Buckeye State

WOLMAN v. WALTER
SUPREME COURT OF THE UNITED STATES
433 U.S. 229
June 24, 1977

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

This is still another case presenting the recurrent issue of the limitations imposed by the Establishment Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment, on state aid to pupils in church-related elementary and secondary schools. Appellants are citizens and taxpayers of Ohio. They challenge all but one of the provisions of Ohio Rev.Code Ann. § 3317.06 which authorize various forms of aid. The appellees are the State Superintendent of Public Instruction, the State Treasurer, the State Auditor, the Board of Education of the City School District of Columbus, Ohio, and, at their request, certain representative potential beneficiaries of the statutory program. A three-judge court was convened. It held the statute constitutional in all respects. We noted probable jurisdiction.

I

Section 3317.06 was enacted after this Court's May 1975 decision in Meek v. Pittenger[1] and obviously is an attempt to conform to the teachings of that decision...In broad outline, the statute authorizes the State to provide nonpublic school pupils with books, instructional materials and equipment, standardized testing and scoring, diagnostic services, therapeutic services, and field trip transportation.

The initial biennial appropriation by the Ohio Legislature for implementation of the statute was the sum of $88,800,000. Funds so appropriated are paid to the State's public school districts and are then expended by them. **All disbursements made with respect to nonpublic schools have their equivalents in disbursements for public schools, and the amount expended per pupil in nonpublic schools may not exceed the amount expended per pupil in the public schools.**

The parties stipulated that during the 1974-1975 school year there were 720 chartered nonpublic schools in Ohio. Of these, all but 29 were sectarian. More than 96% of the nonpublic enrollment attended sectarian schools, and more than 92% attended Catholic schools. It was also stipulated that, if they were called, officials of representative Catholic schools would testify that such schools operate under the general supervision of the bishop of their diocese; that most principals are members of a religious order within the Catholic Church; that a little less than one-third of the teachers are members of such religious orders; that "in all probability a majority of the

[1] Case 1A-R-051 on this website.

teachers are members of the Catholic faith"; and that many of the rooms and hallways in these schools are decorated with a Christian symbol. All such schools teach the secular subjects required to meet the State's minimum standards. The state-mandated five-hour day is expanded to include, usually, one-half hour of religious instruction. Pupils who are not members of the Catholic faith are not required to attend religion classes or to participate in religious exercises or activities, and no teacher is required to teach religious doctrine as a part of the secular courses taught in the schools.

The parties also stipulated that nonpublic school officials, if called, would testify that none of the schools covered by the statute discriminate in the admission of pupils or in the hiring of teachers on the basis of race, creed, color, or national origin.

The District Court concluded:

> "Although the stipulations of the parties evidence several significant points of distinction, the character of these schools is substantially comparable to that of the schools involved in Lemon v. Kurtzman[2]."

II

The mode of analysis for Establishment Clause questions is defined by the three-part test that has emerged from the Court's decisions. In order to pass muster, a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion. See Roemer v. Maryland Public Works Bd.[3]; Committee for Public Education v. Nyquist[4]; Lemon v. Kurtzman.

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

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

III

Textbooks

Section 3317.06 authorizes the expenditure of funds:

[2] Case 1A-R-042 on this website.
[3] Case 1A-R-052 on this website.
[4] Case 1A-R-047 on this website.

> "(A) To 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 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."

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

> "The secular textbooks used in nonpublic schools will be the same as the textbooks used in the public schools of the state. Common suppliers will be used to supply books to both public and nonpublic school pupils."
>
> "Textbooks, including book substitutes, provided under this Act shall be limited to books, reusable workbooks, or manuals, whether bound or in looseleaf form, intended for use as a principal source of study material for a given class or group of students, a copy of which is expected to be available for the individual use of each pupil in such class or group."

This system for the loan of textbooks to individual students bears a striking resemblance to the systems approved in Board of Education v. Allen[5] and in Meek v. Pittenger. Indeed, the only distinction offered by appellants is that the challenged statute defines "textbook" as "any book or book substitute." Appellants argue that a "book substitute" might include auxiliary equipment and materials that, they assert, may not constitutionally be loaned. We find this argument untenable in light of the statute's separate treatment of instructional materials and equipment in its subsections (B) and (C), and in light of the stipulation defining textbooks as "limited to books, reusable workbooks, or manuals." Appellants claim that the stipulation shows only the intent of the Department of Education and that the statute is so vague as to fail to insure against sectarian abuse of the assistance programs, citing Meek and Lemon. We find no grounds, however, to doubt the Board of Education's reading of the statute, or to fear that the Board is using the stipulations as a subterfuge. As read, the statute provides the same protections against abuse as were provided in the textbook programs under consideration in Allen and in Meek.

