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Changing Perceptions of Private Religious Schools: Public Money and Public Trust in the Education of Children

William W. Bassett[*]

I. INTRODUCTION

Public perception of the private religious school affords the necessary subtext for the debate about emerging law and policy regarding parental choice in the education of children. Perception is the foundation of trust. An elementary or secondary school is more than a training ground for developing skills or assimilating the fundamentals of a prescribed secular curriculum. It is also a haven, a protected place where society's most important personal and common values can be seen and emulated. Parents must trust the school of their choice. Similarly, for a school to become a repository of major public expenditures and oversight, the public must vest more than a guarded confidence in its integrity.

The intractable problem of racial segregation and white flight has left not only the inner cities, but also vast rural areas,[1] with public schools so underfinanced, insecure, violent, and failing, that the need to support parents in their ability to educate their children has reached a point of desperation. Nothing else seems to work.[2] The various voucher systems are tentative steps to provide support so that parents may make choices absolutely vital to their well-being, to say

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1. *See, e.g.*, Dan Barry, *Legacy of School Segregation Endures, Separate But Legal*, N.Y. TIMES, Sept. 30, 2007, at 16 (highlighting impoverished schools in rural Wilcox County, Alabama).

2. Timely verification of the extent and difficulty of the problem of achieving and maintaining integrated public schools is *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (holding racial classifications in elementary and secondary public school assignments unconstitutional). The Chief Justice wrote for the Court, with concurring opinions by Justices Thomas and Kennedy, dissenting opinions by Justice Stevens and Justice Breyer, with whom Justices Stevens, Souter, and Ginsburg joined. The text of the entire case fills one hundred double-columned pages in the Westlaw report. *See also* J. Harvey Wilkinson, *The Seattle and Louisville School Cases: There Is No Other Way*, 121 HARV. L. REV. 158 (2007).

nothing of their rights as citizens to equal educational opportunities for their children.

Fundamental to a viable system of educational choice even partially funded by tax-paid tuition and fee assistance is that the schools will provide all students an equal and genuine secular education. The schools must be untainred by improper financial motives, ideological bias or an exclusionary elitism. I leave the interpretation of the law and the Supreme Court's calculus of the risk ro Professor Laycock.[3] I will put into context a necessary perception of the schools themselves. Can religious elementary and secondary schools be trusted sufficiently by parents and the public to receive tuition vouchers in return for providing not only a "genuine" educational experience,[4] but also for providing these educational opportunities to the poor without a religious bias? Indeed, can this great new undertaking be accomplished in cooperation with the public-school systems and not in competition with their indispensable role in our society? Since the Catholic schools systems are the largest faith-based private educational alternatives in most of the country I will concentrate there.[5]

A brief review of some Catholic educational programs shows thar these institutions receive support from, and benefit, Catholic and non-Catholic students alike. Catholic educational initiatives being studied for their financing today in Washington, D.C.[6] and New

3. Douglas Laycock, *Why the Supreme Court Changed Its Mind About Government Aid to Religious Institutions: It's a Lot More than Just Republican Appointments*, 2008 BYU L. REV 275.

4. Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002).

5. There are today about 800 Catholic diocesan high schools in this country with a student population of 400,000 and about 600 private Catholic high schools serving 32,000 students. We have no immediate breakdown of the numbers of coeducational and single-gender institutions. There are about 6500 Catholic parochial elementary schools here, with a student population of 1,800,000 children. Additionally, 360 private Catholic grade schools serve nearly 100,000 students. THE NATIONAL CATHOLIC DIRECTORY 2048 (P.J. Kennedy and Sons 2007). I have no statistics on the number of Catholic elementary and secondary schools closed in the past decade.

Statistics for other faith-based elementary and secondary schools are available with a modest amount of searching.

6. On November 5, 2007, the Catholic Archdiocese of Washington, D.C., announced a radical reconfiguration of its current inner-city consortium. Four schools will make up a smaller consortium. Seven schools will be converted into charter schools, and one will become a parish-supported and administered school. The announcement added that "a conversion (to charter schools) will allow faculty and students to be 'grandfathered' in and to continue at the school they already attend, although the school would no longer be Catholic." CATHOLIC

York[7] to serve the mission to the poor, include also the concept of charter schools or even resurrecting the image of the 19th century French academy, the *lycée*, to gain surplus income to use for the support of the parish schools.[8] Changing inner-ciry demographics have constrained Oakland, California, to close ten of eighteen parochial schools originally parish-supported.[9] Four of the ten are now charter schools administered by the public school system. Of the remaining eight, some part of the educational cost is borne by parental payment of tuition and fees.[10] In the inner-cities, a major part of the school population comes from non-Catholic families.[11] The diocese contributes a large part to the cost of this education in the parochial schools.

There is no question that schools receiving tax-funded vouchers will be open to the public, where possible, and will serve as many students as possible without regard to religious affiliation and free of the danger of proselytism. Does the public want to use these schools to meet the present educational crisis? In the words of Maurice Merleau-Ponry: "perception is everything, because there is not one of our ideas or one of our reflexions which does not carry a date,

NEWS SERVICE, Nov. 7, 2007, http://www.catholicnews.com/data/briefs/cns/20071107.htm.

7. *See* David Gonzalez, *Frustration Over a $25,000 Catholic School,* N.Y. TIMES, Sept. 29, 2007, at B13 (explaining that, due to financial constraints, the Archdiocese of New York recently closed several parochial schools and converted another to an exclusive academy, with tuition rivaling the priciest secular schools).

8. *See* MARK M. GRAY & MARY L. GAUTIER, PRIMARY TRENDS, CHALLENGES AND OUTLOOK: A REPORT ON CATHOLIC ELEMENTARY SCHOOLS, 2000–2005 (2006); CHRISTOPHER SCALISE & MARY F. TAYNANS, DOLLARS AND SENSE: CATHOLIC HIGH SCHOOLS AND THEIR FINANCES, EXECUTIVE REPORT 2007 (2007).

9. Kate Murphy, *Catholic Education in Retreat,* ALAMEDA TIMES-STAR, Jan. 2, 2008, http://www.insidebayarea.com/timesstar/localnews/ci_4935177.

10. *Id.*

11. *See, e.g.*, DALE MCDONALD, U.S. CATHOLIC ELEMENTARY AND SECONDARY SCHOOLS 2006-2007: THE ANNUAL STATISTICAL REPORT ON SCHOOLS, ENROLLMENT AND STAFFING (2008) (displaying statistical research of Catholic school demographics); Joseph O'Keefe, *How To Save Catholic Schools: Let the Revitalization Begin*, COMMONWEAL, Mar. 25, 2005, http://findarticles.com/p/articles/mi_m1252/is_6_132/ai_n15399761; Office of Catholic Schools, Archdiocese of Chicago, *Facts About the Catholic Schools in the Archdiocese of Chicago*, http://schools.archdiocese-chgo.org/public/factsheet.shtm (last visited Mar. 26, 2008) (discussing specifically Chicago area schools and the composition of student and teacher populations).

whose objective reality exhausts its formal reality, or which transcends time."[12]

The voucher system is a secular concept with secular roots. It is a government program of assisrance to parents, who then can make private choices about where they spend their educational funds. Public trust in the recipient schools must come not only from the parents, but also from the secular school districts. This necessitates credentialing, access, and accountability, activities at one time stigmatized as "excessive entanglement."[13] The schools themselves, long wary of government surveillance and control, must now assure statutory compliance and respect for the mandated curriculum and the treatment of students, notions earlier falling, at least partially, within the scope of free exercise of religion.[14] This cooperation will not be easy and the first steps will be tentative.

For example, the Ohio Pilot Project Scholarship Program operating in the Cleveland City School District lays down statewide educational compliance standards for all public, charter (called "community schools" in Ohio), private, and religiously-affiliated schools that wish to participate in the voucher programs.[15] Among the conditions especially applicable to private schools, the key disqualifier of a school is the advocacy of "unlawful behavior" or teaching of "hatred." More specifically, participating private schools must agree not to discriminate on the basis of race, religion, or ethnic background, or to "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion."[16] Commentators have parsed the words and project difficulty in interpreting and enforcing these

12. MAURICE MERLEAU-PONTY, THE PRIMACY OF PERCEPTION 41 (James M. Edie, ed., Northwestern University Press 1964).

13. Lemon v. Kurtzman, 403 U.S. 602, 609 (1971) (involving monitoring a complex salary calculation formula for certification of eligible teachers); *see also* Earley v. DiCenso, 401 U.S. 931 (1971) (striking down Rhode Island's subsidized parochial schoolteacher salaries on grounds of "excessive entanglement" between church and state). *DiCenso* is a companion case to *Lemon*.

