

1977

Constitutional Law - First Amendment - Establishment Clause - State Aid to Nonpublic School Children

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Recommended Citation

Annaliesse Masser, *Constitutional Law - First Amendment - Establishment Clause - State Aid to Nonpublic School Children*, 16 Duq. L. Rev. 253 (1977).

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CONSTITUTIONAL LAW—FIRST AMENDMENT—ESTABLISHMENT CLAUSE
—STATE AID TO NONPUBLIC SCHOOLCHILDREN—The Supreme Court of the United States has held that portions of an Ohio statute authorizing the state to provide nonpublic school pupils with textbooks, standardized testing and scoring, speech, hearing, and psychological diagnostic services, and therapeutic, guidance, and remedial services are constitutional. Those portions authorizing state expenditures for instructional materials and equipment and for field trip transportation were held to be unconstitutional.

Wolman v. Walter, 97 S. Ct. 2593 (1977).

In an attempt to provide state aid to nonpublic school students in a manner conforming to the most recent United States Supreme Court decision in *Meek v. Pittenger*,¹ the Ohio Legislature passed section 3317.06 of the Ohio Revised Code authorizing state aid to nonpublic school students for certain enumerated purposes.² A group of citizens and taxpayers of Ohio brought suit challenging the constitutionality of all but one provision of the statute.³ A three judge district court was convened, and it held the statute constitutional in all respects.⁴ The plaintiffs appealed, and the United

1. 421 U.S. 349 (1975). The suit involved a statute authorizing the Commonwealth of Pennsylvania to provide auxiliary services (Act 194) and textbooks acceptable for use in public schools (Act 195) directly to students enrolled in nonpublic schools meeting Pennsylvania's compulsory attendance requirements. Act of July 18, 1974, No. 170, § 1, 1974 Pa. Laws 477 (repealed 1975). Act 195 also permitted loans of instructional materials and equipment directly to nonpublic schools. The auxiliary services included counseling, testing, psychological services, speech and hearing therapy, and related services for exceptional, remedial, and educationally disadvantaged students. The instructional materials and equipment included periodicals, maps, charts, recordings, projectors, laboratory paraphernalia, and the like. The United States Supreme Court held that Act 194 and all but the textbook loan provisions of Act 195 violated the establishment clause of the first amendment. 421 U.S. at 373.

At the time *Meek* was decided, an appeal from a district court judgment holding a predecessor Ohio statute providing for state aid to nonpublic schools was pending before the United States Supreme Court. *Wolman v. Essex*, No. 73-292 (S.D. Ohio July 1, 1974). The case was remanded for further consideration in light of *Meek*. 421 U.S. 982 (1975). On remand, the district court entered a consent order dated November 17, 1975, declaring the predecessor statute to be unconstitutional, but reserved the right to review the successor statute. It was at this time that the appellants transferred their attention to the present legislation.

2. OHIO REV. CODE ANN. § 3317.06 (Page Supp. 1976).

3. The citizens group did not challenge authorization of aid for physician, nursing, dental, and optometric services for nonpublic school students authorized in OHIO REV. CODE ANN. § 3317.06(E) (Page Supp. 1976). *Wolman v. Walter*, 97 S. Ct. 2593, 2602 (1977).

4. *Wolman v. Essex*, 417 F. Supp. 1113 (S.D. Ohio 1976), *rev'd in part sub nom. Wolman v. Walter*, 97 S. Ct. 2593 (1977). The district court concluded that the effect of § 3317.06 was to make available to all students in Ohio certain limited and inherently secular services and

States Supreme Court noted probable jurisdiction.⁵

Since nearly all nonpublic schools in Ohio are sectarian,⁶ evaluating the constitutionality of the various forms of assistance authorized by section 3317.06 necessarily encompassed a consideration of the establishment clause of the first amendment. The Supreme Court began its analysis by referring to the three-part test which has emerged in establishment clause cases, requiring that a statute have a secular legislative purpose, have a primary effect that neither advances nor inhibits religion, and not foster excessive government entanglement with religion.⁷ The Court perceived no difficulty with the legislative purpose of the Ohio statute, finding that the statute serves Ohio's legitimate interest in protecting the health of all its youth and providing them with a "fertile" educational environment.⁸ The analytical difficulty arose in the "effect" and "entanglement" criteria, and in applying those tests to the Ohio statute the Court substantially relied on case law for guidance.

The Court found the textbook loan system set forth in section 3317.06(A)⁹ to be strikingly similar to the systems approved in

materials. The court did not perceive the risk of excessive governmental entanglement to be present because, although a large amount of aid was necessary to effectuate the authorized program, there was no constitutional significance between "a little bit of secular aid and a lot of secular aid." The potential for political division because of the program was seen to be minimal because the statute provided services and materials to students attending nonpublic schools only to the extent that such services and materials were also available to public schoolchildren. Section 3317.06 was characterized as merely extending already existing programs to all students in Ohio. *Id.* at 1125.

