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NOTES

Interpreting State Aid to Religious Schools Under the Establishment Clause: Zobrest v. Catalina Foothills School District

The United States Supreme Court’s interpretation of the Establishment Clause in cases dealing with public aid to sectarian schools has undergone significant changes since the Court first dealt with the issue almost fifty years ago. At that time, the Court declared that the Establishment Clause was “intended to erect ‘a wall of separation between church and State.’” Nevertheless, the Court recently held in Zobrest v. Catalina Foothills School District that state funding of a sign-language interpreter provided to a deaf student attending a Catholic high school did not violate the Establishment Clause.

This Note traces the development of the Court’s interpretation of the Establishment Clause as it relates to public aid to sectarian schools and examines the basis of the Court’s current view as expressed in Zobrest. The Note posits that Zobrest represents an unprecedented move by the Court towards accommodating public aid to religious schools. In addition, the Note suggests that Zobrest may represent a new method of Establishment Clause interpretation in which the Court bases its holdings solely on factual similarities of previous cases instead of invoking the Lemon test. The Note concludes that such an approach is likely to make Establishment Clause analysis even more unpredictable than it is now.

James Zobrest has been deaf since birth. In 1988, his parents enrolled him in a Roman Catholic high school in Tucson, Arizona. Pursuant to the Individuals with Disabilities Education Act (IDEA) and a corre-

1. The Establishment Clause provides that “Congress shall make no law respecting an establishment of religion.” U.S. CONST. amend. I.
3. Id. at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)). The Everson decision, however, also illustrates a tension in Establishment Clause interpretation between the separation of church and state and the funding of education. See infra notes 40-47 and accompanying text.
5. Id. at 2469.
7. See infra notes 139-74 and accompanying text.
8. See infra notes 175-84 and accompanying text.
9. See infra note 185 and accompanying text.
10. Zobrest, 113 S. Ct. at 2464.
sponding state statute, the Zobrests asked the public school district to pro-
vide a sign-language interpreter to accompany him to class. The school
district denied the request because of their conclusion that such aid would
violate the Establishment Clause. The Zobrests then initiated a civil ac-
tion asserting "that the IDEA and the Free Exercise Clause of the First
Amendment require[d] [the school district] to provide James with an inter-
preter [at the Catholic school], and that the Establishment Clause [did] not
bar such relief."

The United States District Court for the District of Arizona denied the
Zobrests' request for a preliminary injunction. The court concluded that
such aid would likely violate the Establishment Clause because the inter-
preter would be a conduit for James's religious education and would thus
promote "religious development at government expense." The United
States Court of Appeals for the Ninth Circuit affirmed, holding that the
interpreter's function of relating both secular educational lessons and reli-
gious teachings would have the primary effect of advancing religion in viol-
ation of the Establishment Clause.

The United States Supreme Court reversed. The Court held that the
Establishment Clause did not prevent the school district from providing an
interpreter because the aid was "part of a general government program that
distributes benefits neutrally to any child qualifying as 'handicapped' under

children). James attended a school for the deaf during grades one through five, and a public
school with a publicly funded sign-language interpreter during grades six through eight. His par-
ents enrolled him in Salpointe Catholic High School at the beginning of his ninth grade year. Zobrest,
113 S. Ct. at 2464.

13. Zobrest, 113 S. Ct. at 2464. The school district first referred the matter to the county
attorney and the Arizona Attorney General, both of whom concluded that providing an interpreter
on the Catholic school's premises would violate the United States Constitution. Id.

brought under IDEA. It provides: "The district courts of the United States shall have jurisdiction
of actions brought under this subsection without regard to the amount in controversy." Id.

15. Zobrest, 113 S. Ct. at 2464.

16. Id.

17. Id. (citing App. to Pet. for Cert. at A-35).

18. Zobrest v. Catalina Foothills Sch. Dist., 963 F.2d 1190, 1196 (9th Cir. 1992), rev'd, 113

19. Id. at 1194-95. The court found that the aid violated the three-part test for interpreting
test requires state aid to (1) have a secular legislative purpose, (2) have a primary effect that
neither advances nor inhibits religion, and (3) not foster excessive government entanglement in
religion. Id. at 612-13; see also infra notes 56-59 and accompanying text. The court of appeals
held that the interpreter's function would violate the second prong of the test. The court also
indicated that even if the interpreter's services were provided only for secular subjects, the moni-
toring required would violate the entanglement prong of the test. Zobrest, 963 F.2d at 1196 n.5.

the IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends."^21 The Court held that because the aid program entitled individual parents to choose where to send their children to school but did not create a financial incentive for parents to send their children to a religious school, the presence of the sign-language interpreter in the Catholic school could not "be attributed to state decisionmaking."^22 The Court also held that, at most, the Catholic school would receive only an indirect benefit from the aid, "assuming that the school makes a profit on each student; [and] that, without an IDEA interpreter, the child would have gone to school elsewhere and . . . the school . . . would have been unable to fill that child's spot."^23

The Court disagreed with the school district's argument that providing the sign-language interpreter was similar to forms of aid that the Court found unconstitutional in *Meek v. Pittenger*^24 and *Grand Rapids School District v. Ball.*^25 In *Meek,* the Court struck down a Pennsylvania program that provided publicly funded services including counseling, psychological services, speech and hearing therapy, and instructional materials and equipment, including tape recorders, to nonpublic schools because it was not certain that the aid would be used exclusively for secular purposes.^26 Similarly in *Ball,* the Court struck down two programs that provided public employees to teach students in religious classrooms because it found a substantial risk that the aid would result in the advancement of religion at government expense.^27 The *Zobrest* Court concluded that the aid in those cases "relieved sectarian schools of costs they otherwise would have borne in educating their students," whereas the aid in *Zobrest* was not an expense the school "otherwise would have assumed."^28 The Court also noted that "[h]andicapped children, not sectarian schools, are the primary beneficiaries of the [program]."^29 Finally, the Court distinguished the aid by asserting that the task of a sign-language interpreter is

quite different from that of a teacher or guidance counselor . . . .

