C. Financial Aid to Parochial Schools and for Church-Affiliated Education

1. Elementary and Secondary Parochial Schools

LEMON v. KURTZMAN

403 U.S. 602 (1971)

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

These two appeals raise questions as to Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools. Both statutes are challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment.

Pennsylvania has adopted a statutory program that provides financial support to nonpublic elementary and secondary schools by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. Rhode Island has adopted a statute under which the State pays directly to teachers in nonpublic elementary schools a supplement of 15% of their annual salary. Under each statute state aid has been given to church-related educational institutions. We hold that both statutes are unconstitutional.

I

The Rhode Island Statute

The Rhode Island Salary Supplement Act rests on the 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 Act authorizes state officials to supplement the salaries of teachers of secular subjects in nonpublic elementary schools by paying directly to a teacher an amount not in excess of 15% of his current annual salary. As supplemented, however, a nonpublic school teacher's salary cannot exceed the maximum paid to teachers in the State's public schools, and the recipient must be certified by the state board of education in substantially the same manner as public school teachers.

In order to be eligible for the Rhode Island salary supplement, the recipient must teach in a nonpublic school at which the average per-pupil expenditure on secular education is less than the average in the State's public schools. Appellant State Commissioner of Education also requires eligible schools to submit financial data. If this information indicates a per-pupil expenditure in excess of the statutory limitation, the records of the school in question must be examined in order to assess how much of the expenditure is attributable to secular education and how much to religious activity.[1]

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[1] The District Court found only one instance in which this breakdown between religious and secular expenses was necessary. The school was not affiliated with the Catholic church. The court found it unlikely that such determinations would be necessary with Catholic schools because their reliance on nuns kept their costs substantially below those of public schools.

The Act also requires that teachers eligible for salary supplements must teach only those subjects that are offered in the State's public schools. They must use "only teaching materials which are used in the public schools." Finally, any teacher applying for a salary supplement must first agree in writing "not to teach a course in religion for so long as or during such time as he or she receives any salary supplements" under the Act.

A three-judge federal court found that Rhode Island's nonpublic elementary schools accommodated approximately 25% of the State's pupils. About 95% of these pupils attended schools affiliated with the Roman Catholic church. To date some 250 teachers have applied for benefits under the Act. All of them are employed by Roman Catholic schools.

The court held a hearing at which evidence was introduced concerning the nature of the secular instruction offered in the Roman Catholic schools whose teachers would be eligible for salary assistance under the Act. Although the court found that concern for religious values does not necessarily affect the content of secular subjects, it also found that the parochial school system was "an integral part of the religious mission of the Catholic Church."

The District Court concluded that the Act violated the Establishment Clause, holding that it fostered "excessive entanglement" between government and religion. We affirm.

The Pennsylvania Statute

Pennsylvania has adopted a program that has some but not all of the features of the Rhode Island program. The Pennsylvania Nonpublic Elementary and Secondary Education Act was passed in response to a crisis that the Legislature found existed in the State's nonpublic schools due to rapidly rising costs. The statute affirmatively reflects the legislative conclusion that the State's educational goals could appropriately be fulfilled by government support of "those purely secular educational objectives achieved through nonpublic education . . . ."

The statute authorizes appellee state Superintendent of Public Instruction to "purchase" specified "secular educational services" from nonpublic schools. Under the "contracts" authorized by the statute, the State directly reimburses nonpublic schools solely for their actual expenditures for teachers' salaries, textbooks, and instructional materials. A school seeking reimbursement must maintain prescribed accounting procedures that identify the "separate" cost of the "secular educational service." These accounts are subject to state audit. The Act is financed by a portion of the state tax on cigarettes.

There are several significant statutory restrictions on state aid. 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. Textbooks and instructional materials included in the program must be approved by the state Superintendent of Public Instruction. Finally, the statute prohibits reimbursement for any course that contains "any subject matter expressing religious teaching, or the morals or forms of worship of any sect."

The Act went into effect on July 1, 1968. It appears that some $ 5 million has been expended annually under the Act. The State has now entered into contracts with some 1,181 nonpublic elementary and secondary schools with a student population of some 535,215

pupils -- more than 20% of the total number of students in the State. More than 96% of these pupils attend church-related schools, and most of these schools are affiliated with the Roman Catholic church.

Appellants brought this action in the District Court to challenge the constitutionality of the Pennsylvania statute.

II

In *Everson*, 330 U.S. 1 (1947), this Court upheld a state statute that reimbursed the parents of parochial school children for bus transportation expenses. There MR. JUSTICE BLACK suggested that the decision carried to "the verge" of forbidden territory under the Religion Clauses. Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.

The language of the Religion Clauses of the First Amendment is at best opaque. Its authors did not simply prohibit the establishment of a state church or a state religion. Instead they commanded that there should be "no law *respecting* an establishment of religion." A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not *establish* a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment.

In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz* v. *Tax Commission*, 397 U.S. 664, 668 (1970).

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

Inquiry into the legislative purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative intent was to advance religion. On the contrary, the statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. As in *Allen*, we find nothing here that undermines the stated legislative intent; it must therefore be accorded appropriate deference.

In *Allen* the Court acknowledged that secular and religious teachings were not necessarily so intertwined that secular textbooks furnished to students by the State were in fact instrumental in the teaching of religion. The legislatures of Rhode Island and Pennsylvania have concluded that secular and religious education are identifiable and separable. In the abstract we have no quarrel with this conclusion.

The two legislatures, however, have also recognized that church-related elementary and

secondary schools have a significant religious mission and that a substantial portion of their activities is religiously oriented. They 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. All these provisions are precautions taken in candid recognition that these programs approached, even if they did not intrude upon, the forbidden areas under the Religion Clauses. 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, for we conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.

III

In *Walz* v. *Tax Commission*, the Court upheld state tax exemptions for real property owned by religious organizations and used for religious worship. That holding, however, tended to confine the area of permissible state involvement with religious institutions by calling for close scrutiny of the degree of entanglement involved in the relationship. The objective is to prevent, as far as possible, the intrusion of either into the precincts of the other.

Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts. Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.

In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority. Here we find that both statutes foster an impermissible degree of entanglement.

(a) *Rhode Island program*

The District Court made extensive findings on the grave potential for excessive entanglement that inheres in the religious character and purpose of the Roman Catholic elementary schools of Rhode Island, to date the sole beneficiaries of the Rhode Island Act.

The church schools involved in the program are located close to parish churches. This understandably permits convenient access for religious exercises since instruction in faith and morals is part of the total educational process. The school buildings contain identifying religious symbols such as crosses on the exterior and crucifixes, and religious paintings and statues either in the classrooms or hallways. Although only approximately 30 minutes a day are devoted to direct religious instruction, there are religiously oriented extracurricular activities. Approximately two-thirds of the teachers in these schools are nuns of various religious orders. Their dedicated efforts provide an atmosphere in which religious instruction and religious vocations are natural and proper parts of life in such schools. Indeed, the role of teaching nuns in enhancing the religious atmosphere has led the parochial school authorities

to attempt to maintain a one-to-one ratio between nuns and lay teachers in all schools rather than to permit some to be staffed almost entirely by lay teachers.

On the basis of these findings the District Court concluded that the parochial schools constituted "an integral part of the religious mission of the Catholic Church." The various characteristics of the schools make them "a powerful vehicle for transmitting the Catholic faith to the next generation." This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly. In short, parochial schools involve substantial religious activity and purpose.

The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid. Although the District Court found that concern for religious values did not inevitably or necessarily intrude into the content of secular subjects, the considerable religious activities of these schools led the legislature to provide for careful governmental controls and surveillance by state authorities in order to ensure that state aid supports only secular education.

The dangers and corresponding entanglements are enhanced by the particular form of aid that the Rhode Island Act provides. Our decisions 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.

In *Allen* the Court refused to make assumptions, on a meager record, about the religious content of the textbooks that the State would be asked to provide. We cannot, however, refuse here to recognize that teachers have a substantially different ideological character from books. 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. We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education.

In our view the record shows these dangers are present to a substantial degree. The Rhode Island Roman Catholic elementary schools are under the general supervision of the Bishop of Providence and his appointed representative, the Diocesan Superintendent of Schools. With only two exceptions, school principals are nuns appointed either by the Superintendent or the Mother Provincial of the order whose members staff the school. By 1969 lay teachers constituted more than a third of all teachers in the parochial elementary schools, and their number is growing. They are first interviewed by the superintendent's office and then by the school principal. The contracts are signed by the parish priest. Religious authority necessarily pervades the school system.

The schools are governed by the standards set forth in a "Handbook of School Regulations," which has the force of synodal law in the diocese. It emphasizes the role and importance of the teacher in parochial schools. The Handbook also states that: "Religious formation is not confined to formal courses; nor is it restricted to a single subject area." Finally, the Handbook advises teachers to stimulate interest in religious vocations and missionary work.

Several teachers testified, however, that they did not inject religion into their secular

classes. And the District Court found that religious values did not necessarily affect the content of the secular instruction. But what has been recounted suggests the potential if not actual hazards of this form of state aid. The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith. These controls are not lessened by the fact that most of the lay teachers are of the Catholic faith. Inevitably some of a teacher's responsibilities hover on the border between secular and religious orientation.

We need not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion.

We do not assume, however, that parochial school teachers will be unsuccessful in their attempts to segregate their religious beliefs from their secular educational responsibilities. But the potential for impermissible fostering of religion is present. The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion -- indeed the State here has undertaken to do so. To ensure that no trespass occurs, the State has therefore carefully conditioned its aid with pervasive restrictions. An eligible recipient must teach only those courses that are offered in the public schools and use only those texts and materials that are found in the public schools. In addition the teacher must not teach any course in religion.

A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. 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. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

There is another area of entanglement in the Rhode Island program that gives concern. The statute excludes teachers employed by nonpublic schools whose average per-pupil expenditures on secular education equal or exceed the comparable figures for public schools. In the event that the total expenditures of an otherwise eligible school exceed this norm, the program requires the government to examine the school's records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches. We cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses.

(b) *Pennsylvania program*

The Pennsylvania statute also provides state aid to church-related schools for teachers' salaries. The complaint describes an educational system very similar to the one in Rhode Island. According to the allegations, the church-related schools are controlled by religious organizations, have the purpose of propagating and promoting a particular religious faith, and conduct their operations to fulfill that purpose. Since this complaint was dismissed for failure to state a claim for relief, we must accept these allegations as true for purposes of our review.

As we noted earlier, the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state. The Pennsylvania statute, like that of Rhode Island, fosters this kind of relationship. Reimbursement is not only limited to courses offered in the public schools and materials approved by state officials, but the statute excludes "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." In addition, schools seeking reimbursement must maintain accounting procedures that require the State to establish the cost of the secular as distinguished from the religious instruction.

The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related school. This factor distinguishes both *Everson* and *Allen*, for in both those cases the state aid was provided to the student and his parents. In *Walz* v. *Tax Commission*, the Court warned of the dangers of direct payments to religious organizations: "Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards . . . ."

The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance. The government cash grants before us now provide no basis for predicting that comprehensive measures of surveillance and controls will not follow. In particular 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.

IV

A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs. Partisans of parochial schools, understandably concerned with rising costs, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.

Ordinarily political debate and division are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process. It conflicts with our

whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government. The highways of church and state relationships are not likely to be one-way streets, and the Constitution's authors sought to protect religious worship from the pervasive power of government. The history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the free exercise of religious belief.

Here we are confronted with very likely permanent annual appropriations that benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines are thus likely to be intensified in these two programs by the need for continuing annual appropriations and the likelihood of larger demands as costs and populations grow.

V

In *Walz* it was argued that a tax exemption for places of religious worship would prove to be the first step in an inevitable progression leading to the establishment of state churches and state religion. That claim could not stand up against more than 200 years of virtually universal practice imbedded in our colonial experience and continuing into the present.

The progression argument, however, is more persuasive here. We have no long history of state aid to church-related educational institutions comparable to 200 years of tax exemption for churches. Indeed, the state programs before us today represent something of an innovation. We have already noted that modern governmental programs have self-perpetuating and self-expanding propensities. These internal pressures are only enhanced when the schemes involve institutions whose legitimate needs are growing and whose interests have substantial political support. Nor can we fail to see that in constitutional adjudication some steps, which when taken were thought to approach "the verge," have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a "downhill thrust" easily set in motion but difficult to retard or stop. The dangers are increased by the difficulty of perceiving in advance exactly where the "verge" of the precipice lies. As well as constituting an independent evil against which the Religion Clauses were intended to protect, involvement or entanglement between government and religion serves as a warning signal.

Finally, nothing we have said can be construed to disparage the role of church-related elementary and secondary schools in our national life. Nor do we ignore their economic plight. Taxpayers have been spared vast sums by the maintenance of these educational institutions by religious organizations.

The merit and benefits of these schools, however, are not the issue before us. The sole question is whether state aid to these schools can be squared with the Religion Clauses. The judgment of the Rhode Island District Court is affirmed. The judgment of the Pennsylvania District Court is reversed, and the case is remanded for further proceedings.

MR. JUSTICE DOUGLAS, whom MR. JUSTICE BLACK joins, concurring.

Early in the 19th century the Protestants obtained control of the New York school system

and used it to promote reading and teaching of the Scriptures as revealed in the King James version of the Bible. The contests between Protestants and Catholics, often erupting into violence including the burning of Catholic churches, are a twice-told tale. Parochial schools grew, but not Catholic schools alone. Other dissenting sects established their own schools -- Lutherans, Methodists, Presbyterians, and others. But the major force in shaping the pattern of education in this country was the conflict between Protestants and Catholics. The Catholics logically argued that a public school was sectarian when it taught the King James version of the Bible. They therefore wanted it removed from the public schools; and in time they tried to get public funds for their own parochial schools.

The story of conflict and dissension is long and well known. The result was a state of so-called equilibrium where religious instruction was eliminated from public schools and the use of public funds to support religious schools was banned. But the hydraulic pressures created by political forces and by economic stress were great and they began to change the situation. Laws were passed that dispensed public funds to sustain religious schools and the plea was always in the educational frame of reference. And it was forcefully argued that a linguist or mathematician or physicist trained in religious schools was just as competent as one trained in secular schools. So we have gradually edged into a situation where vast amounts of public funds are supplied each year to sectarian schools.

But we have never faced, until recently, the problem of policing sectarian schools. Under these laws there will be vast governmental suppression, surveillance, or meddling in church affairs. In the present cases we deal with the totality of instruction destined to be sectarian, at least in part, if the religious character of the school is to be maintained. A school which operates to commingle religion with other instruction plainly cannot completely secularize its instruction. Parochial schools, in large measure, do not accept the assumption that secular subjects should be unrelated to religious teaching.

[The Pennsylvania] statute prescribes that courses in mathematics, modern foreign languages, physical science, and physical education "shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect." The subtleties involved in applying this standard are obvious. It places the State astride a sectarian school and gives it power to dictate what is or is not secular, what is or is not religious. I can think of no more disrupting influence apt to promote rancor and ill-will between church and state than this kind of surveillance and control.

Those who man these schools are good people, zealous people, dedicated people. But they are dedicated to ideas that the Framers of our Constitution placed beyond the reach of government. If the government closed its eyes to the manner in which these grants are actually used it would be allowing public funds to promote sectarian education. If it did not close its eyes but undertook the surveillance needed, it would, I fear, intermeddle in parochial affairs in a way that would breed only rancor and dissension.

MR. JUSTICE BRENNAN, concurring.

Public education was, of course, virtually nonexistent when the Constitution was adopted. Education in the Colonies was overwhelmingly a private enterprise, usually carried on as a

denominational activity by the dominant Protestant sects. In point of fact, government generally looked to the church to provide education, and often contributed support through donations of land and money.

Nor was there substantial change in the years immediately following ratification of the Constitution and the Bill of Rights. Schools continued to be local and, in the main, denominational institutions. But the Nation's rapidly developing religious heterogeneity, the tide of Jacksonian democracy, and growing urbanization soon led to widespread demands throughout the States for secular public education. At the same time strong opposition developed to use of the States' taxing powers to support private sectarian schools. In fact, after 1840, no efforts of sectarian schools to obtain a share of public school funds succeeded. Between 1840 and 1875, 19 States added provisions to their constitutions prohibiting the use of public school funds to aid sectarian schools, and by 1900, 16 more States had added similar provisions. In fact, no State admitted to the Union after 1858, except West Virginia, omitted such provision from its first constitution. Today fewer than a half-dozen States omit such provisions from their constitutions.

Thus for more than a century, the consensus has been that public subsidy of sectarian schools constitutes an impermissible involvement of secular with religious institutions. If this history is not itself compelling, other forms of governmental involvement that each of the statutes requires tip the scales in my view against validity. These are involvements that threaten "dangers -- as much to church as to state -- which the Framers feared would subvert religious liberty and the strength of a system of secular government." It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government."

The Rhode Island statute requires Roman Catholic teachers to surrender their right to teach religion courses and to promise not to "inject" religious teaching into their secular courses. This has led at least one teacher to stop praying with his classes, a concrete testimonial to the self-censorship that inevitably accompanies state regulation of delicate First Amendment freedoms. Both the Rhode Island and Pennsylvania statutes prescribe extensive standardization of the content of secular courses, and of the teaching materials and textbooks to be used in teaching the courses. And the regulations to implement those requirements necessarily require policing of instruction in the schools. The picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction surely raises more than an imagined specter of governmental "secularization of a creed."

Policing the content of courses, the specific textbooks used, and indeed the words of teachers is far different from the legitimate policing carried on under state compulsory attendance laws or laws regulating minimum levels of educational achievement. Government's legitimate interest in ensuring the acquisition of certain knowledge does not carry with it power to prescribe what shall *not* be taught, or what methods of instruction shall be used, or what opinions the teacher may offer in the course of teaching.

I expressed the view in *Walz* that "general subsidies of religious activities would, of course, constitute impermissible state involvement with religion:"

"Tax exemptions and general subsidies are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise. An exemption, on the other hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes. In other words, 'in the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches,' while 'in the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions.'"

Pennsylvania [and] Rhode Island argue strenuously that the government monies in all these cases are not "general subsidies of religious activities" because they are paid specifically and solely for the secular education that the sectarian institutions provide.

The universality of state constitutional provisions forbidding such grants, as well as the weight of judicial authority disapproving such aid as a violation of our tradition of separation of church and state, reflects a time-tested judgment that such grants do indeed constitute impermissible aid to religion. The recurrent argument, consistently rejected in the past, has been that government grants to sectarian schools ought not be viewed as impermissible subsidies "because [the schools] relieve the State of a burden, which it would otherwise be itself required to bear . . . . by performing for it its duty of educating children."

Nonetheless, it is argued once again in these cases that sectarian schools perform two separable functions. First, they provide secular education, and second, they teach the tenets of a particular sect. Since the State has determined that the secular education provided in sectarian schools serves the legitimate state interest in the education of its citizens, it is contended that state aid solely to the secular education function does not involve the State in aid to religion.

Our opinion in *Allen* recognized that sectarian schools provide both a secular and a sectarian education. But I do not read *Allen* as supporting the proposition that public subsidy of a sectarian institution's secular training is permissible state involvement. When the same secular educational process occurs in both public and sectarian schools, *Allen* held that the State could provide secular textbooks for use in that process to students in both public and sectarian schools. Since the textbooks involved in *Allen* would, at least in theory, be limited to secular education, no aid to sectarian instruction was involved.

More important, since the textbooks in *Allen* had been previously provided by the parents, and not the schools, no aid to the institution was involved. Rather, as in the case of the bus transportation in *Everson*, the general program of providing all children in the State with free secular textbooks assisted all parents in schooling their children.

Allen, in my view, simply sustained a statute in which the State was "neutral in its relations with groups of religious believers and non-believers." The only context in which the Court in *Allen* employed the distinction between secular and religious in a parochial school was to reach its conclusion that the textbooks that the State was providing could and would be secular. The present cases, however, involve direct subsidies of tax monies to the schools themselves and we cannot blink the fact that the secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence.

Within the institution, the two are inextricably intertwined.

The common ingredient of the three prongs of the test set forth at the outset of this opinion is whether the statutes involve government in the "essentially religious activities" of religious institutions. My analysis of the operation, purposes, and effects of these statutes leads me inescapably to the conclusion that they do impermissibly involve the States with the "essentially religious activities" of sectarian educational institutions. More specifically, for the reasons stated, I think each government uses "essentially religious means to serve governmental ends, where secular means would suffice." This Nation long ago committed itself to primary reliance upon publicly supported public education to serve its important goals in secular education. Our religious diversity gave strong impetus to that commitment.

I conclude that, in using sectarian institutions to further goals in secular education, the statutes do violence to the principle that "government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice." I, therefore, agree that the state statutes providing public funds to sectarian schools are unconstitutional.

MR. JUSTICE WHITE, concurring in part, dissenting in part.

Our prior cases have recognized the dual role of parochial schools in American society: they perform both religious and secular functions. That religion may indirectly benefit from governmental aid to the secular activities of churches does not convert that aid into an impermissible establishment of religion. It is enough for me that the States are financing a separable secular function of overriding importance in order to sustain the legislation here challenged. That religion and private interests other than education may substantially benefit does not convert these laws into impermissible establishments of religion. I would sustain the Rhode Island program. I would also reject the facial challenge to the Pennsylvania statute.

The Court strikes down the Rhode Island statute on its face. Accepting the District Court's observation that education is an integral part of the religious mission of the Catholic church -- an observation that should neither surprise nor alarm anyone -- the majority then interposes findings and conclusions that the District Court expressly abjured, namely, that nuns, clerics, and dedicated Catholic laymen unavoidably pose a grave risk in that they might not be able to put aside their religion in the secular classroom. Although stopping short of considering them untrustworthy, the Court concludes that for them the difficulties of avoiding teaching religion along with secular subjects would pose intolerable risks and would in any event entail an unacceptable enforcement regime.

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

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY v. NYQUIST

413 U.S. 756 (1973)

MR. JUSTICE POWELL delivered the opinion of the Court.

These cases raise a challenge under the Establishment Clause of the First Amendment to the constitutionality of a recently enacted New York law which provides financial assistance, in several ways, to nonpublic elementary and secondary schools in that State. The cases involve an intertwining of societal and constitutional issues of the greatest importance.

James Madison admonished that a "prudent jealousy" for religious freedoms required that they never become "entangled . . . in precedents." His strongly held convictions, coupled with those of Thomas Jefferson and others among the Founders, are reflected in the first Clauses of the First Amendment of the Bill of Rights. Yet, despite Madison's admonition and the "sweep of the absolute prohibitions" of the Clauses, this Nation's history has not been one of entirely sanitized separation between Church and State. It has never been thought either possible or desirable to enforce a regime of total separation, and as a consequence cases arising under these Clauses have presented some of the most perplexing questions to come before this Court.

As a result of these decisions, it may no longer be said that the Religion Clauses are free of "entangling" precedents. Neither, however, may it be said that Jefferson's metaphoric "wall of separation" between Church and State has become "as winding as the famous serpentine wall" he designed for the University of Virginia. Indeed, the controlling constitutional standards have become firmly rooted and the broad contours of our inquiry are now well defined. Our task, therefore, is to assess New York's several forms of aid in the light of principles already delineated.

I

In May 1972, the Governor of New York signed into law several amendments to the State's Education and Tax Laws. The first five sections of these amendments established three distinct financial aid programs for nonpublic elementary and secondary schools. Almost immediately after the signing of these measures a complaint was filed in the United States District Court for the Southern District of New York challenging each of the three forms of aid as violative of the Establishment Clause. Because the questions before the District Court were resolved on the basis of the pleadings, that court's decision turned on the constitutionality of each provision on its face.

