Repudiating Everson: On Buses, Books, and Teaching Articles of Faith

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I. Introduction

Ever since deciding *Everson v. Board of Education*, the Court has wrestled with the proper way to characterize the limitations imposed on the states by the Establishment Clause. Many of the cases have involved the extent to which the state can give aid to the parents of children attending primary and secondary sectarian schools. The Court’s understanding of the limits on this kind of aid has changed markedly over the past sixty years, having first involved an analysis of the degree to which the state would be aiding religious teaching and then having changed to an analysis of whether the state was offering nonsectarian benefits to the religious and non-religious alike, and then finally to whether a majority of the Court believes that a person could reasonably impute to the state what admittedly is support of religious teaching. While the changes in the jurisprudence were often not dramatic, they have cumulatively resulted in a jurisprudence that is hard to reconcile with either the spirit or the holding of *Everson*, even when *Everson* is understood to be much less separationist than is commonly supposed.

Part II of this Article traces the development of the Court’s Establishment Clause jurisprudence with respect to aid to primary and secondary sectarian education from the 1940s to the 1970s, suggesting that a rough guide is discernible with respect to the line between permissible and impermissible aid. Part III discusses some of the Court’s cases in the 1980s and 1990s in this area, noting how the jurisprudence changed in subtle and not-so-subtle ways, and culminated in a jurisprudence which is neither principled nor workable. The Article concludes by suggesting that the current jurisprudence not only contradicts the letter and spirit of *Everson* but guts the basic protections that the Establishment Clause is designed to offer.

II. No Support for Religious Education

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1 330 U.S. 1 (1947).
Contemporary Establishment Clause jurisprudence can hardly be called transparent, at least in part because the jurisprudence has changed markedly over the past sixty years. That said, the jurisprudence with respect to the conditions under which the state can provide aid benefiting primary and secondary sectarian institutions has not always been as difficult to fathom as has sometimes been claimed. While the Court has never articulated a principle clearly delineating between permissible and impermissible kinds of aid, a rough rule emerged which permitted aid for (1) specified kinds of secular materials, and (2) for families with children attending sectarian schools as long as certain conditions had been met. This understanding seems to have governed the Court’s holdings in this area at least through the 1970s, although the dicta in some of the Court’s decisions during this period provided the basis for the radical transformation which subsequently occurred in the jurisprudence.

A. Support for Safety and Health

Everson v. Board of Education is the seminal case in contemporary Establishment Clause jurisprudence. It is important both because of its holding that Establishment Clause guarantees have been incorporated through the Fourteenth Amendment against the states, and because it attempts to set out some

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2 Steven G. Gey, Reconciling the Supreme Court's Four Establishment Clauses, 8 U. Pa. J. Const. L. 725, 725 (2006) (“It is by now axiomatic that the Supreme Court’s Establishment Clause jurisprudence is a mess--both hopelessly confused and deeply contradictory.”). Cf. Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 861 (1995) (Thomas, J. concurring) (“our Establishment Clause jurisprudence is in hopeless disarray”); Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) (“Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional.”).

3 Cf. Committee for Public Ed. and Religious Liberty v. Regan, 444 U.S. 646, 662 (1980) (“our decisions [concerning the Establishment Clause] have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility”).


of the parameters regarding the conditions under which state aid can be offered to sectarian schools without offending constitutional guarantees. The decision itself sent rather mixed messages, however, because its very robust language regarding the required degree of separation between Church and State did not seem compatible with the Court’s upholding the statute at issue.\textsuperscript{7}

The disparity between the tone and the holding of the opinion has led some commentators to suggest that the Court was simply being inconsistent.\textsuperscript{8} Other commentators suggest that the decision is unproblematic in reasoning and result, except for some overly exuberant rhetorical flourishes.\textsuperscript{9} In any event, Everson demands close attention, both because it was the first case in modern Establishment Clause jurisprudence,\textsuperscript{10} and because it foreshadows many of the competing considerations which continue to play a role when the Court seeks to draw a line between permissible and impermissible state aid to sectarian schools.

At issue in Everson was the following statute:

Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.

When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other

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\textsuperscript{7} See Everson, 330 U.S. at 19 (Jackson, J., dissenting)


\textsuperscript{9} Cf. Akhil Reed Amar, 2000 Daniel J. Meador Lecture: Hugo Black and the Hall of Fame, 53 Ala. L. Rev. 1221, 1245 (2002) (“Black's Everson opinion did contain some loose language in places, but its key logic was sound, as was its holding on its facts.”).

\textsuperscript{10} Tracey L. Meares & Kelsi Brown Corkran, When 2 or 3 Come Together, 48 Wm. & Mary L. Rev. 1315, 1363 (2007) (“Everson v. Board of Education is a landmark case . . . because it marks the beginning of modern Establishment Clause jurisprudence”).
point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part.\textsuperscript{11}

The statute performed two functions: (1) it authorized school boards to provide transportation for children attending public and private non-profit schools, and (2) it required school districts providing transportation to public school students to provide it to children attending private, non-profit schools, as long as the private school was along the established school route. Arguably, (2) would require no extra expenditure of funds beyond the de minimis expenditure involved in stopping along the route to pick up and drop off the children at the bus stops near their homes and stopping along the route to drop off or pick up the children at the school.\textsuperscript{12} In contrast, (1) permitted but did not require additional expenditures, since the boards were authorized to provide transportation for children who, for example, were going to a private school which was not located along an established school route.

A New Jersey taxpayer challenged the right of the school board to authorize reimbursement of transportation expenses incurred by children using public buses to go to and from parochial school,\textsuperscript{13} arguing that the authorizing statute violated state and federal constitutional guarantees.\textsuperscript{14} The New Jersey Supreme Court upheld the constitutionality of the statute,\textsuperscript{15} and the case was appealed to the United States Supreme Court.

After making clear that the constraints imposed by the Establishment Clause on the federal government also apply to the states,\textsuperscript{16} the Everson Court tried to explain the limitations imposed by that

\textsuperscript{11} Everson, 330 U.S. at 3 n.1 (citing N.J. Rev. Stat. 18:14-8).
\textsuperscript{12} See Everson v. Board of Ed. of Ewing Tp., 44 A.2d 333, 337 (N.J. 1945).
\textsuperscript{13} The intent of P.L.1941, Chapter 191, is that pupils may be transported to parochial schools only as an incident to the transportation of pupils to the public schools since the statute provides that children attending schools could be furnished transportation by any school district from any point on an already established school route to any other point on such established school route. Payment of such expense out of local taxes is the payment of ‘incidental expenses’ or ‘transportation of pupils’ authorized by R.S. 18:7-78.
\textsuperscript{14} Id. at 3-4.
\textsuperscript{15} See Everson, 44 A.2d at 337 (“We conclude that there is nothing on the face of the resolution or statute or in the record before us showing that either the statute or the resolution enacted thereunder is unconstitutional or does violence to the Constitution for any of the reasons urged.”).
\textsuperscript{16} See also Everson, 330 U.S. at 15.
Clause. States are precluded from “set[ting] up a church”\textsuperscript{17} or from passing “laws which aid one religion, aid all religions, or prefer one religion over another.”\textsuperscript{18} Indeed, the Court suggested that the “clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State,’”\textsuperscript{19} thereby implying that the Constitution requires Church and State to be in completely non-overlapping spheres.\textsuperscript{20}

While speaking in rather absolute terms,\textsuperscript{21} the Everson Court nonetheless found that the reimbursement at issue did not violate constitutional guarantees.\textsuperscript{22} The Court explained that the Constitution’s prohibiting the use of public funds for the support of religion was not meant to preclude every use of public funds which might in some way benefit religion. Such a broad interpretation of the rule would prohibit the state from extending any kind of aid, including police and fire services,\textsuperscript{23} which would make the state an “adversary” of religion.\textsuperscript{24} An interpretation making the state an adversary of religion misrepresents the constitutional guarantee, since state power “is no more to be used so as to handicap religions, than it is to favor them.”\textsuperscript{25} Instead, the prohibition on state aid is narrower in scope, so that some kinds of aid but not others are permissible.

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\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id. at 16 (citing Reynolds v. United States, 98 U.S. 145, 164 (1878)).
\textsuperscript{21} See Everson, 330 U.S. at 19 (Jackson, J., dissenting) (describing “the undertones of the opinion as advocating complete and uncompromising separation of Church from State”).
\textsuperscript{22} Id. at 17 (“Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools.”).
\textsuperscript{23} Id. at 17-18.
\textsuperscript{24} See id. at 18.
\textsuperscript{25} Id.
When upholding the state reimbursement of parents for transportation costs, the Court emphasized that this aid was “so separate and so indisputably marked off from the religious function”\textsuperscript{26} that the state could not plausibly be thought to be directly supporting religious activities or teaching. By focusing on the function that the aid was to perform, the Court implied that sectarian aid could not be offered to support religious functions, but could be offered to support non-religious functions.

One complicating factor in \textit{Everson} not emphasized by the Court was that “the township resolution authorized reimbursement only for parents of public and Catholic school pupils.”\textsuperscript{27} While there was no evidence that any child attending a private, non-profit, non-Catholic school had been denied travel reimbursement or even that there was a child who would have attended such a school if only transportation reimbursement had been provided,\textsuperscript{28} the resolution nonetheless facially discriminated among religions.\textsuperscript{29} Had the Court analyzed the resolution’s constitutionality in light of its expressly distinguishing among religions,\textsuperscript{30} it seems doubtful that the Court would have upheld the statute. As Justice Jackson pointed out in dissent, if the Court were examining the permissibility of reimbursing children attending Catholic but not other private, non-profit schools, then the police/fire services analogy would have cut the other way—the question would have been whether, for example, it would be permissible for the state to afford fire services to Catholic establishments but permit other religious establishments to burn.\textsuperscript{31}

The \textit{Everson} Court did not analyze whether it was constitutional for the state to reimburse transportation costs for Catholic schools in particular but, instead, whether the State’s paying for the transportation costs of children attending religious schools violated the Establishment Clause. The Court offered a quick history of the Establishment Clause, observing that “dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons

\textsuperscript{26} \textit{Id.}

\textsuperscript{27} \textit{See id.} at 4 n.2.

\textsuperscript{28} \textit{See id.} at n.2. It is also true, however, that there was nothing in the record establishing that there were no private, non-profit, non-Catholic schools. \textit{See id.} at 62 (Rutledge, J., dissenting) (“There is no showing that there are no other private or religious schools in this populous district.”).

\textsuperscript{29} \textit{See id.} at 21 (Jackson, J., dissenting) (“the Act does not authorize reimbursement to those who choose any alternative to the public school except Catholic Church schools”).

\textsuperscript{30} \textit{See id.} (Jackson, J., dissenting) (“If we are to decide this case on the facts before us, our question is simply this: Is it constitutional to tax this complainant to pay the cost of carrying pupils to Church schools of one specified denomination?”).

\textsuperscript{31} \textit{See id.} at 25-26 (Jackson, J., dissenting) (“Could we sustain an Act that said police shall protect pupils on the way to or from public schools and Catholic schools but not while going to and coming from other schools, and firemen shall extinguish a blaze in public or Catholic school buildings but shall not put out a blaze in Protestant Church schools?”).
designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters.”32 After noting that practices burdening dissenters “became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence.”33 the Court explained that the people of Virginia, “as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.”34 Here, too, a broad reading of the Court’s language in Everson suggests strict separation between Church and State.

Yet, the Court’s language regarding the tax power might be given a much narrower interpretation. Just as the Court denied that the state was precluded from offering fire protection services to a religious school, the Court would also deny that the state was precluded from spending public funds to extinguish a fire in a chapel,35 even though that would mean that public support (e.g., in the use of public equipment, the payment of fire personnel salaries, etcetera) was being expended to aid religion. Thus, when suggesting that “New Jersey cannot consistently with the ‘establishment of religion’ clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church,”36 the Court did not mean that the State was prohibited from spending monies in any way which might provide some benefit to a religious institution.

It is underappreciated that even Justice Rutledge rejected the robust claim that no tax monies could be expended in a way which would benefit religion--in his Everson dissent, he wrote, “Certainly the fire department must not stand idly by while the church burns.”37 Basically, he suggested that the “First Amendment does not exclude religious property or activities from protection against disorder or the ordinary accidental incidents of community life,”38 arguing that the proper way to characterize the

32 Id. at 10.
33 Id. at 11.
34 Id.
36 Everson, 330 U.S. at 16.
37 Id. at 61 (Rutledge, J., dissenting).
38 Id. n.56 (Rutledge, J., dissenting).
difference between the permissible and impermissible use of tax dollars to aid religion is that the First Amendment “forbids support, not protection from interference or destruction.”

Yet, Justice Rutledge seemed not to appreciate the potential difficulties in applying the distinction between support and protection. For example, the Everson Court implied that the bus transportation was being provided as a kind of safety measure, noting that “state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare.” Thus, the Court suggested, the provision of free transportation to schools should be viewed in the same light as the provision of policemen at a crosswalk. Yet, if indeed the transportation reimbursement should be characterized as providing protection rather than support, that would make the program constitutionally permissible even according to Justice Rutledge’s criterion.

At least one of the issues dividing the members of the Court in Everson was whether the Court’s characterization of the reimbursement as a safety measure was plausible. As Justice Jackson pointed out, “All school children are left to ride as ordinary paying passengers on the regular buses operated by the public transportation system.” Thus, it was not as if the town was taking measures to increase safety, e.g., by providing buses which had much better safety records than the buses that the children would otherwise have used. Instead, the Township would “at stated intervals . . . reimburse parents for the fares paid, provided the children attend either public schools or Catholic Church schools.” Such an expenditure had “no possible effect on the child's safety or expedition in transit. As passengers on the public busses they travel as fast and no faster, and are as safe and no safer.” Thus, according to Justice Jackson, the reimbursement at issue could not accurately be characterized as promoting safety if those monies could not plausibly be said to be contributing to the safety of the buses carrying the children.

Justice Jackson’s point that reimbursement would not improve the safety of the children assumes that either (1) the children would ride the buses whether or not their parents were reimbursed, or (2) those

39 Id. n.56 (Rutledge, J., dissenting).
40 See id. at 17.
41 Id. at 20 (Jackson, J., dissenting).
42 Id. (Jackson, J., dissenting).
43 Id. (Jackson, J., dissenting).
who could not afford the cost of transportation in addition to the cost of tuition, books, etcetera, simply
would not attend the parochial school. The Everson majority seemed to be operating under a different
assumption, namely, that at least some of the children who could not afford the cost of transportation in
addition to the other expenses would hitchhike to school if their parents were not reimbursed for
transportation expenses. 44 If, indeed, offering the travel reimbursement would induce a significant number
of children to ride buses rather than hitchhike and if indeed hitchhiking to school was much more
dangerous than riding buses, then the majority’s characterization of the reimbursement as a safety measure
was reasonable.

Regrettably, the Everson Court failed to cite any evidence that there was or would be a great deal
of hitchhiking to be averted, 45 and failed to appreciate that offering the reimbursement might not have
prevented hitchhiking anyway. Because the reimbursement was not based on receipts or any other proof of
the students’ having used public transport but instead was based on attendance records at school, 46 it may
be that those students (if any) who were hitchhiking would still do so and the monies paid in
“reimbursement” would be used to defray other costs.

