PRIMARY AND SECONDARY RELIGIOUS SCHOOLS AND THE DISESTABLISHMENT OF *EVERSON*

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ABSTRACT

Everson v. Board of Education, the seminal case in modern Establishment Clause jurisprudence, held that states are not constitutionally barred from providing school children with transportation to sectarian schools because states are not thereby using public dollars to support religious education. The Everson compromise—permitting states to help families send children to religious schools as long as the public dollars are not used to fund religious teaching, has now been turned on its head. The current Court has held that state dollars can and must be used to promote religious indoctrination if state dollars are used to promote private secular education. The Court's Establishment jurisprudence makes a mockery of Everson and cannot help but further religious division and animosity.

I. INTRODUCTION

Everson v. Board of Education[1] is the seminal case of modern Establishment Clause jurisprudence.[2] The case has been subject to differing interpretations[3] because the United States Supreme Court not only suggested

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[1] Everson v. Bd. of Educ., 330 U.S. 1 (1947).

[2] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 839 (1995) ("The first case in our modern Establishment Clause jurisprudence was *Everson v. Board of Ed. of Ewing*, 330 U.S. 1 (1947)."); Rupal M. Doshi, *Nonincorporation of the Establishment Clause: Satisfying the Demands of Equality, Pluralism, and Originalism*, 98 GEO. L.J. 459, 470–71 (2010) ("The origins of modern Religion Clause jurisprudence can be traced to the Supreme Court's decision in *Everson*."); Kyle Duncan, *Bringing Scalia's Decalogue Dissent Down from the Mountain*, 2007 UTAH L. REV. 287, 295 (2007) (discussing "*Everson v. Board of Education*, which inaugurated modern Establishment Clause jurisprudence"); Mary Nobles Hancock, *God Save the United States and This Honorable County Board of Commissioners:* Lund*,* Bormuth*, and the Fight over Legislative Prayer*, 76 WASH. & LEE L. REV. 397, 405 (2019) ("*Everson v. Board of Education of Ewing Township* in 1947 applied the Establishment Clause to the states through incorporation via the Fourteenth Amendment and marked the beginning of the Supreme Court's modern era of Establishment Clause jurisprudence.").

[3] See Joseph R. McKinney, Special Education and the Establishment Clause, 65 West's Educ. L. Rep. 1, 6 (1991) ("The Court concluded in Everson that children, not the religion, were the actual beneficiaries of the government aid to the parochial school."); Brett G. Scharffs, The (Not So) Exceptional Establishment Clause of the United States Constitution, 33 J.L. & Religion 137, 141–42 (2018). The Court's opinion is schizophrenic. The first half of the opinion is a passionate articulation of the value of freedom and separation, culminating in the invocation of Thomas Jefferson's, until then largely ignored, image of a "wall of separation between Church and State." Only a sentence later, however, the opinion is demarcated by an important "but," which is followed by a defense of accommodation of religion by the state that is nearly as passionate. William C. Porth Robert, Trimming the Ivy: A Bicentennial Re-Examination of the Establishment Clause, 90 W. Va. L. Rev. 109, 126 (1987) ("Black, and the justices joining in his opinion, understood the words 'make no law respecting an establishment of religion' to preclude any aid, even non-discriminatory aid, to religions."); Daniel K. Storino, Resurrecting the Faith-Based Plan: Analyzing Government Funding for Religious Social Service Groups, 79 Notre Dame L. Rev. 389, 397 (2003):

that there is a wall of separation between church and state,[4] but also upheld state reimbursement of families for transportation costs to parochial schools,[5] a position in tension with itself.[6] Yet, the differing positions offered by members of the Court were not particularly far apart and all of the positions articulated, or even suggested, there point to how the current Court's Establishment Clause jurisprudence is antithetical both to *Everson* and to the principles for which it stood.

Since *Everson*, the Court has struggled to provide a coherent Establishment Clause jurisprudence that both promotes certain ends[7] and is capable of application.[8] At times, the Court has struggled because of the difficulty in drawing clear lines in close cases.[9] At other times, however, the Court has unwittingly or otherwise turned past cases on their heads to reach conclusions that simply could not be reconciled with the existing jurisprudence. Regrettably, the Court has currently adopted an approach that undermines both *Everson* and the long-recognized goals of the Establishment Clause, an especially wrong-headed approach in a society as fragmented and religiously diverse as the United States is today.

Part II of this Article discusses *Everson*, noting some of the ambiguities within the opinion. Part III discusses the developing jurisprudence post-*Everson* with respect to state support of religious schools through the purchase or loan of textbooks and other materials and through the payment of salaries of teachers and other personnel. Part IV discusses state subsidies

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In *Everson*, the Court addressed a New Jersey law that reimbursed parents with children in public and religious schools for the costs of bus transportation to their schools. Although the Court upheld the New Jersey law and permitted an indirect benefit to flow to families in religious schools, the Court strongly emphasized the importance of keeping church and state separate.

[4] *Everson*, 330 U.S. at 16 ("[T]he clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'") (citing Reynolds v. United States, 98 U.S. 145, 164 (1878)).

[5] *Id.* at 18 ("The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.").

[6] *Id.* at 19 (Jackson, J., dissenting). In fact, the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters. The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Lord Byron's reports, "whispering 'I will ne'er consent,'—consented."

[7] Mere internal coherence is not enough. *See* Nelson Tebbe, *Religion and Social Coherentism*, 91 NOTRE DAME L. REV. 363, 400 (2015) ("When we say that someone's reading of free exercise or non-establishment is justified, we mean something more than that it is coherent internally. For example, a white supremacist interpretation of the Constitution might be believed to hang together but is unwarranted.").

[8] Michael I. Meyerson, *The Original Meaning of "God": Using the Language of the Framing Generation to Create a Coherent Establishment Clause Jurisprudence*, 98 MARQ. L. REV. 1035, 1051 (2015) ("There is widespread agreement that the Supreme Court has not been able to create and maintain a consistent and coherent system for analyzing Establishment Clause issues."); Joe Dryden, *The Religious Viewpoint Antidiscrimination Act: Using Students as Surrogates to Subjugate the Establishment Clause*, 82 MISS. L.J. 127, 152 (2013) ("Establishment Clause jurisprudence is 'incapable of coherent explanation.' " (quoting Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 132 S. Ct. 12, 22 (2011) (Thomas, J., dissenting))); Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725 (2006) ("It is by now axiomatic that the Supreme Court's Establishment Clause jurisprudence is a mess—both hopelessly confused and deeply contradictory."); Joshua N. Turner, *A Perturbed Prayer Policy: When Past Practice, Not Purpose, Possesses a Preeminent Position*, 9 LIBERTY U. L. REV. 405, 408–09 (2015) ("Until the courts return to an examination of both the purpose and text of the Establishment Clause, there is no hope for a consistent, coherent, or even predictable Establishment Clause jurisprudence.").

[9] *Cf.* Roger Clegg, *Let's Get Boring*, 1 NEXUS, 9, 12 (Spring 1996) ("And even when lines are drawn as clearly as they can be, there will be cases close to that line where judges must make hard calls.").

through tax benefits or scholarships to help families whose children attend religious schools. This Article explains how the Court's current position on what the Establishment Clause permits in these areas is antithetical to *Everson* and the principles for which it stood.

II. THE AMBIGUITY OF *EVERSON*

Everson v. Board of Education[10] involved a challenge[11] to a local school board's decision to reimburse families for the costs of public transportation to parochial schools[12] pursuant to a New Jersey law permitting districts to make transportation arrangements for schoolchildren.[13] The appellant claimed that he was, in effect, being taxed to support religious schools.[14]

The town policy was problematic on its face in that it authorized the reimbursement of transportation costs of families sending their children to public schools and to Catholic parochial schools in particular rather than to religious schools more generally.[15] The record failed to establish the absence of other religious schools in the area,[16] and reimbursing the transportation costs to one religious school but not to another would have been difficult to justify.[17]

Ignoring the text of the policy,[18] the *Everson* Court focused on whether the Constitution permitted New Jersey to reimburse families for transportation costs to any accredited non-profit schools,[19] whether religious or secular.[20] A New Jersey court had offered a broad interpretation of the

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[10] *Everson*, 330 U.S. at 3.

[11] *Id.* ("The appellant, in his capacity as a district taxpayer, filed suit in a state court challenging the right of the Board to reimburse parents of parochial school students.").

[12] *Id.* ("The appellee, a township board of education, acting pursuant to this statute, authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by the public transportation system.").

[13] *Id.* ("A New Jersey statute authorizes its local school districts to make rules and contracts for the transportation of children to and from schools.").

[14] *Id.* at 5. The statute and the resolution forced inhabitants to pay taxes to help support and maintain schools which are dedicated to, and which regularly teach, the Catholic faith. This is alleged to be a use of state power to support church schools contrary to the prohibition of the First Amendment which the Fourteenth Amendment made applicable to the states.

[15] *Id.* at 30 (Rutledge, J., dissenting) ("The school board of Ewing Township has provided by resolution for 'the transportation of pupils of Ewing to the Trenton and Pennington High Schools and Catholic Schools by way of public carrier . . . .' ").

[16] *Id.* at 62 ("There is no showing that there are no other private or religious schools in this populous district. I do not think it can be assumed there were none.").

[17] *See id.* at 15 (majority opinion) ("Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion . . . or prefer one religion over another."); *see also* Gillette v. United States, 401 U.S. 437, 450 (1971) ("[A]s a general matter it is surely true that the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization."); Mark Strasser, *Repudiating* Everson*: On Buses, Books, and Teaching Articles of Faith*, 78 MISS. L.J. 567, 573 (2009) ("Had the resolution's constitutionality been analyzed in light of its expressly distinguishing among religions, the statute would likely have been struck down.").

[18] *See Everson*, 330 U.S. at 21 (Jackson, J., dissenting) ("If we are to decide this case on the facts before us, our question is simply this: Is it constitutional to tax this complainant to pay the cost of carrying pupils to Church schools of one specified denomination?"); *Id.* at 62 (Rutledge, J., dissenting) ("[T]he resolution by which the statute was applied expressly limits its benefits to students of public and Catholic schools.").

[19] *Id.* at 20 (Jackson, J., dissenting) ("The Act permits payment for transportation to parochial schools or public schools but prohibits it to private schools operated in whole or in part for profit.").

[20] *Id.* at 17 (majority opinion) ("[W]e cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools.").

policy at issue so that transportation costs could be reimbursed for attendance at any accredited religious school, express policy language notwithstanding.[21] The *Everson* Court did not make clear whether it was adopting the lower court's interpretation or, instead, was simply addressing the issue that was bound to come before the Court at a later time were the program at issue struck down because of its language expressly favoring Catholic parochial schools.[22]

The Court sought to determine the policy's purpose. If the state was trying to aid or promote religion, then the policy would be unconstitutional[23] because the state must be neutral toward religion.[24] However, the requisite neutrality requires explication. For example, the Court was not suggesting that if a state funds public schools to promote secular views,[25] then the state must also fund religious schools to promote religious views[26]—on the contrary, the state was prohibited from supporting religious teaching even though the state supported secular teaching.[27] Neutrality precludes the State from being an "adversary"[28] of religion, although what qualifies as being neutral would have to be developed in the case law.[29]

The *Everson* Court suggested that the reimbursement program was designed to promote safety.[30] Justice Jackson rejected that analysis in his dissent, arguing that the reimbursement policy could not reasonably be viewed as promoting safety because as "passengers on the public busses [the students] travel as fast and no faster, and are as safe and no safer"[31] whether

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[21] *See* Everson v. Bd. of Educ., 39 A.2d 75, 76 (N.J. Sup. Ct. 1944), *rev'd*, 44 A.2d 333 (N.J. 1945), *aff'd*, 330 U.S. 1 (1947) ("The result, of course, is to provide for free transportation of children at the expense of the home municipality and of the state school fund to and from any school, other than a public school, which is not operated for profit . . . .").