The first section of the challenged enactment, entitled "Health and Safety Grants for Nonpublic School Children," provides for direct money grants from the State to "qualifying" nonpublic schools to be used for the "maintenance and repair of . . . school facilities and equipment to ensure the health, welfare and safety of enrolled pupils." A "qualifying" school is any nonpublic, nonprofit elementary or secondary school which "has been designated during the [immediately preceding] year as serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of nineteen

hundred sixty-five." Such schools are entitled to receive a grant of $ 30 per pupil per year, or $ 40 per pupil per year if the facilities are more than 25 years old. Each school is required to submit to the Commissioner of Education an audited statement of its expenditures for maintenance and repair during the preceding year, and its grant may not exceed the total of such ex penses. The Commissioner is also required to ascertain the average per-pupil cost for equivalent maintenance and repair services in the public schools, and in no event may the grant to nonpublic qualifying schools exceed 50% of that figure.

"Maintenance and repair" is defined by the statute to include "the provision of heat, light, water, ventilation and sanitary facilities; cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to ensure the health, welfare and safety of enrolled pupils."

The remainder of the challenged legislation -- §§ 2 through 5 -- is a single package captioned the "Elementary and Secondary Education Opportunity Program." It is composed, essentially, of two parts, a tuition grant program and a tax benefit program. Section 2 establishes a limited plan providing tuition reimbursements to parents of children attending elementary or secondary nonpublic schools. To qualify under this section a parent must have an annual taxable income of less than $ 5,000. The amount of reimbursement is limited to $ 50 for each grade school child and $ 100 for each high school child. Each parent is required, however, to submit to the Commissioner of Education a verified statement containing a receipted tuition bill, and the amount of state reimbursement may not exceed 50% of that figure. No restrictions are imposed on the use of the funds by the reimbursed parents.

The remainder of the "Elementary and Secondary Education Opportunity Program," contained in §§ 3, 4, and 5 of the challenged law, is designed to provide a form of tax relief to those who fail to qualify for tuition reimbursement. Under these sections parents may subtract from their adjusted gross income for state income tax purposes a designated amount for each dependent for whom they have paid at least $ 50 in nonpublic school tuition. If the taxpayer's adjusted gross income is less than $ 9,000 he may subtract $ 1,000 for each of as many as three dependents. As the taxpayer's income rises, the amount he may subtract diminishes. Thus, if a taxpayer has adjusted gross income of $ 15,000, he may subtract only $ 400 per dependent, and if his adjusted gross income is $ 25,000 or more, no deduction is allowed. The amount of the deduction is not dependent upon how much the taxpayer actually paid for nonpublic school tuition, and is given in addition to any deductions to which the taxpayer may be entitled for other religious or charitable contributions. The actual tax benefits under these provisions were carefully calculated in advance. Thus, comparable tax benefits pick up at approximately the point at which tuition reimbursement benefits leave off.

Although no record was developed in these cases, a number of pertinent generalizations may be made about the nonpublic schools which would benefit from these enactments. The District Court, relying on findings in a similar case recently decided by the same court, adopted a profile of these sectarian, nonpublic schools similar to the one suggested in the plaintiffs' complaint. Qualifying institutions, under all three segments of the enactment, could be ones that "(a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a

particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach."

Of course, the characteristics of individual schools may vary widely from that profile. Some 700,000 to 800,000 students, constituting almost 20% of the State's entire elementary and secondary school population, attend over 2,000 nonpublic schools, approximately 85% of which are church affiliated. And while "all or practically all" of the 280 schools entitled to receive "maintenance and repair" grants "are related to the Roman Catholic Church, institutions qualifying under the remainder of the statute include a substantial number of Jewish, Lutheran, Episcopal, Seventh Day Adventist, and other church-affiliated schools.[1]

II

It is now firmly established that a law may be one "respecting an establishment of religion" even though its consequence is not to promote a "state religion," *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971), and even though it does not aid one religion more than another but merely benefits all religions alike. It is equally well established, however, that not every law that confers an "indirect," "remote," or "incidental" benefit upon religious institutions is, for that reason alone, constitutionally invalid. What our cases require is careful examination of any law challenged on establishment grounds with a view to ascertaining whether it furthers any of the evils against which that Clause protects. Primary among those evils have been "sponsorship, financial support, and active involvement of the sovereign in religious activity." To pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and, third, must avoid excessive government entanglement with religion.

In applying these criteria to the three distinct forms of aid involved in this case, we need touch only briefly on the requirement of a "secular legislative purpose." As the recitation of legislative purposes appended to New York's law indicates, each measure is adequately supported by legitimate, nonsectarian state interests. We do not question the propriety, and fully secular content, of New York's interest in preserving a healthy and safe educational environment for all of its schoolchildren. And we do not doubt the validity of the State's interests in promoting pluralism and diversity among its public and nonpublic schools. Nor do we hesitate to acknowledge the reality of its concern for an already overburdened public school system that might suffer in the event that a significant percentage of children presently attending nonpublic schools should abandon those schools in favor of the public schools.

But the propriety of a legislature's purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive

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[1] In the fall of 1968, there were 2,038 nonpublic schools in New York State; 1,415 Roman Catholic; 164 Jewish; 59 Lutheran; 49 Episcopal; 37 Seventh Day Adventist; 18 other church affiliated; 296 without religious affiliation.

entanglements between Church and State. Accordingly, we must weigh each of the three aid provisions challenged here against these criteria of effect and entanglement.

A

The "maintenance and repair" provisions of § 1 authorize direct payments to nonpublic schools, virtually all of which are Roman Catholic schools in low-income areas. The grants, totaling $ 30 or $ 40 per pupil depending on the age of the institution, are given largely without restriction on usage. So long as expenditures do not exceed 50% of comparable expenses in the public school system, it is possible for a sectarian elementary or secondary school to finance its entire "maintenance and repair" budget from state tax-raised funds. No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions. Nothing in the statute, for instance, bars a qualifying school from paying out of state funds the salaries of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities. Absent appropriate restrictions on expenditures for these and similar purposes, it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools.

The state officials nevertheless argue that these expenditures for "maintenance and repair" are similar to other financial expenditures approved by this Court. Primarily they rely on *Everson v. Board of Education* [and] *Board of Education v. Allen*. In each of those cases it is true that the Court approved a form of financial assistance which conferred undeniable benefits upon private, sectarian schools. But a close examination of those cases illuminates their distinguishing characteristics.

These cases simply recognize that sectarian schools perform secular, educational functions as well as religious functions, and that some forms of aid may be channeled to the secular without providing direct aid to the sectarian. But the channel is a narrow one, as the above cases illustrate. Of course, it is true in each case that the provision of such neutral, nonideological aid, assisting only the secular functions of sectarian schools, served indirectly and incidentally to promote the religious function by rendering it more likely that children would attend sectarian schools and by freeing the budgets of those schools for use in other nonsecular areas. But an indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law.

It might be argued, however, that while the New York "maintenance and repair" grants lack specifically articulated secular restrictions, the statute does provide a sort of statistical guarantee of separation by limiting grants to 50% of the amount expended for comparable services in the public schools. The legislature's supposition might have been that at least 50% of the ordinary public school maintenance and repair budget would be devoted to purely secular facility upkeep in sectarian schools. The shortest answer to this argument is that the statute itself allows, as a ceiling, grants satisfying the entire "amount of expenditures for maintenance and repair of such school" providing only that it is neither more than $ 30 or $ 40 per pupil nor more than 50% of the comparable public school expenditures. Quite apart

from the language of the statute, our cases make clear that a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education.

What we have said demonstrates that New York's maintenance and repair provisions violate the Establishment Clause because their effect, inevitably, is to subsidize and advance the religious mission of sectarian schools. We have no occasion, therefore, to consider the further question whether those provisions would also fail to survive scrutiny under the administrative entanglement aspect of the three-part test because assuring the secular use of all funds requires too intrusive and continuing a relationship between Church and State.

B

New York's tuition reimbursement program also fails the "effect" test, for much the same reasons that govern its maintenance and repair grants. The state program is designed to allow direct, unrestricted grants of $ 50 to $ 100 per child (but no more than 50% of tuition actually paid) as reimbursement to parents in low-income brackets who send their children to nonpublic schools, the bulk of which is concededly sectarian in orientation. To qualify, a parent must have earned less than $ 5,000 in taxable income and must present a receipted tuition bill from a nonpublic school.

There can be no question that these grants could not be given directly to sectarian schools, since they would suffer from the same deficiency that renders invalid the grants for maintenance and repair. In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid. As Mr. Justice Black put it quite simply in *Everson*: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."

The controlling question here, then, is whether the fact that the grants are delivered to parents rather than schools is of such significance as to compel a contrary result. The State and intervenor-appellees rely on *Everson* and *Allen* for their claim that grants to parents, unlike grants to institutions, respect the "wall of separation" required by the Constitution. It is true that in those cases the Court upheld laws that provided benefits to children attending religious schools and to their parents. But those decisions make clear that, far from providing a *per se* immunity from examination of the substance of the program, the fact that aid is disbursed to parents rather than to schools is only one among many factors to be considered.

In *Everson*, the Court found the bus fare program analogous to the provision of services such as police and fire protection, sewage disposal, highways, and sidewalks for parochial schools. Such services, provided in common to all citizens, are "so separate and so indisputably marked off from the religious function" that they may fairly be viewed as reflections of a neutral posture toward religious institutions. *Allen* is founded upon a similar principle. The Court there repeatedly emphasized that upon the record in that case there was no indication that textbooks would be provided for anything other than purely secular courses. "Of course books are different from buses. Most bus rides have no inherent religious significance, while religious books are common. However, the language of [the law under consideration] does not authorize the loan of religious books, and the State claims no right to

distribute religious literature. . . . Absent evidence, we cannot assume that school authorities . . . are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law."[2]

The tuition grants here are subject to no such restrictions. There has been no endeavor "to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former." Indeed, it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian. By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. And while the other purposes for that aid -- to perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools -- are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions.[3]

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[2] Allen and *Everson* differ from the present litigation in a second important respect. In both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools. We do not agree with the suggestion in the dissent of THE CHIEF JUSTICE that tuition grants are an analogous endeavor to provide comparable benefits to all parents of schoolchildren whether enrolled in public or nonpublic schools. The grants to parents of private schoolchildren are given in addition to the right that they have to send their children to public schools "totally at state expense." And in any event, the argument proves too much, for it would also provide a basis for approving through tuition grants the *complete subsidization* of all religious schools on the ground such action is necessary if the State is to equalize the position of parents who elect such schools -- a result wholly at variance with the Establishment Clause.

Because of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (*e. g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited. Thus, our decision today does not compel the conclusion that the educational assistance provisions of the "G. I. Bill" impermissibly advance religion.

[3]Appellees, focusing on the term "principal or primary effect" utilized in the second prong of the three-part test, have argued that the Court must decide whether the "primary" effect of New York's tuition grant program is to subsidize religion or to promote these legitimate secular objectives. We do not think that such metaphysical judgments are either possible or necessary. Our cases simply do not support the notion that a law found to have a "primary" effect to promote some legitimate end is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion. In *Schempp* the school authorities argued that Bible-reading in public schools served, primarily, secular purposes. Yet, without discrediting these ends and without determining whether they took precedence over the direct religious benefit, the Court held such exercises incompatible with the Establishment Clause.

Such secular objectives, no matter how desirable and irrespective of whether judges might possess sufficiently sensitive calipers to ascertain whether the secular effects outweigh the

Although we think it clear, for the reasons above stated, that New York's tuition grant program fares no better under the "effect" test than its maintenance and repair program, in view of the novelty of the question we will address briefly the subsidiary arguments made by the state officials and intervenors in its defense.

First, it has been suggested that it is of controlling significance that New York's program calls for *reimbursement* for tuition already paid rather than for direct contributions which are merely routed through the parents to the schools, in advance of or in lieu of payment by the parents. The parent is not a mere conduit, we are told, but is absolutely free to spend the money he receives in any manner he wishes. If the grants are offered as an incentive to parents to send their children to sectarian schools, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions. Whether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same.

Second, the Majority Leader and President pro tem of the State Senate argues that it is significant here that the tuition reimbursement grants pay only a portion of the tuition bill, and an even smaller portion of the religious school's total expenses. The New York statute limits reimbursement to 50% of any parent's actual outlay. Additionally, intervenor estimates that only 30% of the total cost of nonpublic education is covered by tuition payments. On the basis of these two statistics, appellees reason that the "maximum tuition reimbursement by the State is thus only 15% of educational costs in the nonpublic schools." And, "since the compulsory education laws of the State, by necessity require significantly more than 15% of school time to be devoted to teaching secular courses," the New York statute provides "a statistical guarantee of neutrality." It should readily be seen that this is simply another variant of the argument we have rejected as to maintenance and repair costs, and it can fare no better here. Our cases have long since foreclosed the notion that mere statistical assurances will suffice to sail between the Scylla and Charybdis of "effect" and "entanglement."

Finally, the State argues that its program of tuition grants should survive scrutiny because it is designed to promote the free exercise of religion. The State notes that only "low-income parents" are aided by this law, and without state assistance their right to have their children educated in a religious environment "is diminished or even denied." It is true, of course, that this Court has long recognized and maintained the right to choose nonpublic over public education. It is also true that a state law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause. But this Court repeatedly has recognized that tension inevitably exists between the Free Exercise and the Establishment Clauses. As a result of this tension, our cases require the State to maintain an attitude of "neutrality," neither "advancing" nor "inhibiting" religion. In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one "advancing" religion. However great our sympathy for the burdens experienced by those who must pay public school taxes at the same time that they support other schools, and notwithstanding the "high social importance" of the

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sectarian benefits, cannot serve to justify such a direct and substantial advancement of religion.

State's purposes, neither may justify an eroding of the limitations of the Establishment Clause now firmly emplanted.

C

Sections 3, 4, and 5 establish a system for providing income tax benefits to parents of children attending New York's nonpublic schools. In this Court, the parties have engaged in a considerable debate over what label best fits the New York law. Because of the peculiar nature of the benefit allowed, it is difficult to adopt any single traditional label lifted from the law of income taxation. It is, at least in its form, a tax deduction since it is an amount subtracted from adjusted gross income, prior to computation of the tax due. Its effect is more like that of a tax credit since the deduction is not related to the amount actually spent for tuition and is apparently designed to yield a predetermined amount of tax "forgiveness" in exchange for performing a specific act which the State desires to encourage -- the usual attribute of a tax credit. We see no reason to select one label over another, as the constitutionality of this hybrid benefit does not turn in any event on the label we accord it.

These sections allow parents of children attending nonpublic elementary and secondary schools to subtract from adjusted gross income a specified amount if they do not receive a tuition reimbursement under § 2, and if they have an adjusted gross income of less than $ 25,000. The amount of the deduction is unrelated to the amount of money actually expended by any parent on tuition, but is calculated on the basis of a formula contained in the statute. The formula is apparently the product of a legislative attempt to assure that each family would receive a carefully estimated net benefit, and that the tax benefit would be comparable to, and compatible with, the tuition grant for lower income families. Thus, a parent who earns less than $ 5,000 is entitled to a tuition reimbursement of $ 50 if he has one child attending an elementary, nonpublic school, while a parent who earns more (but less than $ 9,000) is entitled to have a precisely equal amount taken off his tax bill. Additionally, a taxpayer's benefit under these sections is unrelated to, and not reduced by, any deductions to which he may be entitled for charitable contributions to religious institutions.

In practical terms there would appear to be little difference, for purposes of determining whether such aid has the effect of advancing religion, between the tax benefit allowed here and the tuition grant allowed under § 2. The qualifying parent under either program receives the same form of encouragement and reward for sending his children to nonpublic schools. The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over to the State. "In both instances the money involved represents a charge made upon the state for the purpose of religious education."

Appellees defend the tax portion of New York's legislative package on two grounds. First, they contend that it is of controlling significance that the grants or credits are directed to the parents rather than to the schools. This is the same argument made in support of the tuition reimbursements. Our treatment of this issue in Part II-B is applicable here and requires rejection of this claim. Second, appellees place their strongest reliance on *Walz* v. *Tax Comm'n*, in which New York's property tax exemption for religious organizations was upheld. We think that *Walz* provides no support for appellees' position. Indeed, its rationale plainly

compels the conclusion that New York's tax package violates the Establishment Clause.

Tax exemptions for church property enjoyed an apparently universal approval in this country both before and after the adoption of the First Amendment. The Court in *Walz* surveyed the history of tax exemptions and found that each of the 50 States has long provided for tax exemptions for places of worship. We know of no historical precedent for New York's recently promulgated tax relief program.

But historical acceptance without more would not alone have sufficed, as "no one acquires a vested or protected right in violation of the Constitution by long use." *Walz*, 397 U.S. at 678. It was the reason underlying that long history of tolerance of tax exemptions for religion that proved controlling. A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of "neutrality" toward religion. Special tax benefits, however, cannot be squared with the principle of neutrality established by the decisions of this Court. To the contrary, insofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions.

To be sure, the exemption of church property from taxation conferred a benefit, albeit an indirect and incidental one. Yet that "aid" was a product not of any purpose to support or to subsidize, but of a fiscal relationship designed to minimize involvement and entanglement between Church and State. "The exemption," the Court emphasized, "tends to complement and reinforce the desired separation insulating each from the other." The granting of the tax benefits under the New York statute, unlike the extension of an exemption, would tend to increase rather than limit the involvement between Church and State.

One further difference between tax exemptions for church property and tax benefits for parents should be noted. The exemption challenged in *Walz* was not restricted to a class composed exclusively or even predominantly of religious institutions. Instead, the exemption covered all property devoted to religious, educational, or charitable purposes. Tax reductions authorized by this law flow primarily to the parents of children attending sectarian, nonpublic schools. Without intimating whether this factor alone might have controlling significance in another context, it should be apparent that in terms of the potential divisiveness of any legislative measure the narrowness of the benefitted class would be an important factor.

In conclusion, we find the *Walz* analogy unpersuasive, and in light of the practical similarity between New York's tax and tuition reimbursement programs, we hold that 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.

III

Because we have found that the challenged sections have the impermissible effect of advancing religion, we need not consider whether such aid would result in entanglement of the State with religion. But the importance of the competing societal interests implicated here prompts us to make the further observation that, apart from any specific entanglement of the State in particular religious programs, assistance of the sort here involved carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion.

Few would question most of the legislative findings supporting this statute. We recognized in *Board of Education* v. *Allen* that "private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience," and certainly private parochial schools have contributed importantly to this role. Moreover, the tailoring of the New York statute to channel the aid provided primarily to afford low-income families the option of determining where their children are to be educated is most appealing. There is no doubt that the private schools are confronted with increasingly grave fiscal problems, that resolving these problems by increasing tuition charges forces parents to turn to the public schools, and that this in turn -- as the present legislation recognizes -- exacerbates the problems of public education at the same time that it weakens support for the parochial schools.

These, in briefest summary, are the underlying reasons for the New York legislation and for similar legislation in other States. They are substantial reasons. Yet they must be weighed against the relevant provisions and purposes of the First Amendment, which safeguard the separation of Church from State and which have been regarded from the beginning as among the most cherished features of our constitutional system.

One factor of recurring significance in this weighing process is the potentially divisive political effect of an aid program. As Mr. Justice Black's opinion in *Everson* emphasizes, competition among religious sects for political and religious supremacy has occasioned considerable civil strife, "generated in large part" by competing efforts to gain or maintain the support of government. As Mr. Justice Harlan put it, "what is at stake as a matter of policy [in Establishment Clause cases] is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point."

The Court recently addressed this issue specifically and fully in *Lemon* v. *Kurtzman*. The Court said: "The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow."

The language of the Court applies with peculiar force to the New York statute now before us. Section 1 (grants for maintenance) and § 2 (tuition grants) will require continuing annual appropriations. Sections 3, 4, and 5 (income tax relief) will not necessarily require annual re-examination, but the pressure for frequent enlargement of the relief is predictable. All three of these programs start out at modest levels. But we know from long experience that aid programs tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies. And the larger the class of recipients, the greater the pressure for accelerated increases. Moreover, the State itself, concededly anxious to avoid assuming the burden of educating children now in private schools, has a strong motivation for increasing this aid as public school costs rise and population increases. In this situation, where the underlying issue is the deeply emotional one of Church-State relationships, the potential for seriously divisive political consequences needs no elaboration. And while the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a "warning signal" not to be ignored.

Our examination of New York's aid provisions, in light of all relevant considerations, compels the judgment that each, as written, has a "primary effect that advances religion" and offends the constitutional prohibition against laws "respecting an establishment of religion."

MR. CHIEF JUSTICE BURGER, joined in part by MR. JUSTICE WHITE, and joined by MR. JUSTICE REHNQUIST, concurring in part and dissenting in part.

I join in that part of the Court's opinion in which holds the New York "maintenance and repair" provision unconstitutional under the Establishment Clause because it is a direct aid to religion. I disagree, however, with the Court's decisions to strike down the New York tuition grant program and the tax relief provisions.

While there is no straight line running through our decisions interpreting the Establishment and Free Exercise Clauses of the First Amendment, our cases do, it seems to me, lay down one solid, basic principle: that the Establishment Clause does not forbid governments, state or federal, to enact a program of general welfare under which benefits are distributed to private individuals, even though many of those individuals may elect to use those benefits in ways that "aid" religious instruction or worship.

The Court's opinions in both *Everson* and *Allen* recognized that the statutory programs at issue there may well have facilitated the decision of many parents to send their children to religious schools. Indeed, the Court in both cases specifically acknowledged that some children might not obtain religious instruction but for the benefits provided by the State. Notwithstanding, the Court held that such an indirect or incidental "benefit" to the religious institutions that sponsored parochial schools was not a conclusive indicium of a "law respecting an establishment of religion."

The essence of all these decisions, I suggest, is that government aid to individuals generally stands on an entirely different footing from direct aid to religious institutions. This fundamental principle which I see running through our prior decisions, and which I believe governs the present cases, is premised more on experience and history than on logic. It is admittedly difficult to articulate the reasons why a State should be permitted to reimburse parents of private schoolchildren -- partially at least -- to take into account the State's enormous savings in not having to provide schools for those children, when a State is not allowed to pay the same benefit directly to sectarian schools on a per-pupil basis. In either case, the private individual makes the ultimate decision that may indirectly benefit church-sponsored schools; to that extent the state involvement with religion is substantially attenuated. The answer, I believe, lies in the experienced judgment of various members of this Court over the years that the balance between the policies of free exercise and establishment of religion tips in favor of the former when the legislation moves away from direct aid to religious institutions and takes on the character of general aid to individual families. That principle is established in our cases and it ought to be followed here.

The tuition grant and tax relief programs now before us are, in my view, indistinguishable in principle, purpose, and effect from the statutes in *Everson* and *Allen*. In the instant cases as in *Everson* and *Allen*, the States have merely attempted to equalize the costs incurred by parents in obtaining an education for their children. The only discernible difference between

the programs in *Everson* and *Allen* and these cases is in the method of the distribution of benefits: here the benefits are given only to parents of private school children, while in *Everson* and *Allen* the statutory benefits were made available to parents of both public and private school children. But to regard that difference as constitutionally meaningful is to exalt form over substance. It is beyond dispute that the parents of public school children in New York presently receive the "benefit" of having their children educated totally at state expense; the statute at issue merely attempt to equalize that "benefit" by giving to parents of private school children, in the form of dollars or tax deductions, what the parents of public school children receive in kind. It is no more than simple equity to grant partial relief to parents who support the public schools they do not use.