The Everson Court concluded that the Establishment Clause did not prohibit “New Jersey from
spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program
under which it pays the fares of pupils attending public and other schools.” 47 Of course, to reach that
conclusion, the Court had to characterize the statute before it in a somewhat misleading way. 48 For
example, the Court wrote that the State “does no more than provide a general program to help parents get

44 See id. at 7 (arguing that the “same thing is no less true of legislation to reimburse needy parents, or all
parents, for payment of the fares of their children so that they can ride in public busses to and from schools
rather than run the risk of traffic and other hazards incident to walking or ‘hitchhiking.’”)  See also Mark
J. Beutler, Public Funding of Sectarian Education: Establishment and Free Exercise Clause Implications, 2
the children and their parents by enabling children to ride public buses safely rather than risk injury from
walking and hitchhiking.”).
1945), the lower court struck down the reimbursement. In dissent, Justice Heher made a vague allusion to
the “traffic hazards incident to the journey, for which children are generally so ill-equipped.” See id. at 77
(Heher, J., dissenting).
46 Everson, 44 A.2d at 335 (“The payments to parents were in satisfaction of advancements made by them;
and the amount was fixed upon the basis of the actual number of days' attendance as indicated upon each
pupil's report card.”).
47 Everson, 330 U.S. at 17.
48 Cf. id. at 19 (Jackson, J., dissenting) (“The Court sustains this legislation by assuming two deviations
from the facts of this particular case; first, it assumes a state of facts the record does not support, and
secondly, it refuses to consider facts which are inescapable on the record.”).
their children, regardless of their religion, safely and expeditiously to and from accredited schools." Yet, the program was general only in that it covered both public and Catholic schools. Face. it did not provide reimbursement for students attending non-Catholic religious schools, and thus Everson upheld a statute which facially distinguished among religions.

In his Everson dissent, Justice Rutledge seemed to read the Establishment Clause prohibition quite broadly, suggesting that it “broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes.” He characterized the tax at issue as furnishing support for religion in that it helped children “in a substantial way to get the very thing which they are sent to the particular school to secure, namely, religious training and teaching.” Indeed, he argued that “transportation, where it is needed, is as essential to education as any other element” and was no less essential to the educational process than was “the very teaching in the classroom or payment of the teacher's sustenance.” Because he viewed the provision of transportation as an essential factor in the religious education of these children, he believed that its provision could not pass constitutional muster.

Yet, Justice Rutledge’s argument proved too much. The Court admitted the “possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State,” i.e., that the state’s providing the transportation might be a necessary condition for the children’s

49 Id. at 18.
50 See note 27 and accompanying text supra.
51 Cf. Everson, 330 U.S. at 62 n. 61 (Rutledge, J., dissenting) (“It would seem that a statute, ordinance or resolution which on its face singles out one sect only by name for enjoyment of the same advantages as public schools or their students, should be held discriminatory on its face by virtue of that fact alone, unless it were positively shown that no other sects sought or were available to receive the same advantages.

Some commentators seem not to appreciate this aspect of Everson. See, for example, John C. Jeffries, Jr. & James E. Ryan, A Political History of the Establishment Clause, 100 Mich. L. Rev. 279, 289 (2001) (“Everson drew the line between permissible support for education and impermissible aid to religion very far to one side.”).
52 Everson, 330 U.S. at 33 (Rutledge, J. dissenting).
53 Id. at 44 (Rutledge, J. dissenting) (“Does New Jersey's action furnish support for religion by use of the taxing power? Certainly it does, if the test remains undiluted as Jefferson and Madison made it, that money taken by taxation from one is not to be used or given to support another's religious training or belief, or indeed one's own.”).
54 Id. at 45 (Rutledge, J. dissenting).
55 Id. at 47-48 (Rutledge, J. dissenting).
56 Id. at 48 (Rutledge, J. dissenting).
57 Id. at 17.
attending the schools. But (2) of the state ordinance would also have permitted some children to attend
parochial school who otherwise would not have been able to do so. Thus, children living along a bus route
who attended a parochial school along that bus route might not have attended the school if they had been
forced to pay the transportation costs, even if the additional expenses incurred by the state by transporting
these students for free was minimal. Presumably, Justice Rutledge did not think that the Constitution
precluded the state from offering free transportation to children who lived along an existing bus route and
who were going to a religious school along that route. Or, consider state or federal funds which are
provided so that children can get lunch at school. Their having meals provided free or at a reduced price
would allow saved monies to be used for other expenses and, further, the students’ being well-nourished
might help them learn better, which might be thought to be aiding church schools in their mission. Yet,
presumably, Justice Rutledge would not have thought that providing lunches to needy children whether in
public or private school (including religious schools) offends the Establishment Clause. Indeed, although
the provision of food to hungry children attending parochial schools might be characterized as support of
religion, it might also be characterized as protecting the children from harm, which was the sort of state aid
to religion that Justice Rutledge did not think precluded by the Establishment Clause.

58 See Ellen Fried & Michele Simon, The Competitive Food Conundrum: Can Government Regulations
Improve School Food? 56 Duke L.J. 1491, 1499 (2007) (“83 percent of all public and private schools
participate in the NSLP [National School Lunch Program], and approximately 60 percent of children in
those participating schools eat the NSLP lunch on a typical school day.”).
59 Cf. Associated Press, Central Schools hope free meals will improve test scores, Albuquerque Tribune
(NM), 5/22/00 at A2 (2000 WLNR 2209879) (“School officials hope the free meals program will boost test
scores and improve attendance as well as provide nutritious breakfasts and lunches for the more than 7,000
students in the district's 17 schools.”).
60 Cf. Lemon v. Kurtzman 403 U.S. 602, 616-617 (1971) (“Our decisions from Everson to Allen have
permitted the States to provide church-related schools with secular, neutral, or nonideological services,
facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks
supplied in common to all students were not thought to offend the Establishment Clause.”)
61 See notes 38-40 and accompanying text supra.
While sympathetic to the plight of parents wishing to send their children to religious schools, Justice Rutledge believed that permitting the state to finance transportation would open the door to state financing of tuition or teachers’ salaries. “No more unjust or discriminatory in fact is it to deny attendants at religious schools the cost of their transportation than it is to deny them tuitions, sustenance for their teachers, or any other educational expense which others receive at public cost.” Yet, Justice Rutledge’s argument that the state cannot justify refusing to pay parochial school tuition if paying for school transportation assumes that there is no principled way to distinguish between these expenses. If the reimbursement at issue is justifiable as a safety measure, and the Constitution permits the state to promote safety but not instruction in religious institutions, then Justice Rutledge’s slippery slope claim is untenable. Indeed, he believed that a principled distinction could be made between the different types of expenses; he just believed that this expense was more accurately characterized as promoting education than safety.

Justice Jackson also dissented in *Everson*, suggesting that as a constitutional matter it makes no difference whether “the beneficiary of this expenditure of tax-raised funds is primarily the parochial school and incidentally the pupil, or whether the aid is directly bestowed on the pupil with indirect benefits to the school.” On Justice Jackson’s view, the state cannot directly or indirectly support religious teaching. Yet, the state’s being precluded from supporting religious teaching does not mean that the state is also precluded from making religious schools safer for children. Further, because Justice Jackson believed that the statute

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No one conscious of religious values can be unsympathetic toward the burden which our constitutional separation puts on parents who desire religious instruction mixed with secular for their children. They pay taxes for others’ children’s education, at the same time the added cost of instruction for their own. Nor can one happily see benefits denied to children which others receive, because in conscience they or their parents for them desire a different kind of training others do not demand.

The record indicates that the schools are failing to serve their objective, and the vouchers in issue here are said to be needed to provide adequate alternatives to them. If there were an excuse for giving short shrift to the Establishment Clause, it would probably apply here. But there is no excuse.

63 *Everson*, 330 U.S. at 58 (Rutledge, J. dissenting).
64 See note 39 and accompanying text *supra*.
65 See notes 55-56 and accompanying text *supra* (where he discusses how transportation is as necessary as books and other instructional materials).
66 *Everson*, 330 U.S. at 24 (Jackson, J. dissenting).
67 Given that he did not believe that the subsidy increased safety, see note 43 and accompanying text *supra*, it simply is not clear what he would have said had he believed that the state aid did in fact promote safety.
on its face benefited one religion in particular, he was not forced to confront a statute which offered benefits, perhaps indirectly, on a facially nondiscriminatory basis.

The issues dividing the Everson Court continue to divide the Court today. For example, the members of the Court were divided about whether the use to which the monies had been put was itself constitutionally significant. Justice Rutledge believed that unimportant—the program was unconstitutional because tax dollars were being used to support religion in that they were being used to help students receive religious instruction. It did not matter to him that the dollars themselves were not used to pay the teachers giving the instruction or to buy the books which would be used in class. The Everson majority emphasized that the monies were not being directly used for religious instruction. That was true in that (a) the monies were going to the parents rather than the schools, and (b) the reimbursement was for transportation costs rather than religious instruction.

A point which seems underappreciated is that the majority and dissent in Everson did not seem so far apart after all. Most if not all members of the Court believed that public expenditures to promote the safety of children in or on the way to/from religious settings is permissible, and the disagreement was really about whether the expenditure at issue could accurately be characterized as promoting safety. Yet, if the reading of Everson offered here is correct, then the opinion is not as separationist as some commentators imply. Nor is the opinion reasonably construed as standing for the proposition that because public funds can be used to protect or prevent destruction, they can also be used to pay religious school tuition or parochial school teachers’ salaries.

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68 See notes 387-90 and accompanying text infra (comparing Everson with Zelman v. Simmons-Harris, 536 U.S. 639 (2002)).

69 Eight members of the Court signed onto either the majority opinion or Justice Rutledge’s dissent and both of those opinions suggested that the state expending money to promote the safety of religious institutions is permissible. While Justice Jackson did not sign onto Justice Rutledge’s dissent, he did suggest that he generally concurred with Justice Rutledge’s opinion. See Everson, 330 U.S. at 28 (Jackson J., dissenting).

70 See Edward J. Eberle, Religion in the Classroom in Germany and the United States, 81 Tul. L. Rev. 67, 84 (2006) (“In Everson, all nine members of the Court employed separationist rhetoric, but the Court split 5-4 in applying the doctrine to the facts, upholding state-supported bussing of Roman Catholic schoolchildren.”); Deverich, supra note 20, at 222 (“Everson v. Board of Education launched the modern Establishment Clause epoch in which courts adopted a strict separationist approach to church-state interaction by reference to Jefferson's formidable wall of separation.”) Eric R. Claeys, Justice Scalia and the Religion Clauses: A Comment on Professor Epps, 21 Wash. U. J.L. & Pol'y 349, 359 (2006) (discussing “the most extreme separationist claims one sees in Everson”).

71 Cf. note 63 and accompanying text supra (discussing Justice Rutledge’s dissent where he makes this suggestion).
B. No Support for the Teaching of Religion

The Everson Court upheld the statute before it because the funding was “so separate and so indisputably marked off from the religious function”\(^\text{72}\) that it could not plausibly be thought to be supporting religious teaching. At issue in Board of Education v. Allen\(^\text{73}\) was a statute requiring local public school authorities to lend textbooks to all children in grades seven through twelve, whether those students were in public or private school.\(^\text{74}\) The Court considered Everson “most nearly in point.”\(^\text{75}\) While recognizing that the line between neutrality towards and support of religion is not easy to draw,\(^\text{76}\) the Allen Court employed the test announced in School District of Abington Township v. Schempp,\(^\text{77}\) namely, 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.”\(^\text{78}\) The Court suggested that the statute at issue before it had a secular purpose and a primary effect neither advancing nor inhibiting religion,\(^\text{79}\) just as the law permitting the provision of bus transportation in Everson had a secular purpose and a primary effect that neither advanced nor inhibited religion.\(^\text{80}\)

Yet, there are important differences between bus transportation on the one hand and the provision of books to students on the other. As the Allen Court recognized, “books are different from buses,”\(^\text{81}\) and most “bus rides have no inherent religious significance.”\(^\text{82}\)

By noting that most bus rides have no religious significance, the Allen Court shifted the focus away from the criterion that the Everson Court had implicitly considered important, namely, whether the aid was promoting health and safety rather than education.\(^\text{83}\) That shift in focus was important because it

\(^{72}\) Everson, 330 U.S. at 18.

\(^{73}\) 392 U.S. 236 (1968).

\(^{74}\) Id. at 238.

\(^{75}\) Id. at 241-42.

\(^{76}\) Id. at 242.


\(^{78}\) Id. at 222 (citing Everson).

\(^{79}\) Allen, 392 U.S. at 243.

\(^{80}\) See id.

\(^{81}\) Id. at 244.

\(^{82}\) Id. .

\(^{83}\) See Donald A. Giannella, Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement, 1971 Sup. Ct. Rev. 147, 148 (1971) (“In Everson, the Court purported to draw the line at public welfare benefits, clearly excluding educational aids.”). The claim here is not that the presumed Everson criterion would solve all difficulties—it would not be clear, for example, whether to classify a class on health and safety as “promoting health and safety,” as “educational,” or as both. The claim is merely that the Court
allowed the Court to distinguish what was before it from other kinds of impermissible support by noting that the books at issue in this case had no religious significance either, since they had to be approved by public school authorities and only secular books would receive the necessary approval. Now the focus of discussion was not on whether books were more aptly characterized as promoting education rather than health and safety but, instead, on whether the public officials in charge of making the selection would be “unable to distinguish between secular and religious books” or whether they would surreptitiously approve religious books as texts.

The appellants had claimed that textbooks, unlike buses, are central to the teaching process, and that the state could not offer support for something central in providing a religious education. The Court rejected that argument, suggesting that parochial schools provide “religious instruction and secular education.” Given these different functions performed by parochial schools and the Court’s unwillingness to accept “that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion,” the Court held that provision of these textbooks did not violate the Establishment Clause.