[22] Mark Strasser, *Free Exercise and* Comer*: Robust Entrenchment or Simply More of a Muddle?*, 52 U. RICH. L. REV. 887, 906 (2018). The Court did not specify whether it was simply adopting the trial court's interpretation of the resolution, express language notwithstanding, or whether it was reading the resolution that way, for example, to forestall the next resolution that would have been worded more carefully so as not to facially benefit one religion over another.

[23] *Everson*, 330 U.S. at 15 ("Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.").

[24] *Id.* at 18 ("That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers . . . .").

[25] *See id.* at 23–24 (Jackson, J., dissenting) ("Our public school . . . . is a relatively recent development . . . . [which] is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion."). *But see* Lemon v. Kurtzman, 403 U.S. 602, 629 (1971) (Douglas, J., concurring) ("The Catholics logically argued that a public school was sectarian when it taught the King James version of the Bible.").

[26] In *Mitchell v. Helms*, 530 U.S. 793 (2000), the plurality adopted a position reminiscent of the mistaken understanding criticized here. *See id.* at 809 ("If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.").

[27] *Everson*, 330 U.S. at 16 ("New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church.").

[28] *Id.* at 18.

[29] *See id.* ("State power is no more to be used so as to handicap religions than it is to favor them.").

[30] *Id.* ("[New Jersey's] legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."); *see also* People of Ill. *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 249 (1948) (Reed, J., dissenting) ("The *Everson* decision itself justified the transportation of children to church schools by New Jersey for safety reasons."); Mark Strasser, *Religion in the Schools: On Prayer, Neutrality, and Sectarian Perspectives*, 42 AKRON L. REV. 185, 192 (2009) ("*Everson* upheld the constitutionality of the state's promoting health and safety.").

[31] *Everson*, 330 U.S. at 20 (Jackson, J., dissenting).

or not the state reimburses the travel expenses. However, the majority was not arguing that the reimbursement made the buses themselves safer, for example, by providing funds to install seatbelts;[32] instead, it was suggesting that the reimbursement might afford children the luxury of using public transport when they otherwise would have used a more dangerous means of travel,[33] for example, walking or hitchhiking to school.[34] That said, no evidence was included suggesting that the children attending parochial school were in fact putting themselves at risk by walking along busy streets or hitchhiking to get to school and thereby exposing themselves to increased danger.[35]

The *Everson* Court made clear that the State "cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church."[36] However, the First Amendment also precludes the state from "hamper[ing] its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation."[37]

Regrettably, the Court did not explore the implications of these two limitations. There had been no suggestion that Catholics in particular were being targeted by being denied benefits that members of other religious groups received. For example, suppose that New Jersey had authorized reimbursement of transportation costs to all religious schools and that such a policy did not violate federal or state constitutional guarantees. Suppose further that families of various faiths had received the transportation reimbursement, but the state had refused to reimburse Catholic families for their religious-school transportation expenses. In that event the Court's articulated worry would have been implicated. But that was not what was at issue in New Jersey.[38] On the contrary, individuals of any faith could attend

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[32] Doug Shinkle, *Improving School Bus Safety*, 26 LEGISBRIEF (2018), https://www.ncsl.org/research/transportation/improving-school-bus-safety.aspx [https://perma.cc/2BEE-6M8P] ("NHTSA continues to support the installation of three-point lap belts on large school buses. . . . [T]hree-point lap belts can provide additional protection to school bus occupants in the event of a lateral or side collision.").

[33] *See id.* ("[S]chool buses are statistically the safest way to transport school children . . . .").

[34] *See Everson*, 330 U.S. at 7:

> The same thing is no less true of legislation to reimburse needy parents, or all parents, for payment of the fares of their children so that they can ride in public busses to and from schools rather than run the risk of traffic and other hazards incident to walking or "hitchhiking."

[35] *Cf.* Jesse Coburn, *'Always Scared': Traffic Chaos Outside NYC Schools Threatens Children*, STREETSBLOG (May 24, 2022), https://ny.chalkbeat.org/2022/5/24/23139701/dangerous-streets-traffic-threaten-children-nyc-schools [https://perma.cc/S8EH-V3ES]:

> Two years ago, a boy crossing a street in Queens on his way to school was run over and killed by a man driving a 20-ton truck. Seven weeks later, a girl walking to school with her brother in Brooklyn died under the wheels of a school bus. Two days after that, in the same neighborhood, a woman driving with a suspended license struck and killed a boy in a crosswalk. He was also heading to school.

[36] *Everson*, 330 U.S. at 16.

[37] *Id.*

[38] *Cf. id*. at 19 (Jackson, J., dissenting) ("The Court sustains this legislation by assuming two deviations from the facts of this particular case; first, it assumes a state of facts the record does not support, and secondly, it refuses to consider facts which are inescapable on the record.").

public school.[39] In addition, those attending public high schools and Catholic schools in particular were entitled to reimbursement costs.[40]

Suppose that the township had not been willing to pay the transportation costs to Catholic schools, and for lack of that reimbursement, the children had attended public school rather than parochial school. While the children attending public school would not have received the religious education that their parents might have valued,[41] that difficulty would apply across faiths and would not be targeting one faith's adherents in particular.

In his dissent, Justice Rutledge noted that parents who chose to have their children attend public school and additionally receive religious training after school could not be reimbursed for the costs of that religious training, even if the after-school training also included secular elements.[42] But if that was so (and no one on the Court disagreed), then it was not clear why the state was constitutionally permitted to reimburse the transportation costs of the children attending religious day-school but not the transportation costs of the children receiving religious training after school.

Perhaps it would be argued that the after-school program would be predominantly religious while the other would not be, but that would require a comparison of the degree to which religion permeated the differing programs. If it turned out that religion permeated both programs,[43] then the programs could not be differentiated that way. Further, if that were the test and if transportation (and perhaps other) costs were permissibly reimbursed for the day school,[44] then it would seem that the costs of the after-school program would also be permissible to reimburse as long as the latter programs were no more sectarian than the day programs for which reimbursement was permissible.

The Court might have explored more fully whether the prohibition on supporting religion should be understood to include precluding

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[39] *Id.* at 58 (Rutledge, J., dissenting) ("The child attending the religious school has the same right as any other to attend the public school.").

[40] *Id.* at 30 ("The school board of Ewing Township has provided by resolution for 'the transportation of pupils of Ewing to the Trenton and Pennington High Schools and Catholic Schools by way of public carrier . . . .' ").

[41] *Id.* at 46–47:

> [T]he view is sincerely avowed by many of various faiths, that the basic purpose of all education is or should be religious, that the secular cannot be and should not be separated from the religious phase and emphasis. Hence, the inadequacy of public or secular education and the necessity for sending the child to a school where religion is taught.

[42] *See id.* at 47:

> An appropriation from the public treasury to pay the cost of transportation to Sunday school, to weekday special classes at the church or parish house, or to the meetings of various young people's religious societies, such as the Y.M.C.A., the Y.W.C.A., the Y.M.H.A., the Epworth League, could not withstand the constitutional attack. This would be true, whether or not secular activities were mixed with the religious.

[43] *See* Lemon v. Kurtzman, 403 U.S. 602, 635 (1971) (Douglas, J., concurring) ("It is well known that everything taught in most parochial schools is taught with the ultimate goal of religious education in mind."); Mitchell v. Helms, 530 U.S. 793, 885–86 (2000) (Souter, J., dissenting) ("[W]e have recognized the fact that the overriding religious mission of certain schools, those sometimes called 'pervasively sectarian,' is not confined to a discrete element of the curriculum, but permeates their teaching." (citing *Everson,* 330 U.S. at 22–24 (Jackson, J., dissenting))); *Everson*, 330 U.S. at 45–47 (Rutledge, J., dissenting).

[44] The Court has permitted the state to offer other kinds of indirect support for religious programs. *See* Mueller v. Allen, 463 U.S. 388, 398 (1983) (upholding tax benefits for those sending their children to religious schools).

reimbursement of bus transportation costs and under what conditions, if any, the prohibition on burdening individuals because of their faith was triggered by not reimbursing transportation costs to religious schools.[45] Rather than offer those helpful analyses, the *Everson* Court stated in a rather conclusory fashion that

> [m]easured by these standards, [the Court could not] . . . say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools.[46]

But in failing to develop more fully the lines that should be drawn, the Court increased the probability that its holding would be misunderstood.[47]

The Court acknowledged that the reimbursement might have certain religious effects but nonetheless rejected that those effects established the unconstitutionality of the support. For example, the Court acknowledged that the reimbursement would help children go to religious schools.[48] Although no anecdotal or statistical evidence on these matters was provided, the Court admitted that "[t]here is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State."[49] But precluding support whenever providing that support would make parochial school more attractive would go too far. For example,

> [S]tate-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare.[50]

Indeed, the refusal to provide traffic police might convince parents that it was too dangerous for their children to attend the parochial school—"parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks."[51] Yet, everyone on the Court agreed that the Constitution does not preclude the state from providing these services to religious institutions,[52] which underscored the importance of determining whether providing police and fire services is analogous to busing children.

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[45] The Court suggested that towns did not have an obligation to provide that funding. *See Everson*, 330 U.S. at 16.

[46] *Id.* at 17.

[47] *See infra* note 82 and accompanying text (discussing Justice Black's dissent in which he suggested that *Everson*'s principle was misunderstood by a later Court).

[48] *Everson*, 330 U.S. at 17 ("It is undoubtedly true that children are helped to get to church schools.").

[49] *Id.*

[50] *Id.*

[51] *Id.* at 17–18.

[52] *Id.* at 18 ("Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment."); *Id.* at 25 (Jackson, J., dissenting):

When discussing why it was permissible for the State to provide services to religious entities, the Court noted that police, fire, and sewage services were "so separate and so indisputably marked off from the religious function"[53] that the Constitution could not plausibly be interpreted to require their denial. The Court implied that reimbursement of transportation costs should also be treated as "indisputably marked off"[54] from religion.[55] Yet, it was not clear what principle was being used to determine which kinds of activities were clearly separate.

Suppose that a bus driver was to take the opportunity while driving children to or from school to engage in some religious teaching.[56] That presumably would not be indisputably marked off from religious instruction, even if bus drivers as a general matter do not proselytize while driving their charges.

In his dissent, Justice Rutledge suggested that school transportation as a general matter was not so separate and indisputably marked off from religious education that it could not plausibly be deemed in contravention of constitutional guarantees:

> [T]ransportation, where it is needed, is as essential to education as any other element. Its cost is as much a part of the total expense, except at times in amount, as the cost of textbooks, of school lunches, of athletic equipment, of writing and other materials; indeed of all other items composing the total burden.[57]

Basically, Justice Rutledge was seeking some principle by which to distinguish among these elements other than cost. At least one reason that such a principle might be important to establish is that, absent some way to determine which were appropriately subsidized and which were not, permitting one of these to be subsidized might be thought to open the door to subsidize any of them.[58]

Justice Rutledge agreed that the State could not deny police and fire services to the parochial schools, noting that "the fire department must not stand idly by while the church burns."[59] It would have been helpful had he

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> A policeman protects a Catholic, of course—but not because he is a Catholic; it is because he is a man and a member of our society. The fireman protects the Church school—but not because it is a Church school; it is because it is property, part of the assets of our society.

Id. at 60–61 (Rutledge, J., dissenting) ("Nor is the case comparable to one of furnishing fire or police protection, or access to public highways. These things are matters of common right, part of the general need for safety.").

[53] *Id.* at 18 (majority opinion).

[54] *Id.*

[55] *Id.* (suggesting that this was simply "a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools").

