students who chose the "tutor" option caused the state to provide its public schools with $4167 in regular aid plus the $324 in tutorial assistance.[417] This amount far exceeded the $2250 maximum amount private religious schools could receive under the program. From the majority's perspective, the program was neutral because it did not provide financial incentives that steered individuals toward religious schools.[418]

Moving on to the issue of "choice," the majority argued that "[t]here also is no evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options."[419] The majority argued that Cleveland's schoolchildren had a wide range of educational options that included staying in public school, with or without "tutoring," attending a community or magnet school, or enrolling in a private secular or sectarian school.[420] According to the majority, the key to assessing the constitutionality of the Cleveland program was to ask whether Ohio was forcing children to attend religious schools.[421] In order to answer that question properly, the majority believed that it had to consider all of the educational options available to Cleveland's schoolchildren, including public schools that were not part of the program.[422]

That eighty-two percent of the private schools were religious was not grounds for declaring the program unconstitutional, according to the majority.[423] Because eighty-one percent of Cleveland's private schools had been religious schools before the program was created,[424] the program did not cause this disparity. Indeed, the relative percentage of secular to sectarian schools that participated in the program reflected a

415. *Id.*
416. *Id.* at 654 n.3.
417. *Id.*
418. *Id.* at 654.
419. *Id.* at 655.
420. *Zelman*, 536 U.S. at 655.
421. *Id.* at 655-56.
422. *Id.*
423. *Id.* at 655.
424. *Id.* at 657.

cross-section of religious-nonreligious private schools.[425] The majority argued that if this sort of statistical evidence were used to declare programs unconstitutional, it would lead to uneven and absurd results.[426] Two identical programs in two different cities might result in two different constitutional rulings simply because one city had a higher percentage of secular private schools.[427]

Justice Rehnquist also noted that although the program spurred the creation of "several" new nonreligious schools, it had not spurred the creation of any new religious schools.[428] The creation of the new secular private schools occurred despite the litigation before the Court, which had served as a "barrier to entry" for such schools because the litigation threatened the continued financial commitment from the state.[429]

The majority likewise rejected Justice Souter's complaint that insufficient funding levels forced students, who would otherwise have chosen the more expensive private secular schools, to attend religious schools.[430] The majority pointed out that ten private secular schools found the funding levels sufficient.[431] Justice Rehnquist further noted that "not a scintilla of evidence" had been produced at trial to support the claim that any private secular school refused to participate because funding levels were too low.[432]

For similar reasons, the majority rejected Justice Souter's claim that the fact that ninety-six percent of voucher

425. *Id.*
426. *Zelman*, 536 U.S. at 657.
427. *Id.*
428. *Id.* at 656 n.4.
429. *Id.*
430. *Id.* at 656-57.
431. *Id.* at 656 n.4.
432. *Zelman*, 536 U.S. at 656 n.4 (quoting Simmons-Harris v. Zelman, 234 F.3d 945, 970 (6th Cir. 2000) (Ryan, J., concurring)). Justice Souter appears to devise yet another "catch-22" for the state. If the state failed to provide enough funding to pay for expensive private secular schools, he claimed that it steered students toward religious schools. If the state did provide enough money for students to choose expensive private secular schools, then it would inevitably also transfer more money to religious schools, which Souter found just as objectionable. He left no doubt that he would find a constitutional objection either way when, after complaining that the funding levels were insufficient to pay for most secular private schools, he went on to write: "It is not, of course, that I think even a genuine choice criteria is up to the task of the Establishment Clause when substantial state funds go to religious teaching." *Id.* at 703.

holders chose religious schools was evidence that the program did not offer parents real choice.[433] Citing *Mueller* and *Agostini*, Justice Rehnquist said that "[t]he Constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school."[434] He also noted that the ninety-six percent statistic failed to account for the 1900 students enrolled in community schools, the 13,000 children attending magnet schools, or the 1400 students in traditional schools who chose the "tutoring" option.[435] When these choices were taken into account, the percentage of students who chose religious schools dropped to under twenty percent.[436] Justice Rehnquist also pointed out that the ninety-six percent figure was applicable to one particular year and that, in the 1997-1998 school year, only seventy-eight percent of voucher holders chose religious schools.[437]

Justice Souter was not impressed by these figures because he and the other dissenters believed that the Court should not be including options that were not a formal part of the program in the calculation.[438] For Justice Souter, the

433. *Id.* at 658-60.

434. *Id.* at 658.

435. *Id.* at 659.