The Allen Court did not state which of two possible positions it was maintaining: (1) state aid to parochial schools is permissible unless it can be shown that the aid will in fact support religious teaching, or (2) because the Court found it implausible that secular texts could be used to promote religion, the Court would only strike use of public monies to buy secular textbooks if it could be shown that the books were in fact being used to support religion. The first position imposes a heavy burden as a general matter on those

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84 See Allen, 392 U.S. at 244 (noting that the statute “does not authorize the loan of religious books”).
85 Id. at 244-45.
86 Id. at 245.
87 Id.
88 Id. (“The major reason offered by appellants for distinguishing free textbooks from free bus fares is that books, but not buses, are critical to the teaching process, and in a sectarian school that process is employed to teach religion.”).
89 Id.
90 Id. at 248.
91 Id.
challenging state support of religious institutions, whereas the second imposes a heavy burden on those challenging state support of religion only where the supported activity is itself quite secular in nature.\footnote{The plurality in Mitchell v. Helms, 530 U.S. 793 (2000) would impose an even heavier burden on those challenging sectarian aid, arguing that the Establishment Clause is not violated as long as the aid is secular and generally available. For a discussion of this case, see notes 352-74 and accompanying text infra.}

There were three dissents in Allen, two questioning whether the approved texts would in fact be secular and one questioning the Court’s reading of Everson. Justice Douglas worried in his dissent that a “parochial school textbook may contain many, many more seeds of creed and dogma than a prayer,”\footnote{Allen, 392 U.S. at 257 (Douglas, J., dissenting).} pointing out as an example a general science text which distinguished among animal and human embryos by noting that the latter “has a human soul infused into the body by God.”\footnote{Id. at 258 (Douglas, J., dissenting) (quoting from John M. Scott’s Adventures in Science (1963) at 618-19).} Because the textbook plays such a central role in religious education\footnote{Id. at 257 (Douglas, J., dissenting) (noting that the “textbook goes to the very heart of education in a parochial school”).} and can be so central in teaching aspects of a religious creed,\footnote{Id. (Douglas, J., dissenting) (describing it as “the chief, although not solitary, instrumentality for propagating a particular religious creed or faith”).} Justice Douglas suggested that the Constitution could not possibly permit the aid in question.\footnote{See id. (Douglas, J., dissenting).} Justice Fortas had related concerns, pointing out that the program at issue did not simply involve the approval of textbooks which would be used in both public and private schools.\footnote{Id. at 271 (Fortas, J., dissenting) (noting that the program was “not one in which all children are treated alike, regardless of where they go to school”).} Rather, the books were chosen by sectarian authorities specifically for the children attending their parochial schools.\footnote{Id. (Fortas, J., dissenting) (suggesting that the program was “hand-tailored to satisfy the specific needs of sectarian schools. Children attending such schools are given special books-books selected by the sectarian authorities”).} Thus, he suggested, because “the books furnished to students of sectarian schools are selected by the religious authorities and are prescribed by them,” the statute did not fall within the area protected by Everson\footnote{Id. (Fortas, J., dissenting) (“This case is not within the principle of Everson v. Board of Education, 330 U.S. 1 (1947)”)).} and had to be struck down as a violation of Establishment Clause guarantees.\footnote{Id. (Fortas, J., dissenting) (“How can this be other than the use of public money to aid those sectarian establishments?”).} However, the Court was not convinced that sectarian texts would in fact be approved,\footnote{See notes 85-87 and accompanying text supra.} and so was unpersuaded by Justices Douglas’s and Fortas’s points.

\footnote{92 The plurality in Mitchell v. Helms, 530 U.S. 793 (2000) would impose an even heavier burden on those challenging sectarian aid, arguing that the Establishment Clause is not violated as long as the aid is secular and generally available. For a discussion of this case, see notes 352-74 and accompanying text infra.}
\footnote{93 Allen, 392 U.S. at 257 (Douglas, J., dissenting).}
\footnote{94 Id. at 258 (Douglas, J., dissenting) (quoting from John M. Scott’s Adventures in Science (1963) at 618-19).}
\footnote{95 Id. at 257 (Douglas, J., dissenting) (noting that the “textbook goes to the very heart of education in a parochial school”).}
\footnote{96 Id. (Douglas, J., dissenting) (describing it as “the chief, although not solitary, instrumentality for propagating a particular religious creed or faith”).}
\footnote{97 See id. (Douglas, J., dissenting).}
\footnote{98 Id. at 271 (Fortas, J., dissenting) (noting that the program was “not one in which all children are treated alike, regardless of where they go to school”).}
\footnote{99 Id. (Fortas, J., dissenting) (suggesting that the program was “hand-tailored to satisfy the specific needs of sectarian schools. Children attending such schools are given special books-books selected by the sectarian authorities”).}
\footnote{100 Id. (Fortas, J., dissenting) (“This case is not within the principle of Everson v. Board of Education, 330 U.S. 1 (1947)”)).}
\footnote{101 Id. (Fortas, J., dissenting) (“How can this be other than the use of public money to aid those sectarian establishments?”).}
\footnote{102 See notes 85-87 and accompanying text supra.}
Justices Douglas and Fortas worried that (1) the actual choice of the textbooks might be affected by virtue of their being used in parochial schools, and (2) texts incorporating subtle or not-so-subtle religious views might be chosen. Justice Black made a different but related point when suggesting that the texts, “although ‘secular,’ realistically will in some way inevitably tend to propagate the religious views of the favored sect.” The Court disagreed that it was inevitable that the secular texts would be so used, however, and rejected that the statute should be struck down without more of a showing that the state aid was actually promoting religion.

Justice Black made another point in his Allen dissent, disagreeing with the majority’s implicit reading of Everson and suggesting instead that the law at issue in Everson was treated in the same way as a general law paying the streetcar fare of all school children, or a law providing midday lunches for all children or all school children, or a law to provide police protection for children going to and from school, or general laws to provide police and fire protection for buildings, including, of course, churches and church school buildings as well as others.

Thus, Justice Black explained that the bus service upheld in Everson was analogous to if not actually providing protection, which is distinguishable in kind from providing money for books, tuition, or teacher salaries.

A few points might be made about Justice Black’s Everson analysis. First, given that he authored the opinion, his interpretation of it is due some deference, at least with respect to the distinction that the opinion was trying to draw. Second, his interpretation of Everson as approving a safety measure both underscores that members of the Court may have been less far apart in their view of what the Establishment Clause permits than is commonly supposed and suggests that if the result in Allen was dictated by Everson, the decision should have come out the other way—it would have been rather difficult, indeed, to argue plausibly that the provision of textbooks promoted safety rather than instruction.

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103 Allen, 392 U.S. at 252 (Black, J., dissenting).
104 See notes 84-91 and accompanying text supra.
105 Allen, 392 U.S. at 252 (Black, J., dissenting).
106 See, for example, Ira C. Lupu & Robert W. Tuttle, Federalism and Faith, 56 Emory L.J. 19, 39 (2006) (describing the Everson dissent as “more stridently separationist” than the majority opinion).
107 See note 75 and accompanying text supra (suggesting that the Allen Court implied that Everson was virtually dispositive).
Allen modified the relevant criterion from “Is the program receiving state support a health/safety measure rather than instructional?” to “If the program receiving state support is instructional, is the instruction secular?” To answer whether the instruction was secular, the Court considered among other things the nature of the materials.

That the texts were secular in nature was helpful, although not dispositive, in establishing that the texts would not be used to promote religious instruction. Presumably, had the Court accepted Justice Black’s claim that the secular materials inevitably would have been used to promote religion, it would have struck down the use of the public funds to buy such secular materials—else, there would have been no need for the Court to have discussed the dual functions of parochial education. Nonetheless, one infers, because of the secular nature of the textbooks at issue, the Court believed it reasonable to assume that the books would be used to promote secular learning and was unworried by the bare possibility that such texts could be used to promote religious views.

Echoing Justice Rutledge’s warning in his Everson dissent that the majority opinion was opening the door to a variety of kinds of support for religious institutions, Justice Black warned in his Allen dissent that the majority opinion could be used to justify state support of religious schools in other ways. “It requires no prophet to foresee that on the argument used to support this law others could be upheld providing . . . to pay the salaries of the religious school teachers.” That very issue was addressed in Lemon v. Kurtzman.

C. State Augmentation of Religious Teachers’ Salaries

Lemon involved a challenge to Pennsylvania and Rhode Island statutes providing support to sectarian elementary and secondary schoolteachers. The Rhode Island Act supplemented teacher salaries by 15% based on a legislative finding that “the quality of education available in nonpublic elementary schools has been jeopardized by the rapidly rising salaries needed to attract competent and dedicated teachers.” The only teachers eligible for these supplements were those who (a) only taught subjects

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108 See note 103 and accompanying text supra.
109 See note 89 and accompanying text supra.
110 See note 63 and accompanying text supra.
111 Allen, 392 U.S. at 253 (Black, J., dissenting).
112 403 U.S. 602 (1971).
113 See id. at 606-07.
114 Id. at 607.
offered in the public schools,\(^{115}\) (b) only used teaching materials available in the public schools,\(^{116}\) and (c) agreed in writing not to teach religion while receiving any salary supplement under the Act.\(^{117}\) The Pennsylvania statute authorized reimbursement of “nonpublic schools solely for their actual expenditures for teachers’ salaries, textbooks, and instructional materials.”\(^{118}\) Reimbursement was limited to those teaching certain courses,\(^{119}\) and the textbooks and instructional materials had to be approved by the State Superintendent of Public Instruction.\(^{120}\) There would be no reimbursement for any course containing “any subject matter expressing religious teaching, or the morals or forms of worship of any sect.”\(^{121}\) Thus, just as the only textbooks which could receive state funding in Allen were books that were secular in content, the only teachers whose salaries would be supplemented in Lemon were those teaching secular subjects.

The Lemon Court began its analysis by offering “the cumulative criteria developed by the Court over many years:”\(^{122}\)

1. “the statute must have a secular legislative purpose,”\(^{123}\)
2. “its principal or primary effect must be one that neither advances nor inhibits religion,”\(^{124}\) and
3. “the statute must not foster ‘an excessive government entanglement with religion,’”\(^{125}\)

and then applied the criteria to the statutes before it. The Court accepted that the purpose behind the

\(^{115}\) Id. at 608.

\(^{116}\) Id.

\(^{117}\) Id.

\(^{118}\) Id. at 609.

\(^{119}\) Id. at 610 (“Reimbursement is limited to courses ‘presented in the curricula of the public schools.’ It is further limited ‘solely’ to courses in the following ‘secular’ subjects: mathematics, modern foreign languages, physical science, and physical education.”).

\(^{120}\) Id.

\(^{121}\) Id.

\(^{122}\) Id. at 612.

\(^{123}\) Id.

\(^{124}\) Id. (citing Board of Education v. Allen, 392 U.S. 236, 243 (1968)).

\(^{125}\) Id. at 613 (citing Walz v. Tax Commission, 397 U.S. 664, 674 (1970)) The Lemon Test has been extensively criticized. See, for example, Lamb’s Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment) (“As to the Court’s invocation of the Lemon test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again.”); id. at 399 (Scalia, J., concurring in the judgment) (“For my part, I agree with the long list of constitutional scholars who have criticized Lemon and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.”). Indeed, the decision may be overruled by the current Court. See Erwin Chemerinsky, The Future of Constitutional Law, 34 Cap. U. L. Rev. 647, 665 (2006) (“But both Chief Justice Roberts and Justice Alito are very likely votes to overrule the Lemon test and join with Justices Scalia, Kennedy, and Thomas in adopting a view that the government violates the Establishment Clause only if it literally establishes a church or coerces religious participation.”). Nonetheless, it remains the law of the land and was used in 2005 to strike down a posting
legislation was secular—to enhance the quality of secular education in all schools, but did not decide whether the principal and primary effect of the statute was to promote religion, instead suggesting that the legislatures’ attempts to assure that only secular education was receiving support resulted in the violation of the excessive entanglement prong.

The excessive entanglement prong was violated because of the necessity of maintaining continuing supervision of the teachers to assure that they would not be engaging in sectarian teaching while receiving state support. The Court made clear that although the State could provide aid to religious schools with respect to neutral materials, facilities, or services, for example, the provision of transportation, school lunches, public health services, and secular textbooks were all permissible, the aid at issue in Lemon was of a different sort. Teachers are quite different from books, since it is much easier to tell whether a particular book’s content includes religious matters than it is to predict whether a teacher’s handling of a particular subject will include religious matters.

The Lemon Court was not assuming that parochial school teachers would act in bad faith or attempt to circumvent constitutional limitations, but merely noted that a teacher might have some difficulty in completely separating secular and religious teaching. This was in part a function of the different perspectives that individuals might have with respect to particular course contents, since what

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126 Lemon, 403 U.S. at 613.
127 Id. at 613-14 (“We need not decide whether these legislative precautions restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses.”).
128 See id. at 613 (“The two legislatures . . . have therefore sought to create statutory restrictions designed to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former.”).
129 Id. at 614 (“we conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion”).
130 Id. at 616.
131 Id. at 616-17.
132 Id. at 617.
133 See id. (“In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not.”).
134 Id. at 618.
135 Id. at 618-19.
might “appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion.”

To avoid even inadvertent state support of sectarian teaching, the state would be forced to monitor the classrooms. After all, the Court noted, “Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment.” Yet, the Lemon Court did not explore whether its observations about teachers would have any implications for its prior approval of secular texts, which would be used by the very teachers whom the Court believed had to be under continuing surveillance. Even a close and careful inspection of a book could not reveal how it would be used in class. The Lemon rationale for striking down salary augmentation of parochial school teachers for fear that the state would thereby be unwittingly supporting the inculcation of religious doctrine would also suggest that the state should not provide even secular books for fear of how they would be used.

The Lemon Court noted an additional defect in the Pennsylvania statute, namely, that the monies were given directly to the schools. This was a concern because the “government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state.” Continuing contact creates an opportunity for constitutional mischief because, for example, the government might pressure a school to modify its curriculum to achieve more secular aims.

Yet, by noting some of the additional difficulties associated with a direct grant to sectarian institutions, for example, that a continuing and intimate relationship between Church and State can “cause

136 Id. at 619.
137 Id. (“comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected”).
138 Id.
139 Cf. Mitchell v. Helms, 530 U.S. 793, 823 (2000) (“Although it might appear that a book, because it has a pre-existing content, is not divertible, and thus that lack of divertibility motivated our holding in Allen, it is hard to imagine any book that could not, in even moderately skilled hands, serve to illustrate a religious message.”).
140 Cf. note 214 and accompanying text infra (discussing the Court’s recognition of the tension between how it treats the constitutionality of programs involving texts versus other kinds of secular materials).
141 Lemon, 403 U.S. at 621 (“The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related schools.”).
142 Id. at 621-22.
143 Cf. Wolman v. Walter, 433 U.S. 229, 266 n.7, (1977) (Stevens, J., concurring in part and dissenting in part) (“sectarian schools will be under pressure to avoid textbooks which present a religious perspective on secular subjects, so as to obtain the free textbooks provided by the State”).
political division along religious lines,” the Lemon Court was not implying that indirectly funneling funds to religious schools somehow should or would immunize the grant from constitutional review. Whether the allocation at issue involves a single contact or instead continual interaction, the state still must fulfill its constitutional obligations under the Establishment Clause, which might well necessitate the state’s making decisions about what counts as religious and what does not. While such decisions may not necessitate continuing and intimate relationships between Church and State, they nonetheless must still be made. Both Everson and Allen were predicated on the secular nature of that which was funded—had the fact that the monies were not directly going to the schools immunized the funding from further constitutional review, there would have been no need for an analysis of whether the funds were supporting something secular rather than sectarian.

That aid is not immunized merely because it goes indirectly to religious schools is illustrated in Committee for Public Education & Religious Liberty v. Nyquist. The Nyquist Court examined a New York program which would partially reimburse low-income parents if they sent their children to private schools, and which would also pay directly to private schools monies for facilities maintenance and repair based on the number of students in attendance. Few if any restrictions were placed on which

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144 Lemon, 403 U.S. at 622.
145 For the suggestion that indirect funding somehow immunizes, see note 269 and accompanying text infra.
146 Cf. Aguilar v. Felton, 473 U.S. 402, 413 (1985) overruled, Agostini v. Felton, 521 U.S. 203 (1997) (“Agents of the city must visit and inspect the religious school regularly, alert for the subtle or overt presence of religious matter in Title I classes. . . . In addition, the religious school must obey these same agents when they make determinations as to what is and what is not a ‘religious symbol’ and thus off limits in a Title I classroom.”).
147 So, too, in Levitt v. Committee for Public Education and Religious Liberty, 413 U.S. 472 (1973), the Court struck down a New York statute reimbursing private schools for examination expenses, precisely because of “the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church.” See id. at 480.
149 Id. at 774 (“The ‘maintenance and repair’ provisions of s 1 authorize direct payments to nonpublic schools, virtually all of which are Roman Catholic schools in low-income areas. The grants . . . total[] $30 or $40 per pupil depending on the age of the institution.”).
facilities would be maintained or repaired with these monies.\textsuperscript{151} The state justified these expenditures by noting that the public schools would be massively overburdened were all those children currently attending private schools to start attending public schools instead.\textsuperscript{152} The Court struck down both types of aid because “neither form of aid is sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools.”\textsuperscript{153} Thus, the fact that the reimbursement was going to low-income families rather than the schools themselves did not immunize the funding from further constitutional review.