[56] *See, e.g.*, Janissa Delzo, *School Bus Driver Who Led Prayer with Students Removed from Job*, NEWSWEEK (Apr. 21, 2018), https://www.newsweek.com/school-bus-driver-george-nathaniel-fired-prayer-students-896215 [https://perma.cc/C7JV-MCLZ] ("A Minnesota school bus driver claims he was removed from his driving route after leading students in prayer while working.").

[57] *Everson*, 330 U.S. at 47–48 (Rutledge, J., dissenting).

[58] *See id.* at 58 ("No more unjust or discriminatory in fact is it to deny attendants at religious schools the cost of their transportation than it is to deny them tuitions, sustenance for their teachers, or any other educational expense which others receive at public cost."). *But see* Hugh F. Smart, *Tax Deductions as Permissible State Aid to Parochial Schools:* Mueller v. Allen, 60 CHI.-KENT L. REV. 657, 675 (1984) ("Allowances for tuition are unlike indirect aid for transportation and textbooks as they provide much more direct benefit to the school.").

[59] *Everson*, 330 U.S. at 61 (Rutledge, J., dissenting).

expanded the point, if only because that would have indicated a difficulty with the analogy between the provision of transportation and the provision of police and fire services.

The *Everson* Court denied that the town was *required* to reimburse the transportation costs of students attending parochial school—it would have been permissible to reimburse only the public-school students for their transportation costs.[60] But neither the *Everson* majority nor the *Everson* dissents suggested that it was permissible but not required for the fire department to put out a church fire.[61] The difference between what the State could choose to furnish to religious schools (bus transportation) and what the State could not refuse to provide to religious schools (police, fire, and sewage services) suggests that there is some difference between these kinds of services, although a separate question is whether that difference has any import for what the Establishment Clause requires, permits, and prohibits.

Everson is open to interpretation both with respect to the degree to which the Constitution requires Church and State to be separate and to the kinds of support that the State is constitutionally prohibited from offering religious schools.[62] Support might come in the form of books, materials, or services on the one hand or in terms of cash subsidies on the other. The Court's understanding of what the Establishment Clause prohibits in each of these areas has undergone a significant change over the years.

III. STATE PROVISIONS OF MATERIALS AND SERVICES TO RELIGIOUS SCHOOLS

After *Everson*, the Court addressed a variety of state programs designed to provide aid to religious schools and their students. The Court drew lines that provided temporary guidance, but were ultimately replaced with different, less protective lines. Eventually, the Court modified the jurisprudence so markedly that neither the spirit nor the letter of *Everson* was maintained.

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[60] *Id.* at 16 (majority opinion) ("[W]e do not mean to intimate that a state could not provide transportation only to children attending public schools . . . .").

[61] *See id.* at 25 (Jackson, J. dissenting) ("[T]here is no parallel between police and fire protection and this plan of reimbursement . . . ."). However, Justice Jackson's focus was on selecting Catholic parochial schools in particular for the benefit. *See id.* at 25–26:

> Could we sustain an Act that said the police shall protect pupils on the way to or from public schools and Catholic schools but not while going to and coming from other schools, and firemen shall extinguish a blaze in public or Catholic school buildings but shall not put out a blaze in Protestant Church schools . . . ?

Some commentators seem not to appreciate this difference. *See* Trent Collier, *Revenue Bonds and Religious Education: The Constitutionality of Conduit Financing Involving Pervasively Sectarian Institutions*, 100 MICH. L. REV. 1108, 1134 (2002) ("The Court reasoned that the state must at least permit religious institutions to benefit from public services such as police and fire protection that are available to all.").

[62] Gerard V. Bradley, *The Judicial Experiment with Privatizing Religion*, 1 LIBERTY U. L. REV. 17, 21 (2006) ("The weaknesses of *Everson*'s reasoning, and the apparent incongruity of its outcome with that reasoning, rendered the case ambiguous, if not simply confusing.").

A. ALLEN CHANGES THE FOCUS

Board of Education v. Allen[63] tested the *Everson* distinction between state support of religious-school transportation and state support of religious-school education.[64] At issue was a New York law requiring that schoolbooks be lent to all students in certain grades regardless of whether those students attended public or private schools.[65]

The *Allen* Court interpreted *Everson* to provide the following test to determine whether State action comported with Establishment guarantees: "[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[66] The Court accepted that the state's purpose was "furtherance of the educational opportunities available to the young."[67] But that did not end the matter because the Court still had to determine whether the effect of this arrangement was to advance religion. The Court admitted that "[t]his test [to determine effect] is not easy to apply,"[68] and that "the line between state neutrality to religion and state support of religion is not easy to locate."[69]

When determining whether the New York program impermissibly promoted religion, the *Allen* Court noted that *Everson* upheld the travel reimbursement, notwithstanding that children might thereby be helped to get to religious school, and notwithstanding that schoolchildren without the reimbursement might decide to attend a different school instead.[70] In addition, the *Allen* Court noted *Everson*'s point that police, fire, and sewage services are permissibly provided to sectarian institutions, even though they are all "of some value to the religious school."[71]

Nonetheless, *Everson*'s permitting the provision of those services did not settle the matter because, as the *Allen* Court acknowledged, "books are different from buses."[72] For example, "books, but not buses, are critical to the teaching process, and in a sectarian school that process is employed to teach religion."[73]

When purportedly analyzing whether the Establishment Clause precludes states from providing support to sectarian schools in their core mission of teaching, the Court shifted its focus to whether the State can

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[63] Bd. of Educ. v. Allen, 392 U.S. 236 (1968).

[64] Ira C. Lupu & Robert W. Tuttle, *Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers*, 18 J.L. & POL. 539, 590 (2002) ("*Allen* represented a large step beyond *Everson*, because the aid approved in *Allen* operated to subsidize the educational program rather than to guarantee the safety of students as they traveled to and from such programs.").

[65] *Allen*, 392 U.S. at 238 ("A law of the State of New York requires local public school authorities to lend textbooks free of charge to all students in grades seven through 12; students attending private schools are included.").

[66] *Id.* at 243 (citing *Everson*, 374 U.S. at 222).

[67] *Id.*

[68] *Id.*

[69] *Id.* at 242.

[70] *Id.* (quoting *Everson*, 330 U.S. at 17):

> The statute was held to be valid even though one of its results was that "children are helped to get to church schools" and "some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets."

[71] *Id.*

[72] *Id.* at 244.

[73] *Id.* at 245.

require students to attend public schools, even when religious schools provide the requisite secular content in addition to the religious content.[74] The Court had no trouble in answering that question, because the Court had already rejected that states could preclude students from attending parochial schools.[75] Regrettably, that analysis was beside the point, because the issue in *Allen* was not whether the state could preclude students from attending sectarian schools but whether the State could support teaching at those schools without violating constitutional guarantees. While it was true that "parochial schools are performing, in addition to their sectarian function, the task of secular education,"[76] the question at hand was whether the "statute results in unconstitutional involvement of the State with religious instruction."[77]

The Court rejected that "all teaching in a sectarian school is religious."[78] Because the books would be suitable for public schools as well,[79] and because the Court rejected that "the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion,"[80] the Court held that the loan program passed muster.[81]

In his dissenting opinion, Justice Black wrote that "it is not difficult to distinguish books, which are the heart of any school, from bus fares, which provide a convenient and helpful general public transportation service."[82] He argued that the Constitution precludes the use of public funds "to purchase books for use by sectarian schools, which, although 'secular,' realistically will in some way inevitably tend to propagate the religious views of the favored sect."[83]

Allen shifted the focus of inquiry for Establishment purposes. The question was not whether the state was supporting education at a religious institution but whether the monies were in fact being used to support sectarian education in particular.[84] The Court was unpersuaded that all of the

[74] *See id.* at 246–47 (discussing Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510 (1925) and subsequent cases).

[75] *See Soc'y of Sisters*, 268 U.S. 510, 534–35 (striking down Oregon requirement that students aged 8–16 attend public schools).

[76] *Allen*, 392 U.S. at 248.

[77] *Id.*

[78] *Id.*

[79] *Id.* at 245 ("[W]e cannot assume that school authorities . . . are unable to distinguish between secular and religious books. . . . [W]e must proceed on the assumption that books loaned to students are books that are not unsuitable for use in the public schools because of religious content.").

[80] *Id.* at 248.

[81] *Id.* ("We are unable to hold, based solely on judicial notice, that this statute results in unconstitutional involvement of the State with religious instruction or that § 701, for this or the other reasons urged, is a law respecting the establishment of religion within the meaning of the First Amendment.").

[82] *Id.* at 252–53 (Black, J., dissenting).

[83] *Id.* at 252; *see also* Lemon v. Kurtzman, 403 U.S. 602, 637 (1971) (Douglas, J., concurring) ("Parochial schools, in large measure, do not accept the assumption that secular subjects should be unrelated to religious teaching.").

[84] Strasser, *supra* note 17, at 583–84 ("[T]he *Allen* Court shifted the focus away from the *Everson* Court criterion, namely, whether the aid was promoting health and safety rather than education, to whether the aid had religious significance.").

textbooks were in fact being used to teach religion,[85] notwithstanding Justice Douglas's warning in dissent that the system for book approval carried grave risks. For example, the parochial school might request a book that seemed most compatible with the school's creed,[86] and then the school board would have to decide whether to reject the choice as too sectarian. If the board did not reject a sectarian choice, then the Establishment guarantees would not have been respected.[87] If the board did reject a sectarian choice, then this would increase political division along religious lines,[88] a result the Establishment Clause was designed to avoid.[89]

Allen permitted support of religious institutions as long as the textbooks provided were secular in nature. But it is of course true that one does not always know how particular materials will be used, and one of the issues dividing the *Allen* Court was whether State support of religious schools was permissible as long as there was no showing that the aid had been used to support sectarian education[90] or whether instead the sufficient likelihood that the aid would be used to support sectarian education would suffice to preclude that support.[91]

B. LEMON MODIFIES THE *ALLEN* APPROACH

In *Lemon v. Kurtzman*,[92] the Court again modified the focus of Establishment inquiry in the school context. Instead of focusing solely on whether the monies were in fact being used to support religious teaching, the Court expanded the focus to the constitutionality of the prophylactic measures used to assure that the state was not promoting sectarian teaching.[93]

At issue were attempts by Rhode Island and Pennsylvania to supplement teacher salaries in parochial schools.[94] The Rhode Island and Pennsylvania

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[85] *Allen*, 392 U.S. at 248 ("Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial schools to teach religion.").

[86] *Id.* at 256 (Douglas, J., dissenting) ("Can there be the slightest doubt that the head of the parochial school will select the book or books that best promote its sectarian creed?"); *see also id.* at 261–62:

> Is Franco's revolution in Spain to be taught as a crusade against anti-Catholic forces or as an effort by reactionary elements to regain control of that country? Is the expansion of communism in select areas of the world a manifestation of the forces of Evil campaigning against the forces of Good? (citations omitted)

Mitchell v. Helms, 530 U.S. 793, 824 (2000) ("In fact, the risk of improper attribution is *less* when the aid *lacks* content, for there is no risk (as there is with books) of the government inadvertently providing improper content." (quoting *Allen,* 392 U.S. at 255–62 (Douglas, J., dissenting))).

[87] *Allen*, 392 U.S. at 256 (Douglas, J., dissenting) ("If the board of education supinely submits by approving and supplying the sectarian or sectarian-oriented textbooks, the struggle to keep church and state separate has been lost.").

[88] *Id.* ("If the board resists, then the battle line between church and state will have been drawn and the contest will be on to keep the school board independent or to put it under church domination and control.").

[89] Lemon v. Kurtzman, 403 U.S. 602, 622 (1971) ("[P]olitical division along religious lines was one of the principal evils against which the First Amendment was intended to protect.").

[90] *Cf. Allen*, 392 U.S. at 248 ("Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial schools to teach religion. No evidence has been offered about particular schools, particular courses, particular teachers, or particular books.").