The Court appears to distinguish the New York statute from *Everson* and *Allen* on the ground that here the state aid is not apportioned between the religious and secular activities of the sectarian schools attended by some recipients, while in *Everson* and *Allen* the state aid was purely secular in nature. There are at present many forms of government assistance to individuals that can be used to serve religious ends, such as social security benefits or "G. I. Bill" payments, which are not subject to nonreligious-use restrictions. Yet, I doubt that today's majority would hold those statutes unconstitutional under the Establishment Clause.

Since I am unable to discern in the Court's analysis of *Everson* and *Allen* any neutral principle to explain the result reached in these cases, I fear that the Court has in reality followed the unsupportable approach of measuring the "effect" of a law by the percentage of the recipients who choose to use the money for religious, rather than secular, education.

With all due respect, I submit that such a consideration is irrelevant to a constitutional determination of the "effect" of a statute. The "primary effect" branch of our test was never intended to vary with the *number* of churches benefitted.

Such a consideration, it is true, might be relevant in ascertaining whether the *primary legislative purpose* was to advance the cause of religion. But the Court has, and I think correctly, summarily dismissed the contention that New York had an improper purpose in enacting these laws. And in light of this Court's recognition of these secular legislative purposes, I would uphold the New York statute.

MR. JUSTICE WHITE joins this opinion insofar as it relates to the New York tuition grant and tax relief statute.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE WHITE concur, dissenting in part.

Differences of opinion are undoubtedly to be expected when the Court turns to the task of interpreting the meaning of the Religion Clauses of the First Amendment. I dissent from those portions of the Court's opinion which strike down §§ 2 through 5. I find both the Court's reasoning and result all but impossible to reconcile with *Walz* v. *Tax Comm'n*, decided only three years ago, and with *Board of Education* v. *Allen*, and *Everson* v. *Board of Education*.

I

The opinions in *Walz* make it clear that tax deductions and exemptions, even when

directed to religious institutions, occupy quite a different constitutional status under the Religion Clauses of the First Amendment than do outright grants to such institutions. Here the effect of the tax benefit is trebly attenuated as compared with the outright exemption considered in *Walz*. There the result was a complete forgiveness of taxes, while here the result is merely a reduction in taxes. There the ultimate benefit was available to an actual house of worship, while here even the ultimate benefit redounds only to a religiously sponsored school. There the churches themselves received the direct reduction in the tax bill, while here it is only the parents of the children who are sent to religiously sponsored schools who receive the direct benefit.

The Court seeks to avoid the controlling effect of *Walz* by comparing its historical background to the relative recency of the challenged deduction plan; by noting that in its historical context, a property tax exemption is religiously neutral, whereas the educational cost deduction here is not; and by finding no substantive difference between a direct reimbursement from the State to parents and the State's abstention from collecting the full tax bill which the parents would otherwise have had to pay.

While it is true that the Court reached its result in *Walz* in part by examining the unbroken history of property tax exemptions for religious organizations in this country, there is no suggestion in the opinion that only those particular tax exemption schemes that have roots in pre-Revolutionary days are sustainable against an Establishment Clause challenge. If long-established use of a particular tax exemption scheme leads to a holding that the scheme is constitutional, that holding should extend equally to newly devised tax benefit plans which are indistinguishable in principle from those long established.

The Court's statements that "special tax benefits, however, cannot be squared with the principle of neutrality established by the decisions of this Court," and that "insofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions," are impossible to reconcile with *Walz*. Who can doubt that the tax exemptions which that case upheld were every bit as much of a "special tax benefit" as the New York tax deduction plan here, or that the benefits resulting from the exemption in *Walz* had every bit as much tendency to "aid and advance . . . religious institutions" as did New York's plan here?

The Court nonetheless declares that what has been authorized by the legislature is not a true deduction and in substance provides an incentive for parents to send their children to sectarian schools because the amount deductible from adjusted gross income bears no relationship to amounts actually expended for nonpublic education. But the deduction here allowed is analytically no different from any other flat-rate exemptions or deductions. Surely neither the standard deduction, usable by those taxpayers who do not itemize their deductions, nor dependency exemptions, for example, bear any relationship to the actual expenses accrued in earning any of them. Yet none of these could properly be called a reimbursement from the State. And it would take more of a record than is present in this case to prove that the possibility of a slightly lower aggregate tax bill accorded New York taxpayers who send their dependents to nonpublic schools provides any more incentive to send children to such schools than personal exemptions provide for getting married or having children.

The sole difference between the flat-rate exemptions currently in widespread use and the deduction established in §§ 4 and 5 is that the latter provides a regressive benefit. This legislative judgment, however, as to the appropriate spread of the expense of public and nonpublic education is consonant with the State's concern that those at the lower end of the income brackets are less able to exercise freely their consciences by sending their children to nonpublic schools. Regardless of what the Court chooses to call the New York plan, it is still abstention from taxation, and that abstention stands on no different theoretical footing, in terms of running afoul of the Establishment Clause, from any other deduction or exemption currently allowable for religious contributions or activities. The invalidation of the New York plan is directly contrary to this Court's pronouncements in *Walz*.

II

In striking down both plans, the Court places controlling weight on the fact that the State has not purported to restrict to secular purposes either the reimbursements or the money which it has not taxed. This factor assertedly serves to distinguish *Board of Education* v. *Allen*, and *Everson* v. *Board of Education*, and compels the result that inevitably the primary effect of the plans is to provide financial support for sectarian schools.

The reimbursement and tax benefit plans today struck down, no less than the plans in *Everson* and *Allen*, are consistent with the principle of neutrality. New York has recognized that parents who are sending their children to nonpublic schools are rendering the State a service by decreasing the costs of public education and by physically relieving an already overburdened public school system. Such parents are nonetheless compelled to support public school services unused by them and to pay for their own children's education. Rather than offering "an incentive to parents to send their children to sectarian schools," New York is effectuating the secular purpose of the equalization of the cost of educating New York children that are borne by parents who send their children to nonpublic schools. As in *Everson* and *Allen*, the impact, if any, on religious education from the aid granted is significantly diminished by the fact that the benefits go to parents rather than to institutions.

If the Constitution does indeed allow for play in the legislative joints, the Court must distinguish between a new exercise of power within constitutional limits and an exercise of legislative power which transgresses those limits. I believe the Court has failed to make that distinction here, and I therefore dissent.

MR. JUSTICE WHITE, joined in part by THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST, dissenting.

This Court has held that the Due Process Clause of the Fourteenth Amendment entitles parents to send their children to nonpublic schools, secular or sectarian, if those schools are sufficiently competent to educate the child in the necessary secular subjects. *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). About 10% of the Nation's children now take this option. Under state law these children have a right to a free public education and it would not appear unreasonable if the State, relieved of the expense of educating a child in the public school, contributed to the expense of his education elsewhere. The parents of such children pay taxes, including school taxes. Constitutional considerations aside, it would be understandable if a

State gave such parents a call on the public treasury up to the amount the parents save the State by not sending their children to public school.

In light of the Free Exercise Clause of the First Amendment, this would seem particularly the case where the parent desires his child to attend a school that offers not only secular subjects but religious training as well. A State should put no unnecessary obstacles in the way of religious training for the young. Positing an obligation on the State to educate its children, which every State acknowledges, it should be wholly acceptable for the State to contribute to the secular education of children going to sectarian schools.

Historically, the States of the Union have not furnished public aid for education in private schools. But in the last few years, as private education, particularly the parochial school system, has encountered financial difficulties, there has developed a variety of programs seeking to extend at least some aid to private educational institutions.

There are, then, the most profound reasons for this Court to proceed with the utmost care. It should not, absent a clear mandate in the Constitution, invalidate these New York statutes and thereby not only scuttle state efforts to hold off serious financial problems in their public schools but also make it more difficult, if not impossible, for parents to follow the dictates of their conscience and seek a religious as well as secular education for their children.

I am quite unreconciled to the Court's decision in *Lemon* v. *Kurtzman*. I thought then, and I think now, that the Court's conclusion there was not required by the First Amendment. I therefore have little difficulty in accepting the New York maintenance grant, which does not approach the actual repair and maintenance cost incurred in connection with the secular education services performed for the State in parochial schools. But, accepting *Lemon* and the invalidation of the New York maintenance grant, I would, with THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST, sustain the New York tuition grant and tax credit provisions.

The Court strikes down the maintenance law because its "effect, inevitably, is to subsidize and advance the religious mission of sectarian schools," and for the same reason invalidates the tuition grants. But the test is one of "primary" effect not *any* effect. The Court makes no attempt at that ultimate judgment necessarily entailed by the standard fashioned in our cases.

There is no doubt here that New York sought to keep the parochial schools system alive and capable of providing adequate secular education. By the same token, it seems to me, preserving the secular functions of these schools is the overriding consequence of these laws and the resulting, but incidental, benefit to religion should not invalidate them.

LEVITT v. COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY

413 U.S. 472 (1973)

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We are asked to decide whether Chapter 138 of New York State's Laws of 1970, under which the State reimburses private schools throughout the State for certain costs of testing and recordkeeping, violates the Establishment Clause of the First Amendment.

In April 1970, the New York Legislature appropriated $ 28,000,000 for the purpose of reimbursing nonpublic schools throughout the State

"for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation."

As indicated by the portion of the statute quoted above, the State has in essence sought to reimburse private schools for performing various "services" which the State "mandates." Of these mandated services, by far the most expensive for nonpublic schools is the "administration, grading and the compiling and reporting of the results of tests and examinations." Such "tests and examinations" appear to be of two kinds: (a) state-prepared examinations, such as the "Regents examinations" and the "Pupil Evaluation Program Tests," and (b) traditional teacher-prepared tests, which are drafted by the nonpublic school teachers for the purpose of measuring the pupils' progress in subjects required to be taught under state law. The overwhelming majority of testing in nonpublic, as well as public, schools is of the latter variety.

Church-sponsored as well as secular nonpublic schools are eligible to receive payments under the Act. The District Court made findings that the Commissioner of Education had "construed and applied" the Act "to include as permissible beneficiaries schools which (a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach."

A school seeking aid under the Act is required to submit an application to the Commissioner of Education. Qualifying schools receive an annual payment of $ 27 for each pupil in average daily attendance in grades one through six and $ 45 for each pupil in average daily attendance in grades seven through 12.[1] Payments are made in two installments: Between January 15 and March 15 of the school year, one-half of the "estimated total apportionment" is paid directly to the school; the balance is paid between April 15 and June 15. The Commissioner is empowered to make "later payments for the purpose of adjusting and correcting apportionments."

Section 8 of the Act states: "Nothing contained in this act shall be construed to authorize the making of any payment under this act for religious worship or instruction." However, the Act contains no provision authorizing state audits of school financial records to determine whether a school's actual costs in complying with the mandated services are less than the

[1]Exactly how the $ 27 and $ 45 figures were arrived at is somewhat unclear.

annual lump sum payment. Nor does the Act require a school to return to the State moneys received in excess of its actual expenses.[2] In appellant Nyquist's answers to appellees' interrogatories, the Commissioner stated that "qualifying schools are not required to submit reports accounting for the moneys received and how they are expended."

In *Committee for Public Education & Religious Liberty* v. *Nyquist*, the Court has today struck down a provision of New York law authorizing "direct money grants from the State to 'qualifying' non-public schools to be used for the 'maintenance and repair of . . . school facilities and equipment to ensure the health, welfare and safety of enrolled pupils.'" The infirmity of the statute in *Nyquist* lay in its undifferentiated treatment of the maintenance and repair of facilities devoted to religious and secular functions of recipient, sectarian schools. Since "no attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes," the Court held that the statute has the primary effect of advancing religion and is, therefore, violative of the Establishment Clause.

The statute now before us contains some of the same constitutional flaws that led the Court to its decision in *Nyquist*.[3] As noted previously, Chapter 138 provides for a direct money grant to sectarian schools for performance of various "services." Among those services is the maintenance of a regular program of traditional internal testing designed to measure pupil achievement. Yet, despite the obviously integral role of such testing in the total teaching process, no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction.

We cannot ignore 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. We do not "assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment." *Lemon* v. *Kurtzman*, 403 U.S. at 618. But the potential for conflict "inheres in the situation," and because of that the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination. Since the State has failed to do so here, we are left with no choice under *Nyquist* but to hold that Chapter 138 constitutes an impermissible aid to religion; this is so because the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities.

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[2] Subsequent to the enactment of Chapter 138, the state conducted several studies to determine whether the per-pupil allotment under the statute exceeded the actual costs to schools in performing the mandated services. The District Court found the results "cloudy": "If such items as 'teacher examinations' and 'entrance examinations' are included in the list of 'mandated services,' it appears that the schools' expenses are at least as great as the amounts they receive from the state. But if those items are excluded, the amounts received from the state are substantially greater than the schools' expenses."

[3] We do not doubt that the New York Legislature had a "secular legislative purpose" in enacting Chapter 138.

Appellants insist that payments under Chapter 138 do not aid the religious mission of church-related schools but merely provide partial reimbursement for totally nonsectarian activities performed at the behest of the State. Appellants, in other words, contend that this case is controlled by our decisions in *Everson* and *Allen*. In this case, however, we are faced with state-supported activities of a substantially different character from bus rides or state-provided textbooks. Routine teacher-prepared tests are "an integral part of the teaching process." And, "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." *Lemon* v. *Kurtzman*, 403 U.S. at 617.

To the extent that appellants argue that the State should be permitted to pay for any activity "mandated" by state law or regulation, we must reject the contention. State or local law might, for example, "mandate" minimum lighting or sanitary facilities for all school buildings, but such commands would not authorize a State to provide support for those facilities in church-sponsored schools. The essential inquiry in each case is whether the challenged state aid has the primary purpose or effect of advancing religion or religious education or whether it leads to excessive entanglement by the State in the affairs of the religious institution. That inquiry would be irreversibly frustrated if the Establishment Clause were read as permitting a State to pay for whatever it requires a private school to do.

We hold that the lump-sum payments violate the Establishment Clause.

SLOAN, TREASURER OF PENNSYLVANIA v. LEMON

413 U.S. 825 1973

MR. JUSTICE POWELL delivered the opinion of the Court.

On June 28, 1971, this Court handed down *Lemon* v. *Kurtzman* in which Pennsylvania's "Nonpublic Elementary and Secondary Education Act" was held unconstitutional. On August 27, 1971, the Pennsylvania General Assembly promulgated a new aid law, entitled the "Parent Reimbursement Act for Nonpublic Education," providing funds to reimburse parents for a portion of tuition expenses incurred in sending their children to nonpublic schools. Shortly thereafter, this suit, challenging the enactment was filed.

We have today held in *Committee for Public Education & Religious Liberty* v. *Nyquist* that New York's tuition reimbursement legislation has the impermissible effect of advancing religious institutions and is therefore unconstitutional under the Establishment Clause. We find no constitutionally significant difference between New York's and Pennsylvania's programs.

Pennsylvania's "Parent Reimbursement Act for Nonpublic Education" provides for reimbursement to parents who pay tuition for their children to attend the State's nonpublic elementary and secondary schools. Qualifying parents are entitled to receive $ 75 for each dependent enrolled in an elementary school, and $ 150 for each dependent in a secondary school, unless that amount exceeds the amount of tuition actually paid. The money to fund

this program is to be derived from a portion of the revenues from the State's tax on cigarette sales. In an effort to avoid the "entanglement" problem that flawed its prior aid statute, the new legislation specifically precludes the administering authority from having any "direction, supervision or control over the policy determinations, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic school or schools." Similarly, the statute imposes no restrictions or limitations on the uses to which the reimbursement allotments can be put by the qualifying parents.

Like the New York tuition program, the Pennsylvania law is prefaced by "legislative findings," which emphasize its underlying secular purposes: parents who send their children to nonpublic schools reduce the total cost of public education; "inflation, plus sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden"; if the State's 500,000 nonpublic school children were to transfer to the public schools, the annual operating costs to the State would be $ 400 million, and the added capital costs would exceed $ 1 billion; therefore, "parents who maintain students in nonpublic schools provide a vital service" and deserve at least partial reimbursement for alleviating an otherwise "intolerable public burden." We certainly do not question now, any more than we did in *Lemon* v. *Kurtzman*, the reality and legitimacy of Pennsylvania's secular purposes.

We turn, then, to consider the new law's effect. For purposes of determining whether the Pennsylvania tuition reimbursement program has the impermissible effect of advancing religion, we find no constitutionally significant distinctions between this law and the one declared invalid today in *Nyquist*. Each authorizes the States to use tax-raised funds for tuition reimbursements payable to parents who send their children to nonpublic schools. Neither tells parents how they must spend the amount received. While the Pennsylvania grants are more generous ($ 75 to $ 150 as opposed to $ 50 to $ 100), and while Pennsylvania imposes no ceiling on the number of children for whom parents may claim tuition reimbursement or on the percentage of the tuition bill for which parents may be reimbursed, these considerations are irrelevant to the First Amendment question.

The intervenors have, however, proffered a distinction which deserves discussion because it serves to underline the basis for our ruling in these cases. Intervenors suggest that New York's law might be differentiated on the ground that, because tuition grants there were available only to parents in an extremely low income bracket (less than $ 5,000 of taxable income), it would be reasonable to predict that the grant would, in fact, be used to pay tuition, rendering the parent a mere "conduit" for public aid to religious schools. Since Pennsylvania authorizes grants to all parents of children in nonpublic schools -- regardless of income level -- it is argued that no such assumption can be made as to how individual parents will spend their reimbursed amounts.[1]

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[1] It was also alleged, as a ground of distinction between the Pennsylvania and New York tuition reimbursement grants, that there was less likelihood of political divisiveness under the Pennsylvania scheme because it is financed out of a self-perpetuating fund derived from the state cigarette tax. Thus, it is contended that no annual appropriations are required and there will be less likelihood of divisive political pressure for increased grants and expanded aid. We addressed the problem of potential political divisiveness in our opinion in *Nyquist*. At most, the difference

Our decision, however, is not dependent upon any such speculation. Instead we look to the substance of the program, and no matter how it is characterized its effect remains the same. The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions. We think it plain that this is quite unlike the sort of "indirect" and "incidental" benefits that flowed to sectarian schools from programs aiding *all* parents by supplying bus transportation and secular textbooks for their children. Such benefits were carefully restricted to the purely secular side of church-affiliated institutions and provided no special aid for those who had chosen to support religious schools. Yet such aid approached the "verge" of the constitutionally impermissible. *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). In *Lemon v. Kurtzman*, we declined to allow *Everson* to be used as the "platform for yet further steps" in granting assistance to "institutions whose legitimate needs are growing and whose interests have substantial political support." Again today we decline to approach or overstep the "precipice" against which the Establishment Clause protects. We hold that Pennsylvania's tuition grant scheme violates the constitutional mandate against the "sponsorship" or "financial support" of religion or religious institutions.

In holding today that Pennsylvania's post-*Lemon* attempt to avoid the Establishment Clause's prohibition against government entanglements with religion has failed to satisfy the parallel bar against laws having a primary effect that advances religion, we are not unaware that appellants may feel that the decisions of this Court have, indeed, presented them with the "insoluble paradox" to which MR. JUSTICE WHITE referred in his separate opinion in *Lemon* v. *Kurtzman*. But if novel forms of aid have not readily been sustained by this Court, the "fault" lies not with the doctrines which are said to create a paradox but rather with the Establishment Clause itself. With that judgment we are not free to tamper.

MEEK *v.* PITTENGER, SECRETARY OF EDUCATION

421 U.S. 349 (1975)

MR. JUSTICE STEWART announced the judgment of the Court and delivered the opinion of the Court (Parts I, II, IV, and V), together with an opinion (Part III), in which MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL, joined.

This case requires us to determine once again whether a state law providing assistance to nonpublic, church-related, elementary and secondary schools is constitutional under the Establishment Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment.

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here is one in degree and one not likely to diminish perceptibly over the long term the inevitable demands for increased and expanded aid.

I

With the stated purpose of assuring that every schoolchild in the Commonwealth will equitably share in the benefits of auxiliary services, textbooks, and instructional material provided free of charge to children attending public schools, the Pennsylvania General Assembly in 1972 added Acts 194 and 195 to the Pennsylvania Public School Code of 1949.

Act 194 authorizes the Commonwealth to provide "auxiliary services" to all children enrolled in nonpublic elementary and secondary schools meeting Pennsylvania's compulsory-attendance requirements. "Auxiliary services" include 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, non-ideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth." Act 194 specifies that the teaching and services are to be provided in the nonpublic schools themselves by personnel drawn from the appropriate "intermediate unit," part of the public school system of the Commonwealth established to provide special services to local school districts.

Act 195 authorizes the State Secretary of Education, either directly or through the intermediate units, to lend textbooks without charge to children attending nonpublic elementary and secondary schools that meet the Commonwealth's compulsory-attendance requirements. The books that may be lent are limited to those "which are acceptable for use in any public, elementary, or secondary school of the Commonwealth."

Act 195 also authorizes the Secretary of Education, pursuant to requests from the appropriate nonpublic school officials, to lend directly to the nonpublic schools "instructional materials and equipment, useful to the education" of nonpublic school children. "Instructional materials" are defined to include periodicals, photographs, maps, charts, sound recordings, films, "or any other printed and published materials of a similar nature." "Instructional equipment," as defined by the Act, includes projection equipment, recording equipment, and laboratory equipment.

On February 7, 1973, three individuals and four organizations filed a complaint in the District Court for the Eastern District of Pennsylvania challenging the constitutionality of Acts 194 and 195.

II

In judging the constitutionality of the various forms of assistance authorized by Acts 194 and 195, the District Court applied the three-part test that has been clearly stated, if not easily applied, by this Court in recent Establishment Clause cases. First, the statute must have a secular legislative purpose. Second, it must have a "primary effect" that neither advances nor inhibits religion. Third, the statute and its administration must avoid excessive government entanglement with religion.

These tests constitute a convenient, accurate distillation of this Court's efforts over the past decades to evaluate a wide range of governmental action challenged as violative of the constitutional prohibition against laws "respecting an establishment of religion," and thus provide the proper framework of analysis for the issues presented in the case before us. It is

well to emphasize, however, that the tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired.

Primary among the evils against which the Establishment Clause protects "have been 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' The Court has broadly stated that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." But it is clear that not all legislative programs that provide indirect or incidental benefit to a religious institution are prohibited by the Constitution. "The problem, like many problems in constitutional law, is one of degree."

III

The District Court held that the textbook loan provisions of Act 195 are constitutionally indistinguishable from the New York textbook loan program upheld in *Allen*. We agree.

Approval of New York's textbook loan program in the *Allen* case was based primarily on this Court's earlier decision in *Everson*. The Court in *Allen* found that the New York textbook law "merely makes available to all children the benefits of a general program to lend school books free of charge."

Like the New York program, the textbook provisions of Act 195 extend to all schoolchildren the benefits of Pennsylvania's well-established policy of lending textbooks free of charge to elementary and secondary school students.[1] As in *Allen*, Act 195 provides that the textbooks are to be lent directly to the student, not to the nonpublic school itself, although, again as in *Allen*, the administrative practice is to have student requests for the books filed initially with the nonpublic school and to have the school authorities prepare collective summaries of these requests which they forward to the appropriate public officials. Thus, the financial benefit of Pennsylvania's textbook program, like New York's, is to parents and children, not to the nonpublic schools.[2]

Under New York law the books that could be lent were limited to textbooks "which are designated for use in any public, elementary or secondary schools of the state or are approved

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[1] New York in a single statute authorized the loan of textbooks without charge to students attending both public and nonpublic schools. The Pennsylvania General Assembly has used two separate provisions of the Public School Code of 1949 to accomplish the same result. Pennsylvania Stat. Ann., Tit. 24, § 8-801, requires that textbooks be provided free of charge for use in the Pennsylvania public schools. Act 195 provides the authorization for the loan of textbooks to nonpublic elementary and secondary school students. So long as the textbook loan program includes all schoolchildren, those in public as well as those in private schools, it is of no constitutional significance whether the general program is codified in one statute or two.