5. *Wolman v. Essex*, 97 S. Ct. 730 (1977).

6. The parties stipulated that out of the 720 chartered nonpublic schools in Ohio during the 1974-1975 school year, 691 were sectarian and more than 92% of the nonpublic enrollment attended Catholic schools. It was further stipulated that the Catholic schools operate under the general supervision of the bishop of their diocese, that most principals are members of a religious order in the Catholic Church, that approximately one-third of the teachers are members of a religious order, that a majority of teachers are probably members of the Catholic faith, and that religious objects decorate the classrooms and hallways in these schools. The school day consists of five hours of state-mandated instruction plus one-half hour of religious instruction which non-Catholics are not required to attend. No teacher is required to teach religious doctrine in his secular classes. 97 S. Ct. at 2598.

7. *Id.* at 2599. See notes 48-65 and accompanying text *infra*.

8. 97 S. Ct. at 2599.

9. OHIO REV. CODE ANN. § 3317.06(A) (Page Supp. 1976) authorizes the expenditure of funds

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

*Board of Education v. Allen*¹⁰ and in *Meek*. Expressly declining to overrule *Allen* and *Meek*, the Court concluded that this section was constitutional.

The authorization of expenditures by the state for standardized testing and scoring services for nonpublic school students found in section 3317.06(J)¹¹ was held to be a permissible means to ensure that the state's legitimate interest in seeing that all its schoolchildren receive an adequate secular education was being served.¹² The Court distinguished *Levitt v. Committee for Public Education & Religious Liberty*,¹³ in which a New York statute providing funding for both teacher-prepared and standardized testing was invalidated, emphasizing that the Ohio statute funds only standardized testing not controlled by the nonpublic school. Thus, the use of the Ohio-supported testing service as a part of religious teaching was prevented, and the direct aid to religion found present in *Levitt* was avoided.¹⁴ Furthermore, the inability of the nonpublic school to con-

parents. Such requests shall be submitted to the local public school district in which the nonpublic school is located. Such individual requests for the loan of textbooks shall, for administrative convenience, be submitted by the nonpublic school pupil or his parent to the nonpublic school which shall prepare and submit collective summaries of the individual requests to the local public school district. As used in this section, "textbook" means any book or book substitute which a pupil uses as a text or text substitute in a particular class or program in the school he regularly attends.

10. 392 U.S. 236 (1968). The United States Supreme Court upheld as constitutionally valid a New York statute requiring local public school authorities to lend textbooks free of charge to all students in grade 7 through 12 enrolled in a public or private school which complied with the compulsory education law. The textbooks loaned were those "designated for use in any public elementary or secondary schools of the state or are approved by any boards of education," and which a pupil "is required to use as a text for a semester or more in a particular class" in his school. N.Y. EDUC. LAW § 701 (McKinney 1969). The Court asserted that religious schools pursue two goals, religious instruction and secular education, which are not so intertwined that secular textbooks furnished to religious schools are in fact instrumental in teaching religion. 392 U.S. at 248.

11. OHIO REV. CODE ANN. § 3317.06(J) (Page Supp. 1976) authorizes the expenditure of funds "[t]o supply for use by pupils attending nonpublic schools within the district such standardized tests and scoring as are in use in the public schools of the state."

12. 97 S. Ct. at 2601. The Court declared that a state may require schools to meet certain standards of instruction to fulfill compulsory education requirements and may examine both teachers and pupils to ensure that the state's interest is being fulfilled. This section was viewed as a means whereby the state may ensure that certain minimum standards are met.

13. 413 U.S. 472 (1973). State reimbursement of private schools for certain testing and record-keeping costs mandated by the state was held to be unconstitutional aid to religion because the aid to the secular function was not identifiable and severable from aid to the sectarian. Failure to ensure that teacher-prepared tests did not inculcate religious precepts was a fatal defect in the statute. See note 14 and accompanying text *infra*.

14. Because of the integral role that testing plays in the total teaching process, a means

trol the test eliminated the need for government supervision that might result in excessive entanglement.¹⁵