In the alternative, appellants urge that we overrule Allen and Meek. This we decline to do. Accordingly, we conclude that § 3317.06(A) **is constitutional**.

IV

Testing and Scoring

[5] Case 1A-R-037 on this website.

Section 3317.06 authorizes expenditure of funds:

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

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

In Levitt v. Committee for Public Education[6], this Court invalidated a New York statutory scheme for reimbursement of church-sponsored schools for the expenses of teacher-prepared testing. The reasoning behind that decision was straightforward. The system was held unconstitutional because "no means are available, to assure that internally prepared tests are free of religious instruction."

There is no question that the State has a substantial and legitimate interest in insuring that its youth receive an adequate secular education. The State may require that schools that are utilized to fulfill the State's compulsory-education requirement meet certain standards of instruction and may examine both teachers and pupils to ensure that the State's legitimate interest is being fulfilled. Levitt; Lemon. Pierce v. Society of Sisters[7]. Under the section at issue, the State provides both the schools and the school district with the means of ensuring that the minimum standards are met. The nonpublic school does not control the content of the test or its result. This serves to prevent the use of the test as a part of religious teaching, and thus avoids that kind of direct aid to religion found present in Levitt. Similarly, the inability of the school to control the test eliminates the need for the supervision that gives rise to excessive entanglement. We therefore agree with the District Court's conclusion that § 3317.06(J) **is constitutional**.

V

Diagnostic Services

Section 3317.06 authorizes expenditures of funds:

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

It will be observed that these speech and hearing and psychological diagnostic services are to be provided within the nonpublic school. It is stipulated, however, that the personnel (with the exception of physicians) who perform the services are employees of the local board of education; that physicians may be hired on a contract basis; that the purpose of these services is to

[6] Case 1A-R-050 on this website.
[7] Case 1A-R-005 on this website.

determine the pupil's deficiency or need of assistance; and that treatment of any defect so found would take place off the nonpublic school premises.

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

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

> "Our decisions from Everson v. Board of Education[8] to Allen have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause."

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

In Meek the Court did hold unconstitutional a portion of a Pennsylvania statute at issue there that authorized certain auxiliary services "remedial and accelerated instruction, guidance counseling and testing, speech and hearing services" on nonpublic school premises. The Court noted that the teacher or guidance counselor might "fail on occasion to separate religious instruction and the advancement of religious beliefs from his secular educational responsibilities." The Court was of the view that the publicly employed teacher or guidance counselor might depart from religious neutrality because he was "performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." The statute was held unconstitutional on entanglement grounds, namely, that in order to insure that the auxiliary teachers and guidance counselors remained neutral, the State would have to engage in continuing surveillance on the school premises. The Court in Meek explicitly stated, however, that the provision of diagnostic speech and hearing services by Pennsylvania seemed "to fall within that class of general welfare services for children that may be provided by the State regardless of the incidental benefit that accrues to church-related schools." The provision of such services was invalidated only because it was found unseverable from the unconstitutional portions of the statute.

The reason for considering diagnostic services to be different from teaching or counseling is readily apparent. First, diagnostic services, unlike teaching or counseling, have little or no

[8] Case 1A-R-022 on this website.

educational content and are not closely associated with the educational mission of the nonpublic school. Accordingly, any pressure on the public diagnostician to allow the intrusion of sectarian views is greatly reduced. Second, the diagnostician has only limited contact with the child, and that contact involves chiefly the use of objective and professional testing methods to detect students in need of treatment. The nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student.

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

VI

Therapeutic Services

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

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

At the outset, we note that in its present posture the case does not properly present any issue concerning the use of a public facility as an adjunct of a sectarian educational enterprise. The District Court construed the statute, as do we, to authorize services only on sites that are "neither physically nor educationally identified with the functions of the nonpublic school." Thus, the services are to be offered under circumstances that reflect their religious neutrality.