[2] In Pennsylvania, as in New York, prior to commencement of the state-supported textbook loan program, the parents of nonpublic school children had to purchase their own textbooks.

by any boards of education, trustees or other school authorities." Act 195 similarly limits the books that may be lent.[3] Moreover, the record in the case before us, like the record in *Allen,* contains no suggestion that religious textbooks will be lent or that the books provided will be used for anything other than purely secular purposes.

In sum, the textbook loan provisions of Act 195 are in every material respect identical to the loan program approved in *Allen.* As such, those provisions of Act 195 do not offend the constitutional prohibition against laws "respecting an establishment of religion."

IV

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. The appellants assert that such direct aid to Pennsylvania's nonpublic schools, including church-related institutions, constitutes an impermissible establishment of religion.

Act 195 is accompanied by legislative findings that the welfare of the Commonwealth requires that present and future generations of schoolchildren be assured ample opportunity to develop their intellectual capacities. Act 195 is intended to further that objective by extending the benefits of free educational aids to every schoolchild in the Commonwealth, including nonpublic school students. We accept the legitimacy of this secular legislative purpose. But we agree with the appellants that the direct loan of instructional material and equipment has the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefitting from the Act.[4]

Commonwealth officials, as a matter of state policy, do not inquire into the religious characteristics, if any, of the nonpublic schools requesting aid pursuant to Act 195. The chief administrator of Acts 194 and 195 testified that a school would not be barred from receiving loans of instructional material and equipment even though its dominant purpose was the inculcation of religious values, even if it imposed religious restrictions on admissions or on faculty appointments, and even if it required attendance at classes in theology or at religious services. In fact, of the 1,320 nonpublic schools in Pennsylvania that comply with the requirements of the compulsory-attendance law and thus qualify for aid under Act 195, more than 75% are church-related or religiously affiliated educational institutions. Thus, the

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[3] Indeed, under the statutory scheme approved in *Allen,* the books lent to nonpublic school students might never in fact have been approved for use in any public school of the State. The statute permitted the loan of books initially selected for use by the nonpublic schools themselves, subject only to subsequent approval by "any boards of education." In contrast, only those books which have the antecedent approval of Pennsylvania school officials qualify for loans under Act 195.

[4] Because we have concluded that the direct loan of instructional material and equipment to church-related schools has the impermissible effect of advancing religion, there is no need to consider whether such aid would result in excessive entanglement of the Commonwealth with religion through "comprehensive, discriminating, and continuing state surveillance." *Lemon* v. *Kurtzman,* 403 U.S. 602, 619.

primary beneficiaries of Act 195's instructional material and equipment loan provisions are nonpublic schools with a predominant sectarian character.

It is, of course, true that as part of general legislation made available to all students, a State may include church-related schools in programs providing bus transportation, school lunches, and public health facilities - secular and nonideological services unrelated to the primary, religion-oriented educational function of the sectarian school. The indirect and incidental benefits to church-related schools from those programs do not offend the constitutional prohibition against establishment of religion. But the massive aid provided church-related nonpublic schools by Act 195 is neither indirect nor incidental.

For the 1972-1973 school year the Commonwealth authorized just under $ 12 million of direct aid to the predominantly church-related nonpublic schools of Pennsylvania through the loan of instructional material and equipment pursuant to Act 195. To be sure, the material and equipment that are the subjects of the loan - maps, charts, and laboratory equipment, for example - are "self-polic[ing], in that starting as secular, nonideological and neutral, they will not change in use." But faced with the substantial amounts of direct support authorized by Act 195, 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. Even though earmarked for secular purposes, "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.

The church-related schools that are the primary beneficiaries of Act 195's instructional material and equipment loans typify such religion-pervasive institutions. Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. "[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined." For this reason, Act 195's direct aid to Pennsylvania's predominantly church-related, nonpublic elementary and secondary schools, even though ostensibly limited to wholly neutral, secular instructional material and equipment, inescapably results in the direct and substantial advancement of religious activity and thus constitutes an impermissible establishment of religion.

V

Unlike Act 195, which provides only for the loan of teaching material and equipment, Act 194 authorizes the Secretary of Education to supply professional staff, as well as supportive materials, equipment, and personnel, to the nonpublic schools of the Commonwealth. The "auxiliary services" authorized by Act 194 - remedial and accelerated instruction, guidance counseling and testing, speech and hearing services - are provided directly to nonpublic school children with the appropriate special need. But the services are provided only on the nonpublic school premises, and only when "requested by nonpublic school representatives."

Act 194 is intended to assure full development of the intellectual capacities of the children of Pennsylvania by extending the benefits of free auxiliary services to all students in the

Commonwealth. The appellants concede the validity of this secular legislative purpose. Nonetheless, they argue that Act 194 constitutes an impermissible establishment of religion because the services are provided on the premises of predominantly church-related schools.

We need not decide whether substantial state expenditures to enrich the curricula of church-related elementary and secondary schools, like the expenditure of state funds to support the basic educational program of those schools, necessarily result in the direct and substantial advancement of religious activity. For decisions of this Court make clear that the District Court erred in 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. The prophylactic contacts required to ensure that teachers play a strictly nonideological role necessarily give rise to a constitutionally intolerable degree of entanglement between church and state. The excessive entanglement would be required for Pennsylvania to be "certain," as it must be, that Act 194 personnel do not advance the religious mission of the church-related schools in which they serve.

That Act 194 authorizes state funding of teachers only for remedial and exceptional students, and not for normal students participating in the core curriculum, does not distinguish this case from *Lemon.* 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: "The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion." And a state-subsidized guidance counselor is surely as likely as a state-subsidized chemistry teacher to fail on occasion to separate religious instruction and the advancement of religious beliefs from his secular educational responsibilities.

The fact that the teachers and counselors providing auxiliary services are [not] employees of the church-related schools in which they work does not substantially eliminate the need for continuing surveillance. To be sure, auxiliary-services personnel, because not employed by the nonpublic schools, are not directly subject to the discipline of a religious authority. But they are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained. The potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present. To be certain that auxiliary teachers remain religiously neutral, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that those restrictions were being followed.

In addition, Act 194 creates a serious potential for divisive conflict over the issue of aid to religion - "entanglement in the broader sense of continuing political strife." The recurrent nature of the appropriation process guarantees annual reconsideration of Act 194 and the prospect of repeated confrontation between proponents and opponents of the auxiliary-services program. The Act thus provides successive opportunities for political fragmentation and division along religious lines, one of the principal evils against which the Establishment Clause was intended to protect. This potential for political entanglement, together with the

administrative entanglement which would be necessary to ensure that auxiliary-services personnel remain strictly neutral and nonideological compels the conclusion that Act 194 violates the constitutional prohibition against laws "respecting an establishment of religion."

The judgment of the District Court as to Act 194 is reversed; its judgment as to the textbook provisions of Act 195 is affirmed, but as to that Act's other provisions now before us its judgment is reversed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, concurring in part and dissenting in part.

I join in the reversal of the District Court's judgment insofar as that judgment upheld the constitutionality of Act 194 and the provisions of Act 195 respecting instructional materials and equipment, but dissent from Part III and the affirmance of the judgment upholding the constitutionality of the textbook provisions of Act 195.

A three-factor test by which to determine the compatibility with the Establishment Clause of state subsidies of sectarian educational institutions has evolved over 50 years of this Court's stewardship in the field. But four years ago, the Court, albeit without express recognition of the fact, added a significant fourth factor to the test: "A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs." The evaluation of this factor in determining compatibility of a state subsidy law with the Establishment Clause is essential, said the Court.

> This factor was key in [*Lemon'* s] determination that Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools violated the Establishment Clause. *Nyquist*, decided two years later, emphasized the importance to be attached by judges to this fourth factor.

The Court today also relies on the factor of divisive political potential but only as support for its holding that Act 194 is unconstitutional. Contrary to the plain and explicit teaching of [*Lemon*] and *Nyquist,* however, and inconsistently with its own treatment of Act 194, the plurality, in considering the constitutionality of Act 195 says not a single word about the political-divisiveness factor in Part III of the opinion upholding the textbook loan program, and makes only a passing footnote reference to the factor in holding that Act 195's program for loans of instructional materials and equipment “constitutes an impermissible establishment of religion."

I recognize that the plurality was on the horns of a dilemma. The plurality notes that the total 1972-1973 appropriation under Act 195 was $ 16,660,000, of which $ 4,670,000 was appropriated to finance the textbook program. The plurality notes further that "aid programs like Act 195 are dependent on continuing annual appropriations which generate increasing demands as costs and population grow." Plainly then, as in *Nyquist,* the political-divisiveness factor applies. But to comply with *Nyquist*, as is required, the plurality obviously must attach determinative weight to the factor as respects both the textbook loan and instructional materials and equipment loan provisions. For in light of the massive appropriations involved, the plurality would be hard put to explain how the factor weighs determinatively against the

validity of the instructional materials loan provisions, and not also against the validity of the textbook loan provisions. The plurality therefore would extricate itself from the horns of the dilemma by simply ignoring the factor in the weighing process.

But however much this evasion may be tolerable in the case of the instructional materials loan provisions, since these are invalidated on other grounds, responsibility for evaluating the weight to be accorded the factor cannot be evaded, in the case of the textbook loan provisions, by relying, as the plurality does, upon *Allen*. For *Allen*, which I joined, was decided before [*Lemon*] ordained that the political-divisiveness factor must be involved in the weighing process. Giving the factor the weight that [*Lemon*] and *Nyquist* require, compels, in my view the conclusion that the textbook loan program of Act 195, equally with the program for loan of instructional materials and equipment, violates the Establishment Clause. The plurality's answer is that a difference in result is justified because Act 195 distinguishes between recipients of the loans: textbooks are lent to students, while instructional material and equipment are lent directly to the schools. That answer will not withstand analysis.

First, it is pure fantasy to treat the textbook program as a loan to students. It is true that Act 195 talks of loans of acceptable secular textbooks directly to students attending nonpublic schools. But even the plurality acknowledges that "the administrative practice is to have student requests for the books filed initially with the nonpublic school and to have the school authorities prepare collective summaries of these requests which they forward to the appropriate public officials." Further, "the nonpublic schools are permitted to store on their premises the textbooks being lent to the students." Even if these practices were also followed under the New York statute, the regulations implementing Act 195 make clear, as the record in *Allen* did not, that the nonpublic school in Pennsylvania is something more than a conduit between the State and pupil. The Commonwealth has promulgated Guidelines to implement the statutes. These regulations, unlike those upheld in *Allen*, constitute a much more intrusive and detailed involvement of the State into the administration of nonpublic schools. The whole business is handled by the schools and public authorities, and neither parents nor students have a say. The guidelines make crystal clear that the nonpublic school, not its pupils, is the motivating force behind the textbook loan, and that virtually the entire loan transaction is to be conducted between officials of the nonpublic school and officers of the State.

Plainly, then, whatever may have been the case under the New York statute sustained in *Allen*, the loan ostensibly to students is, under Act 195, a loan in fact to the schools. In this regard, it should be observed that sophisticated attempts to avoid the Constitution are just as invalid as simple-minded ones.

In sum, I join the Court's opinion as to Parts I, II, IV and V, except that I would go further in Part IV and rest the invalidation of the provisions of Act 195 for loans of instructional materials and equipment also upon the political-divisiveness factor. I dissent from Part III.

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

I agree with the Court only insofar as it affirms the judgment of the District Court. My limited agreement with the Court leads me, however, to agree generally with the views

expressed by MR. JUSTICE REHNQUIST and MR. JUSTICE WHITE in regard to the other programs under review. I especially find it difficult to accept the Court's extravagant suggestion of potential entanglement which it finds in the "auxiliary services" program. Here, the Court's holding goes beyond any prior holdings of this Court and, indeed, conflicts with our holdings in *Allen* and *Lemon*. Certainly, there is no basis in "experience and history" to conclude that a State's attempt to provide the remedial assistance necessary for *all* its children poses the same potential for unnecessary administrative entanglement or divisive political confrontation which concerned the Court in *Lemon.* Indeed, I see at least as much potential for divisive political debate in opposition to the crabbed attitude the Court shows in this case.

To hold, as the Court now does, that the Constitution permits the States to give special assistance to some of its children whose handicaps prevent their deriving the benefit normally anticipated from the education required to become a productive member of society and, at the same time, to deny those benefits to other children *only because* they attend a Lutheran, Catholic, or other church-sponsored school does not simply tilt the Constitution against religion; it literally turns the Religion Clauses on their heads.

The melancholy consequence of what the Court does today is to force the parent to choose between the "free exercise" of a religious belief by opting for a sectarian education for his child or to forgo the opportunity for his child to learn to cope with - or overcome - serious congenital learning handicaps, through remedial assistance financed by his taxes. One can only hope that, at some future date, the Court will come to a more enlightened and tolerant view of the First Amendment's guarantee of free exercise of religion, thus eliminating the denial of equal protection to children in church-sponsored schools, and take a more realistic view that carefully limited aid to children is not a step toward establishing a state religion - at least while this Court sits.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE WHITE joins, concurring in the judgment in part and dissenting in part.

I agree with MR. JUSTICE STEWART that [the textbook] program is constitutionally indistinguishable from the New York textbook loan program upheld in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), and on the authority of that case I join the judgment of the Court insofar as it upholds the textbook loan program.

The Court strikes down other provisions of Act 195 dealing with instructional materials and equipment because it finds that they have "the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefitting from the Act." This apparently follows from the high percentage of nonpublic schools that are "church-related or religiously affiliated educational institutions." The Court thus again appears to follow "the unsupportable approach of measuring the 'effect' of a law by the percentage of" sectarian schools benefitted. I find that approach to the "primary effect" branch of our three-pronged test no more satisfactory in the context of this instructional materials and equipment program than it was in the context of tuition reimbursement and tax relief.

One need look no further than to the majority opinion for a demonstration of the arbitrariness of the percentage approach to primary effect. In determining the constitutionality

of the textbook loan program, the plurality views the program in the context of the State's "well-established policy of lending textbooks free of charge to elementary and secondary school students." But when it comes time to consider the same Act's instructional materials and equipment program, which is not alleged to make available to private schools any materials and equipment that are not provided to public schools, the majority strikes down this program because more than 75% of the nonpublic schools are religiously affiliated.

If the number of sectarian schools were measured as a percentage of all schools, public and private, then no doubt the majority would conclude that the primary effect of the instructional materials and equipment program is not to advance religion. One looks in vain, however, for an explanation of the majority's selection of the number of private schools as the denominator in its instructional materials and equipment calculations.

The failure of the majority to justify the differing approaches to textbooks and instructional materials and equipment in the above respect is symptomatic of its failure even to attempt to distinguish the Pennsylvania textbook loan program, which the plurality upholds, from the Pennsylvania instructional materials and equipment loan program, which the majority finds unconstitutional. I fail to see how the instructional materials and equipment program can be distinguished in any significant respect. Under both programs "ownership remains, at least technically, in the State." Once it is conceded that no danger of diversion exists, it is difficult to articulate any principled basis upon which to distinguish the two Act 195 programs.

The Court eschews its primary-effect analysis in striking down Act 194, and relies instead upon the proposition that the Act "give[s] rise to a constitutionally intolerable degree of entanglement between church and state." Acknowledging that Act 194 authorizes state financing "of teachers only for remedial and exceptional students, and not for normal students participating in the core curriculum," the Court nonetheless finds this case indistinguishable from *Lemon* v. *Kurtzman* and companion cases, in which salary supplement programs for core curriculum teachers were found unconstitutional. "[A] state-subsidized guidance counselor is surely as likely as a state-subsidized chemistry teacher to fail on occasion to separate religious instruction and the advancement of religious beliefs from his secular educational responsibilities."

I find this portion of the Court's opinion deficient as a matter of process and insupportable as a matter of law. The Court's conclusion that the dangers presented by a state-subsidized guidance counselor are the same as those presented by a state-subsidized chemistry teacher is apparently no more than an *ex cathedra* pronouncement on the part of the Court, since the District Court found the facts to be exactly the opposite.

As a matter of constitutional law, the holding by the majority that this case is controlled by *Lemon* and companion cases marks a significant *sub silentio* extension of that 1971 decision. The auxiliary services program established by Act 194 differs from the programs struck down in *Lemon* in two important respects. First the opportunities for religious instruction through the auxiliary services program are greatly reduced. Unlike the core curriculum instruction provided in *Lemon*, "auxiliary services" are defined in Act 194 to embrace a narrower range of services.

Even if the distinction between these services and core curricula is thought to be a matter of degree, the second distinction between the programs involved in *Lemon* and Act 194 is a difference in kind. Act 194 provides that these auxiliary services shall be provided by personnel of the *public* school system. Since the danger of entanglement articulated in *Lemon* flowed from the susceptibility of parochial school teachers to "religious control and discipline," I would have assumed that exorcisation of that constitutional "evil" would lead to a different constitutional result. The Court does not contend that the public school employees who would administer the auxiliary services are subject to "religious control and discipline." The decision of the Court that Act 194 is unconstitutional rests ultimately upon the unsubstantiated factual proposition that "[t]he potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present." "The test [of entanglement] is inescapably one of degree," but if the Court is free to ignore the record, then appellees are left to wonder whether the possibility of meeting the entanglement test is now anything more than "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards* v. *California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

I am disturbed as much by the overtones of the Court's opinion as by its actual holding. The Court apparently believes that the Establishment Clause of the First Amendment not only mandates religious neutrality on the part of government but also requires that this Court go further and throw its weight on the side of those who believe that our society as a whole should be a purely secular one. Nothing in the First Amendment or in the cases interpreting it requires such an extreme approach to this difficult question, and "[a]ny interpretation of [the Establishment Clause] and the constitutional values it serves must also take account of the free exercise clause and the values it serves."

Except insofar as the Court upholds the textbook loan program, I respectfully dissent.

WOLMAN *v.* WALTER

433 U.S. 229 (1977)

MR. JUSTICE BLACKMUN delivered the opinion of the Court (Parts I, V, VI, VII, and VIII), together with an opinion (Parts II, III, and IV), in which THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE POWELL joined.

This is still another case presenting the recurrent issue of the limitations imposed by the Establishment Clause on state aid to pupils in church-related elementary and secondary schools. Appellants challenge all but one of the provisions of Ohio Rev. Code Ann. § 3317.06 (Supp. 1976) which authorize various forms of aid.

I

Section 3317.06 was enacted after this Court's May 1975 decision in *Meek* v. *Pittenger*, and obviously is an attempt to conform to the teachings of that decision. In broad outline, the statute authorizes the State to provide nonpublic school pupils with books, instructional

materials and equipment, standardized testing and scoring, diagnostic services, therapeutic services, and field trip transportation.

The initial biennial appropriation for implementation of the statute was the sum of $88,800,000. Funds so appropriated are paid to the State's public school districts and are then expended by them. 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.

The parties stipulated that during the 1974-1975 school year there were 720 chartered nonpublic schools in Ohio. Of these, all but 29 were sectarian. More than 96% of the nonpublic enrollment attended sectarian schools, and more than 92% attended Catholic schools. All such schools teach the secular subjects required to meet the State's minimum standards. The state-mandated five-hour day is expanded to include, usually, one-half hour of religious instruction. Pupils who are not members of the Catholic faith are not required to attend religion classes or to participate in religious exercises or activities, and no teacher is required to teach religious doctrine as a part of the secular courses taught in the schools.

The District Court concluded: "Although the stipulations of the parties evidence several significant points of distinction, the character of these schools is substantially comparable to that of the schools involved in *Lemon* v. *Kurtzman,* 403 U.S. 602, 615-618 (1971)."

II

The mode of analysis for Establishment Clause questions is defined by the three-part test that has emerged from the Court's decisions. In order to pass muster, a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion.

In the present case we have no difficulty with the first prong of this three-part test. We are satisfied that the challenged statute reflects Ohio's legitimate interest in protecting the health of its youth and in providing a fertile educational environment for all the schoolchildren of the State. As is usual in our cases, the analytical difficulty has to do with the effect and entanglement criteria.

We have acknowledged before, and we do so again here, that the wall of separation that must be maintained between church and state "is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon,* 403 U.S. at 614. Nonetheless, the Court's numerous precedents "have become firmly rooted" and now provide substantial guidance. We therefore turn to the task of applying the rules derived from our decisions to the respective provisions of the statute at issue.

III. Textbooks

Section 3317.06 authorizes the expenditure of funds:

"(A) To purchase such secular textbooks as have been approved by the superintendent of public instruction for use in public schools and to loan such textbooks to pupils attending nonpublic schools within the district or to their parents. Such loans shall be based upon individual requests submitted by such nonpublic school pupils or parents. Such requests shall

be submitted to the local public school district. Such individual requests for the loan of textbooks shall, for administrative convenience, be submitted by the nonpublic school pupil or his parent to the nonpublic school which shall prepare and submit collective summaries of the individual requests to the local public school district."

The parties' stipulations reflect operation of the textbook program in accord with the dictates of the statute. In addition, it was stipulated:

"The secular textbooks used in nonpublic schools will be the same as the textbooks used in the public schools of the state. Common suppliers will be used to supply books to both public and nonpublic school pupils."

"Textbooks provided under this Act shall be limited to books, reusable workbooks, or manuals, whether bound or in looseleaf form, intended for use as a principal source of study material for a given class or group of students, a copy of which is expected to be available for the individual use of each pupil in such class or group."

This system for the loan of textbooks to individual students bears a striking resemblance to the systems approved in *Allen* and *Meek*.[1] Accordingly, we conclude that § 3317.06 (A) is constitutional.

IV. Testing and Scoring

Section 3317.06 authorizes expenditure of funds:

"(J) To supply for use by pupils attending nonpublic schools within the district such standardized tests and scoring services as are in use in the public schools of the state."

These tests "are used to measure the progress of students in secular subjects." Nonpublic school personnel are not involved in either the drafting or scoring of the tests. The statute does not authorize any payment to nonpublic school personnel for administering the tests.

In *Levitt* v. *Committee for Public Education*, 413 U. S. 472 (1973), this Court invalidated a New York statutory scheme for reimbursement of church-sponsored schools for the expenses of teacher-prepared testing. The reasoning behind that decision was straightforward. The system was held unconstitutional because "no means are available, to assure that internally prepared tests are free of religious instruction."

There is no question that the State has a substantial and legitimate interest in insuring that its youth receive an adequate secular education. The State may require that schools that are utilized to fulfill the State's compulsory-education requirement meet certain standards of instruction. Under the section at issue, the State provides both the schools and the school district with the means of ensuring that the minimum standards are met. The nonpublic school does not control the content of the test or its result. This serves to prevent the use of the test as a part of religious teaching, and thus avoids that kind of direct aid to religion found present in

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[1] The Ohio Code provides in separate sections for the loan of textbooks to public school children and to nonpublic school children. The Court observed in *Meek:* "So long as the textbook loan program includes all schoolchildren, those in public as well as those in private schools, it is of no constitutional significance whether the general program is codified in one statute or two."

Levitt. Similarly, the inability of the school to control the test eliminates the need for the supervision that gives rise to excessive entanglement. We therefore agree with the District Court's conclusion that § 3317.06(J) is constitutional.

V. Diagnostic Services

Section 3317.06 authorizes expenditures of funds:

"(D) To provide speech and hearing diagnostic services to pupils attending nonpublic schools within the district. Such service shall be provided in the nonpublic school attended by the pupil receiving the service.

. . .

"(F) To provide diagnostic psychological services to pupils attending nonpublic schools within the district. Such services shall be provided in the school attended by the pupil receiving the service."