Section 3317.06(D) and (F)¹⁶ also authorized expenditures to provide speech, hearing, and psychological diagnostic services to pupils in their nonpublic school facilities so long as such services were also available to public school students within the district.¹⁷ The danger that providing such services on nonpublic school premises offered "an impermissible opportunity for the intrusion of religious influence" was found by the Court to be insufficient to render that portion of the statute unconstitutional.¹⁸ Impermissible church-state entanglement was likewise found to be absent since government surveillance of the school premises to insure neutrality was unnecessary. Furthermore, the Court found no basis to distinguish physician, nursing, dental, and optometric services, which the appellants did not challenge, from diagnostic speech, hearing, and psychological services, which were challenged. The Court relied on *Lemon v. Kurtzman*,¹⁹ where the provision of health services to nonpublic

must be available to assure that internally prepared tests are free of religious instruction. There is a substantial risk that teacher-prepared tests may unconsciously or otherwise inculcate students with religious precepts. See 413 U.S. at 480. The potential for conflict "inheres in the situation," and the state is constitutionally compelled to make sure that state funds are not used for religious indoctrination. Failure to do so will result in the statute being held unconstitutional. State aid only for standardized testing avoids the problem presented by the aid for internally prepared tests. The nonpublic school does not control the content of the standardized test or its result. This prevents its use as a tool of religious teaching, and thus avoids direct aid to religion. See *Wolman v. Walter*, 97 S. Ct. at 2601.

15. 97 S. Ct. at 2601.

16. OHIO REV. CODE ANN. § 3317.06 (Page Supp. 1976) authorizes the expenditure of funds "(D) [t]o provide speech and hearing diagnostic services to pupils attending nonpublic schools within the district. Such service shall be provided in the nonpublic school attended by the pupil receiving the service," and "(F) [t]o provide diagnostic psychological services to pupils attending nonpublic schools within the district. Such services shall be provided in the school attended by the pupil receiving the service."

17. The appellants argued that such services were constitutionally impermissible because the speech and hearing staff might occasionally engage in unrestricted conversation with the pupil and might fail to separate religious instruction from their secular work. Further, the conversations between the psychological diagnostician and the pupil provide an opportunity for the intrusion of religious influence. 97 S. Ct. at 2602.

18. The Court found that diagnostic services, unlike teaching and counseling, have little or no educational content and are not closely associated with the educational mission of the nonpublic school. Further, the limited contact the diagnostician has with the pupil does not provide the same opportunity for transmission of sectarian views as does the teacher and student or counselor and student relationship. *Id.* at 2603.

19. 403 U.S. 602 (1971). *Lemon* involved two appeals raising questions as to the validity of Pennsylvania and Rhode Island statutes providing aid to church-related elementary and secondary schools. The Pennsylvania program provided financial support to private schools

schoolchildren was found not to have the primary effect of aiding religion, and distinguished *Meek*, in which diagnostic speech and hearing services were invalidated on entanglement grounds because the compatible section was found to be unseverable from the unconstitutional portions of the statute.²⁰

Section 3317.06(G), (H), (I), and (K)²¹ authorized expenditures for certain therapeutic, guidance, and remedial services for students who had been identified as having a need for specialized attention.²² The Court found that such services, offered on sites that are not physically or educationally identified with the nonpublic school, did not impermissibly foster religion. Since the services would be performed by public employees, no excessive entanglement was created. In distinguishing *Meek*, where the possibility was recognized that public employees might advance religious beliefs while carrying out their supposed religiously neutral responsibilities, the *Wolman* Court asserted that the danger in *Meek* existed not because the public employee was likely to deliberately "subvert his task to the service of religion," but rather because the compulsion to the

by reimbursing them for the cost of teachers' salaries, textbooks, and instructional materials for specified secular subjects. The Rhode Island statute permitted the state to pay directly to teachers in nonpublic schools a supplement of 15% of their annual salary. Both statutes were held to be unconstitutional.

20. 97 S. Ct. at 2602-03.

21. OHIO REV. CODE ANN. § 3317.06 (Page Supp. 1976) authorizes expenditure of funds

(G) [t]o provide therapeutic psychological and speech and hearing services to pupils attending nonpublic schools within the district

(H) [t]o provide guidance and counseling services to pupils attending nonpublic schools within the district

(I) [t]o provide remedial services to pupils attending nonpublic schools within the district

(K) [t]o provide programs for the deaf, blind, emotionally disturbed, crippled, and physically handicapped children attending nonpublic schools within the district

In addition, each subsection states:

Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided in the public school or in public centers, transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located.

22. The appellants conceded that such services provided both to public and nonpublic school students simultaneously in public schools or centers or in mobile units are constitutional. They argued, however, that anywhere a facility might be used to service only nonpublic school students raised the danger that the public employee might act in a manner reinforcing the ideological views of the sectarian school; the assistance therefore would amount to direct aid to the sectarian institution. Brief for Appellants at 41-42, 46, *Wolman v. Walter*, 97 S. Ct. 2593 (1977).

religious environment might modify his behavior.²³ Furthermore, the concern that a mobile unit on a neutral site might on occasion serve only sectarian pupils was of no consequence to the Court because it perceived the danger in *Meek* arising from the nature of the institution where services were performed and not from the nature of the pupils.²⁴