[91] *See id.* at 252–54 (Black, J., dissenting).

[92] Lemon v. Kurtzman, 403 U.S. 602 (1971, *abrogation recognized by* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

[93] *See infra* notes 105–10 and accompanying text (discussing the analysis of the entanglement prong).

[94] *Lemon*, 403 U.S. at 606–07:

statutes specifically restricted the use of state funds to the promotion of secular education.[95]

When beginning its analysis of the constitutionality of the statutes, the *Lemon* Court cited two conditions that the *Allen* Court employed: "[T]he statute must have a secular legislative purpose . . . [and] its principal or primary effect must be one that neither advances nor inhibits religion."[96] In addition, the Court cited an additional condition from *Walz v. Tax Commission*,[97] namely, that "the statute must not foster 'an excessive government entanglement with religion.' "[98]

The *Lemon* Court examined the two statutes in light of the purpose prong, accepting that the purpose was "to enhance the quality of the secular education in all schools covered by the compulsory attendance laws."[99] The Court found it unnecessary to determine whether the statutes had the primary effect of promoting religion and thus were unconstitutional under the second prong.[100] Instead, the Court held that the programs in the respective states could not pass muster under the entanglement prong.[101]

The *Lemon* Court neither accused anyone of acting in bad faith[102] nor argued that teachers would be unable to avoid stepping over the line and teaching religious doctrine.[103] The Court merely noted that "the potential for impermissible fostering of religion is present."[104] Because the "State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate

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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.

[95] *Id.* at 608:

The [Rhode Island] 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.

Id. at 610:

Reimbursement is limited [in Pennsylvania] 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.

[96] *Id.* at 612 (citing *Allen*, 392 U.S. at 243).

[97] Walz v. Tax Comm'n of N.Y., 397 U.S. 664 (1970).

[98] *Lemon*, 403 U.S. at 613 (citing *Walz*, 397 U.S. at 674).

[99] *Id.*

[100] *Id.* at 613–14 ("We need not decide whether these legislative precautions restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses.").

[101] *Id.* at 614 ("[T]he cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion."); *see also* Stephanie H. Barclay, *Untangling Entanglement*, 97 WASH. U. L. REV. 1701, 1711 (2020) (discussing the Courts introduction of "a 'prophylactic dimension' into its Establishment Clause jurisprudence, particularly related to public support of religious groups.").

[102] *Lemon*, 403 U.S. at 618 ("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.").

[103] *Id.* at 619 ("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.").

[104] *Id.*

religion, . . . the State has therefore carefully conditioned its aid with pervasive restrictions."[105] But those "prophylactic contacts . . . involve excessive and enduring entanglement between state and church,"[106] which itself was a violation of Establishment guarantees.

The *Lemon* Court feared that "government grants of a continuing cash subsidy . . . [would result in] comprehensive measures of surveillance and controls."[107] Further, it would likely result in political partisanship along religious lines.[108] The Court noted that the "history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief,"[109] and worried that "[p]olitical fragmentation and divisiveness on religious lines are . . . likely to be intensified."[110] Because the entanglement prong was not met, the Court left for another day which school policies would have the impermissible effect of promoting religion.

C. TEACHING MATERIALS OTHER THAN BOOKS

The *Everson* Court upheld reimbursement of bus transportation costs to parochial schools,[111] and the *Allen* Court upheld loaning textbooks to parochial schools.[112] A separate question involved whether the state could provide other kinds of materials or services to religious schools without thereby violating constitutional guarantees, and the Court had some difficulty in drawing lines.

The Court continued to uphold statutes permitting textbooks to be loaned to parochial-school students,[113] but was unwilling to uphold the permissibility of loaning instructional material and equipment.[114] The Court reasoned that while the materials and equipment were "secular, nonideological, and neutral,"[115] they would nonetheless likely be used to promote religious teaching.[116]

The Court upheld the provision of diagnostic services,[117] but rejected the provision of on-site counseling and teaching services, believing that the latter

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[105] *Id.*

[106] *Id.*; *see also id.* at 621–22 (examining the Pennsylvania program and explaining that "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.").

[107] *Id.* at 621.

[108] *Id.* at 622.

[109] *Id.* at 623.

[110] *Id.*

[111] *See supra* note 46 and accompanying text.

[112] *See supra* note 81 and accompanying text.

[113] *See* Meek v. Pittenger, 421 U.S. 349, 359 (1975), *overruled by* Mitchell v. Helms, 530 U.S. 793 ("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*, 392 U.S. 236. We agree."); Wolman v. Walter, 433 U.S. 229, 238 (1977), *overruled by Mitchell*, 530 U.S. 793.

[114] *Meek*, 421 U.S. at 366 (citing Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 781–83, 783 n.39 (1973)).

[115] *Id.* at 365 (quoting Meek v. Pittinger, 374 F. Supp. 639, 660 (E.D. Pa. 1974), *aff'd in part*, *rev'd in part sub nom.* Meek v. Pittenger, 421 U.S. 349 (1975)).

[116] *Id.* at 366 (citing *Nyquist*, 413 U.S., at 781–83, 783 n.39); *see also* Steven K. Green, *The Legal Argument Against Private School Choice*, 62 U. CIN. L. REV. 37, 49 (1993) ("One key question for the Court has always been whether the public aid is restricted to secular educational uses or is unrestricted and 'divertable' for religious uses.").

[117] *Wolman*, 433 U.S. at 244.

were more likely to result in religious indoctrination.[118] Some services that could not be provided on-site could be provided off-site on the theory that there would be less temptation off-site to include religious content.[119]

The Court was clear in what it was trying to prevent: "Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."[120] The difficulty was in figuring out which state-supported services were too likely to result in religious teaching and what kinds of prophylactic measures were required to prevent violation of constitutional guarantees.

In *Aguilar v. Felton*, federal funds were used to pay the salaries of public-school teachers in parochial schools.[121] The programs included remedial reading and math courses.[122] Not only were teachers instructed to avoid teaching religious content,[123] but the program also included oversight to assure that sectarian content was not taught.[124] However, the Court found that the state was excessively entangled with religion under this program and thus the program could not pass muster.[125]

The Court examined the same New York program at issue in *Aguilar* over a decade later in *Agostini v. Felton*.[126] This time the Court reached a very different conclusion, finding that the very program it had examined and found unconstitutional before now comported with Establishment guarantees.[127]

New York City schools had changed their practices to comply with *Aguilar*, having shifted from providing services on-site to providing "instruction to parochial school students . . . at public school sites, at leased sites, and in mobile instructional units (essentially vans converted into classrooms) parked near the sectarian school."[128] The increased costs of

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[118] *Id.* ("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.").

[119] *Id.* at 247:

> The danger existed there, not because the public employee was likely deliberately to subvert his task to the service of religion, but rather because the pressures of the environment might alter his behavior from its normal course. So long as these types of services are offered at truly religiously neutral locations, the danger perceived in *Meek* does not arise.

[120] Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

[121] Aguilar v. Felton, 473 U.S. 402, 404 (1985), *overruled by Agostini*, 521 U.S. 203.

[122] *Id.* at 406 ("The programs conducted at these schools include remedial reading, reading skills, remedial mathematics, English as a second language, and guidance services.").

[123] *Id.* at 407 ("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.").

[124] *Id.* at 409 ("[T]he City of New York . . . has adopted a system for monitoring the religious content of publicly funded Title I classes in the religious schools.").

[125] *Id.* ("[T]he 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.").

[126] *Agostini*, 521 U.S. at 208 ("Twelve years later, petitioners—the parties bound by that injunction—seek relief from its operation.").

[127] *Id.* at 240.

[128] *Id.* at 213.

complying with *Aguilar*'s mandates totaled more than one hundred million dollars.[129]

The *Agostini* Court reaffirmed that when deciding whether a program violated Establishment guarantees, the Court must consider whether the program has an impermissible purpose[130] and whether it has an impermissible primary effect.[131] However, the *Agostini* Court rejected certain presumptions that the *Aguilar* Court accepted[132] and, in addition, considered entanglement as part of the effect prong rather than as a separate prong.[133]

While reaffirming that "government inculcation of religious beliefs has the impermissible effect of advancing religion,"[134] the *Agostini* Court modified what would count as government inculcation of religious beliefs. To explain its understanding of what counted as prohibited inculcation, the Court discussed a previous case, *Zobrest v. Catalina Foothills School District*,[135] which involved whether a deaf student attending a sectarian school could have a publicly paid sign-language interpreter provide classroom assistance. Because the interpreter would be operating in the sectarian school as "a result of the private decision of individual parents"[136] and because the interpreter would presumably be "dutifully discharg[ing] her responsibilities as a full-time public employee and comply[ing] with the ethical guidelines of her profession by accurately translating what was said,"[137] the *Agostini* Court argued that the *interpreter* would not be inculcating a prohibited message, and so there would be no Establishment Clause violation.[138] The Court implied that the interpreter would only be inculcating forbidden content if she "inculcate[d] religion by 'add[ing] to [or] subtract[ing] from' the lectures translated."[139] Basically, the Court was suggesting that although the interpreter would be assisting the teacher in imparting sectarian content, that inculcation should be attributed to the teacher rather than the interpreter. But by the same token, one would have expected the Court to say that a teacher using neutral instruction equipment (an overhead projector loaned by the state) to impart religious doctrine should be imputed to the teacher rather than the state so there would be a

[129] *Id.* ("It is not disputed that the additional costs of complying with *Aguilar*'s mandate are significant. Since the 1986–1987 school year, the Board has spent over $100 million providing computer-aided instruction, leasing sites and mobile instructional units, and transporting students to those sites.").

[130] *Id.* at 222–23 ("[W]e continue to ask whether the government acted with the purpose of advancing or inhibiting religion.").

[131] *Id.* at 223 ("Likewise, we continue to explore whether the aid has the 'effect' of advancing or inhibiting religion.").

[132] *Id.* ("[W]e have abandoned the presumption erected in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion."); *Id.* at 225 ("[W]e have departed from the rule relied on in *Ball* that all government aid that directly assists the educational function of religious schools is invalid.").

[133] *Id.* at 233 ("([I]t is simplest to recognize . . . entanglement . . . as an aspect of the inquiry into a statute's effect.").

[134] *Id.* at 223.

[135] Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

[136] *Id.* at 10.

[137] *Agostini*, 521 U.S. at 223 (citing *Zobrest,* 509 U.S. at 12).

[138] *Id.* ("Because the only *government* aid in *Zobrest* was the interpreter, who was herself not inculcating any religious messages, no *government* indoctrination took place and we were able to conclude that 'the provision of such assistance [was] not barred by the Establishment Clause.' " (citing *Zobrest*, 509 U.S. at 13)).

[139] *Id.* (citing *Zobrest*, 509 U.S. at 13).

constitutional violation in the state provision of that equipment. This point had been made to the *Zobrest* Court,[140] although it was rejected because the parents had chosen to send their deaf child to a sectarian school.[141] As a general matter, parents choose to send their children to sectarian schools,[142] so if that were enough to immunize state allocation of funds, then the Court would have been worrying about nothing when trying to carefully parse which state aid to parochial schools was permissible and which state aid was not.[143]

The *Agostini* Court understood that its position was not consistent with the longstanding jurisprudence but suggested that the real change had occurred in *Zobrest*.[144] Yet, as the *Agostini* Court itself recognized, the constitutional justification for *Zobrest* involved an element that was not present in *Agostini*,[145] since an important part of the analysis in *Zobrest* was based on the parents' choice for their hearing-impaired child.[146] But if that element was central as a constitutional matter, then the *Agostini* Court was wrong to claim that the big jurisprudential change had already occurred. Further, the Court was rejecting what it had decided in *Aguilar*, so it was not as if the Court was feeling compelled to decide in a particular way because of stare decisis. On the contrary, the Court was justifying its overcoming of stare decisis,[147] even though the cases not in accord with the longstanding jurisprudence were distinguishable[148] and even though one might have expected the Court to cabin cases not in accord with the longstanding jurisprudence.[149]

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[140] *Zobrest*, 509 U.S. at 11 ("According to respondent, if the government could not place a tape recorder in a sectarian school in *Meek*, then it surely cannot place an interpreter in Salpointe.").