Nothing in this record suggests that a sign-language interpreter would do more than accurately interpret whatever material is presented to the class as a whole. In fact, ethical guidelines require interpreters to "transmit everything that is said in exactly

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21. *Id.* at 2467.
22. *Id.*
23. *Id.* at 2468.
26. *Meek,* 421 U.S. at 365-66; see also infra notes 68-80 and accompanying text.
27. *Ball,* 473 U.S. at 396-97; see also infra notes 104-11 and accompanying text.
29. *Id.* at 2469.
the same way it was intended." . . . The sign-language interpreter they have requested will neither add to nor subtract from that environment, and hence the provision of such assistance is not barred by the Establishment Clause.30

Justice Blackmun, joined by Justices Souter, Stevens, and O'Connor, dissented from the opinion on the grounds that the Court did not have to reach the constitutional question.31 Justice Blackmun, again joined by Justice Souter, further dissented from the Court's resolution of the Establishment Clause issue.32 Justice Blackmun contended that secular and religious components were "inextricably intertwined" in this case because the interpreter "would be required to communicate the material covered in religion class . . . and the daily Masses at which [the school] encourages attendance."33 Justice Blackmun argued that even a general aid program "may have specific applications that are constitutionally forbidden under the Establishment Clause."34 He also contended that such an aid program could be unconstitutional even if it took the form of direct aid to students or their parents.35 Although secular and nonideological public aid to sectarian schools had been upheld in the past, Justice Blackmun declared that "[the Court] has always proscribed the provision of benefits that afford even 'the opportunity for the transmission of sectarian views.'"36 In this case, though, the government was "furnish[ing] the medium for communication of a religious message."37 As a result, Justice Blackmun asserted that the state's providing a sign-language interpreter clearly violated the Establishment Clause.38

30. Id.
31. Id. at 2469-71 (Blackmun, J., dissenting). The Justices dissented on grounds that the Court could have remanded the case for consideration of statutory and regulatory issues. Id. at 2469-70 (Blackmun, J., dissenting). In the majority opinion, Chief Justice Rehnquist responded that because only the First Amendment issues were litigated below, the Court could address the constitutional claim. Id. at 2465-66. This point, though worthy of further discussion, is beyond the scope of this Note.
32. Id. at 2469, 2471-75 (Blackmun, J., dissenting).
33. Id. at 2472 (Blackmun, J., dissenting).
34. Id. at 2473 (Blackmun, J., dissenting) (citing Bowen v. Kendrick, 487 U.S. 589 (1988) and Aguilar v. Felton, 473 U.S. 402, 410 (1985)). In Bowen, the Court held that a general aid program did not on its face violate the Establishment Clause, but the Court remanded the case for examination of the constitutionality of particular applications. 487 U.S. at 621-22. In Aguilar, the Court struck down a publicly funded remedial education program for educationally disadvantaged children; the Court found that the aid would require excessive government entanglement to ensure that religion was not advanced. 473 U.S. at 413-14; see infra notes 112-18 and accompanying text.
36. Id. (Blackmun, J., dissenting) (quoting Wolman, 433 U.S. at 244).
37. Id. at 2474 (Blackmun, J., dissenting).
38. Id. (Blackmun, J., dissenting).
As Zobrest demonstrates, the Court has struggled to define the parameters of the Establishment Clause in cases involving public aid to sectarian schools. The Court first addressed this issue in Everson v. Board of Education. In Everson, the Court considered the constitutionality of a New Jersey statute that authorized local school districts to pay for the transportation of children attending parochial schools. In defining the limits of acceptable aid, the Court stated that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions." In five to four decision, however, the Court upheld the statute. The Court stated that although the Establishment Clause forbids the government from advancing religion, it must not "hamper its citizens in the free exercise of their own religion." Because the state contributed no money to the parochial school, and because the program was similar to other permissible public services—such as police and fire protection, public roads, and sidewalks—that are "indisputably marked off from the [school's] religious function," the Court found the statute to be "a general program to help parents get their children... safely and expeditiously to and from accredited schools," rather than an aid to religion. Thus, Everson illustrates the tension between the Establishment Clause requirement of separation of church and state and the First Amendment’s guarantee of the free exercise of religion. Because the separation of church and state is not absolute, the problem becomes one of degree.

41. Id. at 17. The case involved a local school district that, pursuant to the statute, authorized reimbursements to parents for money spent to transport their children to school. Part of the money was used to reimburse parents whose children attended a Catholic parochial school. Id. at 3.
42. Id. at 16.
43. Id. at 18.
44. Id. at 16. The Free Exercise Clause provides that "Congress shall make no law... prohibiting the free exercise [of religion]." U.S. CONST. amend. I.
46. Id. at 18.
47. See, e.g., Zorach v. Clauson, 343 U.S. 306 (1952) (upholding a New York law that permitted public schools to release students during school hours to go to religious centers for religious instruction). The Court stated:

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

....
The decision of the Court in *Board of Education v. Allen* further demonstrates this tension in resolving the degree of separation that the Establishment Clause requires. In *Allen*, the Court upheld a New York law that required public school authorities to provide textbooks to all students, including those in private sectarian schools. The Court again recognized "that the line between state neutrality to religion and state support of religion is not easy to locate." Nevertheless, as in *Everson,* the Court upheld the program by characterizing it as a general program available to all students. Because the statute authorized only secular textbooks, the Court held that the aid was intended only to further secular education. The Court refused to find that the sectarian schools would use the secular textbooks to further their religious purpose. Thus, the sectarian schools' performance of a secular educational function in addition to their religious function was sufficient to convince the Court that the aid did not have the primary effect of advancing or inhibiting religion.