14. *See, e.g.*, Grove City Coll. v. Bell, 465 U.S. 555, 574 (1984). The Grove City College website contains strong affirmations of the college's religious belief in its independence from the state. The college trustees have rejected all forms of government support, even providing private endowments to supply funds for student aid.

15. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 645 (2002) (quoting and discussing OHIO REV. CODE ANN. §§ 3313.974–3313.979 (Anderson 1999 and Supp. 2000)).

16. OHIO REV. CODE ANN. § 3313.976(A)(6).

conditions.[17] We note here, however, that some attenuation of the control over private and religious schools by local school districts occasions the admonition. The voucher system necessitates a far greater public trust in private and religious schools than heretofore conceivable.

II. PUBLIC OPINION AND THE SUPREME COURT

Public perception of the private religious school enrerprise has come a long way from the political rhetoric of Senator James Blaine at the apex of American Nativism.[18] It has moved from violent opposition, as apparent in the run-up to the *Pierce* litigation;[19] through disdainful, but subtle, begrudging tolerance on a child-benefit basis in *Everson*;[20] bumping down the minutiae of itemized distrust in the parochial school-aid cases following *Lemon*;[21] to a somewhat guarded acceptance of the concept of parallel school systems, in *Witters*,[22] *Zobrest*,[23] *Mitchell*,[24] and *Zelman*.[25]

Public perception, of course, is not coterminous with that of nine justices sitting upon a series of single issues at law coming before them seriatim. The public-opinion polls may indicate a different sentiment in the majority of voters. Public sentiment may fluctuate with social needs or grow to new dimensions with study, discussion, and experimentation. Ultimately, what each individual sees in the

17. For example, will church-affiliated schools that are largely parish-funded be able to accommodate the children of parish members by preference, or is that religious discrimination? or, What will the courts find in the definition of "unlawful behavior" or "hatred"? Other questions arise, e.g., what are the income tax consequences of imputed income to the parental recipients, as, indeed, may be the case of tuition assistance for the children of faculty members at institutions of higher learning? Will the mandates of *No Child Left Behind*, No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (2005), follow vouchers to take authority over private schools? Will a voucher system undermine the rationale for denying NLRB jurisdiction over teachers unions expressed by the Supreme Court in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979)?

18. WARD M. MCAFEE, RELIGION, RACE, AND RECONSTRUCTION: THE PUBLIC SCHOOLS IN THE POLITICS OF THE 1870S (1998); Ward M. McAfee, *The Historical Context of the Failed Blaine Amendments of 1876*, 2 FIRST AM. L. REV. 1 (2004).

19. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

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

21. Lemon v. Kurtzman, 403 U.S. 602, 609 (1971).

22. Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986).

23 Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

24. Mitchell v. Helms, 530 U.S. 793 (2000).

25. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

schools depends upon personal experience and the shared successes or failures of each generation's children. We will consider the Supreme Court, therefore, not as a spokesman for the public, but rather as a provocateur, a catalyst focusing attention upon problems and setting the parameters of public policy decisions to be implemented with government assistance on a local level.

The narrowed focus of Supreme Court discourse is an indispensable factor in the checks and balances of our system of democratic government. Thus, it greatly matters what the Court says, or, in this case, how it may articulate its own perceptions. While not decisive, the Court's point of view upon the facts that bring people into litigation molds the grammar of our deliberations. Unverified perception, of course, is prejudice, not only in individuals, but also in courts. The role of private religious schools in serving, or burdening, the educational needs of all the public depends on the didactic role of the Court and how it reins popular initiatives running before it.

III. THE EVOLUTION OF THE COURT'S (MIS)PERCEPTION OF RELIGIOUS SCHOOLS

Control of the education of children has always been closely guarded and draws a unique solicitude from the courts. We will put aside similar concerns for public funding of church-related health care,[26] higher education,[27] or social services,[28]—or, indeed, the Individuals With Disabilities Education Act (IDEA)[29]—where distrust by the Court has long since diminished, except perhaps, around the peripheries. This section of the paper will examine and discuss the fluctuating attitude of the Court in the specific context of religious schools, primarily through the lens of three cases: ***Everson***,[30]

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26. *See* Bradfield v. Roberts, 175 U.S. 291 (1899).

27. *See* Tilton v. Richardson, 403 U.S. 672 (1971).

28. *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589 (1988).

29. See ***Board of Education of the City School District of New York v. Tom F.***, 128 S. Ct. 1 (2007), a 4-4 decision, Justice Kennedy abstaining, affirming the Second Circuit's requirment that the School District of New York pay tuition for disabled students attending private or parochial schools where the public schools have failed to offer an acceptable plan of assistance. Will this case provide precedent for requiring religious schools receiving vouchers also to provide programs parallel to those provided by public schools for disabled and learning-impaired students?

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

Aguilar,[31] and *Mitchell*.[32] These three cases, though neither exhaustive nor fully representative of the Court's jurisprudence, each offer a glimpse of the perceptive barriers to full public/private cooperation in education.

A. Everson v. Board of Education *(1947)*

We start with *Everson*,[33] not for its actual holding, but for the echo of its rhetoric through the courts for the sixty years of its controversial life. Justice Hugo Black's peroration upon Madison's *Memorial and Remonstrance*, written in opposition to Patrick Henry's initiative to raise a tax in support of teachers of Christian morality, and upon Jefferson's preamble to the Virginia *Bill For Religious Liberty* ended with an enduring checklist of possible government violations of the Establishment Clause.[34] Not only did the Supreme Court then canonize into law the advocacy of two private individuals,[35] and the experience of but one of the thirteen ratifying states,[36] but it construed the Fourteenth Amendment, for

31. Aguilar v. Felton, 473 U.S. 402 (1985).

32. Mitchell v. Helms, 530 U.S. 793 (2000).

33. 330 U.S. at 1.

34. *Id.* at 15.

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. 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. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion was intended to erect 'a wall of separation between church and State.'

Id. (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

35. Neither Madison nor Jefferson in their famous documents, nor the Constitution itself, mention schools or religion as a part of the curriculum. Education was left to the states. The common school movement began in the 1840s. The teaching of religion was and remained a part of public school curricula until the *McCollum* decision in 1948. Illinois *ex rel.* McCollum v. Bd. of Educ. of School Dist. No. 71, Champaign County, Illinois, 333 U.S. 203 (1948).

36. *See, e.g.*, JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT (2d ed. 2005) (containing an extensive, updated bibliography); Carl Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*,

the first time, to apply the Establishment Clause to all the states.[37] *Everson* thereby achieved the favor of place, over the Court's earlier decision in *Cochran v. Louisiana State Board of Education*,[38] in string citations supporting strict separation over government neutrality in reference to public aid to religious schools. It identified, anachronistically, the established Anglican Church of Virginia in 1785–86 with New Jersey's parochial schools in 1947.[39] In light of its hyperbolic rationale, the Court's holding that the state could assist parents in providing bus fares for their children to attend parochial schools was astounding. This was vigorously argued in the sixteen-page dissent of Justice Wiley Rutledge (joined by Justices Frankfurter, Jackson, and Burton). "Neither so high nor so impregnable today as yesterday," Rutledge wrote, "is the wall raised between church and state by Virginia's great statute of religious freedom and the First Amendment, now made applicable to all the states by the Fourteenth."[40] *Everson* consecrated the "wall" metaphor in the next sixty years of Establishment Clause cases, even as it twisted its original meaning.

The influence of *Everson* upon the Court's legacy of distrust of the parochial schools must be read, not out of the begrudging safety measure it allowed for the state to protect children on their way to and from the schools, but, rather, in the context and the force with which it spoke. In a very real sense, Justices Rutledge, Jackson, Frankfurter, and Burton rejected almost completely the child benefit justification for public assistance to parochial schools, thereby reinforcing Black's majority analysis of "original inrent": "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[41] They dissented only from the holding: "New Jersey has nor breached it here."[42] Child benefit was left threadbare

2004 BYU L. REV. 1385; Joel A. Nichols, *Religious Liberty in the Thirteenth Colony: Church-State Relations in Colonial and Early National Georgia*, 80 N.Y.U. L. REV. 1693 (2005).

37. Earlier the Free Exercise Clause was applied to the states in *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940).

38 281 U.S. 370 (1930).

39. *Everson*, 330 U.S. at 42 n.33 (1947) (Rutledge, J., dissenting).

40. *Id.* at 29.

41. *Id.* at 18 (majority opinion).

42. *Id.*

and would be relegated in the future only to necessary considerations of health and safety.