Section 3317.06(B) and (C)²⁵ authorized funds to purchase and loan to individual pupils or their parents upon their request such instructional materials and equipment as were used in the public schools within the district and which were "incapable of diversion to religious use."²⁶ The Court determined that although the loan was ostensibly limited to religiously neutral materials, it inescapably had the primary effect of furnishing direct aid to religion because of the impossibility of separating the secular function from the sectarian.²⁷ For support, the Court relied on *Committee for Public Education & Religious Liberty v. Nyquist*,²⁸ where a tuition reimbursement program in which New York gave low income parents who sent their children to nonpublic schools a direct cash grant of \$50 to \$100

23. 97 S. Ct. at 2605. The danger arose in *Meek* because the services were to be performed in the pervasively sectarian atmosphere of the church-related school. "So long as these types of services are offered at truly religiously neutral locations, the danger perceived in *Meek* does not arise." *Id.*

24. *Id.*

25. OHIO REV. CODE ANN. § 3317.06 (Page Supp. 1976) authorizes expenditure of funds

(B) [t]o purchase and to loan to pupils attending nonpublic schools within the district or to their parents upon individual request, such secular, neutral and nonideological instructional materials as are in use in the public schools within the district and which are incapable of diversion to religious use and to hire clerical personnel to administer such lending program.

(C) [t]o purchase and to loan to pupils attending nonpublic schools within the district or to their parents, upon individual request, such secular, neutral and nonideological instructional equipment as is in use in the public school within the district and which is incapable of diversion to religious use and to hire clerical personnel to administer such lending program.

26. The equipment included projectors, tape recorders, record players, maps, globes, science kits, weather forecasting charts, and the like. 97 S. Ct. at 2606. The district court found these sections, as limited, to be constitutional because it could not distinguish the loan of instructional materials and equipment from the loan of textbooks upheld in *Meek* and in *Allen Wolman v. Essex*, 417 F. Supp. at 1119.

27. 97 S. Ct. at 2606. In *Meek*, the Court had determined that the direct loan to nonpublic schools of instructional materials and equipment was impermissible despite the secular nature of the items. To avoid the consequences of *Meek*, the Ohio legislature provided for loans only to the pupil or his parent. The *Wolman* Court rejected this factor as exalting form over substance and stated that the programs are really the same. *Id.* at 2606-07.

28. 413 U.S. 756 (1973).

per child was held unconstitutional as direct aid to religion. The *Wolman* Court reasoned that if a grant in cash to parents is impermissible, then a grant in kind is no better.²⁹

Finally, the Court examined expenditures for field trip transportation authorized in section 3317.06(L).³⁰ This service was held to be impermissible direct aid to sectarian education because the non-public schools controlled the timing and frequency of the field trips and as such were the true recipients of the service rather than the children.³¹ Furthermore, the close supervision of nonpublic school teachers that would be necessary to ensure that the funds were used only for secular purposes would result in excessive government entanglement.³²

The establishment clause of the first amendment against which the *Wolman* Court evaluated Ohio's statute states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."³³ According to Jefferson, the clause was intended to erect "a wall of separation between Church and State."³⁴ In *Everson v. Board of Education*,³⁵ the first Supreme

29. 97 S. Ct. at 2607. The state in *Nyquist* attempted to justify the tuition reimbursement program, as Ohio did the loan of instructional materials and equipment here, on the basis that the aid flowed to the parents rather than to the sectarian schools. The *Nyquist* Court observed, however, that there was no attempt to guarantee separation of secular and religious education functions and to provide state aid only for the former. 413 U.S. at 783.

30. OHIO REV. CODE ANN. § 3317.06(L) (Page Supp. 1976) authorizes expenditure of funds "[t]o provide such field trip transportation and services to nonpublic school students as are provided to public school students in the district. School districts may contract with commercial transportation companies for such transportation service if school district busses are unavailable."

31. 97 S. Ct. at 2608. The *Wolman* Court contrasted the bus fare program upheld in *Everson*, providing transportation only to and from school, with the Ohio plan and noted that the plan in *Everson* was acceptable because the school did not determine how often the pupil traveled between home and school and because the travel was unrelated to any aspect of the curriculum. *Id.* The fact that the schools, rather than the children, are truly the recipients of the service may be sufficient basis alone to invalidate the program as impermissible direct aid, said the Court, citing *Lemon*. *Id.* Furthermore, the Court recognized it is the individual teacher who makes a field trip meaningful and an integral part of the educational experience. Because the teacher works in a sectarian institution, an unacceptable risk of fostering religion existed. *Id.*

32. *Id.* at 2609. "Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between church and state." *Id.* (quoting *Lemon*).

33. U.S. CONST. amend. I.

34. 8 JEFFERSON WORKS 113, quoted in *Reynolds v. United States*, 98 U.S. 145, 164 (1879).