Three years later in the seminal decision of *Lemon v. Kurtzman*, the Court announced the need for established criteria in its analysis of the Establishment Clause. The Court stated its intention to "draw lines with refer-

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... The problem, like many problems in constitutional law, is one of degree. *Id.* at 312-14; see also Kenneth F. Mott, *The Supreme Court and the Establishment Clause: From Separation to Accommodation and Beyond*, 14 J.L. & Educ. 111, 112-45 (1985) (tracing the evolution of the Court's separationist and accommodationist positions in its interpretation of the Establishment Clause).

49. *Id.* at 248. The New York law required local school boards, without charge, to "purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, textbooks." *Id.* at 239 n.3 (quoting N.Y. Educ. Law § 701 (McKinney 1967)).
50. *Id.* at 242.
51. 330 U.S. 1, 18 (1947); see also *supra* notes 40-47 and accompanying text.
53. *Id.* at 244-45.
54. *Id.* at 248.
55. *Id.* at 243-49.
56. 403 U.S. 602 (1971). In *Lemon*, the Court struck down Rhode Island and Pennsylvania statutes that provided "state aid to church-related elementary and secondary schools." *Id.* at 606. The Rhode Island statute provided a salary supplement for teachers of secular subjects in religious schools where the average per-pupil expenditure on secular education was below that of the average in the public schools. *Id.* at 607. The Pennsylvania statute authorized the state to reimburse religious schools for expenditures for teachers' salaries, textbooks, and instructional materials in secular subjects. *Id.* at 609-10. The Court held that the statutes violated the Establishment Clause because they impermissibly resulted in "excessive entanglement between government and religion." *Id.* at 613; see also *infra* note 59 and accompanying text. The Court found there was great potential for the entangling of religious and secular instruction and that the surveillance necessary to ensure that such entangling did not take place would itself result in impermissible entanglement. *Lemon*, 403 U.S. at 615-22. The Court also found that such subsidization would impermissibly lead to "political division along religious lines[,] . . . one of the principal evils against which the First Amendment was intended to protect." *Id.* at 622 (citation omitted).
ence to the three main evils against which the Establishment Clause was intended to afford protection: ‘sponsorship, financial support, and active involvement of the sovereign in religious activity.” 57 Accordingly, the Court presented a three-part test for this analysis: “[F]irst, the statute must have a secular legislative purpose; 58 second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’” 59

Application of the Lemon test resulted in a more separationist approach to public aid to religious schools. For example, in Committee for Public Education and Religious Liberty v. Nyquist, 60 the Court struck down three New York aid programs with the secular legislative purpose of “preserving a healthy and safe educational environment for all of [New York’s] school children,” and “promoting pluralism and diversity among its public and nonpublic schools.” 61 These programs failed under the Lemon test because they impermissibly advanced the religious mission of the sectarian schools. 62 They included direct money grants to the schools for maintenance and repair, a tuition reimbursement program for parents of children

57. Lemon, 403 U.S. at 612 (quoting Walz v. Tax Comm’n, 397 U.S. 664, 668 (1970)).
58. State programs have consistently survived the secular legislative purpose prong of the Lemon test because of the Court’s “reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state’s program may be discerned from the face of the statute.” Mueller v. Allen, 463 U.S. 388, 394-95 (1983); see also infra notes 61, 70, 76, 91, 108, and 128 and accompanying text. Some commentators have even called for the elimination of the purpose prong. See, e.g., William B. Peterson, “A Picture Held Us Captive”: Conceptual Confusion and the Lemon Test, 137 U. Pa. L. Rev. 1827, 1830-49 (1989) (arguing that a statute’s purpose cannot be discovered, and even if it could, it would not be helpful to the Court in deciding Establishment Clause cases).
59. Lemon, 403 U.S. at 612-13 (quoting Walz, 397 U.S. at 674 (citations omitted)). Justice White dissented in Lemon, arguing that the decision created an insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught—a promise the school and its teachers are quite willing and on this record able to give—and enforces it, it is then entangled in the “no entanglement” aspect of the Court’s Establishment Clause jurisprudence. Id. at 668 (White, J., dissenting in part and concurring in part). Justice White has argued against a strict separationist interpretation of the religion clauses in regard to public aid to religious schools, contending that the denial of such aid would make it “more difficult, if not impossible, for parents to follow the dictates of their conscience and seek a religious as well as secular education for their children.” Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 820 (White, J., dissenting); see also John J. Coughlin, Common Sense in Formation for the Common Good—Justice White’s Dissents in the Parochial School Aid Cases: Patron of Lost Causes or Precursor of Good News, 66 St. John’s L. Rev. 261, 265 (1992) (noting that Justice White “has persistently dissented from the Supreme Court’s strict-separationist, no-aid position”).
60. 413 U.S. 756 (1973).
61. Id. at 773.
62. Id. at 774-94.
attending nonpublic schools, and a tax relief program for parents who failed to qualify for the tuition reimbursement program.\textsuperscript{63}

The \textit{Nyquist} Court expressed concern that the lack of “appropriate restrictions” on the aid might result in impermissible use of the aid for religious purposes.\textsuperscript{64} The Court was also unpersuaded that the method of aid—direct reimbursement to parents as opposed to schools—negated the program’s primary effect of advancing religion.\textsuperscript{65} The Court’s recognition that religious schools performed a secular educational function in addition to their religious purposes was no longer sufficient to justify state aid, thus denoting a shift from \textit{Everson} and \textit{Allen}.\textsuperscript{66} The Court required more adequate assurances that the aid would “be used exclusively for secular, neutral and nonideological purposes.”\textsuperscript{67}

In \textit{Meek v. Pittenger},\textsuperscript{68} however, the Court approved a state program that lent secular textbooks directly to students in nonpublic schools, including religious schools.\textsuperscript{69} Relying on \textit{Allen}, the Court upheld the program because it found no evidence that the books would “be used for anything other than purely secular purposes.”\textsuperscript{70}