The *Everson* Court lanced a barrage of metaphors into the next generation: the "wall," "not even 'three pence,'" "early and indelible indoctrination," the "stricr and lofty neutrality" of public schools, parochial schools as "the rock on which the whole structure [of the Roman Catholic Church] rests," "religion's hands off the state," the "public business of religious worship and instruction," "the struggle of sect against sect" for public funds, and "[t]he dominating group will achieve the dominant benefit; or all will embroil the state in their dissensions."[43] In language that still persists in the courts, the *Everson* majority typified the educational mission of church-affiliated, especially Catholic, schools as "inculcat[ion]" and "indoctrination," and painted their curricula as tainted by a "religious permeation."[44] In the early perception of the majority of the Court, rax money to parochial schools was considered money paid directly to the Catholic Church. In language reverberating from armed camps in the Reformation era, Justice Rutledge referred to Madison's views calling for "tear[ing] out the institution not partially but root and branch."[45]

The Conference Notes reveal something of the Court's deliberations.[46] Apparently, Justice Frankfurter wished to commit his own experience to writing. The Notes say that Justice Frankfurter shared that he had left Vienna with his family as an eleven-year-old boy.[47] He deeply resented the influence of the established Roman Catholic hierarchy in Austria that subjected him to mandatory religious instruction in Catholic doctrine in his early schooling. He strongly resisted church influence in the schools as dangerous for this country. Justice Frankfurter seems to have been the only justice to have been instructed in Catholic teaching in his public school days. The other Justices, including Justice Frank Murphy, received

43. *Id.* at 18, 40, 23, 24, 24, 27, 26, 53, 54, respectively.

44. *Id.* at 19, 24.

45. *Id.* at 40 (explaining the views expressed in JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON 295 (Robert A. Rutland & William M.E. Rachel eds., 1973)).

46. THE SUPREME COURT IN CONFERENCE (1940–1985): PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 400–03 (Del Dickson ed., 2001) [hereinafter SUPREME COURT IN CONFERENCE].

47. *Id.* at 401.

Protestant instruction as part of the mandated religious education of public school curricula prior to the Supreme Court's 1948 decision in *McCollum v. Board of Education*.[48] Not a single Justice serving on the Court at that time had ever attended a parochial school.

The Conference decided to distinguish *Cochran v. Louisiana State Board of Education*, a 1930 Supreme Court decision allowing secular textbooks to be placed on loan with parochial schools as a matter of child benefit.[49] This appears by analogy in the majority decision.[50] There were no concurring opinions.

Two matters of national concern were also mentioned in the Notes. The Conference agreed that the Court should not upset either of them by its pending decision. Among the greatest and most enduring Congressional initiatives in the latter years of the Second World War were the National School Lunch Program[51] and the so-called G.I. Bill.[52] All of these programs provide generous federal assistance to the states to underwrite vital, enduring, and extensive aid to assist primary and secondary education in all schools, public, private, and religious. They provide to all accredited colleges and universities tuition and fee subsidies for returning military personnel, regardless of the affiliation of the institutions of matriculation. Of the G.I Bill it can fairly be said that it saved religiously-based higher education in this country. The Pell Grant program administered by the federal Department of Education continues a vast plan of financial assistance to students in higher education whether public, private, or religiously affiliated.[53]

48. 333 U.S. 203 (1948). Religion teachers in this case were not employees of the public schools, but persons appointed by local church pastors and the ministerial association for the task. They were, however, under the control of the school principals and took class attendance for the school records. *See id.* at 226–27.

49. Cochran v. La. Bd. of Educ., 281 U.S. 370 (1930). *Cochran* set a precedent for permissible loans of secular textbooks to parochial schools; it was later affirmed in *Board of Education v. Allen*, 392 U.S. 236 (1968).

50. *Cochran*, 281 U.S. at 374–75.

51. The National School Lunch Act, 42 U.S.C. §§ 1751–1760, esp. § 1759 (1946) (administered by the Department of Agriculture).

52. The Servicemen's Readjustment Act, 38 U.S.C. § 701 (1944) has been amended several times since, and is administered today by the Department of Education. The Department of Education has a budget of $91 billion in 2007, with hundreds of programs, grants, scholarships, etc., available to qualifying public and religious educational institutions without distinction.

53. *See* DEP'T OF EDUC., FUNDING EDUCATION BEYOND HIGH SCHOOL: THE GUIDE TO FEDERAL STUDENT AID (2007).

Finally, the Conference Notes indicate a desire not to upset transportation initiatives in sixteen other states and in the District of Columbia.[54] In the District of Columbia, for example, all school-age students, regardless of the school of attendance, rode public transportation for 3¢ a ticket.

Truancy laws and the consolidation of school districts in the 1930s and again after the War made student transportation absolutely necessary. Of course, both public and private schools fell under state compulsory education statutes and the need to strictly comply with attendance requirements. That meant thar children who could no longer walk to local schools had to find ways to come and go on time and safely. Stories of traffic deaths, injuries, kidnappings along the way and chaotic scheduling problems in the schools, together with parental pressure to address these issues, were incentives to state legislatures to provide safe transportation for children of both educational systems.

In the 1940s, Ewing Township, New Jersey, was an unincorporated area just west of Trenton. The General Motors parts plant built there in 1938 had been converted into an assembly plant for B-29 bombers during the War. The population grew from 3000 to 10,000.[55] Ewing had no public high school and no parochial school. It supported fifteen Protestant churches. Its oldest, the First Presbyterian, originally chartered in 1712, had been the pulpit of John Witherspoon while he was president of nearby Princeton. It had one Catholic parish. Twenry-one Catholic students had been taking public buses ro atrend a Catholic high school and two parochial schools in Trenton.[56] Pursuant to New Jersey law,[57] the local school board decided to reimburse the parents of each student 22¢ a day. Between 1941 and 1945 Catholic parents received $357.74 out of a total $8034.95 reimbursed.[58]

Six important national events in the immediate aftermath of the War, viral to our topic, were known to the Justices while this case was under deliberation. First, African-American, Latino, and Asian-American military personnel were being mustered out of the Armed

54. SUPREME COURT IN CONFERENCE, *supra* note 46, at 402–03.

55. Everson v. Bd. of Educ., 330 U.S. 1, 62 n.60 (1947).

56. Everson v. Bd. of Educ., 44 A.2d 333, 335 (N.J. 1945), *aff'd*, 330 U.S. 1.

57. *Everson*, 330 U.S. at 3 n.1 (citing N.J. REV. STAT. § 18:4-8 (1941)).

58. *Everson*, 44 A.2d at 335.

Services into closely-confined ghettoes and segregated rural pockets of poverty—with abysmal public education, high unemployment, and little hope of ever getting into mainstream American life.[59] In the industrial cities, white flight to the suburbs began. As early as 1926, the Supreme Court in *Village of Euclid, Ohio v. Ambler Realty*[60] decided that the citizenry had a constitutional right to determine their own neighbors. This meant that local groups could manipulate public financing to relegate the children of racial minorities to training for manual labor.[61]

Second, Congress passed the National Hospital Survey and Construction Act of 1946 (Hill-Burton), which provided federal funds for construction of public and private hospitals, including religiously-affiliated healthcare facilities, without constitutional challenge.[62]

Third, the President's Commission on Higher Education report, "Higher Education for Democracy," planned a transition into mass higher education, funded largely by federal funds.[63] Out of this report emerged the Higher Education Facilities Act of 1963,[64] providing construction and long-term, low-interest funds to colleges

59. *See* DAVID DELANEY, RACE, PLACE AND THE LAW, 1836–1948 (1998); *see also* DAVISON M. DOUGLAS, JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865–1954, at 219–73 (2005) (detailing the black experience following WWII).

60. Vill. of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926).

61. RISA GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007) (analyzing parallel developments in employment and labor law, and civil rights, and the role of the NAACP up to *Brown v. Board of Education*, 347 U.S. 483 (1954)); *see also* Juan Perea, *Buscando America: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420 (2004).

62. National Hospital Survey and Construction Act of 1946, 42 U.S.C. § 291. In 1899, the Supreme Court, in *Bradfield v. Roberts*, 175 U.S. 291 (1899) impliedly assumed that the provision of healthcare services was secular, not religious. Thereby, a grant of funds by Congress to build a Catholic Hospital (Providence Hospital) in the District of Columbia was constitutional. *Id.* at 295–300. By 1965 nearly forty percent of Jewish and Catholic hospitals had received direct government grants under the Hill-Burton Act alone for construction of hospital facilities. Timothy M. Burgess, *Government Aid to Religious Social Service Providers*, 75 VA. L. REV. 1077, 1084–85 (1989). Medicare has traditionally reimbursed hospitals even for the services of chaplains because of the "beneficial therapeutic effect on the medical condition of the patients." MICHAEL MCCONNELL, JOHN GARVEY & THOMAS BERG, RELIGION AND THE CONSTITUTION 392 (2d ed. 2006).