[141] *Id.* at 10 ("By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of individual parents' private decisions.").

[142] For a discussion of the constrained conditions under which parents might make such a choice, see *infra* notes 206–21 and accompanying text (discussing Zelman v. Simmons-Harris, 536 U.S. 639 (2002)).

[143] In *Mitchell v. Helms*, 530 U.S. 793 (2000), the plurality offered a much simpler way of determining whether there was a constitutional violation—whether the state aid itself was sectarian in content. *See infra* notes 158–59 and accompanying text.

[144] *Agostini*, 521 U.S. at 225 ("[E]ven the *Zobrest* dissenters acknowledged the shift *Zobrest* effected in our Establishment Clause law when they criticized the majority for "stray[ing] . . . from the course set by nearly five decades of Establishment Clause jurisprudence." *Zobrest*, 509 U.S. at 24 (Blackmun, J., dissenting). Thus, it was *Zobrest*—and not this litigation—that created 'fresh law.' ").

[145] *Agostini* noted that both *Zobrest* and *Witters v. Washington Department of Services for Blind*, 474 U.S. 481 (1986), another case upon which the *Agostini* Court relied, involved the independent and private choices of the family. *See Agostini*, 521 U.S. at 225–26. But here the funds went directly to the school rather than to the family. *See Agostini*, 521 U.S. at 228; *see also Mitchell*, 530 U.S. at 817 (noting that the *Agostini* Court had not required that the monies be given to families who then made independent private choices where their monies would go).

[146] *See Zobrest*, 509 U.S. at 10–11.

[147] *Agostini*, 521 U.S. at 235 ("The doctrine of *stare decisis* does not preclude us from recognizing the change in our law and overruling *Aguilar* and those portions of *Ball* inconsistent with our more recent decisions.").

[148] The *Agostini* Court made much of *Zobrest* and *Witters*. *See Agostini*, 521 U.S. at 226. In both of those cases the Court emphasized the private choices being made by the family. *See Witters*, 474 U.S. at 488 (1986); *Zobrest*, 509 U.S. at 10–11.

[149] For example, for a long period, the Court seemed to be trying to cabin *Board of Education v. Allen*, 392 U.S. 236 (1968) upholding the provision of textbooks to parochial schools but not other kinds of materials or equipment. *See* Strasser, *supra* note 17, at 599 n.186 ("Basically, the Court may have been trying to cabin *Allen*'s ruling upholding the state provision of books to sectarian schools by refusing to uphold the state provision of other kinds of secular materials to sectarian schools.").

Perhaps the prophylactic requirement at issue, requiring sessions to occur offsite, was unnecessary and much too expensive,[150] so the *Agostini* result might seem difficult to condemn. But the *Agostini* opinion is nonetheless open to criticism for pretending that the change it was effectuating had already occurred.[151] Further, the Court included language in the opinion that, unless properly understood and applied, significantly undercuts establishment guarantees.

The Court explained that "where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis . . . , the aid is less likely to have the effect of advancing religion."[152] Certainly, such aid might be *less* likely to be constitutionally offensive in that public aid reserved for religious entities would be *more* likely to have the effect of advancing religion. But saying that aid of one kind is less obviously impermissible than aid of another kind does not establish that the former aid is permissible.

Consider how this neutral aid principle might work. The government offers aid with no strings attached to secular and nonsecular accredited schools. Such aid is neutral and thus is deemed less likely to promote religion even if the secular schools use the funding to teach secular content and the sectarian schools use the funding to teach religious content. Lest this example seem too contrived, because the Establishment Clause would of course be violated if state funds were given directly to religious schools to help them inculcate religious doctrine,[153] a plurality of the Court suggested such a position in a different case.[154]

In *Mitchell v. Helms*,[155] the Court examined the constitutionality of a program that lent "educational materials and equipment to public and private schools."[156] One condition of the program was that "the 'services, materials, and equipment' provided to private schools must be 'secular, neutral, and nonideological.' "[157]

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[150] *Agostini*, 521 U.S. at 240 ("[U]nder these circumstances, it would be particularly inequitable for us to bide our time waiting for another case to arise while the city of New York labors under a continuing injunction forcing it to spend millions of dollars on mobile instructional units and leased sites when it could instead be spending that money to give economically disadvantaged children a better chance at success in life by means of a program that is perfectly consistent with the Establishment Clause."). *See also* Robert G. Neill, Agostini v. Felton*: The Gnat Is Swallowed, the Camel Goes Free*, 24 J. CONTEMP. L. 192, 204 (1998) ("In *Agostini*, the majority sees the waste in spending millions of dollars to physically separate anything religious from anything secular.").

[151] The Court implied that previous cases had already required this change. *See Agostini*, 521 U.S. at 226. That was not true both because of a salient difference between *Agostini* and the relied upon cases, and because the past cases were compatible with the jurisprudence that the *Agostini* Court had said was implicitly overruled. *See supra* note 146 and accompanying text; *Agostini*, 521 U.S. at 248 (Souter, J., dissenting) (*"Zobrest,* however, is no such sanction for overruling *Aguilar* or any portion of *Ball*.").

[152] *Agostini*, 521 U.S. at 231 (citing Widmar v. Vincent*,* 454 U.S. 263, 274 (1981)).

[153] Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985), *overruled by Agostini*, 521 U.S. 203 ("Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith.").

[154] *See infra* notes 155–68 and accompanying text (discussing Mitchell v. Helms, 530 U.S. 793 (2000)).

[155] Mitchell v. Helms, 530 U.S. 793 (2000).

[156] *Id.* at 801.

[157] *Id.* at 802.

It may be that there were relatively few instances in which the federal monies were actually diverted.[158] Nonetheless, the *Mitchell* plurality opinion construed the Establishment Clause in a way that was not recognizable under *Everson*. The *Mitchell* plurality explained that "whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action."[159] The plurality set a high standard for such attribution, suggesting that "[i]f the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government."[160] But the issue had never before been whether the indoctrination was at the behest of the government; rather, the issue was whether the government was supporting religious teaching.[161]

The *Mitchell* plurality agreed that "the Establishment Clause requires that aid to religious schools not be impermissibly religious in nature."[162] But the test for what was *impermissibly* religious was rather demanding. "So long as the governmental aid is not itself 'unsuitable for use in the public schools because of religious content,' and eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern."[163] But such a rule suggests that as long as the government is providing dollars to secular and sectarian entities and the government itself is not supplying religious objects, then constitutional guarantees are not triggered[164] even if the sectarian entities use the monies to purchase religious objects.[165]

The position offered by the *Mitchell* plurality would be unrecognizable by members of the *Everson* Court who had struggled with whether bus transportation was "indisputably marked off"[166] from religious teaching and so would be permissible. *Mitchell* suggests that the government's paying for religious teaching (with dollars, which are suitable for use in public schools, too) would be permissible. There is another respect in which the Court has

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[158] *See id.* at 861 (O'Connor, J., concurring) ("The limited evidence amassed by respondents during 4 years of discovery (which began approximately 15 years ago) is at best *de minimis* and therefore insufficient to affect the constitutional inquiry.").

[159] *Id.* at 809 (plurality opinion).

[160] *Id.*

[161] Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997) ("[T]he Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith.").

[162] *Mitchell*, 530 U.S. at 820.

[163] *Id.* at 820 (citing Bd. of Educ. v. Allen, 392 U.S. 236, 245 (1968)).

[164] *See id.* at 837 (O'Connor, J., concurring in the judgment) ("Reduced to its essentials, the plurality's rule states that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content.").

[165] *See* Mark Strasser, *Establishment Clause Health on a Restricted, Artificial Lemon Diet*, 29 B.U. PUB. INT. L.J. 169, 210–11 (2019) ("Based on this rationale, the *Mitchell* plurality would presumably uphold federal funds given to sectarian schools to buy Bibles, as long as this neutral aid (money) was also given to nonreligious schools."). *But see Mitchell*, 530 U.S. at 840 (O'Connor, J., concurring in the judgment) ("I also disagree with the plurality's conclusion that actual diversion of government aid to religious indoctrination is consistent with the Establishment Clause.").

[166] Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

turned *Everson* upside down—namely, whether the State may choose not to fund sectarian entities.

To some extent, the *Mitchell* plurality position is more easily understood in light of its view of sectarian entities. In the past, the Court had wanted to make sure that the state was not funding religious teaching.[167] But the *Mitchell* plurality viewed such a position as "reserv[ing] special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children."[168]

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court addressed whether Missouri could refuse to grant monies to a religious school to make its facilities safer by funding a rubberized surface for its playground.[169] The Court rightly suggested that under *Everson* the State was permitted to offer that funding.[170] But the Missouri Constitution prohibited the state from providing those benefits to a religious entity,[171] and *Everson* made clear that the state was permitted, *but not required*, to afford the benefit at issue.[172] The *Trinity Lutheran* Court held that Missouri was required to provide the benefit to the religious institution, the Missouri Constitution notwithstanding.[173]

IV. STATE PROVISION OF FUNDING TO FAMILIES TO FACILITATE RELIGIOUS SCHOOL ATTENDANCE

One issue raised by *Everson* was whether the State could offer benefits to religious schools without offending Establishment guarantees. A different but related issue raised by *Everson* was whether the state can give benefits to families so that their children may attend religious schools. Here, too, the Court's current position is utterly at odds with the letter and spirit of *Everson*.

A. EARLY POST-*LEMON* AID TO FAMILIES CASES

After *Lemon* was issued, the Court addressed the constitutionality of additional programs that helped the families of children attending those schools. *Committee For Public Education & Religious Liberty v. Nyquist*[174]

[167] *Id.* at 11 (discussing "the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.").

[168] *Mitchell*, 530 U.S. at 827–28.

[169] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017 (2017) ("The Missouri Department of Natural Resources offers state grants to help public and private schools, nonprofit daycare centers, and other nonprofit entities purchase rubber playground surfaces made from recycled tires.").

[170] *See id.* at 2019–20.

[171] *Id.* at 2023 ("[T]he Department nonetheless emphasizes Missouri's similar constitutional tradition of not furnishing taxpayer money directly to churches.").

[172] *Everson*, 330 U.S. at 16 ("[W]e do not mean to intimate that a state could not provide transportation only to children attending public schools.").

[173] *Trinity Lutheran*, 137 S. Ct. at 2025 ("But the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand.").

[174] Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

involved *inter alia*[175] a law offering a limited reimbursement[176] to poor families[177] whose children attended non-public schools[178] and a tax incentive to those poor families not qualifying for the reimbursement.[179]

The Court examined the constitutionality of the statue in light of its purpose and effect, and the degree of entanglement that would be required.[180] The Court accepted that the purpose behind the statute was secular:

> [W]e fully recognize . . . the validity of the State's interest 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.[181]

Yet, the program's passing muster under the purpose prong was not enough—the program had to pass muster under the effects and entanglement prongs as well.[182] The Court was less deferential when examining the program in light of the effects prong.[183] When considering the grants to the parents, the Court first noted that

> [t]here can be no question that these grants could not, consistently with the Establishment Clause, be given directly to sectarian schools . . . [i]n 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.[184]

But that did not establish the unconstitutionality of the program at issue because "the grants are delivered to parents rather than schools."[185] Nonetheless, because "the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the

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[175] The law also offered direct funding to schools serving children of economically disadvantaged families. *See id.* at 762–63 ("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.' ").

[176] *Id.* at 764 ("The amount of reimbursement is limited to $50 for each grade school child and $100 for each high school child.").