It will be observed that these speech and hearing and psychological diagnostic services are to be provided within the nonpublic school. It is stipulated, however, that the personnel (with the exception of physicians) who perform the services are employees of the local board of education; that physicians may be hired on a contract basis; that the purpose of these services is to determine the pupil's deficiency or need of assistance; and that treatment of any defect so found would take place off the nonpublic school premises.

Appellants assert that the funding of these services is constitutionally impermissible. They argue that the speech and hearing staff might engage in unrestricted conversation with the pupil and, on occasion, might fail to separate religious instruction from secular responsibilities. They further assert that the communication between the psychological diagnostician and the pupil will provide an impermissible opportunity for the intrusion of religious influence.

The District Court found these dangers so insubstantial as not to render the statute unconstitutional. We agree. This Court's decisions contain a common thread to the effect that the provision of health services to all schoolchildren - public and nonpublic - does not have the primary effect of aiding religion.

Indeed, appellants recognize this fact in not challenging subsection (E) of the statute that authorizes publicly funded physician, nursing, dental, and optometric services in nonpublic schools. We perceive no basis for drawing a different conclusion with respect to diagnostic speech and hearing services and diagnostic psychological services.

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.

We conclude that providing diagnostic services on the nonpublic school premises will not create an impermissible risk of the fostering of ideological views. It follows that there is no need for excessive surveillance, and there will not be impermissible entanglement. We therefore hold that §§ 3317.06 (D) and (F) are constitutional.

VI. Therapeutic Services

Sections 3317.06 (G), (H), (I), and (K) authorize expenditures of funds for certain therapeutic, guidance, and remedial services for students who have been identified as having a need for specialized attention. Personnel providing the services must be employees of the local board of education or under contract with the State Department of Health. The services are to be performed only in public schools, in public centers, or in mobile units located off the nonpublic school premises. The parties have stipulated: "The determination as to whether these programs would be offered in the public school, public center, or mobile unit will depend on the distance between the public and nonpublic school, the safety factors involved in travel, and the adequacy of accommodations in public schools and public centers."

Appellants concede that the provision of remedial, therapeutic, and guidance services in public schools, public centers, or mobile units is constitutional if both public and nonpublic school students are served simultaneously. Their challenge is limited to the situation where a facility is used to service only nonpublic school students. They argue that any program that isolates sectarian pupils is impermissible because the public employee providing the service might tailor his approach to reflect and reinforce the ideological view of the sectarian school attended by the children. Such action by the employee, it is claimed, renders direct aid to the sectarian institution. Appellants express particular concern over mobile units because they perceive a danger that such a unit might operate merely as an annex of the school it services.

We recognize that, unlike the diagnostician, the therapist may establish a relationship with the pupil in which there might be opportunities to transmit ideological views. In *Meek* the Court acknowledged the danger that publicly employed personnel who provide services analogous to those at issue here might transmit religious instruction and advance religious beliefs in their activities. But the Court emphasized that this danger arose from the fact that the services were performed in the pervasively sectarian atmosphere of the church-related school. 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. So long as these types of services are offered at truly religiously neutral locations, the danger perceived in *Meek* does not arise.

The fact that a unit on a neutral site on occasion may serve only sectarian pupils does not provoke the same concerns that troubled the Court in *Meek*. The influence on a therapist's behavior that is exerted by the fact that he serves a sectarian pupil is qualitatively different from the influence of the pervasive atmosphere of a religious institution. The dangers perceived in *Meek* arose from the nature of the institution, not from the nature of the pupils.

Accordingly, we hold that providing therapeutic and remedial services at a neutral site off the premises of the nonpublic schools will not have the impermissible effect of advancing

religion. Neither will there be any excessive entanglement arising from supervision of public employees to insure that they maintain a neutral stance. It can hardly be said that the supervision of public employees performing public functions on public property creates an excessive entanglement between church and state. Sections 3317.06(G), (H), (I), and (K) are constitutional.

VII. Instructional Materials and Equipment

Sections 3317.06(B) and (C) authorize expenditures of funds for the purchase and loan to pupils or their parents upon individual request of instructional materials and instructional equipment of the kind in use in the public schools within the district and which is "incapable of diversion to religious use." Section 3317.06 also provides that the materials and equipment may be stored on the premises of a nonpublic school.

Although the exact nature of the material and equipment is not clearly revealed, the parties have stipulated: "It is expected that materials and equipment loaned to pupils or parents under the new law will be similar to such former materials and equipment except that to the extent that the law requires that materials and equipment capable of diversion to religious issues will not be supplied." Equipment provided under the predecessor statute included projectors, tape recorders, record players, maps and globes, science kits, weather forecasting charts, and the like. The District Court found the new statute, as now limited, constitutional because the court could not distinguish the loan of material and equipment from the textbook provisions upheld in *Meek* and in *Allen*.

In *Meek,* however, the Court considered the constitutional validity of a direct loan to nonpublic schools of instructional material and equipment, and, despite the apparent secular nature of the goods, held the loan impermissible.

Appellees seek to avoid *Meek* by emphasizing that it involved a program of direct loans to nonpublic schools. In contrast, the material and equipment at issue under the Ohio statute are loaned to the pupil or his parent. In our view, however, it would exalt form over substance if this distinction were found to justify a result different from that in *Meek.* 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. Despite the 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. In view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools.

Indeed, this conclusion is compelled by the Court's prior consideration of an analogous issue in *Committee for Public Education* v. *Nyquist,* 413 U.S. 756 (1973). There the Court considered, among others, a tuition reimbursement program whereby New York gave low-income parents who sent their children to nonpublic schools a direct and unrestricted cash grant of $50 to $100 per child (but no more than 50% of tuition actually paid). The State attempted to justify the program, as Ohio does here, on the basis that the aid flowed to the parents rather than to the church-related schools. The Court observed, however, that, unlike the bus program in *Everson* and the book program in *Allen*, there "has been no endeavor 'to

guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former.'" The Court thus found that the grant program served to establish religion. If a grant in cash to parents is impermissible, we fail to see how a grant in kind of goods furthering the religious enterprise can fare any better.[2] Accordingly, we hold §§ 3317.06(B) and (C) to be unconstitutional.[3]

VIII. Field Trips

Section 3317.06 also authorizes expenditures of funds:

"(L) To provide such field trip transportation and services to nonpublic school students as are provided to public school students in the district. School districts may contract with commercial transportation companies for such transportation service if school district busses are unavailable."

There is no restriction on the timing of field trips; the only restriction on number lies in the parallel the statute draws to field trips provided to public school students in the district. The parties have stipulated that the trips "would consist of visits to governmental, industrial, cultural, and scientific centers designed to enrich the secular studies of students." The choice of destination will be made by the nonpublic school teacher from a wide range of locations.

The District Court held this feature to be constitutionally indistinguishable from that with which the Court was concerned in *Everson* v. *Board of Education,* 330 U. S. 1 (1947). We do not agree. The critical factors in the *Everson* reimbursement system are that the school has no control over the expenditure of the funds and the effect of the expenditure is unrelated to the content of the education provided. Thus, the bus fare program in *Everson* passed

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[2] In many respects, *Nyquist* was a more difficult case than the present one. First, it was at least arguable in *Nyquist* that the tuition grant did not end up in the hands of the religious schools since the parent was free to spend the grant money as he chose. No similar argument could be made here since the parties have stipulated expressly that material and equipment must be used to supplement courses. Second, since the grant in *Nyquist* was limited to 50% of tuition, it was arguable that the grant should be seen as supporting only the secular part of the church-school enterprise. An argument of that kind also could not be made here, for *Meek* makes clear that the material and equipment are inextricably connected with the church-related school's religious function.

[3] There is a tension between this result and *Board of Education* v. *Allen*. *Allen* was premised on the view that the educational content of textbooks is something that can be ascertained in advance and cannot be diverted to sectarian uses. *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. In more recent cases, we have declined to extend that presumption of neutrality to other items in the lower school setting. See *Meek*; *Levitt*. It has been argued that the Court should extend *Allen* to cover all items similar to textbooks. 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.

constitutional muster because the school did not determine how often the pupil traveled between home and school - every child must make one round trip every day - and because the travel was unrelated to any aspect of the curriculum.

The Ohio situation is in sharp contrast. First, the nonpublic school controls the timing of the trips and, within a certain range, their frequency and destinations. Thus, the schools, rather than the children, truly are the recipients of the service and, as this Court has recognized, this fact alone may be sufficient to invalidate the program as impermissible direct aid. Second, although a trip may be to a location that would be of interest to those in public schools, it is the individual teacher who makes a field trip meaningful. The experience begins with the study and discussion of the place to be visited; it continues on location with the teacher pointing out items of interest and stimulating the imagination; and it ends with a discussion of the experience. The 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. In *Lemon* the Court stated:

"We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral."

Funding of field trips, therefore, must be treated as was the funding of maps and charts in *Meek* v. *Pittenger,* the funding of buildings and tuition in *Committee for Public Education* v. *Nyquist,* and the funding of teacher-prepared tests in *Levitt* v. *Committee for Public Education;* it must be declared an impermissible direct aid to sectarian education.

Moreover, the public school authorities will be unable adequately to insure secular use of the field trip funds without close supervision of the nonpublic teachers. This would create excessive entanglement. We hold § 3317.06(L) to be unconstitutional.

IX

In summary, we hold constitutional those portions of the Ohio statute authorizing the State to provide nonpublic school pupils with books, standardized testing and scoring, diagnostic services, and therapeutic and remedial services. We hold unconstitutional those portions relating to instructional materials and equipment and field trip services.

The judgment of the District Court is therefore affirmed in part and reversed in part.

THE CHIEF JUSTICE dissents from Parts VII and VIII of the Court's opinion.

MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST concur in the judgment with respect to textbooks, testing and scoring, and diagnostic and therapeutic services (Parts III, IV, V and VI of the opinion) and dissent from the judgment with respect to instructional materials and equipment and field trips (Parts VII and VIII of the opinion).

MR. JUSTICE BRENNAN, concurring in part and dissenting.

I join Parts I, VII, and VIII of the Court's opinion. I dissent however from Parts II, III, and

IV (plurality opinion) and Parts V and VI of the courts opinion. The Court holds that Ohio has managed in these respects to fashion a statute that avoids an effect or entanglement condemned by the Establishment Clause. But "[t]he [First] Amendment nullifies sophisticated as well as simple-minded" attempts to avoid its prohibitions, and, in any event, ingenuity in draftsmanship cannot obscure the fact that this subsidy to sectarian schools amounts to $88,800,000 (less now the sums appropriated to finance §§ 3317.06(B) andd (C) which today are invalidated) just for the initial biennium. The Court nowhere evaluates this factor in determining the compatibility of the statute with the Establishment Clause, as that Clause requires. Its evaluation compels in my view the conclusion that a divisive political potential of unusual magnitude inheres in the Ohio program. This suffices without more to require the conclusion that the Ohio statute in its entirety offends the First Amendment's prohibition against laws "respecting an establishment of religion."

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

I join Parts I, V, VII, and VIII of the Court's opinion. For the reasons stated below, however, I am unable to join the remainder of the Court's opinion.

The court upholds the textbook loan provision on the precedent of *Board of Education* v. *Allen*. It also recognizes that there is "a tension" between *Allen* and the reasoning of the Court in *Meek* v. *Pittenger*. I would resolve that tension by overruling *Allen*. I am now convinced that *Allen* is largely responsible for reducing the "high and impregnable" wall between church and state erected by the First Amendment to "a blurred, indistinct, and variable barrier" incapable of performing its vital functions of protecting both church and state.

In *Allen*, we upheld a texbook loan program on the assumption that the sectarian school's twin functions of religious instruction and secular education were separable. In *Meek*, we flatly rejected that assumption as a basis for allowing a State to loan secular teaching materials and equipment to such schools.

It is, of course, unquestionable that textbooks are central to the educational process. Under the rationale of *Meek*, therefore, they should not be provided by the State to sectarian schools because "[substantial] aid to the educational function of such schools... necessarily results in aid to the sectarian school enterprise as a whole." It is also unquestionable that the cost of textbooks is certain to be substantial. Under the rationale of *Lemon*, therefore, they should not be provided because of the dangers of political "divisiveness on religious lines." I would, accordingly, overrule *Board of Education* v. *Allen* and hold unconstitutional § 3317.06 (A).

By overruling *Allen*, we would free ourselves to draw a line between acceptable and unacceptable forms of aid that would be both capable of consistent application and responsive to the concerns discussed above. That line, I believe, should be placed between general welfare programs that serve children in sectarian schools because the schools happen to be a convenient place to reach the programs' target populations and programs of educational assistance. General welfare programs, in contrast to programs of educational assistance, do not provide "[s]ubstantial aid to the educational function" of schools, whether secular or sectarian, and therefore do not provide the kind of assistance to the religious mission of sectarian schools we found impermissible in *Meek*. Moreover, because general welfare

programs do not assist the sectarian functions of denominational schools, there is no reason to expect that political disputes over the merits of those programs will divide the public along religious lines.

In addition to § 3317.06(A), which authorizes the textbook loan program, paragraphs (B), (C), and (L), held unconstitutional by the Court, clearly fall on the wrong side of the constitutional line I propose. Those paragraphs authorize, respectively, the loan of instructional materials and equipment and the provision of transportation for school field trips. There can be no contention that these programs provide anything other than educational assistance.

I also agree with the Court that the services authorized by paragraphs (D), (F), and (G) are constitutionally permissible. Those services are speech and hearing diagnosis, psychological diagnosis, and psychological and speech and hearing therapy. Like the medical, nursing, dental, and optometric services authorized by paragraph (E) and not challenged by appellants, these services promote the children's health and well-being, and have only an indirect and remote impact on their educational progress.

The Court upholds paragraphs (H), (I), and (K), which it groups with paragraph (G), under the rubric of "therapeutic services." I cannot agree that the services authorized by these three paragraphs should be treated like the psychological services provided by paragraph (G). Paragraph (H) authorizes the provision of guidance and counseling services. The parties stipulated that the functions to be performed by the guidance and counseling personnel would include assisting students in "developing meaningful educational and career goals," and "planning school programs of study." In addition, these personnel will discuss with parents "their children's a) educational progress and needs, b) course selections, c) educational and vocational opportunities and plans, and d) study skills." This description makes clear that paragraph (H) authorizes services that would directly support the educational programs of sectarian schools. It is, therefore, in violation of the First Amendment.

Paragraphs (I) and (K) provide remedial services and programs for disabled children. These paragraphs will fund specialized teachers who will both provide instruction and create instructional plans for use in the students' regular classrooms. These "therapeutic services" are clearly intended to aid the sectarian schools to improve the performance of their students. I would not treat them as if they were programs of physical or psychological therapy.

Finally, the Court upholds paragraph (J), which provides standardized tests and scoring services, on the ground that these tests are clearly nonideological and that the State has an interest in assuring that the education received by sectarian school students meets minimum standards. I do not question the legitimacy of this interest. The record contains no indication that the measurements are taken to assure compliance with state standards rather than for internal administrative purposes of the schools. To the extent that the testing is done to serve the purposes of the sectarian schools rather than the State, I would hold that its provision by the State violates the First Amendment.

MR. JUSTICE POWELL, concurring in part, concurring in the judgment in part, and dissenting in part.

Our decisions in this troubling area draw lines that often must seem arbitrary. No doubt we could achieve greater analytical tidiness if we were to accept the broadest implications of the observation in *Meek* v. *Pittenger*, 421 U. S. 349, 366 (1975), that "[s]ubstantial aid to the educational function of [sectarian] schools... necessarily results in aid to the sectarian enterprise as a whole." If we took that course, it would become impossible to sustain state aid of any kind - even if the aid is wholly secular in character and is supplied to the pupils rather than the institutions. *Meek* itself would have to be overruled, along with *Board of Education* v. *Allen*, and even perhaps *Everson* v. *Board of Education*. This Court has not yet thought that such a harsh result is required by the Establishment Clause. Parochial schools have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools. The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them.

It is important to keep these issues in perspective. At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. The risk of significant religious or denominational control over our democratic processes - or even of deep political division along religious lines - is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court. Our decisions have sought to establish principles that preserve the cherished safeguard of the Establishment Clause without resort to blind absolutism. If this endeavor means a loss of some analytical tidiness, then that too is entirely tolerable. Most of the Court's decision today follows in this tradition, and I join Parts I through VI of the opinion.

With respect to Part VII, I concur only in the judgment. I am not persuaded that all loans of secular instructional material and equipment "inescapably [have] the primary effect of providing a direct and substantial advancement of the sectarian enterprise." If that were the case, then *Meek* surely would have overruled *Allen.* Instead the Court reaffirmed *Allen*, thereby necessarily holding that at least some such loans are permissible - so long as the aid is incapable of diversion to religious uses, and so long as the materials are lent to the individual students or their parents. Here the statute is expressly limited to materials incapable of diversion. Therefore the relevant question is whether the materials are such that they are "furnished for the use of *individual* students and at their request."

The Ohio statute includes some materials such as wall maps, charts, and other classroom paraphernalia for which the concept of a loan to individuals is a transparent fiction. Since the provision makes no attempt to separate these instructional materials from others meaningfully lent to individuals, I agree with the Court that it cannot be sustained. But I would find no constitutional defect in a properly limited provision lending to the individuals themselves only appropriate instructional materials and equipment.

I dissent as to Part VIII, concerning field trip transportation. The Court writes as though

the statute funded the salary of the teacher who takes the students on the outing. In fact only the bus and driver are provided for the limited purpose of physical movement between the school and the secular destination of the field trip. As I find this aid indistinguishable in principle from that upheld in *Everson*, I would sustain the District Court's judgment approving this part of the Ohio statute.

MR. JUSTICE STEVENS, concurring in part and dissenting in part.

The line drawn by the Establishment Clause of the First Amendment must have a fundamental character. It should not differentiate between direct and indirect subsidies, or between instructional materials like globes and maps on the one hand and instructional materials like textbooks on the other. For that reason, rather than the three-part test described in Part II of the plurality's opinion, I would adhere to the test enunciated for the Court by Mr. Justice Black: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Everson* v. *Board of Education,* 330 U.S. 1, 16.

Under that test, a state subsidy of sectarian schools is invalid regardless of the form it takes. The financing of buildings, field trips, instructional materials, educational tests, and schoolbooks are all equally invalid. For all give aid to the school's educational mission, which at heart is religious. On the other hand, I am not prepared to exclude the possibility that some parts of the statute before us may be administered in a constitutional manner. The State can plainly provide public health services to children attending nonpublic schools. The diagnostic and therapeutic services described in Parts V and VI of the Court's opinion may fall into this category.

This Court's efforts to improve on the *Everson* test have not proved successful. "Corrosive precedents" have left us without firm principles on which to decide these cases. As this case demonstrates, the States have been encouraged to search for new ways of achieving forbidden ends. What should be a "high and impregnable" wall between church and state, has been reduced to a "'blurred, indistinct, and variable barrier.'" The result has been harm to "both the public and the religion that [this aid] would pretend to serve."

Accordingly, I dissent from Parts II, III, and IV of the plurality's opinion.

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY v. REGAN, COMPTROLLER OF NEW YORK

444 U.S. 646 (1980)

MR. JUSTICE WHITE delivered the opinion of the Court.

I

In 1970, the New York Legislature appropriated public funds to reimburse both church-sponsored and secular nonpublic schools for performing various services mandated by the State. The most expensive of these services was the "administration, grading and the

compiling and reporting of the results of tests and examinations." Covered tests included both state-prepared examinations and the more common and traditional teacher-prepared tests. The statute did not provide for any state audit of school financial records that would ensure that public funds were used only for secular purposes.

In *Levitt* v. *Committee for Public Education*, 413 U.S. 472 (1973) (*Levitt I*), the Court struck down this enactment as violative of the Establishment Clause. The majority focused its concern on the statute's reimbursement of funds spent by schools on traditional teacher-prepared tests. The Court was troubled that, "no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction."

The Court distinguished its earlier holdings in *Everson* and *Allen* from Levitt I. The crucial feature that distinguished tests was that, "'[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.'" Thus, the inherent teacher discretion in devising, presenting, and grading traditional tests, together with the failure of the legislature to provide for auditing to ensure that public funds would be spent exclusively on secular services, disabled the enactment from withstanding constitutional scrutiny.

Almost immediately the New York Legislature attempted to eliminate these defects from its statutory scheme. A new statute was enacted in 1974, and it directed New York's Commissioner of Education to apportion and to pay to nonpublic schools the actual costs incurred as a result of compliance with certain state-mandated requirements.

Of signal interest and importance in light of *Levitt I*, the new scheme does not reimburse nonpublic schools for the preparation, administration, or grading of teacher-prepared tests. Further, the 1974 statute provides a means by which payments of state funds are audited, thus ensuring that only the actual costs incurred are reimbursed out of state funds.

Although the new statutory scheme was tailored to comport with the reasoning in *Levitt I*, the District Court invalidated the enactment with respect to both the tests and the reporting procedure. The District Court understood the decision in *Meek* v. *Pittenger* to require this result. *Levitt II* was appealed to this Court. We vacated the judgment and remanded the case in light of our decision in *Wolman* v. *Walter*. On remand the District Court ruled that under *Wolman* "state aid may be extended to [a sectarian] school's educational activities if it can be shown with a high degree of certainty that the aid will only have secular value of legitimate interest to the State and does not present any appreciable risk of being used to aid transmission of religious views." Applying this "more flexible concept," the District Court concluded that New York's statutory scheme did not violate the Establishment Clause.

II

In *Wolman* v. *Walter*, this Court reviewed and sustained in relevant part an Ohio statutory scheme that authorized the expenditure of state funds "[to] supply for use by pupils attending nonpublic schools within the district such standardized tests and scoring services as are in use in the public schools of the state." We held that this provision, which was aimed at providing the young with an adequate secular education, reflected a secular state purpose. Under the Ohio provision the nonpublic school did not control the content of the test or its result. This "serves to prevent the use of the test as a part of religious teaching, and thus avoids that kind

of direct aid to religion found present in Levitt [I]." The provision of testing services hence did not have the primary effect of aiding religion. It was also decided that "the inability of the school to control the test eliminates the need for the supervision that gives rise to excessive entanglement." We thus concluded that the Ohio statute, insofar as it concerned examinations, passed our Establishment Clause tests.

III

We agree with the District Court that *Wolman* v. *Walter* controls this case. Although the Ohio statute under review in *Wolman* and the New York statute before us here are not identical, the differences are not of constitutional dimension. Addressing first the testing provisions, we note that here, as in *Wolman*, there is clearly a secular purpose behind the legislative enactment. Also like the Ohio statute, the New York plan calls for tests that are prepared by the State and administered on the premises by nonpublic school personnel. The nonpublic school thus has no control whatsoever over the content of the tests. The Ohio tests, however, were graded by the State; here there are three types of tests involved, one graded by the State and the other two by nonpublic school personnel, with the costs of the grading service, as well as the cost of administering all three tests, being reimbursed by the State. In view of the nature of the tests, the District Court found that the grading by nonpublic school employees afforded no control to the school over the outcome of any of the tests.

The District Court explained that the state-prepared tests are primarily of three types: pupil evaluation program (PEP) tests, comprehensive achievement tests, and Regents Scholarship and College Qualifications Tests (RSCQT). Each of the tests addresses a secular academic subject; none deals with religious subject matter.[1] The RSCQT examinations are graded by State Education Department personnel, and "the risk of [RSCQT examinations] being used for religious purposes through grading is non-existent." The PEP tests are graded by nonpublic school employees, but they "consist entirely of objective, multiple-choice questions, which can be graded by machine and, even if graded by hand, afford the schools no more control over the results than if the tests were graded by the State." The comprehensive tests, based on state courses of study for use in grades 9 through 12, are also graded on the premises by school employees, but "consist largely or entirely of objective questions with multiple-choice answers." Even though some of the comprehensive tests may include an essay question or two, the District Court found that the chance that grading the answers to state-drafted questions in secular subjects could or would be used to gauge a student's grasp of religious ideas was "minimal," especially in light of the "complete" state procedures designed to guard against serious inconsistencies in grading and any misuse of essay questions. These procedures include the submission of completed and graded comprehensive tests to the State Department of Education for review off the school premises.