63. HIGHER EDUCATION FOR DEMOCRACY: A REPORT OF THE PRESIDENT'S COMMISSION ON HIGHER EDUCATION: ESTABLISHING THE GOALS (1947), *reprinted in* AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY 970 (Richard Hofstadter & Wilson Smith eds., 1961).

64. 20 U.S.C. §§ 711–721, 751(a)(2) (1964).

and universities—including religiously affiliated institutions. The Court upheld the constitutionality of the Act in *Tilton v. Richardson.*[65]

Fourth, the American Jewish Congress completed a strongly worded study of faculty screening and student admissions quotas used against Jewish applicants in the Ivy League universities.[66] The study demanded an end to the discrimination that had excluded them from the best educational institutions. A Catholic echo of protest against similar discrimination in major universities against graduates of religious secondary schools may be seen in William F. Buckley's classic, *God and Man At Yale*,[67] in preparation at this time.

Fifth, the immediate postwar years experienced a great quickening of religious piety. Sydney Ahlstrom records a growth in church affiliation from forty-nine to fifty-five percenr of the total population between 1940 and 1950, accompanied by an increase in church attendance and acceleration in church building construction from $26 million spent in 1945 to $409 spent million in 1950.[68] With this growth, both the principal Protestant churches affiliated with the National Council of Churches and those in the National Association of Evangelicals became intensely concerned with improving the religious education of children and youth. Notwithstanding divergences in ascription to the permeating influences upon scriptural interpretation and modern religious liberalism, both groups concurred in the role of religious instruction in the public schools, with Bible reading and religious observances. A number of studies were commissioned by the churches with recommendations. Education of youth without religious teaching, all concurred, was considered radically deficient. The General Assembly of the Presbyterian Church, U.S.A., Board of Christian Education "Faith and Life Initiative" (1947) resolved "unabashed advocacy for public schools and the need to maintain a strong working

65. 403 U.S. 672, 689 (1971).

66. *See* MARCIA G. SYNNOTT, THE HALF-OPENED DOOR: DISCRIMINATION AND ADMISSIONS AT HARVARD, YALE AND PRINCETON, 1900–1970 (1979).

67. WILLIAM F. BUCKLEY, GOD AND MAN AT YALE: THE SUPERSTITIONS OF ACADEMIC FREEDOM (1951).

68. SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 952–53 (1972). See also, for the enlivened public religion of this era, the popular sociological study of Will Herberg. WILL HERBERG, PROTESTANT, CATHOLIC, JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY (1955).

partnership between public schools and church," for example, with reference to release-time religious instruction.[69] The resolution was not out of step with initiatives taken by other churches. Mainline denominational seminaries, in the meanwhile, were deeply influenced by the newly minted social gospel, best articulated by Walter Rauschenbusch, himself a Lutheran theologian of some considerable anti-Catholic bias.[70]

Finally, John Dewey, the leading philosopher of American empiricism, published an influential essay in which he said that the Roman Catholic hierarchy was engaged in a concerted program to gain public fiscal aid "advanced through active lobbying for school lunches, health programs and school transportation facilities for Catholic schools . . . a powerful reactionary world organization in the most vital realm of democratic life with the resulting promulgation of principles inimical to democracy."[71] The Catholic school system became—to elite emerging university departments of education—a threat to American democracy. The upshot of all this is that a perception existed that Catholics educators certainly could not be trusted with public money.[72]

69. For principles of the renewed educational initiatives, see MINUTES OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA, PART II, THE REPORTS OF THE BOARDS 77–93 (Philadelphia: Office of the General Assembly, August, 1947). In *McCollum*, briefs opposing release-time religious instruction in public schools were filed for the first time in First Amendment litigation by the ACLU and the Unitarian-Universalist Association. McCollum v. Bd. of Educ., 333 U.S. 203 (1948). No briefs were filed in *McCollum* by church organizations supporting release-time religious instruction. *Id.* Shock and disappointment in the mainline church community, however, were palpable after the Supreme Court's ruling. Opposition from the Evangelical sector continues. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985); *see also* Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 443 n.1 (1969) (explaining the origins of the local schism in the church in disappointment with the General Assembly for, among other things, reneging on the commitment to support religious education in the public schools).

70. *See* PAUL RAUSCHENBUSCH, CHRISTIANITY AND THE SOCIAL GOSPEL IN THE 21ST CENTURY: THE CLASSIC THAT WOKE UP THE CHURCH (2007). Rev. Martin Luther King, Jr. read this book in the 1950s and he has been quoted as saying that Rauschenbusch "left an indelible imprint on my thinking." THOMAS F. JACKSON, FROM CIVIL RIGHTS TO HUMAN RIGHTS: MARTIN LUTHER KING, JR. AND THE STRUGGLE FOR ECONOMIC JUSTICE (2007).

71. 15 JOHN DEWEY, THE LATER WORKS, 1925–1953, at 284–85 (Jo Ann Boydston ed., 1989); *see also* PHILLIP HAMBURGER, SEPARATION OF CHURCH AND STATE, 391–478 (2d ed. 2002); MCCONNELL, GARVEY & BERG, *supra* note 62. John Dewey was himself a charter member of the Religious Education Association founded in 1903 and wrote on religious education issues throughout his life. *See* AHLSTROM, *supra* note 68, at 907.

72. Prior to the candidacy of John F. Kennedy for the presidency, there is no mention in

What may have slipped under the Supreme Court's radar at the time was the profound and widespread quickening of religious fervor that swept the churches in this country after the Second World War. For Catholics, the institutional fallout was a veritable explosion in construction of seminaries, novitiates, monasteries, etc. Colleges and universities were improved, expanded, and opened up to ecumenical admissions. Elementary and secondary schools were built to meet expanding populations of growing families. Projections for staffing and financing for the schools in the future envisioned virtually endless lines of new, young postulants, able to live with minimal allowances and benefits, while maintaining the highest motivation for professional excellence in the schools. In retrospect it seems like a massive Ponzi scheme.

In February 1947, Princeton University, just eight miles southwest of Ewing Township, was welcoming its students for the spring semester. They were all male and overwhelmingly Caucasian. Chapel attendance was compulsory until the mandate was lifted in 1964. The Campus was dominated by the newly-completed Ralph Adams Cram gothic chapel, the largest in any university, while to the south end of the campus was the Divinity School, both the largest of the American seminaries, Presbyrerian, and possessed of the second largest theological library in the world. Princeton was private, non-sectarian, and clearly Protestant, as it had been since the days of John Witherspoon, the only minister to sign the Declaration of Independence. In the academic year 1946–1947, Princeton received

Supreme Court case law of what had become a proof-text for anti-Catholic mistrust, the now well-known *Syllabus of Errors* (1864) of Pope Pius IX which seemed to deny a universal human right of freedom of religion. Reference to the *Syllabus* appears for the first time in post-Civil War debates in Congress on the Blaine Amendment. Then and subsequently it was quoted out of context. The reference was to French *laicité* and the anti-religious principles of the *Communist Manifesto* of 1849. Political theories attributable to the *Syllabus* were never applied to the United States or the English-speaking world. *See* THOMAS J. CURRY, FAREWELL TO CHRISTENDOM: THE FUTURE OF CHURCH AND STATE IN AMERICA 62–63 (2001). As was polygamy by the Church of Jesus Christ of Latter-day Saints, the top-down political theories of the *ancien régime* were rejected by Catholics by the turn of the century. JOHN C. MURRAY, WE HOLD THESE TRUTHS 27–142 (New York: Sheed and Ward, 1960). Recitation of each as relates to the modern churches is untrue and, for that reason, offensive. Both the Vatican and Catholic leaders in America supported ratification by Congress of the U.N. Declaration on Human Rights of 1948, Art. 18, which is the mandate for religious freedom in all countries having membership in the United Nations. *See* DECLARATION ON RELIGIOUS LIBERTY, *DIGNITATIS HUMANAE*, OF THE SECOND VATICAN COUNCIL (1965); JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE WITH RELIGIOUS FREEDOM (1998).

an infusion of federal funds under the G.I. Bill to pay for tuition and fees of matriculating military veterans. The same sources directly funded Princeton Theological Seminary for tuition and fees for training veterans in religious ministries and theological education.[73] As we will see, the *Everson* court neglects to mention this in its rhetoric condemning the "slightest breach" of the "wall between church and state."[74] Its omission from the text of the opinion was not inadvertent.