436. *Id.*

437. *Id.* Justice Rehnquist cited evidence from a similar program in Milwaukee to support the statistical point. Milwaukee experienced a five-fold increase in the number of nonreligious schools participating in its program over a twelve-year period. During the same period, the number of students attending private secular schools increased from 337 to 3,582. Justice Rehnquist suggested that the private secular schools were attracted to the program after the Wisconsin Supreme Court declared the program constitutional. *Id.* at 659 n.5. This example points out yet again one of the many "catch-22s" that face states wishing to address the needs of failing students. The threat of First Amendment litigation suppresses participation levels on the part of private secular schools that no doubt need to know that funding levels will be likely to continue if they invest in the additional resources necessary to accept voucher students. But the fact that some members of the Court seem to invite litigation creates uncertainty that may scare private secular schools away. Those members then point to the low levels of participation by private secular schools as evidence of the lack of choice. It will be interesting to monitor the impact of the Court's decision in *Zelman* on participation rates by such schools. A five to four decision may not provide the sort of certainty that could definitively encourage increased participation.

438. *Zelman*, 536 U.S. at 698-99.

point of the "choice" test was to provide the Court with a tool for weeding out educational aid programs that provided funds to religious schools.[439] For the majority, the point of the choice test was clearly different. The majority saw the choice test as a means of upholding the Constitution's guarantee that no one would be forced to subscribe to a religious act or view against his or her will.[440] Under Justice Souter's approach, even if individuals were absolutely free from any coercion by the state, because they can choose not to participate in the program, the program is unconstitutional if too many of those that do participate attend religious schools.

It is not immediately clear why, in determining whether a program is neutral or whether choice exists, the Court should turn a blind eye to funds provided to public schools, or to other educational options that are not funneled through the program. Such an approach would make sense only if students were forced into the program and could not opt for a nonreligious school choice. In that case, the only funding/choice that individuals would have would be the one that accompanied the private religious school that the state forced them to attend. But the state is not "directing" aid to religious schools if parents have legitimate secular school options, be they public or private. In Cleveland's case, students had the option of not participating in the program at all by remaining in their regular schools, attending community or magnet schools, participating while remaining in public schools with tutors, or participating by selecting private religious or secular schools.[441] In such cases, it is reasonable to consider all those choices, and any aid that accompanies all of those choices, when considering the neutrality/choice issue.

One way to understand the majority's position would be to imagine that Cleveland adopted an "All Vouchers" educational system. In such a system, the state would give *every* student a voucher to purchase education, and the state would not assign any student to public schools by default. Students would then choose on which of the various school choices they would spend their money. In such a system, if the state of-

439. *Id.* at 699. Justice Souter wrote "Defining choice as choice in spending the money or channeling the aid is, moreover, necessary if the choice criterion is to function as a limiting principle at all." *Id.* at 700.

440. *Id.* at 662-63.

441. *Id.* at 655.

fered students who chose the public schools two to three times as much aid as those who chose the private religious schools, with an additional grant of $324 to all students who chose the public schools system with tutoring assistance, no one could question the program's neutrality. An "All Vouchers" educational system of this kind would obviously be skewed toward public schools. The only difference between an "All Voucher" system and the one actually challenged in *Zelman* were formal legal definitions. Considered from the perspective of students or parents, the choices were virtually identical, and the legal definitions did not restrict the "choices" available to parents or children.

Yet another way to understand the majorities' position would be to view the educational choices from the perspective of a poor family that has just moved into Cleveland. Such a family could indeed choose from among all the choices the majority claimed were available. Nothing about the state's voucher program would encourage the family to choose religious schools, other than the better education opportunities available at private sectarian schools, which the state did nothing to help create. From the perspective of such a family, Cleveland would offer many genuine educational choices without any pressure to choose one over the other.

This was exactly the position of every poor family in Cleveland that participated in the voucher program whether or not they had recently moved to the city. The only families that were not given this range of choices were those that were not poor. Such families were actually pressured by Ohio to accept public education because, for them, the state offered considerably reduced subsidies. Again, if we are to be persuaded by Justice Souter's position that the only choices that should be considered were those that were available after the family chose the voucher program, we should demand some evidence that the parents had no choice but to select the voucher program in the first instance. No such evidence exists.