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[1] PEP tests are "standardized reading and mathematics achievement tests." Comprehensive tests correspond to the following subject areas: biology; bookkeeping and accounting II; business law; business mathematics; chemistry; earth science; English; French; German; Hebrew; Italian; Latin; mathematics; physics; shorthand II and transcription; social studies; and Spanish. The RSCQT tests are divided into two parts. Part 1 is a "test of general scholastic aptitude." Part 2 is "a test of subject matter achievement."

We see no reason to differ with the factual or legal characterization of the testing procedure arrived at by the District Court. As in *Wolman*, "[the] nonpublic school does not control the content of the test or its result"; and here, as in *Wolman*, this factor "serves to prevent the use of the test as a part of religious teaching," thus avoiding the kind of direct aid forbidden by the Court's prior cases. The District Court was correct in concluding that there was no substantial risk that the examinations could be used for religious educational purposes.

The District Court was also correct in its characterization of the recordkeeping and reporting services for which the State reimburses the nonpublic school. Under the New York law, "[each] year, private schools must submit to the State a Basic Educational Data System (BEDS) report. This report contains information regarding the student body, faculty, support staff, physical facilities, and curriculum of each school. Schools are also required to submit annually a report showing the attendance record of each minor who is a student at the school." Although recordkeeping is related to the educational program, the District Court characterized it and the reporting function as "ministerial [and] lacking ideological content or use." These tasks are not part of the teaching process and cannot "be used to foster an ideological outlook." Reimbursement for the costs of so complying with state law, therefore, has primarily a secular, rather than a religious, purpose and effect.[2]

IV

The New York statute, unlike the Ohio statute at issue in *Wolman*, provides for direct cash reimbursement to the nonpublic school for administering the state-prescribed examinations and for grading two of them. We agree with the District Court that such reimbursement does not invalidate the New York statute. If the State furnished state-prepared tests, and if the grading procedures could be used to further the religious mission of the school, serious Establishment Clause problems would be posed, for by furnishing the tests it might be concluded that the State was directly aiding religious education. But as we have already concluded, grading the secular tests furnished by the State in this case is a function that has a secular purpose and primarily a secular effect. This conclusion is not changed simply because the State pays the school for performing the grading function.

A contrary view would insist on drawing a constitutional distinction between paying the nonpublic school to do the grading and paying state employees or some independent service to perform that task, even though the grading function is the same regardless of who performs it and would not have the primary effect of aiding religion whether or not performed by nonpublic school personnel. In either event, the nonpublic school is being relieved of the cost of grading state-required, state-furnished examinations. None of our cases requires us to invalidate these reimbursements simply because they involve payments in cash. The Court

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[2] The recordkeeping function involves "collection of data requested from homeroom teachers, pupil personnel services staff, attendance secretaries and administrators; compilation and correlation of data; and filling out and mailing of report." The attendance-taking function is described in similar ministerial terms. Between 85% and 95% of the total reimbursement is accounted for by the costs attributable to attendance-taking, of which all but a negligible portion represents compensation to personnel for this service."

"has not accepted the argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." Because the recordkeeping and reporting functions also have neither a religious purpose nor a primarily religious effect, we reach the same results with respect to the reimbursements for these services.

Under the relevant cases the outcome would likely be different were there no effective means for insuring that the cash reimbursements would cover only secular services. But here, as we shall see, the law provides ample safeguards against excessive reimbursement.

V

After examining the New York statute and its operation, the District Court concluded that "[the] activities subsidized under the Statute here at issue . . . do not pose any substantial risk of such entanglement." The District Court described the process of reimbursement:

"Schools which seek reimbursement must 'maintain a separate account or system of accounts for the expenses incurred in rendering' the reimbursable services, and they must submit to the N. Y. State Commissioner of Education an application for reimbursement with additional reports and documents prescribed by the Commissioner. . . . Reimbursable costs include proportionate shares of the teachers' salaries and fringe benefits attributable to administration of the examinations and reporting of State-required data on pupil attendance and performance, plus the cost of supplies and other contractual expenditures such as data processing services. Applications for reimbursement cannot be approved until the Commissioner audits vouchers or other documents submitted by the schools to substantiate their claims. The Statute further provides that the State Department of Audit and Control shall from time to time inspect the accounts of recipient schools in order to verify the cost to the schools of rendering the reimbursable services. If the audit reveals that a school has received an amount in excess of its actual costs, the excess must be returned to the State immediately."

The reimbursement process is straightforward and susceptible to the routinization that characterizes most reimbursement schemes. On its face, therefore, the New York plan suggests no excessive entanglement, and we are not prepared to read into the plan as an inevitability the bad faith upon which any future excessive entanglement would be predicated.

The judgment of the District Court is *Affirmed*.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

The Court in this case, I fear, takes a long step backwards in the inevitable controversy that emerges when a state legislature continues to insist on providing public aid to parochial schools.

I thought that the Court's judgments in *Meek* and in *Wolman* (which the Court concedes is the controlling authority here), at last had fixed the line between that which is constitutionally appropriate public aid and that which is not. The line, wavering though it may be, was drawn in *Meek* and in *Wolman*, albeit with different combinations of Justices, those who perceive no barrier under the First and Fourteenth Amendments and who would rule in favor of almost any aid a state legislature saw fit to provide, on the one hand, and those who perceive a broad

barrier and would rule against aid of almost any kind, on the other hand, in turn joining Justices in the center on these issues, to make order and a consensus out of the earlier decisions. Now, some of those who joined in *Lemon, Levitt I, Meek*, and *Wolman* in invalidating, depart and validate. I am able to attribute this defection only to a concern about the continuing and emotional controversy and to a persuasion that a good-faith attempt on the part of a state legislature is worth a nod of approval.

I have no trouble agreeing that Chapter 507 manifests a clear secular purpose. I therefore would evaluate Chapter 507 under the two remaining inquiries of the three-part test. In deciding whether Chapter 507 has an impermissible primary effect of advancing religion, or whether it fosters excessive government entanglement with sectarian affairs, one must keep in focus the nature of the assistance prescribed by the New York statute. The District Court found that $ 8-$ 10 million annually would be expended under Chapter 507, with the great majority of these funds going to sectarian schools to pay for personnel costs associated with attendance reporting. The court found that such payments would amount to from 1% to 5.4% of the personnel budget of an individual religious school receiving assistance. Moreover, Chapter 507 provides direct cash payments by the State to religious schools, as opposed to providing services or providing cash payments to third parties who have rendered services. And the money paid sectarian schools is designated to reimburse costs incurred to meet basic state testing and reporting requirements, costs that would have been incurred regardless of the availability of reimbursement from the State.

This direct financial assistance provided by Chapter 507 differs significantly from the types of aid to religious schools approved by the Court in *Wolman* v. *Walter*. Unlike Chapter 507, Ohio's statute provided only the tests themselves and scoring by employees of neutral testing organizations. It did not authorize direct financial aid of any type to religious schools.

Similarly, the other forms of assistance upheld in *Wolman* did not involve direct financial support to sectarian schools. At the very least, then, the Court's holding today goes further in approving state assistance to sectarian schools than the Court had gone in past decisions. But beyond merely failing to approve the type of direct financial aid at issue in this case, *Wolman* reaffirmed the finding of the Court in *Meek* v. *Pittenger* that *direct* aid to the educational function of religious schools necessarily advances the sectarian enterprise as a whole. Thus, the Court in *Wolman* invalidated Ohio's practice of loaning instructional materials directly to sectarian schools, "even though the loan ostensibly was limited to neutral and secular instructional material and equipment, [because] it inescapably had the primary effect of providing a direct and substantial advancement of the sectarian enterprise." In the same vein, the Court disapproved Ohio's provision of field-trip transportation directly to religious schools as impermissible direct aid that furthered the religious goals of the schools, and that also required government surveillance of expenditures to such a degree as to foster entanglement of the State in religion.

Wolman thus re-enforces the conclusion that substantial direct financial aid to a religious school, even though ostensibly for secular purposes, runs the great risk of furthering the religious mission of the school as a whole because that religious mission so pervades the functioning of the school.

Under the principles announced in these decided cases, I am compelled to conclude that Chapter 507, by providing substantial financial assistance directly to sectarian schools, has a primary effect of advancing religion. The vast majority of the schools aided under Chapter 507 typify the religious-pervasive institution the very purpose of which is to provide an integrated secular and sectarian education. The aid goes primarily to reimburse such schools for personnel costs incurred in complying with state reporting and testing requirements, costs that must be incurred if the school is to be accredited. Sectarian schools thus are required to incur the costs outlined in § 3, or else lose accreditation by the State. These reporting and testing requirements would be met by the schools whether reimbursement were available or not. As such, the attendance, informational, and testing expenses compensated by Chapter 507 are essential to the overall educational functioning of sectarian schools in New York in the same way instruction in secular subjects is essential. Therefore, just as direct aid for ostensibly secular purposes by provision of instructional materials or direct financial subsidy is forbidden by the Establishment Clause, so direct aid for recordkeeping and testing activities that are an essential part of the sectarian school's functioning also is interdicted.

It is also true that the keeping of pupil attendance records is essential to the religious mission of sectarian schools. To ensure that the school is fulfilling its religious mission properly, it is necessary to provide a way to determine whether pupils are attending the sectarian classes required of them. Chapter 507 makes no attempt, and none is possible, to separate the portion of the overall expense of attendance-taking attributable to the desire to ensure that students are attending religious instruction from that portion attributable to the desire to ensure that state attendance laws are complied with. This type of direct aid the Establishment Clause does not permit.

I thus would hold that the aid provided by Chapter 507 constitutes a direct subsidy of the operating costs of the sectarian school that aids the school as a whole, and that the statute therefore directly advances religion in violation of the Establishment Clause.

Beyond this, Chapter 507 also fosters government entanglement with religion to an impermissible extent. Unlike *Wolman*, under Chapter 507 sectarian employees are compensated by the State for grading examinations. In some cases, such grading requires the teacher to exercise subjective judgment. For the State properly to ensure that judgment is not exercised to inculcate religion, a "comprehensive, discriminating, and continuing state surveillance will inevitably be required." *Lemon* v. *Kurtzman*, 403 U.S., at 619.

Finally, entanglement also is fostered by the system of reimbursement for personnel expenses. The State must make sure that it reimburses sectarian schools only for those personnel costs attributable to the sectarian employees' secular activities described in § 3 of Chapter 507. It is difficult to see how the State adequately may discover whether the time for which reimbursement is made available was devoted only to secular activities without some type of ongoing surveillance of the sectarian employees and religious schools at issue. It is this type of extensive entanglement that the Establishment Clause forbids.

I therefore conclude that Chapter 507 has a primary effect of advancing religion and also fosters excessive government entanglement with religion. The statute, consequently, is unconstitutional under the Establishment Clause, at least to the extent it provides

reimbursement directly to sectarian nonpublic schools.

MR. JUSTICE STEVENS, dissenting.

Although I agree with MR. JUSTICE BLACKMUN's demonstration of why today's holding is not compelled by precedent, my vote also rests on a more fundamental disagreement. The Court's approval of a direct subsidy to sectarian schools to reimburse them for staff time spent in taking attendance and grading standardized tests confirms my view that the entire enterprise of trying to justify various subsidies to nonpublic schools should be abandoned. Rather than continuing with the sisyphean task of trying to patch together the "blurred, indistinct, and variable barrier" described in *Lemon*, I would resurrect the "high and impregnable" wall between church and state constructed by the Framers of the First Amendment.

MUELLER v. ALLEN

463 U.S. 388 (1983)

JUSTICE REHNQUIST delivered the opinion of the Court.

Minnesota, like every other State, provides its citizens with free elementary and secondary schooling. It seems to be agreed that about 820,000 students attended this school system in the most recent school year. During the same year, approximately 91,000 elementary and secondary students attended some 500 privately supported schools located in Minnesota, and about 95% of these students attended schools considering themselves to be sectarian.

Minnesota, by a law originally enacted in 1955 and revised in 1976 and again in 1978, permits state taxpayers to claim a deduction from gross income for certain expenses incurred in educating their children. The deduction is limited to actual expenses incurred for the "tuition, textbooks and transportation" of dependents attending elementary or secondary schools. A deduction may not exceed $ 500 per dependent in grades K through 6 and $ 700 per dependent in grades 7 through 12.[1]

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[1] The statute permits deduction of a range of educational expenses. The District Court found that deductible expenses included: "1. Tuition in the ordinary sense; 2. Tuition to public school students who attend public schools outside their residence school districts; 3. Certain summer school tuition; 4. Tuition charged by a school for slow learner private tutoring services; 5. Tuition for instruction provided by an elementary or secondary school to students who are physically unable to attend classes at such school; 6. Tuition charged by a private tutor or by a school that is not an elementary or secondary school if the instruction is acceptable for credit in an elementary or secondary school; 7. Montessori School tuition for grades K through 12; 8. Tuition for driver education when it is part of the school curriculum." In addition, the District Court found that the statutory deduction for "textbooks" included not only "secular textbooks" but also: 1. Cost of tennis shoes and sweatsuits for physical education; 2. Camera rental fees paid

Today's case is no exception to our oft-repeated statement that the Establishment Clause presents especially difficult questions of interpretation and application. One fixed principle in this field is our consistent rejection of the argument that "any program which in some manner aids an institution with a religious affiliation" violates the Establishment Clause. For example, it is now well established that a State may reimburse parents for expenses incurred in transporting their children to school, *Everson* v. *Board of Education*, 330 U.S. 1 (1947), and that it may loan secular textbooks to all schoolchildren within the State, *Board of Education* v. *Allen*, 392 U.S. 236 (1968).

Notwithstanding the repeated approval given programs such as those in *Allen* and *Everson*, our decisions also have struck down arrangements resembling, in many respects, these forms of assistance. In this case we are asked to decide whether Minnesota's tax deduction bears greater resemblance to those types of assistance to parochial schools we have approved, or to those we have struck down. Petitioners place particular reliance on our decision in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973). As explained below, we conclude that § 290.09, subd. 22, bears less resemblance to the arrangement struck down in *Nyquist* than it does to assistance programs upheld in our prior decisions.

The general nature of our inquiry in this area has been guided, since the decision in *Lemon* v. *Kurtzman*, by the "three-part" test laid down in that case. While this principle is well settled, our cases have also emphasized that it provides "no more than [a] helpful [signpost]" in dealing with Establishment Clause challenges. With this caveat in mind, we turn to the specific challenges raised against § 290.09, subd. 22, under the *Lemon* framework.

Little time need be spent on the question of whether the Minnesota tax deduction has a secular purpose. Under our prior decisions, governmental assistance programs have consistently survived this inquiry. This reflects, at least in part, our reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute.

We turn therefore to the more difficult but related question whether the Minnesota statute has "the primary effect of advancing the sectarian aims of the nonpublic schools." In concluding that it does not, we find several features of the Minnesota tax deduction particularly significant. First, an essential feature of Minnesota's arrangement is the fact that § 290.09, subd. 22, is only one among many deductions -- such as those for medical expenses and charitable contributions -- available under the Minnesota tax laws. Our decisions consistently have recognized that traditionally "[legislatures] have especially broad latitude in

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to the school for photography classes; 3. Ice skates rental fee paid to the school; 4. Rental fee paid to the school for calculators for mathematics classes; 5. Costs of home economics materials needed to meet minimum requirements; 6. Costs of special metal or wood needed to meet minimum requirements of shop classes; 7. Costs of supplies needed to meet minimum requirements of art classes; 8. Rental fees paid to the school for musical instruments; 9. Cost of pencils and special notebooks required for class."

creating classifications and distinctions in tax statutes." Under our prior decisions, the Minnesota Legislature's judgment that a deduction for educational expenses fairly equalizes the tax burden of its citizens and encourages desirable expenditures for educational purposes is entitled to substantial deference.[2]

Other characteristics of § 290.09, subd. 22, argue equally strongly for the provision's constitutionality. Most importantly, the deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools.

In this respect, as well as others, this case is vitally different from the scheme struck down in *Nyquist*. There, public assistance amounting to tuition grants was provided only to parents of children in *nonpublic* schools. This fact had considerable bearing on our decision striking down the New York statute at issue; we explicitly distinguished both *Allen* and *Everson* on the grounds that "[in] both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools." Moreover, we intimated that "public assistance (*e. g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted," might not offend the Establishment Clause. We think the tax deduction adopted by Minnesota is more similar to this latter type of program than it is to the arrangement struck down in *Nyquist*. Unlike the assistance at issue in *Nyquist*, § 290.09, subd. 22, permits *all* parents to deduct their children's educational expenses. A program, like § 290.09, subd. 22, that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.

We also agree 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. It is true, of course, that financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children. It is also true, however, that under Minnesota's arrangement public funds become available only as a result of numerous private choices of individual parents of school-age children. It is noteworthy that all but one of our recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the State to the schools themselves. The exception, of course, was *Nyquist*, which, as discussed previously, is distinguishable from this case on other grounds. Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no "imprimatur of state approval" can be deemed to have been conferred on any particular religion, or on religion generally.

The Establishment Clause of course extends beyond prohibition of a state church or payment of state funds to one or more churches. We do not think, however, that its prohibition extends to the type of tax deduction established by Minnesota. The historic

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[2] Our decision in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973), is not to the contrary on this point. We expressed considerable doubt there that the "tax benefits" provided by New York law properly could be regarded as parts of a genuine system of tax laws. The fact that the Minnesota plan embodies a "genuine tax deduction" is thus of some relevance, especially given the traditional rule of deference accorded classifications in tax statutes.

purposes of the Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.

Petitioners argue that, notwithstanding the facial neutrality of § 290.09, subd. 22, in application the statute primarily benefits religious institutions. Petitioners rely on a statistical analysis of the type of persons claiming the tax deduction. They contend that most parents of public school children incur no tuition expenses, and that other expenses deductible are negligible; moreover, they claim that 96% of the children in private schools in 1978-1979 attended religiously affiliated institutions. Because of this, they reason, the bulk of deductions taken will be claimed by parents of children in sectarian schools. Respondents reply that petitioners have failed to consider the impact of deductions for items such as transportation, summer school tuition, tuition paid by parents whose children attended schools outside the school districts in which they resided, rental or purchase costs for a variety of equipment, and tuition for certain types of instruction not ordinarily provided in public schools.

We need not consider these contentions in detail. We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled should be of little importance in determining the constitutionality of permitting such relief.

Finally, if parents of children in private schools choose to take especial advantage of § 290.09, subd. 22, it is no doubt due to the fact that they bear a particularly great financial burden in educating their children. More fundamentally, whatever unequal effect may be attributed to the statutory classification can fairly be regarded as a rough return for the benefits provided to the State and all taxpayers by parents sending their children to parochial schools. In the light of all this, we believe it wiser to decline to engage in the type of empirical inquiry into those persons benefitted by state law which petitioners urge.

Thus, we hold that the Minnesota tax deduction for educational expenses satisfies the primary effect inquiry of our Establishment Clause cases.

Turning to the third part of the *Lemon* inquiry, we have no difficulty in concluding that the Minnesota statute does not "excessively entangle" the State in religion. The only plausible source of the "comprehensive, discriminating, and continuing state surveillance" necessary to run afoul of this standard would lie in the fact that state officials must determine whether particular textbooks qualify for a deduction. In making this decision, state officials must disallow deductions taken for "instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship." Making decisions such as this does not differ substantially from making the types of decisions approved in earlier opinions of this Court.[3]

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[3] No party has urged that the Minnesota plan is invalid because it runs afoul of the rather elusive inquiry, subsumed under the third part of the *Lemon* test, whether the Minnesota statute

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

The Establishment Clause of the First Amendment prohibits a State from subsidizing religious education, whether it does so directly or indirectly. In my view, this principle of neutrality forbids not only the tax benefits struck down in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973), but any tax benefit, including the tax deduction at issue here, which subsidizes tuition payments to sectarian schools. I also believe that the Establishment Clause prohibits the tax deductions that Minnesota authorizes for the cost of books and other instructional materials used for sectarian purposes.

I

The majority today does not question the continuing vitality of this Court's decision in *Nyquist*. That decision 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. *Nyquist* also established that financial aid to parents of students attending parochial schools is no more permissible if it is provided in the form of a tax credit than if provided in the form of cash payments. Notwithstanding these accepted principles, the Court today upholds a statute that provides a tax deduction for the tuition charged by religious schools. The Court concludes that the Minnesota statute is "vitally different" from the statute at issue in *Nyquist*. As demonstrated below, there is no significant difference between the two schemes. The Minnesota tax statute violates the Establishment Clause for precisely the same reason as the statute in *Nyquist*: it has a direct and immediate effect of advancing religion.

A

In calculating their net income for state income tax purposes, Minnesota residents are permitted to deduct the cost of their children's tuition, subject to a ceiling of $ 500 or $ 700 per child. Although this tax benefit is available to any parents whose children attend schools which charge tuition, the vast majority of the taxpayers who are eligible to receive the benefit are parents whose children attend religious schools. Although the statute also allows a deduction for the tuition expenses of children attending public schools, Minnesota public schools are generally prohibited by law from charging tuition. Public schools may assess tuition charges only for students accepted from outside the district. In the 1978-1979 school year, only 79 public school students fell into this category.

Like the law involved in *Nyquist*, the Minnesota law can be said to serve a secular purpose: promoting pluralism and diversity among the State's public and nonpublic schools. But the Establishment Clause requires more than a secular purpose. [The] propriety of a

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partakes of the "divisive political potential" condemned in *Lemon*. The argument is advanced, however, by *amici*. This aspect of the "entanglement" inquiry originated with *Lemon*. The Court's language in *Lemon* respecting political divisiveness was made in the context of statutes which provided for either direct payments of, or reimbursement of, a proportion of teachers' salaries in parochial schools. We think the language must be regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools.

legislature's purposes may not immunize from further scrutiny a law which has a primary effect that advances religion." Moreover, even if one "'primary' effect [is] to promote some legitimate end," the legislation is not "immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion."

As we recognized in *Nyquist*, direct government subsidization of parochial school tuition is impermissible because "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." "[Aid] to the educational function of [parochial] schools . . . necessarily results in aid to the sectarian school enterprise as a whole" because "[the] very purpose of many of those schools is to provide an integrated secular and religious education." For this reason, aid to sectarian schools must be restricted to ensure that it may be not used to further the religious mission of those schools. While "services such as police and fire protection, sewage disposal, highways, and sidewalks" may be provided to parochial schools because this type of assistance is clearly "'marked off from the religious function'" of those schools, unrestricted financial assistance may not be provided. "In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid."

Indirect assistance in the form of financial aid to parents for tuition payments is similarly impermissible because it is not "subject to . . . restrictions" which "'guarantee the separation between secular and religious educational functions and . . . ensure that State financial aid supports only the former.'" By ensuring that parents will be reimbursed for tuition payments, the Minnesota statute requires that taxpayers in general pay for the cost of parochial education and extends a financial "incentive to parents to send their children to sectarian schools."

That parents receive a reduction of their tax liability, rather than a direct reimbursement, is of no greater significance here than it was in *Nyquist*. It is equally irrelevant whether a reduction in taxes takes the form of a tax "credit," a tax "modification," or a tax "deduction." What is of controlling significance is not the form but the "substantive impact" of the financial aid. "[Insofar] as such benefits render assistance to parents who send their children to *sectarian* schools, their purpose and inevitable effect are to aid and advance those religious institutions."