Arch Everson, though he did not get the exact result he sued for, won a momentous victory in the Supreme Court's wildly inconsistent and utterly ahistorical five to four decision. At the same time, in Champagne, Illinois, Vashti McCollum had filed an appeal from a lower court judgment upholding "release time" religious education in the public schools.[75] In 1948, the same Supreme Court that had voted in *Everson* would reverse McCollum's case, deciding in her favor[76] and thereby launching a nationwide campaign to purge the religious schools of every penny of public money and the public schools of every vestige of religious sentiment. Both opinions were written by Justice Hugo Black, gaining the *Everson* dissenters for the majority in *McCollum*. As for the sentiment of the courts, Catholic schools (and a smaller number of non-Catholic religious schools)

73. The G.I. Bill contained no restrictions on faith-based higher education, as Congress conceived the legislation as reimbursement to veterans for their service to the country, to be used individually at their choice. The popularity of student aid spawned eight federal programs between 1965 and 1980: Basic Education Opportunity Grants (later called Pell grants), Supplementary Educational Opportunity Grants, National Direct Student Loans, federally insured student loans, State Student Incentive Grants, College Work-Study grants, Veterans' Education benefits, and Social Security for recipients' children. All are unrestricted. States, in the meanwhile, also provided funds for religiously-affiliated private colleges and universities, such as the Bundy Foundation funds in New York. The breakthrough in private foundation funding came in 1956, when the Ford Foundation included twenty-three Catholic colleges in its grant program to subsidize faculty salaries. The best study of federal funding and its effects on church-related higher education in America is that of James T. Burtchaell. *See* JAMES T. BURTCHAELL, THE DYING OF THE LIGHT: THE DISENGAGEMENT OF COLLEGES AND UNIVERSITIES FROM THEIR CHRISTIAN CHURCHES (W.B. Eerdmans ed., 1998).

74. Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

75. McCollum v. Bd. of Educ., 333 U.S. 203 (1948). In a symposium on *McCollum* in 1949, Russell N. Sullivan noted that release-time programs had been working in "over 3000 communities in forty-six states." Because of the uncertainties of the opinion, he correctly foresaw, with Justice Jackson concurring, that the decisions would lead to "much business of the sort" in the future. Russell N. Sullivan, *Religious Education in the Schools*, 14 LAW & CONTEMP. PROBS. 92 (1949).

76. *McCollum*, 333 U.S. at 209–11.

were considered untrustworthy in a modern democracy.[77] The schools were perceived as so intimately fused with the Catholic Church that they were identified with it entirely.

The Court's ruling in *Everson* was razor thin. Its broad interpretation of the Establishment Clause in application to parochial school education was robust enough to carry the majority of the justices through the turn of the century.[78] In application to acts of Congress, however, *Everson*'s high wall was an inconsistent barrier to public education programs and social services contracted out to faith-based organizations.[79]

B. Aguilar v. Felton *(1985)*

The next case important to our discussion is *Aguilar v. Felton*.[80] We will look at *Aguilar* here not only because it did such great damage to congressional intent in providing funds for special education programs for the poor, but, more importantly, because it illustrates the very nadir of distrust that the majority at that time felt for parochial schools.

Aguilar was filed the same day as *School District of City of Grand Rapids v. Ball*;[81] both were ideological, strict constructionist attacks on programs that brought public-school teachers onto the premises of parochial schools. The federal program funding remedial education in *Aguilar* and a state program in *Ball* that had allowed public school teachers on a lend-lease basis into parochial schools were both held unconstitutional in the strongest possible terms.[82]

77. Later Justice Douglas wrote the classic and most acerbic expression of anti-Catholic bias, using the debased vocabulary of nineteenth century bigotry in *Lemon v. Kurtzman*, 403 U.S. 602, 635–42 (1971) (Douglas, J., concurring). *See* Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHI. L.J. 121, 129 (2001).

78. *See, e.g.*, Tilton v. Richardson, 403 U.S. 672, 678 (1971); *Lemon*, 403 U.S. at 612; Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (adding a third requirement to *Everson* and *Abington*—a statute, even if it satisfies the first two requirements, must still fail if its end result, or effect, would lead to "excessive government entanglement with religion"); Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968) (approving the lending of textbooks to private schools, saying that it withstood the *Everson* test); Abington Township v. Schempp, 374 U.S. 203, 222 (1963) (enunciating the "effect" test and adding the "purpose" test established in *Everson*).

79. Dissenting in *Zelman v. Simmons-Harris*, Justices Stevens, Souter, and Breyer explicitly took note of *Everson*'s legacy. They thought it may have been terminated in the voucher decision. 536 U.S. 639, 686–88 (2002).

80. 473 U.S. 402 (1985), *overruled by* Agustini v. Felton, 521 U.S. 203 (1997).

81. 473 U.S. 373 (1985), *overruled by Agustini*, 521 U.S. 203.

82. *Aguilar*, 473 U.S. at 414; *Ball*, 473 U.S. at 397–98. Twelve years later the Supreme

Aguilar, written by Justice Brennan, with a concurring opinion by Justice Powell, included three dissenting opinions, written by Chief Justice Burger and Justices Rehnquist, O'Connor, and White.[83]

Aguilar was decided nearly forty years after *Everson*, yet the majority rationale was so similar that it could have been crafted the next day. Between the two pivotal cases there had been nearly a dozen Supreme Court decisions striking down vestiges of state aid to parochial schools, punctuated by Justice Blackmun's dreary list of dos and don'ts in *Wolman v. Walter*,[84] a veritable laundry list of trivia, and ending with some permissible, non-discriminating state tax relief for parents, in *Mueller v. Allen*.[85] *Witters v. Washington Department of Services for the Blind*[86] in 1986 and *Zobrest v. Catalina Foothills School District*[87] in 1993 finally broke down the territoriality imperatives of earlier Supreme Court ideology.

Since it was enacted by Congress in 1965, Title I of the Elementary and Secondary Education Act[88] provided funds to pay the salaries of public school teachers and other professionals, such as guidance counselors and clinical diagnosticians, to go into elementary schools to provide remedial instruction, especially in mathematics, ESL, and grammar. For fourteen years, the School District of the Ciry of New York had administered this program in both public and parochial schools.[89] At the time of the Second Circuit's injunction against the program's continuance in parochial schools, nearly twenty thousand poor and underachieving students were being served.[90] The Supreme Court affirmed the injunction, holding that to pay public school employees to teach in parochial schools violated the Establishment Clause.[91]

The Supreme Court's perception of the parochial schools and their operation in *Aguilar* is ill-conceived. The School District of the

Court overruled both decisions in *Agostini v. Felton*, a plurality opinion written by Justice O'Connor, with equally violent dissents. 521 U.S. 203.

83. *Aguilar*, 473 U.S. 402.

84. 433 U.S. 229, 236–55 (1977).

85. 463 U.S. 388, 393–94 (1983).

86. 474 U.S. 481 (1986).

87. 509 U.S. 1 (1993).

88. 20 U.S.C. §§ 2701–2901 (1976) (omitted 1994).

89. Aguilar v. Felton, 473 U.S. 402, 424 (1985) (O'Connor, J., dissenting).

90. *Id.* at 431.

91. *Id.* at 414 (majority opinion).

City of New York had administered the remedial education program on the premises of parochial schools, during regular class hours, and in classrooms that had been stripped of all religious materials and symbolism.[92] The public school teachers and clinicians were volunteers, specially trained both in advance and periodically during their service. This training was in necessary comportment while in the schools, that is, it did not involve wandering into other parts of the buildings, talking with the teachers, or taking notice of religious observances. Even supplies and materials provided by the government were locked up so they could not be used by the school itself.[93] Measures of poverty and underachievement were developed to certify students and their families for eligibility for the supplementary assistance. The city superintendent had created a detailed compliance manual for the volunteers precisely to avoid any semblance of overstepping perceived Establishment Clause prohibitions. Unannounced drop-in visits occurred, and regular monitoring of the administration of the program was provided.[94] Justice O'Connor noted from the record that not a single complaint or instance of advantage or intrusion upon either side had occurred during the entire nineteen years of New York's experience.[95]

The Court agreed upon the factual record. The federal program met the basic requirements of ***Lemon v. Kurtzman***,[96] even though it was conducted on the premises of parochial schools. It clearly was not intended to promote religion in any way. It did not advance religion, directly or indirectly.[97] But because of the exaggerated perspective of the Court upon supervision and monitoring that the ***Aguilar*** majority thought necessary, the very attempts at Establishment Clause compliance were themselves an impermissible entanglement with religion.[98] Therefore, the entire program

92. *Id.* at 407.