35. 330 U.S. 1 (1947). The Court in *Everson* upheld a New Jersey statute which authorized the spending of tax revenues to pay the bus fares of parochial school students as part of a

Court case dealing directly with the establishment clause, the Court broadly interpreted the clause to mean at least that government cannot pass laws which "aid one religion, aid all religions, or prefer one religion over another."³⁶ The *Everson* Court further stated that no tax in any amount could be levied to support any religious institutions, and that the government could not "openly or secretly participate in the affairs of any religious organizations or groups."³⁷ Yet, despite the sweeping prohibitions of the clause and the Court's pronouncements in *Everson*, total separation between church and state has been recognized as both impossible and undesirable.³⁸ It has been acknowledged that not all legislative programs that provide indirect benefit to religious activities are prohibited by the Constitution.³⁹ "The problem, like many problems in constitutional law, is one of degree."⁴⁰ Since the Court seems to have decided that a certain amount of government involvement with religion is permissible and indeed inevitable, the theoretically absolute standard of the establishment clause offers little guidance in ascertaining what kind of involvement would tip the balance toward government sponsorship of or interference with religion.⁴¹ The job for the Court has been to balance the rhetoric with a workable system of government neutrality regarding religious activity that nonetheless

general program under which the state paid the fares of pupils attending public and other schools.

36. *Id.* at 15.

37. *Id.* at 16.

38. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. at 760.

39. *Id.* at 775. *See, e.g., Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664 (1970) (property tax exemptions for church property were held not violative of the establishment clause despite the fact that such exemptions relieved the church of a financial burden); *McGowan v. Maryland*, 366 U.S. 420 (1961) (Sunday closing laws sustained even though one of their undeniable effects was to render it somewhat more likely that citizens would respect religious institutions and even attend religious services).

40. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). *Zorach* and another brought a proceeding for review of the action of the Board of Education of the City of New York in establishing a "released time" program for the religious instruction of public schoolchildren. The program involved neither religious instruction in public schools nor the use of public funds. *Id.* at 308-09. The United States Supreme Court held the statute to be constitutional. The Court said government may not finance religious groups, undertake religious instruction, blend secular and sectarian education, or use secular institutions to force one or more religions on any person. "But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Id.* at 314. *See* 86 HARV. L. REV. 1068, 1073-76 (1973).

41. 397 U.S. at 668-70. *See, e.g., Meek v. Pittenger*, 421 U.S. at 358-59; *Lemon v. Kurtzman*, 403 U.S. at 612.

“respects the religious nature of our people.”⁴²

The Supreme Court Justices often have divergent opinions on whether a particular form of aid tips the scales toward unconstitutionality, and the plurality decision in *Wolman* presents a good example of the variety of opinion on the Bench. Chief Justice Burger and Justices White and Rehnquist would hold the entire statute constitutional.⁴³ Justice Brennan would invalidate the entire statute because of the divisive political potential inherent in so large a subsidy to carry out the programs.⁴⁴ Justice Stevens declared that all forms of state aid to sectarian schools are invalid, but he suggested that public health services may be constitutionally administered.⁴⁵ Justice Powell would uphold the entire statute except for the provision of instructional materials and equipment. However, he suggested a method by which even those services could be provided.⁴⁶ Finally, Justice Marshall recommended that *Allen* be overruled and that a new test for distinguishing acceptable from unacceptable forms of aid be formulated.⁴⁷

42. *Zorach v. Clauson*, 343 U.S. at 314.

43. 97 S. Ct. at 2609. The Chief Justice offered no analysis for his decision. Justices White and Rehnquist cited as their basis the reasons stated in Justice Rehnquist's separate opinion in *Meeke* and Justice White's dissenting opinion in *Nyquist*.

44. *Id.* at 2609-10. Justice Brennan believed that the amount of the subsidy must be evaluated in determining the compatibility of the statute with the establishment clause. He concluded that a “divisive political potential of unusual magnitude” existed in the Ohio program. In his opinion, this factor alone would justify invalidating the entire Ohio statute as offending the first amendment's prohibition against laws “respecting an establishment of religion.” Divisive political potential was recognized by the *Lemon* Court as a fourth test, but ignored by the *Wolman* Court. See note 48 *infra*.

45. 97 S. Ct. at 2614-15. Justice Stevens stated that any state subsidy of sectarian schools is invalid because financing of buildings, field trips, instructional materials, educational tests, and school books “all give aid to the school's educational mission, which at heart is religious.” However, he believed that the state can provide public health services to children attending nonpublic schools and so would not hold this part of the statute invalid on its face.

46. *Id.* at 2613-14. Justice Powell saw any risk of significant religious control over our democratic processes or of deep political division along religious lines to be remote and tolerable when viewed against the positive contributions of sectarian schools, especially in light of continuous overseeing by the Supreme Court. He, therefore, would uphold the entire Ohio statute except for the provision of instructional materials and equipment. His analysis of *Meeke* and *Allen* suggested to him that some loans of materials helpful to the educational function were permissible so long as the aid was incapable of diversion to religious uses and so long as the materials were lent to the individual student rather than the sectarian institutions. The Ohio statute did not separate those instructional materials which may be meaningfully lent to individuals from those which may not and so he agreed with the majority in striking down this part of § 3317.06. However, he saw no constitutional problem in a statute lending certain instructional materials to the individuals themselves.