[177] *Id.* ("To quality under this section a parent must have an annual taxable income of less than $5,000.").

[178] *Id.* ("Section 2 establishes a limited plan providing tuition reimbursements to parents of children attending elementary or secondary nonpublic schools.").

[179] *Id.* at 765–66. 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.

[180] *Id.* at 773.

[181] *Id.*

[182] *Id.* at 774 ("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 entanglements between Church and State.").

[183] *See infra* notes 184–90 and accompanying text.

[184] *Nyquist*, 413 U.S. at 780.

[185] *Id.* at 781.

actual dollars given eventually find their way into the sectarian institutions."[186] Further, "[w]hether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same."[187] Because "[i]n 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,"[188] the program could not pass muster.[189] The tax benefit received similar treatment because "[i]n 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."[190]

Sloan v. Lemon involved a Pennsylvania program "providing funds to reimburse parents for a portion of tuition expenses incurred in sending their children to nonpublic schools."[191] The Court rejected this program as well, reasoning that "[w]hether 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 consequences is to preserve and support religion-oriented institutions."[192] The Court distinguished this program[193] from "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."[194]

Pennsylvania's program differed from New York's in that the "Pennsylvania grants [were] more generous ($75 to $150 as opposed to $50 to $100), and . . . Pennsylvania impose[d] 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."[195] Further, Pennsylvania authorized grants to all parents of children in nonpublic schools—regardless of income level."[196] In the programs that the Court had previously approved, the "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."[197] No comparable claim could be made in *Sloan*.

Nyquist and *Sloan* were in accord with the *Everson* position. The *Everson* Court had expressly noted that "[t]he prohibition against establishment of religion cannot be circumvented by a subsidy, bonus or

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[186] *Id.* at 786.
[187] *Id.*
[188] *Id.* at 788.
[189] *Id.* at 789 (explaining that the State's worthy purposes could not "justify an eroding of the limitations of the Establishment Clause now firmly [i]mplanted.").
[190] *Id.* at 790–91.
[191] Sloan v. Lemon, 413 U.S. 825, 827 (1973).
[192] *Id.* at 832.
[193] *Id.* at 828. The program at issue provided

> 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.

[194] *Id.* at 832.
[195] *Id.* at 831.
[196] *Id.*
[197] *Id.* at 832.

reimbursement of expense to individuals for receiving religious instruction and indoctrination."[198]

B. THE COURT DOES AN ABOUT FACE

In *Mueller v. Allen*,[199] the Court examined a Minnesota tax-benefit program for parents of children attending elementary and secondary schools.[200] The *Mueller* Court considered the purpose behind the statute, reasoning that a "state's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable."[201] But, following *Nyquist* and *Sloan*, there was still the question of the effect of such a program.

The Court noted that "the deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend non-sectarian private schools or sectarian private schools,"[202] which distinguished it from *Nyquist* and *Sloan* where the benefits had only been available to families of children attending non-public schools.[203] But as *Everson* had made clear, the point was that the State should not be supporting sectarian education via subsidy.[204]

The *Mueller* Court reasoned that because some benefits were provided to families of children attending public schools, "this case is vitally different from the scheme struck down in *Nyquist."*[205] But the distinction was not a vital difference under *Everson*. *Everson* had upheld the reimbursement for both public- and private-school students because it had been so "indisputably marked off"[206] from religious education and not merely because families of both public- and private-school children received the reimbursement.

The *Mueller* Court considered this program as one involving public assistance that was generally available, notwithstanding that (1) "the vast majority of the taxpayers who are eligible to receive the benefit are parents whose children attend religious schools,"[207] and (2) under this program parents whose children attended private schools received much greater benefits. Justice Marshall explained in dissent:

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[198] Everson v. Bd. of Educ., 330 U.S. 1, 24 (1947).
[199] Mueller v. Allen, 463 U.S. 388 (1983).
[200] *Id.* at 391:

> 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.

[201] *Id.* at 395.
[202] *Id.* at 397.
[203] Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 764 (1973) ("Section 2 establishes a limited plan providing tuition reimbursements to parents of children attending elementary or secondary non-public schools."); *see also* Sloan v. Lemon, 413 U.S. 825, 827 (1973) (the law "provid[ed] funds to reimburse parents for a portion of tuition expenses incurred in sending their children to nonpublic schools.").
[204] *See supra* note 198 and accompanying text.
[205] *Mueller*, 463 U.S. at 398.
[206] Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).
[207] *Mueller*, 463 U.S. at 405 (Marshall, J., dissenting).

> 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.[208]

One of the key elements relied upon the Court—that "under Minnesota's arrangement public funds become available only as a result of numerous, private choices of individual parents of school-age children"[209]—had also been true in *Nyquist* and *Sloan* where parents had chosen to send their children to private school. Nonetheless, the *Mueller* Court upheld the program, while claiming to follow *Nyquist*.[210]

The monies at issue in *Mueller* did not go directly to the religious schools,[211] and parents might have made use of the monies saved through the tax deduction[212] to buy consumer goods.[213] That said, those monies might also have gone to help pay tuition in a later semester. Previously, the Court had worried both about where state monies would go when reimbursing religious-school costs[214] and whether the State would be providing an incentive for children to attend parochial school.[215] The *Mueller* Court was not focused on those issues and in a later case the Court turned a blind eye to where public dollars would go.[216]

At issue in *Zelman v. Simmons-Harris*[217] was Ohio's school-voucher plan.[218] Cleveland City Schools were among the worst performing schools

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[208] *Id.* at 409.

[209] *Id.* at 399 (majority opinion).

[210] *Id.* at 404 (Marshall, J., dissenting) ("The majority today does not question the continuing vitality of this Court's decision in *Nyquist.*").

[211] *Id.* at 399 (majority opinion) ("[A]ll 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."). Perhaps the Court was considering *Nyquist* and *Sloan* as the same case. While they were different cases, they were both argued on April 16, 1973, and the opinions were both issued on June 25, 1973. *See* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Sloan v. Lemon, 413 U.S. 825 (1973); Abner S. Greene, *Why Vouchers Are Unconstitutional, and Why They're Not*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 397, 404 (1999). In *Mueller*, the Court upheld a Minnesota law allowing tax deductions for tuition, textbook, and transportion expenses for parents of children in both public schools and in secular and religious private schools. As in *Nyquist*, the second and third factors were easily met—the money did not go directly to the coffers of the religious schools.

[212] *Mueller*, 463 U.S. at 408 (Marshall, J., dissenting) ("Minnesota makes all parents eligible to deduct up to $500 or $700 for each dependent.").

[213] Mark Strasser, *State Funding of Devotional Studies: A Failed Jurisprudence That Has Lost Its Moorings*, 11 J.L. & FAM. STUD. 1, 16 (2008) ("[O]ne simply could not tell where the monies saved through the tax deduction would be spent.").

[214] Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 780 (1973) (discussing the importance "of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes").

[215] *Sloan*, 413 U.S. at 832 ("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 consequences is to preserve and support religion-oriented institutions.").

[216] *See infra* notes 217–34 and accompanying text (discussing *Zelman*).

[217] Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

[218] *Id.* at 645:

> The tuition aid portion of the program is designed to provide educational choices to parents who reside in a covered district. Any private school, whether religious or nonreligious, may participate in the program and accept program students so long as the school is located within the boundaries of a covered district and meets statewide educational standards.

in the nation,[219] and Ohio had adopted a plan that would enable Cleveland schoolchildren to attend private schools.[220] The state would pay a percentage of the tuition costs depending upon the family's income.[221] Perhaps because the state was not willing to pay high tuition costs per pupil,[222] most of the schools participating in the plan were religious schools.[223] The Court denied that the system built in a financial incentive to attend religious schools because the religious schools did not receive as much in voucher assistance as did the public schools.[224] The Court did not address whether the costs of education in public schools was greater, for example, because of the students served.[225]

Perhaps it would be thought that religious schools were chosen so frequently[226] because those schools represented the faith traditions of the families whose children were attending.[227] But the majority of parents sending their children to religious schools were sending them to a school that did not represent their faith tradition.[228] It seems reasonable to believe that the families were choosing the schools because the parents believed those schools provided the best educational opportunity for their children *despite the religious component*.[229] But if that is the decision-making of these parents, the choice does not seem particularly independent or voluntary.[230]

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[219] *Id.* at 644 ("For more than a generation, however, Cleveland's public schools have been among the worst performing public schools in the Nation.").

[220] *See id.* at 644–47.

[221] *Id.* at 646. Tuition aid is distributed to parents according to financial need. Families with incomes below 200% of the poverty line are given priority and are eligible to receive 90% of private school tuition up to $2,250. §§ 3313.978(A) and (C)(1). For these lowest income families, participating private schools may not charge a parental copayment greater than $250. § 3313.976(A)(8). For all other families, the program pays 75% of tuition costs, up to $1,875, with no copayment cap.

[222] *See id.* at 706 (Souter, J., dissenting) ("[T]he obvious fix would be to increase the value of vouchers so that existing nonreligious private and non-Catholic religious schools would be able to enroll more voucher students, and to provide incentives for educators to create new such schools given that few presently exist.").

[223] *See id.* at 655 (majority opinion) ("That 46 of the 56 private schools now participating in the program are religious schools does not condemn it as a violation of the Establishment Clause.").

[224] *Id.* at 654 ("The program here in fact creates financial *dis*incentives for religious schools, with private schools receiving only half the government assistance given to community schools and one-third the assistance given to magnet schools.") (emphasis added).

[225] *See*, *e.g.*, Claire Raj, *Coerced Choice: School Vouchers and Students with Disabilities*, 68 EMORY L.J. 1037, 1079 (2019) ("[I]t costs less to provide a voucher for a child to attend private school than to educate that child in public schools."); *Id.* at 1063 ("[T]o the extent broader voucher policies prevent access to private schools for students with severe physical or mental disabilities, such policies may aid the exodus of regular education students from public schools, while leaving behind those students with disabilities who require more costly supports and services to facilitate inclusion."); *see also* Thomas Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHI. L.J. 121, 165 (2001) ("Catholic schools produce better educational results than public schools at a lower cost per student.").

[226] *Zelman*, 536 U.S. at 658 ("96% of scholarship recipients have enrolled in religious schools.").

[227] *Id.* at 703 (Souter, J., dissenting) ("One answer to these statistics, for example, which would be consistent with the genuine choice claimed to be operating, might be that 96.6% of families choosing to avail themselves of vouchers choose to educate their children in schools of their own religion.").

[228] *Id.* at 704 ("[A]lmost two out of three families using vouchers to send their children to religious schools did not embrace the religion of those schools.").

[229] *Id.* ("The families made it clear they had not chosen the schools because they wished their children to be proselytized in a religion not their own, or in any religion, but because of educational opportunity.").

[230] *Id.* at 707:

> There is, in any case, no way to interpret the 96.6% of current voucher money going to religious schools as reflecting a free and genuine choice by the families that apply for vouchers. The 96.6% reflects, instead, the fact that too few nonreligious school desks are available and few but religious schools can afford to accept more than a handful of voucher students.

The Court was unfazed by the percentage of children attending religious schools, believing that the important question was "whether recipients generally were empowered to direct the aid to schools or institutions of their own choosing."[231] But when talking about whether the schools were of the individuals' own choosing, the Court made clear that it was not using a particularly high bar.[232]

Would this program create the impression that the government was favoring religion? The Court rejected such a suggestion because "no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement."[233] Apparently, the Court believed it irrelevant for purposes of the voluntariness of the choice that families were placing the children in schools of a different faith tradition rather than placing their children in the "demonstrably failing public school system."[234] But individuals who had to choose between their child receiving a poor education at a public school and a better education at a private school that embraces a different faith tradition, might not be as confident that the State was a neutral player in the provision of this constrained choice.[235]

One of the important considerations in *Everson*, *Allen*, *Lemon*, *Nyquist*, and *Sloan* for determining whether the Establishment Clause barred the program at issue was whether the program would be paying to promote sectarian education, directly or indirectly.[236] Here, the Court upheld public support of religious inculcation[237] in a context in which parents might well have thought they had no other acceptable alternative.