B

The majority attempts to distinguish *Nyquist* by pointing to two differences between the Minnesota tuition-assistance program and the program struck down in *Nyquist*. Neither of these distinctions can withstand scrutiny. The majority first attempts to distinguish *Nyquist* on the ground that Minnesota makes all parents eligible to deduct up to $ 500 or $ 700 for each dependent, whereas the New York law allowed a deduction only for parents whose children attended nonpublic schools. Although Minnesota taxpayers who send their children to local public schools may not deduct tuition expenses because they incur none, they may deduct other expenses, such as the cost of gym clothes, pencils, and notebooks, which are shared by all parents of school-age children. This, in the majority's view, distinguishes the Minnesota scheme from the law at issue in *Nyquist*.

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. It is simply undeniable that the single largest expense that may be deducted under the Minnesota statute is tuition. The statute is little more than a subsidy of tuition masquerading as a subsidy of general educational expenses. The other deductible expenses are *de minimis* in comparison to tuition expenses.[1]

Fewer than 100 of more than 900,000 school-age children in Minnesota attend public schools that charge a general tuition. Of the total number of taxpayers who are eligible for the tuition deduction, approximately 96% send their children to religious schools. Parents who send their children to free public schools are simply ineligible to obtain the full benefit of the deduction except in the unlikely event that they buy $ 700 worth of pencils, notebooks, and bus rides for their school-age children. Yet parents who pay at least $ 700 in tuition to nonpublic, sectarian schools can claim the full deduction even if they incur no other educational expenses.

That this deduction has a primary effect of promoting religion can easily be determined without any resort to the type of "statistical evidence" that the majority fears would lead to constitutional uncertainty. The only factual inquiry necessary is the same as that employed in *Nyquist* and *Sloan* v. *Lemon*, 413 U.S. 825 (1973): whether the deduction permitted for tuition expenses primarily benefits those who send their children to religious schools. In *Nyquist* we unequivocally rejected any suggestion that, in determining the effect of a tax statute, this Court should look exclusively to what the statute on its face purports to do and ignore the actual operation of the challenged provision. In determining the effect of the New York statute, we emphasized that "virtually all" of the schools receiving direct grants for maintenance and repair were Roman Catholic schools, that reimbursements were given to parents "who send their children to nonpublic schools, the bulk of which is concededly sectarian in orientation," that "it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian," and that "tax reductions authorized by this law flow primarily to the parents of children attending sectarian, nonpublic schools." Similarly, in *Sloan* v. *Lemon*, we considered important to our "[consideration of] the new law's effect . . . [that] 'more than 90% of the children attending nonpublic schools in Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith.'"

In this case, it is undisputed that well over 90% of the children attending tuition-charging schools in Minnesota are enrolled in sectarian schools. Any generally available financial assistance for elementary and secondary school tuition expenses mainly will further religious education because the majority of the schools which charge tuition are sectarian.

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[1] Even if the Minnesota statute allowed parents of public school students to deduct expenses that were likely to be equivalent to the tuition expenses of private school students, it would still be unconstitutional. Insofar as the Minnesota statute provides a deduction for parochial school tuition, it provides a benefit to parochial schools that furthers the religious mission of those schools. *Nyquist* makes clear that the State may not provide any financial assistance to parochial schools unless that assistance is limited to secular uses.

The majority also asserts that the Minnesota statute is distinguishable from the statute struck down in *Nyquist* in another respect: the tax benefit available under Minnesota law is a "genuine tax deduction." Under the Minnesota law, the amount of the tax benefit varies directly with the amount of the expenditure. Under the New York law, the amount of deduction was not dependent upon the amount actually paid for tuition but was a predetermined amount which depended on the tax bracket of each taxpayer. The deduction was designed to yield roughly the same amount of tax "forgiveness" for each taxpayer.

This is a distinction without a difference. Our prior decisions have rejected the relevance of the majority's formalistic distinction between tax deductions and the tax benefit at issue in *Nyquist*. The deduction afforded by Minnesota law was "designed to yield a [tax benefit] in exchange for performing a specific act which the State desires to encourage." Like the tax benefit in *Nyquist*, the tax deduction at issue here concededly was designed to "[encourage] desirable expenditures for educational purposes." Of equal importance, as the majority also concedes, the "economic [consequence]" of these programs is the same, for in each case the "financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools." It was precisely the substantive impact of the financial support, and not its particular form, that rendered the programs in *Nyquist* and *Sloan* v. *Lemon* unconstitutional.

C

The majority incorrectly asserts that Minnesota's tax deduction for tuition expenses "bears less resemblance to the arrangement struck down in *Nyquist* than it does to assistance programs upheld in our prior decisions and those discussed with approval in Nyquist." One might as well say that a tangerine bears less resemblance to an orange than to an apple. The two cases relied on by the majority, *Allen* and *Everson*, are inapposite today for precisely the same reasons that they were inapposite in *Nyquist*.

We distinguished these cases in *Nyquist*, and again in *Sloan v. Lemon*. Financial assistance for tuition payments has a consequence that "is quite unlike the sort of 'indirect' and 'incidental' benefits that flowed to sectarian schools from programs aiding *all* parents by supplying bus transportation and secular textbooks for their children. *Such benefits were carefully restricted to the purely secular side of church-affiliated institutions* and provided no special aid for those who had chosen to support religious schools. Yet such aid approached the 'verge' of the constitutionally impermissible."

As previously noted, the Minnesota tuition tax deduction is not available to *all* parents, but only to parents whose children attend schools that charge tuition, which are comprised almost entirely of sectarian schools. More importantly, the assistance that flows to parochial schools as a result of the tax benefit is not restricted, and cannot be restricted, to the secular functions of those schools.

II

In my view, Minnesota's tax deduction for the cost of textbooks and other instructional materials is also constitutionally infirm. The instructional materials which are subsidized by the Minnesota tax deduction plainly may be used to inculcate religious values and belief. In

Meek v. *Pittenger*, we held that even the use of "wholly neutral, secular instructional material and equipment" by church-related schools contributes to religious instruction because "'[the] secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence.'" In *Wolman* v. *Walter*, we concluded that precisely the same impermissible effect results when the instructional materials are loaned to the pupil or his parent, rather than directly to the schools. We stated that "it would exalt form over substance if this distinction were found to justify a result different from that in *Meek*." It follows that a tax deduction to offset the cost of purchasing instructional materials for use in sectarian schools, like a loan of such materials to parents, "necessarily results in aid to the sectarian school enterprise as a whole" and is therefore a "substantial advancement of religious activity" that "constitutes an impermissible establishment of religion."

There is no reason to treat Minnesota's tax deduction for textbooks any differently. Secular textbooks, like other secular instructional materials, contribute to the religious mission of the parochial schools that use those books. Although this Court upheld the loan of secular textbooks to religious schools in *Allen*, the Court believed at that time that it lacked sufficient experience to determine "based solely on judicial notice" that "the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public [will always be] instrumental in the teaching of religion." This basis for distinguishing secular instructional materials and secular textbooks is simply untenable, and is inconsistent with many of our more recent decisions concerning state aid to parochial schools.

In any event, the Court's assumption in *Allen* that the textbooks at issue there might be used only for secular education was based on the fact that those very books had been chosen by the State for use in the public schools. In contrast, the Minnesota statute does not limit the tax deduction to those books which the State has approved for use in public schools. Rather, it permits a deduction for books that are chosen by the parochial schools themselves. Indeed, under the Minnesota statutory scheme, textbooks chosen by parochial schools but not used by public schools are likely to be precisely the ones purchased by parents for their children's use. Like the law upheld in *Allen*, Minn. Stat. §§ 123.932 and 123.933 (1982) authorize the State Board of Education to provide textbooks used in public schools to nonpublic school students. Parents have little reason to purchase textbooks that can be borrowed under this provision.

III

In my view, the lines drawn in *Nyquist* were drawn on a reasoned basis with appropriate regard for the principles of neutrality embodied by the Establishment Clause. I do not believe that the same can be said of the lines drawn by the majority today. For the first time, the Court has upheld financial support for religious schools without any reason at all to assume that the support will be restricted to the secular functions of those schools and will not be used to support religious instruction. This result is flatly at odds with the fundamental principle that a State may provide no financial support whatsoever to promote religion.

SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS v. BALL

473 U.S. 373 (1985)

JUSTICE BRENNAN delivered the opinion of the Court.

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

I

A

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

The Shared Time program offers classes during the regular school day that are intended to be supplementary to the "core curriculum" courses that the State of Michigan requires as a part of an accredited school program. Among the subjects offered are "remedial" and "enrichment" mathematics, "remedial" and "enrichment" reading, art, music, and physical education. A typical nonpublic school student attends these classes for one or two class periods per week; approximately "ten percent of any given nonpublic school student's time during the academic year would consist of Shared Time instruction." Although Shared Time is a program offered only in nonpublic schools, there was testimony that the courses in that program are offered, perhaps in a somewhat different form, in the public schools as well.

The Shared Time teachers are full-time employees of the public schools, who often move from classroom to classroom during the course of the school day. A "significant portion" of the teachers (approximately 10%) "previously taught in nonpublic schools, and many of those had been assigned to the same nonpublic school where they were previously employed." The School District of Grand Rapids hires Shared Time teachers in accordance with its ordinary hiring procedures. The public school system apparently provides all of the supplies, materials, and equipment used in connection with Shared Time instruction.

The Community Education program is offered throughout the Grand Rapids community in schools and on other sites, for children as well as adults. The classes at issue here are taught in the nonpublic elementary schools and commence at the conclusion of the regular school day. Among the courses offered are Arts and Crafts, Home Economics, Spanish, Gymnastics, Yearbook Production, Christmas Arts and Crafts, Drama, Newspaper, Humanities, Chess, Model Building, and Nature Appreciation.

Community Education teachers are part-time public school employees. Community

Education courses are completely voluntary and are offered only if 12 or more students enroll. Because a well-known teacher is necessary to attract the requisite number of students, the School District accords a preference in hiring to instructors already teaching within the school. Thus, "virtually every Community Education course conducted on facilities leased from nonpublic schools has an instructor otherwise employed full time by the same nonpublic school."

Both programs are administered similarly. The Director of the program, a public school employee, sends packets of course listings to the participating nonpublic schools before the school year begins. The nonpublic school administrators then decide which courses they want to offer. The Director works out an academic schedule for each school, taking into account the varying religious holidays celebrated by the schools of different denominations.

Nonpublic school administrators decide which classrooms will be used for the programs, and the Director then inspects the facilities and consults with Shared Time teachers to make sure the facilities are satisfactory. The public school system pays the nonpublic schools for the use of the necessary classroom space by entering into "leases" at the rate of $ 6 per classroom per week. Each room used in the programs has to be free of any crucifix, religious symbol, or artifact, although such religious symbols can be present in the adjoining hallways, corridors, and other facilities used in connection with the program. During the time that a given classroom is being used in the programs, the teacher is required to post a sign stating that it is a "public school classroom."[1]

Although petitioners label the Shared Time and Community Education students as "part-time public school students," the students attending Shared Time and Community Education courses in facilities leased from a nonpublic school are the same students who attend that particular school otherwise. There is no evidence that any public school student has ever attended a Shared Time or Community Education class in a nonpublic school. The District Court found that "[though] Defendants claim the Shared Time program is available to all students, the record is abundantly clear that only nonpublic school students wearing the cloak of a 'public school student' can enroll in it." The District Court noted that these "public school" classes, in contrast to ordinary public school classes which are largely neighborhood based, are as segregated by religion as are the schools at which they are offered.

Forty of the forty-one schools at which the programs operate are sectarian in character.[2] The schools of course vary from one another, but substantial evidence suggests that they share deep religious purposes. The District Court found that the schools are "pervasively

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[1] The signs read as follows: "GRAND RAPIDS PUBLIC SCHOOLS' ROOM. THIS ROOM HAS BEEN LEASED BY THE GRAND RAPIDS PUBLIC SCHOOL DISTRICT, FOR THE PURPOSE OF CONDUCTING PUBLIC SCHOOL EDUCATIONAL PROGRAMS. THE ACTIVITY IN THIS ROOM IS CONTROLLED SOLELY BY THE GRAND RAPIDS PUBLIC SCHOOL DISTRICT."

[2] Twenty-eight of the schools are Roman Catholic, seven are Christian Reformed, three are Lutheran, one is Seventh Day Adventist, and one is Baptist.

sectarian," and concluded "without hesitation that the purposes of these schools is to advance their particular religions," and that "a substantial portion of their functions are subsumed in the religious mission."

II

Since *Everson*, we have often grappled with the problem of state aid to nonpublic, religious schools. We have noted that the three-part test first articulated in *Lemon v. Kurtzman* guides "[the] general nature of our inquiry in this area." These tests "must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children. The government's activities in this area can have a magnified impact on impressionable young minds, and the occasional rivalry of parallel public and private school systems offers an all-too-ready opportunity for divisive rifts along religious lines in the body politic. The *Lemon* test concentrates attention on the issues -- purposes, effect, entanglement -- that determine whether a particular state action is an improper "law respecting an establishment of religion." We therefore reaffirm that state action alleged to violate the Establishment Clause should be measured against the *Lemon* criteria.

As has often been true in school aid cases, there is no dispute that the purpose of the Community Education and Shared Time programs was "manifestly secular." We therefore go on to consider whether the primary or principal effect of the challenged programs is to advance or inhibit religion.

Our inquiry must begin with a consideration of the nature of the institutions in which the programs operate. Of the 41 private schools where these "part-time public schools" have operated, 40 are identifiably religious schools. The District Court found that "the conclusion is inescapable that the religious institutions receiving instructional services from the public schools are sectarian in the sense that a substantial portion of their functions are subsumed in the religious mission." At the religious schools here -- as at the sectarian schools that have been the subject of our past cases -- "the secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within that institution, the two are inextricably intertwined."

Given that 40 of the 41 schools in this case are thus "pervasively sectarian," the challenged public school programs operating in the religious schools may impermissibly advance religion in three different ways. First, the teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs. Second, the programs may provide a crucial symbolic link between government and religion, thereby enlisting -- at least in the eyes of impressionable youngsters -- the powers of government to the support of the religious denomination operating the school. Third, the programs may have the effect of directly promoting religion by impermissibly providing a subsidy to the primary religious mission of the institutions affected.

(1) In *Meek* v. *Pittenger*, 421 U.S. 349 (1975), the Court invalidated a statute providing for the loan of state-paid professional staff -- including teachers -- to nonpublic schools to

provide remedial and accelerated instruction, guidance counseling and testing, and other services on the premises of the nonpublic schools. Such a program, if not subjected to a "comprehensive, discriminating, and continuing state surveillance," would entail an unacceptable risk that the state-sponsored instructional personnel would "advance the religious mission of the church-related schools in which they serve." Even though the teachers were paid by the State, "[the] potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present." The program in *Meek*, if not sufficiently monitored, would simply have entailed too great a risk of state-sponsored indoctrination.

The programs before us today share the defect that we identified in *Meek*. With respect to the Community Education program, the District Court found that "virtually every Community Education course conducted on facilities leased from nonpublic schools has an instructor otherwise employed full time by the same nonpublic school." These instructors, many of whom no doubt teach in the religious schools precisely because they are adherents of the controlling denomination and want to serve their religious community zealously, are expected during the regular school day to inculcate their students with the tenets and beliefs of their particular religious faiths. Yet the premise of the program is that those instructors can put aside their religious convictions and engage in entirely secular Community Education instruction as soon as the school day is over. Moreover, they are expected to do so before the same religious school students and in the same religious school classrooms that they employed to advance religious purposes during the "official" school day. Nonetheless, as petitioners themselves asserted, Community Education classes are not specifically monitored for religious content.

We do not question that the dedicated and professional religious school teachers employed by the Community Education program will attempt in good faith to perform their secular mission conscientiously. Nonetheless, there is a substantial risk that, overtly or subtly, the religious message they are expected to convey during the regular school day will infuse the supposedly secular classes they teach after school. The danger arises "not because the public employee [is] 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." "The conflict of functions inheres in the situation."

The Shared Time program, though structured somewhat differently, nonetheless also poses a substantial risk of state-sponsored indoctrination. The most important difference between the programs is that most of the instructors in the Shared Time program are full-time teachers hired by the public schools. Moreover, although "virtually every" Community Education instructor is a full-time religious school teacher, only "[a] significant portion" of the Shared Time instructors previously worked in the religious schools.[3] Nonetheless, as with the Community Education program, no attempt is made to monitor the Shared Time courses for religious content.

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[3] Approximately 10% of the Shared Time instructors were previously employed by the religious schools, and many of these were reassigned back to the school at which they had previously taught.

Thus, despite these differences between the two programs, our holding in *Meek* controls the inquiry with respect to Shared Time, as well as Community Education. Shared Time instructors are teaching academic subjects in religious schools in courses virtually indistinguishable from the other courses offered during the regular religious school day. The teachers in this program, even more than their Community Education colleagues, are "performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." Teachers in such an atmosphere may well subtly (or overtly) conform their instruction to the environment in which they teach, while students will perceive the instruction provided in the context of the dominantly religious message of the institution, thus reinforcing the indoctrinating effect. As we stated in *Meek*, "[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." Unlike types of aid that the Court has upheld, such as state-created standardized tests or diagnostic services, there is a "substantial risk" that programs operating in this environment would "be used for religious educational purposes."

Respondents adduced no evidence of specific incidents of religious indoctrination in this case. But the absence of proof of specific incidents is not dispositive. When conducting a supposedly secular class in the pervasively sectarian environment of a religious school, a teacher may knowingly or unwillingly tailor the content of the course to fit the school's announced goals. If so, there is no reason to believe that this kind of ideological influence would be detected or reported by students, by their parents, or by the school system itself. The students are presumably attending religious schools precisely in order to receive religious instruction. After spending the balance of their schoolday in classes heavily influenced by a religious perspective, they would have little motivation or ability to discern improper ideological content that may creep into a Shared Time or Community Education course. Neither their parents nor the parochial schools would have cause to complain if the effect of the publicly supported instruction were to advance the schools' sectarian mission. And the public school system itself has no incentive to detect or report any specific incidents of improper state-sponsored indoctrination. Thus, the lack of evidence of specific incidents of indoctrination is of little significance.

(2) Our cases have recognized that the Establishment Clause guards against more than direct, state-funded efforts to indoctrinate youngsters in specific religious beliefs. Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any -- or all -- religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated. "[The] mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred."

It follows that an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the

nonadherents as a disapproval, of their individual religious choices. The inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years. The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.

Our school-aid cases have recognized a sensitivity to the symbolic impact of the union of church and state. Grappling with problems in many ways parallel to those we face today, *McCollum* v. *Board of Education* held that a public school may not permit part-time religious instruction on its premises as a part of the school program, even if participation is voluntary and even if the instruction is conducted only by nonpublic school personnel. Yet in *Zorach* v. *Clauson* the Court held that a similar program conducted off the premises of the public school passed constitutional muster. The difference in symbolic impact helps explain the difference between the cases. The symbolic connection of church and state in the *McCollum* program presented the students with a graphic symbol of the "concert or union or dependency" of church and state. This very symbolic union was conspicuously absent in the *Zorach* program.

In the programs challenged in this case, the religious school students spend their typical school day moving between religious school and "public school" classes. Both types of classes take place in the same religious school building and both are largely composed of students who are adherents of the same denomination. In this environment, the students would be unlikely to discern the crucial difference between the religious school classes and the "public school" classes, even if the latter were successfully kept free of religious indoctrination. Even the student who notices the "public school" sign would have before him a powerful symbol of state endorsement and encouragement of the religious beliefs taught in the same class at some other time during the day. This effect -- the symbolic union of government and religion in one sectarian enterprise -- is an impermissible effect under the Establishment Clause.

(3) In *Everson* v. *Board of Education*, 330 U.S. 1 (1947), the Court stated that "[no] tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." With but one exception, our subsequent cases have struck down attempts by States to make payments out of tax dollars directly to primary or secondary religious educational institutions.

Aside from cash payments, the Court has distinguished between two categories of programs in which public funds are used to finance secular activities that religious schools would otherwise fund. In the first category, the Court has noted "that not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid." In such "indirect" aid cases, the government has used primarily secular means to accomplish a primarily secular end, and no "primary effect" of advancing religion has thus been found. On this rationale, the Court has upheld loans of secular textbooks and programs providing bus transportation for nonpublic school children.

In the second category of cases, the Court has relied on the Establishment Clause prohibition of forms of aid that provide "direct and substantial advancement of the sectarian

enterprise." Under this rationale, the Court has struck down state schemes providing for tuition grants and tax benefits for parents whose children attend religious school and programs providing for "loan" of instructional materials to be used in religious schools.

Thus, the Court has never accepted the mere possibility of subsidization as sufficient to invalidate an aid program. On the other hand, this effect is not wholly unimportant for Establishment Clause purposes. If it were, the public schools could gradually take on themselves the entire responsibility for teaching secular subjects on religious school premises. The question in each case must be whether the effect of the aid is "direct and substantial" or indirect and incidental.[4] "The problem, like many in constitutional law, is one of degree."

We have noted that the religious school has dual functions, providing its students with a secular education while it promotes a particular religious perspective. In *Meek* and *Wolman*, we held unconstitutional state programs providing for loans of instructional equipment and materials to religious schools, on the ground that the programs advanced the "primary, religion-oriented educational function of the sectarian school." The programs challenged here, which provide teachers in addition to instructional equipment and materials, have a similar -- and forbidden -- effect of advancing religion. This kind of direct aid to the educational function of the religious school is indistinguishable from the provision of a direct cash subsidy to the religious school that is most clearly prohibited under the Establishment Clause.

Petitioners claim that the aid here, like the textbooks in *Allen*, flows primarily to the students, not to the religious schools. Of course, all aid to religious schools ultimately "flows to" the students, and petitioners' argument if accepted would validate all forms of nonideological aid to religious schools, including those explicitly rejected in our prior cases. Yet in *Meek*, we held unconstitutional the loan of instructional materials to religious schools and in *Wolman*, we rejected the fiction that a similar program could be saved by masking it as aid to individual students. It follows *a fortiori* that the aid here, which includes not only instructional materials but also the provision of instructional services by teachers in the parochial school building, "inescapably [has] the primary effect of providing a direct and substantial advancement of the sectarian enterprise." Where, as here, no meaningful distinction can be made between aid to the student and aid to the school, "the concept of a loan to individuals is a transparent fiction."

Petitioners also argue that this "subsidy" effect is not significant in this case because the Community Education and Shared Time programs supplemented the curriculum with courses not previously offered in the religious schools. As in *Meek*, we do not find this feature of the program controlling. First, there is no way of knowing whether the religious schools would have offered some or all of these courses if the public school system had not offered them first. The distinction between courses that "supplement" and those that "supplant" the regular

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[4] This "indirect subsidy" effect only evokes Establishment Clause concerns when the public funds flow to "an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." In this case, the District Court explicitly found that 40 of the 41 participating nonpublic schools were pervasively religious in this sense. For this reason, the inquiry into whether the aid is "direct and substantial" is necessary.

curriculum is therefore not nearly as clear as petitioners allege. Second, although the precise courses offered in these programs may have been new to the participating religious schools, their general subject matter -- reading, mathematics, etc. -- was surely a part of the curriculum in the past, and the concerns of the Establishment Clause may thus be triggered despite the "supplemental" nature of the courses. Third, and most important, petitioners' argument would permit the public schools gradually to take over the entire secular curriculum of the religious school, for the latter could surely discontinue existing courses so that they might be replaced by a Community Education or Shared Time course with the same content. The average religious school student now spends 10% of the school day in Shared Time classes. But there is no principled basis on which this Court can impose a limit on the percentage of the religious school day that can be subsidized by the public school. To let the genie out of the bottle in this case would be to permit ever larger segments of the religious school curriculum to be turned over to the public school system, thus violating the cardinal principle that the State may not in effect become the prime supporter of the religious school system.