47. *Id.* at 2610-12. Justice Marshall would resolve the tension between *Allen* and *Meeke*

The judgment of the Court as announced by Justice Blackmun evaluated the assistance authorized in the Ohio statute under the three-part test first set forth in *Lemon*.⁴⁸ The first test requires that the statute have a legitimate purpose—providing for the education and welfare of all school children.⁴⁹ This inquiry has become a mere formality, however, with the Court generally accepting the state's asserted purpose at face value.⁵⁰

The second test requires that the statute's primary or necessary effect neither advance nor inhibit religion; the Court will consider whether the necessary effect is contrary to the statute's stated purpose.⁵¹ The test seems to necessitate showing (a) that the program

by overruling *Allen*. The textbook loan program was upheld in *Meek* on the assumption that a sectarian school's function of religious instruction is separable from its secular education function, an assumption flatly rejected in *Meek* regarding teaching materials and equipment. The rationale of *Allen* was undamaged, therefore, only if there was a constitutionally significant difference between a loan of materials directly to a sectarian school and a loan to the students for use in sectarian schools. No such distinction exists, as the Court demonstrated in *Wolman*. Further, the dangers of political divisiveness along religious lines required that *Allen* be overruled. Justice Marshall next suggested a method to differentiate between acceptable and unacceptable forms of aid which he believed was capable of consistent application. "That line, I believe, should be placed between general welfare programs that serve children in sectarian schools because the schools happen to be a convenient place to reach the programs' target populations and programs of educational assistance." *Id.* at 2611. Under this test, Justice Marshall would hold state aid for speech, hearing, and psychological diagnostic services, and therapeutic services (subsections (D), (F), (G)) constitutionally permissible as services which promote children's health and well-being with only an indirect and remote impact on their educational progress. However, state aid to provide textbooks, instructional materials and equipment, standardized testing and scoring, guidance and remedial services, and field trip transportation (subsections (A), (B), (C), (H), (I), (J), and (K)) would be unconstitutional as directly supporting the educational programs of sectarian schools.

48. 403 U.S. at 612-13. The *Lemon* Court also recognized a fourth and separate test: the potential for divisive political debate and division along religious lines because of the necessity that state assistance involve considerable political activity. The potential divisiveness was viewed as a threat to the normal political process. *Id.* at 622-23. Two years later, in *Nyquist*, the Court noted the importance of this fourth factor in the weighing process. 413 U.S. at 795-96. However, the Court in *Meek* and *Wolman* did not view this factor as being of crucial importance. In *Meek*, the fourth factor was cited for support, but was not determinative. 421 U.S. at 372. In *Wolman*, this factor was mentioned only in the dissents of Justices Brennan, Marshall, and Powell. 97 S. Ct. at 2609-14.

49. See note 8 *supra*.

50. See note 8 and accompanying text *supra*. See, e.g., *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. at 773.

51. By pursuing the inquiry into any underlying sectarian motivation through the effect test rather than the purpose test, the Court avoids a "frontal attack on the legislators' veracity." Note, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion*, 74 COLUM. L. REV. 1175, 1181 (1974). Once the state's justification for the statute has been accepted, the Court will be more willing to probe the underlying legislative intent as part of the effect test. *Id.*

of aid as planned assists only the secular function of the nonpublic school which has been found to be severable from the sectarian,⁵² (b) that the aid in fact reaches only the secular function, and (c) that safeguards necessary to prevent possible abuse are present. A program of aid designed to assist only the secular function of the nonpublic school will provide appropriate restrictions on expenditures in the statute.⁵³

Because sectarian schools attempt to provide an integrated secular and religious education, the statute also should channel the aid to the secular function of the nonpublic school in a manner that avoids providing "direct" assistance to the sectarian function; "indirect" assistance to the sectarian function will not be sufficient to invalidate the statute.⁵⁴ To separate the narrow channel between direct and indirect aid and to ensure that the aid reaches only the secular function of the nonpublic schools, the aid should be unrelated to any aspect of the curriculum.⁵⁵ In addition, the primary effect test requires sufficient safeguards to ensure against sectarian abuse of the assistance.⁵⁶ It is often said that the state must be "certain" that its aid does not advance the religious purpose of the nonpublic school.⁵⁷ However, what is necessary to demonstrate this certainty is often elusive. The mere possibility that a teacher or diagnostician working in the nonpublic school at a secular function may consciously attempt to subvert legitimate legislative objectives

52. See *Board of Educ. v. Allen*, 392 U.S. at 245, 248 (religious schools pursue two goals, religious instruction and secular education, which are not so intertwined that secular textbooks are instrumental in teaching religion). *But see Wolman v. Walter*, 97 S. Ct. at 2607 ("In view of the impossibility of separating the secular education function from the sectarian, the state aid [in supplying instructional materials] inevitably flows in part in support of the religious role of the schools.").