93. *Id.*

94. *Id.* at 405–07.

95. *Id.* at 424 (O'Connor, J., dissenting).

96. 403 U.S. 602 (1971).

97. *Aguilar*, 473 U.S. at 408–14 (deciding that the day-to-day supervision of religious actors constituted "excessive entanglement" without ever finding that the program advanced religion in any manner).

98. *Id.* "Entanglement" was originally seeded by *Walz v. Tax Commission*, 397 U.S. 664, 671 (1970), then—on adoption as the third prong of the *Lemon* "test"—grew luxuriantly in the parochial school-aid cases to flower into "political divisiveness" (proven by the fact of litigation itself) and administration in *Committee for Public Education & Religious Liberty v.*

conducted on parochial school premises was held to be unconstitutional.[99] The same infirmity found in *Ball* was added to the symbolism of perceived thoughts of immature students, of some kind of public recognition of the value of their schools. It is in the Court's perception of the need for constant surveillance that the essential note of distrust of the parochial schools becomes evident. Taxpayers could not trust parochial school authorities not to abuse the purpose of the public funds, not to fraudulently, or even inadvertently, twist their purpose to exploit public employees or seek some kind of false public recommendation of their religious mission.

Justice Powell, concurring, compounded the crimped and narrow view of parochial school education by trotting out the specter of political divisiveness and jealousy by "nonrecipient sectarian groups."[100] "As this Court has repeatedly recognized," he said, "there is a likelihood whenever direct governmental aid is extended to some groups that there will be competition and strife among them and others to gain, maintain, or increase the financial support of the government."[101] What must he have thought of religion in America to have committed to print such a venal and ridiculous point of view? Furthermore, Justice Powell scrambled the "supplemenral" services provided under Title I, misunderstanding them for the necessary courses the schools must supply, laying upon the federal program the horror that the parochial recipients would use the money to relieve themselves of other requirements, thus, indirectly, benefiting religion.[102] On both points he construed the Establishment Clause to place upon the parochial schools an impossible burden of proof, certainty in the proof of a negative.[103]

Justice Brennan ended his opinion for the majority by cautioning parochial school authorities to beware of the threar of "secularization" of their schools endangered by the presence of public employees among them.[104] He quoted again the paranoidal caveat of the *Lemon* Court: "[t]he picture of state inspectors

Nyquist, 413 U.S. 756, 796 (1973) (quoting *Lemon*, 403 U.S. at 623).

99. *Aguilar*, 473 U.S. at 414.

100. *Id.* at 417.

101. *Id.* at 416.

102. *Id.* at 417–18.

103. *Id.* at 416–18.

104. *Id.* at 414 (quoting Lemon v. Kurtzman, 403 U.S. 602, 650 (1971) (Brennan, J., concurring)).

prowling the halls of parochial schools and *auditing* classroom instruction surely raises more than an imagined specter of governmental 'secularization of a creed.'"[105] Justice Brennan was quoting himself as written fourteen years earlier in the landmark direct parochial aid case![106]

The result of *Aguilar* in school systems around the country was simply chaos. Parochial school students, if they were to benefit from Title I programs, would have to be transported to nearby public schools during class hours, or taught in off-premises facilities, or even mobile classrooms parked some distance from the parochial schools.[107] *Aguilar* spawned million-dollar industries to enable school districts' compliance, at leasr in those areas where public authorities made efforts to continue ro include these children in the benefits Congress had intended for them.[108] The evident waste and added administrative complexity caused a chorus of complaints directed to Congress.

Twelve years later, the Supreme Court overruled both *Aguilar* and *Ball* in *Agostini v. Felton*.[109] A new majority had reached the Court, whose perception of the parochial schools was considerably improved. After more than a decade of development in jurisprudence, social need, and perception, the new majority seemed willing to see parochial school systems as genuine, professional educational enterprises. *Agostini* was decided under substantially the same congressional legislation as *Aguilar*. What had changed was the perception—the Court's calculus of risk and benefit.

105. *Id.* (quoting *Lemon*, 403 U.S. at 650 (Brennan, J., concurring)) (emphasis added).

106. *Lemon*, 403 U.S. at 650.

107. Agostini v. Felton, 521 U.S. 203, 213 (1997). For example, following *Aguilar* many school districts

> stopped the practice of providing special education services on the premises of parochial schools, out of a concern that this practice would also be held to be unconstitutional. Instead, public school districts met their statutory obligation to provide special education services to parochial school students by offering the instruction off site or at a neutral location.

Allan G. Osborne, Jr. et al., *Legal Considerations in Providing Special Education Services in Parochial Schools*, 64 EXCEPTIONAL CHILD. 385, 388 (1998).

108. *Agostini*, 521 U.S. at 213 ("It is not disputed that the additional costs of complying with *Aguilar*'s mandate are significant. Since the 1986–1987 school year, the Board has spent over $100 million providing computer-aided instruction, leasing sites and mobile instructional units, and transporting students to those sites.").

109. *Id.* at 235.

What is virtually unprecedented in Supreme Court history occurred in 1994 in *Kiryas Joel*[110] when, in striking down a special school district that had been created by the New York Legislature along the lines of an Hasidic Jewish community,[111] five justices—Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas—called for a new case to be filed to overrule *Aguilar*. Justice O'Connor said that the Court "should, in a proper case, be prepared to reconsider *Aguilar*, in order to bring our Establishment Clause jurisprudence back to what I think is the proper track—government impartiality, not animosity, toward religion."[112] The problem brought before the Court in *Kiryas Joel*, had, indeed, been caused by the unfortunate ruling in *Aguilar*, in other words, precipitated by the Court's own misunderstanding. Petitioners had originally sought relief from the injunction that had prohibited them from providing Title I services on the premises of their religious schools.[113] Denied relief from the injunction, they turned to the state legislature, which accommodated them by creating a special school district for them and their disabled children, a gracious gesture that itself proved to be a violation of the Establishment Clause![114]

The record before the Court in *Kiryas Joel* surely informed the Justices that not all religious schools are rickety little buildings tucked next to towering old churches and staffed only by nuns uniformed in black. The history of the litigation here is a testament to the force of the religious faith of the Satmar community to take almost any measures to protect their children and provide them with comparable social services in an academic environment of their choice.

Agostini corrected Justice Powell's misperception of the Title I program. Its services were "secular, neutral and nonideological," a "supplement," not intended to "supplant" the level of services already provided by the private school.[115] Thus, the federal program in no way, directly or indirectly, advanced religion. As to "excessive entanglement," the Court revisited the administration of the Title I

110. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994).

111. *Id.*

112. *Id.* at 717–18 (O'Connor, J., concurring).

113. *Id.* at 692–93 (majority opinion).

114. *Id.* at 692–95.

115. *Agostini*, 521 U.S. at 210 (quoting 20 U.S.C. § 6321(a)(2) and 34 C.F.R. § 200.12(a) (1996)).

program in New York, as well as the shared time program in *Ball*, and found the degree of cooperation between public and school personnel had been greatly exaggerated in the earlier opinions.[116] There was no excessive entanglement.

Furthermore, rejecting the rationale of *Meek v. Pittenger*,[117] the Court found that the Title I program did not violate the Establishment Clause's prohibition against "'government-financed or government-sponsored *indoctrination* into the beliefs of a particular religious faith.'"[118] "[W]e have abandoned the presumption erected in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored *indoctrination* or constitutes a symbolic union between government and religion."[119] Moreover, "we have departed from the rule relied on in *Ball* that all government aid that directly assists the educational function of religious schools is invalid."[120] Both references look to *Witters* and *Zobrest* as authorities for the change in presumptions.[121]

Justice O'Connor attached to her majority opinion a reference to the urgency as well as the constitutionality of Title I's services on the premises of religious schools:

> Indeed, under these circumstances, it would be particularly inequitable for us to bide our time waiting for another case to arise while the city of New York labors under a continuing injunction forcing it to spend millions of dollars on mobile instructional units and leased sites when it could instead be spending that money to give economically disadvantaged children a better chance at success in life by means of a program that is perfectly consistent with the Establishment Clause.[122]

Justice Souter could not be persuaded. He was convinced that line-drawing was difficult, but not impossible. Title I helped the parochial schools "to survive," it retained the symbolism of state

116. *Id.* at 226–27.

117. 421 U.S. 349 (1975) (outlawing provision of instructional materials in secular subjects to religious schools), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

118. *Agostini*, 521 U.S. at 219 (quoting Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 385 (1985)) (emphasis added).

119. *Id.* at 223 (emphasis added).

120. *Id.* at 225.