In contrast to the provision regarding textbooks, the Court held that a provision for lending instructional material and equipment, including tape recorders, to the religious schools was unconstitutional.\textsuperscript{71} Although these materials were considered “secular, nonideological and neutral,” the Court distinguished them because “it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed” by the schools.\textsuperscript{72} However, the Court had made precisely this

\begin{itemize}
\item \textsuperscript{63} \textit{Id.} at 762-65.
\item \textsuperscript{64} \textit{Id.} at 774. The Court wanted assurances that the aid would be used exclusively for secular purposes. However, given the religious orientation of the schools, the Court did not think the imposition of such restrictions was possible. \textit{Id.} at 777-80.
\item \textsuperscript{65} \textit{Id.} at 785-87. The Court stated, “if 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 actual dollars given eventually find their way into the sectarian institutions.” \textit{Id.} at 786.
\item \textsuperscript{66} \textit{Id.} at 775. Because the second prong was violated, the Court did not have to decide whether the programs violated the entanglement prong. The Court indicated, however, that “assistance of the sort here involved carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion.” \textit{Id.} at 794.
\item \textsuperscript{67} \textit{Id.} at 780.
\item \textsuperscript{68} 421 U.S. 349 (1975).
\item \textsuperscript{69} \textit{Id.} at 361-62.
\item \textsuperscript{70} \textit{Id.} at 362. In fact, the Court found the program “constitutionally indistinguishable from the New York textbook loan program upheld in [\textit{Allen}].” \textit{Id.} at 359.
\item \textsuperscript{71} \textit{Id.} at 355, 362-63. The instructional materials included periodicals, photographs, maps, charts, recordings, and films. The instructional equipment also included projectors and laboratory supplies. \textit{Id.} at 355.
\item \textsuperscript{72} \textit{Id.} at 365.
\end{itemize}
differentiation in regard to the textbooks. Nevertheless, the Court held these materials impermissible because the aid was direct, and the materials were not capable of restriction to secular purposes.

The Meek Court also struck down a similar provision that provided "auxiliary services" in the nonpublic schools, including "counseling, testing, and psychological services, speech and hearing therapy, teaching and related services for exceptional children, for remedial students, and for the educationally disadvantaged." Applying the Lemon test, the Court found that this aid had a secular legislative purpose as required under the first prong of the test. Further, the Court recognized that the publicly funded employees providing the auxiliary services were less likely than religious school teachers to intertwine religious and secular education because they were "not directly subject to the discipline of a religious authority."

Nevertheless, because most of the schools that benefitted were religious, the Meek Court found that the services were provided in "an atmosphere dedicated to the advancement of religious belief." Hence, the Court declared that "a diminished probability of impermissible conduct is not sufficient: 'The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion.'" Because this certainty could not occur without a surveillance scheme that amounted to impermissible entanglement, the Court held the program unconstitutional under the entanglement prong of the Lemon test.

The inconsistencies apparent in Meek also surfaced in Wolman v. Walter. In Wolman, the Court again approved the direct loan of textbooks to students, but prohibited the loan of other instructional materials and equipment. In drafting the challenged statutes, the Ohio legislature had attempted to avoid the direct aid pitfalls associated with the instructional materials in Meek by characterizing the aid as a loan to the pupil or his parent rather than a loan to the religious school. The Court found, however, that "[t]he equipment is substantially the same; it will receive the same use by the students; and it may still be stored and distributed on the

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73. See supra notes 68-70 and accompanying text.
74. Meek, 421 U.S. at 365.
75. Id. at 352-53.
76. Id. at 367-68. The Court noted the secular legislative purpose of assuring the "full development of the intellectual capacities of the children of Pennsylvania." Id.
77. Id. at 371-72.
78. Id. at 371.
79. Id. (quoting Lemon v. Kurtzman, 403 U.S. 602, 619 (1971)).
80. Id. at 372.
82. Id. at 237-38, 249-51.
83. Id. at 250.
nonpublic school premises." As a result, the Court held that it "would exalt form over substance if this distinction were found to justify a result different from that in Meek."85

The Court's contemporary view regarding the Establishment Clause began to emerge in Mueller v. Allen.86 In Mueller, the Court again applied the Lemon test to uphold a Minnesota statute that permitted parents to deduct "expenses incurred for the 'tuition, textbooks and transportation' of dependents attending elementary or secondary schools."87 The statute was similar to the reimbursement and tax relief programs struck down in Nyquist.88 However, relying on Allen89 and Everson,90 the Mueller Court upheld the statute because it had the secular legislative purpose of ensuring that the state's citizenry was well educated.91 The Court also held that the statute did not have the primary effect of advancing religion because it was part of a broad program "available for educational expenses incurred by all parents, including those whose children attend public schools and those whose children attend . . . sectarian private schools."92 The Court distinguished its decision from Nyquist on this basis.93

Justice Rehnquist, writing for the majority in Mueller, conceded that the effect of state aid provided to parents in this situation was comparable to direct aid to the schools their children attended.94 Nevertheless, Justice Rehnquist contended this was not direct aid, but rather an "attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available

84. Id.
85. Id. The Wolman Court upheld provisions for diagnostic and therapeutic services, however. The Court found the diagnostic services permissible because the diagnosticians had limited contact with the students and provided little or no educational content in their services. The Court upheld the therapeutic services because they were offered at sites away from the religious schools. Id. at 244, 247-48.
87. Id. at 391 (quoting Mnn. Stat. § 290.09(22) (1982)).
88. 413 U.S. 756, 762-67 (1973); see also supra note 63 and accompanying text. As Justice Marshall pointed out in his dissent in Mueller, both cases appeared to involve programs for the relief of financial burdens on religious school parents to the ultimate benefit of religious schools. Mueller, 463 U.S. at 407-08 (Marshall, J., dissenting).
89. 392 U.S. 236 (1968).
90. 330 U.S. 1 (1947).
91. Mueller, 463 U.S. at 394-95. The Court also noted that there "is a strong public interest in assuring the continued financial health of private schools, both sectarian and nonsectarian." Id. at 395.
92. Id. at 397-98.
93. Id. at 398-99. For a discussion of Nyquist, see supra notes 60-67 and accompanying text. Cf. Ronald D. Rotunda, The Constitutional Future of the Bill of Rights: A Closer Look at Commercial Speech and State Aid to Religiously Affiliated Schools, 65 N.C. L. Rev. 917, 933 (1987) (arguing that the decision in Mueller is perverse in light of Nyquist "because deductions benefit the rich more than the poor, while tax credits . . . do not share that bias").
94. Mueller, 463 U.S. at 399.
tax benefit at issue." The statute thus apparently avoided the "form over substance" problem of Wolman.