C. WHEN THE STATE MUST FUND RELIGIOUS SCHOOLS

Zelman is simply not compatible with *Everson*,[238] which suggested that the State was simply prohibited from funding sectarian education. The Court

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[231] *Id.* at 651 (majority opinion).

[232] *Cf. id.* at 670 (O'Connor, J., concurring) ("For nonreligious schools to qualify as genuine options for parents, they need not be superior to religious schools in every respect. They need only be adequate substitutes for religious schools in the eyes of parents.").

[233] *Id.* at 655 (majority opinion).

[234] *Id.* at 649.

[235] *See id.* at 728 (Breyer, J., dissenting) (discussing "the parent who may see little real choice between inadequate nonsectarian public education and adequate education at a school whose religious teachings are contrary to his own"); *see also* Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 799 (1995) (Stevens, J., dissenting) (discussing the importance of the perspective of the nonadherent).

[236] *Zelman*, 536 U.S. at 686–87 (Souter, J., dissenting) (quoting Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947)):

> The applicability of the Establishment Clause to public funding of benefits to religious schools was settled in *Everson v. Bd. of Ed. of Ewing,* 330 U.S. 1 (1947), which inaugurated the modern era of establishment doctrine. The Court stated the principle in words from which there was no dissent: "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."

[237] *Id.* at 686 ("The Court's majority holds that the Establishment Clause is no bar to Ohio's payment of tuition at private religious elementary and middle schools under a scheme that systematically provides tax money to support the schools' religious missions.").

[238] *Id.* at 688:

> How can a Court consistently leave *Everson* on the books and approve the Ohio vouchers? The answer is that it cannot. It is only by ignoring *Everson* that the majority can claim to rest on

has made additional inroads on *Everson*, shifting its permissive approach with respect to providing secular benefits to one of obligation with respect to providing support even for sectarian purposes.

Consider *Espinoza v. Montana Department of Revenue*,[239] which involved a state program providing tuition assistance to private non-religious schools.[240] The Montana Constitution precluded aid from going to sectarian schools,[241] which had been interpreted to mean "any school 'owned or controlled in whole or in part by any church, religious sect, or denomination.' "[242]

The law was challenged and the Montana Supreme Court struck down the entire program.[243] After recounting this history, the United States Supreme Court suggested that "the scholarship program is permissible under the Establishment Clause,"[244] that is, where religious entities are not excluded. The Court accepted the Montana Supreme Court's construction of Montana law, which involved not only the interpretation of the statute, but also the interpretation of the no-aid provision contained in the Montana Constitution[245] and then examined "whether the Free Exercise Clause precluded the Montana Supreme Court from applying Montana's no-aid provision to bar religious schools from the scholarship program."[246]

The United States Supreme Court held that Montana's refusal to allow religious schools to participate in the program was unconstitutional—"Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools."[247] Basically, Montana looked at who controlled the school—"The provision bars aid to any school 'controlled in whole or in part by any church, sect, or denomination' "[248]—and then made a decision as to whether the school was eligible. The Court rejected the state's argument that "the no-aid provision has the goal or effect of ensuring that government aid does not end up being used for 'sectarian education' or 'religious education,' "[249] but it was not

traditional law in its invocation of neutral aid provisions and private choice to sanction the Ohio law.

[239] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020).

[240] *Id.* at 2251 ("The Montana Legislature established a program to provide tuition assistance to parents who send their children to private schools."); *see also id.* at 2252 ("The Montana Legislature also directed that the program be administered in accordance with Article X, section 6, of the Montana Constitution, which contains a 'no-aid' provision barring government aid to sectarian schools.").

[241] *Id.* at 2252 (quoting MONT. CONST., art. X, § 6(1)) (emphasis and alteration in original) (internal quotation marks omitted):

> **Aid prohibited to sectarian schools**. . . . The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

[242] *Id.* (citing MONT. ADMIN. R. 42.4.802(1)(a) (2015)).

[243] *Id.* at 2253 ("The Montana Supreme Court went on to hold that the violation of the no-aid provision required invalidating the entire scholarship program.").

[244] *Id.* at 2254.

[245] *Id.* ("[W]e accept the Montana Supreme Court's interpretation of state law—including its determination that the scholarship program provided impermissible 'aid' within the meaning of the Montana Constitution . . . .").

[246] *Id.*

[247] *Id.* at 2255.

[248] *Id.* (citing MONT. CONST., art. X, § 6(1)).

[249] *Id.* at 2256.

clear why that claim was being rejected. For example, the Court might have believed that the state was painting with too broad a brush by forbidding "aid to any school that is 'sectarian,' 'religiously affiliated,' or 'controlled in whole or in part by churches.' "[250] Because some religiously affiliated schools might not include religious content within all of their classes,[251] the Court might have believed that a more forgiving approach would have been possible, for example, just making clear that the state funding was not to be used for sectarian education.[252]

Yet, there was reason to doubt that the *Espinoza* Court's fear was that the state had an overbroad classification, because the Court noted, "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."[253] Further, several members of the Court addressed whether the Court's Establishment Clause jurisprudence was too hostile toward religion. Justice Thomas (joined by Justice Gorsuch),[254] suggested that the "Court's distorted view of the Establishment Clause, . . . removes the entire subject of religion from the realm of permissible governmental activity, instead mandating strict separation,"[255] recent cases where the Court has permitted state support of religious teaching notwithstanding.[256] Justice Thomas was confident that some members of the Court were hostile to religion. "Although such hostility [to religion] may not be overtly expressed by the Court any longer, manifestations of this 'trendy disdain for deep religious conviction' assuredly live on."[257] Justice Alito implied that limitations on aid to sectarian institutions were motivated by animus.[258]

The *Sloan* Court addressed the argument that a state providing funding to private schools must be sure to include religious schools when the appellants asserted the following: "If the parents of children who attend nonsectarian schools ['schools that are not church related'[259]] receive assistance, . . . parents of children who attend sectarian schools are entitled to the same aid as a matter of equal protection."[260] The Court characterized the "argument [as] thoroughly spurious."[261] In contrast, the *Espinoza* Court held that Montana was making an unconstitutional status-based distinction

[250] *Id.* at 2255 (quoting Espinoza v. Mont. Dep't of Revenue, 435 P.3d 603, 612–13 (Mont. 2020)).

[251] *Cf.* Tilton v. Richardson, 403 U.S. 672, 682 (1971) (noting that not all religiously affiliated institutions teach religious doctrine in all courses).

[252] The program struck down in *Agostini* but upheld in *Aguilar* had both specified that funds were not to be used for sectarian teaching and in addition had safeguards to assure that did not happen. *See supra* notes 123–52 and accompanying text.

[253] *Espinoza*, 140 S. Ct. at 2261.

[254] *Id.* at 2263 ("Justice Thomas, with whom Justice Gorsuch joins, concurring.").

[255] *Id.* at 2266 (Thomas, J., concurring).

[256] *See, e.g.*, *supra* notes 155–68 and accompanying text (discussing *Mitchell* plurality decision authored by Justice Thomas).

[257] *Espinoza*, 140 S. Ct. at 2266–67 (citing Locke v. Davey, 540 U.S. 714, 733 (2004) (Scalia, J., dissenting)).

[258] *See id.* at 2273–74 (Alito, J., concurring).

[259] Sloan v. Lemon, 413 U.S. 825, 834 (1973).

[260] *Id.*

[261] *Id.*

when distinguishing among private schools,[262] an analysis quite reminiscent of the Equal Protection argument[263] the *Sloan* Court rejected dismissively.[264]

Espinoza is difficult to understand for a very different reason. The United States Supreme Court accepted the Montana Supreme Court's construction of the state law,[265] which was that the law would permit private funds to go only to private schools that were not religiously affiliated.[266] The Montana Supreme Court struck down the funding program entirely as unconstitutional.[267] The United States Supreme Court *reversed* the Montana Supreme Court,[268] which is the opposite of what one would have expected because by striking the program entirely the Montana Supreme Court cured any alleged constitutional violation posed by funding private secular schools but not private sectarian schools.[269]

Basically, Montana law precluded any families with children attending private schools from receiving the relevant scholarship.[270] The Court accepted that this was a permissible position for the state to take[271] but reversed the Montana Supreme Court anyway.[272]

It may be that *Espinoza* was not the best vehicle for the Court to announce its new understanding of the constitutional limitations with respect to religion. *Carson v. Makin*[273] provided the Court with a better opportunity to make its position clear.

Carson involved a Maine law permitting parents to receive tuition assistance at their secondary school of choice when the district did not operate its own secondary school.[274] However, Maine limited the schools that might receive that assistance to those that were "nonsectarian."[275]

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[262] *Espinoza*, 140 S. Ct. at 2256 ("This case also turns expressly on religious status . . . .").

[263] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 635 (1996) (striking down the "status-based enactment" on Equal Protection grounds).

[264] *See supra* note 261 and accompanying text.

[265] *Espinoza*, 140 S. Ct. at 2254.

[266] *Id.* at 2251–52.

[267] *Id.* at 2253 ("The Montana Supreme Court . . . invalidat[ed] the entire scholarship program.").

[268] *Id.* at 2263 ("The judgment of the Montana Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.").

[269] *Id.* at 2281 (Ginsburg, J., dissenting) ("Because [the] Montana's Supreme Court['s] . . . judgment put all private school parents in the same boat[,] this Court had no occasion to address the matter.").

[270] *Id.* at 2292 (Sotomayor, J., dissenting) ("The majority holds that a Montana scholarship program unlawfully discriminated against religious schools by excluding them from a tax benefit. The threshold problem, however, is that such tax benefits no longer exist for anyone in the State."); *see also id.* at 2279 (Ginsburg, J., dissenting) ("True, petitioners expected to be eligible for scholarships under the legislature's program, and to use those scholarships at a religious school. And true, the Montana court's decision disappointed those expectations along with those of parents who send their children to secular private schools.").

[271] *See id.* at 2261 (majority opinion).

[272] *See supra* note 261 and accompanying text.

[273] Carson v. Makin, 142 S. Ct. 1987 (2022).

[274] *Id.* at 1993:

> Maine has enacted a program of tuition assistance for parents who live in school districts that do not operate a secondary school of their own. Under the program, parents designate the secondary school they would like their child to attend—public or private—and the school district transmits payments to that school to help defray the costs of tuition.

[275] *Id.*

The Maine Constitution requires the Legislature to require towns to provide children with a public education[276] and the Legislature passed a law to meet that obligation.[277] But Maine's geography and population density provide a stumbling block to fulfilling that duty in that there may be too few students in particular areas of the state to make setting up public schools cost-effective.[278] So, Maine set up a program whereby the state would pay to defray tuition costs at public or private schools rather than force a town to set up its own school.[279]

At one point, Maine permitted religious schools (both sectarian and nonsectarian) to receive funding.[280] However, after the State Attorney General issued an opinion suggesting limitations on state funding of religious schools, the state amended the program.[281] The United States Supreme Court subsequently issued its ruling in *Zelman*, making clear that "a benefit program under which private citizens 'direct government aid to religious schools wholly as a result of their own genuine and independent private choice' does not offend the Establishment Clause."[282] The Legislature considered amending the program but ultimately decided not to do so.[283]

While Maine required that schools be nonsectarian in order to receive funding and sectarian schools are associated with faith traditions,[284] Maine was not simply saying that association with a faith tradition precluded a school from receiving funding—the fact of association was not dispositive with respect to whether the institution was considered sectarian.[285] Instead, the state considered both the content of the curriculum and how it was taught.[286]

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[276] *Id.* ("Maine's Constitution provides that the State's legislature shall 'require . . . . . the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools.' Me. Const., Art. VIII, pt. 1, § 1.").