We recognize that, unlike the diagnostician, the therapist may establish a relationship with the pupil in which there might be opportunities to transmit ideological views. In Meek the Court acknowledged the danger that publicly employed personnel who provide services analogous to those at issue here might transmit religious instruction and advance religious beliefs in their activities. But, as discussed in Part V, the Court emphasized that this danger arose from the fact

that the services were performed in the pervasively sectarian atmosphere of the church-related school. See also Lemon. The danger existed there, not because the public employee was likely deliberately to subvert his task to the service of religion, but rather because the pressures of the environment might alter his behavior from its normal course. So long as these types of services are offered at truly religiously neutral locations, the danger perceived in Meek does not arise.

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

Accordingly, we hold that providing therapeutic and remedial services at a neutral site off the premises of the nonpublic schools will not have the impermissible effect of advancing religion. Neither will there be any excessive entanglement arising from supervision of public employees to insure that they maintain a neutral stance. It can hardly be said that the supervision of public employees performing public functions on public property creates an excessive entanglement between church and state. Sections 3317.06(G), (H), (I), and (K) **are constitutional**.

VII

Instructional Materials and Equipment

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

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

In Meek, however, the Court considered the constitutional validity of a direct loan to nonpublic schools of instructional material and equipment, and, despite the apparent secular nature of the goods, held the loan impermissible. Mr. Justice Stewart, in writing for the Court, stated:

> "The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. See Lemon v. Kurtzman. Substantial aid to the educational

> function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. 'The secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined.' (opinion of Brennan, J.)."

Thus, even though the loan ostensibly was limited to neutral and secular instructional material and equipment, it inescapably had the primary effect of providing a direct and substantial advancement of the sectarian enterprise.

Appellees seek to avoid Meek by emphasizing that it involved a program of direct loans to nonpublic schools. In contrast, the material and equipment at issue under the Ohio statute are loaned to the pupil or his parent. In our view, however, it would exalt form over substance if this distinction were found to justify a result different from that in Meek. Before Meek was decided by this Court, Ohio authorized the loan of material and equipment directly to the nonpublic schools. Then, in light of Meek, the state legislature decided to channel the goods through the parents and pupils. Despite the technical change in legal bailee, the program in substance is the same as before: The equipment is substantially the same; it will receive the same use by the students; and it may still be stored and distributed on the nonpublic school premises. In view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools.

Indeed, this conclusion is compelled by the Court's prior consideration of an analogous issue in Committee for Public Education v. Nyquist. There the Court considered, among others, a tuition reimbursement program whereby New York gave low-income parents who sent their children to nonpublic schools a direct and unrestricted cash grant of $50 to $100 per child (but no more than 50% of tuition actually paid). The State attempted to justify the program, as Ohio does here, on the basis that the aid flowed to the parents rather than to the church-related schools. The Court observed, however, that, unlike the bus program in Everson v. Board of Education and the book program in Allen, there "has been no endeavor 'to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former.' " The Court thus found that the grant program served to establish religion. If a grant in cash to parents is impermissible, we fail to see how a grant in kind of goods furthering the religious enterprise can fare any better. Accordingly, we hold §§ 3317.06(B) and (C) to be **unconstitutional**.

VIII

Field Trips

Section 3317.06 also authorizes expenditures of funds:

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

There is no restriction on the timing of field trips; the only restriction on number lies in the parallel the statute draws to field trips provided to public school students in the district. The

parties have stipulated that the trips "would consist of visits to governmental, industrial, cultural, and scientific centers designed to enrich the secular studies of students." The choice of destination, however, will be made by the nonpublic school teacher from a wide range of locations.

The District Court held this feature to be constitutionally indistinguishable from that with which the Court was concerned in Everson v. Board of Education. We do not agree. In Everson the Court approved a system under which a New Jersey board of education reimbursed parents for the cost of sending their children to and from school, public or parochial, by public carrier. The Court analogized the reimbursement to situations where a municipal common carrier is ordered to carry all schoolchildren at a reduced rate, or where the police force is ordered to protect all children on their way to and from school. The critical factors in these examples, as in the Everson reimbursement system, are that the school has no control over the expenditure of the funds and the effect of the expenditure is unrelated to the content of the education provided. Thus, the bus fare program in Everson passed constitutional muster because the school did not determine how often the pupil traveled between home and school every child must make one round trip every day and because the travel was unrelated to any aspect of the curriculum.