The Court further held that the statute was not an incentive for parents to send their children to religious schools, even though parents who sent their children to schools that charged tuition received the greatest benefit under the program. Justice Rehnquist declared that "[the Court] would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." Justice Rehnquist did point out, however, that public school parents also benefitted from deductions under the statute, and that private schools benefitted public schools by substantially relieving the tax burden associated with their operation.

The Court also determined that the statute did not involve excessive entanglement of government and religion because the "only plausible source" of this entanglement would be the state's determination of "whether particular textbooks qualify for a deduction." The Court held that this was the same determination allowed in Allen.

Although Mueller appeared to signal a more relaxed application of the Lemon test, the Court again returned to a strict separationist approach in the companion cases of Grand Rapids School District v. Ball and Aguilar v. Felton. In Ball, the Supreme Court found that two publicly funded programs that provided classes to nonpublic school students in predominantly sectarian nonpublic schools violated the Establishment Clause. One of the programs, "Shared Time," involved publicly funded teachers moving from classroom to classroom in nonpublic schools during the course of the regular school day, teaching courses that were supplementary to Michigan's accredited school program. The second program, "Community Education," offered classes in a variety of subjects at the end of the school day in...

95. Id. at 399-400.
96. See supra notes 81-85 and accompanying text.
98. Id. at 401.
99. Id. at 402-03.
100. Id. at 403. The Court indicated that because only secular textbooks would qualify for a deduction, state officials had to determine whether particular books were or were not secular. Id.
101. Id.
104. Ball, 473 U.S. at 397. The Court noted that "[f]orty of the forty-one schools at which the programs operate[d] [were] sectarian in character." Id. at 379.
105. Id. at 375-76. The public school district supplied materials used in the program. Approximately 10% of the publicly funded teachers involved in the program had taught previously in the same nonpublic schools where they were employed. Id. at 376.
religious schools, as well as at other sites. The teachers in the community education program were part-time public school employees.

Justice Brennan, writing for the majority, agreed with the lower court's determination that the first prong of the Lemon test was satisfied because the purpose of the programs was "manifestly secular." However, Justice Brennan found the programs unconstitutional under the primary effect prong because they "pose[d] a substantial risk of state-sponsored indoctrination." The Court concluded that the programs impermissibly promoted religion in three ways:

The state-paid instructors, influenced by the pervasively sectarian nature of the religious schools in which they work, may subtly or overtly indoctrinate the students in particular religious tenets at public expense. The symbolic union of church and state inherent in the provision of secular, state-provided instruction in the religious school buildings threatens to convey a message of state support for religion to students and to the general public. Finally, the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects.

Thus, the Court held that the aid was impermissible because it amounted to a direct subsidy to the religious school.

In Aguilar v. Felton, a five-member majority of the Court struck down a New York program that provided for publicly funded employees to conduct remedial programs in private religious schools to help with the needs of educationally deprived children from low-income families. Most of the students in the program were enrolled in public schools. The

106. Id. at 376-77. The classes included "Arts and Crafts, Home Economics, Spanish, Gymnastics, Yearbook Production, Christmas Arts and Crafts, Drama, Newspaper, Humanities, Chess, Model Building, and Nature Appreciation." Id.

107. Id. at 377.


109. Id. at 387.

110. Id. at 397. Because it concluded that the programs violated the primary effect prong, the Court did not determine whether the programs also violated the entanglement prong. Id. at 397 n.14.

111. Id. at 396.


113. The programs included "remedial reading, reading skills, remedial mathematics, English as a second language, and guidance services." Id. at 406. The publicly funded employees included "teachers, guidance counselors, psychologists, psychiatrists, and social workers" who had volunteered to teach in the religious schools. Id.

114. Id. at 404-07.

115. Id. at 406. The Court noted that of those students eligible for the program, 13.2% were enrolled in private schools, and of that group, 84% were enrolled in sectarian schools. Id.
city of New York was careful to adopt a monitoring system to ensure that religion would not be promoted in the secular classes. However, the Court ruled that the monitoring system itself resulted in a violation of the Establishment Clause because it amounted to "excessive entanglement of church and state." Thus, as one commentator has stated: "Ball failed for lack of monitoring; Aguilar failed for too much monitoring. In both cases, the Court assumed ill effects without requiring evidence to support them."

Justice O'Connor concurred in part and dissented in part in Ball, and dissented in Aguilar. Applying what came to be known as the endorsement test, Justice O'Connor contended that "[i]f a statute lacks a purpose or effect of advancing religion, [it should not be] invalidated merely because it requires some ongoing cooperation between church and state or some state supervision to ensure that state funds do not advance religion."

Perhaps in response to the dilemma created by the outcomes in Ball and Aguilar, a unanimous Court held in Witters v. Washington Department of Services for the Blind that the primary effect of public funds provided to a blind student attending a private Christian college was not the advancement of religion. Applying the Lemon test, the Washington Supreme Court had denied the student's request for assistance for vocational rehabilitation services because the aid "'clearly ha[d] the primary effect of advancing religion'"—the funds would be used to help the student pursue religious studies at a Christian college.