The Nyquist Court noted another difficulty with the way the New York system had been set up, namely, that the “tax reductions authorized by this law flow primarily to the parents of children attending sectarian, nonpublic schools.”\textsuperscript{154} While refusing to hold that this factor alone was dispositive to establish the unconstitutionality of the program so that, for example, another program which had corrected the other defects in the New York program would still be unconstitutional if giving this benefit solely to parents of children attending sectarian schools,\textsuperscript{155} the Court nonetheless suggested that it was a separate factor militating against the constitutionality of the statute at issue.\textsuperscript{156} The Nyquist Court made clear that had the benefit to religious institutions only been indirect and incidental, the Court would have upheld the statute,\textsuperscript{157} but this statute could not pass muster.

In Everson, Allen, Lemon and Nyquist, the Court offered some “guidelines”\textsuperscript{158} with respect to the kinds of state aid to religious institutions which will pass constitutional muster. The Court in Everson and

\textsuperscript{151} Id. (“The grants . . . are given largely without restriction on usage.”).
\textsuperscript{152} Id. at 765

Turning to the public schools, the findings state that any ‘precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs,’ an increase that would ‘aggravate an already serious fiscal crises in public education’ and would ‘seriously jeopardize quality education for all children.’ Based on these premises, the statute asserts the State’s right to relieve the financial burden of parents who send their children to non-public schools through this tuition reimbursement program. Repeating the declaration contained in s 1, the findings conclude that ‘(s)uch assistance is clearly secular, neutral and nonideological.’

\textsuperscript{153} Id. at 794.
\textsuperscript{154} Id.
\textsuperscript{155} Id. (refusing to intimate “whether this factor alone might have controlling significance in another context in some future case”)
\textsuperscript{156} Id. (“it should be apparent that in terms of the potential divisiveness of any legislative measure the narrowness of the benefited class would be an important factor”).
\textsuperscript{157} Id. at 775-76 (“an indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law”).
\textsuperscript{158} See Meek v. Pittenger, 421 U.S. 349, 359 (1975).
Allen suggested that secular aid is permissible, but suggested in Nyquist and Lemon that aid which is too readily divertible to aid sectarian instruction is impermissible. These guidelines do not set “precise limits” but, instead, leave a large gray area, as was illustrated in Meek v. Pittenger.

At issue in Meek was a Pennsylvania statute authorizing the provision to students in nonpublic primary and secondary schools of:

1. auxiliary services
2. textbooks
3. instructional materials and equipment.

The Court examined the provision of each of these in light of the Lemon Test.

The Court upheld the loaning of the textbooks, citing Allen and noting that the textbooks were secular and would be used for purely secular purposes. The Court emphasized that the textbooks were loaned directly to the student, and reasoned that the financial benefits were therefore to the “parents and children, not to the nonpublic schools.”

Yet, there was reason to question whether the books were really loaned to the students in more than a merely formal sense. As Justice Brennan pointed out in his concurrence and dissent, it was “pure fantasy to treat the textbook program as a loan to students,” because “virtually the entire loan transaction [was] . . . conducted between officials of the nonpublic school, on the one hand, and officers of the State,

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159 Id. 421 U.S. 349 (1975).
160 Id. at 353. Auxiliary services were defined as counseling, testing, and psychological services, speech and hearing therapy, teaching and related services for exceptional children, for remedial students, and for the educationally disadvantaged, and such other secular, neutral, nonideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth.
161 Id. at 353-54. See id. at 353. See id. at 355 (Instructional materials were defined to include “periodicals, photographs, maps, charts, sound recordings, films, or any others printed and published materials of a similar nature.”).
162 Id. (Instructional equipment included “projection equipment, recording equipment, and laboratory equipment.”).
163 Id. at 358. See id. at 362 (citing Allen, 392 U.S. at 244-245).
164 See id. at 361. See id. at 379 (Brennan, J., concurring in part and dissenting in part).
Further, the loaned textbooks were stored on-campus. Finally, while the books were sometimes described as being loaned to the students, at other times they were described as being loaned to the schools themselves, for example, when discussing when the books were to be presumed lost, obsolete, or worn out. That said, however, the arrangement at issue in Meek was similar to the arrangement whose constitutionality was upheld in Allen, and it presumably would have been difficult to justify striking down the loan program at issue in Meek without overruling Allen.

One of the surprising aspects of Meek was the degree to which the Court emphasized the importance of the identity of the individuals receiving the loans. Consider the Meek Court’s analysis of the constitutionality of the program whereby instructional equipment and materials were loaned directly to the schools rather than to the pupils. Doing so, the Court reasoned, had the “unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefiting from the Act.” Yet, it is not clear how the loan of the instructional materials and equipment significantly advanced religion in a way that the loan of the books did not.

It might be argued that the instructional materials and equipment might be diverted to religious uses in a way that the secular books could not, and that this is why the loan of the latter was constitutional.

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171 Id. at 380 (Brennan, J., concurring in part and dissenting in part).
172 See id. at 361 n.9; id. at 379 (Brennan, J., concurring in part and dissenting in part).
173 See id. at 380-81 (Brennan, J., concurring in part and dissenting in part).

Indeed, the Guidelines make no attempt to mask the true nature of the loan transaction. In explicit words s 4.10 describes the transaction: ‘Textbooks loaned to the nonpublic schools: (a) shall be maintained on an inventory by the nonpublic school.’ (Emphasis added.) Section 4.11 provides: ‘It is presumed that textbooks on loan to nonpublic schools after a period of time will be lost, missing, obsolete or worn out. This information should be communicated to the Department of Education. After a period of six years, textbooks shall be declared unserviceable and the disposal of such shall be at the discretion of the Secretary of Education.’

174 See id. at 362 (“In sum, the textbook loan provisions of Act 195 are in every material respect identical to the loan program approved in Allen.”).
175 Justice Brennan tried to distinguish the two. See, for example, id. at 379 (Brennan, J., concurring in part and dissenting in part) (“The Commonwealth has promulgated ‘Guidelines for the Administration of Acts 194 and 195’ to implement the statutes. These regulations, unlike those upheld in Allen, constitute a much more intrusive and detailed involvement of the State and its processes into the administration of nonpublic schools.”) and id. at 383 (Brennan, J., concurring in part and dissenting in part) (“unlike the New York statute in Allen which extended assistance to all students, whether attending public or nonpublic schools, Act 195 extends textbook assistance only to a special class of students, children who attend nonpublic schools which are, as the plurality notes, primarily religiously oriented.”).
176 See id. at 362-63 (“Although textbooks are lent only to students, Act 195 authorizes the loan of instructional material and equipment directly to qualifying nonpublic elementary and secondary schools in the Commonwealth.”).
177 Id. at 363.
but the former was not. But that was not the reasoning of the Court. The Meek Court accepted the district court’s conclusion that “the material and equipment that are the subjects of the loan--maps, charts, and laboratory equipment, for example-are ‘self-policing’, in that starting as secular, nonideological and neutral, they will not change in use.” Nonetheless, the Court reasoned that “it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and to then characterize Act 195 as channeling aid to the secular without providing direct aid to the sectarian.”

Yet, this analysis has implications of which the Court failed to take account. Basically, the Court suggested that even secular materials will promote sectarian ends if used within pervasively sectarian institutions. But the same point might be made about texts, namely, that they, even if secular, might be used to promote sectarian ends if used within pervasively sectarian institutions.

A separate issue addressed by the Court involved how to characterize the loan. Rather than suggest that ownership of the loaned materials remained with the state, the Court instead discussed “the substantial amounts of direct support authorized by Act 195,” as if the loans of the equipment were instead cash that had been given directly to the religious institutions. While accepting that the aid could only be used for “secular purposes,” the Court nonetheless concluded that “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,’ state aid has the impermissible primary effect of advancing religion.” Yet, money was not flowing to these institutions. While the institutions were receiving the benefits involved in having instructional materials and equipment loaned to them so that, for example, these goods would not have to be purchased and the saved monies might be used for other purposes, an analogous claim might have been made about the loaned books.

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178 Id. at 365 (citing Meek v. Pittinger, 374 F.Supp. 639, 660 (E.D. Pa. 1974)).
179 Id.
180 Indeed, it indeed was made in Justice Black’s Allen dissent. See note 103 and accompanying text supra.
181 Cf. Dr. Mark J. Chadsey, State Aid to Religious Schools: From Everson to Zelman A Critical Review, 44 Santa Clara L. Rev. 699, 724 (2004) (“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.”).
182 Cf. Meek, 421 U.S. at 360 (quoting Allen, 392 U.S. at 243) (“Books are furnished at the request of the pupil and ownership remains, at least technically, in the State.”).
183 Id. at 365.
184 Id.
185 Id. at 365-66 (citing Hunt v. McNair, 413 U.S. 734, 743 (1973)).
Had the equipment not been loaned, the schools presumably would have been forced to buy that equipment and at least some of those costs would have been passed on to the students and their families. Had the books not been loaned, the students would have been forced to buy them. But the schools might then have been forced to bear some of those costs, for example, by being forced to lower tuition or reduce other fees. Or, in the alternative, because the textbooks were loaned, the schools might have been able to charge more in tuition or fees, and the families who did not have to spend money on the books might now be able to afford to pay additional fees to the schools. There is no reason to think that the loan of the equipment benefited only the schools and not in addition the families of those attending the schools, just as there is no reason to think that the loan of the textbooks was only a financial boon for the students’ families and not in addition the schools.

Suppose that the instructional equipment and materials had been loaned to the student body with the understanding that the equipment and materials would be stored and used at the school. The equipment would be used for the students’ benefit and some of the materials such as maps might even be permitted to leave the school under appropriate circumstances. The Meek Court’s analysis suggests that this formal maneuver might well have made the difference with respect to the program’s constitutionality, even though the schools would have received the same functional benefits whether the equipment was loaned in name to the students or instead the schools.

It may well be that the Meek Court is less appropriately subject to criticism for upholding the loaning of books containing maps while at the same time striking down the loaning of maps\(^{186}\) than for its apparent willingness to uphold or not uphold the loan of school materials based on the formal identity of the loan recipient. Such a method of distinguishing is likely to yield absurd results\(^{187}\) and, further, would seem open to a variety of kinds of abuse.\(^{188}\)

\(^{186}\)See James R. Beattie, Jr., *Taking Liberalism and Religious Liberty Seriously: Shifting Our Notion of Toleration from Locke to Mill*, 43 *Cath. Law* 367, 398 n.131 (2004). (“Government may fund the costs of books for parochial school students. See Bd. of Educ. v. Allen, 392 U.S. 236, 248 (1968). Yet it cannot cover the costs of maps. See Meek v. Pittenger, 421 U.S. 349, 362 (1975) (approving textbook loans, but not other additional materials).”) Basically, the Court may have been trying to cabin Allen’s upholding the state provision of books to sectarian schools by refusing to uphold the state provision of other kinds of secular materials to sectarian schools. See notes 215-17 and accompanying text infra.

\(^{187}\)See notes 207-08 and accompanying text infra (discussing Wolman’s rejection of that formal approach).

\(^{188}\)Cf. note 269 and accompanying text infra (discussing the immunizing effect of directing funds for parochial schools through the students’ families).
The Meek Court also examined whether the auxiliary services could be provided without
offending the Constitution. The Court explained that the district court had “emphasized that ‘auxiliary
services’ are provided directly to the children involved and are expressly limited to those services which are
secular, neutral, and nonideological,”189 thus making these services seem analogous to the loaned texts
whose constitutionality had been upheld. However, the Meek Court chided the district court for “relying
entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-
related schools to ensure that a strictly nonideological posture is maintained.”190 Like the Lemon Court,191
the Meek Court worried that teachers in religious schools might inadvertently include religious teaching
within their secular instruction,192 and also worried that those providing auxiliary services at pervasively
sectarian schools might feel pressured to promote religion,193 which would necessitate the state’s
maintaining continual surveillance to make sure that this perceived pressure did not result in religious
instruction.194 In short, the Meek Court upheld the practice which had already been upheld in Allen, but
struck down the remaining provisions, notwithstanding the Court’s professed confidence that the materials,
equipment, and services at issue were secular and would not be put to sectarian uses.

Meek left open a variety of questions whose answers were clarified in Wolman v. Walter.195 At
issue in Wolman were appropriations by the Ohio Legislature whereby various books, materials, and
services could be provided to both public and private students.196 The Wolman Court followed Allen and
Meek and upheld Ohio’s textbook loan program,197 and also upheld the provision of various kinds of

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189 Meek, 421 U.S. at 368
190 Id. at 369.
191 See notes 134-36 and accompanying text supra.
192 Id., 421 U.S. at 370-71
193 Whether the subject is ‘remedial reading,’ ‘advanced reading,’ or simply ‘reading,’ a
teacher remains a teacher, and the danger that religious doctrine will become intertwined
with secular instruction persists. The likelihood of inadvertent fostering of religion may
be less in a remedial arithmetic class than in a medieval history seminar, but a diminished
probability of impermissible conduct is not sufficient.
194 Id. at 371.
195 Id. at 372.
197 Id. at 234 (“All disbursements made with respect to nonpublic schools have their equivalents in
disbursements for public schools, and the amount expended per pupil in nonpublic schools may not exceed
the amount expended per pupil in the public schools.”).
198 Id. at 237-38 (“This system for the loan of textbooks to individual students bears a striking resemblance
to the systems approved in Board of Education v. Allen, 392 U.S. 236 (1968), and in Meek v. Pittenger,
421 U.S. 349 (1975).”) See also id. at 254 (“we hold constitutional those portions of the Ohio statute
authorizing the State to provide nonpublic schools with books”).
services involving speech, hearing, and psychological diagnosis and treatment. Those of the services that would be performed on-site were unlikely to provide an opportunity for the promotion of sectarian views, and other services involving a greater risk of the communication of sectarian views would be provided off-site. Given that the personnel providing these off-site services were either under contract with the state health department or were employed by the local board of education, the Court did not believe that there was a great risk that these individuals would engage in sectarian instruction.