[277] *Id.* ("In accordance with that command, the legislature has required that every school-age child in Maine 'shall be provided an opportunity to receive the benefits of a free public education,' Me. Rev. Stat. Ann., Tit. 20-A, § 2(1) (2008) . . . .").

[278] *Id.* ("But Maine is the most rural State in the Union, and for many school districts the realities of remote geography and low population density make those commands difficult to heed.").

[279] *See supra* note 274.

[280] *Id.* at 1994 ("Prior to 1981, parents could also direct the tuition assistance payments to religious schools.").

[281] *Id.*:

> In 1981, however, Maine imposed a new requirement that any school receiving tuition assistance payments must be "a nonsectarian school in accordance with the First Amendment of the United States Constitution." Me. Rev. Stat. Ann., Tit. 20-A, § 2951(2). That provision was enacted in response to an opinion by the Maine attorney general taking the position that public funding of private religious schools violated the Establishment Clause of the First Amendment.

[282] *Id.* (citing Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002)).

[283] *Id.* ("Following our decision in *Zelman*, the Maine Legislature considered a proposed bill to repeal the 'nonsectarian' requirement, but rejected it.").

[284] *Id.* (quoting Carson v. Makin, 979 F.3d 21, 38 (1st Cir. 2020)):

> The Department has stated that, in administering this requirement, it "considers a sectarian school to be one that is associated with a particular faith or belief system and which, in addition to teaching academic subjects, promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith."

[285] *See id.* ("'[A]ffiliation or association with a church or religious institution is one potential indicator of a sectarian school,' but 'it is not dispositive.'") (quoting Carson v. Makin, 979 F.3d 21, 38 (1st Cir. 2020)).

[286] *Id.*

The plaintiffs had sought to send their children to sectarian schools and had been denied tuition assistance.[287] They challenged this denial as a violation of Establishment and Free Exercise guarantees.[288]

When considering the constitutionality of Maine's limitation, the *Carson* Court explained that "Maine's decision to continue excluding religious schools from its tuition assistance program after *Zelman* . . . promotes stricter separation of church and state than the Federal Constitution requires."[289] The Court explained that refusing to fund sectarian institutions violated free exercise guarantees,[290] and a state's interest in keeping church and state more separate than was required under the Federal Constitution could not pass muster if not in accord with the Free Exercise Clause.[291]

The *Carson* Court implied that the state's distinguishing between sectarian and nonsectarian religious schools was actually a ruse, because "[s]aying that Maine offers a benefit limited to private secular education is just another way of saying that Maine does not extend tuition assistance payments to parents who choose to educate their children at religious schools."[292] But that is simply untrue, because some religious schools provide nonsectarian education,[293] and those schools could receive tuition assistance.

Nonetheless, the Court struck down Maine's limiting subsidies to nonsectarian schools while denying that Maine was required to fund religious education.[294] After all, the State could simply not make use of any private schools, instead "expand[ing] the reach of its public school system, increas[ing] the availability of transportation, provid[ing] some combination of tutoring, remote learning, and partial attendance, or even operat[ing] boarding schools of its own."[295] What was precluded was Maine's saving money by defraying tuition costs to attend private nonsectarian schools (whether religious or secular) while refraining from promoting religious divisiveness by refusing to fund sectarian schools.

As Justice Sotomayor explained in dissent, the Court's new understanding of Establishment and Free Exercise guarantees puts Maine in an unfortunate position: "Maine must choose between giving subsidies to its residents or refraining from financing religious teaching and practices."[296] But Justice Sotomayor understated the difficulty created by the Court.

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[287] *See id.* at 1994–95.

[288] *Id.* at 1995.

[289] *Id.* at 1997.

[290] *Id.* at 1997 ("By 'condition[ing] the availability of benefits' in that manner, Maine's tuition assistance program—like the program in *Trinity Lutheran*—'effectively penalizes the free exercise' of religion." (citing Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021 (2017) (quoting McDaniel v. Paty, 435 U.S. 618, 626 (1977) (plurality opinion)))).

[291] *Id.* at 1998 ("But as we explained in both *Trinity Lutheran* and *Espinoza*, such an 'interest in separating church and state "more fiercely" than the Federal Constitution . . . "cannot qualify as compelling" in the face of the infringement of free exercise.' " (citing Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2260 (2020) (quoting *Trinity Lutheran*, 137 S. Ct. at 2024))).

[292] *Id.* at 1999.

[293] Zelman v. Simmons-Harris, 536 U.S. 639, 726 (2002) (Breyer, J., dissenting) ("States now certify the nonsectarian educational content of religious school education.").

[294] Carson v. Makin, 142 S. Ct. 1987, 2000 (2022) ("The dissents are wrong to say that under our decision today Maine '*must*' fund religious education.").

[295] *Id.*

[296] *Id.* at 2014 (Sotomayor, J., dissenting).

First, the Court did not apply *Zelman* correctly because, as the Court itself noted, *Zelman* permits state funding of sectarian schools where the parent's choice is *genuine and independent*.[297] But given Maine demographics, there may be very few schools among which to choose for a particular family and some of those schools might not be genuine options because they are too far away.[298] Further, because of the economics connected with providing schooling when there are relatively few students of the relevant age,[299] providing funding to sectarian schools might decrease the likelihood that parents would have a viable nonsectarian option. Parents who had to choose between sending their child to a school of a different faith tradition or instead sending their child out of state to receive a nonsectarian education might not believe that they have been offered a genuine option.[300]

The Nelsons, who were also plaintiffs,[301] had wanted to send their daughter to a sectarian school but had not been able to afford the tuition without the Maine subsidy so they instead sent her to a secular school.[302] Suppose that a different family also wanted to send their child to a school that taught the values of their faith tradition. However, there was no such school in the area and instead the only convenient school was a sectarian school associated with a different, minority faith tradition. As the Court points out, if the family did not want their child to attend that school, the family might be afforded the opportunity to get tutoring, send the child on long bus rides each day, or perhaps send the child to a boarding school.[303] But one must at least wonder whether the Court would view such a family as having had an independent and genuine choice if their only realistic option was to send their child to a sectarian school of a minority faith tradition.[304] Maine might have limited the schools receiving funding to nonsectarian schools to increase the likelihood that parents would have a nonsectarian educational option for their child rather than only having a sectarian option possibly involving a different faith tradition.[305]

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[297] *See supra* note 279 and accompanying text.

[298] *Carson*, 142 S. Ct. at 1994 ("Parents may direct tuition payments to schools inside or outside the State, or even in foreign countries.").

[299] *Id.* at 1993 (discussing "the realities of remote geography and low population density").

[300] *See supra* notes 234–37 and accompanying text (discussing whether parents had an independent and genuine choice when considering which school their child should attend in Cleveland).

[301] *See Carson*, 142 S. Ct. at 1994. The named plaintiff, David Carson, sent his daughter to Bangor Christian School but did not receive the benefit of the subsidy. *Id.*

[302] *Id.*

[303] *Id.* at 2000.

[304] *Cf.* Zelman v. Simmons-Harris, 536 U.S. 639, 687 (Souter, J., dissenting):

> Public tax money will pay at a systemic level for teaching the covenant with Israel and Mosaic law in Jewish schools, the primacy of the Apostle Peter and the Papacy in Catholic schools, the truth of reformed Christianity in Protestant schools, and the revelation to the Prophet in Muslim schools, to speak only of major religious groupings in the Republic.

Justice Sotomayor has implied that the Court may not use the same standard when evaluating Establishment guarantees where individuals of minority faith traditions are involved. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2448 (2018) (suggesting that the Court was using a double standard when analyzing whether the Establishment Clause precluded a particular policy adversely affecting Muslims); *see also* Caroline Mala Corbin, *Commentary: Exploiting Mixed Speech*, 6 CALIF. L. REV. CIR. 37, 38 (2015) (suggesting that in two different cases, the Court "permitted state sponsorship of Christianity"); Stephen M. Feldman, *The Roberts Court's Transformative Religious Freedom Cases: The Doctrine and the Politics of Grievance*, 28 CARDOZO J. EQUAL RTS. & SOC. JUST. 507, 555–56 (2022) ("[T]he conservative justices have turned to tradition to determine the parameters of the Establishment Clause, and they interpret tradition in accord with the nation's long history of de facto Christianity.").

[305] *See supra* note 299 and accompanying text.

As might not be surprising, individuals in the past have argued that Free Exercise guarantees should be understood to impact the Establishment analysis in the context of state funding of religious schools. The *Allen* Court gave short shrift to a claimed violation of Free Exercise guarantees in that case, noting that "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion."[306]

Yet, the *Allen* Court's point about what constitutes coercion and thus a possible Free Exercise violation has relevance to the Maine funding program. *Everson* had made clear that the town was not even required to pay for bus transportation to a parochial school,[307] much less pay to support sectarian education,[308] so it is difficult to see how a state deciding not to fund *sectarian* education is acting coercively and thus offending free-exercise guarantees. Basically, the current Court is rewriting the Religion Clauses to make it much more difficult for the State to refuse to fund sectarian education.[309]

V. CONCLUSION

Everson v. Board of Education,[310] the foundation of modern Establishment Clause jurisprudence, drew a line between providing support of sectarian teaching and providing a health and safety benefit. The Court in subsequent cases modified the approach, always maintaining that the Constitution precluded state support of religious indoctrination but shifting the line with respect to what was permissible in light of what the Court believed insufficiently likely to involve or lead to such indoctrination. Then, the *Mueller* Court shifted gears, claiming to apply the existing jurisprudence but radically changing it *sub silentio* and permitting state support of religious teaching as long as the parents could be viewed as immunizing such state support. But parents had long been choosing sectarian education for their children and the Court had always suggested that such indirect state support of religious inculcation was constitutionally prohibited.

Some of the prophylactic measures the Court held were constitutionally required caused state monies that could have been spent directly on education to instead be spent assuring that the state would not fund religious indoctrination. In rejecting the necessity of those measures, the *Agostini* Court opened the door to direct state funding of sectarian teaching, a position endorsed by the *Mitchell* plurality.

In a series of cases, the Court undermined the teaching and principles of *Everson* by opening the door to direct and indirect funding of religious education. The current Court has taken an additional step, shifting what was,

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[306] Bd. of Educ. v. Allen, 392 U.S. 236, 248–49 (1968) (citing Abington Twp. Sch. Dist. v. Schempp, 374 U.S. 203, 223 (1963)).

[307] *See supra* note 60 and accompanying text.

[308] *See supra* note 236 and accompanying text.

[309] The Court has had the opportunity in the past to rewrite the Clauses. *See, e.g.*, Patrick Malone, *Prayers for Relief*, 71 ABA J. 61, 61 (Apr. 1985) (discussing "seven religion cases now before the Supreme Court that could rewrite the modern understanding of the First Amendment's establishment and free exercise of religion clauses.").

[310] Everson v. Bd. of Educ., 330 U.S. 1 (1947).

at best, permissible state support of religious education into an obligation of support of sectarian inculcation whenever the state provides support to nonsectarian private schools. The Court's current approach not only continues to undermine the separation of church and state,[311] but also seems designed to replace the *Everson* wall with a bridge that the State, in many instances, will be required to use.[312] In a society as religiously diverse and divided as the United States is today, the Court's current approach is almost guaranteed to promote further division and animosity along religious lines and simply cannot be justified as a matter of constitutional law or good public policy.

[311] Carson v. Makin, 142 S. Ct. 1987, 2012 (2022) (Sotomayor, J., dissenting) ("This Court continues to dismantle the wall of separation between church and state that the Framers fought to build.").

[312] *Id.* at 2014 (Sotomayor, J., dissenting) ("Today, the Court leads us to a place where separation of church and state becomes a constitutional violation.").