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

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

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

Moreover, the public school authorities will be unable adequately to insure secular use of the field trip funds without close supervision of the nonpublic teachers. This would create excessive entanglement:

> "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent

and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church." Lemon v. Kurtzman.

We hold § 3317.06(L) to be **unconstitutional**.

IX

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

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

CONCURRENCE/DISSENT: BURGER...dissents from Parts VII and VIII of the Court's opinion.

For the reasons stated in Mr. Justice REHNQUIST's separate opinion in Meek v. Pittenger and Mr. Justice WHITE's dissenting opinion in Committee for Public Education v. Nyquist, Mr. Justice WHITE and Mr. Justice REHNQUIST concur in the judgment with respect to textbooks, testing and scoring, and diagnostic and therapeutic services (Parts III, IV, V and VI of the opinion) and dissent from the judgment with respect to instructional materials and equipment and field trips (Parts VII and VIII of the opinion).

CONCURRENCE/DISSENT: Mr. Justice BRENNAN...I join Parts I, VII, and VIII of the Court's opinion, and the reversal of the District Court's judgment insofar as that judgment upheld the constitutionality of Ohio Rev.Code Ann. §§ 3317.06(B), (C), and (L) (Supp.1976).

I dissent however from Parts II, III, and IV (plurality opinion) and Parts V and VI of the Court's opinion and the affirmance of the District Court's judgment insofar as it sustained the constitutionality of §§ 3317.06(A), (D), (F), (G), (H), (I), (J), and (K). The Court holds that Ohio has managed in these respects to fashion a statute that avoids an effect or entanglement condemned by the Establishment Clause. But "the First Amendment nullifies sophisticated as well as simple-minded . . ." attempts to avoid its prohibitions and, in any event, ingenuity in draftsmanship cannot obscure the fact that this subsidy to sectarian schools amounts to $88,800,000 (less now the sums appropriated to finance §§ 3317.06(B) and (C) which today are invalidated) just for the initial biennium. The Court nowhere evaluates this factor in determining the compatibility of the statute with the Establishment Clause, as that Clause requires. Everson v. Board of Education. Its evaluation, even after deduction of the amount appropriated to finance §§ 3317.06(B) and (C), compels in my view the conclusion that a divisive political potential of unusual magnitude inheres in the Ohio program. This suffices without more to require the conclusion that the Ohio statute in its entirety offends the First Amendment's prohibition against laws "respecting an establishment of religion." Meek v. Pittenger (Brennan, J., concurring); Lemon v. Kurtzman (Douglas, J., concurring); Everson v. Board of Education.

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

opinion or its judgment upholding the constitutionality of Ohio Rev.Code Ann. §§ 3317.06(A), (G), (H), (I), (J), and (K) (Supp.1976).

The plurality upholds the textbook loan provision, § 3317.06(A), on the precedent of Board of Education v. Allen. It also recognizes, however, that there is "a tension" between Allen and the reasoning of the Court in Meek v. Pittenger. I would resolve that tension by overruling Allen. I am now convinced that Allen is largely responsible for reducing the "high and impregnable" wall between church and state erected by the First Amendment to "a blurred, indistinct, and variable barrier," Lemon v. Kurtzman, incapable of performing its vital functions of protecting both church and state.

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

> "The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. . . . Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. 'The secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined.' (Lemon v. Kurtzman (opinion of Brennan, J.))."

Thus, although Meek upheld a textbook loan program on the strength of Allen, it left the rationale of Allen undamaged only if there is a constitutionally significant difference between a loan of pedagogical materials directly to a sectarian school and a loan of those materials to students for use in sectarian schools. As the Court convincingly demonstrates, there is no such difference.

Allen has also been undercut by our recognition in Lemon that "the divisive political potential" of programs of aid to sectarian schools is one of the dangers of entanglement of church and state that the First Amendment was intended to forestall. We were concerned in Lemon with the danger that the need for annual appropriations of larger and larger sums would lead to "political fragmentation and divisiveness on religious lines." This danger exists whether the appropriations are made to fund textbooks, other instructional supplies, or, as in Lemon, teachers' salaries. As Mr. Justice BRENNAN has noted, Allen did not consider the significance of the potential for political divisiveness inherent in programs of aid to sectarian schools. Meek v. Pittenger (concurring in part and dissenting in part).