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116. Id. at 409.
117. Id. The Court held that "the scope and duration of [the program] would require a permanent and pervasive state presence in the sectarian schools receiving aid. This pervasive monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement." Id. at 412-13.
120. Aguilar, 473 U.S. at 421 (O'Connor, J., dissenting).
121. See infra notes 134-38 and accompanying text.
124. Id. at 489. Larry Witters, who suffered from a progressive eye condition, had applied for vocational rehabilitation aid under a Washington law that "'[p]rovide[d] for special education and/or training in the professions, business or trades' so as to 'assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care.'" Id. at 483 (quoting WASH. REV. CODE § 74.16.18 (1981)).
126. Id.
The Supreme Court, also applying the three-part Lemon test, reversed. Justice Marshall, writing for the Court, found a secular purpose for the aid. He further found that the aid did not have the primary effect of advancing religion because the aid was paid directly to the student, who then made a "genuinely independent and private choice[e] of aid recipients." Thus, the program was "in no way skewed towards religion" and "create[d] no financial incentive for students to undertake sectarian education." In his concurring opinion, Justice Powell, joined by Chief Justice Rehnquist, noted the absence of Mueller v. Allen from the Court's opinion. Justice Powell emphasized that Mueller strongly supported the Court's decision because it made clear that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the Lemon test, because any aid to religion results from the private choices of individual beneficiaries.

Under the Lemon test, the Court has continued to shift between separationist and accommodationist approaches when dealing with public aid to religious schools. Perhaps as a result of these varying outcomes, the Court has expressed dissatisfaction with the traditional Lemon test. Accordingly, the Court has increasingly looked to alternative methods of interpretation in its Establishment Clause analysis. The method of interpretation that has moved to the fore is the endorsement test, first espoused by Justice O'Connor in Lynch v. Donnelly. The endorsement test is a modification of the first two prongs of the traditional Lemon test. Instead of focusing on the secular purpose and primary effect of state aid, the endorsement test

127. Id.
128. Id. at 485-86. The Court noted that the "program was designed to promote the well-being of the visually handicapped through the provision of vocation rehabilitation services." Id.
129. Id. at 487.
130. Id. at 488. Notably, Justice Marshall also observed that "nothing in the record indicate[d] that, if petitioner succeed[ed], any significant portion of the aid expended under the Washington program as a whole [would] end up flowing to religious education" because no other person had ever sought to finance religious education under the program. Id. As a result, the Court did not find it "appropriate to view any aid ultimately flowing to the [Christian college] as resulting from a state action sponsoring or subsidizing religion." Id. The Court declined to address the entanglement issue, indicating that it would be inappropriate to do so without the benefit of a lower court decision on that issue. Id. at 489 n.5.
131. 463 U.S. 388 (1983); see also supra notes 86-101 and accompanying text.
133. See, e.g., Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (emphasizing the Court's "unwillingness to be confined to any single test or criterion in this sensitive area").
134. Id. at 690-94 (O'Connor, J., concurring). In Lynch the Court upheld a city's inclusion of a nativity scene in its Christmas display. Id. at 687.
focuses on whether the "government intends to convey" or has "the effect of communicating a message of endorsement or disapproval of religion." 135

The endorsement test gained increased support in County of Allegheny v. ACLU. 136 In Allegheny, the Court held that a creche displayed in a county courthouse was impermissible under the Establishment Clause because it sent a message of governmental endorsement of religion. 137 The influence of the endorsement test is evident in Zobrest from the Court's concern with whether public aid in religious schools can "be attributed to state decisionmaking." 138

In light of this background, Zobrest v. Catalina Foothills School District signifies a strong move by the Court to accommodate public aid to religious schools. Zobrest may also represent a new method of Establishment Clause interpretation in which the Court bases its holding solely on factual similarities of previous cases instead of invoking the Lemon test.

A comparison of the facts in Zobrest with those in earlier cases evidences the Court's shift in Establishment Clause interpretation. The aid approved in Witters v. Washington Department of Services for the Blind 139 demonstrates that the aid in Zobrest would not have presented an Establishment Clause problem if state funds had been given directly to James Zobrest's parents to hire an interpreter. 140 However, as Justice Blackmun observed, Zobrest did not involve simply the "disbursement of funds." 141 Rather, this case marks the first time the Court permitted a publicly funded employee to be directly involved in a student's ongoing religious indoctrination in a parochial school. 142

Prior to this case, as Justice Blackmun observed, the Supreme Court had endeavored to eliminate "even 'the opportunity for the transmission of

137. Id. at 598-602. Notably, however, the court found that a menorah displayed next to a Christmas tree in front of a city-county building did not impermissibly endorse religion "given its 'particular physical setting.'" Id. at 621.
138. Zobrest, 113 S. Ct. at 2467.
139. 474 U.S. 481 (1986); see also supra notes 123-30 and accompanying text.
140. As the Court pointed out, the school district readily conceded this fact. Zobrest, 113 S. Ct. at 2469 n.11. However, Witters could have been distinguished from Zobrest because Witters involved aid to a student attending a Christian college, not a religious elementary or secondary school. See, e.g., Rotunda, supra note 93, at 932-33 (observing that the Court has been "quite generous in allowing states to give financial assistance directly to religious institutions when schools are on the college or graduate level" but has forbidden similar aid to religiously affiliated elementary or high schools).
141. Zobrest, 113 S. Ct. at 2474 (Blackmun, J., dissenting).
142. Id. at 2467-69.
sectarian views’” by a publicly funded employee in a religious school. Under this approach even inadvertent transmission of sectarian views would have violated the Establishment Clause. Yet, by allowing a state-provided interpreter to relate the content of religion classes and worship services, the Zobrest Court seems to permit such public funding of religious instruction.

One of the bases the Court gave for distinguishing the aid in Zobrest from that struck down in previous cases was that the task of a sign-language interpreter is different from that of a teacher or guidance counselor. An interpreter does not add anything to the school’s instruction, but simply “transmit[s] everything that is said in exactly the same way it was intended.” Thus, an interpreter is acceptable because there is no teaching or indoctrinating involved, but rather a neutral transmission of information. If the school intends for the information transmitted by the interpreter to indoctrinate, however, a distinction is difficult to find. As Justice Blackmun pointed out, “[a] state-employed sign-language interpreter would be required to communicate the material covered in religion class... and the daily Masses at which [the religious school] encourages attendance.” Thus, the publicly funded interpreter is actively participating in the child’s religious indoctrination.