The Wolman Court explained that the constitutionally worrisome features of the auxiliary services program at issue in Meek were not present in the Ohio program. The provision of services in Meek had been struck down because of the danger that “arose from the fact that the services were performed in the pervasively sectarian atmosphere of the church-related school.” The important consideration involved the environment in which the services would be offered, and as “long as these types of services are offered at truly religiously neutral locations, the danger perceived in Meek does not arise.” Because in Wolman those services which had the potential to involve sectarian instruction were offered off-site and those provided on-site did not have that potential, the Court held that there was insufficient likelihood that the

198 See id. at 241-42.
199 Id. at 241 (“It will be observed that these speech and hearing and psychological diagnostic services are to be provided within the nonpublic school.”).
200 Id. at 244.
201 Id. at 247.
202 Id. at 245 (“The services are to be performed only in public schools, in public centers, or in mobile units located off the nonpublic school premises.”).
203 See id.
204 Id. at 242 (citing Meek, 421 U.S. at 371).
205 Id. at 247 (“The danger existed there, not because the public employee was likely deliberately to subvert his task to the service of religion, but rather because the pressures of the environment might alter his behavior from its normal course.”).
206 Id. (“The danger existed there, not because the public employee was likely deliberately to subvert his task to the service of religion, but rather because the pressures of the environment might alter his behavior from its normal course.”).
state would be promoting sectarian education through its funding of any of the services at issue and thus found no violation of the Establishment Clause.

Wolman made clear that the Court was willing to look past the formal identity of the loan recipients when considering whether aid to sectarian schools violated Establishment Clause guarantees, striking down the Ohio materials/equipment loan program as attempt to do an end-run around the constitutional requirements. The Court noted, “Before Meek was decided by this Court, Ohio authorized the loan of material and equipment directly to the nonpublic schools. Then, in light of Meek, the state legislature decided to channel the goods through the parents and pupils.” 207 Rejecting that the Legislature’s move could save the program, the Court explained that while there had been a “technical change in legal bailee, the program in substance is the same as before: The equipment is substantially the same; it will receive the same use by the students; and it may still be stored and distributed on the nonpublic school premises.” 208

By emphasizing the history of the program, the Court made clear that it would not permit states to do an end-run around their constitutional obligations. 209 Yet, the Wolman Court did not thereby resolve all relevant issues. For example, it is not clear what the Court would have said if Ohio had initially loaned these materials directly to the students or if a period of years had elapsed between the ending of the program involving loans to the schools and the beginning of the new program making loans directly to the students. 210

207 Id. at 250.
208 Id.
209 Cf. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 522 (4th Cir. 1999) (“We believe that such an end-run around First Amendment strictures is foreclosed by Hustler”) (citing Hustler Magazine v. Falwell, 485 U.S. 46 (1988) in which the Court precluded Jerry Falwell from receiving damages for intentional infliction of emotional distress because he could not establish that Hustler had printed a false story about him with actual malice).

A separate question is whether the Ohio Legislature was trying to do an end-run around the Constitution or, instead, was modifying the program to be in accord with constitutional requirements. 210 Cf. McCreary County, Ky. v. American Civil Liberties Union of Ky. 545 U.S. 844, 873-874 (2005) In holding the preliminary injunction adequately supported by evidence that the Counties' purpose had not changed at the third stage, we do not decide that the Counties' past actions forever taint any effort on their part to deal with the subject matter. We hold only that purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context; an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense. It is enough to say here that district courts are fully capable of adjusting preliminary relief to take account of genuine changes in constitutionally significant conditions.
When striking down that material/equipment loan program, the Wolman Court analogized these loans to the grants at issue in Nyquist and suggested that the Ohio loans were more clearly unconstitutional than the New York grants.\textsuperscript{211} The Court reasoned that the New York grants could be used by the parents in any way they wanted and so might not “end up in the hands of the religious schools,”\textsuperscript{212} whereas the loaned materials and equipment in Wolman had to “be used to supplement courses.”\textsuperscript{213} The Court thus suggested that the fact that the benefit was restricted in that it had to be used in a way connected to a sectarian institution was itself constitutionally significant.

By arguing that the required tie between the courses and the loaned materials/equipment militated in favor of the program’s unconstitutionality, the Wolman Court was implicitly undercutting the constitutionality of the textbook loan program, because the use of the textbooks was also tied to courses. The Court appreciated this implication,\textsuperscript{214} but upheld the textbook loan provision as a matter of stare decisis.\textsuperscript{215} The Court then explained that it was refusing to extend Allen,\textsuperscript{216} and struck down both the equipment loan provision and a provision which funded field trips.\textsuperscript{217}

In the series of cases discussed above, the Court at least seemed to have adopted a relatively consistent approach. The Court would approve programs permitting the provision of secular services if those services did not pose a risk of sectarian instruction\textsuperscript{218} or, where there was such a risk, if those services were not provided on-site. The Court would approve provision of secular texts in sectarian schools, but

\textsuperscript{211} See Wolman, 433 U.S. at 251 n.17 (“In many respects, Nyquist was a more difficult case than the present one.”).
\textsuperscript{212} Id. n.17.
\textsuperscript{213} Id. n.17.
\textsuperscript{214} See id. n.18 (“There is, as there was in Meek, a tension between this result and Board of Education v. Allen, 392 U.S. 236 (1968)).
\textsuperscript{215} See id. n.18 (“Board of Education v. Allen has remained law, and we now follow as a matter of stare decisis the principle that restriction of textbooks to those provided the public schools is sufficient to ensure that the books will not be used for religious purposes.”).
\textsuperscript{216} See id. n.18 (“When faced, however, with a choice between extension of the unique presumption created in Allen and continued adherence to the principles announced in our subsequent cases, we choose the latter course.”).
\textsuperscript{217} See id. at 254 (“field trips are an integral part of the educational experience, and where the teacher works within and for a sectarian institution, an unacceptable risk of fostering of religion is an inevitable byproduct”).
\textsuperscript{218} See, for example, Committee for Public Ed. and Religious Liberty v. Regan, 444 U.S. 646 (1980) (upholding New York reimbursement program for private schools where funds were provided to defray the costs of grading exams which had been created by the state.). The Regan Court cited Wolman for support. See id. at 847 (“We agree with the District Court that Wolman v. Walter controls this case.”).
would likely not approve the provision of other kinds of materials, even if secular. This approach was continued in the 1980s, with at least one important modification.

### III. The New Take on Neutrality

In the 1980s, there was no wholesale revision of the jurisprudence with respect to what was permissible state aid to primary and secondary sectarian institutions. Rather, there was a change in one area of this jurisprudence which, coupled with some developments in other areas of the law, had important implications in the 1990s. Those changes culminated in the current jurisprudence with respect to aid to sectarian primary and secondary schools, which simply is not reconcilable with either the letter or the spirit of Everson.

#### A. Reimbursing Families for Parochial School Expenses

As discussed above, the Nyquist Court struck down a New York plan to offer grants to low-income families whose children attended private schools. Ten years after that opinion was issued, the Court in *Mueller v. Allen* considered a Minnesota statute permitting individuals to take a tax deduction for the “actual expenses incurred for the ‘tuition, textbooks and transportation’ of dependents attending elementary or secondary schools.” The *Mueller* Court noted that that the Court had upheld reimbursement systems in the past for bus transportation, and that a states could loan secular textbooks to parochial schoolchildren without running afoul of constitutional guarantees. The Court further noted that the Minnesota program promoted legitimate secular purposes of the state such as helping to produce an educated citizenry and preventing an already heavily burdened public school system from being forced to shoulder an even greater burden.

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219 See notes 148-57 and accompanying text *supra*.
221 Id. at 391.
222 Id. at 393 (citing Everson v. Board of Education, 330 U.S. 1 (1947)).
223 Id. (citing Board of Education v. Allen, 392 U.S. 236 (1968)).
224 Id. at 395.
225 Id.

Minnesota, like other states, could conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and non-sectarian. By educating a substantial number of students such schools relieve public schools of a correspondingly great burden--to the benefit of all taxpayers.
The Mueller Court suggested that the universality of the deduction\textsuperscript{226} militated in favor of its constitutionality. That was accurate, at least in the sense that Minnesota’s having limited the deduction to families with children attending private school would have militated in favor of the program’s unconstitutionality--the Nyquist Court had noted that a flaw of the New York program was that it only offered the grant at issue to parents of children in private schools. Indeed, the Mueller Court emphasized that the case before it was “vitally different from the scheme struck down in Nyquist . . . [where] public assistance amounting to tuition grants, was provided only to parents of children in nonpublic schools.”\textsuperscript{227} However, while the Minnesota and New York programs were distinguishable in the respect, there were at least two important ways in which the Mueller Court misrepresented Nyquist.

First, while it is true that the Nyquist Court had worried that a program which primarily benefited parents of children attending sectarian schools would be politically divisive,\textsuperscript{228} the Mueller Court failed to note that a program might primarily benefit a group in at least two ways: (1) most of the individuals receiving the benefit belong to one particular group, or (2) while individuals belonging to many different groups receive some benefit from a program, most of the individuals receiving a substantial benefit from the program belonged to one particular group. As Justice Marshall noted in his Mueller dissent, the benefits afforded by the Minnesota program to parents of children attending public and private schools were not comparable. Children attending public schools would have no tuition to pay.\textsuperscript{229} Although parents of children in the public schools could deduct the cost of “gym clothes, pencils, and notebooks,”\textsuperscript{230} the amount that those would cost pales in comparison to the cost of tuition.\textsuperscript{231} A program affording thousands of dollars to individuals in one group and tens of dollars to individuals in other groups might be quite divisive, even though it would be false to claim that only members of the first group received any benefit from the program.

\textsuperscript{226}Id. at 397 (“the deduction is available for educational expenses incurred by all parents, including those whose children attend public schools and those whose children attend non-sectarian private schools or sectarian private schools”).  
\textsuperscript{227}Id. at 398.  
\textsuperscript{228}See Nyquist, 413 U.S. at 794.  
\textsuperscript{229}Mueller, 463 U.S. at 408 (Marshall, J., dissenting) (“Minnesota taxpayers who send their children to local public schools may not deduct tuition expenses because they incur none.”).  
\textsuperscript{230}Id. (Marshall, J., dissenting).  
\textsuperscript{231}See id. (Marshall, J., dissenting) (“That the Minnesota statute makes some small benefit available to all parents cannot alter the fact that the most substantial benefit provided by the statute is available only to those parents who send their children to schools that charge tuition.”).
Second, the Mueller Court was somewhat misleading when suggesting that “by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject.”\textsuperscript{232} as if most if not all constitutional difficulties could be avoided by doing this channeling. Although the Mueller Court was correct to imply that there can be additional difficulties posed by direct funding, for example, the possible need for continuing audits to assure that the monies were not misspent, no Court had previously held or even implied that funneling the monies through individuals would immunize the use of those monies from further scrutiny. Indeed, the Wolman Court has expressly repudiated Ohio’s (alleged) attempt to avoid its constitutional obligations by channeling aid though parents and students.\textsuperscript{233}

While recognizing that the “financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children,”\textsuperscript{234} the Mueller Court reasoned that public funds became available to the private schools “only as a result of numerous, private choices of individual parents of school-age children,”\textsuperscript{235} as if the fact that the parent had made intervening choices would somehow permit the state to promote sectarian education. Yet, were that correct, the Everson Court would hardly have based its decision on the aid’s having been “so separate and so indisputably marked off from the religious function.”\textsuperscript{236} As Justice Marshall pointed out in dissent, Nyquist had “established that a State may not support religious education either through direct grants to parochial schools or through financial aid to parents of parochial school students.”\textsuperscript{237} While claiming to follow the opinion, the Mueller Court ignored Nyquist’s reasoning.

Someone reading Mueller’s interpretation of Nyquist would think that: (1) the Nyquist Court had struck down the program at issue because the benefit was reserved for parents of children attending private schools, and (2) the Nyquist Court would have upheld the program, notwithstanding its indirectly promoting sectarian education, if only the New York program had benefited parents of children attending public schools too. But that reading turns Nyquist on its head.

\textsuperscript{232}Id. at 399.
\textsuperscript{233} See notes 207-08 and accompanying text supra.
\textsuperscript{234} Mueller, 463 U.S. at 399.
\textsuperscript{235} Id.
\textsuperscript{236} Everson, 330 U.S. at 18. .
\textsuperscript{237} See Mueller, 463 U.S. at 408 (Marshall, J., dissenting) (citing Nyquist, 413 U.S., at 780, 785-786).
The Nyquist Court had struck down the program benefitting parents because it was not “sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools.”\(^\text{238}\) The Court had noted in dictum that the “tax reductions authorized by this law flow primarily to the parents of children attending sectarian, nonpublic schools,”\(^\text{239}\) but nonetheless refused to intimate “whether this factor alone might have controlling significance in another context in some future case.”\(^\text{240}\) Thus, the Nyquist Court struck down the program at issue because it did not include adequate restrictions to prevent its advancing sectarian objectives but also implied that a program with adequate restrictions might not pass muster if the benefits of the program were reserved for members of a particular group. Without overruling Nyquist, the Mueller Court held that the program before it was permissible because parents of children in both public and private schools received some benefit, even though the Minnesota program lacked restrictions to assure that the sectarian activities of religious schools would not be advanced. Indeed, the Court in both Nyquist and Everson had emphasized the importance of the State’s not advancing sectarian instruction even indirectly, and that essential element was somehow considered irrelevant in Mueller.

B. The Prohibition on Advancing Sectarian Objectives

Mueller had the potential to effect an important change in the sectarian aid jurisprudence. However, two subsequent decisions concerning aid to sectarian primary and secondary schools seemed to ignore Mueller and follow the example set in Meek and Wolman.\(^\text{241}\)

\(^{238}\) Nyquist, 413 U.S. at 794.
\(^{239}\) Id.
\(^{240}\) Id.
\(^{241}\) Three years after Mueller, the Court in Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986) considered whether the State violated Establishment Clause guarantees by providing services so that a visually handicapped student could receive training at a Christian college to become a pastor, missionary, or your director. See id. at 750. The Court suggested that the Establishment Clause did not preclude this aid. See id. at 490. However, the Court had long emphasized that aid to sectarian colleges was constitutionally distinguishable from aid to sectarian primary and secondary schools. See Tilton v. Richardson, 403 U.S. 672, 685-89 (1971); Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 765 (1976). Further, the Court had explained in Witters that sectarian aid might be prohibited “even though it takes the form of aid to students or parents.” Witters, 451 U.S. at 487 (citing Ball, 473 U.S. at 394). Finally, the Witters Court had noted that the grant at issue usually involved secular rather than sectarian training, see id. at 488 (“No evidence has been presented indicating that any other person has ever sought to finance religious education or activity pursuant to the State’s Program.”), as if the use of the grant for sectarian purposes might be upheld as a de minimis exception. Cf. note 374 infra and accompanying text (discussing Justice O’Connor’s belief that the actual diversion of public funds for sectarian purposes at issue in Mitchell v. Helms, 530 U.S. 793 (2000) was de minimis).
Consider School District of the City of Grand Rapids v. Ball,\textsuperscript{242} in which the Court considered two enrichment and remedial "programs in which classes for nonpublic school students are financed by the public school system, taught by teachers hired by the public school system, and conducted in 'leased' classrooms in the nonpublic schools."\textsuperscript{243} Because almost all of the schools in the case were "pervasively sectarian,"\textsuperscript{244} the Court worried that the program at issue might advance religion in three different ways.