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

By overruling Allen, we would free ourselves to draw a line between acceptable and unacceptable forms of aid that would be both capable of consistent application and responsive to the concerns discussed above. That line, I believe, should be placed between general welfare programs that serve children in sectarian schools because the schools happen to be a convenient place to reach the programs' target populations and programs of educational assistance. General welfare programs, in contrast to programs of educational assistance, do not provide "substantial aid to the educational function" of schools, whether secular or sectarian, and therefore do not provide the kind of assistance to the religious mission of sectarian schools we found impermissible in Meek. Moreover, because general welfare programs do not assist the sectarian functions of denominational schools, there is no reason to expect that political disputes over the merits of those programs will divide the public along religious lines.

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

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

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

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

Finally, the Court upholds paragraph (J), which provides standardized tests and scoring services, on the ground that these tests are clearly nonideological and that the State has an interest in

assuring that the education received by sectarian school students meets minimum standards. I do not question the legitimacy of this interest, and if Ohio required students to obtain specified scores on certain tests before being promoted or graduated, I would agree that it could administer those tests to sectarian school students to ensure that its standards were being met. The record indicates, however, only that the tests "are used to measure the progress of students in secular subjects." It contains no indication that the measurements are taken to assure compliance with state standards rather than for internal administrative purposes of the schools. To the extent that the testing is done to serve the purposes of the sectarian schools rather than the State, I would hold that its provision by the State violates the First Amendment.

CONCURRENCE/DISSENT: Mr. Justice POWELL, concurring in part, concurring in the judgment in part, and dissenting in part.

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

It is important to keep these issues in perspective. At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. See Walz v. Tax Comm'n[9]. The risk of significant religious or denominational control over our democratic processes or even of deep political division along religious lines is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court. Our decisions have sought to establish principles that preserve the cherished safeguard of the Establishment Clause without resort to blind absolutism. If this endeavor means a loss of some analytical tidiness, then that too is entirely tolerable. Most of the Court's decision today follows in this tradition, and I join Parts I through VI of the opinion.

With respect to Part VII, I concur only in the judgment. I am not persuaded, nor did Meek hold, that all loans of secular instructional material and equipment "inescapably have the primary effect of providing a direct and substantial advancement of the sectarian enterprise." If that were the case, then Meek surely would have overruled Allen. Instead the Court reaffirmed Allen,

[9] Case 1A-R-039 on this website.

thereby necessarily holding that at least some such loans of materials helpful in the educational process are permissible so long as the aid is incapable of diversion to religious uses, Committee for Public Education v. Nyquist, and so long as the materials are lent to the individual students or their parents and not to the sectarian institutions. Here the statute is expressly limited to materials incapable of diversion. Therefore the relevant question is whether the materials are such that they are "furnished for the use of individual students and at their request." Allen.

The Ohio statute includes some materials such as wall maps, charts, and other classroom paraphernalia for which the concept of a loan to individuals is a transparent fiction. A loan of these items is indistinguishable from forbidden "direct aid" to the sectarian institution itself, whoever the technical bailee. Since the provision makes no attempt to separate these instructional materials from others meaningfully lent to individuals, I agree with the Court that it cannot be sustained under our precedents. But I would find no constitutional defect in a properly limited provision lending to the individuals themselves only appropriate instructional materials and equipment similar to that customarily used in public schools.

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

CONCURRENCE/DISSENT: Mr. Justice STEVENS, concurring in part and dissenting in part.

The distinction between the religious and the secular is a fundamental one. To quote from Clarence Darrow's argument in the Scopes case:

> "The realm of religion . . . is where knowledge leaves off, and where faith begins, and it never has needed the arm of the State for support, and wherever it has received it, it has harmed both the public and the religion that it would pretend to serve."

The line drawn by the Establishment Clause of the First Amendment must also have a fundamental character. It should not differentiate between direct and indirect subsidies, or between instructional materials like globes and maps on the one hand and instructional materials like textbooks on the other. For that reason, rather than the three-part test described in Part II of the plurality's opinion, I would adhere to the test enunciated for the Court by Mr. Justice Black:

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." Everson v. Board of Education.

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

services described in Parts V and VI of the Court's opinion may fall into this category. Although I have some misgivings on this point, I am not prepared to hold this part of the statute invalid on its face.

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

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