121. *Id.* at 219–23.

122. *Id.* at 240.

endorsement, it "telegraph[ed] approval of the school's mission," and, indeed, it "[fed] the resentment" of other religions that would like access to public money for their own worthy projects.[123] In other words, religious schools could not be trusted. He offered no empirical evidence for his opinion.

Aguilar, viewed in conjunction with its strange progeny, *Kiryas Joel* and *Agostini*, shows how the Court's perception of American religious education was transformed over the course of a decade to convince the majority that these institutions could, in fact, be trusted to aid in the vital task of educating our children. The tenuous distrust of the *Everson* Court seemed to be losing hold for the first time in half-a-century.

C. *Mitchell v. Helms* (2000)

We read the Court's decision in *Mitchell v. Helms*[124] for the tone of its discourse, rather than to dissect the accuracy of its authority or the logical cogency of its conclusions. Here the Court finally puts aside nearly a century of distrust of the parochial school system by discarding what had become an epithet to describe it; namely, that the system was "pervasively sectarian"—meaning, of course, that everything was doctrinaire, permeated with religious sentiment, skewed by the irrationalities of blind faith, and that nothing could be taught in the schools, or even said, that was genuinely neutral.[125]

The Court finally put aside what had become an insurmountable barrier to cooperation of religious schools with the public school districts, namely, the deluded conviction that the religious schools may turn every subsidy, every offer of assistance, into a self-interested apologetic for their own institutional purposes. This was the shibboleth of "divertibility" as a fatal weakness of public assistance.[126] The Court put aside the stereotype of both "direct and indirect" advancement of religion that had soured nearly every attempt at cooperation and common educational programs conducted with the help of the personnel and resources of the public schools.[127]

123. *Id.* at 246–47 (Souter, J., dissenting).
124. 530 U.S. 793 (2000).
125. *Id.* at 804.
126. *Id.* at 820 (Thomas, J., concurring).
127. *Id.* at 837 (O'Connor, J., concurring).

Mitchell, indeed, shifted the Establishment Clause burden of proof from the private school to the public provider.[128] The private school may confidently seek and utilize programmatic instructional materials and technology to use in teaching secular subjects without fear of the accusation that in doing so it would engage in some kind of fraud or deceptive practice. A private religious school can, after *Mitchell*, request and receive the personnel and material resources of the public systems for the civic benefit of its own students.

While not wishing to exaggerate until the final professional analysis of legal scholars has been completed, it appears that the Supreme Court put aside the tripartite test of *Lemon v. Kurtzman* for future parochial school-aid cases in favor of a functional standard similar to the *Tilton v. Richardson* test, a test in place as least as long as *Lemon* for cases involving church-affiliated institutions of higher education.[129] Since 1971, this country has developed the finest system of higher education in the world by promoting, rather than inhibiting, the cooperation of both public and private, and secular and religious institutions of learning, research, and training. Perhaps this model may now be extended to elementary and secondary education for the greater good of all the citizens of this country—without discrimination—by sharing expertise and good will without waste and debilitating competition for resources. Perhaps the G.I. Bill that preceded the Higher Education Construction Act evaluated in *Tilton*, or the Pell Grant plan that followed, is a constitutionally safe model to follow for the future.[130]

Zelman took the next step by permitting, at least on an experimental basis, government assistance to parents to choose schools for their children and use, as the G.I. Bill had made possible for returning members of the military, public funds for the payment of school expenses, tuition, and fees.[131]

Mitchell grew out of the implementation of Chapter 2 of the Education Consolidation and Improvement Act of 1981, which in turn had its origins in the Elementary and Secondary Education Act of 1965.[132] Chapter 2 provides aid "for the acquisition and use of

128. *Id.* at 834–35 (Thomas, J., concurring).

129. Tilton v. Richardson, 403 U.S. 672, 678 (1971).

130. Higher Education Act of 1975, 20 U.S.C. § 1070(a) (1975); Servicemen's Readjustment Act, 38 U.S.C. § 701 (1996) (revised title).

131. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

132. 20 U.S.C. §§ 7301–7373 (1981).

instructional and educational materials, including library services and materials, assessments, reference materials, computer software and hardware for instructional use, and other curricular materials."[133]

With appropriate restrictions upon use, Local and State Educational Agencies (LEAs and SEAs) may allocate aid not to "supplant funds from non-Federal sources," but to "supplement and, to the extent practical, increase the level of funds that would be made available from non-Federal sources" to both public and private nonprofit schools.[134] The "'services, materials, and equipment' provided to private schools must be 'secular, neutral, and nonideological.'"[135] While private schools may not acquire control of Chapter 2 funds or ownership of Chapter 2 materials, they may borrow them.[136]

In Jefferson County, Louisiana, for the 1985–1986 fiscal year, about thirty percent of the Chapter 2 funds were allocated for lending programs for private schools; thirty-four out of forty-six were Roman Catholic.[137] Fifteen years after it was filed, *Mitchell v. Helms* finally reached the Supreme Court. During that time the Establishment Clause jurisprudence of the Supreme Court had changed. Both *Meek* and *Wolman* were no longer good law, and the *Lemon* test had been modified.

Justice Thomas wrote in the plurality opinion for the Court that the Chapter 2 lending program to eligible religious schools "neither results in religious indoctrination by the government nor defines its recipients by reference to religion."[138] Thus, it was not a law "respecting an establishment of religion."[139]

Mitchell leaves *Lemon*'s purpose and effects test in place but discards the rest for Establishment Clause analysis.[140] More importantly, *Mitchell* redirects the burden of proof underlying the discarded presumptions in favor of religious schools, not against them. Presumptively, religiously affiliated schools can be trusted to teach secular subjects in a neutral way, accurately and without bias,

133. *Id.* § 7351(b)(2).

134. Mitchell v. Helms, 530 U.S. 793, 802 (2000) (quoting 20 U.S.C. § 7371(b)).

135. *Id.* (quoting 20 U.S.C. § 7372(a)(1)).

136. *Id.* at 802–03.

137. *Id.* at 803.

138. *Id.*

139. *Id.* (quoting U.S. CONST. amend. I).

140. *Id.* at 829.

and they are not so pervasively sectarian (two awful words) that secular aid must always be burdened with the symbolism of endorsement or union between church and state. The aid does not supplant what they normally are required to teach for accreditation, so it does not even indirectly finance their overall budget. Public programs in aid of secular education, therefore, are not essential to religious school existence. They are supplementary and they are neutral in all practical ways.

The Establishment Clause test that emerges from *Mitchell* is articulated by the Court's derivation from *Agostini*. "[W]here the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis . . . the aid is less likely to have the effect of advancing religion," and is less likely to create a "financial incentive to undertake religious indoctrination."[141]

Notions of direct or indirect aid as well as "divertibility" were rejected by the Court out of hand as inconsistent with recent jurisprudence and simply unworkable.[142] Here, the majority rejects the traditional barrier erected by the Court, wrapped up as "pervasively sectarian," as an improper factor in constitutional analysis, and "trolling through a person's or institution's religious beliefs" as not only an unworthy task of the courts, but simply offensive.[143] Finally, the Court concluded, "[h]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow."[144] "Sectarian" was code for "Catholic," and "[t]his doctrine, born of bigotry, should be buried now."[145]

Justice O'Connor concurred in the judgment and filed a separate opinion. She did not join the plurality opinion for two reasons. First, the plurality assigned too much importance to the factor of neutrality for future adjudication of challenges to government school–aid programs. Second, she disapproved of the plurality's failure to ban the actual diversion of government aid to religious *indoctrination*.[146] For both propositions she cited *Agostini*.[147] In effect, Justice

141. *Id.* at 795 (quoting Agostini v. Felton, 521 U.S. 203, 231 (1977)).

142. *Id.* at 824.

143. *Id.* at 828.

144. *Id.*

145. *Id.* at 829.

146. *Id.* at 837–38 (O'Connor, J., concurring).

147. *Id.* at 838–40 (citing Agostini v. Felton, 521 U.S. 203, 226–28, 231–32 (1997)).