1. "teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs,"\textsuperscript{245}

2. "the programs may provide a crucial symbolic link between government and religion, thereby enlisting—at least in the eyes of impressionable youngsters—the powers of government to the support of the religious denomination operating the school,"\textsuperscript{246}

3. "the programs may have the effect of directly promoting religion by impermissibly providing a subsidy to the primary religious mission of the institutions affected"\textsuperscript{247}

The Court noted that some of the instructors in the after-school program who taught in the religious schools during the day would be "expected during the regular schoolday to inculcate their students with the tenets and beliefs of their particular religious faiths,"\textsuperscript{248} but would be expected to "put aside their religious convictions and engage in entirely secular Community Education instruction as soon as the schoolday is over."\textsuperscript{249} The Court was not confident that the teachers would be able to reverse gears completely and offer sectarian education during the regular school session and purely secular instruction in the after-school program. After all, as the Lemon Court had pointed out years before, it may not always be so easy to determine which teaching is sectarian and which secular.\textsuperscript{250} Justice O’Connor noted in her concurrence and dissent that the program at issue would advance the religious aims of the pervasively sectarian schools, especially because "the teachers are accustomed to bring religion to play in everything..."
they teach." 251 Because of the great likelihood that the state funds would be used to promote religion, the Court struck down the program as a violation of Establishment Clause guarantees.252

By the same token, the Court reached a similar result in Aguilar v. Felton,253 in which the Court considered the constitutionality of instructional services provided to parochial students on parochial school premises.254 The programs included remedial reading and mathematics, as well as English as a second language and some counseling services.255 They were carried out by public school employees who volunteered to work in the private schools.256 The volunteers were directed to avoid religious activities and not to have religious materials in the classroom.257 The classrooms were to be cleared of all religious symbols.258

Appellants sought to distinguish this program from the one at issue in Ball by the oversight system that had been devised to assure that there would be no religious content in these classes.259 However, the Court suggested that this monitoring system itself violated the Establishment Clause prohibition of excessive entanglement.260 In his concurrence, Justice Powell noted that the “government surveillance required to ensure that public funds are used for secular purposes inevitably present[s] a serious risk of excessive entanglement.”261 That risk was present “whether the subsidized teachers are religious school teachers, as in Lemon, or public school teachers teaching secular subjects to parochial school children at the parochial schools.”262 Whenever “there is too great a risk of government entanglement,”263 the program will run afoul of Establishment Clause guarantees.

251 Ball, 473 U.S. at 399 (O’Connor, J., concurring in the judgment in part and dissenting in part).
252 See id. at 397.
254 Id. at 406.
255 Id.
256 Id.
257 Id. at 407.
258 Id.
259 Id. at 409 (“Appellants attempt to distinguish this case on the ground that the City of New York, unlike the Grand Rapids Public School District, has adopted a system for monitoring the religious content of publicly funded Title I classes in the religious schools.”).
260 Id. (“But appellants' argument fails in any event, because the supervisory system established by the City of New York inevitably results in the excessive entanglement of church and state, an Establishment Clause concern distinct from that addressed by the effects doctrine.”).
261 Id. at 415 (Powell, J., concurring).
262 Id. at 416 (Powell, J., concurring).
263 Id. at 415 (Powell, J., concurring).
One might have inferred from Ball and Aguilar that the Court was limiting the force of Mueller to cases involving tax deduction programs. However, such an inference would have been inaccurate, as was made clear in the 1990s.

C. The Laundering Effect of Parental Choices

In part because of some of the seeds planted in previous cases and in part because of some unusual readings of previous cases, the Establishment Clause jurisprudence regarding aid to primary and secondary sectarian institutions changed radically by the year 2000. While members of the Court disagreed about which case represented a major break with the past jurisprudence, it was nonetheless clear that an important change had taken place.

That the Court had a new understanding of the limits on state support of sectarian education in the primary and secondary setting was suggested in Zobrest v. Catalina Foothills School District in which the Court examined whether it would be permissible for the state to provide a sign-language interpreter for a deaf student attending a parochial high school. The Zobrest Court foreshadowed that the limitations imposed by the Constitution on sectarian aid would thereafter be less robust when it offered a somewhat misleading summation of the past jurisprudence—the Court noted that it had “consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit,” and suggested that a contrary rule would require that churches not receive police or fire protection.

Yet, the correctness of the claim that general benefit programs to sectarian primary and secondary schools had been upheld against Establishment Clause challenges depended in large part on the type of benefits at issue. For example, Everson establishes that bus transportation can be provided, even if doing so would provide an attenuated benefit to sectarian institutions, and a series of cases including Allen, Meek and Wolman establishes that textbooks can be loaned to students even if doing so would provide an attenuated sectarian benefit. Yet, in all of these cases the state was funding something secular.

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265 Id. at 3.
266 Id. at 8.
267 Id.
important point was not merely that the aid itself, for example, money, was secular, but that the services or products purchased by the money were secular.\textsuperscript{268}

Consider what the Court deciding Allen, Meek, and Wolman would have said if a Legislature had decided that it would provide the money to purchase textbooks for both public and private school students as long as the former were approved by the responsible public authorities and the latter were approved by the responsible sectarian authorities. Were there no reference to religion and were there no requirement that the texts be secular, the Court would have struck down the program as a violation of the Establishment Clause. The “neutral” provision of textbooks could not have withstood scrutiny unless the state had explicitly referred to religion by requiring that the purchased books be secular—it was precisely because of the Allen Court’s confidence that only secular textbooks would be approved that the Court upheld the textbook loan program in the first place.

The Zobrest Court implied that any potential Establishment Clause difficulties resulting from the state’s facilitating religious school education were cured if they occurred “as a result of the private decision of individual parents.”\textsuperscript{269} After all, because there was “no financial incentive for parents to choose a sectarian school, an interpreter’s presence there cannot be attributed to state decisionmaking.”\textsuperscript{270} But up until this point, the constitutionality of state support of sectarian primary and secondary education had never been based on whether the funded object’s/person’s presence could be attributed to state decisionmaking.\textsuperscript{271}

Suppose, for example, that the choice of a sectarian textbook could in no way be attributed to the state because that textbook had already been chosen and would be used in certain grades whether or not the state offered to reimburse the purchase price of that text. Prior to Zobrest, the state’s having had no role in

\textsuperscript{268} See note 358 and accompanying text infra (discussing Mitchell plurality’s focus on whether the aid itself is secular rather than on whether, for example, it was being used to purchase something secular).

\textsuperscript{269} Zobrest, 509 U.S. at 10.

\textsuperscript{270} Id.

\textsuperscript{271} The Zobrest Court cited to Witters for support, see Zobrest, 509 U.S. at 10, but the Court had long distinguished between Establishment Clause requirements for primary and secondary sectarian schools on the one hand and sectarian colleges and universities on the other. See Ira C. Lupu, Government Messages and Government Money: Santa Fe, Mitchell v. Helms and the Arc of the Establishment Clause, 42 Win. & Mary L. Rev. 771, 796 (2001) (“One distinction that did matter greatly, however, was that between elementary and secondary schools, on the one hand, and higher education on the other.”). Further, the Witters Court had merely been pointing out that at issue before it was not “one of ‘the ingenious plans for channeling state aid to sectarian schools that periodically reach this Court.” See Witters, 474 U.S. at 488 (citing Nyquist, 413 U.S. at 785).
the choice of a religious textbook would not have been thought a reason that the state could help purchase such books without offending Establishment Clause guarantees.

The Zobrest Court suggested that disabled children rather than the parochial schools were the direct beneficiaries of the federal funds.\textsuperscript{272} But the same rationale would permit the state to buy sectarian texts for students, since it would be the students rather than the schools who would be the direct beneficiaries of the state’s largesse. So, too, that rationale would permit the state to fund sectarian auxiliary services like counseling, since the students in need rather than the schools would be the direct beneficiaries of that aid. Yet, both Meek and Wolman stood for the proposition that the state could not fund sectarian counseling services,\textsuperscript{273} and Allen, Meek and Wolman all emphasized the secular nature of the textbooks that were being provided by the state when upholding that aid.\textsuperscript{274}

Finally, the Court suggested that the interpreter should not be viewed as the analog of a teacher\textsuperscript{275} but, instead, more like a machine who would translate oral language into sign language.\textsuperscript{276} Because the parents chose to place their child in a “pervasively sectarian environment,”\textsuperscript{277} and because the sign-language interpreter “will neither add to nor subtract from that environment,”\textsuperscript{278} the Court held that the Establishment Clause does not bar the provision of that assistance.\textsuperscript{279}

Certainly, there was precedent for the suggestion that services could be funded by the state where there was no danger that the individuals providing the relevant service would intentionally or inadvertently alter that service by including sectarian instruction. Thus, the provision of diagnostic services within sectarian institutions was upheld in Wolman, precisely because the Court believed that these services would not be used to impart sectarian instruction. But in Wolman the Court was approving the provision of services where there was no risk of adulteration precisely because of the secular nature of the unadulterated service. The point was not simply that the funded service would not add to or subtract from the

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\textsuperscript{272} Zobrest, 509 U.S. at 12 (“Disabled children, not sectarian schools, are the primary beneficiaries”).
\textsuperscript{273} See notes 193-94, 204-06 and accompanying text supra.
\textsuperscript{274} See notes 84-91, 166-67, 197 and accompanying text supra.
\textsuperscript{275} Zobrest, 509 U.S. at 13 (“Second, the task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor.”).
\textsuperscript{276} Id. (“Nothing in this record suggests that a sign-language interpreter would do more than accurately interpret whatever material is presented to the class as a whole. In fact, ethical guidelines require interpreters to ‘transmit everything that is said in exactly the same way it was intended.’”).
\textsuperscript{277} Id.
\textsuperscript{278} Id.
\textsuperscript{279} Id.
\end{flushright}
environment; on the contrary, the point was that whatever was added to the environment via the expenditure of state funds would be secular. As Justice Blackmun suggested in his dissent, the Court had never before suggested that the Establishment Clause permits the state to participate in religious indoctrination in a primary or secondary schools setting. He noted that the sign-language interpreter employed by the state would communicate the sectarian views in religion class or, perhaps, would provide assistance during religious services, and concluded that while there are relatively few absolute prohibitions in the Court’s Establishment Clause jurisprudence, the Clause “does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith.”

Of course, it is not as if the government was telling the school or the sign language interpreter what to say. Justice Blackmun’s criticism might be viewed as missing the mark because the sign-language interpreter would do no “more than accurately interpret whatever material is presented to the class as a whole,” and so might be thought analogous to a machine’s facilitating communication in some way. Suppose, for example, that James Zobrest had not been deaf but instead hard of hearing, and the state had merely provided a hearing aid. That would not offend constitutional guarantees, notwithstanding that the state was providing the means by which the individual might be indoctrinated into the beliefs of a particular faith. Indeed, the provision of a hearing aid would presumably be characterized as promoting health and safety, and thus compatible with Everson.
Admittedly, the hearing aid analogy is not entirely apt, since the hearing aid would presumably be used at all times and thus might more plausibly be argued to be related to health and safety, whereas the interpreter would only be used in class and thus would seem more closely associated with the instruction.\textsuperscript{287} However, if the function of the sign language interpreter is to assist in instruction rather than promote safety and health, the constitutionality of the program would seem to be in doubt--\textit{Meek} had suggested that even secular materials and equipment could not be provided to facilitate education in sectarian schools.\textsuperscript{288} Indeed, respondent had argued that just as \textit{Meek} had made clear that the Constitution precluded the state from loaning equipment like a tape recorder to sectarian schools, the Constitution also precluded the state from supplying an interpreter to a sectarian school.\textsuperscript{289} However, the Court rejected the analogy to \textit{Meek} because \textit{Meek} involved aid given directly to the school.\textsuperscript{290}

The \textit{Zobrest} Court’s point that \textit{Meek} was distinguishable because it precluded direct aid, although accurate, was not dispositive, because \textit{Wolman} had precluded even indirect aid. Yet, arguably, \textit{Wolman}’s invalidation of the indirect aid was based on the Court’s view that Ohio was trying to do an end-run around \textit{Meek},\textsuperscript{291} and there was no history of an end-run around constitutional requirements in \textit{Zobrest}. If the sign language interpreter was viewed as more analogous to a mechanical aid than to a teacher or counselor,\textsuperscript{292} and the benefit was viewed as being given directly to the student, then the \textit{Zobrest} decision might seem compatible with the existing jurisprudence.

Yet, there was at least one additional difficulty that the \textit{Zobrest} Court did not adequately address. The interpreter was a person rather than a machine. An interpreter performing her duties would seem more likely to be viewed as an agent of the state engaging in religious instruction than would a machine amplifying sound.\textsuperscript{293} Nonetheless, had the \textit{Zobrest} Court somehow undermined the contention that the

\textsuperscript{287} See \textit{Zobrest}, 509 U.S. at 3 (discussing petitioner’s request for a sign language interpreter to accompany him to his classes at a Roman Catholic high school).
\textsuperscript{288} See notes 176-77 and accompanying text \textit{supra} (discussing \textit{Meek}).
\textsuperscript{289} See \textit{Zobrest}, 509 U.S. at 11.
\textsuperscript{290} See \textit{id.} at 12.
\textsuperscript{291} See notes 176-77 and accompanying text \textit{supra}.
\textsuperscript{292} \textit{Zobrest}, 509 U.S. at 13.
\textsuperscript{293} Justice Blackmun suggested that it was significant for Establishment Clause purposes that the state was paying a human being to transmit religious doctrine. See \textit{id.} at 23 (Blackmun, J., dissenting) (“Moreover, this distinction between the provision of funds and the provision of a human being is not merely one of form. It goes to the heart of the principles animating the Establishment Clause.”).
provision of a sign language interpreter created a symbolic link between government and religion, its contention that the decision was compatible with the existing jurisprudence would have been more plausible.

Regrettably, the Zobrest Court simply chose not to address this possible symbolic link, even after mentioning that the Court of Appeals had relied in part on this symbolic union of government and religion to strike the provision of this aid. Perhaps the Court could have undermined this claim about symbolism by emphasizing that other state-paid professionals could work on-site in a sectarian institution without creating a symbolic link, although Justice Blackmun argued to the contrary in his dissent.

Rather than offer a careful analysis of the entire line of cases and explain how the provision of sign language interpreters fit within the existing jurisprudence, the Zobrest Court chose to rely heavily on two cases in particular which involved government programs aiding education, Mueller and Witters v. Washington Dept. of Services for the Blind. While Witters seemed on point because it also involved aid to the handicapped, the Court seemed to forget that the case was distinguishable because that aid was in the higher education context, and the Court had already made clear that in Establishment Clause cases aid to primary and secondary sectarian institutions must be distinguished from aid to sectarian colleges and universities. Further, both Ball and Aguilar had been decided after Mueller, so it was somewhat difficult

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294 See note 246 and accompanying text supra (discussing reasons that the Ball Court struck down the program at issue).
295 See Zobrest, 509 U.S. at 5.
296 See id. at 13 n.10 (noting that public employees could provide health services on-site without violating constitutional guarantees and thus, presumably, not creating this forbidden linkage)
297 See id. at 23 (Blackmun J., dissenting)
298 See id. at 8-9 (discussing “two cases dealing specifically with government programs offering general educational assistance”).
300 Witters involved whether the state of Washington was precluded by the Establishment Clause from providing assistance to a visually handicapped individual attending a religious institution who was studying to be a pastor, missionary or youth director. See id. at 483.
301 See note 242 supra.
for the Zobrest Court to suggest with any plausibility that Mueller had relaxed the limitations on the state’s promoting sectarian education.\(^{302}\)

Without providing a plausible explanation of why it might be thought that Mueller had had this effect, the Zobrest Court nonetheless suggested that its decision was compatible with the existing jurisprudence, implying that Meek and Ball, for example, were distinguishable.\(^{303}\) Justice Blackmun disagreed, suggesting in his dissent that the Court was straying “from the course set by nearly five decades of Establishment Clause jurisprudence.”\(^{304}\)

Of course, even were Justice Blackmun correct that the Court was changing course, a separate question would involve how much or what kind of a change. For example, it might have been thought that Zobrest was merely permitting the state to fund neutral services analogous to the provision of hearing aids or glasses. Admittedly, the provision of such services would facilitate religious indoctrination, although perhaps no more so than the provision of free bus transportation.\(^{305}\) Subsequent cases suggest, however, that some members of the Court viewed Zobrest as marking a sea change in the relevant jurisprudence.