In addition, based on the Court’s reasoning that an interpreter is acceptable because she neutrally relates information, an interpreter’s function

143. Id. at 2473 (Blackmun, J., dissenting) (quoting Wolman v. Walter, 433 U.S. 229, 244 (1977)).
145. Zobrest, 113 S. Ct. at 2472 (Blackmun, J., dissenting).
146. See, e.g., Meek, 421 U.S. at 355, 362-63; Ball, 473 U.S. at 397; see also supra notes 68-80, 104-11 and accompanying text.
147. Zobrest, 113 S. Ct. at 2469.
148. Id. at 2469 (quoting Joint Appendix at 73, Zobrest (No. 92-94)).
149. Id.
150. Id. at 2472 (Blackmun, J., dissenting).
151. Id. (Blackmun, J., dissenting).
152. But see Dixie S. Hufner & Steven F. Hufner, Publicly Financed Interpreter Services for Parochial School Students with IDEA-B Disabilities, 21 J.L. & Educ. 223, 226 (1992). These commentators argue that the provision of interpreters does not involve the government in actual inculcation any more than does provision of buses, eyeglasses, Kurzweil reading machines for the blind, or other equipment that may have the incidental effect of providing small-scale, personalized access to religious instruction. The relevant consideration is whether the publicly paid employees are responsible for the inculcation.

Id.
is in effect no different from that of a tape recorder. In both *Meek v. Pittenger*,\(^\text{153}\) and *Wolman v. Walter*,\(^\text{154}\) however, the Court expressly held that state aid in the form of recording equipment was impermissible because there was no guarantee that the equipment would be used exclusively for secular purposes.\(^\text{155}\) The *Meek* Court also struck down the state's practice of providing public employees for hearing therapy because of the risk that the employees might impermissibly promote religion.\(^\text{156}\) Nevertheless, in *Zobrest*, the Court permitted analogous aid in the form of an interpreter.\(^\text{157}\)

Perhaps anticipating such objections, the *Zobrest* Court also held that the interpreter is distinguishable from prior cases because the state is not directly aiding the religious school, as in *Meek* and *Ball*, by relieving it "of an expense that it otherwise would have assumed in educating its students."\(^\text{158}\) As a result, the Court ruled that the aid was more akin to that approved in *Mueller* and *Witters*.\(^\text{159}\) Still, this distinction does not address the argument that religious indoctrination is taking place by means of a publicly funded employee, which could lead to contorted results.

Suppose, for example, that James Zobrest had a wonderful experience at the Catholic school he was attending. His parents then relate his experience to friends who also have deaf children, and the friends then apply for assistance under the IDEA program and enroll their children in the Catholic school. The government would apparently be required to provide an interpreter at the school for each deaf student who qualified for aid under the program. Assuming that the number of deaf students in the school increased significantly, however, it might be more efficient simply to provide an interpreter for each classroom in which there is at least one deaf student. This could lead—apparently without violation of the Establishment

\(^{155}\) See supra notes 71-74, 82-85 and accompanying text.
\(^{156}\) See supra notes 75-80 and accompanying text. The provision of such auxiliary services was allowed in *Wolman*, but only because the services were offered at sites away from the religious schools. See supra note 85.
\(^{157}\) *Zobrest*, 113 S. Ct. at 2469. Arguably, the decision in *Zobrest* is broader than necessary. This case could be distinguished in the future because it deals with a person who is handicapped. Although the opinion did not address the issue, the Court may have been concerned that not providing an interpreter would impermissibly impair James Zobrest's right to choose a private education because his education at the Catholic school would not have been possible without an interpreter. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (holding a state law that compelled students to attend public schools unconstitutional because it impermissibly interfered with the liberty of parents to direct the upbringing and education of their children); see also Huefner & Huefner, supra note 152, at 227 (arguing that, although parents are not entitled to reimbursement for the private education they have selected under the IDEA, "the public school must make special education and related services available to the private school student even though the student attends a private school").
\(^{158}\) *Zobrest*, 113 S. Ct. at 2469.
\(^{159}\) Id. at 2466-68; see also supra notes 86-101 and 123-32 and accompanying text.
Clause—to assignment of an interpreter solely to religion classes, or solely to the chapel to interpret worship services. Such a result appears profoundly illogical if the Establishment Clause is meant to afford protection against "active involvement of the sovereign in religious activity."\footnote{160}

Further, if the enrollment of deaf students in the school did significantly increase, at some point the school conceivably would have an economic interest in retaining the students. Thus, providing interpreters could be an expense the school would otherwise have assumed were it not for the government program. Under the Court's reasoning in Zobrest, then, a distinction no longer exists between this aid and that struck down in Meek and Ball.\footnote{161} However, does that necessarily mean the Court would find the aid unconstitutional? The interpreters would still be present in the Catholic school as part of a broad, general program that neutrally provides aid to parents who then individually choose where to send their children to school, with no financial incentive for them to choose a religious school.\footnote{162} The Court's reasoning in Mueller does not make clear that the lack of such a distinction would lead to a different result.\footnote{163}

On the other hand, Justice Blackmun argued in his dissent "that government crosses the boundary [of constitutionality] when it furnishes the medium for communication of a religious message."\footnote{164} But what if the aid provided in this case had been a hearing aid rather than an interpreter? Would a hearing aid present the same constitutional problems as an interpreter or a tape recorder? Certainly the functions of all three are similar, but it is not clear under the dissent's reasoning that this "medium" would necessarily be unconstitutional. The hearing aid would appear to alleviate Justice Blackmun's concerns about the "ongoing, daily, and intimate governmental participation" in religious teaching.\footnote{165} Government involvement in the form of a hearing aid, like the provision of funds, would stop once the school or government provided the hearing aid.\footnote{166} Yet, if the dissent found the hearing aid did not present the same constitutional problems, would disallowing interpreters for deaf students for whom a hearing aid is insufficient be equitable? Certainly such an outcome seems unfair to those with the most severe problems.\footnote{167}