O'Connor worried that the logic of the plurality opinion "foreshadow[ed] the approval of direct monetary subsidies to religious organizations, even when they use the money to advance their religious objectives."[148]

Justice Souter was joined by Justices Stevens and Ginsburg in dissent. Something more than neutrality, or evenhandedness, they said, is needed to justify government aid that may advance a school's religious mission.[149]

IV. *ZELMAN*'S MIRROR—GLEANING THE VOCABULARY OF THE DISSENTS (2002)

Zelman v. Simmons-Harris split the Court once again.[150] It provoked even sharper disagreements, dissents that border upon accusations of infidelity and betrayal of the constitutional heritage, dissents that reject any expediency under the Establishment Clause no matter the cost to students of the most failed educational systems. *Zelman* is, in effect, a kaleidoscope of the wildly variant perceptions of the religious school that still exist on the Court. The fundamental postulate of Chief Justice Rehnquist's majority opinion is, indeed, that the religious schools in Cleveland were not "pervasively sectarian," nor centers of "indoctrination," but were genuine institutions of education.[151] These religious schools offered poor and underachieving students a "genuine" educational alternative.[152] They could be trusted with family choices designating public funds to pay tuition and expenses without fear of proselytizing or diversion to "sectarian" advancement.[153]

Justices O'Connor and Thomas wrote concurring opinions. Justice O'Connor's use of empirical evidence to support the integrity of the educational programs of parochial schools is refreshing.[154] It is a breakthrough from the long influence of John Dewey and Paul Blanchard's disparagement that underwrote *Lemon*'s crimped and negative appraisal.

148. *Id.* at 844.

149. *Id.* at 877 (Souter, J., dissenting).

150. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

151. *Id.* at 643; *id.* at 711 n.19 (Souter, J., dissenting).

152. *Id.* at 649 (majority opinion).

153. *Id.* at 662.

154. *Id.* at 663–76 (O'Connor, J., concurring).

Justice Thomas's concurring opinion is a paean to Frederick Douglass for education, for "light and liberty,"[155] and for poor blacks still oppressed more than a century after Reconstruction by denial of adequate public school education. Interestingly, his legal concern in this case runs to the core purpose of the Fourteenth Amendment rather than the First Amendment.[156]

The dissenting opinions of Justices Stevens and Souter (with whom Stevens, Ginsburg, and Breyer joined), and Breyer (with whom Stevens and Souter joined) found the majority "profoundly misguided," and its single test of "neutrality" a rejection of fifty years of the Court's school-aid jurisprudence.[157] The dissents identify religious schools with churches, find in them no truly disinterested educational function, and repeat what I think is a benighted and disingenuous affectation in describing their work, not as education, but rather "indoctrination" and inculcation of religious doctrine.[158]

As to religion in America, the dissenters find plenty of competition, conflict of sect against sect, internecine jealousies, and strife. Justice Souter even brings into the Court record the sharply different social philosophies of the principal world religions in reference to the death penalty, religious Zionism, gender discrimination, and women's obligations in marriage.[159] He expresses fear that parents can be misled into choosing schools in which their children may be "proselytized" by a religion different than their own.[160] He is solicitous for the future problems religious schools may encounter as they become more dependent upon state aid and more closely monitored by giving the state "an effective veto over . . . the content of curriculums."[161]

Justice Breyer, the protégé of Wiley Rutledge, is uneasy with the past decade's slide away from the "impregnable wall" of *Everson* and concerned about interreligious strife. He hearkens to the nostalgia of a more settled era of clear lines between hegemonic public education and minority religious schools.[162]

155. *Zelman*, 536 U.S. at 676 (Thomas, J., concurring).

156. *Id.* at 677.

157. *Id.* at 684–86 (Stevens, J., dissenting).

158. *Id.* at 684.

159. *Id.* at 716.

160. *Id.* at 704.

161. *Id.* at 715.

162. *See supra* notes 69–70 and accompanying text.

Public policy considerations in the administration of a comprehensive voucher system are staggeringly complex and would be even if there were a broad-based consensus upon the exigencies of the law under the Establishment Clause of the Federal Constitution or under the state parallels.[163] There still remain, however, deep, principled objections in constitutional law. These also bear upon the perceived role of religiously affiliated education in American society. The dissenting opinions filed in *Zelman* are illustrative.

The Ohio Pilot Project Scholarship Program was proposed in 1996, held in suspension during appeals, enjoined in 2000 by the Court of Appeals as a violation of the Establishment Clause, and, finally, after reversal by the Supreme Court in 2002, put into operation.[164] Thus, we have five years of study to assess whether or not, in fact, the program is working, or, to the contrary, whether it has created the litany of horribles projected by the dissenters. Milwaukee's program is older, and has been amended and refined since inception.[165] Ten other states have experimented.[166] The highest courts in Florida and Maine have rejected proposed voucher programs on state law grounds. In Utah, citizens rejected a statewide voucher program at the polls.

I leave to Professor Laycock[167] the particulars and the intricacies of the Ohio program. I wish to check the mirror to view the private religious school as seen here only with a few generalizations. Justice Breyer, dissenting in *Zelman*, echoes an old shibboleth, more crudely spoken by Justice Hugo Black in reference to supporters of parochial schools as "powerful sectarian religious propagandists" seeking "complete domination and supremacy of their particular brand of religion"[168] or as spoken by Justice William O. Douglas in his concurrence in *Lemon*.[169] The Justices of the Supreme Court are not political scientists, nor do they have expertise in the sociology of

163. In this respect, see *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006) (Florida Supreme Court held a statewide voucher system violates the state constitutional provision requiring taxes to be used only to support the public schools).

164. *Zelman*, 536 U.S. at 644–45.

165. *Id.* at 659 n.5.

166. *Id.* at 683 (Thomas, J., concurring).

167. Laycock, *supra* note 3.

168. Bd. of Educ. v. Allen, 392 U.S. 236, 251 (1968) (Black, J., dissenting).

169. *See supra* note 77 and accompanying text.

religion or the science of education. Hopefully the truth regarding the educational programs of religious schools will prevail.

What is most interesting to me in the course of this long argument before the Supreme Court is that the record reveals no scientific argument that the use of public aid for private schools, including voucher systems, would weaken or, indeed, render impossible the great, noble and indispensable mission of public education in America. This would happen, so it is said, not only by the drain of money and teacher talent from the public schools, but also by the creation of a new elitism to drain away top students from public classrooms, the "skimming" phenomenon, as it were. That is, indeed, another subtext exactly to be articulated.[170]

V. CONCLUSION

Private religious schools were built by parents to provide a sound secular education to young children in their formative years, together with religious instruction and the experience of the life and culture of the ancient faiths. In many ways, the private schools were defensive, built and operated at great costs to protect children from marginalization by those having hegemonic control over the public schools. Like public schools, the parochial schools were free schools, supported by local parishes and staffed by women and men living on a barely subsistence level bur inspired by a mission to teach the young with dignity. All of this began to change in the early 1960s.

Parochial schools became largely private schools, supported ar first by nominal tuition plus parish subsidies, but gradually almost entirely by tuition and charitable contributions. With the decline of the religious orders after the Second Vatican Council, financing the schools became an overarching challenge, particularly in the interests of poor families and families constrained by needs of large numbers of children. None of the sponsoring churches has ever had an interest in underwriting elitist, hybrid educational enclaves.

Financing became more acute as staffing needs led to recruiting majorities of professional lay employees, with salary and benefit packages comparable to those of public school teachers. Vasr

170. For continuing legal developments and analysis of the voucher movement to underwrite parental choice in elementary and secondary education, see WILLIAM BASSETT, W. COLE DURHAM & ROBERT SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW, Ch. 9, § 9:52 (2007).

demographic changes in the inner cities in this generation pose in many cases only the alternatives of closing schools or improving them and opening them to the great needs of new populations, most of whom do not share a common religious affiliation. That is the staggering challenge of the educational mission.

Private schools, unassociated with churches or religious organizations, need also to be accounted for as they emphasize a greater academic freedom to teach religion in ways impossible to the public schools, use religious texts, discuss religious influences upon history and society, and study comparative religious faiths.

Today the result of these briefly noted changes is that private religious schools are more professional, more ecumenical and more financially transparent than anything seen in the Supreme Court paradigm. They are also much more costly. In other words, the reality has changed. Now is a time for a new public perception.

Can religious schools be trusted to provide educational quality without bias? The single most important policy decision that must be made to promote a viable voucher system to underwrite educational choice is to assure the public that the religious schools are genuinely good as educational institutions and that these schools can be trusted not to divert the taxpayers' money into self-interested sectarian purposes.

Secondly, there must be strong enough controls upon qualifying schools to avoid breaking down the school systems into virtually unmanageable complexity, with a new segregation into political, special-interest, economic-class and small, financially wasteful schools. The problems of planning budgets for prospective student populations that depend on varying parental choice rather than domicile may become simply too difficult. Mandatory consolidations may have to occur in a time of experimentation.

Finally, private religious schools working in cooperation with local public school administrations must be, and be perceived to be, professional educators, in the very best sense of the word, who treat all students equally, with dignity and respect, regardless of race, national origin, religious preference, or disability.