D. Recognition of the Allegedly Implicit Overruling

The Court’s sectarian aid jurisprudence from Mueller to Zobrest might be read in several ways. For example, Mueller might be read as modifying Nyquist but as not having had significant implications for the kinds of issues raised in Ball and Aguilar. Zobrest might be read as either compatible with or as signaling an important break from Ball. In Agostini v. Felton,\(^{306}\) the Court made clear that its understanding of the relevant jurisprudence had undergone a radical transformation.

In Agostini, the Court was asked to reconsider its holding in Aguilar in light of the intervening jurisprudence.\(^{307}\) The Court summed up its reasoning in Ball and Aguilar as follows:

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302 The Zobrest Court wrote, “Viewed against the backdrop of Mueller and Witters, then, the Court of Appeals erred in its decision,” see Zobrest, 509 U.S. at 10, as if the Court of Appeals had made an obvious mistake.
303 See id. at 12
304 Id. at 24 (Blackmun, dissenting).
305 See notes 53–54 and accompanying text supra (discussing Justice Rutledge’s claim that the state was playing an important role in promoting sectarian education by providing free bus transportation).
307 Id. at 208–09 (“Petitioners maintain that Aguilar cannot be squared with our intervening Establishment Clause jurisprudence and ask that we explicitly recognize what our more recent cases already dictate: Aguilar is no longer good law”).
(i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work;

(ii) the presence of public employees on private school premises creates a symbolic union between church and state; and

(iii) 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.\(^{308}\)

The Court noted in addition that \textit{Aguilar} had assumed that “New York City's Title I program necessitated an excessive government entanglement with religion because public employees who teach on the premises of religious schools must be closely monitored to ensure that they do not inculcate religion.”\(^{309}\)

The Court explained that it had “abandoned the presumption erected in \textit{Meek} and \textit{Ball} that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion.”\(^{310}\) Yet, the Court had already rejected that the placement of public employees on parochial school grounds inevitably has impermissible effects even before \textit{Ball} had been decided, having decided in \textit{Wolman} that services which were not amenable to being used for sectarian indoctrination could be performed on-site.\(^{311}\) Further, the \textit{Agostini} Court’s noting that in \textit{Zobrest} it had “refused to presume that a publicly employed interpreter would be pressured by the pervasively sectarian surroundings to inculcate religion by ‘add[ing] to [or] subtract[ing] from’ the lectures translated”\(^{312}\) was accurate but misleading. Part of the reason that the publicly employed interpreter in \textit{Zobrest} was unlikely to modify the message by inculcating religion was that she was working within a pervasively sectarian setting and thus would be translating material which already had a religious message.\(^{313}\) Another part of the reason involved the very function performed

\(^{308}\) \textit{Id.} at 222.
\(^{309}\) \textit{Id.}
\(^{310}\) \textit{Id.} at 223.
\(^{311}\) \textit{Id.} at 18 n.2
\(^{312}\) \textit{Agostini}, 521 U.S. at 223 (citing \textit{Zobrest}, 509 U.S. at 13).
\(^{313}\) \textit{Zobrest}, 509 U.S. at 18 n.2

The Faculty Employment Agreement provides: “‘Religious programs are of primary importance in Catholic educational institutions. They are not separate from the academic and extracurricular programs, but are instead interwoven with them and each is believed to promote the other.’” \textit{App.} 90-91.
by the interpreter—the Court had suggested that interpreters are qualitatively different from teachers and can be presumed to do no more than accurately translate the material.

The Agostini Court implied that just as it had assumed in Zobrest that an interpreter would act in good faith and translate accurately, the Court should assume that the instructors and counselors in the program at issue in Agostini also would act in good faith. But this analysis rejected both the reasoning of Zobrest and what the Court had been suggesting since Lemon. Zobrest was predicated at least in part on the difference between interpreters and teachers—“the task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor.” Further, the Court had never suggested that teachers, for example, would act in bad faith and try to incorporate religious messages whenever they could. Rather, the fear had been that sectarian indoctrination might occur inadvertently. But if the fear is that this indoctrination would occur inadvertently, then even individuals attempting to teach the appropriate subject matter and act professionally might nonetheless perform (what at least others would call) religious instruction. The Agostini Court is doing exactly what the Meek Court chided the district court below for having done, namely, “relying entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained.”

In what might most charitably be described as a cursory discussion in great need of further analysis and explanation, the Agostini Court reasoned, “Because the only government aid in Zobrest was the interpreter, who was herself not inculcating any religious messages, no government indoctrination took place and we were able to conclude that ‘the provision of such assistance [was] not barred by the Establishment Clause.’” Yet, the question was why the Court believed that the interpreter herself was not

314 Agostini, 521 U.S. at 223 (citing Zobrest, 509 U.S. at 12) (noting the Zobrest Court’s assumption that “the interpreter would dutifully discharge her responsibilities as a full-time public employee and comply with the ethical guidelines of her profession by accurately translating what was said”).
315 See id. at 211.
316 Id. at 226 (“[T]here is no reason to presume that, simply because she enters a parochial school classroom, a full-time public employee such as a Title I teacher will depart from her assigned duties and instructions and embark on religious indoctrination, any more than there was a reason in Zobrest to think an interpreter would inculcate religion by altering her translation of classroom lectures.”).
317 Zobrest, 509 U.S. at 13.
318 See note 136 and accompanying text supra (discussing how individuals might differ with respect to what might constitute religious instruction).
319 Meek, 421 U.S. at 369.
320 Agostini, 521 U.S. at 225 (citing Zobrest, 509 U.S. at 13).
inculcating any religious message. Certainly, she was the individual who was communicating the message and, further, there would have been no inculcation of any religious message if she had not performed her job. To the extent that she was viewed as a mere “mouthpiece”\(^{321}\) and thus could not be understood to be inculcating any message, she would be distinguishable in kind from a teacher who could not be viewed as behaving so mechanically.\(^{322}\) If there were some other way to understand why the interpreter would not accurately be thought to be inculcating any religious message, the Court regrettably failed to provide that explanation.

In his Agostini dissent, Justice Souter emphasized the difference between the functions performed by the interpreter and teacher.\(^{323}\) suggesting that the interpreter was more analogous to a hearing aid than a teacher.\(^{324}\) On this understanding of sign-language interpretation, the service provided by the interpreter “could not be understood as an opportunity to inject religious content in what was supposed to be secular instruction,”\(^{325}\) and Zobrest was compatible with Meek and Ball.\(^{326}\) However, the Court suggested in response that if there were no opportunity to inject religious content, there would have been no reason for the Court to have consulted the record to for reported instances of inaccurate translation.\(^{327}\)

Yet, the exchange between the majority and dissent in Agostini did little to clarify the relevant issues. Suppose, for example, that a hearing aid had been provided by the state. One might still want to make sure that the hearing aid was performing properly and so might see if there had been complaints about the aid’s operation and performance. That one had checked to see if the aid was working properly would not establish that there had been an opportunity for inaccurate translation, although it would suggest that there had been a possibility of inaccurate translation.

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\(^{321}\) Id. at 226

\(^{322}\) The Mitchell plurality suggested that the interpreter conveys but does not inculcate, but did not explain why that was so. See Mitchell v. Helms, 530 U.S. 793, 823 (2000) (“a government interpreter does not herself inculcate a religious message—even when she is conveying one”).

\(^{323}\) Agostini, 521 U.S. at 248 (Souter, J., dissenting) (“In Zobrest, the Court did indeed recognize that the Establishment Clause lays down no absolute bar to placing public employees in a sectarian school, 509 U.S. at 13, and n. 10, but the rejection of such a per se rule was hinged expressly on the nature of the employee's job, sign-language interpretation (or signing) and the circumscribed role of the signer.”).

\(^{324}\) Id. at 248 (Souter, J., dissenting).

\(^{325}\) Id. at 248-49 (Souter, J., dissenting).

\(^{326}\) Id. at 249 (Souter, J., dissenting) (“Zobrest accordingly holds only that in these limited circumstances where a public employee simply translates for one student the material presented to the class for the benefit of all students, the employee's presence in the sectarian school does not violate the Establishment Clause.” (citing Zobrest, 509 U.S. at 13-14).

\(^{327}\) Id. at 225 (citing Zobrest, 509 U.S. at 13).
We would not describe the hearing aid as having had an opportunity to perform incorrectly because we do not think of hearing aids as deciding to act improperly. However, human beings might choose to inject religious content at inappropriate times and, in this sense, the Court was correct to suggest that interpreters, like teachers and counselors, might have similar opportunities to violate their duty. 328 Further, the Agostini Court was correct that there was no reason to assume that only sign language interpreters would be responsible or that only interpreters would not consciously try to undermine their official role by injecting religion into secular instruction. 329 Thus, the Agostini Court was correct to suggest that there was no reason to think that only interpreters would refrain from surreptitiously smuggling in sectarian content. The only difficulty with the Court’s having made these points is that they misrepresent the danger that had been discussed since Lemon, and thus involved arguments which were beside the point.

The Agostini Court was addressing a danger that had never been taken seriously with respect to either signers or teachers, namely, that they would consciously try to take advantage of opportunities to smuggle in religious content. 330 That this was not the worry is illustrated by Wolman, where the Court distinguished between the functions performed by diagnosticians and counselors, suggesting that the diagnostics could be performed on-site because there was relatively little chance that they would result in attempts at religious indoctrination, whereas the counseling could only be performed off-site because of

328 Id. (suggesting that the “signer in Zobrest had the same opportunity to inculcate religion in the performance of her duties as do Title I employees”).
329 Id. (“there is no genuine basis upon which to confine Zobrest ’s underlying rationale—that public employees will not be presumed to inculcate religion-to sign-language interpreters”).
330 See Wolman, 433 U.S. at 247 (“The danger existed there, not because the public employee was likely deliberately to subvert his task to the service of religion, but rather because the pressures of the environment might alter his behavior from its normal course.”) (referring to Meek, 421 U.S. at 371; Lemon, 403 U.S. at 618-19).
331 Id. at 244

The reason for considering diagnostic services to be different from teaching or counseling is readily apparent. First, diagnostic services, unlike teaching or counseling, have little or no educational content and are not closely associated with the educational mission of the nonpublic school. Accordingly, any pressure on the public diagnostician to allow the intrusion of sectarian views is greatly reduced. Second, the diagnostician has only limited contact with the child, and that contact involves chiefly the use of objective and professional testing methods to detect students in need of treatment. The nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student.
a greater chance of indoctrination. If the concern had been that public personnel might seize any and all opportunities to promote sectarian objectives, then the Court would presumably have worried about those providing health services to children might use those opportunities to inculcate religious doctrine. But the Wolman Court made clear that it was not worried that those providing health services would use time to give religious instruction, instead worrying about programs which were “susceptible to the intrusion of sectarian overtones.” Thus, the Wolman Court was not worried about individuals intentionally giving sectarian instruction when they should not but, instead, that such instruction might occur as a result of more subtle influences.

The focus of the Ball Court had been on teachers in particular who might inadvertently inculcate religious beliefs or tenets. Regrettably, the Agostini Court described Ball as having had a much broader focus and as standing for the proposition that “any public employee who works on the premises of a religious school is presumed to inculcate religion in her work.” But the Court in cases prior to Agostini had tried not to paint with a such broad brush, instead distinguishing among types of public employees working within sectarian institutions and suggesting that certain occupations such as teaching and counseling involve a much greater risk of inadvertent promotion of sectarian objectives than do others. The Agostini Court simply ran roughshod over the Court’s previous attempts to offer a more nuanced discussion in what is admittedly a difficult area requiring great care.

In what might be viewed as a surprising admission, the Court noted that “even the Zobrest dissenters acknowledged the shift Zobrest effected in our Establishment Clause law when they criticized the majority for ‘stray[ing] ... from the course set by nearly five decades of Establishment Clause

332 Id. at 247 (“We recognize that, unlike the diagnostican, the therapist may establish a relationship with the pupil in which there might be opportunities to transmit ideological views.”).
333 See id. at 244 (“it is hard to believe that religious controversy would be generated by the offer of uniform health services for all schoolchildren”).
334 Id.
335 Ball, 473 U.S. at 385.
336 Agostini, 521 U.S. at 222 (emphasis added).
337 See notes 198-203 and accompanying text supra (discussing Wolman’s distinguishing for constitutional purposes among different types of occupations ).
338 Cf. Sedler, supra note 5, at 189 (“In recent years, a Court majority has shown itself disposed toward rejecting ... fine distinctions.”).
339 County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 630 (1989) (O’Connor, J., concurring in part and concurring in the judgment) (“We cannot avoid the obligation to draw lines, often close and difficult lines, in deciding Establishment Clause cases.”).
Here, the Court implied that everyone on the Court understood that Zobrest was radically transforming the jurisprudence—the Agostini Court suggested that “it was Zobrest—and not this litigation—that created ‘fresh law,’” . . . [and the Court’s refusal] refusal to limit Zobrest to its facts despite its rationale does not, in our view, amount to a ‘misreading’ of precedent.” Yet, this is simply breathtaking. The Agostini Court looks at what the Zobrest Court had suggested was compatible with the existing jurisprudence and turns it into a watershed, allegedly understood to be so by all members of the Court at the time Zobrest was decided.

The Agostini Court modified the existing jurisprudence in yet another respect, under cutting the degree to which the state would have to entangle itself to assure that funds would not be used to promote sectarian indoctrination. The Court noted that “the factors we use to assess whether an entanglement is ‘excessive’ are similar to the factors we use to examine ‘effect,’” and thereby made the three-part Lemon Test into a two-part test, at least for purposes of determining whether aid to sectarian schools violated the Establishment Clause. The Court further noted that because it no longer presumed that state employees working in a sectarian environment would be at risk of inculcating religion, believing instead that “properly instructed public employees [will not] . . . fail to discharge their duties faithfully,” the state would not be required to engage in pervasive monitoring of publicly funded teachers to assure that Establishment Clause guarantees were being observed. Given these changes in the jurisprudence, the

jurisprudence.”