53. See *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. at 774.

54. *Id.* at 775-76.

55. The fact that the bus fare program in *Everson* was unrelated to any aspect of the curriculum was seen by the *Wolman* Court as an important distinction from the field trip services proposed in the Ohio statute. Field trips, an integral part of the educational experience, presented to the Court an unacceptable risk of fostering religion. 97 S. Ct. at 2608. Although a similar argument could be raised regarding the loan of textbooks, upheld in *Wolman*, the Court refused to break with precedent and relied on *Allen* in permitting such state aid. 97 S. Ct. at 2607 n.18.

56. Sectarian abuse occurs whenever a teacher, counselor, or administrator, in utilizing the state aid, unconsciously or consciously, inculcates students with the religious views of the sponsoring church. *Lemon v. Kurtzman*, 403 U.S. at 618.

57. *Id.* at 619. In its attempt to be certain that state aid serves only secular functions, a state may not provide for continuing state surveillance, for this would result in excessive entanglement between church and state. *Id.*

by inserting religious views into his secular function will not serve to invalidate a statute;⁵⁸ however, something more than a mere assumption that nonpublic school workers will succeed in separating their secular from their sectarian function is required to be shown.⁵⁹

Providing diagnostic and therapeutic services—basically health services—to all schoolchildren, public and nonpublic, was not viewed by the Court as having the primary effect of aiding religion.⁶⁰ The approved services were described as falling within the class of general welfare services for children that may be provided by the state regardless of any incidental benefit that may result for the nonpublic school.⁶¹ Furthermore, the *Wolman* Court recognized that it must also guard against possible discrimination against religion and therefore refused to deny special assistance to schoolchildren with handicaps that prevent them from benefitting fully from education merely because they attend a church-sponsored school.⁶²

The final test requires that the statute avoid government entanglement with religion. Because absence of all contacts between church and state is impossible,⁶³ the restriction on government entanglement with religion forbids only excessive contacts.⁶⁴ If the effect of the statute might be, although is not necessarily, to aid the sectarian function, government surveillance or supervision would be required to ensure that funds are used only for secular purposes, and the state's entanglement with religion would be deemed excessive.⁶⁵ The Court, therefore, seeks to avoid not only government support of religion, but also government intrusion into religion which by

58. "A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional." *Tilton v. Richardson*, 403 U.S. 672, 679 (1971). *Tilton* was the first Supreme Court decision approving direct cash grants to church related colleges and universities.

59. The state may not "provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts." *Lemon v. Kurtzman*, 403 U.S. at 619. This puts the burden on the state to affirmatively demonstrate that it has devised sufficient safeguards to ensure against state aid being used to further sectarian purposes.

60. 97 S. Ct. at 2602.

61. *Id.* See note 16 and accompanying text *supra*.

62. See 97 S. Ct. at 2605 n.14.

63. See note 41 and accompanying text *supra*.

64. *Walz v. Tax Comm'n of the City of New York*, 397 U.S. at 674, 676.

65. See note 59 *supra*. See also Zoetewey, *Excessive Entanglement: Development of a Guideline for Assessing Acceptable Church-State Relationships*, 3 PEPPERDINE L. REV. 279 (1976).

itself conflicts with the establishment clause.⁶⁶

A basic inconsistency, described by the Court as a "tension," exists in the *Wolman* Court's approval of purchases of secular textbooks for loan to nonpublic schoolchildren, and disapproval of purchases of secular instructional materials and equipment. Like textbooks, instructional materials and equipment are secular and non-ideological in nature and were to be lent directly to the students and their parents. Therefore, like the textbooks in *Allen*, such materials should be self-policing, having a fixed content not divertible to religious use. Nevertheless, the *Wolman* Court invalidated such aid. In permitting the loan of textbooks, the Court followed the concept expounded in *Allen* and followed in *Meek*, that limiting textbooks to those used in public schools is sufficient to ensure that the books will not be put to religious purposes.⁶⁷ The result in *Allen* was explained by the Court in *Nyquist* as merely the recognition that sectarian schools perform secular as well as religious education functions and that some forms of assistance may be given to the secular without providing direct aid to the sectarian.⁶⁸ However, the presumption that items, themselves religiously neutral, will not be put to sectarian use has not been accepted regarding other forms of state aid; specifically, maintenance and repair of school facilities and equipment programs,⁶⁹ field trip transportation, and instructional materials and equipment.⁷⁰ Furthermore, the requirement that the state be certain that aid not advance religious purposes is ignored by the presumption. The statement which the *Meek* Court used to invalidate a direct loan to nonpublic schools of instructional materials and equipment, and which the *Wolman* Court used for support of its decision to invalidate the loan of such materials to nonpublic schoolchildren, applies with equal force to textbooks: "Substantial aid to the educational function of such schools . . . necessarily results in aid to the sectarian school enterprise as a whole."⁷¹

66. See, e.g., *Lemon v. Kurtzman*, 403 U.S. at 620; *Everson v. Board of Educ.*, 330 U.S. at 18.

67. "*Board of Education v. Allen* has remained law, and we now follow as a matter of *stare decisis* the principle that restriction of textbooks to those provided the public schools is sufficient to ensure that the books will not be used for religious purposes." 97 S. Ct. at 2607 n.18.

68. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. at 775.

69. *Id.* at 774-77.

70. *Wolman v. Walter*, 97 S. Ct. at 2605-09.

71. *Meek v. Pittenger*, 421 U.S. at 366.

In refusing to overrule *Allen* and *Meek*, the *Wolman* Court perpetuates a basic inconsistency in establishment clause analysis. The presumption that the content of textbooks is something that can be ascertained in advance and cannot be diverted to sectarian uses has been rejected by Court decisions subsequent to *Allen* and is contrary to the analysis that instructional materials and equipment can be so diverted.⁷² It may be argued that the loan of textbooks merely approaches the verge of a state's power under the Constitution but does not, in fact, cross the line to become impermissible aid. But, as Chief Justice Burger warned in *Lemon*, there is a tendency in constitutional adjudication for steps which were said to approach the verge when taken to become later the platform for still further steps.⁷³ As long as *Allen* remains good law, a platform exists from which to move ever closer to state support of religion. The Court must either overrule *Allen* and *Meek* or venture into new forms of state aid to nonpublic schools, especially as the costs of sectarian education grow and the pressures to expand state aid increase.⁷⁴ A third alternative would be for establishment clause analysis to continue in its present course but with *Allen* remaining outside the mainstream of judicial analysis. This alternative, however, will leave the states in doubt as to what forms of aid will be judicially sanctioned because no consistent rules and precedent may be examined.

Review of the *Wolman* decision suggests to the states that general welfare programs which aid sectarian students are acceptable. Such programs have little or no educational content and are not closely associated with the educational mission of the nonpublic school.⁷⁵ All services which genuinely promote the welfare of children arguably assist the religious function of sectarian schools indirectly, but it is to such a small extent that on balance the benefit to the school-children and society at large has been deemed to outweigh any constitutional problem. Beginning in *Everson*, the Court recognized that the first amendment requires only that a state be neutral in its relations with religious institutions; it does not require the state to be its adversary.⁷⁶ In *Meek*, the Court noted that not all legislative

72. See notes 67 & 68 and accompanying text *supra*.

73. *Lemon v. Kurtzman*, 403 U.S. at 624.

74. 97 S. Ct. at 2611 (Marshall, J., concurring and dissenting).

75. 97 S. Ct. at 2603.

76. *Everson v. Board of Educ.*, 330 U.S. at 18 ("State power is no more to be used so as to handicap religions than it is to favor them.").

programs that indirectly or incidentally benefit religious institutions are prohibited by the Constitution.⁷⁷ In reaching its decision that general welfare aid to children does not directly support religious institutions and is, therefore, constitutionally permissible, the Court remains within its enunciated standards and consistent with its prior analysis. However, because "there is nothing ideological" about a school nurse or speech and hearing diagnostician, the constitutionality of these forms of aid involves considerations not present in the case of textbooks.⁷⁸ Textbooks may be the chief mode of perpetuating a particular religious faith because they can contain many seeds of dogma.⁷⁹ Furthermore, the difficulty with a textbook loan program is that there is no reliable method to distinguish secular from religious textbooks.⁸⁰ Nevertheless, the United States Supreme Court has sanctioned such aid to nonpublic schools. If such aid is permissible, state legislators must wonder what form of aid is not permitted. The Supreme Court has attempted to draw a distinction between the loan of textbooks and the loan of instructional materials, but its reasoning is not easily apprehended. Instead of permitting such doubt to continue, the Court should take a decisive step to overrule *Allen*. In that way, states will be given rational and consistent guidelines which they can follow in formulating legislation. Analysis of current precedent leaves the states without firm principles upon which to rely and in fact encourages them to search for "new ways of achieving forbidden ends."⁸¹ It remains for yet another law attempting to follow the Court's standards to come up for review to see if such a bold move will win the majority's approval.

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77. 421 U.S. at 359.

78. Board of Educ. v. Allen, 392 U.S. at 257 (Douglas, J., dissenting).

79. "The textbook goes to the very heart of education in a parochial school." *Id.*

80. *Id.* at 257-58.

81. Wolman v. Walter, 97 S. Ct. at 2615 (Stevens, J., dissenting).