Even if the Court considered only the choices available to students after they opt for the voucher program, contrary to Justice Souter's assertion, it must consider whether the state sought to promote religion by discouraging the participation

of secular schools.[442] The state of Ohio offered a financial incentive to adjacent public school districts to encourage them to participate in the program.[443] That none chose to participate had nothing to do with the state wishing to force students to choose religious schools. On the contrary, all of the adjacent public schools that opted not to participate in the program likely had a motive for wishing to see the program fail. Voucher programs like Cleveland's threaten to break the monopoly that public school systems have on education in America. Under Justice Souter's analysis, refusal to participate strengthened the position of those seeking to have the program declared unconstitutional.[444] Ironically, had Justice Souter had his way, the Court would have interpreted behavior by the adjacent public schools that may have been deliberately intended to harm religious schools as promoting religion. Public school officials wishing to suppress competition from private schools should not be able to decide the constitutional fate of a voucher program like Cleveland's.

Justice Souter also argued that when ninety-six percent of the students who participate in such programs chose religious schools, it served as evidence that parents do not have real choices.[445] This is particularly likely he argued, when two-thirds of such children choose schools that do not reflect their religious affiliation.[446] According to Justice Souter, the real explanation for the overwhelming choice of religious schools was the paltry funding levels of the vouchers that were insufficient to pay for private secular schools.[447]

This argument assumes that most parents were too poor to supplement the voucher so that their children could attend more expensive private secular schools. But the fact was that about forty percent of the students participating in the program were from families that were not considered poor.[448]

442. *See id.* at 656 n.4. Justice Souter argued that "it is entirely irrelevant that the state did not deliberately design the network of private schools for the sake of channeling money into religious schools." *Id.* at 707. While it may not be dispositive, such evidence can hardly be "irrelevant" if the Court is seeking to discover whether the state is forcing students into religious schools.

443. *Id.* at 654.

444. *Zelman*, 536 U.S. at 700.

445. *Id.* at 658.

446. *Id.* at 704.

447. *See id.* at 704-05.

448. *Id.* at 710 n.21 (Souter, J., dissenting) (noting that at least sixty percent of participating students were below the poverty line).

Some portion of those families almost certainly could have afforded to supplement the voucher had they wished to have their children attend nonreligious schools. That they nonetheless chose religious schools suggests that the choice had little to do with insufficient state funding.

Equally plausible, and no less supported by the record than Justice Souter's assumption, is the possibility that religious tensions have so abated in America that many parents feel free to have their children attend religious schools outside their own faith. Whatever the explanation, it is clear that the state was not forcing students to attend religious schools against their will.

V. CONCLUSION

Those who would brook greater interplay between church and state must remember that there are legitimate reasons for maintaining a reasonable level of division between religion and government in America. If either institution becomes too involved with the affairs of the other it could lead to infringement of individual liberty and that might become the bases for social unrest. Current events throughout the world warn us of the continuing danger that can result when these two powerful forces are intimately united. Conversely, infringement of individual religious liberty and social unrest can also result if government is perceived to be the enemy of religion. As it seeks to strike a balance between these two dangerous extremes, the Court needs to be ever mindful of the core purpose of the First Amendment—the need to protect every individual's liberty to accept or reject religious beliefs. Given the dangers that might result if the state interferes with this liberty by appearing to favor or oppose religion, the Court ought to avoid devising tests that restrict its flexibility in this area.

Fortunately, the Court seems to be moving away from the less flexible three-part test it devised in *Lemon* in favor of a more flexible approach to church and state cases. While bright line tests have intrinsic appeal because of the certainty they provide, they generally prove too rigid to deal with the great variety of cases that are certain to arise in areas like the First Amendment. The Court may wish to consider returning to the more malleable approach it used in *Zorach*. There, as noted above, the Court implied that whenever state

action threatened the principle of "free exercise" or came close to actual "establishment," separation must be "complete and unequivocal."[449] When, however, state actions infringe upon neither of these principles, the Court suggested that it would allow greater interplay between these two institutions.[450] This approach has the great benefit of allowing the Court to recognize, in cases like *Zelman*, that the state is neither attempting to interfere with anyone's religious liberty nor establishing a religion.

The Court's decision in *Zelman* is consistent with this approach. Any voucher program that does nothing either to favor or discourage religion and that offers parents real choices such that the state does not force anyone to attend a religious school against his or her will ought to be found constitutional. This notion is particularly true as America struggles to find innovative solutions to reverse the failure of inner city public schools. Extremely narrow interpretations of the Establishment Clause that turn their back on these problems will do neither the Constitution nor the American educational system justice.

449. Zorach v. Clauson, 343 U.S. 306, 312 (1952).
450. *Id.* at 312-13.