340 Agostini, 521 U.S. at 225 (citing Zobrest, 509 U.S. at 24 (Blackmun, J., dissenting)).
341 (citing id. at 249 (Souter, J., dissenting) (“The Court may disagree with Ball’s assertion that a publicly employed teacher working in a sectarian school is apt to reinforce the pervasive inculcation of religious beliefs, but its disagreement is fresh law.”)).
342 Id. at 225.
343 See note 303 and accompanying text supra.
344 Cf. Mitchell, 530 U.S. at 807 (noting that the Agostini Court had recognized that the Court had “pared somewhat the factors that could justify a finding of excessive entanglement.”) (citing Agostini, 521 U.S. at 233-34).
345 Agostini, 521 U.S. at 232.
346 See Mitchell, 530 U.S. at 808 “Whereas in Lemon we had considered whether a statute (1) has a secular purpose, (2) has a primary effect of advancing or inhibiting religion, or (3) creates an excessive entanglement between government and religion, see [Lemon], 403 U.S. at 612-613, in Agostini we modified Lemon for purposes of evaluating aid to schools and examined only the first and second factors.
347 Agostini, 521 U.S. at 234 (the Court would “no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment”).
348 Id.
349 Id.
Court could no longer say that the program at issue violated Establishment Clause guarantees,\(^{350}\) even though that very program had been held unconstitutional in *Aguilar*.\(^{351}\)

By modifying when state funds might be presumed to be at risk of being used to promote sectarian objectives and modifying how the entanglement prong of *Lemon* would be analyzed, the *Agostini* Court created a much more forgiving Establishment Clause. That said, however, members of the *Agostini* Court did not cast doubt on the impermissibility of the state’s promoting sectarian education. Regrettably, members of the Court did just that in *Mitchell v. Helms*.\(^{352}\)

### E. Further Assaults on the Jurisprudence

In *Mitchell*, the Court examined a federal program channeling monies to public and private elementary and secondary schools to provide services, materials, and equipment\(^{353}\) that were “‘secular, neutral, and nonideological.’”\(^{354}\) The plurality interpreted *Agostini* to stand for the proposition that the Establishment Clause prohibits the state from extending aid to sectarian schools only if the religious indoctrination that occurs could reasonably be attributed to the state.\(^{355}\) To distinguish between indoctrination that might reasonably attributed to the state and indoctrination that could not, the plurality suggested that neutrality was the key consideration, claiming that the Court had consistently upheld aid that was offered to a broad range of people without regard to religion.\(^{356}\) The *Mitchell* plurality reasoned that if “the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.”\(^{357}\) This reasoning suggests that the state could offer to pay the costs of textbooks in public and private schools, *without regard to content*, since no one would conclude that the sectarian texts chosen by the authorities in the sectarian schools had done so at the behest of the government.

The *Mitchell* plurality’s Establishment Clause interpretation is incredibly permissive, suggesting that as long as the Government is (1) providing something that itself is secular such as money rather than

\(^{350}\) *Id.* at 240.

\(^{351}\) *See id.* at 209 ("*Aguilar* is no longer good law.").

\(^{352}\) 530 U.S. 793 (2000).

\(^{353}\) *Id.* at 803 (The materials and equipment at issue included “library books, computers, and computer software, and also slide and movie projectors, overhead projectors, television sets, tape recorders, VCR’s, projection screens, laboratory equipment, maps, globes, filmstrips, slides, and cassette recordings.”).

\(^{354}\) *Id.* at 802 (citing §7372(a)(1)).

\(^{355}\) *Id.* at 809.

\(^{356}\) *Id.*

\(^{357}\) *Id.*
something that has sectarian content such as a religious book, and (2) eligibility for the state aid violates no constitutional guarantees, use of that aid to promote sectarian objectives will not involve government indoctrination and thus will not be of constitutional concern. Lest the implications of this position be missed, the plurality made clear that the use of state aid to promote sectarian objectives could not be equated with religious indoctrination by the state.

According to the Mitchell plurality, the relevant Establishment Clause question is not about whether state funds are being used to promote sectarian objectives, but only about whether the aid itself has sectarian content. Needless to say, this is a huge change from what even Agostini would allow. Indeed, Justice O’Connor noted in her concurrence in the judgment that the plurality’s “approval of actual diversion of government aid to religious indoctrination is in tension with . . . [the Court’s] precedents,” whereas Justice Souter put the matter more forcefully in his dissent—“The plurality position breaks fundamentally with Establishment Clause principle, and with the methodology painstakingly worked out in support of it.”

Even where state aid would qualify as neutral according to the Mitchell plurality and, for example, went directly to both secular and sectarian institutions, Justice O’Connor suggested that the religious indoctrination resulting from the aid might nonetheless be attributed to the government. She writes, “Because the religious indoctrination is supported by government assistance, the reasonable observer would naturally perceive the aid program as government support for the advancement of religion.” She contrasted this with what an observer would think if the government monies were going to the institution as a result of the private choice of the individual, suggesting that no reasonable individual

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358 Id. at 820 (“[s]o long as the governmental aid is not itself ‘unsuitable for use in the public schools because of religious content’”) (citing Allen, 392 U.S. at 245).
359 Id. (“eligibility for aid . . . [must be] determined in a constitutionally permissible manner”).
360 Id. (“any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern”).
361 Id. at 821(rejecting that “the use of governmental aid to further religious indoctrination was synonymous with religious indoctrination by the government or that such use of aid created any improper incentives”).
362 Id.
363 Id. at 822.
364 Lupu, supra note 271, at 811 (“A plurality opinion, authored by Justice Thomas and joined by the Chief Justice, Justice Kennedy, and Justice Scalia, offered a bold and stunning repudiation of much of the prior law on the subject of aid to sectarian schools.”).
365 Mitchell, 530 U.S. at 837-38 (O’Connor J., concurring in the judgment)
366 Id. at 869 (Souter, J., dissenting)
367 Id. at 843 (O’Connor J., concurring in the judgment).
would infer that the State was endorsing a religious practice if the state aid went to a sectarian school as a result of independent decisions by private individuals.\textsuperscript{368}

Several points might be made about the exchange between the Mitchell plurality and concurrence. First, the Mitchell plurality suggests that no reasonable person would infer state endorsement of religion under the facts of the case, notwithstanding that two members of the Court inferred endorsement under those very facts.\textsuperscript{369} Either at least two members of the Court are not reasonable\textsuperscript{370} or the proposed standard is simply unworkable. Add to this that the plurality’s position “would break with the law”\textsuperscript{371} and “would be the end of the principle of no aid to the schools' religious mission”\textsuperscript{372} and it should be clear that the test proposed by the Mitchell plurality cannot be thought to capture the previous Establishment Clause jurisprudence with respect to state aid to sectarian primary and secondary schools.

Second, Justice O’Connor is no longer on the Court. It is simply unclear whether Justice Alito will agree with the plurality about what no reasonable person would think, views to the contrary expressed by members of that very Court notwithstanding.

Third, the facts of Mitchell can be read in very different ways. Both the plurality and the dissent believed that there had been a significant diversion of funds to promote sectarian education,\textsuperscript{373} while the concurrence believed the diversion de minimis.\textsuperscript{374} In future cases, it is quite likely that at least some on the Court will cite Mitchell as upholding direct state aid to sectarian schools that a majority on the Court had

\textsuperscript{368}Id. at 843 (O’Connor J., concurring in the judgment) (citing Witters, 474 U.S. at 493) (O’Connor, J., concurring in part and concurring in judgment).
\textsuperscript{369}See id. (O’Connor J., concurring in the judgment). Justice Breyer signed onto the concurrence. See id. at 836.
\textsuperscript{370}The dissent did not claim that the funding violated the endorsement test but instead because it violated the basic Establishment Clause principle that “there may be no public aid to religion or support for the religious mission of any institution.” Id. at 884 (Souter, J., dissenting).
\textsuperscript{371}See id. at 911 (Souter, J., dissenting).
\textsuperscript{372}See id. (Souter, J., dissenting).
\textsuperscript{373}Id. at 833 (“we agree with the dissent that there is evidence of actual diversion and that, were the safeguards anything other than anemic, there would almost certainly be more such evidence”); id. at 903 (Souter, J., dissenting)

The type of aid, the structure of the program, and the lack of effective safeguards clearly demonstrate the divertibility of the aid. While little is known about its use, owing to the anemic enforcement system in the parish, even the thin record before us reveals that actual diversion occurred.

\textsuperscript{374}Id. at 864 (O’Connor J., concurring in the judgment) (“The evidence proffered by respondents, and relied on by the plurality and Justice Souter, concerning actual diversion of Chapter 2 aid in Jefferson Parish is de minimis.”)
recognized was being used to promote sectarian education, although it is of course unclear whether this
account of Mitchell will be offered in a majority, concurring, or dissenting opinion.

F. When Is Sectarian Support Reasonably Attributed to the State?

That the Mitchell plurality and concurrence disagreed about whether state dollars given directly to
sectarian schools which were used to support religious teaching could reasonably be described as state
support of religion did not convince these members of the Court that the standard itself was unsuitable in
this context nor even that their intuitions about what reasonable people might say needed some fine-tuning.
Instead the Court in Zelman v. Simmons-Harris adopted the position articulated by the Mitchell plurality
and concurrence, namely, that state aid channeled through private individuals which was used to promote
sectarian objectives could not reasonably be attributed to the state.

Regrettably, the Court again used the reasonable person standard to uphold a program which at
least one (unreasonable?) member of the Court understood to involve government support of religion. In
Zelman, the Court considered an Establishment Clause challenge to the Ohio voucher program which
offered financial assistance to parents of children in the Cleveland public schools. Most of the children
participating in the program went to religiously affiliated schools. The Court upheld the program,
distinguishing between direct aid to religious schools on the one hand and programs of “true private

376 See notes 357, 368 and accompanying text supra (discussing the conditions under which support could
not reasonably be attributed to the state).
377 See Zelman, 536 U.S. at 652.
378 Id. at 655 (“no reasonable observer would think a neutral program of private choice, where state aid
reaches religious schools solely as a result of the numerous independent decisions of private individuals,
carries with it the imprimatur of government endorsement.”).
379 See id. at 685 (Stevens, J., dissenting) (suggesting that what was at issue was “the government’s choice
to pay for religious indoctrination”).
380 Id. at 648.
381 Id. at 644-45
Ohio enacted, among other initiatives, its Pilot Project Scholarship Program, Ohio
program provides financial assistance to families in any Ohio school district that is or has
been “under federal court order requiring supervision and operational management of the
district by the state superintendent.” § 3313.975(A). Cleveland is the only Ohio school
district to fall within that category.
382 Id. at 647 (“More than 3,700 students participated in the scholarship program, most of whom (96%)
enrolled in religiously affiliated schools.”).
choice”\(^{383}\) on the other, where the government funds reach private schools as a result of independent choices.

One of the issues dividing the Court was whether in fact the Ohio program provided true private choices. Justice O’Connor was confident that a true choice was offered,\(^ {384}\) because the non-religious schools were “adequate,”\(^ {385}\) whereas Justice Souter suggested that the fact that “almost two out of three families using vouchers to send their children to religious schools did not embrace the religion of those schools”\(^ {386}\) indicated that there was a lack of true choice.

Reasonable people might disagree about whether the Cleveland program gave parents enough choices so that it could not be struck down on that account. Given the jurisprudence since Everson, however, it is at the very least surprising that the constitutionality of the program would turn on whether the choices presented were adequate. As Justice Breyer pointed out in his dissent, at issue was the financing of “a core function of the church: the teaching of religious truths to young children.”\(^ {387}\) Even Justice O’Connor noted that this case was unlike prior cases involving indirect financing of sectarian schools “because a significant portion of the funds appropriated for the voucher program reach religious schools without restrictions on the use of these funds.”\(^ {388}\) The Zelman Court had moved very far from the jurisprudence of Everson, Allen, and Nyquist, which had suggested that it was permissible for the State to give aid to parents whose children were attending private schools only if the aid would promote secular rather than sectarian objectives. Regardless of whether one accepts Justice Souter’s assessment that Zelman represents all that has gone wrong in the development of Establishment Clause jurisprudence, since it is not only incompatible with Everson\(^ {389}\) but betrays “every objective underlying the prohibition of religious establishment,”\(^ {390}\) there is some difficulty in understanding how Zelman can be thought to be part of the same jurisprudence which includes Allen and Nyquist.

\(^{383}\) Id. at 653.
\(^{384}\) Id. at 670 (O’Connor, J., concurring) (“There is little question in my mind that the Cleveland voucher program is neutral as between religious schools and nonreligious schools.”).
\(^{385}\) Id. (O’Connor, J., concurring).
\(^{386}\) Id. at 704 (Souter, J., dissenting).
\(^{387}\) Id. at 726-27 (Breyer, J., dissenting).
\(^{388}\) Id. at 663 (O’Connor J., concurring).
\(^{389}\) Id. at 688 (Souter, J., dissenting) (“How can a Court consistently leave Everson on the books and approve the Ohio vouchers? The answer is that it cannot.”).
\(^{390}\) Id. at 711 (Souter, J., dissenting).
IV. Conclusion

While Everson is sometimes characterized as being stridently separationist, that neither captures the majority opinion nor even the dissent. Rather, the Everson Court was trying to strike a balance so that the state would neither be favoring religion nor antagonistic towards it. The Allen Court likely modified the Everson standard from whether the aid at issue promoted health/safety rather than education to whether the aid promoted secular rather than sectarian education. For the next few decades, the Court would uphold or strike programs based at least in part upon whether there seemed to be too great of a risk of promoting sectarian education. During this period, the Court articulated special concerns about the dangers posed by direct aid to sectarian schools.

In the 1980s, the Court reversed course. That, in itself, is unremarkable. What is more remarkable is that the Court consistently seemed to misrepresent past opinions, for example, suggesting in Mueller that channeling monies through individuals would immunize state funding rather than simply remove a source of additional constitutional concern. What is still more remarkable is that the Agostini Court implied that the Zobrest majority had knowingly created a sea-change in the jurisprudence while expressly claiming to be following it.

The pattern of misrepresentation continued when, for example, the Court claimed that the jurisprudence has long held that benefits conferred without reference to religion are not readily subject to Establishment Clause challenge when until fairly recently that was true only where the conferred benefits were secular. The requirement that the benefits be secular was not only that the aid itself be secular but also that state funds could only be used to purchase products or services that were themselves secular. Even Zobrest stands for this proposition if the sign language interpreter is likened to a (secular) hearing aid.

Mitchell and Zelman offer a radically different way to understand Establishment Clause guarantees. Reasonable people might disagree about whether that very forgiving version of the Establishment Clause better captures what the Clause should do. Yet, it is difficult to believe that members of the Court upholding the programs in those decisions took the past jurisprudence very seriously, even when claiming to do so.

Figuring out the appropriate test to determine whether Establishment Clause guarantees have been violated is a daunting task even for those who are either following the existing jurisprudence or, when
necessary, overruling it. However, the task is simply impossible when members of the Court consistently misrepresent what the Court has already done, whether intentionally or inadvertently. While the Court’s having severely weakened the Establishment Clause’s protections will be welcome to some, the Court’s having done so in a way which undermines the Court’s honesty, credibility, and integrity should be welcome to no one. The religious and the areligious alike are ill-served by the Court’s recent analyses of the past jurisprudence which obfuscates and misrepresents rather than clarifies and persuades, and one can only hope that the Court will reverse course and try to address what admittedly are vexing questions in a way that is honest and in the best of faith. The country deserves that and can afford no less.