\footnotetext[161]{161. See supra notes 68-80, 104-11 and accompanying text.}
\footnotetext[162]{162. See Zobrest, 113 S. Ct. at 2466-68.}
\footnotetext[163]{163. See supra notes 94-99 and accompanying text.}
\footnotetext[164]{164. Zobrest, 113 S. Ct. at 2474 (Blackmun, J., dissenting).}
\footnotetext[165]{165. Id. (Blackmun, J., dissenting).}
\footnotetext[166]{166. See id. (Blackmun, J., dissenting) (distinguishing the cash payments approved in Witters and Mueller from the function of a state-funded interpreter).}
\footnotetext[167]{167. See generally Lines, supra note 118, at 12-23 (arguing that the Court's application of the Establishment Clause results in inequitable treatment of disadvantaged children).}
In any event, a state-funded interpreter involved in the ongoing teaching of religious doctrine presents serious Establishment Clause problems. As Justice Blackmun observed, such aid may impermissibly "place the imprimatur of governmental approval upon [a] favored religion, conveying a message of exclusion to all those who do not adhere to its tenets."\footnote{Zobrest, 113 S. Ct. at 2474 (Blackmun, J., dissenting).}

Furthermore, the presence of a publicly funded interpreter in religious schools could lead to problems of individual liberty if the religious school required specific forms of dress or conduct for anyone upon their premises.\footnote{Id. (Blackmun, J., dissenting).}

Perhaps a better solution, as in \textit{Witters},\footnote{See supra notes 123-32 and accompanying text.} would be to limit state aid to funds provided directly to individuals so that they could, in essence, purchase their own aid. This approach would alleviate the ongoing nature of government involvement that the dissent in \textit{Zobrest} finds troublesome.\footnote{Id. (Blackmun, J., dissenting).}

Arguably, like the distinction attempted in \textit{Wolman},\footnote{Zobrest, 113 S. Ct. at 2474 (Blackmun, J., dissenting).} this solution is mere "form over substance."\footnote{See supra notes 81-85 and accompanying text.} Still, given the precedent leading up to \textit{Zobrest} and the problems that may arise from the aid provided in it,\footnote{Wolman v. Walter, 433 U.S. 229, 250 (1977).} this resolution would seem to be a less troublesome and more consistent determination of where to draw the line between church and state when dealing with public aid to religious schools.\footnote{See supra notes 168-69 and accompanying text.}

Finally, \textit{Zobrest} may represent a new method of Establishment Clause interpretation in regard to public aid to religious schools. The Court's application of the \textit{Lemon} test has received widespread criticism virtually since the test's inception.\footnote{Donald L. Beschle, \textit{The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor}, 62 \textit{Notre Dame L. Rev.} 151, 163-64 (1987); see also Jesse H. Choper, \textit{The Religion Clauses of the First Amendment: Reconciling the Conflict}, 41 U. \textit{Pitt. L. Rev.} 637, 680 (1980) ("[A]pplication of the Court's three-prong test has generated ad hoc judgments which are incapable of being reconciled on any principled basis."); Philip B. Kurland, \textit{The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court}, 24 \textit{Vill. L. Rev.} 3, 18, 20 (1978). Professor Kurland argues that the three-prong test has resulted in as much confusion and conflict under the establishment clause as the Court's decisions under the free exercise clause. . . . [T]he three-prong test hardly elucidates the Court's judgments. Nor does it cover the plastic
leading to inconsistent results, and "simply incorrect." Indeed, members of the Court have also expressed their dissatisfaction with test. Most recently, Justice Scalia attacked the Court's use of the Lemon test:

Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . . . Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart . . . and a sixth has joined an opinion doing so. Yet the Court has expressly refused to overrule the test.

As evidenced in the Court's use of the endorsement test, however, the Court has strived to refine its Establishment Clause interpretation. Zobrest, then, may represent a new trend in regard to public aid to religious schools under which the Court will look to the facts of prior cases rather than applying the Lemon test anew.

The Court has established considerable precedent in the area of public aid to religious schools. As a result, neither the majority nor the dissent in Zobrest had to apply the Lemon test in its opinion. Further, the only indication of the endorsement test in the majority opinion appears to be the Court's contention that the presence of the interpreter in the Catholic school

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nature of the judgments in this area. Judicial discretion, rather than constitutional mandate, controls the results.

Id. at 18, 20.

177. Beschle, supra note 176, at 163-64.

178. Chief Justice Rehnquist has stated that "[t]he three-part test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize." Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting). Further, a majority of the Court seems to have approved a modification of Lemon, as seen in its use of the endorsement test. See supra notes 134-38 and accompanying text.


181. See supra notes 134-38 and accompanying text.

182. See, e.g., Lee, 112 S. Ct. at 2658-61 (finding an Establishment Clause violation when government activity coerces individuals to participate in a religious activity).

183. See supra notes 40-132 and accompanying text.
could not "be attributed to state decisionmaking." This treatment may indicate that the Court will ignore its stated Establishment Clause test criteria in future cases dealing with public aid to religious schools. Such a change in the Court's analysis, however, would appear to further confuse an already confused area by making future decisions even more unpredictable.

Zobrest illustrates the Court's continuing trend of accommodating increasingly broad areas of public aid to religious schools. By allowing a publicly funded interpreter to be involved in a parochial school student's religious indoctrination, the Court has made an unprecedented move in this area. In addition, as demonstrated in the lower court's contrary decision in this case, the Supreme Court's disregard of the Lemon test arguably allowed the Court to reach this result. If the Court continues this approach of looking to the facts of prior cases rather than applying the Lemon test, such accommodationist results are likely to continue. However, deciding such important Establishment Clause issues on a case by case basis will only add more uncertainty to the law.

T. Jonathan Adams

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184. Zobrest, 113 S. Ct. at 2467.
185. See supra notes 18-19 and accompanying text. But see Huefner & Huefner, supra note 152, at 235-39 (arguing that the Lemon test can accommodate interpreter services on parochial school premises).