III

We conclude that the challenged programs have the effect of promoting religion in three ways. The state-paid instructors, influenced by the pervasively sectarian nature of the religious schools in which they work, may subtly or overtly indoctrinate the students in particular religious tenets at public expense. The symbolic union of church and state inherent in the provision of secular, state-provided instruction in the religious school buildings threatens to convey a message of state support for religion to students and to the general public. Finally, the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects. For these reasons, the conclusion is inescapable that the Community Education and Shared Time programs have the "primary or principal" effect of advancing religion, and therefore violate the dictates of the Establishment Clause of the First Amendment.

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

I agree that the Community Education program violates the Establishment Clause. As to the Shared Time program, I dissent for the reasons stated in my opinion in *Aguilar* v. *Felton*.

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

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

The Court relies on the District Court's finding that a "significant portion of the Shared Time instructors previously taught in nonpublic schools, and many of those had been assigned to the same nonpublic school where they were previously employed." In fact, only 13 Shared

Time instructors have ever been employed by any parochial school, and only a fraction of those 13 now work in a parochial school where they were previously employed. The experience of these few teachers does not significantly increase the risk that the perceived or actual effect of the Shared Time program will be to inculcate religion at public expense. I would uphold the Shared Time program.

I agree with the Court, however, that the Community Education program violates the Establishment Clause. The record indicates that Community Education courses in the parochial schools are overwhelmingly taught by instructors who are current full-time employees of the parochial school. The teachers offer secular subjects to the same students who attend their regular parochial school classes. In addition, the supervisors of the program in the parochial schools are by and large the principals of the very schools where the classes are offered. When full-time parochial school teachers receive public funds to teach secular courses to their parochial school students under parochial school supervision, I agree that the program has the perceived and actual effect of advancing the religious aims of the church-related schools. This is particularly the case where, as here, religion pervades the curriculum and the teachers are accustomed to bring religion to play in everything they teach. I concur that the Community Education program violates the Establishment Clause.

JUSTICE WHITE, dissenting. [This opinion also applies to *Aguilar v. Felton*]

As evidenced by my dissenting opinions in *Lemon* and *Nyquist*, I have long disagreed with the Court's interpretation and application of the Establishment Clause in the context of state aid to private schools. For the reasons stated in those dissents, I am firmly of the belief that the Court's decisions in these cases, like its decisions in *Lemon* and *Nyquist*, are "not required by the First Amendment." For those same reasons, I am satisfied that what the States have sought to do in these cases is not forbidden by the Establishment Clause. Hence, I dissent and would reverse the judgment in each of these cases.

JUSTICE REHNQUIST, dissenting. [This opinion also applies to *Aguilar v. Felton*]

A most unfortunate result of this case is that to support its holding the Court, despite its disclaimers, impugns the integrity of public school teachers. They are assumed to be eager inculcators of religious dogma, requiring, in the Court's words, "ongoing inspection." Not one instance of attempted religious inculcation exists in the records of the school-aid cases decided today, even though both the Grand Rapids and New York programs have been in operation for a number of years. I would reverse.

AGUILAR v. FELTON

473 U.S. 402 (1985)

JUSTICE BRENNAN delivered the opinion of the Court.

The City of New York uses federal funds to pay the salaries of public employees who teach in parochial schools. In this companion case to *School District of Grand Rapids v. Ball*, we determine whether this practice violates the Establishment Clause.

I

The program at issue in this case, originally enacted as Title I of the Elementary and Secondary Education Act of 1965, authorizes the Secretary of Education to distribute financial assistance to local educational institutions to meet the needs of educationally deprived children from low-income families. The funds are to be appropriated in accordance with programs proposed by local educational agencies and approved by state educational agencies. "To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provisions for including special educational services and arrangements in which such children can participate." The proposed programs must also meet the following statutory requirements: the children involved in the program must be educationally deprived, the children must reside in areas comprising a high concentration of low-income families, and the programs must supplement, not supplant, programs that would exist absent funding under Title I.

Since 1966, the City of New York has provided instructional services funded by Title I to parochial school students on the premises of parochial schools. Of those students eligible to receive funds in 1981-1982, 13.2% were enrolled in private schools. Of that group, 84% were enrolled in schools affiliated with the Roman Catholic Archdiocese of New York and the Diocese of Brooklyn and 8% were enrolled in Hebrew day schools. With respect to the religious atmosphere of these schools, "the picture that emerges is of a system in which religious considerations play a key role in the selection of students and teachers, and which has as its substantial purpose the inculcation of religious values."

The programs conducted at these schools include remedial reading, reading skills, remedial mathematics, English as a second language, and guidance services. These programs are carried out by regular employees of the public schools (teachers, guidance counselors, psychologists, psychiatrists, and social workers) who have volunteered to teach in the parochial schools. The amount of time that each professional spends in the parochial school is determined by the number of students in the program and the needs of these students.

The City's Bureau of Nonpublic School Reimbursement makes teacher assignments, and the instructors are supervised by field personnel, who attempt to pay at least one unannounced visit per month. The field supervisors, in turn, report to program coordinators, who also pay occasional unannounced supervisory visits to monitor Title I classes in the parochial schools. The professionals involved in the program are directed to avoid involvement with religious activities that are conducted within the private schools and to bar religious materials in their

classrooms. All material and equipment used in the programs funded under Title I are supplied by the Government and are used only in those programs. The professional personnel are solely responsible for the selection of the students. Additionally, the professionals are informed that contact with private school personnel should be kept to a minimum. Finally, the administrators of the parochial schools are required to clear the classrooms used by the public school personnel of all religious symbols.

II

In *School District of Grand Rapids v. Ball*, the Court has today held unconstitutional under the Establishment Clause two remedial and enhancement programs operated by the Grand Rapids Public School District, in which classes were provided to private school children at public expense in classrooms located in and leased from the local private schools. The New York City programs in this case are very similar to the programs we examined in *Ball*. In both cases, publicly funded instructors teach classes composed exclusively of private school students in private school buildings. In both cases, an overwhelming number of the participating private schools are religiously affiliated. In both cases, the publicly funded programs provide not only professional personnel, but also all materials and supplies necessary for the operation of the programs. Finally, the instructors in both cases are told that they are public school employees under the sole control of the public school system.

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. At best, the supervision in this case would assist in preventing the Title I program from being used, intentionally or unwittingly, to inculcate the religious beliefs of the surrounding parochial school. 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. Even where state aid to parochial institutions does not have the primary effect of advancing religion, the provision of such aid may nonetheless violate the Establishment Clause owing to the interaction of church and state in the administration of that aid.

The principle that the state should not become too closely entangled with the church in the administration of assistance is rooted in two concerns. When the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers, even when the governmental purpose underlying the involvement is largely secular. In addition, the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters.

In *Lemon* v. *Kurtzman*, the Court held that the supervision necessary to ensure that teachers in parochial schools were not conveying religious messages to their students would constitute the excessive entanglement of church and state. Similarly, in *Meek* v. *Pittenger*, we invalidated a state program that offered guidance, testing, and remedial and therapeutic services performed by public employees on the premises of the parochial schools. As in *Lemon*, we observed that though a comprehensive system of supervision might conceivably prevent teachers from having the primary effect of advancing religion, such a system would

inevitably lead to an unconstitutional administrative entanglement between church and state.

Moreover, our holding in *Meek* invalidating instructional services much like those at issue in this case rested on the ground that the publicly funded teachers were "performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." The court below found that the schools involved in this case were "well within this characterization." Many of the schools here receive funds and report back to their affiliated church, require attendance at church religious exercises, begin the school day or class period with prayer, and grant preference in admission to members of the sponsoring denominations. In addition, the Catholic schools at issue here, the vast majority of the aided schools, are under the general supervision and control of the local parish.

The critical elements of the entanglement proscribed in *Lemon* and *Meek* are thus present in this case. First, as noted above, the aid is provided in a pervasively sectarian environment. Second, because assistance is provided in the form of teachers, ongoing inspection is required to ensure the absence of a religious message. In short, the scope and duration of New York City's Title I program would require a permanent and pervasive state presence in the sectarian schools receiving aid.

This pervasive monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement. 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. In short, the religious school, which has as a primary purpose the advancement of a particular religion must endure the ongoing presence of state personnel whose primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought.

The administrative cooperation that is required to maintain the educational program at issue here entangles church and state in still another way that infringes interests at the heart of the Establishment Clause. Administrative personnel of the public and parochial school systems must work together in resolving matters related to schedules, classroom assignments, problems that arise in the implementation of the program, requests for additional services, and the dissemination of information regarding the program. Furthermore, the program necessitates "frequent contacts between the regular and the remedial teachers (or other professionals), in which each side reports on individual student needs, problems encountered, and results achieved."

We have long recognized that underlying the Establishment Clause is "the objective . . . to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other." Although "[separation] in this context cannot mean absence of all contact," the detailed monitoring and close administrative contact required to maintain New York City's Title I program can only produce "a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." The numerous judgments that must be made by agents of the city concern matters that may be subtle and controversial, yet may be of deep

religious significance to the controlling denominations. As government agents must make these judgments, the dangers of political divisiveness along religious lines increase. At the same time, "[the] picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction surely raises more than an imagined specter of governmental 'secularization of a creed.'"

III

Despite the well-intentioned efforts taken by the City of New York, the program remains constitutionally flawed owing to the nature of the aid, to the institution receiving the aid, and to the constitutional principles that they implicate.

JUSTICE POWELL, concurring.

I concur in the Court's opinions and judgments today in this case and in *School District of Grand Rapids* v. *Ball*, holding that the aid to parochial schools involved in those cases violates the Establishment Clause of the First Amendment. I write to emphasize additional reasons why precedents of this Court require us to invalidate these two educational programs that concededly have "done so much good and little, if any, detectable harm."

I agree with the Court that in this case the Establishment Clause is violated because there is too great a risk of government entanglement in the administration of the religious schools; the same is true in *Ball*. This risk of entanglement is compounded by the additional risk of political divisiveness stemming from the aid to religion at issue here. As this Court has repeatedly recognized, there is a likelihood whenever direct governmental aid is extended to some groups that there will be competition and strife among them and others to gain, maintain, or increase the financial support of government. In States such as New York that have large and varied sectarian populations, one can be assured that politics will enter into any state decision to aid parochial schools. Aid to parochial schools of the sort at issue here potentially leads to "that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." Although the Court's opinion does not discuss it at length, the potential for such divisiveness is a strong additional reason for holding that the Title I and Grand Rapids programs are invalid on entanglement grounds.

The Title I program at issue in this case also would be invalid under the "effects" prong of the test adopted in *Lemon* v. *Kurtzman*. As has been discussed thoroughly in *Ball*, with respect to the Grand Rapids programs, the type of aid provided in New York by the Title I program amounts to a state subsidy of the parochial schools by relieving those schools of the duty to provide the remedial and supplemental education their children require. This is not the type of "indirect and incidental effect beneficial to [the] religious institutions" that we suggested in *Nyquist* would survive Establishment Clause scrutiny. Rather, by directly assuming part of the parochial schools' education function, the effect of the Title I aid is "inevitably . . . to subsidize and advance the religious mission of [the] sectarian schools," even though the program provides that only secular subjects will be taught. As in *Meek* v. *Pittenger*, the secular education these schools provide goes "'hand in hand'" with the religious mission that is the reason for the schools' existence. Because of the predominantly religious

nature of the schools, the substantial aid provided by the Title I program "inescapably results in the direct and substantial advancement of religious activity."

I recognize the difficult dilemma in which governments are placed by the interaction of the "effects" and entanglement prongs of the *Lemon* test. Our decisions require governments extending aid to parochial schools to tread an extremely narrow line between being certain that the "principal or primary effect" of the aid is not to advance religion, and avoiding excessive entanglement. Nonetheless, the Court has never foreclosed the possibility that some types of aid to parochial schools could be valid. Our cases have upheld evenhanded secular assistance to both parochial and public school children in some areas. I do not read the Court's opinion as precluding these types of indirect aid to parochial schools. The constitutional defect in the Title I program, as indicated above, is that it provides a direct financial subsidy to be administered in significant part by public school teachers within parochial schools -- resulting in both the advancement of religion and forbidden entanglement. If, for example, Congress could fashion a program of evenhanded financial assistance to both public and private schools that could be administered, without governmental supervision in the private schools, so as to prevent the diversion of the aid from secular purposes, we would be presented with a different question.

CHIEF JUSTICE BURGER, dissenting.

Under the guise of protecting Americans from the evils of an Established Church, today's decision will deny countless schoolchildren desperately needed remedial teaching services funded under Title I. What is disconcerting about the result reached today is that, in the face of the human cost entailed by this decision, the Court does not even attempt to identify any threat to religious liberty posed by the operation of Title I. I share JUSTICE WHITE's concern that the Court's obsession with the criteria identified in *Lemon* v. *Kurtzman* has led to results that are "contrary to the long-range interests of the country." As I wrote in *Wallace* v. *Jaffree*, 472 U.S. 38, 89 (1985) (dissenting opinion), "our responsibility is not to apply tidy formulas by rote; our duty is to determine whether the statute or practice at issue is a step toward establishing a state religion." Federal programs designed to prevent a generation of children from growing up without being able to read effectively are not remotely steps in that direction. It borders on paranoia to perceive the Archbishop of Canterbury or the Bishop of Rome lurking behind programs that are just as vital to the Nation's schoolchildren as textbooks, transportation to and from school, and school nursing services.

On the merits of this case, I dissent for the reasons stated in my separate opinion in *Meek* v. *Pittenger*. We have frequently recognized that some interaction between church and state is unavoidable, and that an attempt to eliminate all contact between the two would be both futile and undesirable. The Court today fails to demonstrate how the interaction occasioned by the program at issue presents any threat to the values underlying the Establishment Clause.

I cannot join in striking down a program that, in the words of the Court of Appeals, "has done so much good and little, if any, detectable harm." The notion that denying these services to students in religious schools is a neutral act to protect us from an Established Church has no support in logic, experience, or history. Rather than showing the neutrality the Court

boasts of, it exhibits nothing less than hostility toward religion and the children who attend church-sponsored schools.

JUSTICE REHNQUIST, dissenting.

In this case the Court takes advantage of the "Catch-22" paradox of its own creation, whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement. The Court today strikes down nondiscriminatory nonsectarian aid to educationally deprived children from low-income families. The Establishment Clause does not prohibit such sorely needed assistance; we have indeed traveled far afield from the concerns which prompted the adoption of the First Amendment when we rely on gossamer abstractions to invalidate a law which obviously meets an entirely secular need.

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST joins as to Parts II and III, dissenting.

Today the Court affirms the holding of the Court of Appeals that public school teachers can offer remedial instruction to disadvantaged students who attend religious schools "only if such instruction . . . [is] afforded at a neutral site off the premises of the religious school." This holding rests on the theory, enunciated in the Court's opinion in *Meek* v. *Pittenger*, that public school teachers who set foot on parochial school premises are likely to bring religion into their classes, and that the supervision necessary to prevent religious teaching would unduly entangle church and state. Even if this theory were valid in the abstract, it cannot validly be applied to New York City's 19-year-old Title I program. The Court greatly exaggerates the degree of supervision necessary to prevent public school teachers from inculcating religion, and thereby demonstrates the flaws of a test that condemns benign cooperation between church and state. I would uphold Congress' efforts to afford remedial instruction to disadvantaged schoolchildren in both public and parochial schools.

I

According to the Court, the New York City Title I program is defective not because of any improper purpose or effect, but rather because it fails the third part of the *Lemon* test: the Title I program allegedly fosters excessive government entanglement with religion. I disagree with the Court's analysis of entanglement, and I question the utility of entanglement as a separate Establishment Clause standard in most cases. Before discussing entanglement, however, it is worthwhile to explore the purpose and effect of the New York City Title I program in greater depth than does the majority opinion.

The purpose of Title I is to provide special educational assistance to disadvantaged children who would not otherwise receive it. No party in this Court contends that the purpose of the statute or of the New York City Title I program is to advance or endorse religion. Indeed, the record demonstrates that New York City public school teachers offer Title I classes on the premises of parochial schools solely because alternative means to reach the disadvantaged parochial school students -- such as instruction for parochial school students at the nearest public school, either after or during regular school hours -- were unsuccessful. Whether one looks to the face of the statute or to its implementation, the Title I program is

undeniably animated by a legitimate secular purpose.

The Court's discussion of the effect of the New York City Title I program is even more perfunctory than its analysis of the program's purpose. While addressing the effect of the Grand Rapids program at length, the Court overlooks the effect of Title I in New York City. One need not delve too deeply in the record to understand why the Court does not belabor the effect of the Title I program. The abstract theories explaining why on-premises instruction might possibly advance religion dissolve in the face of experience in New York City. As the District Court found: "The evidence establishes that the result feared in other cases has not materialized in the City's Title I program." Indeed, in 19 years there has never been a single incident in which a Title I instructor "subtly or overtly" attempted to "indoctrinate the students in particular religious tenets at public expense."

Common sense suggests a plausible explanation for this unblemished record. New York City's public Title I instructors are professional educators who can and do follow instructions not to inculcate religion in their classes. They are unlikely to be influenced by the sectarian nature of the parochial schools where they teach, not only because they are carefully supervised by public officials, but also because the vast majority of them visit several different schools each week and are not of the same religion as their parochial students. In light of the ample record, an objective observer of the implementation of the Title I program in New York City would hardly view it as endorsing the tenets of the participating parochial schools. The only type of impermissible effect that arguably could carry over from the *Grand Rapids* decision to this litigation, then, is the effect of subsidizing "the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." That effect is tenuous, however, in light of the statutory directive that Title I funds may be used only to provide services that otherwise would not be available to the participating students. The Secretary of Education has vigorously enforced the requirement that Title I funds supplement rather than supplant the services of local education agencies.

Even if we were to assume that Title I remedial classes in New York City may have duplicated to some extent instruction parochial schools would have offered in the absence of Title I, the Court's delineation of this third type of effect proscribed by the Establishment Clause would be seriously flawed. Our Establishment Clause decisions have not barred remedial assistance to parochial school children, but rather remedial assistance *on the premises of the parochial school*. Under *Wolman* v. *Walter*, the classes prohibited by the Court today would have survived Establishment Clause scrutiny if they had been offered in a neutral setting off the property of the private school. Yet it is difficult to understand why a remedial reading class offered on parochial school premises is any more likely to supplant the secular course offerings of the parochial school than the same class offered in a portable classroom next door to the school.

II

Recognizing the weakness of any claim of an improper purpose or effect, the Court today relies entirely on the entanglement prong of *Lemon* to invalidate the New York City Title I program. This analysis of entanglement, I acknowledge, finds support in some of this Court's precedents. In *Meek* v. *Pittenger*, the Court asserted that it could not rely "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." Because "a teacher remains a teacher," the Court stated, there remains a risk that teachers will intertwine religious doctrine with secular instruction. The continuing state surveillance necessary to prevent this from occurring would produce undue entanglement of church and state. The Court's opinion in *Meek* further asserted that public instruction on parochial school premises creates a serious risk of divisive political conflict over the issue of aid to religion. *Meek*'s analysis of entanglement was reaffirmed in *Wolman* two Terms later.

I would accord these decisions the appropriate deference commanded by the doctrine of *stare decisis* if I could discern logical support for their analysis. But experience has demonstrated that the analysis in the *Meek* opinion is flawed. At the time *Meek* was decided, thoughtful dissents pointed out the absence of any record support for the notion that public school teachers would attempt to inculcate religion simply because they temporarily occupied a parochial school classroom, or that such instruction would produce political divisiveness. Experience has given greater force to the arguments of the dissenting opinions in *Meek*. It is not intuitively obvious that a dedicated public school teacher will tend to disobey instructions and commence proselytizing students at public expense merely because the classroom is within a parochial school. *Meek* is correct in asserting that a teacher of remedial reading "remains a teacher," but surely it is significant that the teacher involved is a professional, full-time public school employee who is unaccustomed to bringing religion into the classroom. Given that not a single incident of religious indoctrination has been identified as occurring in the thousands of classes offered in Grand Rapids and New York City over the past two decades, it is time to acknowledge that the risk identified in *Meek* was greatly exaggerated.

Just as the risk that public school teachers in parochial classrooms will inculcate religion has been exaggerated, so has the degree of supervision required to manage that risk. In this respect the New York City Title I program is instructive. What supervision has been necessary in New York City to enable public school teachers to help disadvantaged children for 19 years without once proselytizing? Public officials have prepared careful instructions warning public school teachers of their exclusively secular mission. Under the rules, Title I teachers are not accountable to parochial or private school officials; they have sole responsibility for selecting the students who participate in their class, must administer their own tests for determining eligibility, cannot engage in team teaching or cooperative activities with parochial school teachers, must make sure that all materials and equipment they use are not otherwise used by the parochial school, and must not participate in religious activities in the schools or introduce any religious matter into their teaching. To ensure compliance with the rules, a field supervisor and a program coordinator, who are full-time public school employees, make unannounced visits to each teacher's classroom at least once a month.

The Court concludes that this degree of supervision of public school employees by other public school employees constitutes excessive entanglement of church and state. I cannot agree. The supervision that occurs in New York City's Title I program does not differ significantly from the supervision any public school teacher receives, regardless of the location of the classroom. Even if I remained confident of the usefulness of entanglement as an Establishment Clause test, I would conclude that New York City's efforts to prevent

religious indoctrination in Title I classes have been adequate and have not caused excessive institutional entanglement of church and state.

The Court's reliance on the potential for political divisiveness as evidence of undue entanglement is also unpersuasive. There is little record support for the proposition that New York City's admirable Title I program has ignited any controversy other than this litigation. In *Mueller* v. *Allen*, the Court cautioned that the "elusive inquiry" into political divisiveness should be confined to a narrow category of parochial aid cases. The concurring opinion in *Lynch* v. *Donnelly*, 465 U.S. 668, 687 (1984), went further, suggesting that "the entanglement prong of the *Lemon* test is properly limited to institutional entanglement."

I adhere to the doubts about the entanglement test that were expressed in *Lynch*. My reservations about the entanglement test, however, have come to encompass its institutional aspects as well. Many of the inconsistencies in our Establishment Clause decisions can be ascribed to our insistence that parochial aid programs with a valid purpose and effect may still be invalid by virtue of undue entanglement. For example, we permit a State to pay for bus transportation to a parochial school, but preclude States from providing buses for parochial school field trips. To a great extent, the anomalous results in our Establishment Clause cases are "attributable to [the] 'entanglement' prong."

Pervasive institutional involvement of church and state may remain relevant in deciding the *effect* of a statute, but state efforts to ensure that public resources are used only for nonsectarian ends should not in themselves serve to invalidate an otherwise valid statute. If a statute lacks a purpose or effect of advancing or endorsing religion, I would not invalidate it merely because it requires some ongoing cooperation between church and state or some state supervision to ensure that state funds do not advance religion.

III

Today's ruling does not spell the end of the Title I program for disadvantaged children. Children attending public schools may still obtain the benefits of the program. Impoverished children who attend parochial schools may also continue to benefit from Title I programs offered off the premises of their schools -- possibly in portable classrooms just over the edge of school property. The only disadvantaged children who lose under the Court's holding are those in cities where it is not economically and logistically feasible to provide public facilities for remedial education adjacent to the parochial school. But this subset is significant, for it includes more than 20,000 New York City children and uncounted others in the country.

For these children, the Court's decision is tragic. The Court deprives them of a program that offers a meaningful chance at success in life, and it does so on the untenable theory that public school teachers are likely to start teaching religion merely because they have walked across the threshold of a parochial school. I reject this theory.